Neutral Citation Number: [2023] EWHC 1565(KB)

Case No: QB-2021-BHM-000057

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 June 2023

Before :

MR JUSTICE COTTER

- -

Between :

BENJAMIN SCARCLIFFE

Claimants

- and -

BRAMPTON VALLEY GROUP LTD

Defendants

- -
- -

Satinder Hunjan KC & Nicholas Truelove (instructed by Ward and Rider Ltd) for the Claimants
Nicholas Baldock (instructed by Hextalls Law) for the Defendants

Hearing dates: 20, 21, 22, 23, 24, 27, & 28 March 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 29 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE COTTER

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Mr Justice Cotter:

Introduction

1. This claim arises out of an accident which occurred on 22nd September 2017 during the course of the Claimant's employment as an arborist (tree surgeon) at a site at Pitsford Nature Reserve, Northampton.

2. At the time the Claimant, Mr Scarcliffe (who was aged 38 years) was using a chainsaw and was bending over when a fellow employee, Mr Patrick, lost control of a solid section of a tree trunk, which measured about 2.4 metres in length and over 10 inches in diameter, causing it to land on Mr Scarcliffe's back resulting in immediate severe and searing pain and two transverse process spinal fractures on the left side at the L2 and L3 levels (there was also a suspicion of a further fracture at L1). In addition, the accident caused some renal damage with some blood in his urine, but that cleared up after two days and has not resulted in long term problems with his kidney.

3. Mr Scarcliffe was born on 27th September 1979 and he is now 43 years of age.

4. Judgment has been entered in favour of the Mr Scarcliffe and the matter proceeds only in respect of the assessment of the quantum of damages.

5. It is the Mr Scarcliffe's case that the accident has caused the development of chronic post traumatic pain in the lumbar region (together with allodynia symptoms) which is sufficiently disabling to be life changing. He is unable to work, care for his children (save to a minimal event), assist with household duties and needs significant care on a daily basis. The schedule seeks a total sum of £6,189,507.49.

6. The Defendant's case is that the accident caused stable fractures to the transverse processes (which are not at risk of arthritic changes). If these orthopaedic injuries were taken in isolation, even taking into account the significant nature of any soft tissue injury, any residual pain should not have prevented the Claimant from returning to work. It is accepted that he has developed a chronic pain condition. However Mr Scarcliffe had a degenerative spine that would have been increasingly problematic and produced significant symptoms, including pain, in any event. As Mr Scarcliffe was a psychologically vulnerable individual, and someone who took easily took to abnormal feelings of pain when he developed back pain (absent the index event), he would have similarly amplified his perceived/related symptoms i.e. the would have developed a chronic pain syndrome in any event and therefore ended up in much the same position as he is in now in 7.5 years (range 5-10 years) had the accident not occurred. It was also the Defendant's case that prognosis remains good with further treatment. The claim was valued at £136,824.79 excluding damages for pain, suffering and loss of amenity.

7. On the parties' pre-trial valuations there was a difference of £6 million. In closing submissions Mr Baldock very largely maintained the Defendant's pre-trial valuations (with an alternative scenario producing a valuation of £269,055.83). Mr Hunjan KC made some concessions which produced some reductions, however he still advanced a claim of over £5 million.

Brief factual overview

8. Mr Scarcliffe lived (and continues to live) with his partner, Gayle Scarcliffe who is a specialist midwife. Their family life was already, and was to become increasingly, demanding. There are now five children of the family: with two profoundly disabled children. At the time of the accident Mr Scarcliffe had three children:

    (a) Alfie Arnsby – born 18th June 2008 (disabled)
    (b) Elliott Arnsby – born 6th December 2009
    (c) Ottilie Scarcliffe – born 30th January 2017 (disabled)

    So, at the time of the accident Alfie was aged nine years and Elliott seven years. Ottilie was eight months old. Mrs Scarcliffe was also pregnant (with Una).

9. Alfie is severely disabled. He required nasogastric feeding almost from birth and underwent open placement of a gastrostomy and Nissen's Fundoplication at when aged one year. Following chromosomal analysis he was diagnosed with a chromosomal disorder. His difficulties can be briefly summarised as follows:

    (i) Severe global developmental delay;
    (ii) Wheelchair dependency;
    (iii) Cortical visual impairment;
    (iv) Recurrent HSV blepharitis;
    (v) Practically nil by mouth[1];
    (vi) Doubly incontinent;
    (vii) Excessive drooling;
    (viii) Self-harming. This includes biting his thumb, hitting his head, and banging his right foot causing injuries; and
    (ix) Communication difficulties.

    He is completely dependent for all his personal needs on others.

10. The paediatric experts agree that Alfie's life expectancy is to 47 years of age (to 2055, a further 32 years).

11. The full extent of Ottilie's difficulties was not known at the time of the accident. She has been diagnosed with neurofibromatosis type 1 with aortic stenosis. Shortly after her birth she was recognised as having a functional bicuspid aortic valve and to have faltering growth. The six month check confirmed gross motor skills, communication, and problem solving were delayed, leading to the diagnosis. Gross motor development delay persisted and following input from psychologists she was further diagnosed as having Avoidant Restrictive Food Intake Disorder and non-verbal ASD. Ottilie has gone on to develop bilateral optic glioma. Ottilie has difficulties with steps and cannot walk independently on rough ground. She has frequent falls. She is doubly incontinent and will not communicate when she has passed urine or faeces, will

[1] Alfie has pump feeds that need to be administered four times per day with pre and post water flushes and a further three water boluses.

attempt to gain access to her perineum and has smeared faeces. She also self harms. As with Alfie she is dependent on others for her personal requirements and will never achieve independent living.

12. There is some disagreement on Ottilie's life expectancy. However, it is common ground that whatever that life expectancy is, Mr Scarcliffe will pre-decease her such that the issue will not have an impact on assessment of quantum in terms of the care which he would have provided had the accident not occurred.

13. Following the accident Mr and Mrs Scarcliffe had two further children

    (d) Una Scarcliffe – 21st February 2018
    (e) Eli Scarcliffe – 31st August 2019

14. Eli is currently undergoing NHS investigations due to concerns about his behaviour and development. He has a speech delay, poor eyesight and potentially ADHD.

15. The family lived (and still live) in a large bungalow which is fully adapted for Alfie's needs (with hoists, wet room etc) with a very large garden. They had two dogs and chickens.

16. The Claimant's work as an arborist was physical and demanding and he worked long hours (he stated 60-70 hours a week at certain times of the year). He had worked in this occupation since his early twenties. He also stated that he had numerous leisure pursuits which included walking, stalking, shooting and fly fishing amongst other pursuits. He was a Scout assistant and worked with a number of charitable organisations. He is dyslexic.

17. Mrs Scarcliffe has general health issues of asthma, palindromic rheumatism and osteoarthritis of the pelvis and hip joints (she is awaiting a hip replacement) which, she stated:

> "…can on occasion limit me physically and cause me to have brief periods of feeling generally unwell."

18. In respect of the immediate post accident period Mr Scarcliffe stated that

> "following initial discharge from hospital and over the next six month period. I attended numerous follow up appointments at hospital…and also several appointments with my General Practitioner. During this time there was little overall improvement with my back pain and further issues with allodynia, left foot numbness, erectile dysfunction and urological problems developed. I was referred for NHS physiotherapy treatment which commenced in April 2018, but this seemed to actually make matters worse for me, and accordingly I was discharged from physiotherapy in June 2018 and advised to seek a pain clinic opinion as soon as possible…"

and

> "ever since this accident and ongoing to date I have suffered persistent and functionally disabling back pain and allodynia symptoms around the site of my accident injuries."

19. Whilst Mr Scarcliffe was off work he was called to a meeting by the Defendant on around the 31st October 2017 and his employment terminated by reason of his redundancy with effect from the 28th November 2017. It is not disputed that this would have occurred in any event. So had the accident not occurred he was shortly to be on the open labour market.

20. After being made redundant Mr Scarcliffe was contacted by Mr Jonathan Hazell who runs his own arboriculture business. He had heard on the grapevine that the Defendant had made redundancies and wanted to find out if Mr Scarcliffe was interested in working with/for him.

21. Mr Scarcliffe is now classed as 24% disabled for life by the DWP. He receives state benefits in the form of carer's allowance (in respect of Ottilie[2]), personal independence payment and industrial injuries disablement benefit. The family also receives child benefit and working tax credit.

22. Prior to the accident with which this case is concerned, Mr Scarcliffe had been involved in a road traffic accident on the 30th of June 2016. He suffered injuries to his right hip, neck and right shoulder. He also suffered psychological injury in the form of travel anxiety. Initial treatment after this accident comprised of advice and analgesia but he did also speak to a physiotherapist informally over the telephone for further advice. Eventually a medical report was obtained from a General practitioner Dr Parikh, dated 28th of February 2019 (following an examination of the same date). Proceedings were issued and the claim was settled. The content of Dr Parikh's report was at significant (and concerning) variance to the history of symptoms given by Mr Scarcliffe in this case.

23. The provision of local authority statutory care commenced for Alfie in May 2018. This was initially 21 hours per week rising to 23 hours per week, together with two days of respite care each month. Mrs Scarcliffe stated that she expects this regime to continue until such time as Alfie turns 18, when he will transition to adult care and there will be a further assessment of his needs. Both Alfie and Ottilie attend specialist schools.

24. Ottilie did not receive care provided by the statutory services and in August 2019 there was a referral by a community paediatrician to Northamptonshire County Council for an assessment of her needs. On the 27th of January 2022 there was a further referral from the community paediatrician with a view to looking at "the holistic family situation in view of the being two disabled children with very different needs". A visit to specifically address Ottilie's needs was carried out on the 11th of March 2022. For reasons unclear to me, the resulting child and family assessment (produced by Ms Wood) was only disclosed during the course of the trial after I had enquired about the documentation that must be in existence in relation to the provision of statutory care[3]. In my judgment it is a document which provides considerate insight into Mr Scarcliffe's current family life.

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[2] As he has confirmed that he provides more than 35 hours of care a week by listening out at night.
[3] It was disclosed after Mr and Mrs Scarcliffe had given evidence.

25. Mr Scarcliffe's solicitors arranged for a case manager to assist him with his rehabilitation needs. Following her instruction he was formally assessed and assisted by a physiotherapist (Ms Dixon) and an occupational therapist (Ms Field[4]). After input and treatment by Ms Dixon, Mr Scarcliffe was referred onto a multidisciplinary pain management programme which commenced on the 18th of October 2021. Mr Scarcliffe stated that he found the course of particular benefit in terms of educating him as to how the body perceives pain and how this then affects the body. He also obtained a great understanding of how medication works and the interaction between pain and psychological factors. He learned appropriate techniques to manage his pain and self help exercises.

26. On 1st July 2021 Mr and Mrs Scarcliffe engaged the services of Ms Adcock, a nanny, to assist them with the management of childcare provision and general housekeeping. Mr Scarcliffe stated;

> "matters were so strained in our home life that my wife and I considered it was imperative that we had some form of additional outside assistance to help us cope with the demands of my wife working full time us also having to also manage the challenging needs and care requirements of our five young children and given my own limited ability to provide care an at the same time manage my chronic pain condition."

27. The agreed contracted hours were 08.30-4.00pm (plus any overtime). Mr Scarcliffe stated that for a while matters work very well, but unfortunately they were required to terminate her employment on 28th February 2022 "due to a number of issues", including issues in Ms Adcock's personal life which impacted upon her reliability.

28. As at June 2022 Mr Scarcliffe stated that

> "currently my wife and I are looking to replace (Ms Adcock) with someone else who potentially could take more of a personal assistant role but *it has been difficult to find time* to properly investigate, find and suitably vet any potential candidate who would have all the necessary checks done to work with our children and match up with all the necessary role requirements[5]. We therefore now intend to liaise further with a case manager to seek their assistance." (emphasis added).

It is noteworthy that it was not indicated that it was not possible, or even very difficult, to find a person who would work for the remuneration which would be offered.

29. As is so often the case Mr Scarcliffe's life appears to have been to a degree "on hold" pending the outcome of this trial. He has not had any further rehabilitation and presented throughout the trial as a very disabled man, unable even to sit comfortably for any sustained period and frequently drowsy.

The Issues

[4] Who complied a report after an assessment on 10th September 2021.
[5] This phrase is repeated in Ms Scarcliffe's statement.

30. Within his skeleton argument Mr Baldock identified the following factual issues

(x) Mr Scarcliffe's pre-accident health and family dynamics.
(xi) Mr Scarcliffe's post accident health; accident and non-accident related conditions.
(xii) The "but for" position in terms of work and care provision etc for Mr Scarcliffe's and his children.
(xiii) Mr Scarcliffe's actual position post accident in terms of work and care provision etc for himself and his children.

To these I add:

(xiv) Prognosis.

31. Following the necessary factual findings I had to address the polarised submissions of the parties as to the correct approach to the quantification of damages.

Lay witness evidence

32. Mr Scarclifffe relies upon his own evidence and also the evidence of;

(i) Gayle Scarcliffe (wife)
(ii) Jonathan Hazell (potential employer)
(iii) Ray Scarcliffe (father); whose statement was admitted under the Civil Evidence Act
(iv) Christine Scarcliffe (mother); statement admitted under the Civil Evidence Act

33. The Defendant did not call any lay evidence.

34. The general picture that forms from the evidence adduced on behalf of Mr Scarcliffe is of very highly unusual, and exceptionally demanding, family circumstances with two children with (seemingly unrelated) severe disabilities and also concerns about another child's development. At the time of the accident Ottilie was eight months old and the extent of her disabilities was gradually coming to light. Both Mr and Mrs Scarcliffe had been working full time (save for maternity leave) in jobs that they clearly enjoyed. Mr Scarcliffe also had several hobbies/pastimes. However the prospect of their lifestyles continuing as they had in the past, with Alfie growing, Ottilie's disabilities increasingly impacting as she became mobile, and two further children to come was, in my view, negligible. Very few families of five children with a single severely disabled child will manage to have both parents working full time[6]. The brutal reality is that statutory assistance is simply not sufficient to allow it and the demands are simply too great. The prospects of Mr and Mrs Scarcliffe carrying on as before with two disabled children (of different ages) were even more remote. In my view the Claimant's factual and expert evidence failed to adequately address what in my view was clear; in the absence of the accident the wave of their childrens' care demands was about to break over Mr and Mrs Scarcliffe.

[6] This view expressed by Ms Madar reflects my own experience of well over 35 years of personal injury and clinical negligence cases.

The Claimant

35. Mr Scarcliffe's first and only witness statement is dated 9th June 2022. I pause to observe that is well over four and a half years after the accident.

36. Mr Scarcliffe explained that before the accident he had a physically demanding manual job, which included working with machinery such as chain saws. He was working long hours five or six days a week. His basic day was 7.30am -4.30pm, however he usually did overtime (although this varied with the time of year) and he could work Monday to Friday 6.00am -6.00pm. He also explained that he had a good social life with numerous activities including walking dogs, helping within a voluntary canal association, clay pigeon and target shooting, beating for shoots, mountain walking, helping with scouts and fly fishing. He said that he had some form of exercise each weekend and most evenings. When it was pointed out to him that with three children, two of which had serious disabilities (there was no statutory care provision for Alfie pre-accident although he had a social worker), and his ability to keep this all up would surely have been very significantly reduced, he said that he would have "cut back" but would have wanted to keep up what he could. I viewed this evidence as unrealistic.

37. Before Ottilie was born Mrs Scarcliffe's mother assisted to a degree with the two children. However there was then a falling out during the pregnancy with Una and she no longer assisted. Before the accident it had been agreed that Mrs Scarcliffe would change her work pattern to night shifts.

38. Mr Scarcliffe stated that before the accident domestic and childcare duties were shared with his wife when he was at home. When it was pointed out that Ms Madar had recorded that Mrs Scarcliffe had done the bulk of the household chores and this was a 70/30 split ("Mr Scarliffe was responsible for taking out the rubbish and he sometimes helped with vacuuming if needed") he stated that it was more like 50/50. Bearing in mind the hours he worked, his social activities and Mrs Scarcliffe's evidence I do not regard this as an accurate assessment. Indeed the 30% contribution probably included dog walking and washing his own work clothes/PPE.

39. It was put to Mr Scarcliffe that the care claim made on his behalf failed to reflect reality. If he had been working he would not have been taking/picking up any child to/from school or providing care at 4.00pm (as he has done post accident). In response he said that would have tried to get on a different team; a "domestic team", he would have reduced his hours and Mrs Scarcliffe would have worked nights and he would have cut back on other things. When challenged upon the calculation advanced on his behalf (relying on Ms Lewis's report) that, absent the accident (on top of his work and domestic duties that he did each week) he would have been providing fifteen or sixteen hours of care for this children (apart from Ottilie and Alfie), ten hours for Ottilie (such hours now being covered by Mrs Scarcliffe/others) and also assisted with the care of his severely disabled son he refused to accept it was wholly unrealistic. He did however agree with my suggestion that the report failed to reflect the true family dynamic in that when looking after the children e.g. after school; he would look after all them at once i.e. he would not have fifteen hours solely for three children and separate time allocated for Ottilie (and Alfie).

Pre-accident medical history

40. Three and a half years before the accident the general practitioner notes record (on 1st March 2014) that Mr Scarcliffe had significant right shoulder issues ("injured his right shoulder again") he continued to experience pain affecting his ability to work. He had a cortisone injection in October 2014. This is of some significance given the symptoms arising from a subsequent road traffic accident and the reference, in March 2022, to shoulder difficulties.

41. On 18th November 2015 he was recorded as having mechanical low back pain after moving heavy timber but with no neurological symptoms.

42. On 2nd March 2016 the medical records show that his shoulder had been jolted by a piece of timber (he explained that this resulted in a pulled chest muscle). At this stage his weight was eighteen and a half stone; so he was significantly overweight.

43. On 27th December 2016 he slipped and jarred back and later that day he lifted Alfie and it flared up again. The symptoms were sufficiently serious that Mr Scarcliffe attended at the accident and emergency (although for reasons not advanced in evidence he did not remain there).

44. On 3rd January 2017 the record is of:

> "acute sciatica..Right buttock is spasming and pain radiates down the back of the knee and right ankle and across foot to big toe and numb big toe…some numbness in calf as well at times."

45. The GP's diagnosis was of "sciatica with L5 root compromise".

46. Mr Scarcliffe paid for a private consultation at the Maple Tree Clinic[7] where the presenting complaint was set out as "L4/L5 disc prolapse". Mr Scarcliffe stated that the people in the clinic thought he just had a muscle strain. However this evidence cannot be reconciled with the notes (which on 18th January also recorded "L5/S1 disc bulge) and the neurological symptoms. In any event both Mr Newton Ede and Mr Spilsbury attributed his symptoms at this stage to degenerative change at L4/L5.

47. Turning to the position post accident Mr Scarcliffe stated that he thought he was now 25 stone. He is very significantly overweight.

48. He stated that currently his main problems are:

    a. Back pain on the left side
    b. Burning sensation in the left lumbar region
    c. Loss of sensation in the left leg, calf, ankle and big toe
    d. Weakness and loss of sensation in upper limbs
    e. Memory problems
    f. Urinary issues/erectile dysfunction

    He did not have any symptoms in his right leg. He stated that he had reduced sensation and temperature/touch issues which he believed was due to his medication

[7] He was recorded as having a weight of 18 stone.

and in particular gabapentin which us is a neuro – inhibiter. He said that it also caused "brain fog".

49. In his statement he had set out that:

> "I continue to suffer with constant pain on a daily basis affecting my lumbar region. I also occasionally experience shooting pain down towards the rectal area."

50. Significantly, he explained that the numbness in his left leg and the incontinence came on within a month after the accident, and was taken by Mr Baldock to an extract of Ms Lewis' report that referred to him struggling to regain a degree of mobility in the period up to 5th May 2018. He said that "things" depended on levels of pain and it varied a lot. He also had the occasional spasms that meant that he had to walk with furniture. He also (at this time) noticed numbness in the left foot. When it was bad he did not know where he was putting his foot down and he had tripped on stairs. It was one of the reasons why he did not use the shower upstairs. He said that the numbness had continued to be a problem and that he also had cramping in his left foot. He could not walk more than 100 metres and could do very little in the home.

51. Mr Scarcliffe accepted that during an initial need assessment on 7th March 2018 (with a rehabilitation case manager) he stated that he could lift his eldest daughter who weighed 8-10 kg. He could not remember the assessment, the content of which states:

> "Caring for dependents – his family has four children with the ages of two weeks, 13 months, eight and nine years old. One of the children has a heart condition and a genetic disorder. Another of the children is severely disabled and wheelchair bound *and he is the main carer of child (sic) when not at school. He states the care involves manual handling*."

And

> "Mr Scarcliffe has children with additional care needs who require physical assistance, which limits the amount of rest and recovery time he has *due to being a main carer."* (emphasis added)

These recorded comments are inconsistent within the case advanced by Mr Scarcliffe that he provided little or no care for the children. Mr Scarcliffe stated that he must have meant that he could help with feeds and medication. However, I struggle to accept this was, and is, the limit of what he can do as "the main carer" and importantly, the report is consistent with the content of the child and family assessment in 2022 (to which I shall return in due course).

52. The assessment also contained the following analysis:

> "Able to walk, but finds it difficult on uneven ground, or if his foot is numb…
>
> no difficulties were reported with his upper limb or hand use."

and

"no difficulties were reported in his self-care"[8].

53. Mr Scarcliffe explained how, despite his symptoms, he came to claim carer's allowance in respect of Ottilie in February 2018. He stated that he provided care by listening out at night, as his wife slept heavily. He felt that listening out was justifiable as Ottilie has a heart condition (even though as she was 8 months old there would have been a degree of listening out in any event and they had monitors and cameras in Alfie's room and in Ottilie's room). He stated that his wife earned too much money to get carer's allowance.

54. Mr Scarliffe was also taken to a report of 8th April 2018 complied as a result of his claim for personal independence payment. Under the heading "description of a typical day" it is recorded that Mr Scarcliffe:

> "gets washed and dressed every day independently although his partner ties shoe laces as he has problems bending. For most of the time he wears slip on shoes for ease. Can go up and down stairs...stands to prepare snacks…Goes to the supermarket once a week, he drives there, walks slowly from the car into the store to collect prescriptions and a few items, it takes him 5-10 minutes to walk from the car and to the store, he stops briefly once…drives his car short distances 10-12 times a week. Cooks meals, makes hot drinks using the kettle. Has a six week old baby who he carries…uses a computer to browse the internet and to e-mail."

55. Within a hospital spinal assessment performed on 20th April 2018 it is noted:

> "Not planning to return as tree surgeon – carer for disabled child"

56. When challenged Mr Scarcliffe stated that he had not taken the decision to not return to work but he knew that he could not go back as a tree surgeon, and did not know what he could do if he was not "on the tools". He said that the reference to a disabled child was to Ottilie.

57. The content of this record, taken with the references that I have set out to Mr Scarcliffe being physically able to provide care to his children, is in my view very relevant to the "biopsychosocial model" to which the experts psychologists referred and which I shall consider in due course. There was, and is, an obvious care demand to be met somehow. As I have already set out, it is in my view very unlikely that Mr and Mrs Scarcliffe could have continued to work full time given that they had two disabled children (and were to have two more children). Something had to change radically.

58. Mr Scarcliffe staying at home in the role of main carer (with the associated care related benefits and also the benefits in relation to his disability arising from the accident) was a sustainable model that worked albeit that Mr Scarcliffe had some physical restrictions. This would be consistent with the child and family assessment some four years later which described Mr Scarcliffe as;

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[8] Again this is inconsistent with the case as advanced. See e.g. the physiotherapy assessment of 20th May 2021 at paragraph … below

> "a full time stay at home dad and carer"

albeit one who has to be "careful" when looking after Ottlile. Despite the lack of any statutory assistance for Ottilie it was recorded that:

> "your parents are very able to care and support offering a warm and nurturing environment to all the children, with excellent home conditions and good space.

In my judgement this was equally applicable in 2018.

59. Mr Scarcliffe was taken to a further entry within his medical records on the 30th of April 2018 which recorded:

> "is walking more than half an hour twice a day with dogs".

It was Mr Scarcliffe's case that he could not walk the dogs after the accident. This was supported by Mrs Scarcliffe who stated the dogs had not been walked in five and a half years (i.e. since the accident). Mr Scarcliffe stated that the record was wrong. I cannot accept Mr. Scarcliffe's or indeed Mrs Scarcliffe's evidence on this point as accurate. It is implausible to suggest that the author of the record mistakenly inserted this positive detail without it having been volunteered by Mr Scarcliffe. Further Dr Parikh noted in February 2019 that a consequential effect of the ongoing shoulder and neck pain was that:

> "His ability to walk the dog has been moderately restricted…"

This entry (again reflecting a detail which must have been volunteered) would make no sense if Mr Scarcliffe had not been able to walk the dogs *at all* for the previous (approaching) 18 months.

60. Importantly I struggle to accept that Mr Scarcliffe could have forgotten that he was able to walk his dogs twice a day for a total of an hour as at April 2018 (seven months post accident). Given Mrs Scarcliffe's evidence that the dogs were not walked at all, I find as a fact that they were not walked by any other family member after the accident (despite a claim being made for substantial sums for others doing so). If not walked by Mr Scarcliffe they were left to exercise themselves in the quarter of an acre garden. However I am quite satisfied that the entry is correct and that Mr Scarcliffe was managing an hour of walking at this stage. I have simply not been told the truth on this issue. It was the deliberate exaggeration of disability. It is not an isolated example. Approximately five months later within a claim form for personal independent payment the following was entered (in Mrs Scarcliffe's handwriting);

> "when walking I often suffer numbness in one of my legs and foot. I find that I can walk further on smooth flat areas and only very short distances on hills, rough or bumpy ground. Pain can radiate across my back and down my leg and I have to stop to catch my breath. Since injuring my back I find that I'm less steady on my feet and have fallen multiple times which then incapacitates me further. On my best days I can walk 100 metres, stop for a rest, then walk 100 metres further and repeat

> several times. On my worst days I struggled walking from my bed to the bathroom (approximately 4 metres)."

Mr Baldock suggested to Mr Scarcliffe that this entry was not consistent with him being able to provide consistent and safe care for the children. How could it be safe to look after children if you cannot walk 4 metres? Mr Scarcliffe stated that if Ottilie was compliant he could lift her; otherwise he could not but this doesn't explain the discrepancy. In my judgment this entry is also significant in relation to the problems arising from the left leg symptoms which arose from degenerative change (and as I shall set out in due course are not attributable to the accident).

61. Mr Scarcliffe was referred to Professor Shad (a professor in neuro and spinal surgery) who saw him in clinic on the 2nd of November 2018. At that stage Mr Scarcliffe's two complaints (referred to as diagnoses) were of low back pain and also numbness in the left leg "which he describes in the outer thigh and big toe, he denies any pain down the leg". Professor Shad considered an MRI undertaken on the 19th of September 2018 which he stated showed wear and tear at two lower levels with a small left sided disc prolapse at L4/5 level and a further moderate sized disc prolapse at L5/S1 which he considered was impinging on the left S1 nerve root. His report stated that whilst a herniated lumbar disc can be extremely painful for most people the symptoms are not long lasting. Mr Scarscliffe was extremely unhappy with the consultation and made handwritten additions to the report including "would *increasing* pain over 14 months be considered long lasting?". (emphasis added)

62. When questioned about a reference to shooting within the medico legal report of the psychologist Dr Bashford, Mr Scarcliffe explained that he had trained in February 2019 to assist at a Sywell shooting range. He said that his duties included making sure that people complied with basic safety rules[9] whilst using the range and also showing people what they are allowed to do. He said that the range was aware of his disabilities and if he was in a great deal of pain he would not go to the shooting range. The taking up of this pastime does not sit easily (to say the least) with the content of the claim form for personal independent payment made only some months earlier.

63. Mr Scarcliffe was also taken to the medico-legal report of Dr Shalin Parikh (a GP) in relation to a road traffic accident which had occurred on 30th June 2016[10]. The date of examination was 25th February 2019 (so at the same time as he trained to assist at the shooting range). In relation to the "injuries/symptoms and present position reported by the claimant" Dr Parikh recorded:

> "Pain to the neck: He developed severe pain in the neck immediately after the accident. This improved and is now moderate. Pain to right shoulder: He developed moderate pain in the right shoulder immediately after the accident this symptom has not shown any improvement as of yet."

64. In relation to the effects on domestic lifestyle it is recorded that;

> "his ability to lift heavy items had been severely restricted. The problem has improved and is now mild. His sleep had been

[9] Up to 30 people could be shooting at any one time.
[10] Mr Scarcliffe was the passenger in a lorry which collided with a car.

> severely restricted. The problem has improved and is now moderate… his ability to walk the dog has been moderately restricted. He would normally do this activity everyday prior to the accident. It is not yet improved."

On examination movements of the neck were noted to be 90% of normal and appeared to cause discomfort. Movements of the right shoulder were also 90% of normal and appeared to cause discomfort. No doubt because of the complaints of continuing symptoms and the restrictions on examination Dr Parikh advised a further course of physiotherapy. He believed that the symptoms in the neck and right shoulder would fully resolve following treatment. He also referred to travel anxiety.

65. Mr Scarliffe's statement for the purposes of this claim refers to the accident and to initial treatment consisting of advice and analgesia and that he spoke to a private physiotherapist informally over the phone who gave him some basic verbal advice. There is no reference to any ongoing symptoms. Importantly, he told Mr Newton Ede that he had:

> "completely recovered from his whiplash injury and was experiencing no problems with his neck or back at the time of injury."

66. Mr Scarcliffe could not explain the content of Dr Parikh's report which was at direct variance to his evidence that he had pain in the right shoulder only for a few weeks after the road traffic accident. The report shows that as at February 2019 he was complaining of ongoing symptoms in his neck and shoulder and some continuing sleep disturbance and an inability to walk the dogs as a result of the road traffic accident.

67. The personal injury claim was settled for £6,595 on the basis of Dr Parikh's report. As I stated during the course of the hearing, I consider the conflict between what was advanced as regards symptoms following the road traffic accident in the two different personal injury claims to be very concerning and not something which I could ignore. One obvious reason why (beyond concerns as to honesty), is that you cannot get compensated twice for the same symptoms.

68. In a form in relation to a review of personal independence payment dated 26th of September 2020 Mr Scarcliffe stated that he was reliant upon others:

> "100% of the time"

and that;

> "I use no aids as I rarely leave the house. Within the home I utilise areas that can support me such as strategically placed stools to sit on and making sure when pain is at its worst I'm lying down. I rely on my partner to help me out of bed when I cannot manage myself. I also rely on her to bring me pain medication and drinks to help me move."

and

> "Information from my medical team have informed me that my condition will never improve, there is potential for deterioration and at this current time there are no further treatments available to me."

69. When it was (not surprisingly) suggested to Mr Scarcliffe this was an exaggerated overview (and contrary to other evidence) he stated that his symptoms had gradually got worse. However, in August 2020 he indicated to Dr Rayen that, despite the many difficulties to which he referred[11] he was able to lift his daughters who are aged two and three.

70. On 20th May 2021 during a physiotherapy assessment it was recorded that

> "Self- care an issue -cleaning after bowel, difficult twisting and turning. Struggles in shower, difficulty with stairs."[12]

Also that a timed 10 metre walk took 47 seconds. As I raised with Mr Scarcliffe it is difficult to understand how an inability to walk 10 metres in much less than a minute is compatible with being able to safely look after young children (which he was doing for extensive periods during the day).

71. During an occupational therapy assessment on the 29th September 2021 Mr Scarcliffe reported that he had gained 5-6 stone since the accident which he attributed to limited activity levels due to his physical limitations and, less understandably, poor appetite during the day, and tending to eat much later in the evening. I suggested directly to Mr Scarcliffe that a root cause of putting on significant weight (bearing in mind that he was significantly overweight before the accident) was that he was eating too much rather than the time of day which he was eating. Mrs Scarcliffe attributed the weight gain in substantial part to Mr Scarcliffe forgetting that he had already eaten. This was an example of the blame for all adverse health issues being laid at the door of the accident. I have little doubt that Mr Scarcliffe has been repeatedly advised to lose weight over the years, given that being so heavy will not help with many of his reported symptoms.

72. Mr Scarcliffe also complained that he had altered temperature recognition to such an extent that he has to ensure he does not eat or drink foodstuffs which are too hot as he cannot detect the heat. Mr Scarcliffe stated that he could not run a bath for the children as he is unable to detect temperature accurately. Mr Scarcliffe disagreed with Mr Baldock's suggestion that these reported symptoms (together with references to loss of sensation over other parts of the body) were either not true or medically inexplicable. Dr Edwards referred to this is as an example of how bad he thought the disproportionate pain syndrome had become. In my judgment to the extent these symptoms exist they have been exaggerated.

73. As for current symptoms Mr Scarcliffe stated that the back pain fluctuates but is roughly the same throughout the day and is present when he is sitting or standing. It is worse with both activity and inactivity. The sensitivity has got worse and the

[11] Including that due to numbness in his left foot he cannot feel whether he is lifting his foot or not. Sometimes it catches as he walks.
[12] To be contrasted with what he said in 2018; see paragraph 59 above.

numbness varies with the level of the pain. He has a maximum walking distance; without a stick before he stops of a couple of hundred yards. He can drive for 45 minutes (he drives the family van). He denied exaggerating his symptoms in any way.

74. Mr Scarcliffe accepted that he did drop the children (apart from Alfie and Ottilie who are collected separately) off at school and picked them up (at around 3.00pm), with the school helping them to get into the van and that he does look after the children after school, but sometimes he relies on the help of his parents. He can lift Eli who is aged two[13].

75. As for Statutory care Alfie receives 23 hours a week (and has done since May 2018) The hours are as follows; weekdays from 7.00am – 8.15am and 4.00pm –7.00pm and Mondays 5.00pm–7.00pm, Saturday is "carer free". This is also respite care each month.

76. As for potential employment Mr Scarcliffe stated that if he did not have to bend he could do tree survey report and various associated tasks and potentially some teaching. As for the possibility of working at home; he thought this was potentially possible but it would depend upon who would take him on. He had made enquiries, but due distance he would have to drive and medication he thought he was unlikely to get any work. He said, "all through I have asked. I have looked into further education and could become self employed. I am hoping to work"

Mrs Scarcliffe

77. Mrs Scarcliffe indicated that early on in her relationship with her husband she realised that he had dyslexia and his strengths did not lie in filling out forms/paperwork.

78. She is a digital midwife who analyses data in respect of histories of clinical care. She can work flexibly during the week to fulfil her 37.5 hours and tends to condense them into four days. Ideally she spends one day a week in the office.

79. When asked by Mr Baldock about how the family would have coped in the absence of the accident Mrs Scarcliffe stated that she would have changed her pattern to work three night shifts a week (Friday, Saturday and Sunday) but they might have needed help at the weekends from grandparents. They were "hoping to make it work".

80. By the time Ottilie was six months old (so two months before the accident) they knew she had some complex needs, but the full extent has only become apparent over the first two years of her life. She stated that:

> "we would have had to keep matters under review…we could have managed with just one of us working; it would have been tight…we would have to take it on a day by day basis."

The belief that they could have coped on one salary is important given what they faced.

81. She confirmed the 21 hours of care for Alfie was wrap around care and gave a brief description of the average week day. Mr Scarcliffe is at home throughout the day. She

[13] Eli is still undergoing assessments because of concerns over behaviour.

is happy to leave him in charge of the children. She leaves when the children are all at sleep at about 6:15 am. Her son Elliot wakes up at about 6:30am, and then her husband, and then a carer will arrive (Alfie's carer) and by 8:15am there are just two children in the house; Eli and Una (as Ottilie also goes to school). Mr Scarcliffe drops the two youngest children off at school and then returns back to the house. He can then do stretches or go to the gym depending on pain levels. He will then collect the children at about 2:30pm. Elliott then arrives home and next the carer will arrive at 4.00pm."

82. Mrs Scarcliffe stated that she is shattered ("knackered") on some days and is able to give her husband no attention. When she goes to bed she is quickly "dead asleep" and she was sleeping through the activity on the baby monitor. They now have two monitors[14] and a video monitor and it is her husband's job to monitor night time activity. She believes that this justifies carers allowance.

83. She stated that:

> "we were a team…still are, but roles have changed".

84. Mrs Scarcliffe stated that her husband does not eat properly, snacking on items such as muffins, and she has tried to get him to eat healthily.

85. She confirmed the dogs had not been walked since the accident and that the elder dog (her husband's terrier) had recently died, leaving just her dog.

86. When asked about the future for Alfie and Ottilie Mrs Scarcliffe was very clear that it was their hope to keep them at home. She believed she was the best person to bring her children up and to support them as adults, provided that she had the support which would include statutory support. She did not believe that the local authority had supported them very well to date.

Mr Scarcliffe's Parents

87. The statements of Mrs Christine Scarcliffe and Mr Ray Scarcliffe were admitted into evidence under the Civil Evidence Act.

88. Christine Scarcliffe stated that she lived approximately 6 miles away from her son. It is her view that her son suffers with some depression due to the things he cannot now do. She stated that together with her husband she has provided a great deal of support and care to her son since the accident;

> "…helping him to manage his usual domestic activities and then also providing childcare and support and assistance for the five children."

She continued

> "The activities I have been personally required to assist Ben with relate to performing the more physically demanding tasks of general housework and upkeep, to include doing the laundry,

[14] Alfie can choke on his own secretions and sometimes suction is needed.

> cooking, hoovering, dusting, cleaning the floors in windows and cleaning the bathroom. In addition to this, I also assist with the management of the children's care needs and requirements… on average I currently visit Ben's home a couple of times in the week and estimate I spend around 3 hours each time performing the aforementioned tasks and activities. In addition to this at weekends, I estimate that I typically spend on average around 67 hours providing current assistance. I confirm that this care and assistance is provided over and above the level of assistance that I would have provided prior to the occurrence of Ben's accident."

89. Mr Ray Scarcliffe stated that;

> "I would say from a personal perspective during the initial 6 to 9 month period post accident I spent on average around six hours during the week plus around 8 to 10 hours during the weekends providing care and assistance to Ben and his family. Following this period I would estimate I have spent an average around 8 to 10 hours in total each week providing care and assistance to Ben and his family in particular with helping with the children's care needs. I confirm that this care and assistance has been provided over and above the level of assistance that I would have provided prior to the occurrence of Ben's accident.

90. Mr and Mrs Scarcliffe senior could not be cross-examined and asked questions about issues not covered in their witness statements. They both refer to providing care and assistance "over and above the level of assistance they would have provided prior to the accident". However, before the accident the family consisted of Alfie, Elliot and Ottilie who was only eight months old (I do not know the length of Mrs Scarcliffe's maternity leave in respect of Ottilie and Una) and matters were not as complicated and challenging for the household as they would have become. Bearing in mind that they only lived six miles away and that there would have been five grandchildren (two of whom were very disabled and one who appears to have some difficulties) it is highly likely that they would have provided significant care and assistance in any event. This does not appear to have been a factor taken into consideration (or at least adequately evaluated) in the analysis of post accident care (a subject which I shall return to in due course).

Mr Hazell

91. Mr Hazell is self-employed running his own business which provides independent arboricultural consultancy services. His work ranges from providing individual tree inspections to "enterprise wide" tree surveys, hazard assessments and health and safety advice. He prepares tender documents and method statements.[15] He has over 40 years of experience in the industry. He met Mr Scarcliffe through a scouting group connection. People who work in the field of tree surgery and arboriculture are a relatively close community within Northamptonshire. He heard the defendant company were making some redundancies in 2017 and as he had some potential work

[15] It must also be born in mind when considering the writing of tender documents and method statements etc that Mr Scarcliffe is dyslexic and as his wife confirmed, not particularly good with forms.

opportunities, he contacted Mr Scarcliffe to find out whether he might be interested in doing some work with him. He confirmed that he would have no hesitation and offering him work opportunities with him and that he is confident that they would have worked together on any projects that Mr Scarcliffe was in a position to accept;

> "he was a reliable man I could have deflected some work to him"

92. Significantly Mr Hazell was not considering offering Mr Scarcliffe employment, rather offering to send work to him or work together on some projects.

He said that due to HS2 and Ash die back there is more work than capacity to undertake it at present; this includes surveying and then implementing the surveying.

Analysis of the Claimant's lay witness evidence

93. In my judgment Mr Scarcliffe overplayed his pre-accident contribution to the household and care of the children. I do not accept as accurate his description of a 50/50 split in relevant tasks. He was also unrealistic as to what would have been possible in terms of his lifestyle had the accident not occurred. He has also exaggerated the extent of his post accident disability and underplayed, and been inconsistent as to, what he is physically capable of, including his day to day care activities[16] with the aim to maximise his entitlement to benefits and potential recovery in this claim.

94. The most egregious example of exaggeration is the description given on 26th September 2020 for the purposes of personal independence payment of being reliant on others;

"100% of the time."

This was and is simply not accurate and inconsistent with other contemporaneous accounts[17]. On 4th August 2020 it had been noted by a physiotherapist in a letter to a consultant that that due to the Covid crisis they had lost the carers that had assisted the family and that:

> "As a result of this he is now lifting and handling *more than normal* and is really struggling." (emphasis added)

95. On 18th August 2020 he told Dr Rayen that he could lift his daughters aged two and three (whilst also saying that he could lift nothing heavy and that difficulty with lifting and carrying varies depending on the pain) and that he was able to prepare basic meals. Dr Bashforth during her assessment of 28th October 2020 recorded.

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[16] Examples are that in November 2018 he claimed not to be able to make a sandwich due to numbness in his hands yet in February 2019 he was training to assist at the shooting range. He also said in evidence, not having previously mentioned it to a treating Doctor or medico-legal expert, that he was numb all over his body. He told Dr Rayen that if he took mediation he could not drive, yet he has been taking his children to and from school in the van.

[17] And is inconsistent with other accounts such as that he could provide care for the children, drive then to and from school, cook meals, make hot drinks and use the internet.

> "On a daily basis, Mr Scarcliffe's two stepsons attend school, and his two eldest attend full time placements. Mr Scarcliffe looks after his youngest child (aged 1 year) throughout the day…" (although there was reference to his parents helping out with various tasks).

During Ms Madar's visit for the purpose of her report she noted that Mr Scarcliffe could get the children to school and back and deal with them at home; feeding them etc.

96. The late disclosed local authority assessment revealed that the discrepancies between what has been stated to experts, and in evidence, for the purposes of this claim, as opposed to/for other agencies, have continued. Ms Lewis (the Claimant's care expert) accepted the account given by Mr and Mrs Scarcliffe to the social worker in March 2022 was fundamentally different to that given to her on 28th April 2022. Ms Lewis was told that Mr Scarcliffe could not act as a carer for Alfie or provide much by way of care of the other children and was severely restricted as to what he could manage given his pain levels. However the Child and Family assessment contains the following statements;

> "in the recent CIN meeting Gayle went into some detail around her and Ben's lives. they don't get to socialise at all, as they often have to split into two teams *one looking after Alfie and the other the two children.* They are unable to get out much due to the mix of needs of the children.
>
> …
>
> *Ben is a full time stay at home Dad*…his back and shoulder pain make it difficult for him to lift, bend, twist and straddle. This makes it difficult for him to do the things that a Dad might otherwise do with you and means that he has to be careful whilst looking after (Ottilie).
>
> …
>
> the parents are very hard working but have advocated for and work with levels of respite which enabled them to continue *their roles as carers* whilst maintaining their health.
>
> …
>
> the strength of Gale and Ben's family relationships within the home is apparent. The childrens interactions are those of caring siblings generally, and each Charles needs attending to during visits which is challenging as there are such various needs. Both parents are *equally supportive* in this.
>
> …
>
> Gayle is a full time midwife, parent and carer. *Ben Scarcliffe is a stay-at-home dad, and carer*.

…

Gayle has outlined the routine that you follow as a family: she and Ben *work well as a team* to meet all your needs and they have both contributed to this assessment…

….

Ben and Gayle consider that they are providing a stable environment, they bring a lot of experience and a mature perspective to parenting (Ottilie) with a high awareness of (her) needs. *They work together* to overcome obstacles. They are both very tired and have some limitations of movement – given this they work around it as best they can. They have positive about planning for the future.

….

both parents have health limitations…this means as a carer they are more vulnerable *and will need to pace themselves and sufficient support in the home to make the routines manageable.* Ottilie's older sibling's care package needs to be settled and consistent to ensure that (they) have more time to care for you and your other siblings.

…

Ben and Gayle explained that there are two reasons for wanting assessment. (Firstly) They have in the past had agency people who have been very demarcated about not dealing with the other children and only dealing with Alfie. This is particularly impractical in a family where there are two children with very different special needs one of whom moves around a lot and requires constant supervision[18]. The parents want your needs Ottilie assessed in their own right. *(Secondly) they would like to have an evening of real respite*…(they) wondered about Ottilie accessing Squirrels with Alfie..they would like some hours to cover (Ottilie's) care so they can have an evening's rest.

..

your parents are very able to care and support offering a warm and nurturing environment to all their children…

…

Gayle and Ben do not get an evening off as one or other of them, if not both is always dealing with the children, Alfie requiring one to one and Ottilie and the other children also requiring high levels of supervision. They do not socialise.

[18] This is significant in the context of Mr Scarcliffe's reported inability at times to even move 4 metres.

> Their health conditions leave them tired and sometimes in pain. they would like to be able to have an evening off to recharge, and have suggested some hours are provided on the evening that Alfie goes to Squirrels."

97. The picture given to the social worker in March 2022 is of a couple who were able to provide care to their five children acting in concert (Ms Lewis described it as a "tag team" approach). They had some physical restrictions which impacted upon what they could do but they were nevertheless coping. They had an issue with carers who were there for Alfie not helping them with the other children and wanted one night a week off. Bearing in mind the strain and workload involved in having two disabled children (including one who wakes five or six times a night, meaning that they never got a full night's sleep) what they were, and are, achieving is truly admirable. However, it is what the assessment did not report that requires the most careful consideration. If one parent had stated that they were so significantly disabled that they could provide no significant care for either of two significantly disabled children within a family of five young children, then an assessment would have had a very radically different content a fortiori if the other patent worked. The requirement would have been for a significant amount of additional care to enable the family to manage and the children to be safely cared for. A statutory assessment could not properly ignore such a need during an assessment (whether or not it could be fully met) and it would not simply be a question of trying to achieve one evening of respite a week. Ms Lewis identified the level of care required (in the circumstances as she understood them to be) of 32 hours a week for Ottilie alone and 16 hours for care of the other children and domestic assistance in term time. So ignoring the 24 hours of care she opined that Mr Scarcliffe needed and Alfie's statutory care of 23 hours, she was advising that 38 hours of care was necessary for the household to function properly yet the report stated the parents were asking for a fraction of that from the Local Authority. Initially when she entered to the witness box in my view quite remarkably, Ms Lewis could not understand why I was troubled by the content of this assessment. She eventually said that it was "wrong". When I gave her the opportunity to re-consider her evidence (given her duty to help the Court as an expert); she simply set out parts of its content with no analysis. She wholly failed to address the glaring inconsistency and what impact this had on the very large number of hours of care she was opining was necessary each week. This was very unsatisfactory given her duties as an expert.

98. I find that post accident Mr Scarcliffe was walking the dogs for more than half an hour twice day (at one stage at least) and he was not truthful about this. He also trained to be a supervisor at the shooting range in early 2019. Mrs Scarcliffe tried to downplay his attendance as "an annual event", but when I challenged her on whether this was truly correct, she conceded that it was more regular than that. These activities are not those of a person who is "100%" reliant on others.

99. None of this is to say that the chronic pain condition and the effects of the degenerative changes do not cause significant restrictions on Mr Scarcliffe's everyday life. However, the disparity between what Mr Scarcliffe can do and the very limited amount that he claims he can do must be taken into account when a claim is made (as set out in Ms Lewis' report) for the following:

Description	**Hours per week**
Assistance with childcare (not including services provided to Alfie and Ottilie)	10
Footcare	1
Meal provision, clearing away	2
Transport/escort	2
Shopping/errands	3
Domestic	3
Fetching and carrying	1½
Dog walking	7
Total	**29½**

The reality is that Mr Scarcliffe has been able to walk the dogs, he does look after the children (which I have no doubt can be demanding), drives, and does some cooking/meal preparation and fetching and carrying.

100. As I have explained the report in relation to the road traffic accident is very concerning as it is at direct variance with the case advanced in this claim (that he was fully recovered and fit and healthy at the time of the accident in September 2017). In my judgment it establishes that Mr Sacrcliffe is prepared to not give an honest account to a medico-legal expert to advance a claim. Either he did not have any neck and shoulder issues at the time of the accident (in which case he has lied to Dr Parikh) or he has continued to have such symptoms in which case he has lied to Mr Newton Ede (a possibility which gains some traction given the reference to right shoulder issues to the Social worker in March 2022).

101. In my judgment the comment Mr Scarcliffe made in April 2018 about not planning to return as a tree surgeon and being a carer for a disabled child is instinctive and illuminating (I do not accept that this was a reference to Ottilie). In my judgment the "stay-at-home Dad" role suited the demanding family dynamic. Whilst Mr Scarcliffe may not have envisaged such a role when he was younger, however, as I will set out in due course, had the accident not occurred degenerative changes would have radically altered the position.

102. I am also of the very firm view that ensuring the largest amount of compensation that he can within this litigation has been a driver behind some of Mr Scarcliffe's comments to experts and others. Mr Scarcliffe has expressed the view that things will improve when the case is closed and that at the moment he feels "stuck in a hole". On one level this could be interpreted as a belief that funds to employ others will assist. However I am satisfied that some part of his lack of motivation to go to the gym, lose weight, do stretching exercises and follow the recommendation of the pain management programme is because he is waiting for the compensation payment and probably sees major improvement in his symptoms at this stage as not necessarily in his best interests financially.

103. As for Mrs Scarcliffe it is my view that she also down played what her husband can do at present and failed to fully acknowledge the issues her family would have faced

had the accident not occurred during her very confident and assertive evidence. I have no doubt that she fully appreciated that what is in issue in the case is a claim for an amount of money which could radically transform the life of the whole of her family. She was quite keen to make certain points and to address matters which she clearly thought may adversely impact on the claim. She is undoubtedly a forceful and positive person with a very strong family first ethic, and she commands huge admiration for what she manages to do week in and week out. She is doubtless a remarkable person. However I simply do not accept that she could cope if her husband did as little as she suggested he does. In my judgment she would also not entrust the care of her children to Mr Scarscliffe if he could do little more than sit in a chair or potter about such that he can only cover 10 meters in 47 seconds or indeed 26 seconds or sometimes not even walk 4 metres.

104. My factual findings impact on several aspects of the case as they must feed into the expert analysis. In terms of the claim as advanced they mean that the past and future employment, and care claims are unsustainable as presented in the schedule.

Expert Evidence

105. The parties relied on the following expert evidence:

Claimant	Defendant
Mr Newton Ede Consultant Orthopaedic Spinal Surgeon	**Mr Spilsbury** Consultant Orthopaedic Spinal Surgeon
Dr Bashforth Consultant Clinical Psychologist	**Dr Loumidi** Consultant Clinical Psychologist
Dr Rayen Consultant in Pain Medicine and Anaesthesia	**Dr Edwards** Consultant in Pain Management
Dr Rose Consultant Paediatrician	**Dr Raina** Consultant Paediatrician
Susan Lewis Nursing and Care Consultant.	**Safi Madar** Occupational Therapist.

106. The Claimant has also obtained evidence from Dr Dawson, Consultant Urological Surgeon, who has produced an initial report and a supplementary letter.

107. I shall deal with the disciplines in turn

Orthopaedic Expert evidence

108. There was considerable degree of agreement between the orthopaedic experts (who are colleagues at the same hospital). Within the joint statement it was set out that:

> "Transverse Process Fractures
>
> a. We agree:

i. The acute injury is more significant than the relatively benign looking x-rays appear, as almost invariably they represent a larger soft tissue injury with an avulsion of the transverse processes with muscle attachments.
ii. They are not associated with post-traumatic arthritis as they have no associated joints.
iii. The treatment has been appropriate, and from an orthopaedic/spinal perspective, these fractures need no further management.
iv. They would not ordinarily be associated with late deterioration, associated conditions, long-term care or significant long-term disability from a strictly spinal/orthopaedic perspective.

b. Mr Spilsbury avers:

i. He agrees with Mr Newton Ede that it is not uncommon for there to be some long-term discomfort. He would expect after one transverse process fracture for there to be pain for about six to eight weeks. He accepts that with more transverse process fractures there is usually more pain in the acute phase. He would accept that there is often some ongoing discomfort, but agrees with Mr Newton Ede that the level of pain and disability that Mr Scarcliffe presents with cannot be explained solely from orthopaedic pathology.

c. Mr Newton Ede avers:

i. He reaffirms that these are significant injuries and that some long-term pain, functional restriction and loss of amenity can often occur even absent the occurrence of Chronic Pain.
ii. He notes, that the degree of pain, functional restriction and loss of amenity, that the Claimant suffers, is beyond that which could be explained solely by his Spinal Injuries, and that he has developed chronic pain which is reasonable given an injury of this type."

109. As a result the following matters were not in issue;

(xv) Mr Scarcliffe should have recovered from the transverse process fractures within months, but there can sometimes be long term pain and/or discomfort.

(xvi) Deterioration (as opposed to recovery) would not be expected after such an injury.

(xvii) The level of pain and disability that Mr Scarcliffe presents with cannot be explained solely from orthopaedic pathology.

(xviii) Mr Scarcliffe would have suffered left leg numbness/pins and needles in any event by reason of the pre-existing degeneration at L4/L5 (broad prolapse) and L5/S1 (left sided prolapse). The shooting pain into the rectal area is also a symptom of the disc degeneration.

110. Mr Newton Ede and Mr Spilsbury also agreed that Mr Scarcliffe would have had back pain from the degeneration in the discs. However there was disagreement as to the nature and extent of the back pain and how it would have affected him and his ability to work. Within the joint statement their views were set out as follows:

> "Cause of Current Condition
>
> a. We agree
>
> …..
>
> iv. His pre-existing back issue would have continued to cause his problems.
>
> b. Mr Newton Ede avers:
>
> i. As set out in his original report, the back pain from his disc degeneration would have continued at the same level as that prior to the incident, namely, it would have waxed and waned and would have been manageable over the long term and would not have resulted in significant alterations to work or significant functional restrictions in the long term.
>
> ii. This is because, most people with degenerative lumbar spine back pain, did not progress significantly through life, but rather stay at the same level with sporadic flare-ups that aside from short periods of functional and amenity losses, do not trouble them significantly, nor lead to long-term changes in lifestyle employment.
>
> c. Mr Spilsbury avers:
>
> i. His back problem would have become increasingly problematic and absent the incident it would have caused him significant problems such that within 5 to 10 years (because he had attended Casualty with back pain prior to the index event), he would have been required to significantly change the nature of his work, the hours that he was working or even give up work."

111. The joint statement was prepared before Mr Spilsbury appreciated that they had both made a mistake in relation to the disc prolapse at L5/S1 being left sided as opposed to right sided. This resulted in the agreement (as set out above) that the (permanent) left leg numbness and rectal pain were attributable to the degenerative change at L5/S1 and not accident related (the previous right sided sciatica being due to changes at L4/L5).

Oral evidence

112. Mr Newton Ede stated that chronic pain syndromes are something he comes across in spinal cases. Here the significant, multi-level fractures were "consistent with someone who could develop chronic pain". He re-affirmed that he would not have expected significant persisting symptoms from the accident rather no, or minimal up to moderate, pain. Ordinarily he would expect a person to be back to work after these fractures, including heavy manual work, absent a chronic pain syndrome. He would

expect a person to get better over six months. He would also not expect the pain to get worse as Mr Scarcliffe reports that it has.

113. As for pain developing from the degenerative change Mr Newton Ede said that it can wax and wane and sciatica can be managed with a number of strategies. When you get a flair up you slacken off heavy work. He said that he would have pushed back on the idea of Mr Scarcliffe stopping work as it would be "bad for him". He disagreed with the opinion of Mr Ray, a neurosurgeon, given to Mr Scarcliffe in February 2019 that he should avoid bending and lifting. However he agreed that he would not advise a discectomy for the leg numbness.

114. Mr Spilsbury had stated within his first report that he was surprised that a chronic pain syndrome had not been diagnosed. He accepted that he had made an error in referring in the joint statement to Mr Scarcliffe having returned to work for a year post accident. As set out in his report he knew that this was not the case and his conclusions were unaltered.

115. He stated that what was recorded in Dr Parikh's report was also not consistent with a person with an Oswestry score in the second highest category; crippling pain. Both he and Mr Newton Ede were of the view that the silence in the report, given the level of claim disability, was "unusual".

116. Mr Spilsbury said that Mr Scarcliffe has serious degenerative change at two lumbar levels and also in the thoracic spine. Both L4/L5 and L5/S1 had lost disc height and on a grade of 1-6 were 3-4 (or on the modified Furman classification 5 out of 8). The frequency and severity of problems attributable to the changes would have increased with time. He agreed that work is important when considering back health and if a person stops working the pain will often be perceived as worse. However, he stated that there was "no way" that he would be persuaded that heavy bending and lifting was good for a man with significant degenerative change and the past history Mr Scarcliffe had.

117. Mr Spilsbury also said that there would be good and bad periods but over time the pain would get worse. The best predictor was previous back pain and frequency (of pain) would increase with time. Mr Scarcliffe had suffered an episode at the end of 2016/beginning of 2017 lasting some months and also that "we also now have the benefit of the imaging". He believed there would be warnings of pain before it was "catastrophic" and a person should be advised to make changes if the work they were doing was inappropriate. If a person has severe degenerative disc disease they should consider a non manual job. It was "common sense and logical" to give such advice. Tree work was arduous and he should avoid that work.

118. Mr Splisbury accepted that the time frame of 5-10 years was a guesstimate, but explained that "he was running into these problems before the accident" so (in terms of an appropriate time frame) "not that long". The numbness in the left leg merely reinforced his opinion. If managed properly a person can avoid the more significant problems, but heavy work, whilst it did not accelerate the genetic disease, exacerbated the pain and consequential disability. He thought that although the pain and disability from the degenerative disease would become more recurrent and frequent, if the pain could be managed (a very important consideration indeed in a case concerning

chronic pain) and with a different form of job, then he could have been expected to work until retirement.

Analysis

119. Mr Newton Ede changed his views quite significantly during his involvement in the case. Initially he asserted that the herniation of the discs was caused by the accident. This view was based solely on a temporal link and, as he accepted when I suggested to it to him, is contrary to orthodox medical opinion[19]. He stated that he "rowed back" from that view on reflection. He then refined his view to there having been a 10 year acceleration with either a lesser traumatic event or no such event at all. His next step was to maintain his position that the herniation was caused by the accident and to withdraw the acceleration opinion. Finally, he then accepted that there was no connection between the accident and the degenerative changes, (recognising that he had made a mistake about which side the L5/S1 disc was bulging). In my judgment these matters cast some doubt on the reliability of his analysis[20].

120. By the time that both Mr Newton Ede and Mr Spilsbury gave oral evidence they appreciated that the degenerative discs were causing symptoms.

121. It is my view that Mr Newton Ede underplayed (or failed to adequately consider) the significance of the left leg numbness/rectal pain in the opinion he gave as to the progression and effects of the degenerative changes given the available information as to how concerning/disabling they had been for Mr Scarcliffe. This evidence including the following:

(a) In October 2017 Mr Scarcliffe experienced some back spasms and cramping in his left foot as he relayed to Mr Rayen on 18th August 2020[21]. Dr Rayen noted:

> "he complained of numbness in his left foot, intermittent increased urinary frequency, decreased libido and erectile dysfunction."

(b) In November 2018 he consulted Professor Shad with two complaints; continuing low back pain and numbness in his left side outer thigh and big toe.

(c) In February 2019 he also complained of numbness in the buttock area.

[19] As has been set out in numerous reports and articles and explained by Dickson and Butt in "The Medico-Legal Back" [2004] ".. on clinical, pathological and bio mechanical grounds, there is no substance at all for the notion that trauma in any way affects disc herniation which is, rather, part and parcel of the natural and constitutional process of degeneration which is very much under genetic control".

[20] As Mr Baldock pointed out in closing, despite the level of back pain claimed (78% Oswestry overall disability - the second highest level of crippling pain, Mr Newton Ede stated that the back pain in the left flank was consistent with the transverse process fractures in his first report. It appears to have been the hyperaesthesia/allodynia which led him to diagnose a chronic pain syndrome. In his August 2022 report (five years post accident) he recorded that there was no change in Mr Scarcliffe's back pain, and made no mention is made of him suffering from disproportionate pain from the transverse process fracture.

[21] Report paragraph 74.

(d) In February 2019 he saw Mr Ray a consultant neurosurgeon who noted:

> "He presently complains of low back ache which he stated was following an accident where a big log fell on his back. He sustained left sided transverse process fractures of L1, L2 and L3 which has been treated conservatively as expected. He also complains of numbness in the L5 and S1 distribution in the left leg."

Significantly, after reviewing the MRI which he stated showed evidence for degenerative change at L4/L5 and L5/S1, Mr Ray told Mr Scarcliffe:

> "today I explained to him the cause of his low back ache is generalised lumbar spondylosis. This pain syndrome is difficult to treat surgically. the way forward is conservative treatment with avoidance of aggravating factors like bending, twisting and lifting take painkillers on a regular basis and escalate if it is required during worsening episodes. intermittent exacerbations with intervening remissions are a rule as per the natural history of the problem and difficult to prevent them. I have also advised him to lose some weight."

He also stated in regards to the left side numbness that it was not bad enough to warrant surgery which had chances of improvement not more than 50%.

(e) In February 2020

> "Mr Scarcliffe complained of sharp pains in the lumbar spine with some throbbing and pulsing a numbness into the foot and the medial side of the calf he had burning into the toes which was a new symptom and intermittent in nature. He tried physiotherapy. but his pain increased."

(f) 4th August 2020 he told his GP that he had low back pain with radiation into both legs, left greater than right.

(g) Mr Scarcliffe told Mr Rayen on 18th August 2020 that:

> "Due to numbness in his left foot, he cannot feel whether he is lifting his left leg or not. Sometimes it catches as he walks."

(h) On 21st October 2020 (per Dr Carter) he had pain in the legs with occasional sharp shooting pains into the rectum.

(i) In December 2020 Mr Scarcliffe told Dr Rayen that as well as constant dull, deep pain, hyperalgesia and allodynia in the left lumbar region he had:

> "numbness in the outer aspect of his calf, ankle and bit toe and tingling in his left leg: intermittent incontinence to urine and erectile dysfunction."

(j) On 20th September 2021 he was noted to have:

> "low back pain he described as disc pain… sharp rectal pain with certain movements, usually when his back pain is more severe..some leakage or urine when pain is severe."

(k) In his report of 23rd May 2022 at 172 Dr Rayen considered the paraesthesia in the left leg to be

> "(a) serious case and prognosis is poor."

During his evidence Dr Rayen sought initially to argue that this referred to the back and leg symptoms; but he then agreed that the leg symptoms were serious. He recorded that:

> "There was mild observed disability with a limp whilst walking. He was not exerting any pressure on the left leg."[22]

He also recorded his left knee and ankle reflexes were reduced on neurological assessment. So by the stage that he was examined by Dr Rayen, Mr Scarcliffe was seriously troubled by his left leg issues (which it is not in dispute are permanent), urinary symptoms and occasional rectal pain, none of which was caused by the accident and would have occurred in any event.

122. As a result of this chronology I reject Mr Newton Ede's view that these symptoms were "not particularly troublesome". It is inconsistent with the content of the medical records and fails to recognise the nature Mr Scarcliffe's employment. They were indeed serious symptoms and were separate to, and distinct from, back pain arising from the degenerative change. I accept Mr Spilsbury's view that these symptoms would reinforce the "common sense and logical view" that he should change his job.

123. As set out in the joint statement it was agreed between the experts that the degenerative discs would have continued to cause him problems. Mr Newton Ede stated that:

> "…*most people* with degenerative lumbar spine back pain, did not progress significantly through life, but rather stay at the same level with sporadic flare-ups that aside from short periods of functional and amenity losses, do not trouble them significantly, do not lead to long term changes in lifestyle/employment."

124. However Mr Scarcliffe had specific issues such that reference to what may be expected to happen to "most people", is of limited assistance. He was approaching his fortieth birthday, was significantly overweight, had a history of back pain and was

[22] Paragraph 89

engaged in heavy manual work (he reported to working five to six days a week doing 70 to 80 hours[23]) with, significantly, additional manual lifting at home. In November 2015 and December 2016 he developed low back pain while he tried to move heavy timber at work. In 2015 he was diagnosed with mechanical back pain which improved with painkillers. In January 2017 he had an acute incident of right sided sciatica which was probably related to a right sided disc herniation at L4/5 (it was sufficiently acute to mean that he presented at A & E). This issue took some time to resolve and required chiropractic treatment.

125. I cannot accept the opinion of Mr Newton Ede that faced with imaging that showed severe degenerative change at two levels (L4/L5 and L5/S1) in an overweight man working in a heavy manual job, with a history of one acute sciatic episode and who had developed unremitting (permanent) numbness in his left leg (calf and toe) and some shooting rectal pain, that the proper advice, or the advice given by most (if not the vast majority) of orthopaedic surgeons on consultation, would have been simply to carry on working as he was currently doing. Even without working at all since the accident the numbness in the left leg and rectal pain have not subsided. Rather I accept as correct Mr Spilsbury's analysis.

126. I find as fact that Mr Scarcliffe had serious degenerative change in his spine at two lumber levels and would have developed serious symptoms in his left leg, with some rectal pain and urological symptoms had the accident not occurred. He is likely to have been given the common sense advice to change his job (effectively this was the advice Mr Ray gave as it would be impossible to undertake tree work without bending and lifting).

127. In any event back symptoms would have become increasingly problematic and absent the incident it would have caused him pain *in addition to* numbness etc, such that if he had been able to continue in his chosen line of work in some way/form, then within 5 to 10 years (mid-point 7.5 years) he would have been required to stop. It is important to bear in mind that this analysis is *solely* based upon the views of the orthopaedic surgeons as to expected back symptoms alone. Just as they could not explain the level of pain and disability experienced by Mr Scarcliffe after the accident, they could not give expert evidence as to how any symptoms from degenerative changes, with or without pain, would have affected him. This was a matter for the other expert disciplines.

Urology

128. Dr Dawson concluded that the urinary problems and erectile dysfunction which Mr Scarcliffe developed shortly after the accident could not be linked to the accident. Sensibly they could not have been linked to the fractures of the transverse processes in any event [24]. Although consideration was given to the cause being L5/S1/ cauda equina this was ruled out. So Mr Scarcliffe would have suffered these symptoms in any event.

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[23] See Report of Dr Rayen dated 12th December 2020; paragraph 28 in November 2015

[24] Or medication as they were present by January 2018; see notes of Dr Jonathan Taylor. The first discussion about starting Gabapentin was in March 2018 (see Bp 319). The symptoms continued to deteriorate "getting worse" ; see entry of Dr Parikh of 9th August 2018. He first saw Dr Carter and NHS pain management specialist (and increased gabapentin and began other medication in September 2018.

Psychology expert evidence

129. There was little difference between the opinions of the psychologists. Also their oral evidence added little to the joint statement. Had the claim been of a lesser value I very much doubt that I (or any other Judge) would have allowed them to be called. However, given the high value I erred on the side of caution.

130. They agreed that Mr Scarcliffe has not suffered from any psychological or psychiatric condition and paragraphs 74 to 79 of the joint statement encapsulate the level of agreement and such differences as there were between them:

> "74. We agree that the Claimant has experienced psychological distress in the context of the onset of persistent physical symptoms, namely chronic pain, and in the context of loss of employment and he demands of burden within his social and familial network; these have contributed to the onset of psychological distress in the context of pain.
>
> 75. Both experts agree that in the absence of the onset of the physical symptoms following the index incident and their impact on the Claimant's functional ability he would have avoided the emotional response to symptoms of pain.
>
> 76. We agree that, on the balance of probabilities, causation of the psychological symptoms of distress reported by the Claimant subsequent to the index event, can be attributed to
> (1) the Claimant's pain,
> (2) financial circumstanes and
> (3) the caring responsibilities and social situation with his physically dependent children with notable neurodevelopmental and physical disabilities.
>
> 77. Dr Loumidis would like to add to this list
> (4) the pre-incident *trait neuroticism* and *avoidant personality traits*, and
> (5) the likelihood of over-reporting of overall emotional disorders, clinical depression, cognitive impairment, and the psychological components of his pain symptoms.
>
> 78. Dr Bashforth reiterates once again tht she does not dispute with Dr Loumidis on the potential role of any prior psychological vulnerabilities in increasing the likelihood of unhelpful maintenance factors in the context of the onset of pain following injury, illness or disease; it is perfectly reasonable to suggest that some individuals are more disposed to pain related distress and poorer coping following an injury and in the context of a demanding home environment. Dr Bashforth also adds to the list of contributing factors, the role of litigation and associated elevated perceived injustice the latter appeared reduced between 2020 and 2022 assessments.
>
> 79. Dr Bashforth differentiates out the relevant maintenance factors in pain perception and management as part of the multifacorial nature of pain. It is her view that pain catastrophising, reduced self-efficacy, heightened injustice, fear avoidance, low mood, loss of role and familial demands, subsequent to the injury

and onset of pain, has created a poorer maintenance framework for pain perception and management exacerbated by social and familial demands".

131. Dr Bashord referred to the "biopsychosocial model[25]" which states that a person's ill health or medical condition should not be viewed solely as a organic/biological issue, rather considered in the context of psychological and social factors. The biopsychosocial model can be broken down into three components;

(a) Bio (physiological pathology).
(b) Psycho (thoughts emotions and behaviours such as psychological distress, fear/avoidance beliefs, current coping methods and attribution).
(c) Social (socio-economical, socio-environmental, and cultural factors such as work issues, family circumstances and benefits/economics).

132. I readily confess to viewing the biopsychosocial model as in a large part common sense.

133. In the present case the social stressors impacting on Mr Scarcliffe have to be taken into account in terms of both what has caused his current condition and what would have occurred in any event.

134. At the time of the accident Mr Scarcliffe had three children two of which were severely disabled and required extensive care. This would have been, to say the very least, extremely physically and emotionally demanding on any couple. His wife was also pregnant. He had always had a heavy manual job (and is dyslexic) and was about to be made redundant so would lose his secure employment[26]. He had developed some serious and worrying back symptoms. The practical and financial implications of these symptoms (including the ability to survive on one salary and the availability of benefits if he was unfit to work) would have loomed large.

135. I am sure Mr Scarcliffe appreciated that the acute symptoms from a nasty work accident caused by the fault of another could lead to significant compensation (he had another compensation claim arising from a road traffic accident the previous year). Post redundancy the family dynamic no doubt weighed heavily upon him with the extensive practical, and significant financial, demands.

136. Dr Bashforth accepted during cross examination that if the accident had not happened but back pain and other symptoms had developed there would have been likely to have been be an impact although the degree and trajectory was difficult to estimate. She also agreed that given his psycho and social features it would have been more difficult for Mr Scarcliffe to stride through illness and disease and these features could magnify pain perception.

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[25] The Biopsychosocial model was first conceptualised by George Engel in 1977 and my experience is often referred to within experts reports into chronic/disproportionate pain cases.
[26] Dr Bashford stated that redundancy in context of illness and family would ramp up matters including any relevant psychological response. It was emasculating.

137. Dr Loumidis stated that the family context was inextricably linked with his pain (as it is a part of the social model). He added litigation to the list of stressors (again a common-sense view).

138. Dr Loumidis used psychometric testing within his assessment which revealed some pre-incident vulnerability (a vulnerability to emotional distress) which would increase the likelihood of reaction to adverse events. Dr Bashforth stated that all psychometrics are useful but attached some caution to their use. In my judgment the evidence of vulnerability provides some limited support for Dr Edward's opinion.

Expert evidence about pain

139. There was a significant difference of opinion between the pain experts within the joint report (prepared without the joint opinion of the orthopaedic experts).

140. In Dr Edwards' opinion in the absence of psychosocial/psychological and psychiatric issues, Mr Scarcliffe's reported symptoms would be significantly less. It was also Dr Edward's opinion, that if and when the Mr Scarcliffe developed back pain problems absent the index event, then his underlying psychological issues and health anxiety would have similarly amplified his perceived/reported symptoms. This was of great significance given that, as I have already set out, Mr Scarcliffe would have developed symptoms arising from the degenerative changes in his spine including pain, in any event.

141. It was also Dr Edwards view that the litigation would have inevitably caused Mr Scarcliffe to focus on his symptoms, and possibly misattribute any later developing physical symptoms to the index accident. As set out in the joint statement;

> "To summarise, in Dr Edwards' opinion the Claimant's current situation can be considered to be due to a number of interacting physical and psychosocial/psychological issues:
>
> - The Claimants pre-accident physical vulnerability, with a history of back pain and degenerative changes seen on radiological imaging as well as long standing obesity;
> - The physical injuries sustained in the index accident;
> - Physical deconditioning;
> - Pre-accident psychological vulnerability;
> - Possible psychological effects of the index event;
> - Additional non-accident related psychosocial issues;
> - The effects of the litigation.

142. To put matters briefly Dr Rayen was of the view (as set out in his reports and the joint statement) that Mr Scarcliffe had developed a pain syndrome as a result of the accident. He did not attach much weight to pre-accident vulnerability or consider in

any detail the extent to which absent the index event, he would have similarly amplified any perceived/reported symptoms in any event.

143. Before the pain experts were due to give evidence I raised again a matter which I had raised before the hearing started (in an e-mail to the parties). I asked Counsel to please remind the experts about the duty to notify the parties and the Court of any change of opinion (see **Muyepa-v-Home Office** [2022] 2648 at paragraph 291). I pointed out that it appeared to me that it was highly likely that Dr Rayen had significantly revised the opinion set out in his reports/the joint statement given that:

(a) After Dr Rayen had prepared his reports and the joint report, the opinion of Mr Newton Ede had changed significantly. Given that the pain discipline is a referral, or secondary, discipline i.e. patients will usually have had wholly organic causation for pain ruled out by e.g. an orthopaedic consultant or a neurologist, it was surprising and unsatisfactory that matters were not organised so that the pain experts had sight of the joint view of the orthopaedic surgeons before they met to discuss their views (especially given that the orthopaedic joint statement was dated 22nd November and the pain experts report is dated 25th November). In any event in the joint statement Mr Newton Ede radically revised his view about acceleration of degenerative change. Dr Rayen had repeatedly relied within his three reports on Mr Newton Ede's original, *now abandoned*, opinion[27]. Given this change both legal teams, and certainly the Claimant's legal team, should have asked the pain experts to consider an addendum report or revised joint statement within the (nearly four) months before trial.[28]

(b) Further, the Orthopaedic surgeons recognised a week before trial that their combined view was wrong and they now attributed the (permanent) left leg symptoms (numbness, cramping, tingling etc) and also, as was clarified in evidence, rectal pain (which Dr Rayen had referred to in his reports) to degenerative change at L5/S1 which was not caused or exacerbated by the accident; so e.g. paragraph 13 of the pain experts joint statement was plainly wrong. Given that the revised joint view of the orthopaedic experts was available to the parties a week before trial (and was referred to in the skeleton arguments) there was ample time for the pain experts to set out any altered opinion.[29]

144. Given the content of the joint statement, the changes in the evidence obviously significantly impacted on Dr Rayen's analysis, (it was relatively clear how they would impact on the opinion of Dr Edwards). The likely effect of symptoms which would have been arisen had the accident not occurred was obviously a point that Dr Rayen was going to be cross-examined upon given his previously expressed view[30] that the left leg symptoms were "(a) serious case and prognosis is poor". I expressed the view that it was obviously unsatisfactory and unfair to Dr Rayen, if he was not fully aware of the changes in orthopaedic opinion (which should have been immediately notified

[27] See e.g. Bundle pages 137, 158, 301
[28] This was a very high value with case with a large amount of costs incurred. It should have demanded close and very careful attention.
[29] At this stage there should have been focussed consideration on what remains in dispute.
[30] In his report of 23rd May 2022 at paragraph 172

to him) and asked to give evidence without time to fully consider the issue and notify the parties of any change in his expert opinion.

145. I found it very concerning that the intention was that both Mr Rayen and Ms Lewis (as I shall set out in due course) would give oral evidence without adequately addressing the obviously relevant and important changes in evidence which had occurred since they complied their reports. I repeat what I set out in **Muyepa** paragraph 291

> "The sixth of the Ikarian Reefer principles and CPR 35 PD 2.5 cover the position where an expert has changed his or her view arising as a result of matters that have occurred after they have prepared a written report (or joint report). Importantly this includes a change of opinion during a trial. By way of example if as a result of lay witness evidence an expert's view has changed he/she should communicate this (through the legal representatives who have instructed him/her) to the other side without delay and when appropriate to the court. An expert should not step into a witness box having changed his /her view without having made this plain beforehand. If the change of opinion is properly communicated it may alter the need for or extent of evidence to be given."

146. A party is entitled to know as soon as is practicable if an expert instructed by an opposing party has materially changed his or her opinion. As with all other litigation the Court expects the parties within personal injury and clinical actions to seek to (and to continue through the lifetime of the Claim to seek to) achieve a consensual resolution of the claim, or issues within the claim. This includes during a trial. A failure to consider, address and communicate a change/development in an expert's opinion (if the evidence exchanged continues to be relied upon) may mean that necessary discussions (and for potentially) negotiations either do not take place or proceed on a fundamentally incorrect basis.

147. Dr Rayen's evidence was to provide a striking example of a very marked change in opinion only becoming apparent during cross-examination. Legal representatives bear a duty to notify an expert of any evidence which has emerged during the trial which the expert has not heard which may (and there only needs there to be a possibility) materially alter the opinion which he/she has previously expressed and ask them to reflect upon it. Further, if the experts opinion does change to ensure that it is set out in writing. In my judgment there was a clear and obvious need for Dr Rayen to consider the very significant changes in the orthopaedic evidence since he prepared his report. His hastily prepared addendum report (prepared at my request) was inadequate and failed to address the issue that was obviously going to be put to him when he gave evidence. When it was given his evidence set out a radically different view from that previously contained in his reports and I have little doubt drastically changed the parties realistic valuations of the claim.

148. The Court is entitled to have the benefit of a carefully considered opinion of an expert which has been shared and considered by all relevant individuals in advance of the expert giving oral evidence. A paradigm example of what is lost is shown by the (entirely proper) notification by the orthopaedic experts that they had changed their

views a week before the trial. The start of the process was Mr Spilsbury contacting Mr Newton Ede to say that they had both made a mistake leading to all sides appreciating that well in advance of trial and no time being wasted as a result.

149. Dr Rayen produced his addendum report very quickly after I had risen to allow his position to be clarified. Unfortunately, it obviously did not fully address the impact of the changes to the reports on his previously expressed views and still left many obvious issues unanswered. He stated (materially):

> "I understand the spinal surgeon changed his opinion on the cause of left leg paraesthesia symptoms. Based on that, I withdraw paragraph 172 of my report of 23rd May 2022.
>
> My opinion is that the Claimant's left leg numbness are **not** explained by a chronic pain condition, as it has always been. My opinion on the Claimant's back symptoms remains the same. The spinal surgeons as I understand it remained agreed that the Claimant had a significant trauma injury to his back. It remains my opinion that led to the Claimant's chronic pain condition which he now has. My opinion in respect of prognosis remains the same." (emphasis added)

The new report then added;

> "I have been asked additionally whether I can deal with the side effects of the Claimant's pain management medications and side effects. I am able to assist with this with reference to the BNF."

The new report was accompanied by three extracts (said by Mr Hunjan KC to have been taken from the internet) of potential side effects for three drugs. Dr Rayen was then called.

150. I asked Dr Rayen at the outset what he (as an expert) wished me to make of the documents which had now been placed before me. He said that drugs such as those used by Mr Scarcliffe could have side effects and he noted that Mr Scarcliffe had some tingling and parathesia. Upon pressing him on the issue he then confirmed that he was *not* suggesting that the symptoms in the legs were due to the effects of medication. He also confirmed that he had not set out any analysis in his three reports or the joint statement (save for the agreement reached with Dr Edwards that Mr Scarcliffe was over medicated) the about side effects although as a pain clinician he was very well aware of the potential issue and if he was treating a patient and he thought any symptoms may be due to side effects of medication he would address it e.g. by changing medication. He also confirmed that he had not undertaken any analysis of the onset of symptoms as correlated with the drug regime. I then pointed out an example of the dangers of broadbrush statements just on the basis of my own speedy reading of the medical records. Mr Scarcliffe complained of sexual dysfunction which is a recognised side effect of gabapentin (amongst the long number of potential side-effects) and this symptom not been attributed by the orthopaedic

experts or the urology expert to any L5/S1 degeneration or other organic cause[31]. So could there be a link with Gabapentin? Well any detailed consideration of the medical records revealed that Mr Scarcliffe was complaining of erectile dysfunction, increased frequency and lower libido by January 2018 at the latest (see notes of Dr Jonathan Taylor). However the first discussion about starting Gabapentin was on 9th March 2018. Having explored these matters through just one example Mr Rayen conceded that making any link between the drug regime and any apparently unexplained symptoms was a leap. It is not a leap I was prepared to entertain a fortiori in a claim of high value. Put simply this late evidence devoid of any adequate analysis should not have been placed before the Court in this fashion and it represented an elephant trap for an unwary Judge.

151. Despite the unsatisfactory position which I have outlined Dr Rayen was tendered for cross-examined. As was in my view inevitable, he was taken to what he had said about the left leg symptoms (taken with the rectal symptoms and urological symptoms) and pressed on whether Mr Scarcliffe would have developed a pain syndrome in any event.

152. During Dr Rayen's examination Mr Scarcliffe had been limping and not putting pressure through the left leg. I asked Dr Rayen for his view as to why Mr Scarcliffe was limping. He said that he presumed the difficulty with walking was due to back pain as he had experienced people with back pain limping before. I did not find his analysis (that patients say that it is due to increased pain) convincing given the objective testing of reduced reflexes in the left leg and Mr Scarcliffe's history of complaints concerning the left leg. If he was limping due to the effects of the degenerative changes, which were causing numbness, this would significantly elevate the seriousness of the consequences on his life. In any event Dr Rayen confirmed (after initially trying to backtrack somewhat) that (ignoring the limping) the left leg symptoms were "serious".

153. Dr Rayen then gave what I am sure all legal representatives immediately appreciated was very important evidence that Mr Scarcliffe was vulnerable to developing a chronic pain syndrome on the basis of the (non-accident related) left leg symptoms alone in any event and the vulnerability increased if other symptoms (urological and rectal pain) were added in, and then add in back pain and it was an even worse picture. He agreed with the proposition "the more you layer on the worse it gets".

154. This was broadly in line with the previously expressed view of Dr Edwards that if and when the Mr Scarcliffe developed back pain problems absent the index event, then his underlying psychological issues and health anxiety would have similarly amplified his perceived/reported symptoms. The very wide gap between the experts which was set out within the joint statement had been very significantly narrowed.

155. I was not surprised that having obtained this evidence Mr Baldock stopped cross-examining Dr Rayen.

156. When he gave evidence Dr Edwards would not be shaken from the view which he had previously expressed. He said nothing he had heard during the evidence (he had been present throughout) had changed his opinion and that as regards the opinion of Dr

[31] Notably the Urologist make no reference to this issue being potentially due to drugs; referring to other causes apart from the injury to the spine being psychogenic or endrocrine

Rayen "we are (now) just closer". He was keen to emphasise that the issue was one of "disproportionate" as opposed to simply "chronic" pain (as a patient may have chronic pain due an identifiable organic cause). It was his view that the left leg symptoms (alone)

> "would have provoked the same response"

He stated that he agreed with Dr Rayen that the left leg was a serious condition and likely to lead to chronic pain as

> "it would not take much for this gentleman to develop chronic pain...it would not take much to tip him over."

He also agreed with the proposition that the more your "layer on top" of the left leg symptoms the greater the likelihood of Mr Scarcliffe developing disproportionate pain.

157. Dr Edwards was challenged on his view about psychological vulnerability, given the view of the psychologists. His response was that Dr Loumidis suggested some pre-existing vulnerability and that as a clinician, medically trained (unlike the psychologists[32]), with many years of experience in pain management, it was his view that it was important when considering a patient with disproportionate pain to consider pre-existing anxiety. Mr Scarcliffe had 40-45 pages of medical records which would provide support for a significant underlying health anxiety. It was "a piece in the jigsaw".

158. Dr Edwards stated that the biopsychosocial model applied. With many people who develop disproportionate pain, the underlying injury/insult is not that relevant (from a pain management perspective) rather "it's the whole thing". Loss of employment had a significant impact and was made worse as the family "had a lot on their plate" and having children with disabilities was a factor. "You have to insert the bio-social, it's a different picture to back pain that causes him to lose his job entirely".

159. Dr Edwards opined that Mr Scarcliffe currently had "quite widespread unexplained consequences" (such as loss of sensation in the mouth) and that he had gone backwards after the pain programme and that the picture was clearly complex.

160. In my judgment having considered the totality of their evidence, including Dr Rayen's changed/additional opinion, it is effectively the view of both pain experts that if, and when, Mr Scarcliffe developed serious back related symptoms absent the index event, (and the symptoms arising in the left leg and rectal area were serious), then the pressure of his family circumstances, underlying psychological issues and health anxiety would have been likely to have similarly amplified his perceived/reported symptoms.

161. Having regard to the biopsychosocial model it is likely that the more serious the physical symptoms (or as they were increasingly "layered on"), such as the

[32] Dr Edwards stated that it was "unrealistic" to suggest that a pain management consultant should not deal with psychology.

development of pain, the greater the impact on his life such amplification would have been.

162. Unsurprisingly, the experts could provide no greater precision as to what would have occurred in any event. The task falls to me to piece their evidence together with the entirety of the expert and factual evidence and to arrive at a conclusion (to the extent that I can on the evidence) as to what is likely to have happened had the accident not occurred and compare it with what has happened in fact.

163. Dr Edwards and Dr Rayen disagreed as regards prognosis. The joint statement set out their respective view as follows;

> "46. In Dr Edwards opinion if the Claimant engaged with treatment as suggested, he will increase his fitness, and gain confidence in himself, such that he notices improvement on his current situation.
>
> 47. Dr Edwards note recent improvements are noted in more recent expert reports. These are very encouraging, suggesting that he has the potential to make a very good recovery.
>
> 48. Dr Rayen notes that even though it has been 4 years since the index accident, the Claimant's pain symptoms have not improved. Dr Rayen indicates that indeed, despite a PMP, several sessions of physiotherapy and medications, the Claimant claims that his symptoms have worsened, with a major impact in his day-to-day activities.
>
> 49. Dr Rayen opines that, on the balance of probabilities, his pain symptoms, and their impact on his activities of daily living will remain permanent.
>
> Work
>
> 51. We agree that from a pain medicine perspective, we recommend the Claimant to do work whether paid or unpaid, in a job which does not demand manual work and with which he is able to cope and/or is supported in, although he will have long-term serious limitations in terms of undertaking open employment.
>
> Care
>
> 54. Dr Edwards only comment on care would be that in treating individuals with a significant psychological element to their presentation it is very important that they are encouraged to become as independent as possible. In my experience the provision of care or inappropriate alterations to accommodation, in such circumstances, is counterproductive, re-enforcing inappropriate perceptions of disability and discouraging effective rehabilitation and self-determination."

164. During cross-examination Dr Edwards was unshakeable in his view that Mr Scarcliffe could still make a good recovery. He had spent time with him after the medico-legal examination discussing the way forward and in my judgment was clearly committed to helping Mr Scarcliffe to regain back as much of his life as possible. He saw no reason why, after treatment, he could not reach a position compatible with the underlying pathology. Mr Scarcliffe had achieved significant improvement after his previous pain programme and "could do really well", return to work[33] and do normal activities. He believed that Mr Scarcliffe was in a difficult position and family circumstances provided serious limitations; so support was needed. However providing non-physical pain sufferers with care a fortiori too much care, can legitimise the disproportionate disability, and can stop them moving forward. The underlying principle is independence and not dependence ("ablement and not disablement"). There is no doubt whatsoever in my mind that Dr Edwards believed very strongly in what he was saying and he was an impressive witness on the issue.

165. Dr Rayen agreed that Mr Scarcliffe was overmedicated but saw no realistic prospect of any alleviation of symptoms.

166. Having considered all the evidence, including the psycho and social elements of the biopsychosocial model and the initial success of the pain programme I am satisfied that Dr Edwards is probably correct. A focussed and well resourced rehabilitation package will, on balance, produce dramatic improvements from the current position.

Care expert evidence

167. Ms Lewis, who gave expert evidence as to care will have found it a very uncomfortable experience indeed as obvious mistakes and omissions were pointed out. Significant parts of her evidence were unsatisfactory and/or ill thought through. I find it very concerning indeed that such evidence underpinned a very large, and when properly tested, in part clearly unsupportable claim within the schedules. Worryingly it is not the first time that I have had very real concerns about the approach to care evidence in a high value claim.

168. The analysis of the complex issues in this case was not sufficiently thorough and matters which obviously required further investigation had not been followed up. At the outset of the case I raised the issue of statutory care and the lack of documentation in relation to it given the very large claim made in respect of Ottilie's future care alone (on Ms Lewis' expert evidence £34,542 per annum). At 9.00 on the morning that the care experts were due to give evidence I was handed 90 pages of statutory assessments in respect of Ottilie and Alfie. This documentation should have been obtained and analysed long before the trial.

169. The content of this documentation immediately raised very obvious and serious issues with regards to the Claimant's case as regards the need for care to compensate for the lack of care which he can provide to Ottilie and Alfie. Even on brief consideration it was apparent that the child and family assessment undertaken by Helen Wood in respect of Ottilie, had content which conflicted with the Claimant's evidence.

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[33] Dr Edwards stated that it was important to start with something meaningful; unpaid or paid as the start of the process. Activity was to be encouraged; to get out doing something and talking to people. Support in this process was important. He very much liked the idea of a "buddy" (a support worker).

170. Mr Hunjan KC appeared to initially see no real issues arising from the content. As was apparent to all in court I found his stance somewhat remarkable. The case advanced before me was that the Claimant was so severely disabled by pain that he was unable to provide any substantial care for Ottilie (he could do little more than listen out at night). The assessment on 11th March 2022 (so a year ago) appeared to paint a very different picture. Neither care expert had addressed it.

171. An updated document had been provided by the care experts which dealt with the costs of rehabilitation for one year (in light of the evidence of Dr Edwards). However, I had no indication as to how Ms Lewis in particular intended to deal with the statutory assessment (the content provided significant support for the views expressed by Ms Madar).

172. After examination in chief I raised this issue with Ms Lewis. I indicated my intention was to afford her time if required to consider her position given her duties to the Court. During the exchange I also referred to obvious matters which may require amendment in light of the evidence given[34] (and other obvious significant errors[35]), the potential combined effect of which was to reduce the claim by a very large sum of money. I specifically asked for her opinion (which had not been set out anywhere) about what appeared to me to be the significant contradictions between what had been explained to the expert social worker who undertook the child and family assessment and what had been said to her. Ms Lewis said that she "disagreed" with the statutory assessment. I indicated that I would give her time over an extended lunchbreak to set out what she meant by disagreement with the report (given that it was compiled on the basis of information provided by Mr and Mrs Scarcliffe) and also to address the other matters. I did this to allow her some time to reflect on these issues, rather than give "off the cuff" answers, the content of which neither party would have any prior knowledge of. This was clearly required in the interests of fairness given that the care claim for Ottilie alone amounted to such a large amount of money.

173. Ms Lewis produced an addendum report which abandoned certain elements of her previous opinion but which failed to address statutory assessment in any detail. This was obviously unsatisfactory.

174. As for the expert instructed on behalf of the Defendant, Ms Madar, whilst her general approach was far more realistic and careful, her evidence on one issue displayed a partisan approach.

175. As I set out in **Muyepa** -v-Ministry of Defence [2022] EWHC 2648 (KB) at paragraph 284

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[34] E.g. she had given an opinion that there were past sums due for, and should be future provision of, care (i.e. paid at carer's rates) of 7 hours a week for life to walk two dogs (at a cost of £172.03 per week or £4,240 per annum). One dog was elderly at the time of her report and died before trial and one was noted by Mr Madar to be eight years old (and unlikely to live well in excess of another 40 years). The result was a large sum (hundreds of thousands of pounds on her figures over life) the basis for which was unclear. She had also not been made aware of the evidence given in Court by Ms Scarcliffe that that in the past 5.5 years since the accident the dogs had not been walked by anyone and that they exercised themselves in the quarter of an acre garden.

[35] E.g. Ms Lewis had given an opinion that post his retirement (which would be on his case twenty five years away) Mr Scarcliffe would need 30 hours a week (at cost of £349.50 per week or £18, 174 per annum) "looking after children after school, doing the school run for Eli/Una and dressing and supervising them". However, Eli and Una would be in their late twenties by this stage. I did not understand what she was referring to and she also seemed non-plussed by the content of her own report.

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

176. In my experience the content of care reports is sometimes transposed directly into schedules and counter-schedules by lawyers with limited critical analysis or challenge. If care experts fail exercise the reasonable skill which can expected of those who hold themselves out as experts, and also do not fully abide by the well known requirements of an expert within litigation, this can lead to unrealistic valuations, which impede the just resolution of claims. This case adds yet further to my concerns about the approach sometimes taken in compiling care reports which underpin very high claims (and in respect of which very significant fees are often, if not usually, charged). A care expert should be able to fully justify any aspect of care, therapy or equipment which the court is being advised should be provided. The advice should be very carefully considered and automatically stress tested against the realities of life. Anything less is inadequate.

177. I shall return to the evidence of the care experts when I consider the various heads of claim.

Findings of fact

178. I turn to my factual findings having considered the totality of the lay and expert evidence.

Pre-accident health, employment and family dynamics.

179. Mr Scarcliffe had some health issues affecting his employment in forestry other than his low back. He had significant issues with his right shoulder in 2010 and 2013[36] and ongoing difficulties throughout 2014 (eventually having a steroid injection in October of that year). During an examination on 19th February 2016[37] he was described as having a past history of "chronic" right shoulder pain; a notable expression given the issues in this case

180. He injured this shoulder again in the road traffic accident on 30th June 2016. The medical report of Dr Parikh following the examination on 28th February 2019 (over two and a half years later) set out that

[36] See entry of 9th and 23rd January 2014 referring to issues in the autumn of 2013
[37] At the department of Cardiology

> "he developed moderate pain in the right shoulder immediately after the accident. *This symptom has not shown any improvement as of yet*"[38]

181. Mr Baldock also referred to the entry in the (late disclosed[39]) Child and Family assessment in March 2022 that

> "His back *and shoulder pain* make it difficult for him to lift, bend twist and straddle."

182. It is very difficult for me to assess the extent to which Mr Scarcliffe had shoulder problems prior to the accident leading to this claim. This is because he has not been wholly truthful about the issue. The accounts given to Dr Parikh, Mr Newton Ede (that road traffic symptoms had resolved) in evidence before me (shoulder issues resolved after a few months) and to the social worker in 2002 are not consistent. On each occasion he well knew that it was important to be honest and accurate with regard to his symptoms. I found Mr Hunjan KC's attempt to criticise Dr Parikh as most unattractive (given he had no adequate evidential basis to make the sweeping comments which he made) and wholly misconceived given that it was a medical examination with the sole focus on neck and shoulder symptoms. The Doctor (who was heavily reliant upon what he was told by Mr Scarcliffe) found:

> "Right shoulder movement, right hand movement above head and right hand movement behind back were 90% of normal and appeared to cause discomfort."[40]

which led to his recommendation of 8-10 sessions of physiotherapy and opinion that the symptoms should fully resolve following treatment. The idea that during this examination in February 2019 the Doctor somehow made a mistake about a complaint of ongoing symptoms in the right shoulder after the Road Traffic accident is fanciful.

183. Taking all the available evidence into consideration I am satisfied that Mr Scarcliffe had ongoing right shoulder symptoms at the time of the accident. He managed to work with them; but he had also managed to so with right shoulder issues for a long periods in 2014. They have been previously described as chronic. These symptoms alone would have been a very serious concern given the nature of his employment.

184. Mr Baldock also referred to issues with tingling with/after the use of vibrating tools at work and also his left sided chest pain in February 2016. Taken with his back pain issue in November 2015 and the incident of sciatica starting in December 2016, these paint a picture of a man whose body (heavily overweight) was struggling with the physical demands of forestry/tree work. He was now aged 37 and no longer able to do

[38] The consequential effects of the ongoing shoulder and neck pain were that he had moderate difficulties with sleep and his ability to walk the dog has been moderately restricted.
[39] Resulting in Mr Scarcliffe not being cross-examined on the point
[40] This is to be compared with the left shoulder which had a full range of pain free movement.

what he could do ten years earlier.[41] So the pre-accident picture was an increasingly worrying one for Mr Scarcliffe.

185. Mr and Mrs Scarcliffe had three children. Alfie was known to be severely disabled but the knowledge of Ottilie's disabilities was still evolving. Mrs Scarcliffe was pregnant with Una. Life was about to get very significantly more challenging.

Claimant's post accident health, accident and non-accident related conditions and general circumstances.

186. I make the following findings.

187. The accident was a nasty incident and it is fortunate that Mr Scarcliffe was not more seriously injured than he was. He was in immediate pain and suffered bruising to the kidney (which quickly resolved). The fractures were stable and a full recovery within months would have been anticipated by the medical experts although there can sometimes be long term pain and/or discomfort. Deterioration in symptoms (as opposed to recovery) would not be expected and the level of pain and disability that Mr Scarcliffe presented with (and continues to present with) cannot be explained solely from orthopaedic pathology.

188. Mr Scarcliffe has developed well documented disproportionate (chronic) pain in his left lumbar region with allodynia.

189. Mr Scarcliffe has also developed serious symptoms in his left leg unrelated to the accident and arising from (objectively assessed) severe degenerative changes at L4/L5 and L5/S1 consisting of numbness, cramping and tingling. I am satisfied that he presented with a limp due to these symptoms to Dr Rayen and stated that he can sometimes trip.

190. The degenerative changes also cause sporadic rectal pain. Mr Scarcliffe has developed urological issues. These are also unrelated to the accident and also a significant issue for him.

191. After the accident Mr Scarcliffe relatively quickly decided that he would not return to his previous employment and would assist with the care of his children.

192. Mr Scarcliffe has had one pain management programme which was initially successful in helping him cope with his pain, but he regressed in the main due to psycho-social issues.

193. Mr Scarcliffe would benefit from a further intensive, supported rehabilitation package and it would be likely to radically improve his current levels of disability.

194. Mr Scarcliffe can do, and has done, far more in terms of care for his children and other activities than he has on occasions indicated and the claim on his behalf suggests. He is anxious to maximise compensation. The description of him as a man

[41] Add in the effects of the degenerative change with its serious left leg symptoms (as described by the Claimant's own expert) and it can, I hope, be appreciated why I challenged Mr Hunjan KC during closing submissions about the realism of a claim within the schedule for continuing employment as an arboreal worker through to age 68 years (albeit that the multiplicand was not as high as it could theoretically have been advanced).

100% reliant on others on a daily basis is very significantly inaccurate. He can provide basic care for his children, but with some restrictions, coping with more than one child at once. He can drive (and gets the children to and from school), cook and essentially look after himself at home if he avoids heavy tasks. At one stage (although he denies this) he was walking the dogs twice a day. He is able to undertake some activities such as going to the shooting range and the gym when he has sufficient motivation. These activities can be built on within a post litigation rehabilitation plan when his life is no longer "on hold".

195. The psycho social elements of the biopsychosocial model produced strong drivers to maintain disability. The benefits arising from his claimed limitations and the provision of care are significant and it would simply not have been possible for both Mr and Mrs Scarcliffe to have worked full time and to have coped with five children, two of which are seriously disabled with full time care needs. The current model with Mr Scarcliffe as a "full time stay-at-home dad and carer" is sustainable. In this respect (although they have assistance from his parents[42]) the proof has been in the pudding. Save for a period of months when they had the assistance of a nanny they have coped, and continue to cope, remarkably well with such a busy and demanding household (as the 2022 Child and family assessment sets out). When assessed they asked for relatively modest assistance; which would not have been the case if Mr Scarcliffe was anywhere near as disabled as he has at times claimed.

Claimant's "but for" position in terms of work and care provision etc for himself and his children.

196. Mr Scarcliffe would have been made redundant with effect from December 2017. As I set out he already had some worrying physical issues including the right shoulder problems. By the later autumn he would have had serious symptoms from his degenerative changes in his left leg (with occasional rectal pain) and relatively shortly thereafter his urinary symptoms.

197. As Mrs Scarcliffe indicated it would have been necessary to see if the model of division of care and household duties which they hoped to operate would have been sustainable. In my view it would not have been. As Ms Madar stated it is highly unusual for there to be two parents working full time in a household with a severely disabled child (unless a comprehensive privately funded care regime is in place). It is almost invariably the case that statutory care does not provide full cover in relation to a child and the demands (particularly if there is a requirement for 24 hour care) are huge and place an enormous strain on the household (which is even greater if there are siblings). Mr and Mrs Scarcliffe have two disabled children.[43]

198. It was May 2018 before any statutory care was provided for Alfie. So had the accident not occurred for a period of seven or eight months Mr Scarcliffe would have been faced with coping with three children, one of whom was severely disabled requiring 24 hour care, two of which needed a degree of waking night time care, his own developing physical issues arising from degenerative change (described by Dr Rayen as "serious"), such symptoms as he experienced with his right shoulder, trying to find remunerative work, helping a pregnant wife and then, in February 2018, the arrival of

[42] Who would have provided care of their grandchildren and other assistance in any event.
[43] See e.g. in relation to Ottilie the note that she "wakes frequently. Your parents never get a full night's sleep. It is 5-6 times a night" (CFA assessment).

Una. In my judgment "something would have to give" and the model suggested by Mr and Mrs Scarcliffe as to how they would have coped was unsustainable even with significant help from Mr Scarcliffe's parents. It was clear that Ms Lewis had not adequately stress tested her analysis of the provision of care and how the household would have functioned. Had she done so she could not have failed to appreciate that what she was suggesting was unrealistic.

199. Given the above it is unsurprising that Mr Baldock placed reliance on the note made on 20th April 2018 that Mr Scarcliffe was;

> "Not planning to return as tree surgeon-carer for disabled child"

200. In my judgment what would have "given" under the combined strain from the factors which I have set out was Mr Scarcliffe's full time employment. He had serious physical issues and he would not have received optimistic medical opinion given that the left leg numbness (and occasional rectal pain) and urological issues[44] which have never resolved even without Mr Scarcliffe working and, having lived a largely sedentary life since September 2017.

201. In my judgment, doing the best that I can to draw all the strands together I find as a fact that he would have tried to find limited or part-time employment or self-employment compatible with the very considerable care needs of his children (and the potential assistance from his parents), probably undertaking lighter "domestic"[45] tree work and survey work (although I recognise that his dyslexia would have been a limitation[46]). Doubtless he would have also factored in the availability of, and financial thresholds relating to, benefits (given that he could legitimately point to disabilities affecting his employment). As Mrs Scarcliffe stated they could have survived on one salary and she had secure and rewarding employment as a midwife. I take into account that the pull to work as best he could (given the various issues he faced) would have been strong. However, other forces were stronger.

202. It is also likely that the collection of symptoms he would have suffered had the accident not occurred would have been subject to a degree of magnification given the prevailing biopsychosocial factors. This would have affected his employment and his other activities, but on a fine balance I find that he would have initially continued to work to a degree and would not have immediately entirely switched to a full time carer role.

203. However as his symptoms increased (most importantly the onset of pain) and the children got older (and a fifth child arrived) with a consequential increase in the family/household demands, it would have have been increasingly difficult to maintain employment if Mrs Scarcliffe was to continue to work as I find she would have done. So there would have been a decline in his earnings over the years.

204. Some limited pre-existing vulnerability and the biopsychosocial model taken as a whole indicate that there several factors which would have provided fertile ground for the development of a very significant pain syndrome. However I am not satisfied that

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[44] See the GP entry of 9th September 2018; he had to change his clothes two or three times a day. This would have been extremely difficult in full time employment (not to say embarrassing).

[45] A term used by Mr Scarcliffe

[46] There was work around locally due to the effects of Ash die back and work associated with HS2,

it would have developed to a highly intrusive condition without the development of pain i.e. there would have been some amplification but not to a very serious degree.

205. I am satisfied that pain would in due course have developed arising from serious degenerative changes. Continuing to work and the lifting associated with childcare (including occasionally of a severely disabled child[47]) would have increased the risk well beyond the effects of the largely sedentary life he has in fact adopted since 2017. He might have initially coped with some increasing incidents of pain but I am satisfied that by 7.5 years (the midpoint of the 5-10 year range) his back pain would have reached a sufficient level to provoke very serious amplified/disproportionate pain i.e. a chronic pain syndrome. This in turn would have led on to a picture similar to the present position albeit over somewhat extended period and not as occurred, with an acute onset. In the very broad and simplistic terms often necessarily used in personal injury work, the accident accelerated or brought forward the development of a pain syndrome by 7.5 years and changed, to a degree, the nature of its onset. The disproportionate pain would have resulted in Mr Scarcliffe adopting the role of a full time stay at home dad and carer as he described himself to the social worker on 11th March 2022 and his life would have become restricted to the extent that it now is.

Valuation of claim

206. Given some of the issues that arose during submissions I shall repeat some general principles which I set out in **Muyepa**

> 293 .The purpose of an award of damages is, in so far as a sum of money can do so, to put a Claimant, as nearly as possible, in the same position as he/she was in before the relevant injury was sustained (see generally **Wells-v-Wells** [1999] 1 AC 345). As a result a Claimant is entitled to damages to meet his or her "reasonable requirements" or "reasonable needs" arising from his negligently caused disability (see e.g **Sowden v Lodge** [2004] EWCA Civ 1370, [2005] 1 All ER 581, [2005] 1 WLR 2129).
>
> 294 . So the question to be addressed is whether care, and/or aids or equipment are reasonably required? In **Whiten v St George's** [2011] EWHC 2066 (QB), Swift J said that the approach she adopted was as follows:
>
> > "The Claimant is entitled to damages to meet his reasonable needs arising from his injuries. In considering what is 'reasonable', I have had regard to all the relevant circumstances, including the requirement for proportionality as between the cost to the Defendant of any individual item and the extent of the benefit which would be derived by the Claimant from that item."

207. Sometimes potential provision eg of equipment, is not reasonable in which case consideration should be given to reflecting any consequential loss within general damages for pain suffering and loss of amenity. An example in the present case is dog walking. Mr and Mrs Scarcliffe have one dog (described as Mrs Scarcliffe's dog). It is not walked and now exercises itself in the large garden[48]. The schedule seeks £184,

[47] Which in part provoked sciatica in December 2016.

633.21[49] for the services of a dog walker for future dog walking at one hour per day for the rest of Mr Scarcliffe's life[50]. Mr Hunjan KC argued that this was entirely reasonable as Mr Scarcliffe was entitled to have a family pet (it was not and could not be suggested the dog was an assistance or therapy dog rather it would just be a family pet with his children enjoying the benefits although, in the case of the able children, not the burden, of walking it). In my judgment the services of a dog walker in these circumstances is clearly not a reasonable necessity (it is not even needed now) and the costs would manifestly disproportionate. However, to the extent that Mr Scarcliffe has lost the ability to walk a dog or keep one in future it could be reflected within damages for loss of amenity.

208. There are some other general issues of principle which need to be addressed.

209. It is well recognised that when dealing with future employment related losses the court may take account of what have been referred to as "imponderable factors" through/within a lump sum assessment to cover loss of earning capacity, loss of benefits and allowances and pension loss. Such an approach has for many years been referred to as a "Blamire" award following the decision of the Court of Appeal in **Blamire-v-South Cumbria** [1993] PIQR Q1. The Claimant still bears the burden of establishing loss and a Blamire award is an assessment of loss based on available information before the Court. As I stated in **Muyepa-v-Home Office**

> "I see no reason in principle why such an approach cannot be used for the assessment of past employment related losses and this appears to have been the view of the Court of Appeal in **Willemse-v-Hesp** [2003] EWCA Civ 994. Lord Justice Potter stated
>
> > "Miss Perry's alternative submission is that, in any event, the judge was wrong to take a multiplier/multiplicand approach even on the basis of £10 an hour for earnings loss in the light of the uncertainty as to the number of hours worked by the claimant upon the boat. She submits that the judge should simply have attempted a broad assessment on the lines approved by this court in *Blamire v South Cumbria Health Authority* [1993] PIQR/Q1. The approach in *Blamire* was of course one which related to award of a global sum to assess as at trial the present value of the risk of *future* financial loss. However, to the extent that it represents an example of the necessity on occasion, in the light of uncertain circumstances, for the court to award a global (and somewhat impressionistic) sum, I accept that it affords Miss Perry some assistance in principle in relation to pre-trial loss. Had the judge decided that, on the general state of the evidence and his judgment of the claimant, a *Blamire* (i.e. round sum) award was all that was appropriate, I cannot think that this court would have interfered. Equally, however, the judge having felt able to take the approach he did as the just way of dealing with the difficult question of past-earnings loss, I do not think that this court should interfere with the sum awarded in that respect."

[48] Mrs Scarcliffe said that it had not been walked since the accident but I do not accept this evidence as it has been walked by Mr Scarcliffe.
[49] 365 days a year at £11.46 per hour with a multiplier of 44.
[50] With no deduction in the multiplier to reflect his likely infirmity his final years

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

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

210. The assessment of past and future employment related losses in this case has been very difficult due to the multiplicity of factors which would have/will impact on the ability/desire to work and I have concluded a lump sum assessment is appropriate for both.

General damages

211. As the Judicial College Guidelines (16th Edition) sets out an award for pain, suffering and loss of amenity must reflect the impact, severity, and prognosis of the condition. The factors to be taken into account in valuing claims for pain disorders include the following:

(i) the degree of pain experienced;

(ii) the overall impact of the symptoms (which may include fatigue, associated impairments of cognitive function, muscle weakness, headaches etc. and taking account of any fluctuation in symptoms) on mobility, ability to function in daily life, and the need for care/assistance;

(iii) the effect of the condition on the injured person's ability to work;

(iv) the need to take medication to control symptoms of pain and the effect of such medication on the person's ability to function in normal daily life;

(v) the extent to which treatment has been undertaken and its effect (or its predicted effect in respect of future treatment);

(vi) whether the condition is limited to one anatomical site or is widespread;

(vii) the presence of any separately identifiable psychiatric disorder and its impact on the perception of pain;

(viii) the age of the claimant;

(ix) prognosis.

212. In the present case it is necessary to take into account that had the accident not occurred Mr Scarcliffe would have developed a pain syndrome in seven and a half years in any event.

213. I have also taken into account loss of amenity given Mr Scarcliffe's inability to provide care to his children to the extent he would like to do, and his leisure activities (which could broadly be described as country pursuits) but also the restrictions which would have arisen from the symptoms arising from degenerative changes in any event and also the increasing demands of his family life. I have found as a fact that he has walked the dog in the past and on balance I think that he will able to do so again after a further rehabilitation as fully funded pain programme is likely to bring about a substantial improvement in disability. I have also found that Mr Scarcliffe is not as disabled as he has at times claimed; although the current impact on his life is very marked.

214. The Guidelines set out suggested ranges at Section B; "other pain disorders" as follows;

> "Moderate
>
> At the top end of this bracket are cases where symptoms are ongoing, albeit of lesser degree than in (i) above and the impact on ability to work/function in daily life is less marked. At the bottom end are cases where full, or near complete recovery has been made (or is anticipated) after symptoms have persisted for a number of years. Cases involving significant symptoms but where the claimant was vulnerable to the development of a pain disorder within a few years (or 'acceleration' cases) will also fall within this bracket. £21,070 to £38,490.[51]

215. It is helpful to cross refer to the suggested ranges for back injuries

> "Moderate
>
> (ii) Many frequently encountered injuries to the back such as disturbance of ligaments and muscles giving rise to backache, soft tissue injuries resulting in a prolonged acceleration and/or exacerbation of a pre-existing back condition, usually by five years or more, or prolapsed discs necessitating laminectomy or resulting in repeated relapses. The precise figure will depend upon a number of factors including the severity of the original

[51] See also in respect of a CRPS; Moderate: the top end of this bracket will include cases where significant effects have been experienced for a prolonged period but prognosis assumes some future improvement enabling a return to work in a significant (not necessarily full-time) capacity and with only modest future care requirements. At the lower end will be cases where symptoms have persisted for some years but are more variable in intensity, where medication is effective in limiting symptoms, and/or where the prognosis is markedly better, though not necessarily for complete resolution. May already have resumed employment. Minimal, if any, future care requirements.
£28,030 to £52,50

> injury, the degree of pain experienced, the extent of any treatment required in the past or in the future, the impact of the symptoms on the injured person's ability to function in everyday life and engage in social/recreational activities, and the prognosis for the future.
>
> £12,510 to £27,760"

216. In my judgment an appropriate award is £27,500.

217. As for loss of congenial employment Mr Scarcliffe would not have continued in his pre-accident employment (which he greatly enjoyed) had the accident occurred but he would have been able to main some limited and reducing working within his field of expertise for a further 7.5 years A modest award is appropriate to directly reflect this loss of employment. I award £1,000.

Past Loss

218. The figures in the final schedule and counter schedule were adapted/modified before closing submissions in the "Claimant's Quantification" document and Defendant's "Scenario A" and "Scenario B" documents.

Past Loss of earnings and pension

219. In the six months period of 31st March 2017 to 31st August 2017[52], Mr Scarcliffe earned an average of £1,592.11 net per month; an annual net equivalent of £19,105.36.

220. Mr Scarcliffe would have been made redundant with effect from December 2017[53] in any event and the subsequent period up to the trial date (5 years four months) is difficult to assess his likely earnings due to the "imponderables" involved.

221. As I have set out Mr Scarcliffe had serious degenerative change and would have developed serious symptoms in his left leg within a short period had the accident not occurred, with some rectal pain and urological symptoms (and all the symptoms[54] would have been subject to a degree of amplification) such that he is likely to have been given the common sense advice to change his field of work as it would be impossible to undertake tree work without bending and lifting. His back problem would have become increasingly problematic as time progressed. I recognise that he would have wanted to continue on in his general line of work.

222. In my judgment he would have tried (or been driven to try) to find limited and/or at times part-time employment, probably undertaking lighter "domestic" tree work and survey work subject to the limitations of the collection of symptoms he would have suffered had the accident not occurred and also his dyslexia (which means a direct comparison

[52] This period cover the summer months during which the hours were longest with the consequential opportunity for overtime.
[53] His employment was terminated by a letter dated 28th November 2017
[54] He also had shoulder issues.

with Mr Hazell is probably inappropriate). It is difficult to be more specific. I also have very limited information about likely rates of remuneration (apart from pay for the full time employment Mr Scarcliffe previous undertook and an advert of the Defendant seeking applicants[55]) or the availability of work save for Mr Hazell's positive outlook concerning the current excess of demand over supply. However I accept his evidence that the Claimant was very well respected in the trade and therefore likely to get referrals (such as from Mr Hazell) and be offered employment based on his experience and reputation.

223. There would have probably been a decline in his earnings over the years as the demands of his family life (specially his caring responsibilities) increased and the need to ensure that Mrs Scarcliffe could remain in full time employment.

224. The analysis set out in the Defendant's counter schedule takes into account much of what is set out above and suggests a figure of £60,000; on a discounted multiplier/multiplicand basis[56] . In the revised figures for closing (schedule A) this was reduced to £50,000. These figures are based upon a multiplicand of £15, 818.16 (the correct multiplicand may be £15,746.16[57]; but I am proceeding on the higher figure) which offsets the carer's allowance received in respect of Ottilie of £3,287.16 per annum. This is because carer's allowance would only have been available if Mr Scarcliffe was earning £116 or less per week (now £139) after tax, national insurance and expenses; so he would not have received it had the accident not occurred.

225. In relation to pension loss a figure of £1,500[58] is suggested given that it is not clear whether any further work would have been in employment or self employment. In the revised figures for closing (schedule A) this was reduced to £1,000.

226. The Claimants analysis, said to be on "a very conservative basis", and based on a multiplicand of £19,105.36, is £100,270.20 together with pension losses of £2,360.54. Mr Hunjan KC pointed out the important point that the multiplicand had not been increased for inflation/pay increases over the pre-trial period (which of itself is a reasonable point to make) and as a result the sum claimed was probably an under assessment, so in effect a substantial discount has been applied to what could have been claimed. However, unhelpfully, the schedule, skeleton valuation for closing and oral closing all failed to directly address what on usual/settled principles would be the offset of carer's allowance from past loss of earnings[59]. In my judgment an offset must be factored into the calculation.[60]

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[55] At a salary of £28,000- £35,000 gross.
[56] Using multiplicand of £15, 818.16 pa
[57] The counter-schedule sets out two different monthly rates for carer's allowance at paragraph 28.3; £279.33 and paragraph 28.5 £273.93.
[58] Loss of pension to 1st August 2019 is admitted in the sum of £313.29
[59] The skeleton referred to Mrs Scarcliffe not being able to claim carer's allowance as she was, and is, earning over the threshold and also to £69.70 (carer's allowance paid in respect of Mrs Scarcliffe's care of Ottilie) not being "equitable remuneration for the provision of care. The report of Ms Lewis refers to Mr Scarcliffe providing some "additional forms of care in respect of overnight supervision…though if any difficulties arise Mr Scarcliffe's role is largely limited to alerting Gayle to the difficulties" and calculates the additional care provided Mrs Scarcliffe for Alfie and Ottilie.
[60] The offset has not been increased within the calculation in the counter schedule despite the rates of the allowance increasing.

227. Whilst both parties have adopted a multiplier /multiplicand analysis both have discounted and adapted the figure to reflect the difficulties in assessing likely remuneration from employment and pension. I take both calculations into account but believe it would clothe an appropriate analysis in too much certainty to describe it as anything other than a lump sum approach. There is simply inadequate information for me to arrive at a likely multiplicand a fortiori one that would diminish over time. Doing the bests that I can on all the available information I award a lump sum of £70,000 for past employment losses and pension.

Past care

228. The claim was divided up into two parts;

(a) Past care and assistance for Mr Scarcliffe (and the children other than Alfie and Ottilie).

(b) Care services for Ottilie and Alfie

and also into seven periods

i. Period one; 22-23rd September
ii. Period two; 24-26th September
iii. Period three; 27th September -5th May 2018
iv. Period four; 6th May 2018 -4th February 2020
v. Period five; 5th February 2020-1st May 2021
vi. Period six; 2nd May 2021—10th November 2021
vii. Period seven; 11th November 2021-29th March 2023

229. I make some general observations on the claim as presented and the evidence of the care experts.

230. As I have set out above Mr Scarcliffe has at times exaggerated the extent of his disability and under played what he has been able to do. Also when considering care it is necessary to bear in mind that he would have been suffering some symptoms from his degenerative change in any event.

231. In my judgment Ms Lewis' analysis of care had the following flaws (apart from failing to appreciate that Eli had been born at the time of her first report);

(a) As Mr Scarcliffe conceded (and as accords with ordinary experience of family life) if you have a family with more than one child you tend, if they are together in a house, to look after more than one child simultaneously. I well appreciate the extra demands that the care of Ottilie (who is ambulant[61]) requires over her siblings (other than Alfie), but Mr Scarcliffe was able to look after her and his other children (two of which were capable of providing some limited assistance) after school at the same time.

[61] But who clearly likes to be using her I Pad and watching TV programmes such as "The Night Garden" ; which will occupy her for significant periods of time.

(b) Mr Scarcliffe's parents would have provided care for their grandchildren (and other assistance) in any event. This has not been adequately factored in.

(c) To require compensation to be payable, care/assistance provided has to be extra/beyond what would have been provided in any event. If a couple shared tasks before a Claimant suffered injury then some account must be taken of what would have provided by a partner in any event. It is wrong in principle to make an award to cover the provision of all meals, clearing away and "fetching and carrying", transport, shopping and errands if that fails to reflect the "but for picture". Here, as I have already set out household duties were not split 50/50; Mrs Scarcliffe did far more.

(d) It is not necessary to pay carers rates for relatively menial tasks. In her September 2022 report Ms Lewis broke down Mr Scarcliffe's immediate care requirement as follows;

Description	**Hours per week**
Footcare	1
Meal provision, clearing away	3.5
Transport/escort	6
Shopping/errands	3
Fetching and carrying	3.5
and	
Dog walking	7
Total	**24**

Ignoring that the hours would be excessive under each of the heads, such straightforward tasks/duties do not require a person to be employed at full care rates of £23.92 pr hour for weekdays and £26.96 at weekends; an annual cost of £30,686.40. Surprisingly Ms Lewis did not concede that the offer of a job in Northampton for 24 hour a week for such duties and paying in excess of £30,000 would be likely to produce a very long queue indeed. Even more surprisingly she suggested it would be difficult to fill the role. She appeared to have overlooked the fact that the role (or the major elements of the role) had been filled in the past and at a very significantly lower rate. When I asked her what the rate of pay for the nanny had been she did not know and had not asked. Ms Lewis displayed a worrying tendency to ignore the realties of what the vast majority of people pay for tasks such as an hour of dog walking a day, which is not £24-£27 per hour (or £174 per week). She preferred to refer to the rate which the agency to which she was affiliated would charge. This resulted in significantly overinflated figures.

(e) Even when obvious and significant errors which should never have been present in the report (and displayed an obvious lack of reasonable skill in its preparation) were pointed out to her at joint statement meeting Ms Lewis did not correct them. An example is that in her September 2022 report she advised that in respect of Mr Scarcliffe's care contribution following his retirement (on the Claimant's case aged 68 years (the exact age matters not as in any event it would be in excess of twenty years time) he required 30 hours for "after the school run/school run Eli/Una/ am/pm dress supervise" in term time and 20 hours during school holidays. Both Eli and Una would be in their mid twenties by this stage. She advised an annual sum of approaching £21,000 if gratuitously provided or approaching £44,000 if provided through an agency. Ms Lewis eventually provided revised figures in her addendum after I reminded her of the error after she had started to give evidence. She reduced her figures to nine hours for domestic chores and transport/escort (which she still thought required a rate of £24-27 per hour).

(f) Ms Lewis had taken no steps to investigate the likely provision of statutory care in the immediate or long term future despite the very large annual sums she was advising were necessary to reflect past and future lost care given to Ottilie. Her September 2022 report was compiled six months after the statutory assessment which was produced only after I had requested that relevant documents about statutory provision be obtained. Ms Lewis did not adequately investigate the issue.

Past care and assistance for Mr Scarcliffe (and the children other than Alfie and Ottilie).

232. Ms Lewis and Ms Madar disagreed as to appropriate hourly rates for past and future care and assistance.

233. Both experts used the National Joint Council (NJC) rate for home helps (spinal point 2 from 1st April 2019, previously spinal point 8)

234. The basic rate is appropriate when care is provided (or very largely provided) during what could be considered as ordinary working hours, whereas the aggregate rate balances out all the hours of the week and is appropriate when care is provided throughout the week i.e. across the hours of the day and night.

235. I must arrive at a figure using an hourly rate which provides reasonable compensation given Mr Scarcliffe's circumstances.

The hourly rates are gross.

Period one; 22-23rd September

236. In closing submissions the sum claimed was £35. This is not disputed

Period two; 24-26th September

237. In closing submissions the sum claimed was £127.50. This is not disputed

Period three; 27th September – 5th May 2018

238. Ms Lewis supported a claim in the sum of £10,894 whereas Ms Madar set out that a sum of £1,410.20 (using a basic rate) or £4,282.05 (using an aggregate day rate) was appropriate.

239. Ms Lewis suggested that 35 hours was required at an hourly rate of £9.59 rising to £10.47. The 35 hours was broken down as follows

Description	**Hours per week**
Assistance with childcare (not including services provided to Alfie and Ottilie)	10
Footcare	1
Meal provision, clearing away	3.5
Transport/escort	3
Shopping/errands	3
Domestic	4
Fetching and carrying	3.5
Dog walking	7
Total	**35**

240. This equated to 5 hours of care per day and is manifestly excessive. I recognise that this was still early on in the post- accident recovery period, but Mr Scarcliffe was not totally helpless, rather he was independently mobile, able to provide some care for the children and also a significant amount of what is covered by these hours would have been provided by Mrs Scarcliffe, and/or Mr Scarcliffe's parents, in any event. If the dogs were walked at any stage post accident it was Mr Scarcliffe who walked them. As regards foot care Ms Lewis set out in the joint statement that due to the altered sensation in Mr Scarcliffe's feet and the fact that he prefers to walk barefoot his feet need checking daily. However, the altered sensation is due to the degenerative changes and not the effects of the accident.

241. Ms Madar was of the view that 5.5 hours per week was required, ignoring any care provided to the children.

242. For this early period I would allow an average of 1.5 hours a day (averaged over the whole period); 10.5 hours and also the aggregate rate in full; this amounts to £3,267.76 (£2,718.76 and £549).

243. At first blush this sum is less than the Claimant's Counsel had set out as the Defendant's position within the "Claimant's quantification" document used in closing (£5,692.25) However this is because Counsel have incorrectly added together what are clearly alternatives (i.e. Ms Madar's opinion, as clearly set out in the comments about past care, is that the court should use either basic or aggregate rates both of which have been set out to assist the Court). This mistake was replicated for the other periods.

Period four; 6th May 2018 – 4th February 2020.

244. Ms Lewis supported a claim in the sum of £30,771 whereas Ms Madar set out that a sum of £3,975.73 (using a basic rate) or £4,828.95 (using an aggregate day rate) was appropriate.

245. Statutory care was now in place for Alfie. Eli was born on 31st August 2019.

246. Ms Lewis advised that 31.25 hours were reasonable as well as 13 hours additional childcare; so a total of 44.25 hours a week (23 of which were childcare) or over six hours a day; in addition to the care provided to Alfie (and Ottilie). This despite the fact that the family was functioning and Mr Scarcliffe was providing care to his children.

247. Ms Madar maintained her view that 5.5 hours was appropriate.

248. For the reasons which I have set out in respect of the previous period 44.25 hours as replacement care is obviously very considerably excessive. I would allow 9 hours (one hour a day plus two additional hours) at a mid rate between aggregate and basic rates[62] given that most of the care would not be provided at unsocial hours; but some would be necessary at weekends. This amounts to £7,200.18 (£3,176.82 and £4,023.36).

Period five; 5th February 2020 –1st May 2021

249. Ms Lewis suggested that 39.5 hours care (20 of which were childcare) was reasonable as Mr Scarcliffe would "assist with feeding the children when pain allowed it".

250. Ms Madar was of the view that 5 hours was reasonable (excluding any childcare).

251. In my view nine hours a week at an hourly rate which is a mid point between basic and aggregate[63] remains a realistic and proper assessment. This equates to £5,999.76 (£731.52 and £4,885.92 and £382.32).

Period six; 2nd May 2021 – 10th November 2021

[62] £9.54 up to 31st March 2019 and £10.16 thereafter.
[63] £10.16, £10.44 and £10.62 for three periods used by the experts.

252. Mr and Mrs Scarcliffe employed a nanny, Holly-Ann Adcock from July 2021 to February 2022[64]. She worked 37 hours a week; 8.30-4.00 at a rate of £10 per hour (£13.50 for hours of overtime). Despite this Ms Lewis suggested that an additional 19.5 hours of gratuitous care was reasonable for Mr Scarcliffe; this would equate to 56.5 hours of childcare, household work, care and assistance. To this she added 10 hours for Alfie and Ottilie so 66.5 hours per week or 9.5 hours seven days a week family assistance rising to 89.5 if Alfie's statutory care is factored in; over 12.5 hours a day seven days a week. It is an obviously unrealistic assessment and I can only assume that Ms Lewis simply failed to stand back and assess how the different component parts would add together.

253. Ms Lewis made no reference to recovery of the cost of Ms Adcock and no claim was made in respect of the cost (or even a proportion of the cost) in the schedule of damages and no mention was made in the introduction to the schedule to part of the £60,000 interim being used to fund the nanny. No reference to Ms Adcock was made in the skeleton. I raised this curious omission during the trial (as Ms Lewis was not even aware of the hourly rate paid) and it appears that this was a mistake by the legal team, as a claim appeared in the "Claimant's quantification" used as a guide for closing submissions in the sum of £7,856.91[65]. This document set out a claim for 49.5 hours (the cost of the nanny and 12.5 hours[66]), so 10 hours more than Ms Lewis thought necessary over the whole of the previous year and 15 hours more than she thought necessary for the subsequent 72 weeks. This claim is clearly excessive and reveals that the analysis of this period has not been properly thought through.

254. As Ms Lewis had failed to even investigate Ms Adcock's rate of pay she was unaware of the inconsistency of the fact that Mr and Mrs Scarcliffe had been able to employ a person (albeit for daytime weekday hours) at a rate of £10, yet she was opining that a rate of £11.65 was necessary for all hours claimed.

255. For reasons which I do not understand Ms Madar did not alter her estimate of 5 hours care and assistance, notwithstanding the employment of the nanny and this was followed through in the counter-schedule.

256. I do not accept that the need for Ms Adcock's services arose from the accident related symptoms as opposed to the size of the family and difficulties arising from two children having disabilities (given that Mr Scarcliffe would have still been working) I have no doubt that she was of considerable assistance; but that is not the test for recovery of damages.

257. In my view nine hours a week at an hourly rate which is a mid point between basic and aggregate[67] remains a realistic and proper assessment equating to £2,581.87.

258. At the end of this period Mr Scarcliffe attended a pain management programme.

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[64] Ms Scarcliffe stated as at 9th June 2022; "I did feel that being an employer brought added pressures for me, but it was nevertheless a help generally for us in having the benefit of a nanny. Currently we are looking to find a suitable replacement for the nanny but it has been difficult to find time to properly investigate, find and suitably vet any potential candidate who would have all the necessary checks done and be qualified to work with our children and match up with all the necessary role requirements." It is of significance that she did not say that they could not find a replacement at the hourly rate of £10.

[65] Which reflected only six months payment although she worked for eight months

[66] After removal of seven hours of dog walking each week

[67] £10.62 per hour; which is slightly higher than Ms Adcock's basic rate.

Period seven; 11th November 2021-29th March 2023

259. At the beginning of this period Holly-Ann was still employed; but no credit appears to have been given for that in Ms Lewis' report.

260. Ms Lewis stated[68] "the couple could no longer afford to employ the nanny and so gratuitous provision reverted to the previous level prescribed in Period 5". However, for Period 5 she had estimated 39.5 hours, yet her calculation for this period was 34.5 hours. There was no rationale as to why she reduced the figure by 5 hours in respect of childcare (on her figures equivalent to over £3,000 per annum; so a significant sum). Even taking Ms Lewis analysis as reasonable it would appear that period five is too high or period seven too low. This is yet another example of the report not being properly thought through and, cross-checked.

261. Ms Madar's view remained that five hours was reasonable.

262. In my view nine hours remains reasonable again using a mid point rate figure (£10.62) for the 72[69] week period to trial which equates to £6,881.76.

263. The total of the seven periods set out above is £26,093.83.

264. In the counter-schedule Mr Baldock reduced the gross past care figure by the conventional[70] 25% to reflect that it was gratuitous provision. The schedule stated that it was based on Ms Lewis' figures and the skeleton argument invites the court to "assess quantum of care on the basis of the report of Susan Lewis". Ms Lewis recognised that the NJCS figures are gross. As is set out in the very widely used PNBA "Facts and Figures" "since personal injury damages are awarded net of tax and NICs, there is invariably an appropriate reduction in respect of past non-commercial care. It is now almost always 25%". There were no submissions made on behalf of the Claimant that the usual deduction, in my experience the universal default position adopted by practitioners, should not be adopted. It is my view that when compiling a claim for past gratuitous care within a schedule the fact that the hourly rate is gross should be either reflected by a deduction or the subject of justification. In the present case the failure to apply the 25 % deduction meant that the sum in the schedule for past care was overstated by £26,455.

265. After a 25% deduction the sum is £19,570.

Care services for Alfie and Ottilie

266. I should first deal with a point left unaddressed by the submissions on behalf of the Claimant. As I have set out Mr Scarcliffe has received carer's allowance in respect of "overnight care" of Ottilie. This was claimed as it was believed that as Mr Scarcliffe "listens" out for Ottilie at night he was entitled to the payment (there being no need to provide detail of the nature and quality of the care provided on the application form). The receipt of this benefit (which would not have been received had Mr Scarcliffe been in employment as he would have been over the relatively modest earnings

[68] Report of September 2022 page 36
[69] Not as the Claimants closing document sets out 73 weeks
[70] Per Stuart-Smith J (as he then was) in Ali-v-Caton & MIB [2013] EWHC 1730.

threshold) has, as set out out above, been offset by the Defendant against employment related losses.

267. This was care which, it is said, Mr Scarcliffe has provided, not care which he has required from others, or has not been able to provide for others. As I suggested during the course of the case, regard also has to be given to the reality that parents listen out for babies in any event, Ottilie would have been no different in this regard. Given their disabilities there would always have been a need for a degree of listening out for Alfie and Ottilie in any event so any care through overnight listening, provided by Mr Scarcliffe did not go "distinctly beyond what is part of the ordinary regime of family life"[71], this being a question of fact given the circumstances of the family in question.

268. The claim made is that Alfie and Ottilie's additional care needs have been met at a basic level by Mrs Scarcliffe as a result of the symptoms Mr Scarcliffe has suffered since the accident. This has been calculated at 10 hours per week throughout the post accident period (i.e. regardless of whether the statutory care was in place for Alfie or not).

269. I refer back to my findings as to what would have happened had the accident not occurred, in relation to the level of care which has in fact been provided by Mr Scarcliffe and also in relation to the matters set out in the statutory assessment.

270. In her report Ms Madar thought that based on the Claimant's evidence 5 hours a week was appropriate principally to reflect the heavier aspects of care for example when hoisting and bathing[72]. However, as she read the Defendant's expert evidence Mr Scarcliffe would have had increasing difficulty with those tasks in any event in which case she could not identify any additional care needs.

271. In my judgment there is an element of care which Mr Scarcliffe would have provided (but for the accident) to Alfie and Ottilie (taking into account the symptoms of degenerative change and his altered working pattern) which he has not been able to provide and has been an additional burden on Mrs Scarcliffe as part of the care "tag team" for their two disabled children. Given the evidence before me it is very difficult to assess this issue even as a Judge familiar with this area of work, but I have concluded that it probably amounts 7 hours a week when there was no statutory provision and five hours a week since the provision of statutory care. It is my view that the aggregate rate is appropriate for this care which will be provided at variable and to an extent unpredictable times during the week. The result is £17,821.87[73] and after a 25% deduction £13,366.40

Past parking and Parking

272. This agreed in the sum of £400.

Past Pain management Course

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[71] Per Brooke LJ in Giambrone-v-Sunworld [2004] EWCA Civ 158 at paragraph 30.
[72] The house is fully kitted out with hoists and heavy lifting should not be necessary. However the reality of caring for a disabled person (particularly is non-compliant) is that it sometimes is.
[73] 10.38x7x27 and 11.32x5x52 and 12.06x5x52 and 12.39x5x52 and 12.61x5x53 and 12.61x5x51

273. This is agreed in the sum of £14,480.

Past Pain medication

274. This is agreed in the sum of £711.90.

Past Physiotherapy

275. Mr Scarcliffe seeks the sum of £4,084.90 in respect of the fees of Tracey Dixon. It is argued in the counter-schedule that the physiotherapy costs were not reasonably incurred and only commenced in 2021when Mr Scarcliffe should have been aware that such pain as he was suffering was not as a result of the accident. Within closing submissions Mr Baldock argued that the overall spinal condition was not caused by the accident i.e. that the degenerative changes would created the need for physiotherapy in any event and he suggested the sum of £2,000 was reasonable. In my judgment the physiotherapy was largely focussed on the back pain and I allow the sum as reasonably incurred and sums which would not have been incurred but for the accident.

Past Gym and Personal training

276. The dispute narrowed to £79. I allow the sum as claimed within closing submissions.

Past Occupational Therapy

277. Agreed in the sum of £1,330.20.

Past adaptions and purchases

278. I allow past adaptions and the cost of the bed as reasonable necessities in the sum claimed of £3,227.01.

Past case management

279. This is agreed in the sum of £1,076.40.

Past Additional fuel

280. A contribution of £10 per month is claimed "as the Claimant is at home more". In my view no loss has been identified on the evidence and is it if difficult to see how it could result from being at home. If it relates to picking up the children, this would have happened in any event.

Postage and calls

281. Agreed in the sum of £25.

Future earnings

282. Within the closing submissions made on behalf of Mr Scarcliffe it was argued that a multiplicand of £19,105.36 was a significantly discounted figure which did not take into account wage rises over the six years since the accident and the strength of the

market for arboreal workers and as a result accounted for any residual earning capacity. The counter-schedule used a multiplicand of £15,818 given the continuing receipt of carer's allowance. Both figures are effectively frozen at 2017 rates[74]; now six years ago. In my view this is a surprising (given the increase in rates), artificial and unhelpful approach (as it fails to indicate the value of the "minor" discount for residual earning capacity).

283. The counter-schedule dated January 2023 applied a multiplier of 2.01 for a fixed period and set out a figure of £31,794 (£15,818.16 x 2.01) based on Mr Scarcliffe having in effect suffered an acceleration of 7.5 years of his current condition. This was maintained in closing in "Scenario A". In "Scenario B" another year of loss (at £19,105.36) was added and a sum of £50,899.82 suggested. The reasoning is difficult to follow.

284. In closing Mr Hunjan KC continued to advance a claim for £19,105.36 with a multiplier of 24.75 i.e. on the basis of continuing in the same employment through to retirement. Given the totality of the orthopaedic evidence and the nature of the employment this was unrealistic even if, overall, I had preferred the opinion of Mr Newton Ede.

285. The assessment of future earnings related loss in this case is a very difficult exercise. There are a number of factors that are very difficult or impossible to assess or estimate i.e. "imponderables".

286. As I have set out in detail it is my view that Mr Scarcliffe would have developed serious symptoms in his left leg, with some rectal pain and urological symptoms had the accident not occurred.[75] Also his back problem would have become increasingly problematic and would have caused him pain in addition to his existing issues and the combination would have meant that by 7.5 years he would have been required to stop any work in arboriculture. His underlying psychological issues and health anxiety would have been likely to have amplified his symptoms. Having regard to the biopsychosocial model it is likely that the more serious the symptoms (or as they were "layered on") the greater the impact on his life such amplification would have been. This in turn would have led onto a picture similar to the present position albeit over an extended period and not, as occurred, as an acute onset. The accident accelerated or brought forward the development of a pain syndrome by 7.5 years and changed the nature of its onset.

287. The disproportionate pain, family circumstances, (at the date of trial his children were aged 14 (Alfie), 13 (Elliot), 6 (Ottilie), 5 (Una) and 3 (Eli); so still a young family) and availability of benefits would have eventually resulted in Mr Scarcliffe adopting the role of a full time stay at home dad and carer as he described himself to the social worker on 11th March 2022 and his life would have become restricted, broadly assessed, to a similar extent to as it now is. In my view the 7.5 years timeframe should not be taken as, in effect, a cliff edge as the onset would not have been acute; but it would not have long after this date that he would have ceased employment and the likely "but for" pre-accident path and post accident paths merge.

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[74] Including the rate of carer's allowance.
[75] He also had shoulder issues.

288. Both Alfie and Ottilie will require lifetime full time care which would have been (and will be) a huge burden for Mr and Mrs Scarcliffe. The extent to which Mr Scarcliffe would ever have returned (indeed will ever return) to employment to a degree depended on the extent of statutory provision of care (although his options would have been, and are, limited). I was given no analysis, beyond very broad comments, as what this would be likely to be (or even may be) in the future. Alfie will re-assessed at aged eighteen when he transitions to adult social care.

289. Mr Scarcliffe is dyslexic and appears to me to not be a man who would not welcome, or be well suited for, an office/shop based job. He will be and would also (I have no doubt) always have been conscious of the earnings thresholds for benefits such as carer's allowance (£7,228 net per annum).

290. Although I find that a comprehensive rehabilitation package is likely to bring about a significant improvement I do not think that Mr Scarcliffe will be likely work other than in an unpaid/therapeutic role in the immediate future and taking a realistic view, the potential opportunities for paid work will be very limited unless he can re-train/gain further qualifications. He will continue to receive carer's allowance in the foreseeable future.

291. It is extremely difficult to assess any likely pension loss. Mr Baldock submitted in closing that a sum of £450 was appropriate as a lump sum.

292. Taking all relevant factors into account I find that a figure of £37,500 is an appropriate lump sum to cover future employment related losses (including pension loss).

Future care

293. Mr Baldock's primary submission within his closing arguments was that counter-schedule remained an accurate assessment and little adjustment to it was required; indeed it could even be reduced. In his Scenario A (based on an acceleration of 7.5 years) he allowed:

(xix) £1,560 per annum for future care for two years[76] in the sum of £3,135.60
(xx) Some future occupational therapy in the sum of £2,745
(xxi) Future equipment in the sum of £574.80

Amounting to a total of £6,455.40.

294. During the trial (and after having heard Dr Edwards) Ms Madar very helpfully prepared a document entitled "rehabilitation for one year". Ms Lewis agreed the costings set out but was of the view that the elements were required beyond the one year timeframe. The breakdown was;

(a) Buddy support for Mr Scarcliffe; £16,640[77]

[76] Multiplier 2.01
[77] Thirteen hours a week reducing after nine months to five hours a week at £28/£30 per hour

This would provide 4 hours on two days a week and 1 day of five hours at the weekend for nine months dropping to 1 day midweek of five hours for the next three months

(b) Childcare

Unfortunately, as pointed out in the Claimants closing, the calculation, (under which Ms Lewis has signed "agreed in principle") is wrong, even after handwritten amendments [78] and the intended basis is unclear (it does not expressly state that it is for all the children. Mr Baldock referred to it as being for Alfie and Ottilie). The handwritten amendment (reduced from £5,888) was

"Mon-Fri; 5 days x 4 hours x £28 x12 weeks = £2,688 (as amended)

Holidays; 5 days x 5 hours x 28 x 2 weeks = £1400".

Given the reference to holidays I assume that it was intended that the provision would be for five days. I am unclear why it is limited to 14 weeks. I assume that it is to allow for an initial intensive period and also reflects the existence of the buddy support, however as pointed out in the Claimant's closing quantification there is no evidential justification. Assuming that the intended provision was 4 hours the total would be £8,120.

(a) Case Management	£5,137.50[79]
(b) Physiotherapy	£2,660
(c) Personal trainer	£4,600
(d) Dietician	£1,440
(e) Vocational rehabilitation	£9,600

This would give a total for a one year intensive rehabilitation package of £48,197.50.

295. Taking into account all the matters which I have set out within this judgment the one year intensive rehabilitation support package is reasonably necessary. I increase the figure set out above to £54,446.21 to reflect:

(a) additional childcare assistance and replacement of care to Ottilie and Alfie within this first year[80].
(b) Two further years of gym membership (£1727.76) to continue with the training pattern.

296. Mr Baldock conceded in his closing submissions that, "on the basis that there remains some accident causative element of (Mr Scarcliffe's) pain condition that would reasonably benefit from rehabilitation" the figures set out in his scenario B would apply; which included a contingency element (to reflect the need for ongoing support given the relapse after the pain programme). Given the content of his written closing I take that to mean that if I were to find that well beyond the 7.5 year period which

[78] It was wrong before the amendment; the total should have been £6,720 and not £4,488
[79] After another error, properly pointed out in the Claimant's closing has been taken into account
[80] Providing care at 9 hours a week for the balance of the 38 weeks and 5 hours for Ottilie and Alflie

underpins scenario A there will continue to be a pain condition (or more severe pain condition) attributable to the accident, that a contingency is appropriate.

297. As I have set out in very broad and simplistic terms the accident accelerated or brought forward the development of a pain syndrome by 7.5 years and changed, to a degree, the nature of its onset. The 7.5 years timeframe should not be taken as a cliff edge as the onset would not have been acute; but it would not have long after this date that the likely "but for" pre-accident path and post- accident paths merge. To attempt to be more specific would be to clothe the analysis with too much certainty.

298. In addition to the sums above in relation to the first year Mr Baldock allowed

(f)	An additional year of buddy support	£16,640
(g)	A contingency of a further "12 months care as per joint statement (he used the incorrect figure of £4088)"	£8,120
(h)	A further year of case management	£5,137.50
(i)	A further year of personal trainer	£4,600
(j)	A further year of dietary assistance	£1,440
(k)	A contingency in respect of vocational Rehabilitation (of six months)	£4,800
(l)	A contingency of £1,000 for future Psychological help	£1,000
	So an additional sum of	£ 41,737.50

299. Mr Baldock's submission was that, given likely improvement in symptoms/disability due to the intensive package, even if causation stretched well beyond 7.5 years, the total sum of £89,934.50 (assuming a mistake in relation to care in the first year) was sufficient to put Mr Scarcliffe in the position that he would have been had the accident not occurred. He allowed no further sums for care, support or equipment[81].

300. I find that, on balance, a year of rehabilitation (against a background of the end of litigation) will produce a significant improvement as Dr Edwards predicts. Bearing in mind the symptoms from the degenerative changes which he would have suffered had the accident not occurred (as magnified) this will enable Mr Scarcliffe to live without any significant care needs (or additional case management or therapy needs) which are attributable to the accident and to provide care for his children in a like fashion to what he would have given in any event.

301. However there is the possibility of a degree of shortfall arising between the post rehabilitation condition and Mr Scarcliffe's condition had the accident not occurred and/or of relapse (a possibility recognised by Dr Edwards) and a consequential need for additional/further assistance. An additional sum is necessary to cover these factors in the period between the end of the first year (covered by the package) and the time, not long after 7.5 years post accident (March 2025) when the pre-accident path and post accident paths merge. The full contingency set out by Mr Baldock would be significant overcompensation as it would, in effect, provide two years assistance across the range of input against an overall time frame which is not much longer and over which the "causation gap" is narrowing. In these circumstances I adopt the

[81] Although in scenario A he conceded £574.70 in relation to the Apres Body Shower

approach of Kennedy LJ in **Willbye-v-Gibbons** [2003] EWCA Civ 372 (as regards the assessment of future care)

> "…and all that can realistically be done is to increase to some extent the fund available to the appellant to satisfy her need for assistance in the future, recognising the possible ways in which demands may be made upon that fund, but not attempting to evaluate separate types of potential demand, because if potential demands are separately evaluated it may well turn out that there is duplication, or that substantial awards have been made in respect of contingencies which have never happened."

In my judgment approximately half the figure set out is appropriate as a lump sum/contingency figure to cover this period and as result I make an overall future care award of £75,000. I well recognise that the analysis it is imprecise, but Judges have to do the best that they can with evidence and without the clearly defined view into the future a crystal ball would provide.

302. No further/additional care award; to reflect either care/assistance needed by Mr Scarcliffe[82] or given to others is justifiable on the evidence.

303. There is no justification for any additional input from a case manager.

Future specialist equipment

304. The claim in the schedule is based on paragraph 5.3.9 of Ms Lewis' September 2022 report. Ms Madar was not of the view (as she set out in her October 2022) report that any of the items claimed were reasonably necessary as a result of the accident as;

(xxii) they would have been required by virtue of difficulties arising from the constitutional back changes (which would cause "difficulties with pain, bending and reaching"), and
(xxiii) There was no medical evidence to support upper limb difficulties attributable to the accident that would preclude the use of Mr Scarcliffe's hands, and
(xxiv) There was no medical evidence to support the need for a wheelchair or hoist or reclining armchair.

305. I allow as reasonably necessary (given the my findings and the future timeframe) a bed lever, bath sponge (with three replacements) , long handled shoehorn, stocking and sock aid, reacher , shower chair and swivel car seat. The costs amount to £161.54.

306. Ms Madar allowed £600 in respect of a recliner armchair in the joint meeting. She arrived at this figure as a cost of £1,400 less the cost of a chair which would have

[82] I would have made no award in respect of dog walking even if causation of injury had been established into the future. There was a rather remarkable claim pursued through closing submissions in the sum of £184,633.21. It is not reasonably necessary for Mr Scarcliffe to have a family dog in the future (which would not be any form of therapy or assistance dog) if he (or other members of the family who would share the benefit of having a pet) cannot walk it properly. Any loss of ability to walk a dog should be reflected in a loss of amenity

been purchased in any event. I allow this figure after some hesitation (given the degenerative changes).

307. I allow £574.70 in relation to the Apres Body Drier (as agreed by Mr Baldock in the counter-schedule [83] and his Scenario A document).

308. The total future equipment award is £1,336.24.

Future additional adaptions

309. The evidence does not support the reasonable necessity of a further or different vehicle to the one which Mr Scarcliffe currently successfully uses to drop off and pick up the children and drive elsewhere.

310. The totality of the evidence does not support the reasonable necessity of a wheelchair.

Future medication costs

311. It is not in dispute that Mr Scarcliffe is overmedicated and also he will be undertaking the rehabilitation course. He would also have been on mediation in any event given his constitutional symptoms. I allow £100 as a lump sum.

Court of Protection/Deputy costs

312. The schedule claimed a sum of £662,100 in respect of Court of Protection and Deputy Costs. This was wisely abandoned by the time of the skeleton argument in light of the decision of Her Honour Judge Wall at the Pre-Trial Review on 16th February 2023 to refuse to allow expert evidence on the issue[84].

Conclusion

313. I award damages comprising of the sums set out above. I trust that the parties can agree the relevant interest calculations and also agree a relevant order.

314. I fully appreciate that given the sums which were pleaded on his behalf Mr Scarcliffe will be likely to be hugely dismayed and angry with the figure awarded. However, a Judge must decide a case on the evidence (including expert evidence) and arguments as presented and without sympathy or bias. The evidence presented to me established that his life was going to change radically had the accident not occurred principally due to the effects of degenerative changes which had already begun to manifest themselves. He could not continue as he had in the past with a full and active life. He would also have gone onto suffer a chronic pain syndrome in any event.

315. I wish Mr Scarcliffe the very best of luck with his rehabilitation programme and with the many challenges that lie ahead given his family circumstances.

Summary of the award

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[83] The counter-schedule states "D concedes that an Apres Body Shower could be argued to be reasonably required over the next two years and for reasons of proportionality is therefore admitted in the sum of £574.80". Ms Madar had not allowed the item.

[84] The head of claim was bound to fail given damages are awarded to those who would have provided care; it is their loss and not to those who receive it.

1.	Pain, suffering and loss of amenity	£27,500
2.	Loss of congenial employment	£1,000
3.	Interest on general damages	£1,357.06
	Past losses	
4.	Past Loss of earnings and pension	£70,000
5.	Past care	
	(a) Past care Claimant	£19,570
	(b) Past Care Ottilie and Alfie	£13,366.40
6.	Past parking and Parking	£400
7.	Past Pain management Course	£14,480
8.	Past Pain medication	£711.90
9.	Past Physiotherapy	£4,084.90
10.	Past Gym and Personal training	£1,079.85
11.	Past Occupational Therapy	£1,330.20
12.	Past adaptions and purchases	£3,227.01
13.	Past case management	£1,076.40
14.	Postage and calls	£25.00
	Total past losses	£129,351.66
15.	Interest on past Losses	£1,900.37
	Future Losses	
16.	Future earnings (including pension loss)	£37,500
17.	Future care	£75,000
18.	Future specialist equipment	£1,336.24

19. Future medication costs	£100
Total	£275,063.03