

# Fundamental Dishonesty in Clinical Negligence Proceedings

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Consideration of what the person in the street might think of a dishonest or deliberately deceitful RTC claim, or heads/parts of a claim, to now a more detailed, encompassing or “holistic” approach....

Contrast with need for detail in proving exaggeration, misleading experts, particular heads and the quantum of damages sought that is related to the dishonesty, and at the “root” of the the claim....

## Fundamental Dishonesty

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- S.57 Criminal Justice and Courts Act 2015
- CPR 44.16
- Cases before 2015
- Cases afterwards

## Section. 57 Personal injury claims: cases of fundamental dishonesty

(1) This section applies where, in proceedings on *a claim for damages in respect of personal injury* (“the **primary claim**”)—

(a) 1<sup>st</sup> the court finds that *the claimant is entitled to damages in respect of the claim*, but

(b) on 2<sup>nd</sup> *an application by the defendant* for the dismissal of the claim under this section, *the court is satisfied on the balance of probabilities that the claimant has been fundamentally dishonest in relation to the primary claim or a related claim.*

(2) [DUTY] *The court **must dismiss** the primary claim, unless it is satisfied that *the claimant would suffer substantial injustice if the claim were dismissed.**

(3) The duty under subsection (2) *includes* *the dismissal of any element of the primary claim in respect of which the claimant has not been dishonest.*

(4) The court's order dismissing the claim must *record the amount of damages that the court would have awarded* to the claimant in respect of the primary claim “but for” the dismissal of the claim.

(5) When assessing *costs in the proceedings*, a court which dismisses a claim under this section must *deduct the amount recorded in accordance with subsection (4) from the amount which it would otherwise order the claimant to pay in respect of costs incurred by the defendant.* = Balanced sanction

...(8) In this section— “claim” includes a counter-claim and, accordingly, “claimant” includes a counter-claimant and “defendant” includes a defendant to a counter-claim;

**“personal injury” includes any disease and any other impairment of a person’s physical or mental condition;** “related claim” means a claim for damages in respect of personal injury which is made—

(a) in connection with the same incident or series of incidents in connection with which the primary claim is made, and

(b) by a person other than the person who made the primary claim. NOT  
USUALLY CLIN NEG

(9) This section does not apply to proceedings started by the issue of a claim form before the day on which this section comes into force.

## Costs Sanction

**CPR 44.16 - Exceptions to qualified one-way costs shifting ...where permission required:**

- (1) Orders for costs made against the claimant may be enforced to the full extent of such orders with the permission of the court where *the claim is found on the balance of probabilities to be fundamentally dishonest.*

## BEFORE:

- Hunter v Butler 1995 CA
- Cottrell v Redbridge Healthcare NHST 2001 QBD
- Newman v Folkes 2002 QBD/CA
- Kanu v Kashif 2002 CA
- Gosling v Hailo 2014 CC

## Fundamental Dishonesty in clinical negligence

What does Fundamental Dishonesty really mean?

- What did Parliament envisage?
- How have the courts interpreted it?

## BEFORE - Gosling v Hailo 2014 CC - DISHONESTY

“44. It appears to me that this phrase in the rules has to be interpreted purposively and contextually in the light of the context. This is, of course, the determination of whether the claimant is ‘deserving’, as Jackson LJ put it, of the protection (from the costs liability that would otherwise fall on him) extended, for reasons of social policy, by the QOCS rules. It appears to me that when one looks at the matter in that way, one sees that what the rules are doing is distinguishing between two levels of dishonesty: dishonesty in relation to the claim which is not fundamental so as to expose such a claimant to costs liability, and dishonesty which is fundamental, so as to give rise to costs liability.”

“45. The corollary term to ‘fundamental’ would be a word with some such meaning as ‘incidental’ or ‘collateral’. Thus, a claimant should not be exposed to costs liability merely because he is shown to have been dishonest as to some collateral matter or perhaps as to some minor, self-contained head of damage. If, on the other hand, the dishonesty went to the root of either the whole of his claim or a substantial part of his claim, then it appears to me that it would be a fundamentally dishonest claim: a claim which depended as to a substantial or important part of itself upon dishonesty. ”

HHJ Moloney, DCJ at Cambridge

## Parliament intent?

Lord Faulks: “We are not talking about a schedule that contains some slight exaggerations or minor inaccuracies, but about fundamental dishonesty... **claims that involved, frankly, lying and fraud... it should be imposed only where it goes to the heart of a claim**”

## AFTER:

- Thompson v Go North East 2016
- Barber v Liverpool 2017 CC
- Ivey v Genting Casinos 2017 UKSC
- Howlett v Davies 2017 CA
- LOCOPG v Sinfield 2018 QBD
- Wright v Satellite Info 2018 QBD
- McDaid v Walsall MBC 2018

- Spencer Smith v Ashwell 2020 CC
- Haider v DSM Demolition 2019 QBD
- Roberts v Kesson 2020 QBD
- Craig v Webb 2020
- West v Olakanpo 2020
- Kasem v UCL Hospitals NHSFT 2021 QBD

## Other cases - PI focus, Principles relevant

- *Molodi v Cambridge Vibration Maintenance Services* 2018 QB Spencer J
- *AXA Insurance v Masud* [2019] EWHC 497 (QB)
- *Liverpool Victoria v Zafar* 2019 QB/CA
- *Garraway v Holland & Barrett* 2020 CC

*Thompson v Go North East Ltd & Bott & Co Solicitors*  
(2016) unreported, CC (Sunderland) (Judge Charnock-Neal)

## Thomson v Go

- Notice of discontinuance set aside and claim struck out pursuant to rule 44.15, and claim found to be fundamentally dishonest
- AND wasted costs awarded against the solicitor for failing to send CCTV evidence to the medical expert and drafting particulars of claim and witness statement with contradictory accounts.

## Barber v Liverpool City Council

- General rule that unsuccessful claimant should be ordered to pay D's costs
- Dishonest claim for loss of earnings amounting to half of the claim
- No reason to regard him as a litigant who merited protection against adverse costs liability
- The dishonesty did not have to underlie the entire claim
- Fair and just to permit half of D's costs to be enforced vs C. Indemnity basis.

## The Test for Dishonesty

### Ivey v Genting Casinos UK

- 1) Ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. It is not an additional requirement that his belief must be reasonable, the question is whether it is genuinely held;
- 2) Determine whether the conduct was dishonest by applying the (objective) standards of ordinary decent people.

## NB - Requirement to plead fraud - Howlett v Davies 2017 CA

- The Defendant (here LVI litigation) “*does not have to put forward a substantive case of fraud in order to succeed*” - *Kearsley v Klarfeld* (2005) CA
- But does have to set out “*the facts from which they would be inviting the judge to draw the inference that the plaintiff/claimant had not in fact suffered the injuries he asserted*”

## Requirement to cross examine on dishonesty

- No requirement to use words such as “*dishonest*”, “*fraud*” or “*lying*”.
- What matters is that a witness is given “*fair notice of a challenge to their honesty and an opportunity to deal with it.*”
- The fact that a party had not alleged fraud in their pleading might not preclude them from suggesting to a witness in cross-examination that they were lying.
- The pleading had given the appellant sufficient notice of the points the insurer intended to raise at trial, and the possibility that the judge would conclude as he did. The appellant could not fairly suggest that she had been ambushed...

## London Organising Committee v Sinfield

A Claimant should be found fundamentally dishonest if he has acted dishonestly and has thus:

*“...substantially affected the presentation of his case, either in respects of liability or quantum, in a way which potentially adversely affected the defendant in a significant way, judged in the context of the particular facts and circumstances of the litigation.”*

The pieces of dishonesty were premeditated and maintained over many months until the true picture uncovered

## Compare - Wright v Satellite Info QBD

- Future care claim pleaded in excess of £73,000 - £2,100 awarded
- C evidence consistent what he did for wife
- Analysis of the claim for care was that what being done for C did not properly sound in damages
- Trial judge was entitled to find that C not dishonest, fundamentally or otherwise.
- Schedules of Loss are important documents which must be intelligible to C

## Smith v Ashwell

C fell into a hole injuring his ankle. Pain.

“...C had not engaged in FD. He had not faked injury or continuing pain for the purposes of financial gain. Although there had been a degree of overstatement of his pain and its effect on him...C had engaged in such conduct in order to convince rather than deceive the medical witnesses as a consequence of D’s determination to avoid fully compensating him...”

## Haider v DSM Demolition 2019 QBD

Rear end shunt and credit hire claim by C where he C failed to disclose financial information.

Judge 1st instance concluded that while the claimant's disclosure had not been good disclosure, he had not been dishonest, and that inconsistencies in his evidence were explicable on the basis he was trying to recall the events of four years previously.

QBD found that conclusion was not reasonably open to him, because C had concealed the existence of highly material information that went to the heart of his claim. Plainly dishonest, and no basis on which the judge could properly have concluded that he was simply confused. The only reasonable inference was that C had intentionally failed to make full disclosure. In the circumstances, that failure could only be labelled as fundamentally dishonest...

## Roberts v Kesson QBD

...FD was at the forefront of D's case but the judge had not properly addressed it...Not in the systematic way that S.57 required...

clear findings required for and decision of dishonesty...dishonesty was fundamental for s.57

...dishonesty sufficiently fundamental and ...important part of the overall claim to go to the root of it.

C provided dishonest information about vehicle value...

...assessed globally against the entire claim, having regard to its particular importance ...applying a holistic approach C's claim not minor or peripheral it was dishonest and fundamental...

## Pegg v Webb 2020 QBD

A 1<sup>ST</sup> instance judge had erred in not finding that C had not been fundamentally dishonest in his PI claim from and RTC.

Although there had been a genuine collision, C had been dishonest in his presentation of the soft tissue injuries and had failed to tell the medical expert about a quad bike later accident he had been involved in. Claimant was ordered to pay 70% of the defendant insurer's costs.

Damages claimed were confined to PSLA in relation to the injuries and the cost of physiotherapy, dishonesty as to the extent of the injuries would be fundamental because the extent of the claimant's injuries was not merely incidental or collateral but formed the very basis of the claim.

## Pegg cont.

- C sought no medical assistance after RTC.
- His solicitors who arranged for physiotherapy to be carried. Which should immediately have raised at least a suspicion in the mind of the judge.
- C had attended ED after the quad bike accident, but did not inform the ED doctor of the injuries sustained in the RTC. That was a "deafening silence".
- C failed to inform the medical expert of the quad bike accident and the injuries he sustained. The only reasonable inference to be drawn was that the claimant deliberately failed to tell the expert in order to mislead him about the effects of the RTC. That was a second incidence of "deafening silence".
- Significantly aggravated by lies told by C to the medical expert about his symptoms, the longevity of his injuries and the duration of physiotherapy treatment.
- C then compounded his dishonesty by lying again about the longevity of the injuries in the claim form and his witness statements.
- BUT much time and costs spent on whether RTC was bogus, which it was not, so costs order in all circumstances of C pay 70% of D's costs

## West v Olakanpo QBD

Final note of warning - FD cases are not necessarily over until the finding made by a court. So care and forethought required at CMC and to the hearing nature and content required.

Transparency and communication between the parties encouraged!

## Costs Proceedings

- \* Costs belong to the client and that assessment proceedings, although almost invariably in clinical negligence and personal injury claims are in the names of the parties. Lawyers benefit obviously.
- \* Question - can fundamental dishonesty during the assessment proceedings can lead to the dismissal of the whole claim?

No authority as yet...

- \* Would it cause substantial injustice to deprive a claimant of all of her or his damages, no doubt already paid over, due to the claimant's/solicitor's fundamental dishonesty in claiming costs.
- \* If claimant clearly fundamentally dishonesty in claiming costs then it is likely that would indeed lose all of their damages.
- \* Another question - whether fundamental dishonesty in a bill of costs gives the court the power to disallow all of the claimant's costs?

Court has that power/discretion under its very wide discretion in relation to costs. Section 57 strengthens position if there is any fundamental dishonesty.

- \* Does exaggeration = fraud and therefore fundamental dishonesty.

Every claimant's bill of costs is exaggerated?!

# Practical Considerations

## Not confined to exaggeration cases

- Liability often turns on disputed expert evidence and questions of medical causation, with the basic factual background largely agreed.
- Where there is a fundamental dispute of fact, consider why. If the court rejects the Claimant's account, were they just wrong or is dishonesty the explanation for the discrepancy?
- E.g. *Razumas v Ministry of Justice* [2018] EWHC 215 (QB)

## Evidence to look for

- Do the medical records include previous solicitors' requests for records? If so - seek disclosure. Has C claimed these losses before?
- Pre-existing or unrelated co-morbidities which have been downplayed.
- Compare C's account of their disability in DWP records (before and after the index event).
- Social media - N.B. consider evidence of when photographs were taken (rather than posted).

## Surveillance - brief recap

- Surveillance is a privileged document.
- Claimant must be given a fair opportunity to deal with it.
- D may not ambush, but is entitled to wait until C nails colours to mast e.g in a document supported by a statement of truth, before serving.

## See further guidance in

- *Douglas v O’Neill [2001] EWHC 601 (QB);*
- *Hayden v Maidstone & Tunbridge Wells NHS Trust [2016] EWHC 1121 (QB)*
- *Stewart v Kelly [2016] EWHC 3263*
- *Hicks v Rostas [2017] EWHC 1344 (QB)*

## Surveillance - limitations

- Claimants already or separately very disabled
- Exaggerated claims for future deterioration or disability
- Is the surveillance actually inconsistent with C's account? - *Friends Life Ltd v Miley* [2019] EWCA Civ 261

## When to raise FD?

Defendants - If not pleaded in Defence, when and how are you going to put C on notice? In Counter Schedule? Correspondence? Cross-examination?

Claimants - Even if not pleaded, scrutinise your claim as D would. Are there inconsistencies? Can they be explained? Pre-empt issues if you can.

## Raising FD after Discontinuance/Settlement/Judgment

PD44 para 12.4

- (b) Where the proceedings have been settled, the court will not, save in exceptional circumstances, order that issues arising out of an allegation that the claim was fundamentally dishonest be determined in those proceedings;

- (c) Where the claimant has served a notice of discontinuance, the court may direct that issues arising out of an allegation that the claim was fundamentally dishonest be determined notwithstanding that the notice has not been set aside pursuant to rule 28.4

## After settlement

- Claim in deceit
- *Hayward v Zurich Insurance Co Plc [2017] A.C. 142* - D does not need to have believed C's dishonest representation, although must have been induced by it.
- *Kasem v UCL Hospitals NHSFT [2021] EWHC 136 QBD*

## After judgment

- High Court has inherent jurisdiction and County Court has a statutory jurisdiction to set aside a judgment obtained by fraud.
- What about where a judgment was entered for an amount to be determined and C found FD at quantum trial? Can judgment be said to have been obtained by fraud? Can a court set aside a final order pursuant to CPR 3.1(7)?

## Further consequences

- Consequences of a finding can include committal for contempt of court - see e.g. *Calderdale and Huddersfield NHS Foundation Trust v Atwal* [2018] EWHC 2537 (QB), and *George Eliot Hospital NHS Trust v Elder* [2019] EWHC 1813 (QB).
- Need to prove to criminal standard.

## General thoughts for both parties

- Master the detail
- Look for inconsistency
- Consider other explanations

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