

Byrom
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Chambers

Fundamental dishonesty: a round-up

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Fundamental dishonesty: Two contexts

QUOCS: CPR
44.16(1); and

Criminal Courts
and Justice Act
2015 section 57

Exceptions to qualified one-way costs shifting where permission required

44.16

- (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.**

Effective since 1 April 2013

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) the court finds that the claimant is entitled to damages in respect of the claim, but
- (b) on an application by the defendant for the dismissal of the claim under this section, the court is satisfied on the balance of probabilities that the claimant has been fundamentally dishonest in relation to the primary claim or a related claim.

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

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

(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.

Section 57(1)(b)
“on an application
by the
defendant.....”

where, in proceedings on a claim for damages for personal injury (“the primary claim”)-

- (a) the court finds that C is entitled to damages in respect of the claim, but
- (b) On an application by the defendant for the dismissal of the claim under this section.

So D needs to make an application but that could be made informally after judgment, in appropriate circumstances.

More usually by Part 23 Application, or Amended Defence or Counter-Schedule to enable the issue to be determined at trial.

QUOCS disapplication: how is it dealt with?

1. An application to disapply QUOCS after discontinuance by C

Rouse v Aviva, Alpha v Roche: D successfully appealed refusals to hear applications.

- Procedure is for Court's discretion, but timing an important factor.
- No requirement for exceptionality before application made.
- Low value of the claim not the sole factor in proportionality.
- Importance of public interest in identifying false claims emphasised.

2. CPR Part 44 application to disapply QUOCS after dismissal of the claim.

- Barber v Liverpool CC: *"I see no reason to regard C as a litigant who merits protection against adverse costs liability. On the contrary, there is every reason to make adverse costs orders in cases such as this, in order to deter dishonest claims."* (tripping case)
- Lavelle v Thomas Cook: D successful at trial in two holiday sickness cases. *"This is not a matter in which there can realistically be room for doubt. It is not like, for example, a road traffic accident, where there might have been a small impact to a car and somebody might or might not have been injured. That is a situation in which people could reasonably be mistaken."*

Courts will intervene on appeal

Richards v Morris, Molodi v Cambridge-
minor whiplash claims where trial judge
found numerous inconsistencies in Cs'
evidence but awarded damages. Appeals
allowed.

Claimant's appeals less likely to succeed-
have to overturn finding of trial judge
who had benefit of hearing C.

And occasionally things have got very nasty.....

Thompson v Go NE & Bott & Co solicitors

- Following discontinuance D obtained a costs order against C for FD
- In addition, a wasted costs order against C's solicitor for failing to address inconsistencies between C's account of RTA and CCTV.

LVI v Khan & Zafah

- C's trial bundle mistakenly included earlier draft of expert's opinion.
- D successfully brought contempt proceedings against solicitor and expert.

Section 57 application for dismissal on grounds of FD

D made a successful application in several cases at trial.

(Stanton v Hunter, LOCOG v Sinfield, McDaid v Walsall, Pinkus v Direct Line)

- Prospect of a realistic section 57 application sufficient to cause adjournment of costs decision after liability trial: Patel v Arriva
- and sufficient to obtain security for costs where the bulk of C's income regularly sent to the Phillipines: GL v PM and BM [2018] EWHC 2268 (QB)

Differences between the two regimes

- For CPR 44.16 consideration should be as to whether "*the claim*" was on the b/p dishonest.

? Distinction between "*the claim*" in CPR 44.16 and "*the Claimant*" but "*in relation to the primary claim or a related claim*" in s.57(1)(b). A distinction without a difference?

- CPR 44.16 refers to the Court's "*permission*" to enforce a costs order, thereby retaining a discretion, whereas s.57 requires that the Court "*must*" dismiss the entire claim where fundamental dishonesty has been proved.

A claimant who has been FD for CPR 44.16 purposes can, in an appropriate case, still retain their damages. The liability for costs need not necessarily extinguish the entitlement to recover damages.

Cases issued pre-13 April 2015 (where s.57 does not apply): a claimant could still recover the legitimate amount of damages, despite FD in relation to their presentation of the claim.

Section 57(1) and 57(8)

Section 57 applies where in proceedings on a claim for damages for personal injury (“the primary claim”) the court finds that the claimant is entitled to damages in respect of the claim, but has been found FD “*in relation to the primary claim or a related claim*” Section 57(1)(b)

Section 57 (8) defines “*related claim*” as 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.

Discontinuance

CPD 44 Para. 12.4

Where the Claimant has served a notice of discontinuance, the court may direct that issues arising out of allegation that the claim was fundamentally dishonest be determined notwithstanding that the notice has not been set aside pursuant to rule 38.4;

From D’s perspective best to plead fundamental dishonesty before C discontinues to avoid have to grapple with the provision above.

IPs and CRU

“the damages that the court would have awarded to C in respect of the primary claim” need to be reduced by an amount equivalent to any interim payments made.

? Also CRU and possibility of a rebate on NHS charges.

D’s likely tactics when compelling evidence of FD obtained at early stage

- s.57 application to strike out at early stage.
- Leave for later determination, at C’s expense, the sum which would have been awarded but for the dishonesty.

? necessity to plead

For CPR 44.16 cases, FD **does not need to have been pleaded-but sufficient warning of the possibility of such a finding being the outcome needs to have been given.**

Howlett v Davies [2017] EWCA 1696

D did not allege "fraud" and the Judge did not make such a finding, but was satisfied that there had been "fundamental dishonesty" and set aside QUOCS.

Kearsley v Klarfield 2005 referred to. D does not have to put forward a substantive case of fraud. Sufficient to set out fully the facts from which D would be inviting the judge to draw the inference that C had not in fact suffered the injuries he asserted. If that guidance followed: *"it must be open to the trial judge, assuming that the relevant points have been adequately explored during the oral evidence, to state in his judgmentthat, having regard to the matters pleaded in the defence, he has concluded (say) that the alleged accident did not happen or that C was not present."*

It was acknowledged that D may have good reason not to plead positively in advance.

CA: *"the key question.....would be whether C had been given adequate warning and a proper opportunity to deal with the possibility of a conclusion of FD and the matters leading the Judge to it, rather than whether the insurer had positively alleged fraud in its Defence."*

D's Defence

- *"Did not accept the accident occurred as alleged, or at all."*
- Denied *"there was an accident as alleged."*
- Asserted that credibility was in issue and that C were required to *"strictly prove"* their case.
- Listed various matters casting doubt on the claim, including facts that were stated in terms to be *"beyond mere coincidence and, instead,indicative of a stated/contrived accident and injury."*

Sufficient for C not to have been ambushed.

Draper v NCC

- 1 month before trial, 1 week after final statement and Schedule, D served CCTV footage and made application to amend to plead s57.
- DJ refused, succeeded on appeal.
- Not a tactical late ambush.
- Matters within C's knowledge and C could address them,
- *"Where credibility has been raised, it is in the interests of justice for the judge to have the best evidence available."*

How much
notice required
before xx?

Sufficient to avoid ambush!

- Smith v Ashwell Maintenance detailed questions re: C's bank statements and financial affairs, not raised in pre-trial Part 18 questions.
- Pinkus HHJ Coe QC *"I would not allow any issue to be raised of which C would not have any sufficient notice and which he might have been able to deal with by way of additional evidence or which the experts would have been able to address, but had not and could not in the course of the hearing."*

How explicitly must it be put at trial?

- *“Where a witness’ honesty is to be challenged, it will always be best if that is explicitly put to the witness. There can then be no doubt that it is in issue.”*
- *“But what ultimately matters is that the witness has had fair notice of a challenge to his or her honesty and an opportunity to deal with it.”*
- It is a matter for the trial judge as to whether the witness has been given fair warning.
- *“The fact that a party has not alleged fraud in his pleading may not preclude him from suggesting to a witness in cross-examination that he is lying.”*
- See Pinkus v Direct Line where Howlett reasoning followed.

Dishonesty in one factor can taint all C’s evidence

Barber v Liverpool CC

- Tripping accident claim dismissed on the basis that C’s evidence so unreliable that it could not be relied upon.
- What evidence? Essentially his earnings and care claims, which amounted to >50% of the Schedule, even though abandoned pre trial.

Molodi v Cambridge

- Dishonest re: no of previous accidents, amount spent on car repairs, duration of symptoms.
- Spencer J: *“Once, as here, C could be shown to have been dishonest in respect of a fundamental matter and then to have maintained that dishonesty through his witness statement and into his evidence before the Court, it is difficult to see how the Learned Judge could have accepted any other part of C’s evidence or the medical report itself-and, without these, there was nothing left.”*

Fundamental dishonesty

- Can be just “dishonest” as opposed to “fundamentally dishonest”
- Can relate to liability, quantum or both.
- For s.57 it can be FD relating to a different but related claim.
- B/proof. Balance of probabilities.
- Collateral dishonesty that does not seek to enhance damages to be awarded to C does not constitute FD. **Versloot Dredging BV Gerling Industrie Versicherung AG [2017] AC 1**

Gosling v Hailo and Screwfix Direct Ltd [2014] HHJ Maloney, Cambridge CC

*“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.**”*

Sinfield v
LOCOG [2018]
EWHC 51(QB)

- Genuine accident. Fractured wrist causing ongoing disability. Liability admitted.
- Dishonesty related to the gardening claim which comprised 42% of special damages (£14K)
- C employed same gardener pre and post accident.
- C contended that he had only employed a gardener post accident.
- LOCOG amended D to plead FD emphasising Statement of Truths on Schedule and Witness statement and Disclosure statement.

On appeal

Julian Knowles J held:

The preliminary Schedule, production of misleading invoices and witness statement were fundamentally dishonest.

Trial Judge was wrong to find that C would suffer "*substantial injustice*" if his claim was struck out entirely.

62. In my judgment, a claimant should be found to be fundamentally dishonest within the meaning of s.57(1)(b) if the defendant proves on a balance of probabilities that the claim has acted dishonestly in relation to the primary claim and/or a related claim (as defined in s.57(8)), and that he 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.** Dishonesty is to be judged according to the test set out by the Supreme Court in *Ivey v Genting Casinos Limited (t/a Crockfords Club)*.

Knowles J:

- *“By using the formulation ‘substantially affects’ I am intending to convey the same idea as the expressions ‘going to the root’ or ‘going to the heart’ of the claim.”*
- *“By potentially affecting D’s liability in a significant way ‘in the context of the particular facts and circumstances of the litigation’ I mean, e.g., that a dishonest claim for special damages of £9,000 in a claim worth £10,000 in its entirety should be judged to significantly affect D’s interests, notwithstanding that D may be a multi-billion pound insurer to whom £9,000 is a trivial sum.”*

Section 57(2) “The Court must dismiss the primary claim, unless it is satisfied that C would suffer substantial injustice if the claim were dismissed.”

- *“must mean more than the mere fact that C will lose his damages for those heads of claim that are not tainted with dishonesty.”*
- Meant to be punitive.
- *“It seems to me that it would effectively neuter the effect of s 57(3) if dishonest Claimants were able to retain their ‘honest’ damages by pleading substantial injustice on the basis of the loss of those damages per se. What will generally be required is some substantial injustice arising as a consequence of the loss of those damages.”*

The test of dishonesty

R v Ghosh [1982]

A person will be guilty of the dishonesty complained of if:

- (a) It was dishonest by the standards of ordinary reasonable and honest people; and
- (b) The defendant realised that ordinary honest people would regard this behaviour as dishonest.

Both subjective and objective.



Ivey v Genting Casinos (UK) Ltd
(t/a Crockfords Club)
[2017]UKSC 67

“whilst dishonesty is a subjective state of mind, the standard by which the law determines whether that state of mind is dishonest is an objective one.....if by ordinary standards a defendant’s mental state is dishonest, it is irrelevant that the defendant judges by different standards.”

**Razumas v Ministry of
 Justice [2018] EWHC 215
 (QB)**

- Clin neg case against MOJ.
- Negligence admitted. Issues re: vicarious liability and limitation.
- In determining factual issues relating to causation Judge found that C had lied about the circumstances of his medical treatment. Such lies contained in P/CI, witness statement and oral evidence.
- Held that the lies were an intervening cause preventing recovery for any established breach relating to this period.
- D argued that the lies amounted to s.57 FD
- Sinfield guidance adopted.
- FD made out.
- No grounds to find substantial injustice.
- *“It cannot in my judgment be right to say that substantial injustice would result in disallowing the claim where a claimant has advanced dishonestly a claim which if established would result in full compensation. That would be to cut across what the section is trying to achieve.”*

Exaggeration cases

C who fails to establish his case, without more: no sanction.

Nesham v Sunrich, Meadow v La Tasca

Beware of overplaying your hand: Smith v Ashwell

- A surprising level of hostility in pre trial conduct.
- Serving a witness statement from a witness apparently hostile to C; contradicted by a witness statement obtained from him by C; J considered that there had been an element of bad faith re: C's conduct.
- XX C on financial affairs without pre-warning.
- Judge's conclusion: C's undoubted exaggeration of symptoms found to be designed to "*convince rather than deceive.*"

Patel v Arrival Midlands Ltd and Zurich Insurance PLC [2019] EWHC 1216 (QB) Judge Melissa Clarke

- C collided with a bus and suffered cardiac arrest and a brain haemorrhage.
- Claim substantial disability. His Neuropsychiatrist reported that he was unresponsive without arm and leg movement. Conversion disorder diagnosed. D's Neurologist found him in the same condition.
- Surveillance showed him walking, talking and interacting normally.
- Held the claim was for severe conversion disorder and C had been fundamentally dishonest in relation to the claim as pleaded.
- Not a case of exaggeration-faking it.
- No substantial injustice in dismissing the entirety of the claim.
- Dealt with by application before trial.