FUNDAMENTAL DISHONESTY: GUIDANCE FOR PRACTITIONERS

Introduction

The term "fundamental dishonesty" was first coined in the April 2013 amendments to the CPR, describing one of the exceptions to Qualified One-Way Costs Shifting (QOCS).

Part 44.16(1) CPR provides that orders for costs against a 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.

This same term has since been adopted by section 57 Criminal Justice and Courts Act 2015.

Section 57(2) requires a court to dismiss a claim, where the claimant has been found entitled to damages for personal injury, if either that primary claim or a related claim is, on a balance of probabilities, fundamentally dishonest.

This article is intended to offer guidance to practitioners on how the issue of fundamental dishonesty should be dealt with, whether that is raised on the issue of QOCS under the CPR or as the basis for dismissing a claim under the 2015 Act.

After reviewing the background, as that gives some context, it is appropriate, as this is a relatively new definition, to analyse what the term "fundamental dishonesty" means. That leads on to a number of procedural issues practitioners need to be aware of. Finally, this article will consider a number of practical issues for litigants, and indeed their advisors, if the issue of fundamental dishonesty is raised.

Parity?

The statutory provision requiring the court to dismiss the valid part of a claim which has been tainted by fundamental dishonesty does present something of a moral maze. It might be thought the issue is entirely straightforward: no one condones dishonesty. That is surely right but even a brief analysis of the issue suggests it is not, nor has it been made, as simple as that.

The concept of fundamental dishonesty, as something which may result in the dismissal of an otherwise valid claim, only relates to personal injury claims and then only concerns the conduct of claimants. It is worth remembering that, as the Act only engages where the claimant is found to be entitled to damages and hence the victim of a wrong, the starting point must be that it is the defendant who is the wrongdoer. Consequently, to then entirely excuse the defendant of responsibility for that wrongdoing, because there is also wrongdoing by the claimant, seems to adopt the "two wrongs make a right" approach.

The result of all this is that a defendant, liable to put right wrongdoing under the general law, may wish to evade such liability by raising issues about the claimant's

conduct. Seen in this way the new provisions become mere tactics, driven by fiscal considerations, to be employed in the armoury of the defendant litigator.

The lack of parity, with no sanction against dishonest defendants, may, nevertheless, have the effect of the courts imposing corresponding sanctions on such defendants and it remains to be seen how professional regulators will regard any impropriety in the use of these new provisions by representatives.

Whatever the merits, or otherwise, of Section 57 Criminal Justice and Courts Act 2015 that legislation has been enacted, will be deployed and hence needs to be understood, on a practical level, by those representing both claimants and defendants.

Background

Sir Rupert Jackson, in his report, recommended QOCS but concluded there should be exceptions, the original proposal being an exception on the basis of fraud on the part of the claimant[1]. When the CPR was amended, to implement this proposal, the provisions on QOCS included an exception where the court found there had been fundamental dishonesty by the claimant.

The Civil Justice Council (CJC) subsequently made recommendations about the approach to fundamental dishonesty in the context of QOCS. The CJC is an advisory body that has a statutory responsibility[2] for overseeing and co-ordinating the modernisation of the civil justice system so its recommendations do provide a valuable backdrop.

The CJC recommended that the definition in Brighton & Hove Bus & Coach Co Ltd -v- Brooks [2011] EWHC 2504 (Admin) should form the basis of any definition of fraud to be used in removing the QOCS cover from an unsuccessful claimant. On this basis:

- the fraud must be pleaded by the defendant;
- statements and representations must have been made that were false;
- that were likely to interfere with the course of justice in some material respect; and
- at the time they were made the maker had no honest belief in their truth and knew they were likely to interfere with the course of justice.

The CJC explicitly rejected the suggestion that anything short of fraud, such as exaggeration[3], should lead to the loss of QOCS protection.

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[1] Review of Civil Litigation Costs: Final Report: Chapter 19 paragraphs 2.11 and 4.8

[2] Established under the Civil Procedure Act 1997

[3] Paragraph 33 of the CJC Report Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Civil Litigation and Funding Costs) 17th July 2012

A further steer on what was intended came from the Ministry of Justice in the form of a written ministerial statement[4] which suggested loss of QOCS protection if "the claim is found to be fraudulent on the balance of probabilities".

Section 57 Criminal Justice and Courts Act 2015 followed the decision of the Supreme Court in Summers –v- Fairclough Homes Ltd [2012] UKSC 26. That decision confirmed the court had power to dismiss a valid claim where the claimant had also pursued fraudulent elements, though the exercise of this power was conditioned by the need for proportionality suggesting that power would only be used rarely if at all.

It is not surprising the opportunities which are perceived as arising from this new legislation appear to have generated a rush of PR reports from defendant based practices seeking to show that they have the most knowledge and best success rates in pursuing this type of application[5].

In Practice

The approach envisaged by the Ministry of Justice to the loss of QOCS has not, in practice, always been followed by the courts, for example Creech -v- Severn Valley Railway (Telford County Court, 25 March 2015). This, and similar, judgments appear to equate an adverse finding of fact, that an accident did not occur in the way described by the claimant, with a finding of dishonesty. However, the rejection of the evidence given by a witness does not inexorably lead to a justified conclusion of dishonesty.

Many judges have observed, over the years, the fact a witness may not be found credible does not mean the witness must be regarded as having been dishonest. A helpful review of the difficulties with credibility, given the fallibility of human memory, was undertaken by Leggatt J in Gestmin SGPS S.A. –v- Credit Suisse (UK) Ltd [2013] EWCH 3560 (Comm) when he observed:

> "An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.
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> While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe

[4] The Parliamentary Under-Secretary of State for Justice (Mr Jonathan Djanogly) on 10th July 2012

[5] See by way of example: Horwich Farrelly sails past the 60 mark http://www.horwichfarrelly.co.uk/horwich-farrelly-sails-past-the-60-mark/ - which is an article claiming that they have obtained 60 enforcable costs orders under the new QOCS regime or Keoghs Fundamental dishonesty and litigation in the post-Jackson landscape https://www.keoghs.co.uk/Blogs/Fundamental-dishonesty-and-litigation-in-the-postJackson-landscape

our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.

Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).

Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor

> does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.
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> It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth."

Given these issues about how, in practice, the courts have approached issues concerning fundamental dishonesty it is necessary to look, later in this article, at some practical and procedural issues. As a preliminary to that, however, it is important to analyse what the term "fundamental dishonesty" might mean.

What is Fundamental Dishonesty?

On the basis of the judgment in Brighton & Hove Bus & Coach Co Ltd -v- Brooks [2011] EWHC 2504 (Admin), to which the CJC attached importance, "dishonesty", in this context, ought to be equated with fraud, meaning that it is for the defendant to prove that the claimant made a statement that the claimant knew, at the time, both to be false and to be likely to interfere with the course of justice.

Moreover, that dishonesty must be "fundamental". Fundamental can be defined as "foundational base", "essential component" or "root". On this basis it is hard to see how a claim that is fundamentally dishonest could succeed even in part, yet the drafting of the legislation appears to embrace that dichotomy by making the award of damages a preliminary to the exercise of the power to strike out on this basis.

In Gosling –v- Hailo & Screwfix Direct (Cambridge County Court, 29 April 2014) the court simply enquired whether more, rather than less, of the claim was dishonest in

deciding whether such dishonesty was "fundamental". It remains to be seen whether this approach is followed.

This approach may be hard to reconcile with, for example, the observations of Ward LJ in Widlake -v- BAA Limited [2009] EWCA Civ 1256 when he said:

> "…lies are told in litigation every day up and down the country and quite rightly do not lead to a penalty being imposed in respect of them. There is a considerable difference between a concocted claim and an exaggerated claim and judges must be astute to measure how reprehensible the conduct is."

What Advice Should the Claimant be Given?

Whilst it might be difficult for a claimant, who loses QOCS or whose claim is dismissed for fundamental dishonesty, to complain that advice not to be dishonest should have been given it is important to recognise the 2015 Act does change the law. It may, accordingly, be wise to spell out, at the outset, the potential consequences should the court make a finding of fundamental dishonesty against the claimant, namely that an otherwise valid claim for damages may be dismissed.

What Advice Should the Defendant be Given?

A defendant should be made aware of the prospect that a personal injury claim which the court concludes to be fundamentally dishonest may be struck out in its entirety.

It may also be appropriate to ensure the defendant is aware of the procedural, costs and even reputational issues that may arise in the event of an inappropriate allegation being made.

Whilst an insurer may be very involved in the defence of a claim where fundamental dishonesty is alleged it remains the defendant's responsibility to properly conduct that defence. In Denton Hall Legal Services Ltd -v- Fifield [2006] EWCA Civ 169 Wall LJ said:

> "I have to say, however, that I find it distasteful that a large and well known firm of solicitors should not only submit a long−standing and competent employee to a trial at which it called psychiatric evidence in an attempt to show that her symptoms were imaginary, but that even when it rightly abandoned that unattractive argument in this court, it nonetheless sought to escape from its responsibilities to its employee both by attacking clear and compelling findings of fact by the judge relating to its dismissive attitude to its responsibilities under the Regulations, and by persisting in the argument that Mrs. Fifield's injuries were not its responsibility. In my judgment, these are not the actions of a responsible employer."

Wall LJ went on to indicate that the defendant had requested he reconsider his use of the word "distasteful" on the basis the appeal was pursued by the relevant insurers. However, Wall LJ noted:

> "I … see no reason to alter the thrust of what I said. Dentons' statement that they were the creature of their insurers explains their conduct. I can, however, only express my surprise in these circumstances that the course favoured by the insurers was not subjected to a more detailed exploration than seems to have occurred in relation to the balance which needed to be struck between the unlikely success of the arguments advanced, its impact on Dentons' standing as employers and the costs involved."

Consequently, headlines such as "Grandmother Felt Bullied by Ikea Fundamental Dishonesty Allegation"[6], as a result of what is found to be inappropriate use of the new provisions, are not likely to be welcomed by commercial organisations who trade on reputation and brand, for example in that case the judge is reported as having commented that Ikea took "a stance of suspicion rather than sympathy".

Where the defendant concludes an allegation of fundamental dishonesty is appropriate it may be safest to ensure that this allegation is properly pleaded and evidenced.

When Does Fundamental Dishonesty Need to be Raised?

A feature of several county court decisions, dealing with fundamental dishonesty in the context of QOCS, is that it appears the defendants has been allowed to make an application informally at the end of the trial and often without having formally pleaded the allegation, for example Oana -v- O'Duinn (Northampton County Court, 2014).

However, the implication from the wording of Paragraph 12.4(a) of the Practice Direction to Part 44 is that the issue of fundamental dishonesty must be pleaded, as this provision states:

> "the court will normally direct that issues arising out of an allegation that the claim is fundamentally dishonest be determined at the trial".

This view reflects a range of decisions on the pleading of fraud (and given the term fundamental dishonesty is used to implement the recommendation in the Jackson Report relating to fraud the terms should perhaps be regarded as synonymous for these purposes).

In Belmont Finance Corporation –v- Williams Furniture Ltd [1979] Ch. 250, 268 Buckley L.J. said:

[6] Law Society Gazette 24 December 2015

> "An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognised rule of practice. This does not import that the word 'fraud' or the word 'dishonesty' must be necessarily used. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be so clear, and in such a case it is incumbent upon the pleader to make it clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegation of its dishonest nature will not have been pleaded with sufficient clarity."

In Armitage –v- Nurse [1998] Ch. 241 Millett L.J. having cited this passage continued:

> "In order to allege fraud it is not sufficient to sprinkle a pleading with words like "wilfully" and "recklessly" (but not "fraudulently" or "dishonestly"). This may still leave it in doubt whether the words are being used in a technical sense or merely to give colour by way of pejorative emphasis to the complaint."

In Paragon Finance plc –v- D B Thakerar & Co [1999] 1 All ER 400 Buckley LJ said on the question of pleading:

> "It is well established that fraud must be distinctly alleged and as distinctly proved, and that if the facts pleaded are consistent with innocence it is not open to the court to find fraud. An allegation that the defendant 'knew or ought to have known' is not a clear and unequivocal allegation of actual knowledge and will not support a finding of fraud even if the court is satisfied that there was actual knowledge. An allegation that the defendant had actual knowledge of the existence of a fraud perpetrated by others and failed to disclose the fact to the victim is consistent with an inadvertent failure to make disclosure and is not a charge of fraud. It will not support a finding of fraud even if the court is satisfied that the failure to disclose was deliberate and dishonest. Where it is expressly alleged that such failure was negligent and in breach of a contractual obligation of disclosure, but not that it was deliberate and dishonest, there is no room for treating it as an allegation of fraud."

More recently in NGM Sustainable Developments Ltd –v- Wallis [2015] EWHC 2089 (Ch) Peter Smith J held:

> "It is a fundamental tenet of the adversarial procedure in these courts that a case is put against the opposing party. It is only fair for a person against whom allegations are made to have that put to them while giving evidence in the box and to have an opportunity to deal with those in the box in front of the trial Judge."

In order to advance an issue in this way at trial it is necessary for that to be part of the pleaded case.

Despite these authorities, perhaps because of the potential consequences in pleading fraud which are dealt with later in this article, defendants are sometimes reticent and make what might be regarded merely as insinuations against the claimant. That is, presumably, to wait and see how the case develops at trial and then either argue dishonesty has been sufficiently canvassed in the pleadings to advance at trial or, if the case goes the other way, disclaim any intention to impugn the character of the claimant.

This approach, however, was expressly disapproved of by the Court of Appeal in Hussain -v- Amin [2012] EWCA Civ 1456. In that case the defence expressed "a number of significant concerns in relation to the parties and the claim intimated". Lord Dyson MR observed:

> "Although the terms of the pleaded defence are not relevant to the issues that have been raised in this appeal, I am bound to register my concern with the way in which what in substance is an allegation of fraud was pleaded."

Similarly, Davis LJ held:

> "I would, however, particularly wish to add my own comments about the pleaded defence of the second defendant. It was perfectly proper to join issue on the primary facts alleged in the Particulars of Claim and as to whether there had indeed been negligence and whether the claimed losses had been caused thereby. But the pleaded defence went much further in paragraphs 7 and 9, setting out a number of matters which, it was alleged, raised "significant concerns" as to whether or not this had been a staged accident requiring further investigation. Possibly, although I have my reservations, such a pleading could be justified as an initial holding defence. But it is a case pleaded on insinuation, not allegation. If the second defendant considered that it had sufficient material to justify a plea that the claim was based on a collision which was a sham or a fraud, it behoved it properly and in ample time before trial so to plead in clear and unequivocal terms and with proper particulars. Thereafter the burden of proof would of course have been on the second defendant to establish such a defence."
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> "In the event, as I see it, the claimant was faced with a hybrid, he in effect being required at trial to deal with an insinuation of fraud without any express allegation to that effect pleaded. Realistically, the trial judge dealt with the matter in the round, concluding that the claim was not fabricated or fraudulent and that the accident had not been staged. But this sort of pleading should not be sanctioned. It is in fact something of an irony that the second defendant seeks to criticise the conduct of the claimant's solicitors, when in part at least they were

> having to deal with an abusive defence. But ultimately it will be a matter for the costs judge to assess what is an amount reasonable to be paid by way of costs having regard to all the circumstances."

All of this is entirely consistent with the terms of Part 16 CPR, that a defendant must not only give reasons for any denial but assert any positive case, illustrated by way of example in Dill –v- Commissioner of Police for the Metropolis [2014] EWHC 2184. With the greater focus on compliance with court rules, from April 2013, it might be expected the courts will enforce, even more rigorously, the rules on pleadings.

Although section 57(1) 2015 Act talks in terms of an "application" by the defendant the principle of fairness, underpinning the caselaw confirming the need to plead fraud, would seem to be of all the more important where even a valid claim may be dismissed.

Moreover, as the provision requires the court to effectively assess the amount of damages that would have been awarded but for dismissal of the claim it seems unlikely such an "application" can be determined before trial yet once the trial has taken place, and judgment given, it is surely too late for matters to be re-opened by application and re-investigation of the issues.

On this analysis the "application" should usually be made at trial, based on evidence introduced within the scope of a pleaded case, that there has been fundamental dishonesty by the claimant. If, however, it became apparent at trial there had been fundamental dishonesty that is a matter the court can properly deal with in any event, as confirmed by Otkritie International Investment Management Ltd -v- Urumov [2013] EWCA Civ 1196.

Procedural Implications?

If the defendant pleads a case of fundamental dishonesty that is likely to have significant procedural implications.

Procedural points relating to the issue of fundamental dishonesty are best dealt with at the stage of allocation and initial case management, again endorsing the need for any issue of dishonesty to be pleaded in a proper and timely way.

Where dishonesty is alleged it is likely that the evidence will be more wide-ranging than might otherwise be necessary. Furthermore, any trial is likely to take more than a day and, accordingly, the claim to be allocated to the multi-track.

There is presently some debate about the costs implications of allocating to the multi-track a claim that started under either the RTA Protocol or EL/PL Protocol, specifically whether the court should set a budget, as will usually happen with a multi-track claim, or if the question of exceptionality, under Part 45.29J, can only be considered at the conclusion of the claim.

In Gentry -v- Miller [2016] EWCA Civ 141 the Court of Appeal made clear that simply because a party alleges dishonesty against the other party that will not, of

itself, dis-apply the application of sanctions or the need to secure relief from any sanctions by approaching the matter on the basis of the tests set out in Denton -v- T H White Ltd [2014] EWCA Civ 906.

How Will Fundamental Dishonesty be Proved?

Where there are allegations of dishonesty that is an assertion by the defendant which will need, as well as being pleaded, to be proved by evidence whether that be documentary, factual or expert.

Such evidence must be rooted in the pleaded case and may not be allowed if it exceeds the scope of the statements of case.

It is therefore crucial that if the issue of fundamental dishonesty is raised either in correspondence or within a pleading clear attempts are made to address how those will be dealt with in the procedural timetable for the case. In the absence of an early and considered approach to the issue the defendant may consider that guidance in recent cases does not discourage late or opportunistic requests for such findings at the conclusion of cases. In Rouse -v- Aviva (15th January 2016, Bradford County Court) HHJ Gosnell made it clear that in the absence of the rules providing clear guidance on the procedure to be adopted it was a matter for the court's discretion including whether in writing, whether a limited enquiry or whether a full trial. In the particular circumstances of the case he also found that a defendant may even after a notice of discontinuance ask a court to determine whether the case was fundamentally dishonest.

The defendant may wish to introduce documentary evidence from, for example, social media. Guidance on the approach to the admission of such evidence was given by Mr Andrew Edis QC (as he then was) in Locke -v- Stuart [2011] EWHC 399 (QB). Whilst claimants need to be aware that information on social media about a claim being pursued may be accessed by the defendant, representatives of defendants need to be very mindful about professional obligations and ensure access to information unavailable to the general public on social media is not gained through any conduct that might be regarded as having involved the provision of misleading information.

Medical records will often add little to the issue of alleged dishonesty. Inconsistencies between the history documented in the records and the claimant's case are a fact of life. As Jackson LJ observed in Bell -v- London Borough of Havering [2010] EWCA Civ 689:

> "Anyone who has dealt with personal injury litigation over the years not infrequently encounters inaccuracies in records of what the patient said, not necessarily because the nurse or doctor got it wrong. The patient may be in a state of confusion or the doctor may be working, or nurse may be working, under pressure, and one has to view with some caution less significant inconsistencies."

Furthermore, simply because there are no relevant entries does not infer, of itself, any dishonesty. Indeed, as Davis LJ observed in Hussain -v- Hussain [2012] EWCA Civ 1367:

> "If anything, indeed, if there really was a fraudulently staged collision in which the claimant was complicit, then one perhaps might have thought that he would be careful to say to his doctor that he had been hurt in a road traffic collision, in order to enhance his claims."

Surveillance evidence, which is often partly documentary and partly factual, may be introduced by the defendant, but should generally be disclosed by the due date under case management directions for disclosure and exchange of factual evidence respectively. The courts have recently been given encouragement to give express directions, as part of the case management timetable, for the disclosure of surveillance evidence, by Foskett J in Hayden -v- Maidstone & Tunbridge Wells NHS Trust [2016] EWHC 1121 (QB).

There are dangers for a defendant who fails to comply with case management directions for purely tactical reasons, see Dass –v- Dass [2013] EWHC 2520 (QB). Furthermore, where a defendant faces sanctions simply alleging fraud or dishonesty on the part of the claimant will not, of itself, absolve the defendant of the need to secure relief by meeting the test set out in Denton -v- T H White Ltd [2014] EWCA Civ 906, see Gentry -v- Miller [2016] EWCA Civ 141.

With expert evidence it is important that reports contain only admissible opinion. With medical experts, for example, that will mean evidence giving opinion on the consistency of complaints with clinical findings is admissible whilst conclusions about the honesty, or otherwise, of the claimant is, as that is a matter solely for determination by the court, inadmissible, see for example the comments of Jay J in Saunderson –v- Sonae Industria (UK) Ltd [2015] EWHC 2264 (QB).

What Has to be Proved?

Fundamental dishonesty only has to be proved on a balance of probability but, in practice, this may be no easier than the usual criminal standard of proof.

In Mullarkey -v- Broad [2007] EWHC 3400 (Ch) Lewison J adopted the test of Lord Nicholls in Re H and Others (Minors) [1996] AC 563 where he said:

> "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. … Built into the preponderance

> of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.
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> Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established."

The danger for the defendant in alleging dishonesty is that, whilst the civil standard of proof applies, the court, when deciding what is most probable, has to allow for the fact that more evidence is likely to be necessary to establish a serious, or unlikely, allegation. In Hussain -v- Hussain [2012] EWCA Civ 1367 the Court of Appeal held that the trial judge had been wrong to conclude an inference of fraud could properly be drawn on the evidence.

What are the Consequences of Alleging Fundamental Dishonesty?

The consequences of alleging fundamental dishonesty are potentially significant for the claimant, if these are substantiated, and for the defendant, if they are not proved.

Claimant

An unsuccessful claimant will lose QOCS protection and be at risk of having to pay the defendant's costs, under the terms of the CPR.

A successful claimant is at risk of having the claim, nevertheless, dismissed, under section 57 Criminal Justice and Courts Act 2015.

The claimant is, whether successful or unsuccessful, also at risk of proceedings for contempt of court and, possibly, criminal proceedings.

With an unsuccessful claimant there may, at least notionally, be a liability for costs incurred by the claimant's representative, on the basis the claimant will have breached the terms of any conditional fee agreement. It is unlikely, however, recovery of costs from the claimant will be possible.

If a claim is dismissed, on the basis of fundamental dishonesty, it is likely, even though but for this provision the claimant would have been the successful party, the court will regard the defendant as the successful party and hence, under Part 44 CPR, decline to order payment of costs by the defendant to the claimant. Once again any recovery of costs from the claimant, by the claimant's representative, in these circumstances, despite breach of the terms of the conditional fee agreement, is most unlikely.

Defendant

The defendant, at the very least, is likely to face adverse costs consequences if an allegation of fundamental dishonesty is not proved against a claimant who obtains judgment.

The claimant, as the successful party in these circumstances, is likely to obtain an order for costs applying the general discretion in Part 44. Furthermore, should a claimant be vindicated at trial by the court rejecting allegations of dishonesty then, even if the claimant fails to beat a Part 36 offer by the defendant, that is likely to be regarded as an outcome which is "more advantageous" on a broad analysis of the issues, see for example the approach taken in Smith –v- Trafford Housing Trust (Costs) [2012] EWHC 3320 (Ch).

Furthermore, any costs order in favour of the claimant may be assessed on the indemnity basis. Costs on the indemnity basis, for an unsubstantiated allegation of fraud, were said to be appropriate in Zurich Insurance Company Plc -v- Hayward [2011] EWCA Civ 641 and ordered in Liptrot –v- Charters [2005] J.P.I.L. C174. Once again no distinction should be drawn between fraud and dishonesty for these purposes as, in a case about equitable fraud, Warren J held in Halliwells LLP –v- Austin [2012] EWHC 3140 (Ch) that:

> "dishonesty, not fraud, but dishonesty in the sense of sharp practice" took the case out of the norm and justified the costs of the relevant hearing be paid on the indemnity basis.

Similarly, on the basis of the way the defence was conducted and the nature of the allegations made against the claimant, the defendant was ordered to pay costs on the indemnity basis in Clarke –v- Maltby [2010] EWHC 1856 (QB). Owen J held:

> "… the … counter-schedule called into question the genuineness of the symptoms described by the Claimant. The clear implication was that she was deliberately exaggerating her symptoms. Furthermore that was the basis upon which the prolonged cross-examination of the Claimant, and that of other witnesses was conducted. Whilst I accept that it was appropriate for the defendant to test the degree to which the Claimant was under a permanent disability as a consequence of the injuries sustained in the accident, the degree to which such disability adversely affected her capacity to function as a solicitor at partner level carrying out banking related work, and in particular to explore why she had reduced her working hours to three days a week, the manner in which the case was conducted went far beyond that. The allegation of deliberate exaggeration, an allegation that the claim was fraudulent, was not pleaded as it ought to have been if it was to be pursued."

In Williams –v- Jervis [2009] EWHC 1837 (QB) indemnity costs were ordered where the defendant's experts had not addressed their responsibilities or conducted themselves properly as expert witnesses, resulting in attacks on the claimant's integrity.

Furthermore, the courts are increasingly regarding a failure to engage in ADR, by a party subsequently regarded as having been the unsuccessful party, as conduct which justifies assessment of costs on the indemnity basis, see for example Reid -v- Buckinghamshire Healthcare NHS Trust [2015] EWHC B21 (Costs), Bristow -v- The Princess Alexandra Hospital NHS Trust [2015] EWHC B22 (Costs) and Garritt-Critchley -v- Ronnan [2014] EWHC 1774 (Ch).

If the claimant has made a Part 36 offer it is likely, on the basis the defendant will not have made any offers in a case where dishonesty is alleged, judgment will be "at least as advantageous" as the claimant's offer which will mean that the claimant recovers indemnity costs along with the other benefits provided for under Part 36.17 (4), even in a case otherwise subject to fixed costs under Section IIIA Part 45, as confirmed by the Court of Appeal in Broadhurst -v- Tan [2016] EWCA Civ 94.

Whatever the basis of assessment for costs a case involving allegations of dishonesty is likely to be allocated to the multi-track, because the trial will last for more than a day. That will increase costs and whilst there is, at the time of writing this article, a degree of uncertainty about whether or not allocation to the multi-track is, of itself, enough to take a case out of fixed costs that may be an academic point if the defendant refused to engage in ADR and/or if the claimant has made a Part 36 offer (for the reasons already noted).

There are also risks for a defendant who makes allegations of dishonesty but then settles the claim, because if the issue is live any settlement is likely to compromise even an allegation of fraud: Hayward –v- Zurich Insurance Company plc [2015] EWCA Civ 327 (though this point has yet to be argued in the Supreme Court).

Furthermore, if the allegations of dishonesty should never have been made there is a risk of professional sanctions being applied against the representatives of the party making that allegation.

Guidance from the Bar Council provides:

> In the case of Medcalf v Mardell, the House of Lords considered paragraph 704(c) of the Code of Conduct and a barrister's duties in considering whether or not to draft a document including an allegation of fraud.
>
> Paragraph 704(c) states that a barrister should not draft a document containing any allegation of fraud "unless he has clear instructions to make such an allegation and has before him reasonably credible material which as it stands establishes a prima facie case of fraud". In this case, the Court of Appeal had taken the view that a barrister in making such an allegation should have before him "evidence which can be put before the court to make good the allegation".
>
> The House of Lords rejected this interpretation. Lord Bingham of Cornhill, with whom the other law lords agreed, said that:

> "… the requirement is not that counsel should necessarily have before him evidence in admissible form but that he should have material of such a character as to lead responsible counsel to conclude that serious allegations should properly be based upon it".
>
> The Professional Standards Committee (PSC) takes the view that there is no litmus test for determining whether it is proper to allege fraud. As Lord Bingham made clear:"Counsel is bound to exercise an objective professional judgment whether it is in all circumstances proper to lend his name to the allegation". That decision will depend on the individual facts of each case.
>
> It should be noted that although paragraph 704 refers specifically to fraud, the same principle would apply to any other allegation of serious misconduct.

If solicitors draft a pleading it might be expected the SRA would adopt a similar approach.

Summary

The introduction of the concept of "fundamental dishonesty", both under the CPR and 2015 Act, does require claimant representatives to have practical and procedural issues in mind throughout any claim where such an allegation may be made. In summary:

- Claimants need to understand the serious consequences of dishonesty.
- Defendants should be expected to plead any allegation of dishonesty (remembering the need to do so on the basis of clear instructions and credible evidence).
- Claimants may wish to adopt a "zero tolerance" approach to insinuations of dishonesty in pleadings or evidence suggesting dishonesty when that issue has not been pleaded or not adequately pleaded.
- Where dishonesty is an issue in the case that will require, most likely, allocation to the multi-track with appropriate case management directions for the exchange of evidence. That may need to include a specific direction giving a date for disclosure of surveillance evidence whether that be the date for disclosure or witness statements.
- Evidence duly exchanged should be carefully scrutinised to establish whether the allegations are substantiated and also whether this is in the form of admissible evidence.

- The claimant must be ready, at trial, to argue the scope of "fundamental dishonesty" and whether, on the pleaded case and evidence, it is established in the particular case.

- The claimant should also be ready to advance any argument which may be appropriate as to "substantial injustice", given the terms of section 57(2) 2015 Act.

- Claimants should remember the importance of Part 36 offers, as the costs consequences may be particularly significant in the event that additional costs are incurred by the defendant raising allegations, which are not proved, of dishonesty.

- At trial, if successful, the claimant may wish to ask for indemnity costs under Part 44, though if judgment is at least as advantageous as any Part 36 offer made by the claimant there will be an entitlement to indemnity costs, as well as other benefits, under Part 36 (unless that would be unjust).

- A claimant who successfully resists allegations of dishonesty but fails to beat a Part 36 offer by the defendant may wish to argue the judgment obtained is "more advantageous" than the defendant's offer and/or that, in the circumstances, the usual costs consequences under Part 36.17 would be unjust.

Conclusion

Used in the right way these new provisions may well help to deter dishonest and unacceptable conduct, at least by claimants, in personal injury claims. That is to be welcomed. Defendants should not shrink from making the necessary allegations in appropriate cases.

If, however, those provisions are used, almost routinely, for tactical reasons there is a real risk that will diminish the confidence of the public in the administration of the law and the integrity of the legal process. Furthermore, that is likely to generate, rather than reduce, expenditure on costs in cases of this kind.

It is accordingly a matter of importance that practitioners, acting for both claimants and defendants, understand the practical and procedural issues arising from allegations of fundamental dishonesty.

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