FUNDAMENTAL DISHONESTY: REVIEW AND UPDATE
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Introduction

Practitioners dealing with personal injury and clinical negligence claims have become familiar with issues relating to fundamental dishonesty.

The term "fundamental dishonesty" was first used in Part 44.16 (1) of the CPR, as amended in 2013, by way of exception to the qualified one-way costs shifting ("QOCS") introduced for personal injury claimants, provided for by Part 44.13 (1).

The same term has since been used in section 57 Criminal Justice and Courts Act 2015 to provide, in effect, a form of statutory defence to personal injury claims. Under the Act if there is fundamental dishonesty on the part of the claimant that will be a complete defence to what may, apart from the dishonest element, be a valid claim (unless the court is "satisfied that the claimant would suffer substantial injustice if the claim were dismissed").

Since 2013 case law has developed and explained the proper approach to allegations of fundamental dishonesty whether in relation to costs, under Part 44 CPR, or on the substantive claim, under the 2015 Act.

This article aims to provide a review and update of where the law in this area has reached in October 2019 and, on the way, consider some practical issues.

Background

It is worth exploring the rationale for the introduction of fundamental dishonesty as a legal principle before going on to consider ways in which the concept has become important in personal injury litigation.

Rationale

Fundamental dishonesty was first introduced in 2013 on the premise that whilst personal injury claimants should generally benefit from QOCS (following the abolition of recoverable additional liabilities in turn introduced to safeguard the interests of claimants on the effective abolition of legal aid for personal injury claims) that would not be right where the claim was fundamentally dishonest.

The terms of the 2015 Act seek to replicate the long-established rule, in insurance law, of the "fraudulent device". This rule will defeat the claim of an insured against that insured's own insurer where the claim has a dishonest element. Section 57 of the 2015 Act effectively applies that rule to claims by a third party seeking damages for personal injury where "the claim has been fundamentally dishonest".

The policy which underpins the 2015 Act is to discourage what has been termed the "one-way bet", as explained in Versloot Dredging BV –v- HDI Gerling Industrie Versicheung AG [2016] UKSC 45. That is achieved by negating the premise that if there is dishonesty the claimant has little to lose, because if the lie is discovered the claimant would still recover any damages proved to be due.

In Zurich Insurance Plc –v- Romaine [2019] EWCA Civ 851 the Court of Appeal recognised the wider implications, for the legal system and society generally, of dishonesty by quoting from evidence given on behalf of the insurer in that case that "the normalisation of fraudulent behaviour is socially corrosive and erodes trust".

Critique

Whilst there is logic in Part 44 CPR referring just to fundamental dishonesty on the part of the claimant, as only the claimant has the benefit of QOCS, there seems less in the way of logic and fairness that the 2015 Act refers only to the effects of fundamental dishonesty by personal injury claimants. That is because there is an opposite, and perhaps equal, risk of the one-way bet from a dishonest defendant or dishonest defence.

A false allegation by a defendant, particularly a dishonest allegation by the defendant of dishonesty of the part of the claimant (or even the threat to make such an allegation), should surely also be seen as a one-way bet and something no less pernicious, so far as the proper administration of justice or upholding of the rule of law is concerned, than dishonesty by a claimant.

It is quite correct to identify the normalisation of fraudulent behaviour as "socially corrosive" but it is surely morally dubious, and in any event irrational, to suggest only conduct on the part of a claimant has such an effect.

What is Fundamental Dishonesty?

The term "fundamental dishonesty" can be analysed by asking, first, what will amount to "dishonesty" and, secondly, when any such dishonesty will be "fundamental".

Dishonesty?

The test for dishonesty, generally, was explained by the Supreme Court in Ivey -v- Genting Casinos UK Ltd [2017] UKSC 67 where Lord Hughes said:

> "62. … Successive cases at the highest level have decided that the test of dishonesty is objective… The test now clearly established was explained thus in *Barlow Clowes* by Lord Hoffmann, at pp 1479-1480…:
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> > "Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's

> mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards. The Court of Appeal held this to be a correct state of the law and their Lordships agree."
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> 63. … there can be no logical or principled basis for the meaning of dishonesty (as distinct from the standards of proof by which it must be established) to differ according to whether it arises in a civil action or a criminal prosecution. Dishonesty is a simple, if occasionally imprecise, English word. …
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> 75. … it is a fallacy to suggest that his finding that Mr Ivey was truthful when he said that he did not regard what he did as cheating amounted to a finding that his behaviour was honest. It was not. It was a finding that he was, in that respect, truthful. Truthfulness is indeed one characteristic of honesty, and untruthfulness is often a powerful indicator of dishonesty, but a dishonest person may sometimes be truthful about his dishonest opinions, as indeed was the defendant in Gilks. For the same reasons which show that Mr Ivey's conduct was, contrary to his own opinion, cheating, the better view would be, if the question arose, that his conduct was, contrary to his own opinion, also dishonest."

On this analysis mere errors in formulating the claim should not routinely be characterised as dishonesty. In Molodi -v- Cambridge Vibration Maintenance Service [2018] EWHC 1288 (QB) Martin Spencer J quoted the trial judge, HHJ Main QC, who had said:

> "I have hardly seen a Claim Notification Form in the last number of years where the detail of the accident as I found it on the evidence, often on objective evidence, is properly recorded in the Claims Notification Form. The process itself is often, because of its nature, littered with inaccuracy, partly because the forms are filled out by relatively lowly junior people in the office who are not qualified, partly because they do not take sufficient care over setting out the details and sometimes as they type it up they make mistakes. I see it in almost every case."

Whilst HHJ Main QC declined to make a finding of fundamental dishonesty against the claimant Martin Spencer J, allowing an appeal by the defendant, regarded the first instance approach as "too benevolent" and, taking other background factors into account, substituted a finding of fundamental dishonesty by the claimant leading to the claim being dismissed.

Recognising that what would appear to be inconsistencies may, in reality, simply reflect errors, difficulties with the written word or even unfamiliarity with the English language it is important not to let eloquence sanitise conduct which is less than candid, as that will subvert the rule of law.

For example, the phrase of being “economical with the truth” gained parlance following the “Spycatcher” trial in the Supreme Court of New South Wales when Robert Armstrong, then Cabinet Secretary, had the following exchange with counsel:

- Q: So that letter contains a lie, does it not?
- A: It contains a misleading impression in that respect.
- Q: Which you knew to be misleading at the time you made it?
- A: Of course.
- Q: So it contains a lie?
- A: It is a misleading impression, it does not contain a lie, I don't think.
- Q: What is the difference between a misleading impression and a lie?
- A: You are as good at English as I am.
- Q: I am just trying to understand.
- A: A lie is a straight untruth.
- Q: What is a misleading impression – a sort of bent untruth?
- A: As one person said, it is perhaps being economical with the truth.

Adding a further level of sophistication to such sophistry, during the course of evidence in the Matrix Church trial, Alan Clark spoke of being “economical with the *actualité*".

There is an irony that whilst a foreign language may be eloquently deployed as a convenient euphemism the use of English in perhaps a less articulate way from someone not used to the written word of whose first language is not English, may be characterised, on that basis, as likely to be dishonest.

Furthermore, if conduct is regarded as a mere peccadillo, because it can be eloquently and attractively explained by the educated and articulate, yet similar behaviour on the part of the less articulate is condemned as dishonest the law is at risk of a form of intellectual discrimination.

Fundamental?

Any dishonesty must be fundamental.

In Howlett -v- Davies [2017] EWCA Civ 1696 Newey LJ approved the analysis made by HHJ Moloney QC in Gosling –v- Hailo & Screwfix Direct (Cambridge County Court, 29 April 2014) who had said:

> “44. …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
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> 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."

In London Organising Committee of the Olympic and Paralympic Games -v- Sinfield [2018] EWHC 51 (QB) Julian Knowles J, after quoting from Howlett, said:

"57. There are a number of other decisions at the County Court level on CPR r 44.16(1). In *Meadows v La Tasca Restaurants*, Unreported, HHJ Hodge QC at Manchester County Court, said at para 18:

"18. It may perhaps be appropriate to draw an analogy with the court's approach to lies told by a party to litigation. If a lie is told merely to bolster an honest claim or defence, then that will not necessarily tell against the liar. But if the lie goes to the whole root of the claim or defence, then it may well indicate that the claim or defence (as the case may be) is itself fundamentally dishonest."

58. In *Rayner v Raymond Brown Group*, Unreported, HHJ Harris QC at Oxford County Court, the judge said at para 10 that he would direct himself:

"… that fundamental dishonesty within the meaning of CPR 44 means a substantial and material dishonesty going to the heart of the claim – either liability or quantum or both – rather than peripheral exaggerations or embroidery, and it will be a question of fact and degree in each case … Was there substantial material dishonesty which went to the heart of the quantum of this claim ?"

59. In *Menary v Darnton*, Unreported, HHJ Hughes QC at Portsmouth County Court, the judge said at paras 9 to 11:

"9. In terms of ordinary language, the word 'fundamental' was given its classic definition for forensic purposes by Lord Upjohn in the well-known *Suisse Atlantique* case [*Suisse Atlantique Société D'Armement Maritime SA v nv Rotterdamsche Kolen Centrale* [1967] 1 AC 361]. I quote so far as is necessary for present purposes (at p421-422):

'… there is no magic in the words "fundamental breach", this expression is no more than a

> convenient shorthand expression for saying that a particular breach or breaches of contract by one party is or are such as to go to the root of the contract which entitles the other party to treat such breach or breaches as a repudiation of the whole contract. Whether such breach or breaches do constitute a fundamental breach depends on the construction of the contract and on all the facts and circumstances of the case … A fundamental term of a contract is a stipulation which the parties have agreed either expressly or by necessary implication or which the general law regards as a condition which goes to the root of the contract so that *any* breach of that term may at once and without further reference to the facts and circumstances be regarded by the innocent party as a fundamental breach …

10. Although in that case Lord Upjohn was contrasting the meaning of the phrase 'fundamental breach' with that of 'fundamental term', the sense in which the word 'fundamental' is applied is broadly the same in each case, namely it is some characteristic that inevitably goes to the root of the matter. In the present appeal, that matter would not be fundamental in this sense. CPR 44.16(1) only requires the defendant to establish fundamental dishonesty on the balance of probabilities, the civil standard of proof. I think it unhelpful therefore to focus on the meaning of dishonesty as described in the criminal courts, such as in the case of *R v Ghosh* … or as defined by criminal statute, such as the Theft Act 1968.

11. The use of the word 'dishonesty' in the present context necessarily imports well understood and ordinary concepts of deceit, falsity and deception. In essence, it is the advancing of a claim without an honest and genuine belief in its truth. Although I would not presume to give a definition of a phrase that neither Lord Justice Jackson nor the Editorial Board of the Civil Procedure Rules thought appropriate to provide, for present purposes, fundamental dishonesty may be taken to be some deceit that goes to the root of the claim. The purpose of the phrase is twofold: first, to distinguish any dishonesty from the exaggerations, concealments and the like that accompany personal injury claims from time to time. Such exaggerations, concealment and so forth may be dishonest, but they cannot sensibly be said to be fundamentally

> dishonest; they do not go to the root of the claim. Second, the fundamental dishonesty is related to the claim not to the claimant. This must be deliberate on the part of those who drafted the Civil Procedure Rules. It is the claim the defendant has been obliged to meet, and if that claim has been tainted by fundamental dishonesty, then in fairness, and in justice and in accordance with the overriding objective, the defendant should be able to recover the costs incurred in meeting an action that was proved, on balance, to be fundamentally dishonest.""

On this basis Julian Knowles J concluded that:

> "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 claimant 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….
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> 63. 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 the defendant's liability in a significant way 'in the context of the particular facts and circumstances of the litigation' I mean (for example) that a dishonest claim for special damages of £9000 in a claim worth £10 000 in its entirety should be judged to significantly affect the defendant's interests, notwithstanding that the defendant may be a multi-billion pound insurer to whom £9000 is a trivial sum."

In Hayden -v- Maidstone & Tunbridge Wells NHS Trust [2016] EWHC 3276 (QB) Jay J commented on a claimant who complained of ongoing symptoms from an accident but had completed a health questionnaire, in connection a job application, which, whilst disclosing the injury, stated "no problems now" when he said:

> "62. Clearly, the Claimant was caught on the horns of a dilemma. These answers were not consistent with the case she was now advancing. She accepted the obvious lack of congruence and told me that she knew that she would not be employed if she told the truth. Her mitigation was that she did feel that her injury was getting better, and she was receiving reassurance from her doctors to that effect.
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> 63. In my judgment, it is impossible to assess this fragment of evidence in isolation, particularly if I were minded to hold that the employment questionnaire accurately recorded the true state of her functioning. In fact,

> I am completely satisfied that it did not. There is a plethora of evidence, certainly leading up to her operation (if not beyond), clearly indicating that the Claimant was not pain-free and that she was experiencing a functional deficit. She would not have submitted herself to major neck surgery if she knew that she did not need it. I find that the Claimant lied in order to put herself in a better position to secure a job that she really wanted.
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> 64. Logically, therefore, the health questionnaire throws little light on the Claimant's level of functioning in April 2008. It throws some light on it because I do not believe that she would have applied for a job the responsibilities and demands of which she knew that she could not fulfil. It is also capable of throwing light on her propensity to dissemble should the need arise, although I place the obvious marker down that there is a significant difference between lying to secure a job and lying to secure substantial damages in the High Court."

The distinction between dishonesty and fundamental dishonesty was also, in a different context, identified by Mann J giving judgment in Sir Cliff Richard –v- The British Broadcasting Corporation [2018] EWHC 1837 (Ch) when of the BBC reporter Dan Johnson he said:

> "21. … I do not believe that he is a fundamentally dishonest man, but he was capable of letting his enthusiasm get the better of him in pursuit of what he thought was a good story so that he could twist matters in a way that could be described as dishonest in order to pursue his story.

What might be regarded as a damaging analysis does not, perhaps on the basis it was inappropriate to apply the epithet "fundamental", seem to have resulted in any action by the BBC against Mr Johnson who continues to work as a reporter.

Raising Fundamental Dishonesty

A distinction needs to be drawn between raising issues of fundamental dishonesty for costs purposes, relating to QOCS, and alleging fundamental dishonesty for the purposes of Section 57.

Section 57

If the defendant alleges fundamental dishonesty for the purposes of Section 57 that is a substantive defence and, for the purposes of Part 16, either a reason for the defendant denying the claimant's entitlement to damages or, at least, a different version of events from that given by the claimant.

In these circumstances case law dealing with the pleading of allegations relating to fraud (and for these purposes that terms seems synonymous with fundamental dishonesty) are likely to be relevant.

In Three Rivers District Council -v- Bank of England [2001] UKHL 16 Lord Hope, at paragraph 55 of his judgment, said:

> "As the Earl of Halsbury LC said in Bullivant v Attorney General for Victoria [1901] AC 196, 202, where it is intended that there be an allegation that a fraud has been committed, you must allege it and you must prove it. We are concerned at this stage with what must be alleged. A party is not entitled to a finding of fraud if the pleader does not allege fraud directly and the facts on which he relies are equivocal. So too with dishonesty. If there is no specific allegation of dishonesty, it is not open to the court to make a finding to that effect if the facts pleaded are consistent with conduct which is not dishonest such as negligence. As Millett LJ said in Armitage v Nurse [1998] Ch 241, 256G , it is not necessary to use the word "fraud" or "dishonesty" if the facts which make the conduct fraudulent are pleaded. But this will not do if language used is equivocal: Belmont Finance Corporation Ltd v Williams Furniture Ltd [1979] Ch 250, 268 per Buckley LJ. In that case it was unclear from the pleadings whether dishonesty was being alleged. As the facts referred to might have inferred dishonesty but were consistent with innocence, it was not to be presumed that the defendant had been dishonest. Of course, the allegation of fraud, dishonesty or bad faith must be supported by particulars. The other party is entitled to notice of the particulars on which the allegation is based. If they are not capable of supporting the allegation, the allegation itself may be struck out. But it is not a proper ground for striking out the allegation that the particulars may be found, after trial, to amount not to fraud, dishonesty or bad faith but to negligence."

Despite this authority, and many other similar decisions, defendants can be reticent about alleging fraud and make only what might be regarded as insinuations against a claimant. This practice was expressly disapproved of by the Court of Appeal in Hussain -v- Amin [2012] EWCA Civ 1456. In that case where the defence expressed "a number of significant concerns in relation to the parties and the claim intimated".

Lord Dyson MR observed that:

> "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 that:

> "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."

Reviewing a number of authorities in this area Birss J observed in Property Alliance Group –v- Royal Bank of Scotland [2015] EWHC 3732 (Ch) at paragraph 40 of his judgment that:

> "These cases and guidelines are all based on the same rationale. Assertions of fraud and dishonesty are easy to make but difficult to prove and can cause a major increase in the cost, complexity and temperature of an action. The court's approach is not intended to stop soundly based allegations of fraud or dishonesty from being made. It is intended to make sure that improper and unfounded assertions are not permitted and to make sure that the party against whom the allegation is made knows what case they have to meet".

QOCS

A more liberal approach is likely to be taken by the court if the issue of fundamental dishonesty is going to arise only in relation to costs, partly because parties have not traditionally been expected to plead costs issues in advance of a hearing.

Nevertheless, the claimant must be put on notice of the defendant's intention, although it will not be necessary to expressly allege "dishonesty" or "fraud".

In Howlett -v- Davies [2017] EWCA Civ 1696 the Court of Appeal considered the extent to which a defendant had to put the claimant on notice that fundamental dishonesty would be an issue in relation costs.

Newey LJ observed that:

> "Statements of case are, of course, crucial to the identification of the issues between the parties and what falls to be decided by the Court. However, the mere fact that the opposing party has not alleged dishonesty in his pleadings will not necessarily bar a judge from finding a witness to have been lying: in fact, judges must regularly characterise witnesses as having been deliberately untruthful even where there has been no plea of fraud. On top of that, it seems to me that where an insurer in a case such as the present one, following the guidance given in Kearsley v Klarfeld, has denied a claim without putting forward a substantive case of fraud but setting out "the facts from which they would be inviting the judge to draw the inference that the plaintiff had not in fact suffered the injuries he asserted", 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 judgment not just that the claimant has not proved his case but that, having regard to matters pleaded in the defence, he has concluded (say) that the alleged accident did not happen or that the claimant was not present. The key question in such a case would be whether the claimant had been given adequate warning of, and a proper opportunity to deal with, the possibility of such a conclusion and the matters leading the judge to it rather than whether the insurer had positively alleged fraud in its defence."

Picking up this theme in ATB Sales Limited –v- Rich Energy Limited [2019] EWHC 1207 (IPEC) HHJ Melissa Clarke (sitting as a Judge of the High Court) observed:

> "26. It is trite law that the assessment of the credibility and reliability of evidence is peculiarly a matter for the court. Of course I accept Mr Wyand's submission that the Claimant is entitled to test the Defendants' evidence by cross-examination at trial. Until it is so tested, and considered in the light of other evidence before the court and the inherent probabilities, the court cannot know whether on the balance of probabilities it is true, mistaken, dishonest or concocted.
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> 27. As long as the facts upon which an inference of dishonesty may be based are pleaded, if evidence emerges at trial which the Claimant considers sufficient that the court might properly find dishonesty, even though it was not able to plead it before trial, it must be put to the relevant witness so that he may answer it. It is only then that a court may properly be invited to, and may make, an evidential finding that such a witness was indeed dishonest. This is part of the court's ordinary adjudicative function. In this case, the facts from which dishonesty may be inferred are clearly set out in the pleadings and arise from the cause of action….. It is for the court to sift and evaluate the evidence to determine the case. The court's hands will not be tied in the manner that the Defendants seek, by the fact that dishonesty has not been pleaded.

Consequences of Alleging Fundamental Dishonesty

Where fundamental dishonesty is alleged, that may have a number of consequences.

Allocation and Case Management

Allegations of dishonesty will not automatically make a case suitable for the multi-track but the reality is that where such allegations are made the evidence necessary to deal with the issues, as defined, will probably mean any trial taking more than one day, given that this allows for a hearing time of no more than 5 hours.

Howlett is a prime example of the time such a hearing is likely to take, the trial in that case extending over 4 days.

That is all because of the potential significance of dishonesty allegations as recognised by Briggs LJ giving judgment in Qader -v- Esure Services Limited [2016] EWCA Civ 1109 when he said:

> "… the consequences for a claimant of being found to have been party to the fraudulent contriving of a road traffic accident may well include the inability to obtain vehicle insurance in the future, criminal proceedings or punishment for contempt of court."

Briggs LJ also recognised that, in such circumstances, cases involving allegations of dishonesty, even if otherwise suitable for the fast track, would often need to be allocated to the multi-track.

Evidence

If the claimant's honesty is an issue that may have a bearing on the scope of the evidence required, particularly documentary and factual evidence.

It is important, however, claims are managed in a way that reflect the rule on similar fact evidence in civil proceedings. Guidance on what would be admissible as civil fact evidence was given by the House of Lords in O'Brien –v- Chief Constable of South Wales Police [2005] UKHL 26 the relevance of evidence under the similar fact rule will, in turn, determine the appropriate scope of disclosure, as explained by Moulder J in PJSC Tatneft –v- Bogloyubov [2018] EWHC 3249 (Comm).

Costs

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.

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) and MR -v- Commissioner of Police for the Metroopolis [2019] EWHC 1970 (QB).

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 PJSC Aeroflot - Russian Airlines -v- Leeds [2018] EWHC 1735 (Ch) Rose J adopted and approved the approach taken in Clutterbuck -v- HSBC plc [2015] EWHC 3233 (Ch) when, at paragraph 50 of her judgment, she said:

> "David Richards J stated that the general proposition in relation to cases in which allegations of fraud are made is that if they proceed to trial and if the case fails then in the ordinary course of events the claimants will be ordered to pay costs on an indemnity basis. The court of course retains a complete discretion in the matter and there may well be factors which indicate, notwithstanding the failure of the claim of fraud, that indemnity costs are not appropriate. The underlying rationale is that the seriousness of allegations of fraud are such that where they fail they should be marked with an order for indemnity costs because in effect the defendant has no choice

> but to come to court to defend his position. In circumstances where, instead of the matter proceeding to trial and failing, the claimant serves a notice of discontinuance, thereby abandoning the case in fraud, it is appropriate for the court to approach the question of costs in the same way."

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.

The Forensic Approach to Allegations of Fundamental Dishonesty

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. That is because the court needs to bear in mind the inherent improbability of dishonesty, in most circumstances, as Lord Nicholls recognised in re H and Others (Minors) [1996] A.C. 563 when he said:

> "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…"

In Meadows -v- La Tasca Restaurants Ltd (in the County Court at Manchester, 16 June 2016) the trial judge dismissed the claimant's claim on the basis that the claimant's evidence about the accident was not accepted. On this basis the judge acceded to an application by the defendant that the claim should be found to have been fundamentally dishonest. On appeal HHJ Hodge QC, after referring to both Rizan and re H and Others (Minors), noted:

> "District Judge Khan never expressly addressed the inherent probabilities in the claimant getting together with a long-standing friend, Mrs McGrath, to concoct a false account of an accident at a restaurant at the Trafford Centre in support of a claim for personal injuries limited to no more than £10,000. There was nothing to suggest that either the claimant or her witness were other than thoroughly honest individuals who had never engaged in this sort of behaviour before."

Accordingly, HHJ Hodge QC held that:

> "In my judgment, for the reasons that have been advanced by Mr Rana, I am satisfied that District Judge Khan went too far, on the basis of the evidence before him, in concluding, not simply that the accident had not taken place as alleged by the claimant and her witness, but that no accident had taken place at all, and that the claim was a fabrication on the part of the claimant and her supporting witness. In my judgment, the district judge was perfectly entitled to say that the evidence adduced by the claimant and her supporting witness was too weak to prove the claimant's case to an appropriate standard, and that the claim should therefore fail. District Judge

> Khan gave reasons for regarding the evidence before him as unreliable, and I would certainly not be justified in interfering with his conclusion that the claimant had not made out her case. But, in my judgment, and recognising that this does involve a challenge to the district judge's findings of fact, with which an appeal court should interfere only with considerable reluctance, in my judgment, District Judge Khan's conclusion that the claim was fundamentally dishonest falls well outside the ambit of reasonable judicial decision-making. In my judgment, for the reasons that Mr Rana has advanced, it was not appropriate for the district judge to find that the accident had not happened in the circumstances described. He should have limited his decision, as he did in his first extemporary judgment, to a decision simply that the claimant had not made out her case on the evidence before him. In my judgment, the inconsistencies and curiosities highlighted by the judge did not entitle him to go further and to find that the claim had been fabricated, and thus was "fundamentally dishonest".

In Rizan -v- Hayes [2016] EWCA Civ 481 the trial judge, without being asked to do so by the defendant, made a finding of dishonesty. In the Court of Appeal Tomlinson LJ observed:

> "32. In my opinion the judge was unwise to express a view on the question whether the claim was fraudulent, and doubly unwise to do so without giving reasons for his conclusion over and above those which he had already given for his dismissal of the claim. The judge would have been better advised to cleave to his initial, correct, view that, as the Claimants had failed to satisfy the burden of proof on them concerning the occurrence of the alleged accident, it was unnecessary to address the question of fraud. It is apparent that the judge would not have expressed a view on the point had he not anticipated that that is precisely what Mr Clarke was about to ask him to do, but he would in my view have been better advised simply to point out, as of course he did, that resolution of that question was unnecessary, and to have left it at that."

In Wright -v- Satellite Information Services Ltd [2018] EWHC 812 (QB) the trial judge had identified some inconsistencies in the claimant's case but concluded the claimant was not guilty of dishonesty, let alone fundamental dishonesty. The claimant had pleaded a claim for future care in excess of £73,000, whilst the judge allowed only £2,100 (to reflect the anticipated need for care following future surgery).

On appeal Yip J recorded that when she pressed counsel for the defendant to identify the dishonesty in relation to the care claim, counsel said the claimant's dishonesty was in "brandishing" the care report, language Yip J regarded as emotive and perhaps reflective of the general approach taken by the defendant to the claim.

Yip J went on to say:

> "The reason for the judge's rejection of this element of the claim was not that he found the Claimant's evidence to be untruthful, but rather that a

> proper interpretation of that evidence did not support the assessment of the care expert."

The difference between exaggeration, let alone dishonesty, and proper argument of the claim on quantum was also highlighted in Jallow -v- Ministry of Defence (SCCO, 24 April 2018) when Master Rowley said:

> "17. ... The claimant was "employed" by the defendant for a period of 14 months before he left. That is a very limited period on which to base a substantial loss of earnings claim. The situation in respect of being in the Army is further complicated by the various points (in this case 4 years, 7 years and 12 years) at which the claimant might have left the Army. As I indicated in respect of other decisions that I gave in this case, the claimant's claim in quantum was inevitably going to be based on a certain amount of conjecture. It is in fact for that reason that both sides relied upon employment expert's evidence. It seems to me that this is just the sort of case where a wide variety of potential sums might be achieved at an assessment of damages hearing, depending upon how the evidence pans out. Consequently, it was likely to be settled somewhere in the middle given the risks involved to both sides of adverse findings by the judge. That is what happened in this case.
>
> 18. In my judgment, the claimant did not exaggerate his claim. He put forward alternative cases as to quantum which demonstrates that he was alive to the issues surrounding the potential level of damages to be recovered. Therefore, the ultimate settlement of this claim did not falsify in any way the premise of Master Leslie's setting of a budget in a case where the sums in issue were £300,000. ..."

In Knibbs -v- Heart of England NHS Foundation Trust (Birmingham District Registry, 23 June 2017) District Judge Truman held:

> "79. The schedule is enthusiastic. It might well be categorised as overly enthusiastic, because I think it would undoubtedly not have succeeded in full at trial, but being over enthusiastic is not the same as behaving improperly. It was a schedule which had some basis in the medical and lay evidence. It was not a case where the claimant had deliberately exaggerated his injuries and thus the claims resulting."

In Smith -v- Ashwell Maintenance Ltd (in the County Court at Leicester, 23 January 2019) the defendant invited the court to dismiss the claimant's claim for fundamental dishonesty. Rejecting that argument HHJ Hampton referred to an extract from the journal "Clinical Medicine" published in November/December 2002, cited by one of the claimant's experts, which stated:

> "Outright faking of pain for financial gain is rare, but exaggeration is not, especially if the patient is involved in litigation. It is often difficult to

> determine whether this represents an attempt to convince or deceive the clinician."

HHJ Hampton went on to observe:

> "That observation succinctly sums up the court's own experience. I do not find in the present case that there has been outright faking of pain. I do however find that there is an element of exaggeration. It has been necessary to consider carefully whether the exaggeration represents an attempt to convince or deceive the medical witnesses and indeed the court. I note the Defendant's attitude until half way through the trial, as to liability in this case. The Claimant must have constantly felt, that from the earliest intimation of a claim, that the Defendant has shown a determination to avoid fully compensating him (see the letter to the Claimant's solicitors from a Claims Handler dated 27th September 2013, in which liability is denied). In the early stages the Defendant put as witnesses, individuals who were not even present at the time of the accident. Thus, I find, that the Claimant's exaggeration and overstatement of his difficulties, are the result of an attempt by him to convince, rather than to deceive. I find that to some extent, the Claimant genuinely believes himself to be more significantly disabled by his continuing pain than, objectively, is in fact the case."

HHJ Hampton also observed that:

> "Faking pain, as described by the learned authors referred to above, would almost undoubtedly amount to fundamental dishonesty. Exaggeration, with mixed motives of attempting to convince or deceive, is not."

Accordingly, there was no "fundamental dishonesty" for the purposes of Section 57 nor should the claim be dismissed in accordance with the principles in Summers, the claimant had not fabricated evidence to the extent of the claimant in London Organising Committee of the Olympic and Paralympic Games -v- Sinfield [2018] EWHC 51 (QB).

In any event HHJ Hampton observed:

> "Given that this Claimant has suffered a painful injury, and that I have accepted what the Claimant's medical witnesses have told me about that, that he has been required to resist the Defendant's vigorous attempts to avoid responsibility for an accident which it was accepted at the very last moment was entirely the fault of the Claimant's employer, I find that the Claimant would suffer substantial injustice if the claim were dismissed. I do not find that the Claimant has forfeited his right to have his claim determined."

In Friends Life Ltd -v- Miley [2019] EWCA Civ 261 the Court of Appeal dismissed an appeal by an insurer against a judgment for the claimant that the defendant pay benefits under a group income protection insurance policy.

The defendant, amongst other matters, complained about the claimant's failure to disclose information including attendance at a beer festival. Turner J, the trial judge, had said:

> "27. … In so far as the notion of a beer festival might, to the uninitiated, conjure up images of the participants cavorting in lederhosen whilst brandishing overflowing beer steins in scenes of infectious Bavarian gaiety, they must be dispelled. In reality, this was a rather understated affair in which patrons of the local public house were given the leisurely opportunity to sample a range of craft beers."

In the Court of Appeal, having quoted this passage, McCombe LJ observed:

> "It is somewhat ironic that FL should have been complaining about exaggeration."

The courts also recognise that an honest witness may give evidence that is completely mistaken. As Leggatt J observed in Gestmin SGPS S.A. –v- Credit Suisse (UK) Ltd [2013] EWCH 3560 (Comm):

> "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 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."

Leggatt J continued:

> "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.)"

The approach in Gestmin was applied by the court when dealing with allegations of fundamental dishonesty in Keane -v- Tollafield (in the County Court at Birmingham, 8 August 2018).

Professional Standards

If 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:
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> "… 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. In ATB Sales Limited –v- Rich Energy Limited [2019] EWHC 1207 (IPEC) HHJ Melissa Clarke (sitting as a Judge of the High Court) said:

> "24. Both solicitors and counsel have particular professional responsibilities when considering whether to plead or allege fraud or dishonesty. Their responsibilities under the SRA Code of Conduct and the Bar Code of Conduct respectively are not identical, but broadly speaking, both provide that it is an act of professional misconduct to make such allegations without specific

> instructions and without having material which on the face of it justifies those allegations. There are many cases where dishonesty is suspected but there is insufficient material for a party to plead it..."

Representatives need to remember the overriding duty to the Court and the interests of the administration of justice.

Committal

It is important all parties to litigation recognise that, above and beyond sanctions relating to the substantive claim and/or costs, false statements made in the course of proceedings may lead to committal proceedings.

The proper approach to applications for committal for contempt of court under Part 81 CPR was reviewed by the Court of Appeal in Zurich Insurance Plc –v- Romaine [2019] EWCA Civ 851.

Conclusion

Since fundamental dishonesty was first introduced into the CPR, as part of the 2013 version of the rules, related law and practice have adapted as this subject has become part of the legal landscape for those practising in personal injury litigation.

It is important for practitioners to recognise when allegations of fundamental dishonesty should be properly deployed, in order to root out dishonest claims, but, equally, when it is inappropriate to do so.