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Developing case law and tactics

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Case law

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- What guidance is offered by authority on the issue of fundamental dishonesty?
- In respect of both definition and practical application of the rule, the answer is very little!
- The leading case remains the decision in:

  Gosling v (1) Hailo (2) Screwfix Direct Ltd (2014) unreported: HHJ Maloney QC sitting at the County Court at Cambridge

Gosling v Hailo & Screwfix

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- C brought a claim against D1 & D2 for damages arising out of a ladder accident.
- C's claim included a SOL totalling £39K of which £17K was for future care
- D1 & D2 conducted surveillance on C
- On reviewing the surveillance the reporting doctors concluded that C was not being honest about his symptoms and problems

Gosling cntd.

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- C then served a revised SOL that was drastically reduced. The future care claim was abandoned.
- The matter settled with C accepting £5K damages from D1 + £27K costs and CRU of £18K was also paid by D1.
- C discontinued against D2.

Gosling cntd.

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- Ordinarily D2 would have been automatically entitled to costs pursuant to CPR 38.6. However, that order could not be enforced because of the QOCS regime.
- D2 therefore applied to permit enforcement pursuant to CPR 44.16

Gosling cntd.

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- The Judge focussed on the issue of dishonesty on the part of the claimant in respect of the quantum claim.
- He described the surveillance footage as 'frankly devastating'.
- The claimant had alleged that he relied on a crutch to mobilise; the surveillance evidence showed this not to be the case.
- The claimant was caught on camera for several hours walking without a crutch before attending a medico-legal expert on the same day where he reported that he needed a crutch all the time and occasionally a wheelchair.

Gosling cntd

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- C sought to argue that even if there was exaggeration on the claimant's part this would not make the claim fundamentally dishonest as a matter of law.
- The Judge held that a claimant should not be exposed to costs if he had been dishonest as to some collateral matter or perhaps as to some minor self contained head of damage.
- However, if the dishonesty went to the root of the whole of the claim or a substantial part of it then it would be a fundamentally dishonest claim: a claim which depended as to a substantial or important part of itself upon dishonesty.

Gosling cntd.

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- The claimant's case on ongoing pain and lack of function in the knee was relevant to both the claim for general damages and the future care claim. Thus to around half of the claim in terms of value.
- Dishonesty crucial to such a large part of the claim would be sufficient to enable the claim to be characterised as fundamentally dishonest.
- The Judge did not think an argument could be seriously maintained that the law would require dishonesty to go to the root either of liability as a whole or damages in their entirety for a case to be characterised as FD.

Gosling cntd.

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- The Judge also found that it was not necessary for him to have a full oral hearing on the issue of FD as to do so would be disproportionate and unnecessary in light of the 'bulletproof contrast' between the claimant's conduct captured on the surveillance and the statements made to the doctor the same afternoon.
- NB Each case likely to turn on its own facts on this point (see paragraph 52 of the judgment)

Gosling cntd

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- The final conclusions were:
  - It was just and proper to determine the issue without the need for live evidence;
  - The surveillance evidence establishes on the bofp (as the rules provide) that the claimant was deliberately dishonest by gravely exaggerating his symptoms;
  - The effect of his dishonesty was fundamental to a substantial part (both in size and importance) of his claim.

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- *Zurich Insurance Plc v Philip Bain*

  HHJ Freedman sitting at Newcastle upon Tyne County Court 4th June 2015 (unreported but available on Lawtel)

- This case concerned an appeal arising out of the District Judge's decision at 1st instance not to exercise his CPR 44.16 powers

Zurich Insurance cntd.

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- The judge at first instance had found that the claimant had not suffered any injuries as a result of a road traffic accident.
- The circumstances of the accident were that the claimant had been driving his car in a car park when the third party had emerged from a parking space and reversed into the claimant's car at low speed.
- Liability was admitted and the claimant's vehicle repairs paid for.
- The third party insurer then, via a telephone conversation with the claimant, asked him if he had suffered injury. He said not and gave the insurer permission to close the file.

Zurich Insurance cntd.

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- C then received cold calls from claims management companies and eventually instructed solicitors Clinch & Co to pursue a claim for PI.
- A medical report was obtained 11 months post-accident. Moderate low back pain for 8 weeks was diagnosed. No mention of previous back pain was made.
- A defence was pleaded relying on the content of the phone call and also saying that the accident was not capable of causing occupant displacement/injury.
- Under x-x it was revealed that C has consulted his GP about LBP roughly 3 months pre-accident
- The DJ found that C had not suffered injury in the accident, that he had been untruthful to the reporting medic and produced a witness statement that contained untruths.

Zurich Insurance cntd.

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- In light of those findings Zurich asked the appeal court to look again at the DJ's refusal to apply CPR 44.16
- The Judge reminded himself that he could only interfere if the decision was wrong or exceeded the generous ambit of discretion afforded to a District Judge.
- The Judge asked himself, what does FD mean?
- He thought it was something more than simply exaggeration or embellishment (see paragraph 11 of the judgment).
- FD does arise when it goes to the core of the claim.
- In this case the claim would never have been started but for C's false assertion that he had suffered injury. Dishonesty therefore goes far beyond mere exaggeration and provides the sole basis for the claim.

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- When considering FD the Court is entitled to consider not only the effect of the dishonesty but the degree of the dishonesty.
- In this case there was a very serious level of dishonesty as both untruths were told and information withheld.
- The decision of the DJ was therefore overturned and CPR rule 44.16 applied.

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- A third case decided by a Circuit Judge was:
  - *Leonel Zimi v London Central Bus Company Limited*

    HHJ Madge sitting in the County Court at Central London 8th January 2015 (unreported but available on Lawtel)

Zimi cntd

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- C brought a claim alleging that his vehicle had been struck by D's vehicle. C alleged that he was stationary when the bus encroached into his lane and collided with the rear passenger side of C's vehicle.
- A medical report compiled around 5 months post-accident diagnosed pain and stiffness in the neck radiating to the shoulder. C told the reporting medic that there had been moderate damage to his vehicle.
- C made a modest claim for special damages in the sum of £127.

Zimi cntd.

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- D's defence denied that there was a collision.
- D relied on CCTV which it said showed that they did not stray out of their lane or collide with C's vehicle.
- The defence also noted C's involvement in several previous accidents in 2010 and 2011.

Zimi cntd

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- C alleged that it was the rear driver's side of the bus that had impacted with the rear passenger side of his vehicle as the bus attempted to negotiate a right hand bend in the road.
- C described the impact as heavy
- C denied the existence of damage on his vehicle prior to the accident
- Under x-x C accepted that he did not see the bus move into his lane.
- He was not able to identify on the CCTV the point at which he said his car was pushed forward.

Zimi cntd

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- D's driver's evidence was that the vehicles were waiting to pass across a junction.
- Because of the angle of C's car D's driver thought he was going to turn right, whilst D also intended to turn right.
- Both vehicles had to stop before entering a box junction. D noted in his mirror that C's car was very close to his bus so he opened the cab window and asked C to move his car.
- C then accused D of hitting his car. D denied this and formed the initial impression that C accepted this. However, at the next stop C pulled up behind him and again accused D of hitting his car.
- D noted no damage to the bus and no evidence of paint exchange onto C's car.
- The contact point alleged by C was not consistent with where D had seen the vehicles to be close together.

Zimi cntd.

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- Having viewed the CCTV the Judge was of the view that it did not show any collision and, if there was a collision, this occurred when the bus was stationary (i.e. was C's fault).
- When assessing credibility the Judge preferred D to C 'at all times'.
- The claim was dismissed and D applied for costs pursuant to 44.16

Zimi cntd.

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- In considering this the Judge noted that there was no binding authority on the point, albeit that he was referred to *Gosling*, which he found to be 'persuasive'.
- 'Fundamental' was considered to be something going to the core of the claim, something of central importance and which is crucial.

Zimi cntd

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- The Judge found that C could not have had an honest belief that there was a collision of the kind claimed. The Judge was therefore satisfied that the claim was fundamentally dishonest.
- He considered that it was still necessary for him to consider whether it was just to exercise his 44.16 discretion.
- The Judge was satisfied that, taking into account the OO, it was appropriate to exercise the discretion in this case.

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- Some decisions by District Judges on the point (available on Lawtel) include:
  - *Creech v Apple Security Group & 2 others* (25th March 2015 DJ Rogers);
  - *Mahen v Harries* (10th April 2015 DJ Brown);
  - *Nama v Elite Courier Company Limited* (5th March 2015 DDJ Lindwood)

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- *Creech*
  - C was substantially disbelieved at trial in respect of his factual evidence.
  - The accident could not have and did not occur in anything like the circumstances suggested by C.
  - The case advanced by C must, to his knowledge, have been incorrect.
  - The advancing of a case so plainly against the weight of the evidence in the circumstances outlined can only be described as FD.
  - CPR 44.16 applied.

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- *Mahen*
  - The District Judge intervened part way through trial at the conclusion of C's evidence. He made it clear that C's evidence was *'contradictory an incredible at every level'.*
  - *'There simply was not a scintilla of truth about anything he said'.*
  - C discontinued, but the DJ had otherwise intended to strike out the claim.
  - FD found.
  - *'Nothing could go further to the root of the justice in this country that claimants should not be allowed to pursue claims that are dishonest.'*

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- *Nama*
  - C's evidence about a road traffic accident on a roundabout found in general to be inconsistent and unreliable;
  - On balance, C was found to have caused the accident, not D.
  - The issue of FD was raised principally in respect of C's witness evidence.
  - C presented a witness who she said was a passer-by whom she did not know prior to the accident. In fact was found to have been her passenger at the time of the accident, a 'Facebook' friend of C since 2011 and possibly also a work colleague.

Nama cntd.

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- The evidence of this witness was found to have been deliberately manufactured.
- C was clearly dishonest as to the fact of the passenger – she gave evidence that there was no passenger when clearly there was.
- The claim was also 'hopeless from the start'.
- On their own the inconsistencies in her case would not have been sufficient to satisfy the FD test, but the (fabricated) evidence of the passenger was FD and 44.16 would apply.

Case law

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Cases concerning the pre-QOCS/s.57 regimes:

- *Summers v Fairclough Homes Ltd* [2012] UKSC 26
- *Alpha Rocks Solicitors v Benjamin Alade* [2015] EWCA Civ 2015

Case Law

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- *Summers v Fairclough Homes Ltd* [2012] UKSC 26
  - It confirms that courts have jurisdiction to strike out a case pursuant to CPR 3 & as part of inherent jurisdiction as an abuse of process.
  - Fraudulent exaggeration is an abuse of process.
  - The power to strike out after a trial was only to be used in exceptional circumstances (c.f. s.57 which says that if FD is found the courts must dismiss the whole claim unless there is substantial injustice caused)

Pre QOCS/S.57 case law

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- *Alpha Rocks Solicitors v Benjamin Alade* [2015] EWCA Civ 2015
- The appellant solicitors appealed against a decision striking out claims for unpaid fees against the respondent client.
- The client alleged that two of the solicitor's bills had been fraudulently exaggerated or misstated and applied to strike out the whole claim for unpaid fees.
- The Judge, after considering written evidence, held that the solicitors were guilty of abuse of process in bringing claims for deliberately exaggerated fees and in reliance on fabricated documents. He held that the abuse created a serious risk that a fair trial would be impossible and struck out the claimant in respect of those two bills.

Alpha Rocks cntd.

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- Held on appeal: In the early stages of a claim the court should exercise caution in striking out the whole claim on the grounds that part had been properly or fraudulently exaggerated.
- That was because of the draconian effect of doing so and the risk that, at trial, events might appear less clear cut that they did at an interlocutory stage.
- The emphasis should be on the availability of a fair trial.
- In the instant case the judge had conducted an inappropriate mini-trial without hearing any witnesses. There had been a direct conflict of evidence which the judge could not properly resolve without oral evidence.
- He had not considered whether it was proportionate to strike out the whole claim on the basis of alleged exaggeration and inaccurate claims amounting to a small percentage of the bills. Appeal allowed.