Fundamental dishonesty – application in brain injury cases

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The aim of this session is modest in scope. It is expected that everyone litigating personal injury claims is well aware of the importance of fundamental dishonesty, and everyone probably has a handle on the approach of the courts to some extent[1]. That said, it is a relatively new concept. The objective here is to:- (i) go through the more recent cases which might have escaped attention (2016 only, to draw a somewhat arbitrary line given the limits of time); and (ii) provoke some thought about how fundamental dishonesty issues might arise in brain injury litigation in particular.

Basics:- The uses of a finding of fundamental dishonesty

1. As an exception to QOCS, CPR 44.16(1):- "*Orders for costs made against the claimant may be enforced to the full extent of such orders with the permission of the court where the claim is found on the balance of probabilities to be fundamentally dishonest.*"

2. Criminal Justice and Courts Act 2015, s.57:-

   57. ***Personal injury claims: cases of fundamental dishonesty***

[1] Anyone who needs a recap on the basics should start with Gosling v. (1) Hailo; and (2) Screwfix unreported, Judge Moloney QC, Cambridge County Court, 29/4/14 which remains the starting point for considering the meaning of fundamental dishonesty. Fundamental dishonesty was said to be dishonesty going to the root of the whole or a substantial part of the claim, "*a claim which depended as to a substantial or important part of itself upon dishonesty.*"

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

(a) the court finds that the claimant is entitled to damages in respect of the claim, but

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

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

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

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

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

(6) If a claim is dismissed under this section, subsection (7) applies to—

(a) any subsequent criminal proceedings against the claimant in respect of the fundamental dishonesty mentioned in subsection (1)(b), and

(b) any subsequent proceedings for contempt of court against the claimant in respect of that dishonesty.

(7) If the court in those proceedings finds the claimant guilty of an offence or of contempt of court, it must have regard to the dismissal of the primary claim under this section when sentencing the claimant or otherwise disposing of the proceedings.

(8) In this section—

- *"claim" includes a counter-claim and, accordingly, "claimant" includes a counter-claimant and "defendant" includes a defendant to a counter-claim;*
- *"personal injury" includes any disease and any other impairment of a person's physical or mental condition;*
- *"related claim" means a claim for damages in respect of personal injury which is made—*
  - *(a) in connection with the same incident or series of incidents in connection with which the primary claim is made, and*
  - *(b) by a person other than the person who made the primary claim.*

(9) This section does not apply to proceedings started by the issue of a claim form before the day on which this section comes into force [13/4/15].

What the court has been saying/doing

3. **Rayner v. Raymond Brown Group** unreported, HHJ Harris QC, Oxford County Court, 3/8/16 (on appeal from DJ Payne). The claimant sisters alleged that D's lorry hit their car. D produced records showing the lorry was nowhere near at the time of the alleged accident. Counsel for Cs applied to discontinue and Cs left court before giving evidence. The judge found that they were fundamentally dishonest not in relation to the accident itself, but in relation to the severity of injury. They had exaggerated. They appealed complaining that no such finding should have been made without their attendance and a further hearing should have been listed to hear their evidence. They lost the appeal.

"*Fundamental dishonesty within the meaning of CPR44 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 in fact and degree in each case.*" (Para 10).

4. **Meadows v. La Tasca Restaurants** unreported, HHJ Hodge QC, Manchester County Court, 16/6/16 (on appeal from DJ Khan). C alleged that she had slipped in D's restaurant. The DJ rejected her claim, finding her (and her witness's) evidence to be riddled with inconsistencies. He found that the claim was fundamentally dishonest on balance of probabilities and allowed D to enforce a costs order in its favour. The FD finding was overturned on appeal. The DJ had fallen into error because whilst C's evidence was too weak to make out her claim (about how the accident happened), a finding that there was no accident and that the claim was a fabrication was not open to him on the evidence. Gosling v. Hailo & Screwfix was approved (again).

   Note that at first instance C complained that fundamental dishonesty had not been pleaded. The DJ determined that it did not need to be. There was no appeal against that finding, and whilst C continued to complain about the lack of pleading on appeal, it was not part of the judge's reasoning in allowing the appeal.

5. **Nesham v. Sunrich Clothing** unreported, HHJ Freedman, Newcastle County Court, 22/4/16. In this case the DJ (Charnock-Neal) did not make the same mistake as in Meadows. She preferred D's version of events in relation to a road traffic accident (that C pulled into D's path so as to cause an accident rather than that D rear-ended C when they were both established on the same road). She rejected an application to allow enforcement of a costs order on the basis of fundamental dishonesty because she had merely rejected C's account. Indeed the fact that such application was made at all (never mind appealed) seems bizarre to me given that the DJ had found (in her judgment on liability, before rejecting C's evidence) that C was trying to assist the court.

6. **James v. Diamanttek** unreported, HHJ Gregory, Coventry County Court, 8/2/16 (on appeal from DDJ Kilbane). C brought a claim for noise induced hearing loss against his employer. His initially advanced case was wrong in relation to the provision of hearing protection (he claimed not to have had

it when he did). The judge cited with approval Zimi v. London Central Bus Company unreported, DJ Madge, Central London County Court, 8/1/15 (which, with Gosling is one of the earlier significant decisions on FD). Paragraph 8 of Judge Gregory's decision is well crafted:-

> "*The decision to which the District Judge came on the facts was that the claim should fail. That of itself is plainly not sufficient for a court to be able to conclude that the claim was fundamentally dishonest. That phrase begs the question of why the claim failed, that is to say why the claimant was unable to establish the fundamental fact of exposure to injurious levels of noise upon which his claim depended. There may be a variety of reasons. It may be that the claimant's memory was regarded as poorer than that of other witnesses, that he had made a mistake in the assertions that he put forward that he was confused or even possibly naive, a word used by His Honour Judge Madge. The District Judge did not come to any of those conclusions in relation to the nature of the evidence given to her by the claimant. As a consequence of inconsistencies and contradictions within his evidence, she concluded that he was not telling the truth. Laypeople may sometimes refer to somebody not telling the truth when they simply mean that somebody is wrong. No judge should ever use this phrase unless they mean that somebody has lied. It is plain that that is the conclusion to which the District Judge came.*"

Accordingly it was held that the DJ was wrong to say that fundamental dishonesty was not made out. She fell into the error of thinking that he had to be a "dishonest person" (my emphasis) and "*the fact that I found that he did not tell the truth on the day does not, I think, mean that I must find that he was dishonest.*"

7. Note from the above that there are certain key phrases to be on the look-out for in judgments: "lied" and "was not telling the truth" are obvious. Also watch for the decision that one party or another must be lying

(rather than one of them being mistaken). If such a finding is made then the party whose evidence is not preferred has been found to be a liar.

8. **Hanif v. Patel**, unreported, HHJ Main QC, Manchester County Court, 11/5/16. The parties were involved in a road traffic accident in which liability was apportioned on a 25:75 basis. The claim was, however, struck out, apparently on the basis of D's oral application made at the conclusion of trial. There were two elements of what appear *might have been* considered fundamental dishonesty:-

   (i) C alleged that D (effectively) left the scene. D alleged the opposite and that C and others had later found him and invited him to submit a claim himself and assist in submitting fraudulent claims for phantom passengers. He declined. The judge accepted D's account on this (that he had been invited to be involved in fraudulent claims).

   (ii) The judge also found that a witness questionnaire relied upon by C was an attempt to mislead (that witness not in fact being present).

   It was the (found to be false) witness questionnaire which was specified as the reason behind the strike out. The judge did not, however, expressly strike out on the basis of s.57 in the judgment. He referred instead to "public policy". Whilst the judgment does not make it clear, other commentary says that the judge determined what damages C would have recovered but for the strike out and set that off against D's costs (i.e. he applied s.57).

9. **Rouse v. Aviva** unreported, HHJ Gosnell, Bradford County Court, 15/1/16. C discontinued a few days before trial. D applied for a finding of fundamental dishonesty and to enforce a costs order against C. This decision is primarily about the *procedure* for determining the FD issue in such circumstances.

10. **Ravenscroft v. Ikea** unreported, DJ Stonier, Manchester County Court has garnered some publicity this year (albeit that a record of the judgment

is not easy to find). C was injured by a falling wardrobe in Ikea. D (it seems) accused her of fraudulent exaggeration and fundamental dishonesty. She won. The national press ran the story and quoted her criticising Ikea for their allegations of lies.

11. Were this a longer talk/ paper, we could spend some time considering what Sir Rupert Jackson recommended (a "fraud" exception to QOCS) and what the CJC recommended (including that that there must be fraud pleaded by D and that anything short of fraud (including exaggeration) would not do). Time does not permit such exploration, but as a matter of generality, courts are not requiring the same of fundamental dishonesty as they would of fraud. They are not requiring FD to be pleaded (rather applications at the end of a trial are, in the author's experience, relatively common), and they are not requiring the same standard of proof (or quality of evidence) as would be required for a finding of fraud.

12. Commentary on the link between fundamental dishonesty and fraud appears to be somewhat polarised at the moment. Some assert that they are basically the same thing (and cite the historical development as above to support the proposition that a FD finding should not be made unless expressly pleaded and fraud is made out). Others note that despite the historical development neither QOCS nor s.57 refers to "fraud", and fundamental dishonesty must mean something different. Similarly neither the CPR nor the Act require FD to be pleaded. In considering fundamental dishonesty I consider it necessary to be cautious of conflating FD with fraud (as is done in some commentary on Da Costa & Anor v. Sargaco & Anor [2016] EWCA Civ 764 which makes the (obviously right) point that "*a finding of fraud does not inevitably follow from a rejection of an accident claim as not proved*" (para 35)).

What of fundamental dishonesty in brain injury cases?

13. There is dovetailing here with the next talk to be given in relation to capacity. Suppose that the court is dealing with a dishonest brain injured claimant. That individual might:-

(1) Plainly lack capacity/ insight in which case it is difficult to see a court making a finding of fundamental dishonesty

(2) Plainly have capacity/ insight in which case the brain injured claimant is at the same risk as any claimant.

(3) Be somewhere in between those two extremes.

14. It is the third category which is of interest for present purposes. Does capacity for the purposes of litigation mean that the individual can be fundamentally dishonest? Does lack of capacity (for the purposes of litigation) mean that the individual cannot be fundamentally dishonest? My view is that this raises similar issues to those which arise in relation to capacity generally. A claimant might have capacity to do x but not y.

15. Because of the potential capacity issue, defendants need to think harder than usual about whether or not to plead fundamental dishonesty. There are different views in circulation as to whether or not it is necessary to plead FD (or simply raise it at the end of trial which is common). A particular problem with a case where the question of FD might turn on a capacity issue is that if the issue is not pleaded, the experts dealing with capacity will not have addressed it. I can imagine a court being reluctant to allow the obtaining of further expert evidence in such circumstances, so it seems to me that the wise defendant would plead the issue in plenty of time.

16. That in itself creates a tactical problem. Suppose that the defendant does raise FD early on so that it can be explored properly in evidence. That will raise the temperature of the litigation and there are circumstances in which a judge might end up being more generous to the claimant having rejected an allegation of FD than (s)he would have been had the allegation never been made in the first place. Allegations of FD should not

be made lightly. If they are made, care should be taken about pursuing them to trial.

17. Many (all?) firms now have standard guidance which they give to claimants relating to QOCS, s.57 and fundamental dishonesty. There appears to be variability as to whether or not that guidance includes (as I think it should) a warning that if an adverse costs order is made on the basis of a finding of fundamental dishonesty, the legal expenses insurer will probably refuse to indemnify and the claimant will find his/her assets at risk[2].

A MISCELLANY OF OTHER THINGS

18. By way of short points of information (in case any of this has passed you by), you might want to note:-

    (1) The route of appeal from a decision of a County Court judge (including a final decision) is now to a High Court judge (no longer to the Court of Appeal, unless the County Court judge's decision was itself made on appeal).

    (2) Courts are now starting to deal with detailed assessments of costs in which the final bill has to mirror the phases in the budget. Accordingly budgets are now being considered properly at detailed assessment (whereas previously the budget was often ignored or treated as of limited relevance/ help on assessment).

    (3) In Merrix -v-Heart of England NHS Foundation Trust unreported, DJ Lumb (Regional Costs Judge), Birmingham QBD, 13/10/16, the DJ determined (to my mind unsurprisingly) that a judge on detailed assessment is not fettered by a budget (save that good reasons must be shown to exceed budgeted figures). The judge rejected the suggestions that the budget was either a "cap" or an

[2] From the defendant, but also perhaps from his own solicitor. It is not inconceivable that a claimant's solicitor would pursue him/her for costs on the basis that the claimant was in breach of CFA terms.

"available fund". The rumour is that this has been appealed and that the appeal will be expedited (we'll see).

(4) Costs budgeting continues to be unpopular with almost everyone, including (perhaps in particular) the judges who have to do it. Despite repeated pleas from higher courts for proportionality (a) parties (particularly claimants) are budgeting very high figures; (b) judges are making cuts at the budget stage, but not to levels which could be described as proportionate in the BNM/ Brian May sense (see below); and (c) parties (particularly claimants) therefore seem to me to be killing the goose that lays the golden egg. Budgets seem to me, to date at least, to have driven costs *higher* if anything. Carry on like this and we risk having fixed costs imposed on us.

(5) Brian May is a legend. The decision of Master Rowley in Brian May & Anita May v. Wavell Group and Dr Bizarri unreported, SCCO, 16/6/16, takes some of the shine off. In a private nuisance claim the claimants accepted a first offer of £25,000 to settle. Their costs bill was £208,236. On assessment, the **reasonable** costs were £99,656. The **allowed** costs (on the basis of proportionality were [£][3]. See too BNM v. MGN [2016] EWHC B13 (Costs).

(6) Part 36 continues to grow in importance. A potentially helpful case which might have passed you by is Jockey Club Racecourse v. Willmott Dixon Construction [2016] EWHC 167. An offer to settle for 95% was a genuine Part 36 offer (the discount was "modest" but not "derisory").

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[3] Blank left for guesses: the closest I could get to entertainment with this talk