The rules and background to fundamental dishonesty

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What is fundamental dishonesty?

Simply, dishonesty that is fundamental! It is not defined in any statute, explanatory notes, the CPR or any practice direction.

Why does it matter?

1. A finding of fundamental dishonesty is one of the reasons that QOCS protection is lost.

2. Such a finding means the whole claim will be dismissed under Section 57 Criminal Justice and Courts Act 2015.

IT is no coincidence that the QOCS rules and s.57 use the same wording – they are intended to interplay.

The Background: Personal Injury Reform

Recent years have seen the introduction of a host of measures intended to curb the cost of personal injury claims. Fixed costs, the abolition of referral fees, the inability to recover ATE premiums or success fees from losing defendants, QOCS, costs budgeting, the increase in court fees, and now section 57. There is more to come: the small claims limit is set to increase to £5,000. And when will we see fixed costs in multi-track cases, computerised courts, nil-compensation for minor whiplash injuries and so on?

1. QOCS:

Applies to any personal injury case and is fully retrospective, except:

> ***"44.17***
> *This Section does not apply to proceedings where the claimant has entered into a pre-commencement funding arrangement (as defined in rule 48.2)"*

(i.e a pre-April 2013 CFA allowing for an uplift and a recoverable ATE premium).

OCS = a losing claimant does not need to pay a winning defendant's costs.

But this protection is 'qualified': it might be lost if a claimant fails to beat an offer, has their claim struck out or is found to be fundamentally dishonest.

The framework: CPR 44.13 to 44.17 (introduced by CPR (amendment) Rules 2013)

> *"Qualified one-way costs shifting: scope and interpretation*
>
> ***44.13***
> *(1) This Section applies to proceedings which include a claim for damages –*
> *(a) for personal injuries;*
> *(b) under the Fatal Accidents Act 1976[7]; or*
> *(c) which arises out of death or personal injury and survives for the benefit of an estate by virtue of section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934[8],*
> *but does not apply to applications pursuant to section 33 of the Senior Courts Act 1981[9] or section 52 of the County Courts Act 1984[10] (applications for pre-action disclosure), or where rule 44.17 applies.*
> *(2) In this Section, 'claimant' means a person bringing a claim to which this Section applies or an estate on behalf of which such a claim is brought, and includes a person making a counterclaim or an additional claim."*

QOCS therefore applies across the board in any claim, counterclaim or additional claim in which there is a personal injury element, although costs protection might be lost if part of the claim is brought for the benefit of another person.

> *"Effect of qualified one-way costs shifting*
>
> ***44.14***
> *(1) Subject to rules 44.15 and 44.16, orders for costs made against a claimant may be enforced without the permission of the court but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for damages and interest made in favour of the claimant.*

(2) Orders for costs made against a claimant may only be enforced after the proceedings have been concluded and the costs have been assessed or agreed.
(3) An order for costs which is enforced only to the extent permitted by paragraph (1) shall not be treated as an unsatisfied or outstanding judgment for the purposes of any court record."

This is the heart of QOCS: where a successful claimant faces an adverse costs order (for failing to beat a Part 36 offer, for instance), then the order for costs can only be enforced up to the amount won in damages.

It is an oddity of the rules that the restriction is on *enforcement* of costs orders – costs are still *assessed* in the usual way (at least in theory) and the defendant will often have a costs order far in excess of the sum they will actually recover.

In my experience, when claimants lose entirely judges are ordering something along the lines of: *"the Claimant shall pay the Defendant's costs, but that order shall not be enforced pursuant to r.44.14, such costs to be subject to summary assessment on application by either party if they are not agreed".* I

The general rule at r.44.14 is subject to a number of exceptions:

"Exceptions to qualified one-way costs shifting where permission not required

44.15
Orders for costs made against the claimant may be enforced to the full extent of such orders without the permission of the court where the proceedings have been struck out on the grounds that –
(a) the claimant has disclosed no reasonable grounds for bringing the proceedings;
(b) the proceedings are an abuse of the court's process; or
(c) the conduct of –
(i) the claimant; or
(ii) a person acting on the claimant's behalf and with the claimant's knowledge of such conduct is likely to obstruct the just disposal of the proceedings."

These exceptions are self-explanatory. In such circumstances the defendant will have its costs and can enforce the order in full. Perversely, a claimant might discontinue (and face no enforceable costs order) shortly before they are struck out (and would therefore face a fully enforceable costs order), although the court has the power to set aside notice of discontinuance (r.38.4) and is surely likely to do so where the claimant is being tactical. There is at least one case in which the court has done so: *Brian Kite v Phoenix Pub Group (2015) Unreported.*

"Exceptions to qualified one-way costs shifting where permission required

44.16

(1) Orders for costs made against the claimant may be enforced to the full extent of such orders with the permission of the court where the claim is found on the balance of probabilities to be fundamentally dishonest.

(2) Orders for costs made against the claimant may be enforced up to the full extent of such orders with the permission of the court, and to the extent that it considers just, where –

(a) the proceedings include a claim which is made for the financial benefit of a person other than the claimant or a dependant within the meaning of section 1(3) of the Fatal Accidents Act 1976 (other than a claim in respect of the gratuitous provision of care, earnings paid by an employer or medical expenses); or

(b) a claim is made for the benefit of the claimant other than a claim to which this Section applies.

(3) Where paragraph (2)(a) applies, the court may, subject to rule 46.2, make an order for costs against a person, other than the claimant, for whose financial benefit the whole or part of the claim was made."

In contrast to 44.15, 44.16 requires the court's permission before costs orders can be enforced in full. It is quite difficult to imagine a judge being reluctant to allow enforcement if they have made a finding of fundamental dishonesty.

It also seems likely that costs will be assessed on the indemnity basis.

It is interesting to note that the words 'to the extent it considers just' appear at 44.16(2) but *not* 44.16(1). Read strictly, it implies that if the court gives permission to enforce under 44.16(1) then it does so 'to the full extent' of the order (i.e. not to some lesser extent that it considers just). However, PD12.4(d) below makes it clear that this is not the case:

> *"(d) the court may, as it thinks fair and just, determine the costs attributable to the claim having been found to be fundamentally dishonest."*

44.16(2)(a) and 44.16(3) are no doubt aimed at credit hire companies etc.

Anecdotally, judges are setting a lower threshold for fundamental dishonesty than they would for fraud. That may be because judges are used to costs following the event, and see it as unfair that a winning defendant in a dubious case will not get its costs without such a finding. It may just be that judges are more willing to disbelieve claimants these days.

In *Hayward v Zurich Insurance Company Plc [2015] EWCA Civ 327*, it was held that exaggeration of a head of loss for financial gain is fraud (this case is being appealed to the Supreme Court). The allegation was that *"the Claimant has exaggerated his difficulties in recovery and current physical condition for financial gain"*. It seems to be common ground that fraud is something more than fundamental dishonesty, and therefore exaggeration amounts to fundamental dishonesty.

Does fundamental dishonesty need to be pleaded? I have had at least one case where the judge refused to make the finding unless it was part of the defendant's pleaded case, although I was not asked to push the point. Note that section 57(1)(b) reads *"on application by the Defendant"*. The best answer is that a defendant will probably be in difficulty leading evidence to that effect if it has not made the allegation. The situation will be different where a claimant simply falls apart in cross-examination and the defendant can rightfully say that it did not have the evidence to make the allegation before that.

The PI small claims limit is increasing to £5,000. The effect of that is already devastating for claimant solicitors. But consider it in the context of fundamental dishonesty: if the claimant wins, they get no (actually very minimal) costs. But if they are found to be fundamentally dishonest in relation to one head of claim, the whole claim will be defeated by section 57 and they will face a costs order under 27.14(2)(g), which will probably be assessed on the indemnity basis.

The advice for claimant solicitors has to be to push for any allegation of fundamental dishonesty to be pleaded and then to ask for the case to be allocated to the multi-track.

Discontinuance

> *"CPR 44 PD 12.4*
> *In a case to which rule 44.16(1) applies (fundamentally dishonest claims)*
>
> *(a) the court will normally direct that issues arising out of an allegation that the claim is fundamentally dishonest be determined at the trial;*
> *(b) where the proceedings have been settled, the court will not, save in exceptional circumstances, order that issues arising out of an allegation that the claim was fundamentally dishonest be determined in those proceedings;*
> *(c) where the claimant has served a notice of discontinuance, the court may direct that issues arising out of an allegation that the claim was fundamentally dishonest be determined notwithstanding that the notice has not been set aside pursuant to rule 38.4;*
> *(d) the court may, as it thinks fair and just, determine the costs attributable to the claim having been found to be fundamentally dishonest.*

If a claimant discontinues a QOCS claim, they pay no costs, for the simple reason that a claimant with a terrible case would otherwise be better off running the matter all the way to trial and losing than dropping the claim. But this is subject to r.38.4 and also to r.44 PD12.4: if the matter is dropped due to an allegation of fundamental dishonesty, then the matter might be heard in relation to whether QOCS protection should be lost, even if the notice is not set aside. Contrast that with a case that is *settled* in light of an allegation of fundamental dishonesty – a defendant is unlikely to be heard in relation to whether QOCS protection should be lost: see *Hayward.*

2. Section 57 of the Criminal Justice and Courts Act 2015

In short: if there is a finding of fundamental dishonesty, then the whole claim is dismissed.

Section 57 is already in force! It came into force on 13 April 2015 – but only applies to any PI claim issued on or after 13/4/15. The date of injury is irrelevant.

57 Personal injury claims: cases of fundamental dishonesty

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

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

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

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

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

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

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

(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.

There is a huge overlap with 44.16. A finding of fundamental dishonesty means that the whole claim must be dismissed (even where liability is admitted and the dishonesty relates to a very small part of an otherwise honest claim) and that QOCS protection is lost, so the full order for costs can be enforced (as long as the court gives permission under r.44.16). The order for costs will be smaller than it otherwise would have been however, due to the effect of section 57(5).

Section 57 applies to small claims – though costs do not usually follow the event in small claims, if fundamental dishonesty is established then that is bound to be 'unreasonable behaviour' for the purposes of 27.14(2)(g).

Section 57(1)(b) requires the court to dismiss the whole of a claim in which the claimant is entitled to damages if it is satisfied on balance that the claimant has been fundamentally dishonest in relation to the primary claim or a related claim.

Section 57(3) says that this *'includes dismissal of any element of the primary claim in respect of which the claimant has not been dishonest'* unless the court is satisfied that the claimant would suffer substantial injustice as a result. What does this mean? One obvious example would be a claimant with devastating injuries. To deprive them of all of their damages in a huge claim when their dishonesty related to a small part of that claim would almost certainly be a substantial injustice – but the grey area is up for grabs!

If the claim is dismissed, then by section 57(4) the court must record the amount of damages it would have awarded to the claimant. Section 57(5) states that the court must then deduct that sum from the amount to be paid in costs.

By 57(6) and (7), any court sentencing for related criminal proceedings will take into account the fact that the claimant has lost damages and paid costs as mitigation.

A problem: what if the process of calculating quantum (and therefore the amount to be deducted from costs by 57(5)) is going to be lengthy and complicated? Can the claimant protect himself by making an early offer 'greater' than the sum eventually 'won' by the defendant, or is the Claimant bound to bear the costs of that quantum assessment?

Conclusion

The crucial elements of these provisions, 'fundamental dishonesty' and 'substantial injustice' are undefined. One can already see the Court of Appeal struggling with defining these things beyond 'dishonesty that is fundamental' and 'injustice that is substantial'.

My own view is that defendants should be alleging fundamental dishonesty wherever they can. A finding of fundamental dishonesty in a lost claim deprives the claimant of QOCS protection. Fundamental dishonesty in (what would have been) a successful claim will result in dismissal of the whole claim. Claimants should be alert to such issues and pressure defendants into setting out their case fully and having the claim reallocated wherever possible. It remains to be seen what guidance the courts shall give.

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