Fundamental dishonesty: blind men and elephants?

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Patrick West, a member of our Personal Injury team, discusses QOCS cases and fundamental dishonesty by the claimant in this informative article.

"Me I'm dishonest, and a dishonest man you can always trust to be dishonest. Honestly it's the honest ones you have to watch out for, you never can predict if they're going to do something incredibly stupid" - Jack Sparrow, Pirates of the Caribbean.

Joking apart, Johnny Depp's line rings true when it comes to QOCS cases and fundamental dishonesty. These cases come in two varieties:

1) The sort of case where the dishonesty is blindingly obvious (e.g. the Claimant caught out by a surveillance camera).

2) All the others.

A quick reminder of what we are talking about:

CPR 44.15 states that:

"(1) 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."

CPR 44.16 states that:

"(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."

Qualified One Way Costs Shifting and the provisions of 44.15-16 still only apply to personal injury claims. They are the only route for a defendant insurer to recover costs. Understandably, efforts are being made to test the water whenever possible. This is either through submissions at trial that a claimant is dishonest or by applying to set aside notices of discontinuance in claims which look likely to have been dropped for the same reason.

Thus far, we have nothing in the text of the White Book or from the Court of Appeal to help us with the definition of "fundamental dishonesty" leaving District and Circuit Judges to find their way in the dark.

The now oft-quoted case of ***Gosling v (1) Hailo (2) Screwfix Direct*** (2014) CC (Cambridge) (Judge Moloney QC) 29/04/2014 certainly saw a helpful general definition of fundamental dishonesty but of course this was a claimant caught on a covert surveillance camera shopping without his crutch. He clearly fell within my first category of case above. Most courts seem to agree with the view that dishonesty must go to the root/core/heart of the claim.

Absent damning hidden camera footage, the latest slew of county court judgments on fundamental dishonesty is reminiscent of the old Indian story of the blind men describing an elephant. What is fundamental and what is dishonest in one case is not necessarily passing the test in another apparently similar claim.

In ***Mark Menary v Joe Darnton*** (2016) CC (Portsmouth) (Judge Iain Hughes QC) 13/12/2016, the Court dealt with an alleged collision between the defendant's motorcycle and the claimant's car. The defendant did plead fraud. Having heard the evidence of both parties the district judge at first instance found there was no collision at all. Unfortunately, the detailed findings as to why the C was less credible than the D are not included on Lawtel. There was also a failure to disclose previous relevant medical history to his expert. The Judge found that despite all of this, because the previous symptoms/injury were reported by the claimant and present in the medical records the claimant was not dishonest.

The appeal judge criticised this approach and pointed out that the DJ was confusing a dishonest *claimant* with a dishonest *claim*. The disclosure of previous symptoms then exacerbated by the fraud was simply part of the deceit. The accident and the claim remained dishonest. As the judge pointed out:

"If a claim such as this is not fundamentally dishonest what claim could be? Plainly, in my judgment this comes within the meaning of CPR 44.16(1). It is surprising, to put it mildly, that the deputy district judge managed to reach a contrary conclusion."

HHJ Hughes distinguished this fundamental dishonesty from:

"…*the exaggerations, concealments and the like that accompany personal injury claims form time to time. Such exaggerations, concealments 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."*

So we have our two limbs ((1) fundamental and (2) dishonesty) but very different interpretations on the facts.

In ***Margaret Eileen Meadows v La Tasca Restaurants Ltd*** (2016) CC (Manchester) (Judge Hodge QC) 16/06/2016 the Court was presented with a claim for personal injury arising from an alleged slipping accident at a restaurant. The judge found the evidence of the claimant and her supporting witness were

"riddled with inconsistencies". The reasons given by the Court for dismissing the claim included:

1) *"curious mechanics of the fall"*
2) *"inconsistency in the evidence in relation to the precise substance that Miss Meadows said that she had fallen on"*
3) *"inconsistency in relation to the location of the accident"*
4) *"discrepancies in what Miss Meadows and Mrs McGrath had said that they did immediately after the accident"*
5) *"a failure by both Miss Meadows and Mrs McGrath to ask a third party, with whom they had a discussion, to identify herself or to give contact details"*
6) *"discrepancies in the nature of the various injuries said to have been sustained by Mrs Meadows and in her reporting of those injuries"*
7) *"according to Miss Meadows, the involvement of another member of staff, which had not been mentioned in her witness statement"*
8) *"and Mrs McGrath's inability accurately to recall the basic details in relation to the claim"*

Faced by a case resembling a Swiss cheese the District Judge found the claim was fundamentally dishonest. However, the appeal court found it was not. It agreed with Counsel for the claimant Mr Rana, who argued there needed to be something more cogent than a series of inconsistencies and that the failure to plead or submit that the claim was dishonest was also fatal to the defendant. The inconsistencies might be due to "confusion or lack of clarity" especially 2 years after the incident took place. The DJ should have simply dismissed the claim for failing to meet the burden of proof. This is a difficult case as there does seem to have been a very considerable level of inconsistency. Perhaps it is best simply to say there is a sliding scale and where inconsistencies reach a certain level, subject to judicial instinct, only then is fundamental dishonesty reached.

Had ***Meadows*** been heard by the appeal judge in ***Menary***, would she have been held to be fundamentally dishonest? It seems quite possible given the level

of inconsistency. On the other hand, had ***Menary*** been heard by the ***Meadows*** appeal court would his claim have simply been dismissed as not proven? The questions raised underline how much of a gamble 44.16 hearings can be and, of course, the unsuccessful defendant in such matters runs the risk of an adverse costs order.

In one of my recent fundamental dishonesty cases an RTA claimant told the defendant's insurer in a telephone call less than 24 hours later that nobody was injured in the accident. This was said in answer to two specific questions. She did not bring her claim for whiplash for 2 years. On the face of it an apparently dishonest claim. At trial she was a credible witness. A PE teacher with little time for going to doctors, some knowledge of physiotherapy exercises and an explanation that when she said no one was injured she meant "injuries requiring medical attention" i.e. paramedics or casualty. Despite this, the Judge teetered on the edge of a finding of fundamental dishonesty before eventually simply dismissing her claim as not proven.

Zurich Insurance v Philip Bain (2015) CC (Newcastle) (Judge Freedman) 04/06/2015 was an identical situation with a similar double denial of injury in a telephone call with insurers 11 weeks later. In addition, however, Mr Bain failed to tell his medical expert about previous lower back pain. His explanation appears to have been that he only attributed his aches and pains to the accident after an extended period of time. The phone call with the insurer however took place after the end of the prognosis period (8 weeks). The court at first instance dismissed the claim finding he had lied and had suffered no injury at all.

The appeal Judge reiterated the Gosling approach to fundamental dishonesty which must go to the core of a claim. The appeal judge held that: *"Fundamental dishonesty did not cover situations where there was simply exaggeration or embellishment. It was where dishonesty was at the root of the claim that it could properly be categorised as fundamental…the Court was entitled to consider not only the effect of the dishonesty but also its degree. Here, there was a very serious level of dishonesty."*

So again, we have two apparently similar cases where the outcomes were polar opposites.

These cases will clearly turn on credibility and the giving of reasonable explanations for inconsistencies or untruths. It is important to note that the appeal judge said of Mr Bain that he had held a high position in the ambulance service and although he was an *"upright honest member of society, (but) on this occasion he has let himself down".*

In ***Adam Thompson v Go North East Ltd (Defendant) & Bott & Co Solicitors (Respondent)*** (2016) CC (Sunderland (Judge Charnock-Neal) 30/08/2016 the claimant gave differing accounts of how he sustained injury to different sources including his solicitors and medical expert. CCTV footage clearly contradicted the mechanism of the accident described by C to the medical expert but the solicitors failed to show it to the expert before issuing. The defendant sought a wasted costs order against the claimant's solicitors as they argued the claim was always doomed to fail for that reason and should never have been brought. The Claimant was found to be fundamentally dishonest but his solicitors were also ordered to pay wasted costs under s 51(6) of the Senior Courts Act 1981 on the grounds of improper conduct which could also be negligence.

In ***Brian Creech v (1) Apple Security Group Ltd (2) Severn Valley Railway (Holdings) PLC (3) Irvin Leisure Entertainments Ltd (Costs)*** (2015) CC (Telford) (District Judge Rogers) the Claimant alleged he had fallen over a pile of mats but the Court preferred the evidence of three other witnesses that the mats were not there at the time. The Judge helpfully referred to the difference between a case of this sort (very similar to ***Menary*** – a "black or white" type case) and some RTA claims: *"It is not a case of a court hearing witnesses from both sides and deciding that Car A had strayed further over to one side of the road than the driver of Car A remembered, and having decided the two competing versions on the basis of mistaken recollections."*

Diamanttek Ltd v Jonathan James (2016) CC (Coventry) (Judge Gregory) 08/02/2016 was an appeal of a decision in which the DJ originally held the claimant as a person was not fundamentally dishonest even though she found he had not been deprived of hearing protection at any point in his employment by the defendant. The appeal judge held this was a lie and any decision to the

contrary was perverse. The focus was again placed on fundamental dishonesty relating to the claim and not just to the claimant.

In ***Laura Karen Rayner v Raymond Brown Group Ltd*** (2016) CC (Oxford) (Judge Harris QC) 03/08/2016 Two sisters withdrew their claim for injury in an RTA involving light damage only. They failed to seek medical attention for their alleged injuries. The Court characterised fundamental dishonesty as: *"a substantial and material dishonesty going to the heart of the claim, either in liability or quantum or both, rather than peripheral exaggerations or embroidery. It was a question of fact and degree in each case."*

We still await a *tour de force* judgment from the senior courts on fundamental dishonesty but it is useful to consider the matter as a two-limb test considering dishonesty first (albeit there will be liability cases where dishonesty and fundamentality are two sides of the same coin see ***Menary/Creech***) and fundamentality second:

1. Dishonesty

a) Is there dishonesty?

b) Can the "dishonesty" be explained by confusion or mistake (***Meadows***)?

c) Is it a "black or white" type of dispute – i.e. the claimant *must* have realised he was lying (***Creech***).

d) Dishonesty may attach to the claim not just to the claimant.

2. Fundamentality

e) Is the dishonesty peripheral to the claim (***Rayner/Menary*)?**

f) Is the dishonesty of a "very serious" kind (***Bain*)?**

g) Is there dishonesty notwithstanding the fact that the claimant is a generally honest person otherwise (***Bain***)?

In another recent case I was instructed to defend a claimant against a dishonesty allegation related to limitation issues. It went against the defendant that time but it is clear that there is considerable scope for using fundamental dishonesty to recover costs in many different sorts of P.I. cases and also considerable risks.

Law/Procedure

CPR 44.16; s 51(6) of the Senior Courts Act 1981. *Gosling v (1) Hailo (2) Screwfix Direct* (2014) CC (Cambridge) (Judge Moloney QC) 29/04/2014; *Mark Menary v Joe Darnton* (2016) CC (Portsmouth) (Judge Iain Hughes QC) 13/12/2016*; Margaret Eileen Meadows v La Tasca Restaurants Ltd* (2016) CC (Manchester) (Judge Hodge QC) 16/06/2016; *Zurich Insurance v Philip Bain* (2015) CC (Newcastle) (Judge Freedman) 04/06/2015; *Adam Thompson v Go North East Ltd (Defendant) & Bott & Co Solicitors (Respondent)* (2016) CC (Sunderland (Judge Charnock-Neal) 30/08/2016; *Brian Creech v (1) Apple Security Group Ltd (2) Severn Valley Railway (Holdings) PLC (3) Irvin Leisure Entertainments Ltd (Costs)* (2015) CC (Telford) (District Judge Rogers*; Diamanttek Ltd v Jonathan James* (2016) CC (Coventry) (Judge Gregory) 08/02/2016; *Laura Karen Rayner v Raymond Brown Group Ltd* (2016) CC (Oxford) (Judge Harris QC) 03/08/2016.

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