Darnley v Cornish


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County Court (Bristol)

2021 WL 04760420

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TRANSCRIPT OF PROCEEDINGS

Ref. E02SK120

IN THE BRISTOL CIVIL AND FAMILY JUSTICE CENTRE

2 Redcliff Street Bristol

Before HIS HONOUR JUDGE RALTON

IN THE MATTER OF

ASHLEY DARNLEY (Appellant)

-v-

SCOTT CORNISH (Respondent)

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MR J MARWICK appeared on behalf of the Appellant MISS S OPENSHAW appeared on behalf of the Respondent

JUDGMENTS 16 th JULY 2021 (AS APPROVED)

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Central Court, 25 Southampton Buildings, London WC2A 1AL

JUDGE RALTON:

1. This is an appeal, with the permission of myself given on the papers on 7 July 2020, by Mr Ashley Darnley against the decision of DJ Field at the County Court at Weston-super- Mare on 20 May 2020 to award against him damages and some costs to the respondent, Mr Scott Cornish, for personal injury and specific losses arising out of a road traffic accident that occurred on 10 November 2015.

2. In brief, Mr Cornish was riding his bicycle on 10 November 2015 along a road in Winterbourne in Bristol when Mr Darnley's car collided with the rear of the bicycle and Mr Cornish was knocked off. Liability was admitted within the Ministry of Justice's portal on 12 October 2016, leaving in issue injury, loss and damage.

3. The claim form sought damages of between £15,000 and £22,000. It was supported by Particulars of Claim and a schedule of loss. The whole schedule relates to cycling equipment. The main loss relates to the bicycle, where the figure of £5470 was claimed, and a discreet loss for lights to attach to the bicycle of £574.92. The remainder of the schedule relates to cycling clothing and equipment.

4. Today Mr Marwick appears for Mr Darnley, as he did in the lower court. Miss Openshaw appears for Mr Cornish today, but she was not counsel below. I am most grateful to both for the assistance that they have given me.

5. This case concerns section 57 of the Criminal Justice and Courts Act 2015. In the lower court Mr Marwick sought to persuade DJ Field that, given the factual findings he had made, Mr Cornish had been fundamentally dishonest in relation to two elements of his claim and, therefore, the court should dismiss his final claim. DJ Field was not so persuaded, and his reasons can be found in his reserved judgment and also in the order dated 20 May 2020.

6. I will proceed to summarise the law and then I will turn to consider DJ Field's judgment. Before so doing, I remind myself that this is an appeal, thus a review of the decision of the lower court, and in this case Mr Marwick, for the appellant, needs to satisfy me that DJ Field's decision was wrong. It is important to note that the appellant accepts all of the judge's findings of fact and his argument is that, further to those findings, DJ Field was wrong to conclude that Mr Cornish had not been fundamentally dishonest. There is no respondent's notice and Miss Openshaw seeks to uphold the district judge on the basis of the reasons he gave.

7. So now I turn to the law. The relevant part of section 57, which I will use as a shorthand for the provision, are as follows. It is headed Personal Injury Claims, Cases of Fundamental Dishonesty. Subsection (1):

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

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fundamentally dishonest in relation to the primary claim or a related claim."

8. Pausing there, there is no doubt, and no one has sought to argue otherwise, that it is for the defendant to prove fundamental dishonesty. It is not for the claimant to disprove. Subsection (2) says: "The court must dismiss the primary claim, unless it is satisfied that the claimant would suffer a substantial injustice if the claim were dismissed."

9. Subsection (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.

10. Subsection (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." Therefore, as can be seen, a

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claimant can end up losing the entirety of his claim if he is found to have been fundamentally dishonest in part of his claim and the substantial injustice argument is not made out.

11. I have been taken to certain decisions made in the High Court, which are, of course, binding on me, although it strikes me that each section 57 case is likely to be fact sensitive. In *London Organising Committee of the Olympic and Paralympic Games (in liquidation) v Haydn Sinfield [2018] EWHC 51* , Mr Sinfield brought a personal injury claim which included a claim for gardening expenses in the form of employing a gardener. Mr Sinfield's claim that he had to employ a gardener by reason of his injuries was shown to be untrue. Indeed, he went as far as fabricating invoices from the gardener.

12. Notwithstanding the evidence before him, Recorder Widdup in the lower court decided that fundamental dishonesty was not made out. The way the Recorder approached it is essentially set out at paragraph 18 of his judgment, which is repeated in paragraph 33 of the judgment of Knowles J and, essentially, the first sentence in paragraph 18 shows what the Recorder thought, and I quote: "Looking at this part of the claim in the round, I find that the proper inference to draw was that Mr Sinfield was indeed muddled, confused and careless about this part of his claim, but there is insufficient evidence from which I can infer that he was dishonest about it."

13. The appeal was allowed, and Knowles J provides some assistance in paragraphs 62 and 63 of his judgment. Paragraph 62 reads as follows:

"In my judgment, a claimant should be found to be fundamentally dishonest within the meaning of sections 57(1)(b) if the defendant proves on the balance of the probabilities that the claimant has acted dishonestly in relation to the primary claim and/or a related claim (as defined in section 57(8)), and that he has thus substantially affected the presentation of his case, either in respect 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. Dishonesty is to be judged according to the test set out by the Supreme Court in *Ivey v Genting Casinos Limited (t/a Crockfords Club)* supra."

14. 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 £9,000 in a claim worth £10,000 in its entirety should be judged to significantly affect the defendant's interests, notwithstanding that the defendant maybe a multi-billion pound insurer to whom £9,000 is a trivial claim."

15. As I said earlier, the appeal, and as I said in the course of the hearing, somewhat unsurprisingly to myself, succeeded. In *Molodi v Cambridge Vibration Maintenance Service & Aviva Insurance Limited [2018] EWHC 1288* the claimant's honesty was attacked on two bases. Firstly, for disclosing only one relevant pre-accident accident, when he had, in fact, had five. Secondly, claiming £1,300 for repairs to his car, when, in fact, the repairs cost him

£400. In the lower court HHJ Main QC did not accept the defendant's argument that the claim should be dismissed under section 57. On appeal Martin Spencer J disagreed.

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15. Again, I have been taken to certain parts of the decision which Mr Marwick says are helpful when it comes applying the correct law. Paragraph 42 reads as follows:

"In my judgment, Mr Wood was correct in submitting that, given it is for the claimant to prove his case and that case depended very largely upon his credibility and reliability, it was open to the defendants to submit that, by reason of demonstrable untruths, inconsistencies and general unreliability, the claim should be dismissed. If I am satisfied that no reasonable judge, in the position of HHJ Main QC, could have failed to accede to the submission that the claimant had failed to prove his case, then I would be entitled to allow this appeal and overturn the Judge's order."

15. Pausing there, that seems to me to be the position that I am in vis à vis DJ Field. I return to paragraph 42:

"However, where the trial judge has heard the evidence and has not concluded that the claimant was dishonest, I direct myself that it would require a very clear case indeed for an appellate court effectively overturn the trial judge's conclusion in that respect and find that the claimant was dishonest despite not having seen the witnesses give evidence."

15. I pause to observe that that is not Mr Marwick's position here. Mr Marwick has emphasised, on more than one occasion, that he is not seeking to disturb DJ Field's findings in any sense. Paragraphs 46 and 47 also provide some assistance. 46 reads as follows:

"The medical evidence is at the heart of claims for whiplash injuries. Given the proliferation of claims that are either dishonest or exaggerated, for a medical report to be reliable, it is essential that the history given to the medical expert is as accurate as possible. This includes the history in relation to previous accidents as this goes to fundamental questions of causation: whether, if there are ongoing symptoms, those are attributable to the index accident or to previous accidents or to some idiopathic condition of the claimant. Furthermore, the knowledge that a claimant has been involved in many previous accidents might cause a medical expert to look rather more closely at what is being alleged on the incident occasion to see whether the claimant is being consistent and whether his reported injuries are in accordance with the reported circumstances of the accident. Once, as here, the claimant could be shown to have been dishonest in respect of a fundamental matter and then to have maintained that dishonesty through his witness statement and into his evidence before the court, it is difficult to see how the learned judge could have accepted any other part of the claimant's evidence or the medical report itself, and, without these, there was nothing left."

15. Paragraph 47:

"However, the claimant's dishonesty did not stop there: Mr Wood demonstrated clearly that £1,300 special damages were claimed in respect of a loss which, when investigated in cross-examination, turned out to have been only been £400. There were fundamental inconsistencies between what the claimant was saying in his witness statement and evidence, and what he had said in the Claim Notification Form. There were inconsistencies in relation to the period before recovery from the injuries. Finally, it appeared that the claimant had undergone a course of physiotherapy more for reasons to do with his claim rather than for genuine medical reasons."

15. The last case that I am going to refer to is *Jenson Roberts v (1) Alan Kesson (2) Tesco Underwriting Ltd [2020] EWHC 521 (QB)* . I am not going to dwell on the facts of that case. It was, again, an appeal from a lower court, a decision of Mr Recorder Kelbrick, and the appeal was heard by Jay J. Paragraph 58 reads:

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"The final question for me to determine is whether, in circumstances where I am completely satisfied that there has been dishonesty, that dishonesty is fundamental for the purposes of the section. This requires the sort of analysis which Newey LJ pointed out in the authority to which I have referred."

15. Paragraph 59 cross refers back to *Sinfield*, to which I referred already, and paragraph 60 cross refers back to the *London Olympic* case to which I have referred. The last sentence, though, is helpful, where the judge says: "In my view, what is required is a global assessment in the light of the claim as advanced in its entirety, but also in view of the saliency and importance of the particular claim under consideration."

15. Paragraph 61:

"In my judgment, applying that approach, which is necessarily a holistic approach, and having regard both to Newey LJ and to Julian Knowles J, I am satisfied that the dishonesty here did go to the root of the claim and was fundamental. The claim was not minor or peripheral. It was a policy of Parliament in enacting section 57 that even in circumstances where other claims may be valid, if a party advances a claim which is dishonest and it is significant and substantial, the court should not be slow to find that the stringent criterion of section 57 has been fulfilled."

15. I now turn to consider the information and evidence that was before DJ Field. I have already drawn attention to the Particulars of Claim and the schedule of special damage. When it comes to the matter of injury, very little is said in the Particulars of Claim. It is all found within paragraph 5 where under Particulars of Injury it is said: "The claimant has sustained the following injuries: (1), soft tissue injuries to the neck, left shoulder, left leg, left hand, right hand and face; (2) injury to ribs; (3) psychological symptoms."

15. And then: "The claimant relies on the medical reports of the following experts: (1) Doctor James David Wylie, GP, dated 1 December 2016; (2) Mr Andrew Rogers, consultant surgeon in orthopaedics and trauma, dated 3 April 2017 and 11 December 2017; (3) Doctor Elizabeth Boyd, chartered clinical psychologist, dated 7 August 2017. Copies of these reports are attached to these Particulars of Claim."

15. We have, of course, the report of Doctor Wylie. It is structured in a prescribed format and it sets out the various injuries and the severity of the injuries. So far as the various injuries are concerned, there seems to be a commonality of Mr Cornish reporting no relevant pre-accident history, and so far as affects on sports and leisure are concerned, within the report Doctor Wylie says: "The claimant normally takes part in very regular, more than four times each week, leisure activities. At worst these activities were reduced to about 50 per cent of normal. They are currently reduced to about 50 per cent of normal. Activities particularly affected, cycling."

15. Lack of any information from Mr Cornish about pre-accident history continues over into the report of Mr Rogers, and indeed the effect on Mr Cornish's cycling activities, although it is expressed in a different way. Mr Rogers says at paragraph 7.6 of his report: "Mr Cornish, alongside biking, also enjoyed running. His calf remains problematic and after a few miles it will start to tighten and cause him pain and discomfort. He was actually back on a bike within about a week. For eight weeks he was struggling with the bike, particularly if he went over any bumps as this would jolt his neck. Even now he will experience symptoms in his neck with certain types of impact on the bike."
16. Pausing there, the impact on Mr Cornish's amenity sounds considerably less in Mr Rogers' report than Mr Wylie's report. And, of course, the remainder of the information that came before the court consists of medical records and such like, Mr Cornish's witness statement and Mr Cornish's oral evidence.

15. So far as the bike is concerned, Mr Cornish did not amplify upon the bike in his witness statement. In the last paragraph he says: "As a result of the accident I also sustained damage to my bicycle, jacket, et cetera, as detailed in my schedule of

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loss." And in the court below Mr Cornish placed reliance on a quote from Brecon Beacons Cycle Hub Ltd setting out that the bicycle, a specialised Epic Elite World Cup 2015 model year, would cost £4,000 and then they break down the costs of various other upgraded bits for the bike, equipment and clothing. There is no other information about the bike. Clearly the case the defendant is meeting there is that Mr Cornish has a bike, he says "my bicycle", and wishes to be compensated for his loss.

15. Mr Marwick cross-examined Mr Cornish at length about his acquisition of the bike. We have the transcript of the cross-examination, indeed all of the evidence was before the district judge orally, and the submissions. The transcript shows that initially Mr Cornish

gave evidence that he purchased the bike from the Tredz Bicycle Shop for £4,000, paid for on a credit or debit card. On further questioning he changed his evidence to payment by himself of £1,000 and his partner paying the other £3,000. That evidence was given after Mr Cornish was cross-examined about evidence of his financial means at the time.

15. Then Mr Cornish said that he was given the bike by Tredz to race on. Indeed, even the district judge intervened and the evidence then from Mr Cornish was that no money at all had changed hands, but then Mr Cornish indicated that ownership of the bike remained with Tredz, but that if he was to keep the bike he was to pay Tredz.

15. There was also an issue about the bike lights. Mr Cornish had made a claim for the bike lights and no doubt it will have been assumed that his case was that the lights, by reason of the accident, were no good and had to be replaced.

15. And then we have this exchange. Question, "Did your handlebar lights still work?" Answer, "That one, I haven't used that one either since, so." Question, "And did you try using it?" Answer, "Um, I tried using it but it's not as good as it was." Question, "What do you mean it's not as good as it was, it's a light?" Answer, "Yes, it has. They're quite a complicated light in terms of longevity and use. You've got three different settings on them and ---" Question, "Well, that's fantastic, but in what way is it not as good?" Answer, "You've got three different settings on the light to use and (something) settings. It doesn't work as well as it used to." Question, "In what way?" Answer, "Well, it's not going through the three different settings properly as it should do." Question, "OK. So you continued to use it or did you have to buy replacements?" Answer, "I haven't continued to use it, no." Question, "So how did you know the settings wouldn't work?" Answer, "Well, I obviously tried them out afterwards, but (something) after that, so."

15. I have referred to that part of the cross-examination because Mr Marwick submitted, with I think fair force, that it reflects the way the claimant generally gave his evidence, namely consistent vagueness.
16. I turn now to the judgment of DJ Field, limiting myself for the moment with respect to the bike. The district judge summarised the evidence that he heard about the bike and then said:

"In short, it was not possible to fully understand the arrangement regarding this bike. What is clear is that the claimant knowingly and intentionally misled the court and was extremely reluctant to explain the true position. He gave the firm impression that he had paid for the bike in the first place and under further cross-examination accepted that he simply had not. Frankly, I am baffled as to the purpose of this dishonesty. Had the bike been gifted as a promotional item or sponsorship by Tredz, the claimant would still have an entirely valid claim for the value of it. Conversely, if it was clear that the bike still was owned by Tredz, then they could easily have been added as a second claimant and the damage was compensated. Instead, the claimant, for reasons which were unclear, has wasted court time and the efforts of the defendant's counsel and solicitors in unpicking a situation about which he could, and should, have been straightforward."

15. The judge then goes on to consider why the claim for the bike should fail. When DJ Field reserved judgment he knew that the defendant was advancing a section 57 argument. In his reserved judgment he said:

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"The application is not without merit. The claimant was dishonest initially in evidence in respect of the special damages claim, which was a sizeable proportion of the value of the claim. Had the special damages claim been put with proper candour and particularity at the outset, time and expense is likely to have been saved. The pleading itself is not inherently dishonest, although it clearly lacks appropriate details and information. If more pleaded in evidence, it is not impossible that the special damages claim could have succeeded. The dishonesty in evidence appears to have been an attempt to support a claim which was not obviously hopeless but which the claimant appears to have developed doubts about."

15. Then one also has to read across to the order at C1 where DJ Field says: "I have considered the written submissions of both parties

and my decision is as follows. I do not consider that the

entirety of the claimant's costs should be disallowed as a result of his conduct in misleading the court during evidence. For the reasons set out in the judgment, I consider that the dishonesty fell short of being fundamental and it is relevant that it has not clearly been shown or found that the claim was pleaded dishonestly. The dishonesty was specifically in relation to a false

impression about the special damages given during evidence and then corrected under cross-examination."

15. Then he goes on to say:

"Nevertheless, it is conduct which should not go unmarked by the court. The special damages claim was put forward with minimal supporting evidence and was pursued dishonestly during the hearing until the claimant was pressed on this. Even then he was evasive about the issue until I asked him directly how much cash he had handed over in return for the bike. This was not a minor element of the claim, but one which comprised approximately half the sums claimed."

15. Then the judge went on to reduce Mr Cornish's costs by 50 per cent. So, notwithstanding his expressed findings of fact, his use of the term "dishonestly" against the claimant, who was found to have, and I use this the district judge's words, "knowingly and intentionally misled the court," which, incidentally, is also misleading the defendant, DJ Field found that the bike claim, which he found was sizeable, was not a fundamentally dishonest claim, albeit he still decided to reduce the claimant's costs. In my judgment, on reading the authorities and section 57, on his own findings that decision was not a decision which was a decision DJ Field could reasonably make.

15. Miss Openshaw argues that scant detail was pleaded about the bike and that the quality of the evidence advanced about the bike must be looked at in the light of fast-track claims, but the claimant was on notice by reason of the counter schedule that he had to prove his claim about the bike.

15. Miss Openshaw argues that the bike claim could have succeeded, as observed by the district judge. In a sense I agree with Miss Openshaw. A person, a cyclist, who has had their bike critically damaged in a road traffic accident should not find it a difficult task to prove their loss. But, notwithstanding Mr Cornish's changes in his evidence, the answers, it would appear, being given in an attempt to hold on to this claim, Mr Cornish was not able to show that the loss was his.

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15. The dishonesty, in my judgment, started when he referred to "my bike" in his witness statement and this was not a case of, for example, a technicality arising which caused the claim to fail or a simple mistake arising, such that the claimant lost the bike claim, or a misinterpretation.

15. When Miss Openshaw argues that what Mr Cornish was doing gradually was clarifying his case, I think, in fact, what was happening was obfuscation. Therefore, whilst Mr Cornish was perhaps not as culpable as Mr Sinfield, who went as far as fabricating invoices, I am afraid that I consider DJ Field to be wrong in not classifying the dishonesty he found as fundamental, and, therefore, I would allow the appeal.

15. Mr Marwick, having succeeded in his primary argument, I will be briefer with respect to the remainder of his arguments and so I now turn to the injury claim for completeness.

The case for the defendant to meet on paper was really contained within the two medical reports which informed the defendant that no relevant pre-accident history had been disclosed

by Mr Cornish and that he had a significant loss of amenity for a time in the form of 50 per cent less cycling.

15. Both pieces of information turned out to be wrong. There was relevant pre-accident medical history, as found within Mr Cornish's medical records, and it was the defendant's research of social media which revealed that Mr Cornish was far sooner involved in cycling at a high level of endurance and ability than one would otherwise have thought, given the medical reports.

15. DJ Field gave judgment as follows, and I quote:

"I turn then to the issue of general damages and the injuries suffered. Doctor Wylie, a GP, examined the claimant on 1 December 2016 and it was all over a year post accident. Among his more significant findings were the following. (1) Neck and left shoulder pain, which was ongoing with no pre-existing history. This was described as moderate and ongoing. (2) Pain to the left lower leg and ongoing tenderness to the left mid-calf. (3) Soft tissue injury to the left hand and wrist, which resolved six weeks from the accident date. (4) Soft tissue injury to the right ankle, which was described as ongoing and severe. (5) Fractured or bruised ribs, which resolved within about eight weeks. (6) Cycling activities were said to have been reduced to about 50 per cent of normal and at the time of the report were "currently reduced to about 50 per cent of normal." It is of note, in my judgment, that Doctor Wylie was clearly unaware that my March 2016, nine months before examination, the claimant had returned to high level cycling events and competition, commencing with an eight day endurance race in Cape Town in March 2016."

15. DJ Field then summarises the important elements of Mr Rogers' report. To save my voice, I am not going to read out DJ Field's points (1), (2) and (3). At (4) he says:

"The claimant was back on a bike within about a week, albeit he struggled for about eight weeks, particularly if he went over bumps which would hurt his neck. Mr Rogers does not appear to have been aware of the level of return to cycling which had been achieved by March 2016, which echoes the position that Doctor Wylie recorded and is, at best, unfortunate. Mr Rogers answered part 35 questions posed by the defendant's solicitors in light of their research into the claimant's activities, particularly cycling, by way of social media. Mr Rogers agrees that during 2016 and 2017 the claimant appears to be participating in strenuous activities with no mention or obvious evidence of restrictions. He confirmed the claimant did not reveal the significant level

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of sporting activities that he was enjoying at the time of the report. He does reiterate, however, that the claimant had said that he had been back

on a bicycle within a week and that the majority of the symptoms had settled by around eight weeks post accident."

15. Then jumping ahead a little.

"The ongoing symptoms described are not, in Mr Rogers' view, unreasonable and they are, essentially, subjective with no way of discounting their occurring following the accident. They are not, however, at a level which inhibits him in high level activities."

15. The district judge then cross refers to Mr Cornish's evidence. Again, I am not going to read out the entirety of the judgment to save my voice, but there were certain aspects here of obvious concern, and I quote:

"Certainly, it is clear that there has also been a long history about general issues with the left leg and quads, as well as referred sciatic or neurological pain, including pins and needles of the foot. It was also put to the claimant that he had told Doctor Wylie that his leisure activities were reduced to 50 per cent of normal, when he had clearly returned to high level competition. His response was to say, "Well, what is normal?" The answer was evasive and in the context of his other evidence is cause for concern.

Certainly, I do not accept that his activities levels were 50 per cent of normal when he saw Doctor Wylie. However, his evidence at trial was very much that he had adapted and dealt with the symptoms and pressed on. In my judgment, the claimant was not as frank as he ought to have been with Doctor Wylie at the first examination."

15. Then so far as the information about return to high level cycling, the district judge said:

"One has to ask whether, were it not for the defendant's solicitor's investigation, this information would ever have been volunteered. Nevertheless, the level of ongoing symptoms claimed are not particularly significant. Mr Rogers has reviewed such ongoing symptoms as exist about continuing symptoms in the light of the history and knowledge of sporting activities. Mr Rogers does not suggest that the ongoing symptoms complained of are necessarily inconsistent."

15. Then the district judge summarises as follows:

"In my judgment, what we are left with is an unpleasant accident that undoubtedly caused some injuries, which were largely settled within around eight weeks. Those were multi-site injuries which inevitably had an impact

upon the claimant's ability to train and enjoy leisure activities for at least a couple of months. Therefore, the impact was limited. I accept there are some minor ongoing niggling symptoms, but that these are not of any great significance. I cannot give the benefit of the doubt on the impact or severity of those symptoms to the claimant in circumstances where his initial reporting to

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medical professionals appears to lack candour. Similarly, I do not accept that the accident had a significant impact upon sleep for the first few weeks."

15. He then goes on to assess general damages at £6,000 and with respect to the section 57 issue in his reserve judgment he says:

"The core of the claim, the personal injury element, has been successful and was not substantially exaggerated, despite my concerns about initial candour with experts in that respect also. On balance, and by relatively modest margins, I do not consider the matter to have been subject of fundamental dishonesty going to the heart of the claim. I do not dismiss the claim made."

15. The 20 May order does not amplify reasons for not dismissing the claim. There can be no doubt that the district judge's findings with respect to history and loss of amenity reduced the damages award. By how much, I do not know, but the damages award was not hugely reduced, albeit the psychological claim was, in effect, dismissed entirely.

15. The question of whether or not, and this is the question for the district judge, that Mr Cornish was fundamentally dishonest was obviously more difficult with respect to general damages than it was with respect to special damages.

15. I generally agree with Miss Openshaw that it is for medical experts to critically analyse medical records, rather than a claimant, and I also accept that medical records would be disclosed as a matter of course and, therefore, there really is no point in being deceitful about past relevant medical history. What might be relevant for a medical practitioner might not be relevant to a claimant, even if the claimant, I suppose, is a physiotherapist and even if the same body part, especially in this case lower leg, is involved.

15. Further, I accept that for a claimant loss of amenity may be somewhat subjective, although, before anyone criticises me, I emphasise that, of course, dishonesty is objective.

15. It seems to me, looking at the evidence given with respect to the personal injury claim, that DJ Field was obviously troubled, but, with hesitation on my part, whilst accepting that a finding of fundamental dishonesty would have been open to the district judge, I also consider that it was open to the district judge to not make that finding. A different judge may well have reached a different decision, but that, of course, does not permit the appeal to succeed.

15. I conclude, therefore, that, with respect to the general damages claim for personal injury, the district judge could make the decision that he did and, therefore, that part of the appeal, very much Mr Marwick's secondary part, would not succeed. However, that does not

matter because, as both counsel know, Mr Marwick was quite clear that the second part of his argument fell away, in any event, if he was successful on the first part, and he has been.

15. Under section 57 if fundamental dishonesty is made out the court must dismiss the claim, unless the court is satisfied that the claimant would suffer substantial injustice if the claim is dismissed. It seems to me that this point was not considered at all by the lower court and, of course, it would have been for Mr Cornish to make out a case of substantial injustice or to, should I say, at least advance the case. Section 57, as a whole, would be rendered pointless if a fundamentally dishonest claimant could establish substantial injustice by simply arguing, "I have lost my damages, or at least a lot of my damages, that I would otherwise have got."

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15. Miss Openshaw acknowledges the limitations that she is faced with with respect to substantial injustice. She briefly argued before me that there was some evidence in the lower court that the claimant was suffering some financial hardship. This was not a point, of course, put to DJ Field. In any event, insofar as I am substituting my own decision, there is woefully insufficient information to begin to make out a case of substantial injustice.

15. So, I allow the appeal. I substitute my own decision, which is that by reason of fundamental dishonesty this is a claim that is to be, and must be, dismissed. There are, of course, consequential effects on what happens. I do not need to assess the level of damages that would otherwise have been assessed, because Field DJ did that for me.

(There followed further proceedings – please see separate transcript) JUDGE RALTON:

15. I must now carry out the task of summarily assessing the costs of the court below.

15. Firstly, I need to address the basis of assessment. Given the result of the appeal,

Mr Marwick seeks the assessment of costs on the indemnity basis. Miss Openshaw sensibly accepts that that is the appropriate basis.

15. I do not need to consider whether or not the costs are proportionate and therefore the only questions on indemnity basis are, are the costs reasonably incurred, are they reasonable in amount and I give the benefit of the doubt through the receiving not the paying part.

15. Although I have said I do not have to consider proportionality, the total costs are

£6,214.08 and I would in fact have had no hesitation in saying that the costs were proportionate in a case such as this.

15. Miss Openshaw is quite right to observe that no time needed to be spent on liability, because it was conceded, and I suppose that a regular assessment of damages would be that sort of case where the parties have been unable to agree on the figure. Perhaps there is a limited amount of cross-examination of the claimants trying to either emphasise the degree of suffering or perhaps reduce the degree of suffering and, as I have certainly seen so many times, arguments on trying to get to one end or the other of the Judicial College (inaudible).

15. This case was rather different. There was a fairly significant fight because the defendant was suspicious about this claim and ran a fundamental (inaudible).
16. The submissions made by Miss Openshaw, with all due respect to her, merely amount to elements of tinkering. There is nothing within the schedule that leaps out at me as really calling the bill into question and as I have said a moment ago if I were left with some doubt, the benefit of the doubt goes to the defendant.

15. I am going to assess the costs as drawn, 6214.08.

(There followed further proceedings – please see separate transcript) JUDGE RALTON:

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15. I must now summarily assess the costs of the appeal. Again, it is common ground that is assess on the indemnity basis and I adopt what I said when I assess costs in the lower court about how I approach costs. The total costs inclusive of VAT are £16,430.62.

15. One feature to the appeal is that in fact this is the second and successful attempt for the appeal to be heard. First time round only two hours was allowed for the appeal and no one thought to inform the court that much more than two hours was needed and the court did not have a bundle. So the first hearing was frustrated, albeit the costs were costs in the appeal. Inevitably that has resulted in some additional cost, not least Mr Marwick having been booked for the aborted hearings and having reappeared today, as we booked for today as well.

15. It is difficult to envisage what further significant work would have been done by the appellant's solicitors between the last hearing and this hearing, given that all the work that should have been by the last hearing. All that they needed to do for this hearing, I suspect, was see the court order, book counsel and refresh the costs schedule, and yet somehow the solicitor's costs have gone up by £1,100.

15. Miss Openshaw makes a fair point that a lot of people seem to be involved in this case. Now let us look at the reality. Mr Marwick (inaudible) grounds for appeal. I hope you will forgive me if I say they did not take much effort, but the skeleton argument is obviously where the real work went in. He has been the advocate throughout.

15. There has not been any further evidence gathering and yet the profit costs claimed in this case are £8,706.90. Of course there is the assembly of the appeal bundle, various other tasks which I accept have to be carried out. But Miss Openshaw has already pointed out, particularly with reference to the work done on documents where there seems to be duplication, and I have to say surely with respect to the appeal the sensible course would have been for one figure to deal with the running of the appeal. Why on earth does it involve so many people? And one can see different people doing the same task in the schedule of documents.

15. So far as the profit costs are concerned, Miss Openshaw reminds me to reduce them down to £5,000 in place of the 8706.90. Whilst the benefit of the doubt again lies with the appellant as the receiving party. I am concerned about the extent to which the costs have risen between the two hearings, and I am concerned about the duplication, and so I am going to assess those costs down, but I am not going to assess them down as low as Miss Openshaw wants.
16. Painting with a broad-brush I am looking especially at the work done on documents, which comes to a total of £4,888.50, it seems to me that the main reduction probably lies there and the costs that I am going to allow are £6,750 for profit costs.

15. The other challenge is with respect to counsel's fees. Now no issue, I think, is taken with respect to Mr Marwick's work in settling the grounds of appeal and skeleton argument. Again, I am sorry about the fingers, I scroll up and down. Counsel's fee for the hearing on the 15th of March was £2,000. Now inevitably counsel's brief fee includes all of the preparation for the appeal. Whilst acknowledging that there would have been some need for Mr Marwick to refresh his memory of the matter, it is difficult to accept that exactly the same amount of work went into this hearing as did for the 15th of March, but there is quite a gap in time. It therefore seems to me that it is appropriate to have reduced counsel's fee for this hearing down, but not by any great extent, would reduce it by £250. So it is £1,750. The remainder of counsel's fees remain untouched.

This transcript has been approved by the Judge

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