

# Fundamental Dishonesty: Where Are We Now?

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# Section 57 of the Criminal Justice and Courts Act 2015

*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.*

# Section 57 of the Criminal Justice and Courts Act 2015 (cont'd)

- *(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.*

## Hansard, 23.07.2014, cols 1267 - 1268

At the Committee stage of the passage of the Criminal Justice and Courts

Bill through the House of Lords, Lord Faulks QC stated:

*This is part of a series of measures taken by the Government to discourage fraudulent and exaggerated claims, which arise often in motor accident cases and so-called 'trips and slips' claims. Such claims cause substantial harm to society as a whole, not least in increasing the insurance premiums that motorists have to pay...*

# Hansard, 23.07.2014 (cont'd)

Lord Faulks QC:

*Under the current law, the courts have discretion to dismiss a claim in cases of dishonesty, but will do so only in very exceptional circumstances, and will generally still award the claimant compensation in relation to the 'genuine' element of the claim. The Government simply do not believe that people who behave in a fundamentally dishonest way – and I will come to address the adverb in a moment – by grossly exaggerating their own claim or colluding should be allowed to benefit by getting compensation in spite of their deceit. Clause 45 seeks to strengthen the law so that dismissal of the entire claim should become the norm in such cases.*

# Hansard, 23.07.2014 (cont'd)

- Lord Faulks QC:
- *Civil courts do not make findings of dishonesty lightly in any event; clear evidence is required. The sanction imposed by the clause – the denial of compensation to which the claimant would otherwise be entitled – is a serious one and will be imposed only where the dishonesty is fundamental; that is, where it goes to the heart of the claim...*
- *[I]f we...ask a judge to decide whether someone has been fundamentally dishonest, it is well within the capacity of any judge. They will know exactly what the clause is aimed at – not the minor inaccuracy about bus fares or the like, but something that goes to the heart.*

# Objective Test of Dishonesty (1)

Ivey -v- Genting Casinos (UK) Limited trading as Crockfords [2017] UKSC 67 @

para.62, *per* Lord Hughes:

- “...*The test now clearly established was explained thus in Barlow Clowes by Lord Hoffmann, at pp 1479 – 1480, who had been a party also to Twinsectra:*
- ‘*Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant’s mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards. The Court of Appeal held this to be a correct state of the law and their Lordships agree.*’”

# Objective Test of Dishonesty (2)

Lord Hughes adds at paragraph 74 of the judgment in Ivey:

- *“...When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual’s knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.”*

# “Fundamental Dishonesty”: Meaning

Gosling –v- Hailo (29 April 2014), H.H.J. Moloney QC:

*‘The corollary term to ‘fundamental’ would be a word with some such meaning as ‘incidental’ or ‘collateral’. Thus, a claimant should not be exposed to costs liability merely because he is shown to have been dishonest as to some collateral matter or perhaps as to some minor, self-contained head of damage. If, on the other hand, the dishonesty went to the root of either the whole of his claim or a substantial part of his claim, then it appears to me that it would be a fundamentally dishonest claim: a claim which depended as to a substantial or important part of itself upon dishonesty’ (at para.45).*

See also: Howlett -v- Davies and Another [2017] EWCA Civ 1696

## FD in a ‘Substantial Part’ of the Claim (1)

**London Organising Committee of the Olympic & Paralympic Games (In Liquidation) -v- Haydn Sinfield [2018] EWHC 51 (QB)**: C broke his left arm and wrist assisting spectators at the 2012 Olympic Games. Liability was admitted. He advanced a dishonest claim for gardening expenses of c.£14,000 amounting to 42% of the special damages and about 28% of the total claim for special and general damages. Julian Knowles J. @ para.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 may be a multi-billion pound insurer to whom £9,000 is a trivial sum.”*

# FD in a ‘Substantial Part’ of the Claim (2)

- However, if fundamental dishonesty is gauged by the proportion of the overall claim that is dishonest, then it would lead to the perverse result that the greater the value of the claim, the greater would be the amount of dishonesty that would be permitted before being classified as fundamental dishonesty.
- That would be contrary to the policy consideration that: *“section 57 of the Criminal Justice and Courts Act 2015 is frankly punitive in character. A claimant who is fundamentally dishonest is penalised by having his claim dismissed.”* **Sara Iddon -v- Dr. Karen Warner [2021] EWHC 587 (QB)**, per H.H.J. Sephton Q.C. at para.97.

# Jason Roberts –v- Alan Kesson and Anor [2020] EWHC 521 (QB)

C claimed the net pay of his car as written off following an RTA when the car had passed its MOT and been offered for sale. C withdrew this dishonest head of loss before trial but its previous presentation amounted to fundamental dishonesty:

*“The language of Section 57 is important. The Court must be satisfied on the balance of probabilities that the Claimant **has been** fundamentally dishonest...and not whether he has persisted in that dishonesty...[T]he Claimant has been fundamentally dishonest in advancing a false claim in the Schedule of Loss and a false claim in his first witness statement”* (at paragraph 54, *per* Jay J.).

# Recent FD Cases

- **David Pinkus –v- Direct Line [2018] EWHC 1671 (QB)**: to mislead an expert can be fundamentally dishonest
- **Smith –v- Ashwell [2019] 1 WLUK 541**: Judge held that a mixture of honest and dishonest exaggeration is not fundamental dishonesty. This is an outlying case
- **Mustard –v- Flower [2021] EWHC 846**: conscious exaggeration is dishonest
- **Preater –v- Betsi Cadwaladr University Health Board, County Court at Wrexham, 03.08.2022, H.H.J. Howells**

# The “Substantial Injustice” Escape Valve for Claimants

Section 57 of the Criminal Justice and Courts Act 2015 provides that where a finding of fundamental dishonesty is made:

- *“(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.”*

# “Substantial Injustice” (cont’d)

**London Organising Committee of the Olympic and Paralympic Games (In Liquidation) -v-**

**Haydn Sinfield [2018] EWHC 51 (QB):**

*“The starting point is s57(3). As I have explained, it follows from this provision that something more is required than the mere loss of damages to which the claimant is entitled to establish substantial injustice. Parliament has provided that the default position is that a fundamentally dishonest claimant should lose his damages in their entirety, even though ex hypothesi, by s57(1), he is properly entitled to some damages. It would render superfluous s57(3) if the mere loss of genuine damages could constitute substantial injustice”*

*per* Julian Knowles J. at paragraph 89.

# “Substantial Injustice” (cont’d)

- **Iddon –v- Warner [2021] EWHC 587 (QB)**
- C patient suffered a mastectomy because her G.P., D, missed a diagnosis of breast cancer. This was a genuine claim.
- However, C’s presentation of the effects of her chronic pain was found to be irreconcilable with her participation in sporting events in 2017/18 and was held to be dishonest:

*“I have no doubt that Mrs. Iddon was well aware of her training and sporting achievements and of the fact that she was not suffering debilitating chronic pain. I find that she deliberately took the steps...to mislead the defendants and the court about the extent of her injuries...By the standards of ordinary decent people, her actions were dishonest...” (at para.92).*

# “Substantial Injustice” (cont’d)

- Iddon –v- Warner [2021] EWHC 587 (QB)
- H.H.J. Sephton Q.C. held that C did not suffer “substantial injustice” by the loss of her damages claim; nor by the fact that she did not have the funds for her therapies; nor by the fact that she would have to sell the house purchased from an interim payment to pay a costs liability to D:

*“If the money [from an IP] is invested, for example, in a house, the claimant runs the risk that if the court orders repayment, he may lose the investment unless he has other means to repay” (at para.102).*

# “Substantial Injustice” (cont’d)

What content should the Courts give to the words “substantial injustice”? Parliament cannot be supposed to have added mere meaningless verbiage to the wording of the statute. However, the Courts have struggled to define the test.

There is a hint in **Iddon –v- Warner [2021] EWHC 587 (QB)** of a balancing act between, on the one hand, the extent of the dishonesty and, on the other hand, the injustice to C in the dismissal of the claim:

*“In my judgment, the culpability and extent of her dishonesty far outweighs any injustice to her in dismissing her claim; the dismissal of this claim seems to me to be exactly the evil to which Parliament directed its mind in enacting section 57” (at para.103).*

# “Substantial Injustice” (cont’d)

Would a test of “substantial injustice” work based upon a balancing act of (i) the extent of C’s dishonesty and (ii) the injustice to C?

- As per **Sinfield**, the wording of s.57(3) means the injustice to C would have to be more than the mere loss of the damages claim.
- Why should the Court be concerned with the extent of C’s dishonesty? The focus of s.57(2) is upon “substantial injustice”, not upon the extent of the dishonesty (the wording is whether C “*would suffer substantial injustice if the claim were dismissed*”).

# “Substantial Injustice” (cont’d)

It is clear from Iddon –v- Warner that the following would not amount to “substantial injustice”, certainly in the context of serious and pervasive dishonesty:

- the risk of having to repay an interim payment;
- the risk that C has to sell her house to repay an interim payment due to the setting aside of QOCS protection; and / or
- the risk that C will not be able to fund therapies.

What about psychiatric distress? Could that amount to “substantial injustice”?

What if one Claimant puts another under duress to bring a dishonest claim? Could duress amount to “substantial injustice”?

# “Substantial Injustice” (cont’d)

- Steven Lee Woodger –v- Reece Hallas [2022] EWHC 1561 (QB)

- In July 2014, C was the front-seat passenger in a car driven by D who lost control. The car spun and its passenger side was struck by an oncoming vehicle. C had to be cut free. Liability was admitted.
- The trial judge found C to be fundamentally dishonest for exaggerating his ongoing right hip symptoms and his past loss of earnings claim given that he had been filmed working in a garage and moving freely, including working under the bonnet of cars.

# Steven Lee Woodger –v- Reece Hallas [2022] EWHC 1561 (QB) (cont'd)

- However, the trial judge found that C would suffer “substantial injustice” if his claim was dismissed and awarded him £49,415 damages plus costs at trial. D succeeded on appeal:

*“In my judgment there was no proper or adequate basis for the judge’s finding that it would be substantially unjust to dismiss the entire claim...*

*...The two expressed reasons for finding substantial injustice were that part of the claim was genuine; and that others had provided past care. Neither reason is sufficient. The first reason is in conflict with **Sinfield** and **Iddon** and the plain purpose of s.57. The second reason is difficult to reconcile with s.57(2) which makes clear it must be the claimant – and not anyone else – who would suffer substantial injustice” (per Julian Knowles J. at paras.42 and 45).*

# Committal Proceedings

- C bears the standard of proving his claim.
- D bears the burden of proving fundamental dishonesty on the balance of probability.
- In **Aviva Insurance Limited –v- Aleksandar Kovacic [2017] EWHC 2722 (QB)**, Martin Spencer J. was told in committal proceedings that the trial judge had been asked to indicate whether the Court was satisfied to the criminal standard of proof in respect of any findings of deliberate exaggeration and fundamental dishonesty (at paragraph 8).

# FD is normally dealt with at trial

## **Jamie Stannard -v- Euro Garages Limited [2022] 3 WLUK 64:**

*“A paper determination of fundamental dishonesty, without the claimant having the opportunity of promoting his case through his oral evidence and that of his witnesses, and removing any opportunity to explain presentation, would be in the circumstances of this matter unfair...*

*I can fully understand that, in the interests of saving costs and time, solicitors acting for defendants may wish to find ways of bringing to a swift end those claims that they consider to show elements of fundamental dishonesty. However, in order for a court to be satisfied that a defendant has established fundamental dishonesty on the balance of probabilities, it is necessary for the court to have all the evidence and for that evidence to be subjected to the rigours of cross-examination.” (at paragraphs 44 and 49, per H.H.J. Walden-Smith).*

# What if the Claimant discontinues?

- CPR PD 44 para.12.4(c) states that 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 can be determined notwithstanding that the notice has not been set aside pursuant to CPR r.38.4.
- See also: **Alpha –v- Roche [2018] EWHC 1342**

# Remember that Defendants have more tools than Fundamental Dishonesty

- **Elgamol –v- Westminster City Council [2021] EWHC 2510**  
– D could have argued that costs could be reduced under CPR Part 44 to reflect non-fundamental dishonesty
- D can sometimes counterclaim in the Tort of Deceit