

Substantial injustice – where are we now?

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In *Williams-Henry v Associated British Ports Holdings Ltd* [2024] EWHC 806 (KB), Ritchie J found that, despite the Claimant having sustained serious injuries, which would have warranted damages of almost £600,000, that she had been fundamentally dishonest. This resulted in the entirety of her claim being dismissed under s57 of the Criminal Justice & Courts Act 2015 ('CJCA 2015').

The Claimant suffered a moderately severe traumatic brain injury after falling from the Defendant's pier, which had insufficient safety rails. Liability was settled 2/3rds in the Claimant's favour.

The Claim was pleaded at £3.5 million on a full liability basis. The Defendant, within its counter schedule admitted a maximum of £552,000.

Whilst accepting some level of genuine injury, the Judge found that there had been "*gross exaggeration and fabrication of the true duration and/or extent*" of a range of symptoms, including in relation to alleged left sided hearing loss, dizziness and balance issues, memory and cognitive functioning, and her ability to socialise [173]. He described some of the Claimant's answers in cross examination as "*breathhtakingly dishonest*" and found the Claimant to be "*dishonest and manipulative both in Court and in what she said to the medico-legal experts*" [100].

The judgment provides interesting guidance on the approach to the "*substantial injustice*" exception, under s57(2) CJCA 2015.

In *London Organising Committee of the Olympic and Para Olympic Games v Sinfield* [2018] EWHC 51, ('*LOCOG*') Knowles J at [65] held that: "*substantial injustice must mean more than the mere fact that the Claimant will lose his damages for those heads of claim that are not tainted with dishonesty*" noting that if this were not the case, it would "*effectively neuter the effect of s 57(3) if dishonest Claimants were able to retain their 'honest' damages by pleading substantial injustice on the basis of the loss of those damages per se.*" He was, however, not prescriptive as to the type of facts which might give rise to a finding of substantial injustice. This approach has been widely cited with approval, including recently in *Muyepa v Ministry of Justice* [2022] EWHC 2649.

In *Woodger v Hallas* [2022] EWHC 1561, another decision of Knowles J, it was noted that there was no judicial definition of "*substantial injustice*", but that "*judges will generally 'know it when they see it'*" [49].

At [117], Ritchie J, however, disagreed with the approach of Knowles J in *LOCOG* holding that "*the starting point is that a dishonest claimant is not suffering an injustice per se by being deprived of his/her genuine damages*". The Judge considered that:

"...trying to identify whether dismissing a claim for damages with a properly assessed genuine quantum of say £600,000 would cause any or even a substantial injustice to a claimant, whilst ignoring the very dismissal which is the only operative cause of any potential injustice, is imposing a blindfold on the Judge which the Act itself does not impose. I do not understand how a Judge will know injustice when she/he sees it, with the blindfold put on.

[...]

In my judgment it is the dismissal of the claim for damages that is the trigger for the analysis of whether a substantial injustice will occur if no damages are awarded. One cannot ignore the very thing which S.57(3) takes away when considering the injustice of the taking away."

Ritchie J considered that the correct approach when considering whether substantial injustice arises is to *"balance all of the facts, factors and circumstances of the case to reach a conclusion"*[178]. He considered those to include:

1. The amount claimed when compared with the amount awarded.
2. The scope and depth of the Claimant's dishonesty.
3. The effect of the dishonesty on the construction of the claim.
4. The scope and level of the claimant's assessed genuine disability.
5. The nature and culpability of the defendant's tort.
6. What the Court would do in relation to costs if the claim were not dismissed.
7. Whether the defendant had made interim payments, and whether the Claimant could afford to repay these.
8. The effect that dismissing the claim will have on the claimant's life.

This marks a relatively substantial shift in the approach to substantial injustice, which had been widely accepted since *LOCOG*. Whilst, applying his own test, the Judge concluded that substantial injustice would not be caused in relation to the dismissal of the genuine element of the claim, he did not order the Claimant to repay the £75,000 interim payment, as this *"could, when combined with dismissal of the claim be an injustice to the Claimant because she would then be homeless, jobless, depressed and suicidal"*(emphasis added) [206].

Previously, it had been thought that the dismissal of the genuine claim itself was not a factor which the court should consider. Invariably dismissing a genuine part of the claim would cause some level of injustice, but this was the price that was to be paid for the dishonesty, and was inherent in the function of s57(3). However, this case suggests that judges should consider the fact of the dismissal itself, and the impact that this will have upon the claimant, in conjunction with the other circumstances of the case.

Arguably, this lowers the threshold for a finding of substantial injustice, as the court, as a starting point, is entitled to recognise the injustice of losing the damages for a genuine injury.

There is yet to be a reported authority where a fundamentally dishonest claimant is successful in using the s57(2) CJA 2015 shield to retain the genuine element of their claim. We are told judges will *"know it when they see it"*, and if the approach in this authority is followed, it certainly seems to make the first sighting more likely.

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