



39 Essex Chambers
#39Events

FUNDAMENTAL DISHONESTY

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KEY TOPICS

- Fundamental dishonesty v fraud
- What is FD?
- When should it be alleged?
- Common issues: surveillance
- Recent developments: only the PI claim, approach to substantial injustice

FUNDAMENTAL DISHONESTY V FRAUD

- Fundamental dishonesty (“FD”) is conceptually different to fraud.
- **Key point: FD is all about costs in personal injury claims and the dismissal of an otherwise meritorious claim.**
- The consequences can be dramatic.



SECTION 57 CRIME JUSTICE AND COURTS ACT 2015

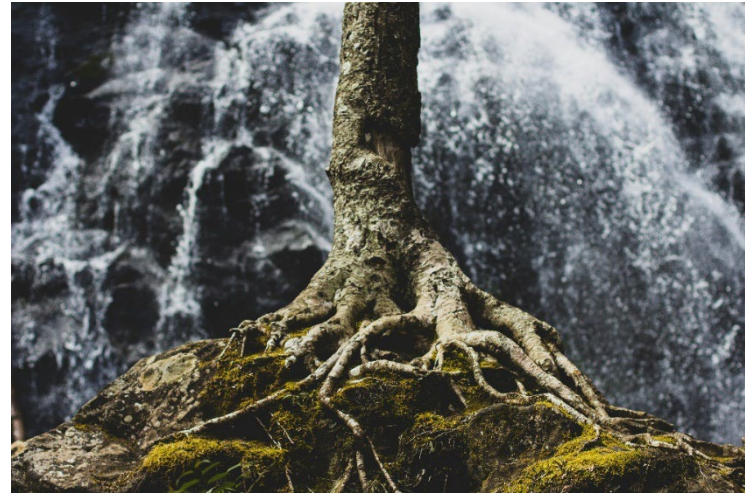
- Section 57 applies to a personal injury claim where:
 - C is entitled to damages in respect of the claim BUT
 - Court is satisfied on BoP that C has been FD in relation to that claim (s.57(1))
- Where triggered, the court **must** dismiss the PI claim *unless* it is satisfied C would suffer substantial injustice (s.57(2))
 - INCLUDING *any* element of the PI claim in respect of which C was not dishonest (s.57(3))
- BUT the court must also record the amount of damages it *would have* awarded but for the dismissal of the claim (s.57(4)) and that amount must be deducted from any costs award against C

PART 44 – QOCS

- **CPR r.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.”
- **Practice Direction 44 Para 12.4(d)**
 - “the court may, as it thinks fair and just, determine the costs attributable to the claim having been found to be fundamentally dishonest.”

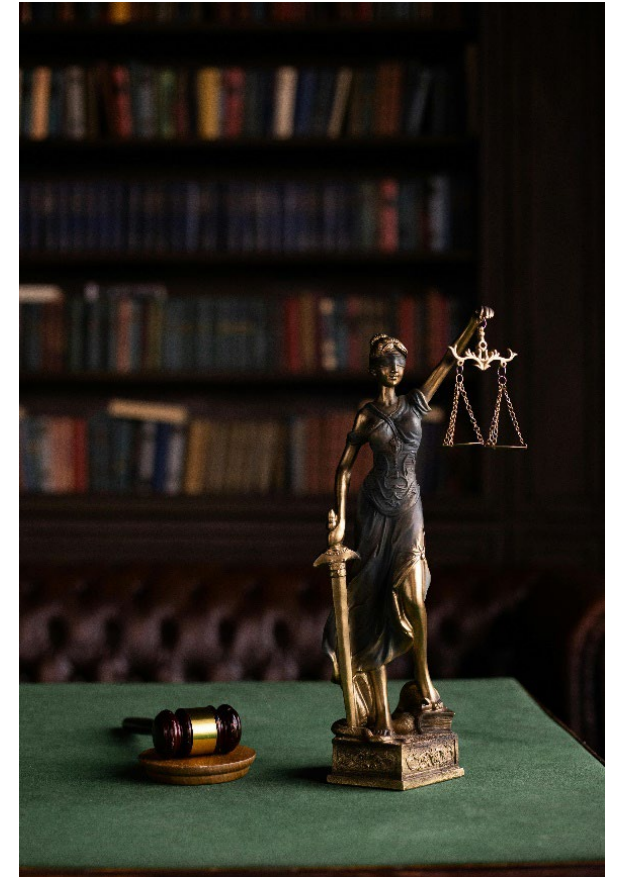
FD: FUNDAMENTAL

- What does “fundamental” mean?
- “Fundamental” v “incidental” or “collateral”
- “Going to the root of the whole claim or a substantial part of it”: *Gosling v Hailo*
- “Substantial and material dishonesty going to the heart of the claim [...] rather than peripheral exaggerations or embroidery”: *Rayner v Raymond Brown*
- “Substantially affecting the presentation of his case, 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.”: *LOCOG v Sinfield*



FD: DISHONEST

- What does “dishonest” mean?
- Para 74 of *Ivey v Genting Casinos UK [2017] UKSC 67* per Lord Hughes
- A **subjective** state of mind BUT an **objective** standard
- First stage: What was the **subjective** state of the individual's knowledge or belief as to the facts? Was the knowledge or belief genuinely held? N.B. There is no added requirement C's belief must be reasonable.
- Second stage: By the **objective** standard of ordinary decent people, was the individual's conduct honest or dishonest? N.B. There is no requirement that C must appreciate they were dishonest.



EXAMPLES OF FD

- Production of fraudulent invoices from a gardener in a claim for past and future loss:
LOCOG v Sinfield
- Failure to give proper disclosure about his financial circumstances in a credit hire/PI claim:
Haider v DSM Demolition [2019] EWHC 2712 (QB)
- Failure to tell medical experts about a later accident:
Pegg v Webb [2020] EWHC 2095 (QB)

WHAT IS NOT FD?

- Statement in evidence of a minor head injury which was not part of pleaded claim:
Denzil v Mohammed [2023] EWHC 2077 (KB)
- Exaggeration of ongoing effects of injury which did not amount to lies:
Elgamal v Westminster CC [2021] EWHC 2510 (QB)
- Generally, take a realistic and holistic view on whether C's conduct is FD
 - Inconsistency or developing narratives do not always amount to FD
 - Exaggeration is not always FD: See *Elgamal* where C had genuine belief in his exaggerated account of the effects of his injuries

WHEN TO ALLEGE

- No obligation to allege fraud or fabrication in a defence:
Kearsley v Klarfeld [2005] EWCA Civ 1510
 - Still relevant? Limited to low velocity RTAs?
- The real question is whether C had adequate warning of and a proper opportunity to deal with the possibility of the court coming to a finding of FD: *Howlett*
 - QOCS protection may be displaced on the grounds of FD even where FD is not positively alleged.
 - “Should the court find any elements of fraud to this claim, the Second Defendant will seek to reduce any damages payable to the Claimants to nil together with appropriate costs orders therein.”

AN OPPORTUNITY TO DEAL WITH THE ALLEGATION

- C's right to respond properly to serious allegations, such as FD
- Fact specific question
 - What are the procedural rules on the allocated track?
 - Did D put C to proof in the defence or set out its different factual basis?
 - Did D probe the honesty of C's evidence in cross-examination?
 - Was the issue of C's honesty put before the court?
 - Were the facts from which the inference of FD can be drawn probed?
- *Howlett*: Better but not required for D explicitly to put C's honesty to them in cross-examination

WHAT IF C DISCONTINUES

- D obtains automatic costs order in its favour when C discontinues: CPR r.38.6
- No benefit in PI claim as cannot enforce against C due to QOCS
- Except, *“the court may direct that issues arising out of an allegation that the claim was fundamentally dishonest be determined notwithstanding that the notice [of discontinuance] has not been set aside pursuant to rule 38.4”*: PD 44 para 12.4(c)
- Two-limbed discretion: (i) whether to determine FD issue, and (ii) method of determining it
- An unfettered discretion requiring the weighing all relevant considerations in accordance with the OO: *Alpha v Roche* [2018] EWHC 1342 (QB)

CONSEQUENCES OF A FINDING OF FD

- Firstly, this triggers the statutory provisions in s.57: the court **must** dismiss the PI claim, including any elements in respect of which C has not been dishonest, unless C would suffer substantial injustice – s.57(2)-(3)
- Secondly, the QOCS protections in Part 44 are displaced and cost orders made against C may be enforced to their full extent, subject to s.57(5):
 - The amount of damages the court *would have* awarded in respect of the PI claim **must** be deducted from the amount it orders C to pay in respect of D's costs.

CONSEQUENCES OF A FINDING OF FD

- Thirdly, the court may, if it thinks it fair and just, determine the costs attributable to the claim having been found to be fundamentally dishonest. (PD44, para 12.4(d))



PRACTICAL POINTS

- Merits **and** fraud check
- The statement of truth
- Client warnings
- Medical appointments
- Where FD fails, C must still prove their case



SURVEILLANCE EVIDENCE

- Common issue
- Permission and when to disclose
 - Video/DVD = “document” for CPR r.31.4
 - But no ambush
- Costs
- FD? Exaggeration? Inconsistency?



RECENT DEVELOPMENTS: *SENAY V MULSANNE*

- *Senay v Mulsanne Insurance Co Ltd [2024] EWCC 12 (24 May 2024)*
- S.57 obliges the court to dismiss **ONLY** the PI claim, *not* the other non-PI heads of claim
- Not binding authority but unlikely to be seriously questioned

RECENT DEVELOPMENTS: *WILLIAMS-HENRY V ASSOCIATED BRITISH PORTS [2024] EWHC 806 (KB)*

- Ritchie J set out correct approach to the question of “substantial injustice” in s.57(2)
- Mere loss of legitimate damages neuters s.57(3), not substantial injustice
- Highly fact-specific, relevant factors were all of the circumstances but included:
 - Proportion of dishonest claim
 - Scope and depth of dishonesty
 - Effect of dishonesty on bringing and defending claim, including costs
 - Scope and level of C's assessed genuine disability
 - Nature and culpability of D's tort
 - C's ability to pay back interim payments
 - Effect on C's life, such as losing a home, living on benefits, being unable to work

QUESTIONS?



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