

A recent trial

This month, I had the opportunity to observe a personal injury trial in which allegations of fundamental dishonesty were raised by the defendant. This is an area of civil litigation which is touched on only in passing on the Bar Course, but is of vital importance in some personal injury cases. I thought it would be of assistance to future pupillage applicants to set out some of the background.

The relevant law is found in section 57 of the Criminal Justice and Courts Act 2015, and in the subsequent cases applying that section. Section 57 applies in a personal injury claim where the court finds the claimant is entitled to damages, but the defendant makes an application that the claimant has been “fundamentally dishonest” in relation to the claim.

What does “fundamentally dishonest” mean? The “dishonest” part of the phrase is construed using the usual test in *Ivey v Genting Casinos*: what were the facts as the claimant subjectively understood them to be and, against that background, would ordinary decent people consider the claimant’s actions to be honest?

As to what “fundamentally” means, the recent case of *Denzil v Mohammed* [2023] EWHC 2077 (KB) provides a useful synthesis of the decided cases (top tip for future pupils – if you can find a case in which a judge has gone through the decided cases and produces a numbered list of the key principles emerging from those cases, this can sometimes be a very useful way into the topic and save a lot of research!). In short, “fundamental” dishonesty goes to the root or the heart of the claim, or substantially affects the presentation of the case in which way potentially adversely affects the defendant in a significant way – all of these concepts being largely synonymous.

In higher value personal injury claims, it is not uncommon for defendants to obtain covert surveillance footage of claimants where they suspect dishonesty. That surveillance footage might, for example, suggest the claimant may be suffering from less of a disability as a result of their injury than the pleaded case suggests. On an application from the defendant, a judge must then consider a) whether the claimant has been dishonest; and b) if so, whether that dishonesty is “fundamental” to the claim.

If the judge does make that finding, the stakes for the claimant could not be higher. The judge must dismiss their claim in its entirety, unless to do so would mean the claimant suffers substantial injustice. The claimant is then entitled to zero damages, even in relation to the aspects of the claim which were not dishonest. They also lose the protection of qualified one-way costs shifting (QOCS), and may incur a significant costs liability. In some cases, claimants can even be imprisoned for contempt of court.

It was against that background that I observed the cross-examination of the claimant in a high value personal injury claim, where the defendant had alleged fundamental dishonesty. Liability for the accident having been admitted, the dispute centred on whether the claimant had been dishonest in relation to the impact the accident had had on his ability to engage in everyday activities. Counsel for the defendant conducted the cross-examination in forensic detail, seeking to paint inconsistencies in the claimant’s claim as it evolved over time as fundamentally dishonest. This included exploitation of inconsistencies in the evidence given by the claimant during his many consultations with experts instructed by both sides.

In many ways, the trial was a salutary reminder of the importance of statements of case (schedules of loss in particular). These documents are verified by a statement of truth, signed by the claimant. Even though most claimants will rely, quite properly, on the expertise and advice of solicitors and counsel, it is vital that the claimant takes personal ownership of their contents. Equally, legal representatives need to give clear advice to claimants on the risks of a finding of fundamental dishonesty if that is a foreseeable outcome.