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PERSONAL INJURY BRIEFING

Recent years have seen the Courts being better equipped to deal with the question of how to deal with claimants who falsify or exaggerate claims. As a body of case law begins to develop, this issue of the PI Briefing traces its development, considers how it might assist those advising litigants in such claims and raises questions about possible future developments.

In this issue: Susanna Bennett considers the Supreme Court's decision in *Ivey v Genting* and reviews recent authorities in which questions of fundamental dishonesty have been considered. Dominique Smith discusses the appropriateness of contempt proceedings in the light of findings of fundamental dishonesty. Ben Hicks asks whether it can ever be appropriate for the Court to have regard to the motives behind the evidence given by less than truthful claimants.

The Story So Far…Case Law on Fundamental Dishonesty

Initial Guidance from the County Court…

Gosling v (1) Hailo (2) Screwfix Direct (29/4/14), HHJ Moloney QC – DCJ at Cambridge

The Court allowed the Second Defendant to enforce its costs to the full extent against the Claimant under CPR rule 44.16 on the basis of fundamental dishonesty after the Claimant's discontinuance.

The facts:

Mr Gosling brought a personal injury claim in respect of an injury to his knee. It appeared, to HHJ Moloney "*probable that he suffered it as a result of an accident of some kind involving a ladder*" that was manufactured by the first defendant and sold to him by the second defendant. Mr Gosling alleged the accident was as a result of the deficient construction of the ladder. The claim included special damages of £39,000 of which £17,000 was for future care.

The defendants conducted some covert surveillance. On the day the claimant was to attend at the defendants' medical expert, Mr Gosling was filmed shopping without using a crutch. He then went to the pre-arranged appointment and used the crutch to help him walk, confirming to the expert that he still had knee pain which limited his walking distance.

The matter was settled a couple of weeks before the trial with the first defendant paying £5,000 damages and £27,000 costs and an indemnity against the claimant's CRU liability (approximately £18,000).

The conclusion:

HHJ Moloney was satisfied, without hearing oral evidence from the claimant, that the surveillance evidence advanced by the defendants established on the balance of probabilities that Mr Gosling was deliberately dishonest and that he knowingly and dishonestly "*gravely exaggerated his symptoms to the doctor and the court*". This act of dishonesty was held to be "*fundamental to a substantial part (both in size and importance) of his claim for damages*".

Guidance from the Court of Appeal in 2017…

Howlett (1) Howlett (2) v (1) Penelope Davies (2) Ageas Insurance Ltd [2017] EWCA Civ 1696

A Defence did not need to positively plead fraud for a Court to find that the claim was fundamentally dishonest.

Facts: The insurer's defence had not pleaded a positive case of fraud, but had expressly stated that it did not accept that the incident had occurred as alleged, and that credibility was in issue.

Conclusion: A claimant should have fair notice of a challenge to their honesty. It would be best if this was explicitly put to them in cross-examination. In this case, the appellant's honesty was adequately explored in oral evidence, and the finding of fundamental dishonesty was upheld.

High Court decisions, following enactment of s. 57 CJCA on 13.04.15…

London Organising Committee of the Olympic and Paralympic Games v Haydn Sinfield [2018] EWHC 51 (QB)

A claim in which liability had been admitted was dismissed for dishonesty under section 57 Criminal Justice and Courts Act 2015.

Facts: A claim for damages for personal injury included a claim for £14,000 of gardening expenses (42 of the special damages claim). In fact the claimant's injury had not resulted in him incurring any additional gardening expenses.

Conclusion: While the 1st instance judge had concluded that the claimant was simply "muddled, confused and careless", this was overturned by Knowles J. He found that on the evidence the claimant had been dishonest, and that the dishonesty "substantially affected" the presentation of the case, meaning that it "went to the root" of the claim.

Razumas v Ministry of Justice [2018] EWHC 215 (QB)

The claimant dishonestly asserted in his particulars of claim that he had sought treatment, and this was the base for one of the allegations of negligence. The claim in any event failed, but Cockerill J concluded *obiter* that the dishonesty went to the root of the claim, sufficient for a finding under section 57 CJCA.

Wright v Satellite Information Services Limited [2018] EWHC 812 (QB)

Facts: Liability was admitted in a personal injury matter. The claimant pleaded his claim for future care in excess of £73,000, but only £2,100 was awarded at first instance. The Judge was concerned that figures in the expert report, and repeated in the schedule of loss, significantly overstated the care required. However he concluded that the claimant had not been dishonest.

Appeal: The Defendant appealed on the basis that the claim should have been dismissed under s. 57 CJCA. Yip J dismissed the appeal because, although the schedule of loss was an important document which had not served its purpose in this case, the Judge's finding that there was no dishonesty was a decision open to him on the facts.

The correct approach to whiplash claims…

Mirajuddin Molodi v (1) Cambridge Vibration Maintenance Service (2) Aviva Insurance Ltd [2018] EWHC 1288 (QB) (Martin Spencer J)

A claim for whiplash injuries in which there had been numerous inconsistencies should have been dismissed.

Facts: The claimant sought damages for a whiplash injury following a minor collision. Liability was admitted. The claimant had taken no time off work and had only sought medical attention on one occasion. There were numerous inconsistencies in the claimant's evidence: he had lied about the number of road traffic collisions he had been involved in, he sought £1,300 for repairs to his car although this had cost only £400, and there were inconsistencies in his accounts of the injury.

Appeal: The claim should have been dismissed because of the claimant's dishonesty. Regarding whiplash claims, Spencer J noted:

"*The court would normally expect [genuine whiplash] claimants to have sought medical assistance from their GP or by attending A & E, to have returned in the event of non-recovery, to have sought appropriate treatment in the form of physiotherapy (without the prompting or intervention of solicitors) and to have given relatively consistent accounts of their injuries, the progression of symptoms and the timescale of recovery… in any case where a claimant can be demonstrated to have been untruthful or where a claimant's account has been so hopelessly inconsistent or contradictory or demonstrably untrue that their evidence cannot be promoted as having been reliable, the court should be reluctant to accept that the claim is genuine…*"

Susanna Bennett

Ivey v Genting: A New Test for Dishonesty

In *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)* [2017] UKSC 67; [2018] A.C. 391 the Supreme Court replaced the test for dishonesty in *R v Ghosh* with a new 2-limb test.

The facts:

The appellant was a gambler who had used the technique of edge-sorting to increase his odds of winning. He believed that this was an honest technique. His claim had been dismissed on the basis that he had cheated, in spite of his belief to the contrary. His appeal was dismissed.

The *Ghosh* test:

In *R v Ghosh* [1982] QB 1053 the Criminal Division of the Court of Appeal set out a 2-stage test for dishonesty in criminal cases:

1. Whether the conduct of the Defendant was dishonest by the lay, objective standards of ordinary reasonable and honest people;
2. If yes, whether the Defendant must have realised that ordinary honest people would regard his behaviour as dishonest.

The new test:

Citing concerns about the second stage, including that a conviction was less likely if the Defendant's standards of honesty were more warped, the Supreme Court introduced a new 2-stage test:

1. Subjectively, what was the actual state of the individual's belief or knowledge as to the facts?
2. If a dishonest state of mind was established, was the conduct dishonest according to the objective standards of ordinary decent people?

Crucially the new test does not require an individual to appreciate that his or her conduct was dishonest by the standards of ordinary decent people. The tests for dishonesty in civil and criminal cases were brought into line.

In the case of *Ivey*, if cheating at gambling had included an additional legal element of dishonesty, that element would have been satisfied.

Susanna Bennett

Sabotaging your own claim: how Facebook can lead to committal proceedings

It is commonplace for social media posts to form part of personal injury litigation. They can be provided by parties in the course of disclosure or uncovered throughout the life of proceedings, often in an attempt to discredit a claimant's account of their injuries. Such posts can be used during cross-examination to assist in establishing a finding of fundamental dishonesty. Recently, in *Zurich Insurance PLC v David Romaine* [2019] EWCA Civ 851 (CA), the Court of Appeal granted permission for committal proceedings to be brought against a litigant in person whose Facebook account revealed his dishonest account of his injuries.

Factual Background

On the 17th November 2015, the Respondent issued proceedings against the Appellant's insured, Stanley Refrigeration Limited ("SRL"), and a third party, Lee Beesley Mech & Elec Limited ("LBMEL"), for noise induced hearing loss. The Respondent had been employed by LBMEL as a refrigeration engineer from 1965 to 1971 and by SRL as an apprentice engineer from 1978 to 1985. The Respondent's Amended Particulars of Claim alleged breaches of statutory duty and/or negligence against SRL and LBMEL, which had caused him bilateral long-term noise induced hearing loss and mild tinnitus.

The Respondent relied upon a medical report of Mr Hugh Wheatley, which was attached to his Particulars of Claim. The medical report stated that the Respondent "*had not had any noisy hobbies*". SRL and LBMEL later obtained the Respondent's medical records, which suggested that he was a professional singer and a motorcyclist. Part 18 questions were subsequently asked of the Respondent. The Respondent stated in his responses that he "*was never and have never been a professional singer*" and further denied playing with a live band, signing the document with a statement of truth. In his witness statement, again signed with a statement of truth, the Respondent specifically stated: "*I do not ride a motorcycle, nor do I participate in or attend motocross or motorsport events*".

The Appellant's solicitors commissioned an intelligence report in the light of these discrepancies. The Respondent's Facebook page revealed that:

- the Respondent had ridden motorcycles;
- the Respondent had an interest in fast motorcycles, fast cars and guitars;
- the Respondent performed in a live rock-and-roll band called the "501's";
- the Respondent played an electric guitar when performing with the live band and was the lead singer;
- the Respondent's live band advertised its services to perform at venues;
- the Respondent's live band performed regularly both at pubs, clubs and larger events;
- the Respondent rehearsed regularly.

The Appellant consequently served the intelligence evidence upon the Respondent along with a notice that a strike out application would be made in due course. The Respondent was also advised that if he sought to discontinue, the Appellant would make an application to set aside the notice of discontinuance and/or seek a trial on the issue of his fundamental dishonesty.

The strike out application was made in March 2017 and the Respondent subsequently served a notice of discontinuance.

In September 2017, the Appellant issued and served committal proceedings on the Respondent. In November 2017, the Respondent provided a witness statement opposing the committal.

In August 2017, Goose J dismissed the Appellant's application for permission to commence contempt proceedings on paper without a hearing. He did so on the basis that whilst there was good evidence of false statements being made deliberately, the documents upon which the statement of truth appeared "*were not signed by the Defendant*". He further recorded that it was not in the public interest that committal proceedings be brought in the circumstances where the Respondent discontinued his claim at a relatively early stage of the proceedings.

The Appellant lodged a notice of appeal. An oral hearing took place before Goose J who refused the application. In the oral hearing, Goose J drew attention to the fact that it did not appear as though the Respondent had been warned that he may have committed a contempt, which he considered a relevant factor.

The appeal came before Lord Justice Davis and Lord Justice Haddon-Cave.

The Appeal

The Court considered that there were two aspects

of Goose J's reasoning to consider: the relevance of the absence of warning given to the Respondent and the relevance of the Respondent's immediate discontinuance of the proceedings.

In respect of the failure to warn, the Court of Appeal considered that Goose J was mistaken in his approach to this issue, as an absence of a warning may be a relevant factor in some, but not all, cases. In this case, the Respondent was an alleged contemnor who himself commenced his claim. It was noted that the absence of a warning in practice was unlikely to be of any relevance where the alleged contemnor is the claimant in an underlying personal injury claim and where the false statements were contained in documents prepared by himself or his solicitors and signed with a statement of truth.

When looking at the discontinuance, the Court considered that if a claimant or appellant discontinued proceedings immediately or shortly after being confronted with evidence, or on an accusation of falsity, it was likely to be a relevant factor to be taken into account in most cases. The Court further stated that the "*stratagem of early discontinuance should not be seen to be used by unscrupulous claimants or lawyers as an inviolable means of protecting themselves from the consequences of their dishonest conduct*". The Court considered that whilst it was right of Goose J to observe that early discontinuance was not a bar to permission to bring proceedings, he erred because he should have given regard to the mischief that the stratagem of early discontinuance represents as one of the tactics of claimants and lawyers who engage in the practice of insurance fraud.

Consequently, the Court granted permission for committal proceedings to be brought. LJ Haddon-Cave made clear following his judgment that "*a message needs to go out to those who might be tempted to bring - or lend their names to - fraudulent claims: that dishonest claimants cannot avoid being liable to committal proceedings merely by discontinuing their original fraudulent claim*".

Comment

This judgment paves the way for defendants to initiate committal proceedings against claimants following discontinuance of suspected fraudulent claims. Should defendants have clear evidence of untruths in a claimant's account, particularly by reference to social media posts and in response to part 18 questions or in their witness statements, committal proceedings should be considered.

Dominique Smith

Exaggeration – how far should a Claimant be permitted to go?

In July 2013, Mr Spencer Smith fell into a hole whilst working for Ashwell Maintenance Limited (Ashwell) as a gas engineer. In so doing, he suffered an injury to his ankle. Unsurprisingly (and unremarkably), he advanced a claim against his employer in respect of that injury and its alleged consequences.

The manner in which he ultimately came to recover a very substantial sum of money is however more surprising – and is one which raises interesting questions as to how far the rationale behind the decision opens up a “fall-back” position for claimants alleged to have been fundamentally dishonest.

At trial, the parties advanced radically different cases as to the injuries he suffered as a result of his accident. Mr Smith alleged that he was at trial still suffering from debilitating pain which significantly impinged upon his earning capacity and would do so permanently. Ashwell contended not only that the injury suffered had been time-limited but that its ongoing effect had been exaggerated.

This being so, it contended that the claim should be struck out pursuant to s.57 of the Criminal Justice and Courts Act 2015 and/or following *Summers v Fairclough Homes* [2012] UKSC 26. In support of that contention, again unremarkably in the context of such arguments, it placed significant reliance upon the contrast between Mr

Smith's presentation to the various medical experts involved and his appearances in surveillance footage, some of which appeared to show him engaging in work-related activities.

More unusually, Mr Smith also made an appearance in a television programme called "*Selling Houses with Amanda Lamb*", in which he was not only involved in what was described by the Court as "playing to the camera", but was also seen apparently undertaking various DIY and decorating activities, as well as negotiating stairs seemingly without difficulty. The latter was in explicit contrast to the limitations described by him to the first of the several orthopaedic experts involved in the case.

In the light of all that, HHJ Hampton's judgment contained much that might well have been expected to provide Ashwell with considerable support for its arguments. These included:

There are, however, significant contradictions in the Claimant's case which I find troubling. The Claimant's presentation…marks a considerable contrast to his description of his continuing difficulties on examination…

I am troubled by the extent to which I can rely on the Claimant's evidence. There are some very obvious contradictions, for example in what the Claimant has said to successive medical experts about the effect of the accident and consequential disability on his ability to function in activities of daily life and what can be seen on the filmed evidence.

The Claimant's accounts to the medical experts as to whether he can drive have also been contradictory…

… I find that this is a case where the effect of the Claimant's injury is not as severe as the Claimant presents. I find that the Claimant has been capable not only of putting on a show for the camera…but also putting on show (sic) *for the medical experts.*

In the light of such findings, whilst Mr Smith's explanations were accepted in respect of other apparent contradictions highlighted by Ashwell, one might nonetheless expect the application to have succeeded. It did not, HHJ Hampton stating that:

… I find, that the Claimant's exaggeration and overstatement of his difficulties, are the result of an attempt by him to convince, rather than to deceive. I find that to some extent, the Claimant genuinely believes himself to be more significantly disabled by his continuing pain than, objectively, is in fact the case.

Faking pain…would almost undoubtedly amount to fundamental dishonesty. Exaggeration, with mixed motives of attempting to convince or deceive, is not.

Mr Smith ultimately recovered some £360,000-odd, with substantial awards being made not only in respect of past losses, but also in respect of six-figure sums relating to future loss of earnings and future care.

On the theoretical level at least, the distinction between, on the one hand, advancing untruthful or exaggerated evidence in support of a genuine claim and, on the other, falsifying a head of loss, is a clear one. This author wonders whether in practice, the line between the two will always be so easy to identify - and whether it is desirable that efforts should made to do so.

Whilst one can well appreciate that Mr Smith very much wished for Ashwell to compensate him appropriately, the fact that it had not done so and chose to resist his claim is not in any way unusual or remarkable in the context of litigation. It is presumably uncontroversial to suggest that there is a responsibility upon any Claimant to present their case in a manner that does not seek to mislead, even where significant issues of quantum and liability remain live.

As a matter of policy, questions must surely arise to the appropriateness of legitimising the presentation of untruthful or misleading evidence to any extent. To do so runs the risk of creating

the opportunity for a Claimant to advance an embellished or exaggerated claim safe in the knowledge that where there is a core of truth to the case advanced, the Court will disregard the inflated and untruthful parts. Such an approach is submitted to be difficult to reconcile with the philosophy seemingly behind s.57 and QUOCS.

Presumably, were the embellishment in question sufficiently flagrant or exaggerated, few judges would be attracted to the idea that merely because that evidence was proffered in support of a genuine head of loss, it should be excused. However, if we are to accept that some degree of exaggeration to "make a point" is in fact permissible or excusable, it begs the question as to where that line should be drawn. It must also open up the unattractive possibility of significant resources being expended on exploring the distinction.

This is of course quite aside from the fact that if such a claimant's embellishment is not identified, the basis on which the case will be decided will have been distorted - unjustly - in his favour. In such circumstances, can the approach taken in *Smith* easily be reconciled with the wording of s.57? Can a claimant who has to any extent knowingly "put on a show" and thus influenced an expert's understanding of the nature of his disability really be said to be "honest" in the *Ivey v Genting*- sense, irrespective of the motives behind his or her decision to do so?

That said, the Court appears to have felt a (perhaps slightly unexpected) degree of sympathy with Mr Smith and viewed the "*hostility to the Claimant on the part of the Defendant's representatives and medical experts*" as being "*surprising in the context of modern litigation, particularly from the medical experts*". Nonetheless, the decision remains a surprising one, not least because the manner in which Ashwell's case was put does not appear in many respects to have been particularly remarkable or unusual given the nature of the issues live.

Ultimately therefore, one might argue that *Smith* itself can be explained by reference to its facts and not the rationale advanced in support of the decision made – this seemingly being the approach taken when it was very recently considered in *Patel v (1) Arriva Midlands Limited (2) Zurich Insurance PLC* [2019] EWHC 1216. However, of more concern is the degree to which the rationale behind it might be relied upon by Claimants to legitimise conduct which, irrespective of the motive behind it, would when viewed objectively and in isolation be difficult to characterise as anything other than dishonest.

Ben Hicks