DEANS COURT CHAMBERS

CIVIL INSURANCE FRAUD NEWSLETTER

Spring 2022

From the Deans Court Chambers Fraud Team

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IN THIS EDITION…

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Editorial

By Pascale Hicks

MASKS are off- there will be no hidden agendas or surprises!

Welcome to the latest edition of the Deans Court Chambers' Civil Insurance Fraud Group's newsletter.

The relaxing of restrictions is a welcome event and the consensus of the civil fraud team is that Judges are keen to get face-to-face trials back into the court buildings, particularly where honesty and credibility are in issue.

There is clear evidence that fundamental dishonesty arguments are being well investigated, pleaded and put before the Courts – and that judges are well prepared to make dishonesty findings. However, Courts are re-emphasising the need for dishonesty to be clearly set out to the claimant before trial.

The ultimate question, in the writer's view, is: was there a fair opportunity to deal with it? Or was the claimant facing an ambush? Inevitably, sometimes the fraud only becomes apparent during the trial – in which case the advocate should not feel constrained by the lack of fore-warning – but in all cases the key question will be whether the Claimant had a fair opportunity to deal with it.

In this edition:

Ross Olson takes the reader through the factors the Judge will have in mind when making that all important assessment of a witnesses' credibility and reliability – and outlining the *Gestmin* principles.

Will Tyler looks at the recent judgment of *Long v Elegant Resort Limited*, where the principles of *Howlett v Davies* and *Pinkus* are re-confirmed, and it is explained that areas of peripheral and diverse inconsistencies are unlikely to secure the FD finding.

Anthony Singh examines the operation and application of CPR 44:15 and hurdles faced by a Defendant persuading a Court to disapply QOCS without the benefit of a fundamental dishonesty finding.

Jonathan King analyses the principles of 'fraud unravels all' against the pursuit of the finality of litigation following trial.

Matt Hooper provides an introduction and some practical points for the civil fraud practitioner with regard to the new whiplash reforms – where the tariff system is in operation for claims occurring after 31st May 2021.

Zara Poulter considers the case where the Claimant's exaggerated claim for damages for medical negligence led to her admission of contempt and receiving an immediate 6-month custodial sentence.

Junaid Durani outlines some recent interesting county court decisions.

So I hope there is something for everyone in the smorgasbord that is the Deans Court Newsletter!

May I thank you for taking the time to read this publication. We are, as ever, happy to receive any feedback: always great to keep dialogue and lines of communication open with our clients. Please do feel free to email me on the address below.

Pascale Hicks

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Proofing & Preparing Witnesses for Trial – Judicial Assessments of Witness Credibility & Reliability

By Ross Olson

"The Claimant's car was empty when the collision occurred – I'm 150% certain about that". "I swear the Claimant was not knocked over by the reversing forklift truck". "The Claimant had definitely left the warehouse to make a cup of tea before the conveyor mechanism exploded". We are probably all familiar with cases in which Defendants (or defence witnesses) have made assertions like these. Indeed, fraudulent claims often turn on stark conflicts in the factual evidence of the protagonists.

Predicting how a witness will 'perform' in court, and whether his or her evidence is likely to be accepted by a trial judge, is not an easy task. Individuals drawn into the litigation process can present confidently in conference and be adamant that their recollections of past events are accurate. Of course, they frequently are. But what principles should guide the court when assessing a witness's credibility and reliability? This is often felt to be an essentially subjective and instinctive process, performed by the trial judge exercising a broad discretion. However, on several occasions the High Court has sought to highlight the *"lessons of experience and science in relation to the judicial determination of facts"*[1].

This guidance, which is essentially drawn from three cases - Gestmin SGPS SA v Credit Suisse (UK) Ltd[2], Lachaux v Lachaux[3] and Carmarthenshire County Council v Y[4], was usefully summarised in R (Dutta) v GMC[5] (per Warby J):

From Gestmin:

- We believe memories are more faithful than they are. Two common errors are to suppose (1) that the stronger and more vivid our recollection of events, the more likely it is to be accurate; (2) the more confident another person is in their recollection of events, the more likely it is to be accurate.
- Memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is even true of "flash bulb" memories (a misleading term), i.e. memories of experiencing or learning of a particularly shocking or traumatic event.
- Events can come to be recalled as memories which did not happen at all or which happened to somebody else.
- The process of civil litigation itself subjects the memories of witnesses to powerful biases.
- Considerable interference with memory is introduced in civil litigation by the procedure of preparing for trial. Statements are often taken a long time after relevant events and drafted by a lawyer who is conscious of the significance for the issues in the case of what the witness does or does not say.
- The best approach from a judge is to base factual findings on inferences drawn from documentary evidence and known or probable facts. *"This does not mean that oral testimony serves no useful purpose…But its value lies largely…in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth".*

From Lavchaux:

- *"Witnesses, especially those who are emotional, who think they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist.*

[1] Per Warby J. in R (Dutta) v GMC [2020] EWHC 1974 (Admin)
[2] 2013] EWHC 3650
[3] [2017] 4 WLR 57
[4] [2017] 4 WLR 136
[5] Citation above

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In is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason, a witness, however honest, rarely persuades a judge that his present recollection is favourable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance…"

- *"…I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective fact proved independent of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities…"*
- *"…I agree…that the demeanour of a witness is not a reliable pointer to his or her honesty."*

CNH later brought a debt / damages claim against Mr. Park based on sums said to be due from him, under the hire purchase agreements, as rectified by the deed of rectification.

From Carmarthenshire County Council:

- The general rule is that oral evidence given under cross-examination is the gold standard because it reflects the long-established common law consensus that the best way of assessing the reliability of evidence is by confronting the witness.
- However, oral evidence under cross-examination is *"far from the be all and end all of forensic proof"*.

The facts of R (Dutta) v GMC illustrate how a court/tribunal can fall into error in this regard. Dr Dutta (a cosmetic surgeon) faced various allegations of malpractice relating to surgery he performed on a patient (Patient A). He denied the allegations and relied on some contemporaneous records to support his account. Patient A was cross-examined with reference to these documents and asserted they were fabricated. It had not previously been suggested that the documents were fabricated or had been tampered with. In accepting Patient A's oral evidence, the tribunal (here the General Medical Council) was found to have made findings of fact which were (unusually) appealable. Warby J identified three critical errors (at Para 38):

i) The Tribunal approached the resolution of the central factual dispute by starting with an assessment of the credibility of a witness's uncorroborated evidence about events ten years earlier, only then going on to consider the significance of unchallenged contemporary documents.

ii) The Tribunal's assessment of the witness's credibility was based largely if not exclusively on her demeanour when giving evidence.

iii) The way the Tribunal tested the witness evidence against the documents involved a mistaken approach to the burden of proof and the standard of proof.

Practice points:

1. Practitioners should be aware of the ***"Gestmin guidance"*** which is likely to be applied by courts when assessing a witnesses' credibility/reliability. The key elements are:
   a. **human memory is fluid and fallible** when witnesses give evidence;
   b. the remembering of distant events often involves a process of **"after the event reconstruction"** which is liable to make evidence inaccurate;
   c. a witness's evidence is often **influenced/biased by involvement in the litigation process**;
   d. these difficulties with memory increase with the passage of time – ***"with every day that passes the memory becomes fainter and the imagination becomes more active…"***;

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e) as a consequence of the above, a witness may **come to recall events as memories when they did not happen or when they happened to someone else**;

f) a witness's **belief in a mistaken recollection of events may be genuine**. Credibility is not the same as honesty;

g) a witness's **demeanour is not a good guide to his or her credibility/honesty** (e.g. outward confidence or conversely signs of 'poor demeanour' such as anxiety, sweating, defensiveness, poor eye-contact, etc). People cope with the stress of giving evidence in different ways and it is dangerous to read too much into this;

h) a witness's evidence should be **tested against known, agreed or probable facts established in the case (particularly from contemporaneous documents assuming they are reliable[6]).**

2. This guidance should be borne in mind when proofing witnesses, preparing statements and during any assessment of how their evidence is likely to be received by the court. In particular, it is wise to consider whether the *detail* of a witness's account is consistent with facts which the court is likely to find are established. Inaccuracy in relation to these facts, even if they are peripheral to the central dispute in the case, may significantly affect the court's assessment of his or her credibility and reliability overall.

3. The evidence of opposing parties/witnesses should be subjected to the same process – this will assist in an assessment of how the court is likely to balance conflicting accounts in a case when making important findings of fact.

4. Above all, do not be distracted by the outward confidence and 'certainty' of a witness – demeanour is not everything!

Ross Olson

[6]This has to be assessed on the entirety of the evidence in a case – see CXB v North West Anglia NHS Foundation Trust [2019] EWHC 2053

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Long v Elegant Resorts Limited [2021] EWHC 1330 (QB)

By Will Tyler

The judgment of His Honour Judge Pearce (sitting as a Judge of the High Court) in Long v Elegant Resorts Limited [2021] EWHC 1330 (QB) is, well, long; running to some 252 paragraphs over 107 pages. It is nevertheless an interesting read, with similar features to claims of all values and some informative comments from the trial judge in relation to evidence and case preparation.

The Claimant had been the Defendant's 'Head of IT' working from premises in Chester. He had started with the company in June 2014 and served a six month probationary period at the end of which he was appointed to the role permanently and with a moderate increase to his salary.

Despite this the Claimant said that on 10th March 2015, he had inadvertently discovered that his job was at risk of redundancy. The nature of that risk and what the Claimant understood it to be was in issue at trial.

On 22nd March 2015, the Claimant was assisting another employee to remove items from the cellar of premises that had been occupied by the Defendant as offices, but which were due to be handed back to the Landlord. In the course of doing so, the Claimant struck his head on a low part of the ceiling of the cellar.

It was the Claimant's case that as a result of this incident he had suffered a Traumatic Brain Injury with serious consequences on his life and his ability to work.

The Defendant admitted its liability to the Claimant but asserted that he suffered no more than a bump to the head, 'of a kind which people suffer regularly and which has led to no long-term consequences at all.'

The Claimant attempted to return to work on 20th April 2015 but was only able to remain for a few hours. On that day he was told that he was to be made redundant and this took effect on 14th May 2015. Shortly thereafter, the Claimant appealed his redundancy in a document referred to as 'the May 2015 document' and which became central to the trial.

In its Defence the Defendant reserved its position in relation to the Claimant's injuries, but, as set out at paragraph 73 of the judgment,

"By the time of the service of the Counter Schedule dated 18 September 2020, the Defendant's position had hardened to the following:

i) It was denied that the Claimant had suffered any injury (or at least any injury of significance) in the accident;

ii) Insofar as an alternative explanation for any symptoms suffered by the Claimant was to be advanced, they were probably a continuing manifestation of a pre-existing condition, triggered by redundancy rather than the accident;

iii) The Defendant proposed to explore the Claimant's genuineness at trial;

iv) The Claimant had falsely represented to that his redundancy in April 2015 was or may have been accident related and that, absent the accident, the redundancy would not have caused him stress in any event.

74. In the Defendant's written skeleton argument, served for the purpose of trial, the Defendant added to this:

i) That the Claimant was "a demonstrably unreliable historian" in respect of issues other than merely the circumstances of his redundancy;

ii) That the Claimant appeared to be a man who exaggerates and therefore his evidence must be treated with the utmost caution."

The trial took place over 7 days in February and March 2021. Given the COVID pandemic most evidence was dealt with remotely, but the parties had urged the Judge to take evidence from the Claimant in person, given the nature of the allegations against him.

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The Judge acceded to this request, although he commented in his judgment (paragraph 5),

"I have found that remote hearings generally allow the Judge to have at least as good an opportunity to assess the reliability and credibility of a witness as do hearings in person." (Emphasis added).

The trial bundle ran to a final length of 3,857 pages. It is clear from the judgment that there was extensive consideration of the Claimant's medical records and the medico-legal reports as the Defendant teased out inconsistencies in an attempt to establish that the Claimant had been dishonest both in relation to his injuries, to his understanding of his job security and to the effect this understanding had on him. A particular feature was that it was alleged that the Claimant had dishonestly failed to inform one of the medical experts that at the time of the accident he was aware (to some degree at least) that he was at threat of redundancy. It being the Defendant's case that the Claimant was aware at the time of the accident that he was to be made redundant and that the stress of this was the cause of many of his symptoms.

From paragraph 37, HHJ Pearce set out a useful summary of the available guidance in relation to assessing lay witnesses and at paragraph 39 concluded,

"That is not to say that the court may or should simply dismiss witness evidence when it is inconsistent with documents. As Floyd LJ said in Kogan v Martin [2019] EWCA Civ 1645 *(citing the judgment of HHJ Gore QC in* CXB v North West Anglia Foundation NHS Trust [2019] EWHC 2053 *as to the caution to be exercised in applying the above passage from Gestmin in the particularly in the context of non-commercial disputes),* ***"a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all of the evidence"*** *(emphasis in the original). This is particularly so where, as here, one is concerned with documents that are (largely) not created or attested to by the witness whose accuracy and/or credibility is an issue, but rather by third parties such as doctors who, whilst usually at least can be taken as intending to make an accurate record, inevitably introduce a degree of subjectivity into that which they record."*

From paragraph 70, HHJ Pearce set out a useful summary of the law in relation to fundamental dishonesty.

Emphasising later in his judgment that the burden of establishing dishonesty lay on the Defendant, and that although the standard of proof was the balance of probabilities the Court required "appropriately cogent evidence" to establish the same.

In this section he also considered the oft-relied on judgment of Newey LJ in Howlett v Davies [2017] EWCA Civ 1696 but went on to say,

"76. During closing submissions, counsel for the Claimant made the valid point that the demands of ensuring that costs are proportionate means that a Claimant cannot be expected to incur cost in exploring factual issues in advance of a trial which are apparently peripheral, merely in order to cover the risk that, at trial, the Defendant will cross-examine on those issues and seek to establish inconsistencies in the evidence which are then said to be evidence of dishonesty.

"77. In my judgment, the court must be careful about drawing conclusions adverse to the honesty of a Claimant from evidence about peripheral issues, most particularly where the Defendant has not given adequate advanced warning of its intention to raise the particular issue. Indeed, having regard to the passage from Howlett v Davies referred to above, the court would doubtless consider preventing cross-examination in such circumstances, on the ground that fairly reaching a conclusion adverse to the Claimant and that therefore the cross-examination was inappropriate. This was the approach taken by HHJ Coe QC in paragraph 14 of her judgment in Pinkus v Direct Line [2018] EWHC 1671 (QB) *and it is one with which I agree."*

The Judge went on to conclude that the Claimant had suffered a TBI, that he had not known before the accident that he would be made redundant, and that any omission or trivialisation by him of his understanding of his risk of redundancy was not dishonest. Damages were awarded in the sum of £509,957 and the Claimant accordingly beat his own part 36 offer.

Conclusion

1. Despite the way in which judgments such as those in Howlett and Molodi v Cambridge Vibration Maintenance Service [2018] EWHC 1288 (QB)

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are often deployed by Defendants; the practice of contingent pleading has been deprecated (see Mustard v Flower [2021] EWHC 846 (QB), with which HHJ Pearce concurred).

2. It is right that fundamental dishonesty need not be pleaded, but the Claimant should be aware of the nature of the allegation, which should, it is suggested, be set out with precision, and must supported by cogent evidence.

3. Failing to do so, or embarking on a defence at trial that vaguely draws on diverse and peripheral inconsistencies, in the nature of a fishing expedition, risks cross-examination being curtailed and the issue of fundamental dishonesty being dismissed without consideration.

Will Tyler

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CPR 44.15: A Clipping of its Wings?

By Anthony Singh

Since the advent of Qualifies One-way Cost Shifting (QOCS), recovery of a Defendant's costs has been an ever more important but difficult task. The most obvious route to recovery is via a finding of fundamental dishonesty and r44.16 provisions, but in the right circumstances there is potential for recovery under r44.15. However, r44.15 has narrow and restrictive parameters:

r44.15:

(1) Orders for costs made against the claimant may be enforced to the full extent of such orders without the permission of the court where the proceedings have been struck out on the grounds that –
  (a) the claimant has disclosed no reasonable grounds for bringing the proceedings;
  (b) the proceedings are an abuse of the court's process; or
  (c) the conduct of –
    (i) the claimant; or
    (ii) a person acting on the claimant's behalf and with the claimant's knowledge of such conduct is likely to obstruct the just disposal of proceedings.

Clearly a case has to be struck out, as opposed to ending through summary judgment, being dismissed or a notice of discontinuance, before r44.15 can be engaged and it is noteworthy that the wording in respect of striking out contained in r3.4(2) is similar but not identical to r44.15:

r3.4:

(2) The court may strike out a statement of case if it appears to the court –
  (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
  (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
  (c) that there has been a failure to comply with a rule, practice directions or court order.

r3.4 refers to "the statement of case" disclosing no reasonable grounds or being an abuse of process whereas r44.15 refers to "the claimant" in respect of no reasonable grounds and "the proceedings" regarding an abuse of process.

Despite QOCS having been with us for over eight years now, there are no notes of guidance in the White Book as regards r44.15 (although there are some guidance notes within r3.4 as regards the comparable wording of that rule and some scant guidance at sections 6-12, 6-33 and 6-34 of the "Costs and Funding following the Civil Justice Reforms: Questions and Answers" Booklet 7th Ed).

Recent collective experiences within Chambers of r44.15 include:

a) a case where the wrong Defendants had been sued and the Claimant had not sought to rectify the situation until the morning of trial [no reasonable grounds for bringing the proceedings];
b) non-attendance at trial by the self-represented Claimants [conduct likely to obstruct the just disposal of proceedings].

But it is also the collective experience of Chambers that such applications are hard fought and judges are resistant to making orders which will result in costs liabilities on Claimants who ostensibly are protected by QOCS, even where such application are unopposed.

Brahilika:

Of some assistance is the unreported first instance case of Brahilika v Allianz Insurance plc (30th July 2015, County Court sitting at Romford, before District Judge Dodsworth).

Brahilika involved a trial where both Claimant and

Defendant were represented at trial, but the Claimant failed to attend because he was on holiday. Claimant's Counsel made an application to adjourn the trial but DJ Dodsworth struck the matter out applying a wide interpretation of "conduct of the Claimant being likely to obstruct the just disposal of the proceedings" finding that the Claimant's failure to attend the trial was conduct likely to obstruct the just disposal of the proceedings because it had denied the Defendant the opportunity to test the Claimant's evidence and to see if it was possible to establish a case on fundamental dishonesty. Whilst not binding, it can be of persuasive value in arguing that failing to attend a trial where fundamental dishonesty was a potential finding amounts to abuse or conduct likely to obstruct the just disposal of proceedings: it cannot be right that when faced with a potential finding of fundamental dishonesty, that a Claimant can be protected simply by failing to attend trial.

To avoid such a difficulty, a weak or potentially fundamentally dishonest Claimant may serve a Notice of Discontinuance, often only shortly before trial, in order to avail themselves of the protection of QOCS. One might think that Brahilika may assist in any application to set aside such a notice, pursuant to CPR r38.4(1), to then enable an application for strike out and enforceable costs on the basis that it was an abuse of process to curtail the litigation process before a Defendant has the opportunity to establish a finding of fundamental dishonesty, but the recent appeal in McDonald v (1) Excalibur and Keswick Groundworks Limited (2) Interserve plc may limit the prospects of any such future applications.

McDonald*:*

McDonald was an appeal before His Honour Judge Freedman in the County Court sitting in Newcastle upon Tyne, which was heard on 15th October 2021 with judgment being handed down on 29th November 2021.

It concerned an accident at work where the Claimant suffered fractures to his left shoulder and heel as the result of a fall from a ladder when it slipped during use. It was the Claimant's pleaded case that the ladder in question had been tied to a scaffold by a piece of string but there had been a failure to adequately secure the ladder to the scaffolding. However, in the Claimant's witness statement it was stated *"…the ladder I used in my accident was not secured…I did not try to move it because I assumed it was tied, even though I do not actually believe that it was."* There was therefore a tension between the pleaded case and the evidence as regards whether the ladder was secured or not.

At trial, before District Judge Searl at first instance, Claimant's Counsel attempted to clarify the position, but after taking further instructions sought to discontinue the claim with Notices of Discontinuance being filed.

In response, Counsel for the First Defendant argued that if the Claimant had made it clear from the outset that he had not checked to see whether the ladder was secure, then an application for summary judgment would have been made, which would have resulted in avoiding costs incurred after the service of the defence. Accordingly, it was argued that the Claimant's conduct was likely to obstruct the just disposal of proceedings, such to justify the setting aside of the Notice of Discontinuance, striking out the claim and to disapply QOCS.

DJ Searl did set aside the Notice of Discontinuance before striking out the claim and disapplying QOCS on the basis that she found the Claimant's conduct was such as to be likely to obstruct the just disposal of the proceedings.

On appeal, HHJ Freedman noted that there was no definitive interpretation to be found in case law as to what amounts to "obstruct the just disposal of the proceedings" but posed the question to be asked as to whether the conduct corrupted the trial process so that a just result could not be achieved.

Having posed the question in that manner, he considered [at paragraph 57 of the judgment] the Claimant's conduct in the case to be very far removed from what could properly be described as conduct likely to obstruct the just disposal of the proceedings. The conduct in question was *"to offer a somewhat different account in his witness statement from that which appeared in the Statement of Case insofar as he was not able to confirm the averment to the effect that the ladder was tied to the scaffold with a piece of string. Indeed, to the contrary, it emerged from his witness statement that he rather thought the ladder was untied. That was a material inconsistency which undermined the credibility and viability of the claim. It might well have been sufficient to justify judgment being entered pursuant to CPR*

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r24.2(a)(i) on the grounds that the Claimant had no real prospect of succeeding on the claim. However, the mere fact that the claim became unsustainable because of differing accounts as to the precise circumstances of the accident…is wholly outwith what is contemplated by conduct likely to obstruct the just disposal of proceedings."

HHJ Freedman continued at paragraph 59 *"…it seems to me that the Rules envisage conduct which jeopardises the fairness of the trial process* ***not run of the mill*** *conduct which amounts to no more than an unreliable or inconsistent account of an accident."*

In conclusion,

1. There is still minimal guidance as to the Court's interpretation and application of CPR r44.15.
2. Not ***"run of the mill"*** conduct or requiring "conduct which corrupts the trial process so that a just result could not be achieve" is I suggest a far narrower interpretation of "the conduct of the Claimant being likely to obstruct the just disposal of the proceedings" than that utilised in Brahilika.
3. The judgment of HHJ Freedman is likely to make the task of applying for enforcement pursuant to r44.15(1)(c) a significantly higher hurdle.

Anthony Singh

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DEANS COURT CHAMBERS

The Bare Knuckle Fight Between Fraud & Finality

By Jonathan King

Setting aside a judgment procured by fraud.

A party faced with a judgment which it considers was obtained by fraud will, naturally, wish to have this set aside. There are, of course, strong policy reasons for allowing this to be done.

A party which has obtained a valid judgment will, naturally, not wish to be troubled again and again by the same allegations. There are, of course, strong policy reasons for preventing a party having to fight the same case again and again.

As Lord Briggs said, in Takhar v Gracefield Developments Ltd & Ors [2020] AC 450, there are, thus, two "important and long-established principles of public policy. The first is that fraud unravels all. The second is that there must come an end to litigation". These can, as in Takhar, lead to a "bare knuckle" fight between the "fraud principle", and the "finality principle".

The rules of the fight

The 'rules' which might govern such a bare knuckle fight have been considered by the higher courts in a number of recent decisions, including Salekipour v Parmar[1], Takhar v Gracefield Developments, Elu v Floorweald[2] and, more recently, Park v CNH Industrial Capital Europe Limited[3].

The starting point for a claim, in equity, to set aside a judgment procured by fraud is the series of principles summarised by Aikens LJ in Royal Bank of Scotland plc v Highland Financial Partners lp [2013] EWCA Civ 328, namely that:

"Firstly, there has to be a conscious and deliberate dishonesty in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned. Secondly, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be 'material'. Material means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court's decision to give judgment in the way it did. Put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision. Thus the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was. Thirdly, the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence."

In Takhar, the Supreme Court had rejected the suggestion that a "reasonable diligence" requirement applied to such claims to set aside, such that Mrs. Takhar (who had not managed to adduce handwriting evidence showing the forgery of a document 'first time around') was not precluded from seeking to set aside the judgment on grounds of fraud. In reaching such a view, the Supreme Court emphasised the limited nature of the restrictions on bringing such an action.

In Elu, Linden J held that, because a 'key ingredient' of the cause of action to set aside a judgment for grounds of fraud was that both the court and the party had been deceived, the facts or evidence relied upon by the party seeking to set aside the judgment must be materials which were not known, to the party alleging fraud, at the time of trial.

Did the decision in Elu set down a general pre-condition for a claim to set aside beyond that envisaged in Takhar? How might the *RBS* principles be applied where there had been no trial in the first action?

Park v CNH Industrial Capital Europe Limited

Mr. Park is a contract farmer, who previously ran his farming business through a limited company, Park Organic Farms Limited. Between 2013 and 2014 he signed a number of hire purchase agreements with

[1] Salekipour v Parmar [2018] Q.B. 833
[2] Takhar v Gracefield Developments Ltd & Ors [2020] AC 450
[3] Elu v Floorweald Ltd [2020] 1 WLR 4369

CNH relating to farm equipment, each of which noted the hirer to be Park Hall Farms Limited. Mr. Park also signed a personal guarantee which referred to Park Hall Farms Limited. In each case, there were issues as to when the relevant details were inserted.

Park Hall Farms Limited never, in fact, existed. In December 2014, CNH obtained Mr. Park's signature on a deed of rectification, which (in its full form) stated that it was "always intended that" the hire purchase agreements were intended to have been made between CNH and Mr. Park, personally.

CNH later brought a debt / damages claim against Mr. Park based on sums said to be due from him, under the hire purchase agreements, as rectified by the deed of rectification.

Mr. Park, acting as a litigant in person, entered a brief handwritten defence which did not raise issues of fraud, but which did indicate that he considered any liability to be with a company, rather than with him personally. As matters proceeded, his defence was struck out owing to non-compliance with an unless order relating to the filing of pre-trial checklists, and he was precluded, by CPR 32.10, from relying on witness evidence having not served witness evidence in time. Mr. Park applied for relief from such sanctions, but was unsuccessful. In turn, CNH requested judgment under CPR 3.5 and judgment in CNH's favour was duly entered 'on paper', without a trial.

Mr. Park issued proceedings in 2018 for the rescission of the judgment on grounds that the judgment had been procured by fraud on the part of CNH; principally that it was clearly untrue for CNH to suggest that it was always intended that Mr. Park, personally, was to be a party to the hire purchase agreement, and that CNH's claim was predicated on such untruths.

CNH applied to strike out the rescission proceedings on grounds that *inter alia* the relevant facts were said to have been known to Mr. Park at the time of the original judgment, and that the acts alleged by Mr. Park to be fraudulent were not the operative cause of the entry of the original judgment.

At first instance, CNH's application for strike out was refused, however the rescission proceedings were subsequently struck out on CNH's appeal, leaving Mr. Park to appeal to the Court of Appeal.

Within a unanimous judgment handed down on 24th November 2021, the Court of Appeal held that the evidence demonstrated, in the clearest terms, that the court was deceived at the time when the judgment in default was entered (in the original proceedings), and that the case that CNH deceived the court into granting judgment by default by making deliberately false statements in their Particulars of Claim was overwhelming.

Importantly, the Court of Appeal noted that the decision in Elu ought to be treated with some caution. Elu was a case in which there had been found to be a number deliberate decisions by a party, 'first time around', not to deploy evidence available to him and not to comply with the directions of the court, and in which there was ample reason to consider the subsequent claim to set aside to be an abuse of process. It was not necessary, in Elu, for the court to decide what was meant by "fresh evidence", and it would not be consistent with the reasoning of the Supreme Court in Takhar to impose a *general* principle or pre-condition that a party might bring a claim to set aside *only* if they discovered new facts not previously known to them.

Having regard to the principles set down by the in Takhar and Elu, Mr. Park's claim to set aside was not an abuse of process, and ought not to have been struck out.

The judgment serves to emphasise (as did Takhar) the importance of the 'fraud principle' and the need to ensure that a party's ability to challenge a previous judgment on grounds that it was procured by fraud is not unduly restricted.

There will undoubtedly be cases where it is abusive subsequently to seek to set aside a judgment on grounds of fraud (see Elu), but this needs to be considered carefully in light of the importance of the 'fraud principle' and the principles set down by the Supreme Court in Takhar.

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DEANS COURT CHAMBERS

Whiplash Reforms: End of the Road for Fraudulent Claims?

By Matt Hooper

The whiplash reforms contained in the Civil Liability Act 2018, announced by the Government as long ago as November 2015, were finally implemented with effect from 31st May 2021.

The Government has expressly stated that the reforms are intended to reduce the number of fraudulent personal injury claims, and they aim to do so in two principle ways:

Firstly, by introducing a tariff system for valuing whiplash injuries lasting up to 24 months, which now attract far lower awards of compensation than before.

Secondly, by increasing the small claims track limit for injuries arising from road traffic accidents from £1,000 to £5,000 in respect of the value of the claim for PSLA. (The overall small claims track limit remains at £10,000). The increase in the small claims limit will of course reduce the recoverable costs associated with low value RTA claims, significantly reducing the economic incentive for claimant representatives to pursue such claims, encouraging greater challenge to potentially fraudulent claims.

Furthermore, "pre-medical" offers are now banned. A claimant may not seek, and an insurer may not make, an offer to settle a claim without medical evidence. This is intended to prevent insurers from choosing to settle claims for commercial reasons without investigating and verifying that a claim is genuine.

It is clear that claims for whiplash injuries arising from road traffic accidents will no longer be the primary cash generator in fraudulent claims as they have been in the past. The days of a claimant recovering £2,000 for a three-month whiplash injury in addition to significant litigation costs are over, but there are concerns that the reforms will not deter fraudulent claims, and may in fact serve to encourage them, not only in respect of claims arising from road traffic accidents but also in non-RTA personal injury claims as well.

Insurers should now ensure they take steps to recognise improper or fraudulent behaviour in claims of this nature and implement strategies to tackle this conduct head on.

There are a number of issues for insurers to be wary of:

Late notification of claims

The reforms only apply to injuries arising from accidents occurring on or after 31st May 2021. At the time of writing (December 2021), there will inevitably still be a significant number of claims being processed to which the previous regime applies. Late notified claims are likely to be an issue for insurers over the next couple of years as one can expect claimants and their representatives to pursue claims arising from accidents that occurred before 31st May 2021 at any stage up to 31st May 2024, as the allure of tariff-free damages and costs-bearing claims remains. Such claims warrant particular scrutiny.

Non-whiplash injuries

A principle area of concern is that the move to a tariff regime for whiplash injuries will prompt claimants to fraudulently claim they have suffered other injuries to which the tariff does not apply. Such injuries may include soft tissue injuries to the limbs or perhaps neurological injuries such as headaches or tinnitus.

These types of injury are just as difficult to objectively test as whiplash injuries and so the bona fides of such a claim is not readily determinable at the outset. Insurers would be well-advised to assess whether non-whiplash claims or alternatively claims involving whiplash alongside 'non-tariff injuries' increase to any significant extent going forward or remain consistent with current levels. Insurers should take steps to identify any particular representatives and/or medical experts to whom such cases appear to disproportionately relate.

Exaggerated whiplash injuries

Where liability is denied in full, the new Official Injury Claim ("OIC") Portal provides that claimants can issue proceedings on the issue of liability only. Following resolution of liability (assuming the claimant is successful) the first medical report is then obtained.

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Based on current timescales for listing of small claims track hearings, it could be upwards of a year before a medical report is obtained. Some claimants may (legitimately or otherwise) report ongoing symptoms at that late stage, or simply report that their injury has now resolved but took, say, 11 months to do so.

Similarly, even where liability is admitted within the OIC Portal, a claimant is not required to provide their medical report until their prognosis period has ended. At that stage, a further report may then be required. There are clear financial incentives for a claimant to claim long-lasting whiplash symptoms. For example, a four-month whiplash injury would attract an award of £495, but a 20-month whiplash injury would attract an award of £4,215.

Moreover, a whiplash injury lasting longer than 24 months would fall outside the tariff, likely be valued in excess of £7,000 as per the current Judicial College Guidelines, and thus fall outside the scope of the OIC

Portal with its £5,000 limit even if the claimant is not alleging a multi-site injury.

Undoubtedly, a dishonest claimant is now incentivised more so than ever to exaggerate the length of time over which their whiplash symptoms, whether initially legitimate or otherwise, persist.

Vulnerable road users

The OIC Protocol does not apply where the claimant is deemed to be a 'vulnerable road user'. This term is defined as including parties using motorcycles, bicycles, wheelchairs, mobility scooters and pedestrians.

Organised fraudsters may look to bring staged, induced or entirely fictional collisions involving motorcycles, bicycles and pedestrians. Of course, attempts to bring about such collisions carry a significant risk given the physical jeopardy to the pedestrian or cyclist, and it would be surprising if claims of this nature became commonplace, but it is certainly something for insurers to be mindful of and to look out for in their ongoing analysis of claims in future.

Non-RTA claims

It is conceivable that the whiplash reforms may drive fraud into non-RTA claims, such as EL/PL claims which would of course be a more lucrative area for fraudsters to target. One could readily foresee an increase in fraudulent slipping/tripping claims against occupiers and/or local authorities, for example. Whilst insurers have always been wary of dishonest claims in these other arenas, acute attention should now be given to claims of this nature. Again, insurers would be well-advised to assess whether non-RTA claims increase to any significant extent or remain consistent with current levels, and take steps to identify any particular representatives and/or medical to whom such cases appear to disproportionately relate.

Commercial settlements

Insurers have previously been tempted to settle whiplash claims on a commercial basis without any real investigation into the accident circumstances or bona fides of the claim beforehand. Rather than discouraging such practice, the reforms may in fact encourage such commercial settlements going forward.

An insurer faced with what it considers a dubious three-month whiplash claim may well be very tempted to settle such a claim without further investigation given the award for such an injury is now likely to be £240.

With this in mind, an opportunistic claimant may be even more tempted to pursue a dishonest whiplash claim on the basis the reward may be low, but the risks even lower, as such modest claims are less likely to face any real scrutiny.

Conclusion

Are the whiplash reforms the end of the road for fraudulent claims? I don't think so. The extent to which the reforms will succeed in discouraging and ultimately reducing the number of fraudulent claims remains to be seen, but what is clear is that there is still plenty of scope for a determined claimant to pursue a dishonest claim, and insurers would be well-advised to continue to scrutinise claims of the type discussed in this article going forward.

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Fraud in Clinical Negligence Claims

By Zara Poulter

It is important that practitioners and medical defence organisations are alive to the hallmarks of fundamental dishonesty and exaggeration, even in liability admitted claims, and well versed in the appropriate tactical approach to combat such dishonesty. A well-considered strategic approach is particularly important in a practice area in which a very small percentage of claims proceed to trial (the NHS Resolution's Annual Report of 2019/20 recorded that of the 15,550 claims resolved in 2019/20, just 0.6% were resolved at trial). The Annual Report also recorded that in 2019/20 71.5% of claims were resolved without court proceedings and just 27.9% were resolved with proceedings issued. Claims should therefore be thoroughly investigated for dishonesty prior to issue.

This article will consider a recent case in which a robust approach to exaggeration was taken and resulted in successful committal proceedings. The obvious benefits to Defendants of a robust approach are twofold: immediate financial savings and a deterrent to future claimants who consider pursuing fraudulent claims.

Calderdale and Huddersfield NHS Foundation Trust v Linda Metcalf [2021] EWHC 611 (QB)

On 11 February 2021, Linda Metcalf admitted the allegations of contempt and received a 6-month custodial sentence. This is to date the longest custodial sentence obtained by an NHS trust in committal proceedings.

Ms Metcalf's claim arose out of a delay in diagnosing cauda equina syndrome in 2012. An early admission was made in respect of a one-day delay in diagnosis and the Trust made an interim payment in the sum of £75,000. The case therefore proceeded on the issue of quantum alone. On 31 January 2019, Ms Metcalf served a Schedule of Loss which made claims totalling £5,712,773.40 which the Trust alleged were based upon fraudulent misrepresentations in her pleadings, witness statements and her presentation to experts and others. It was accepted by the Trust that the Claimant had a legitimate claim for damages which would have been in the region of £350,000. The pleaded claim was therefore grossly exaggerated.

The dishonesty centred on the following matters: exaggerations of her physical disabilities, amounting at times to outright invention; false claims that she could not walk unaided and she was dependent on aids; an inability to drive; a restriction in social activities to places with which she was familiar and comfortable; taking relatively few holidays and restrictions in travel due to reduced mobility. In particular, it was accepted by the Claimant that she lied to thirteen different experts on nineteen difference occasions, as well as signing a number of statements of truth which were not true.

The evidence gathered and approach of the Trust was as follows:

- Covert surveillance over three days in 2017 and in July 2018.
- Internet searches which revealed the Claimant travelling frequently and easily and walking without sticks or other walking aids.
- The above evidence was served after the service of the Schedule of Loss which was verified by a Statement of Truth by Ms Metcalf. An application to amend the Defence to plead fundamental dishonesty was made shortly after.
- Following an initial denial of the dishonesty allegations and a failure to reach a settlement in negotiations, approximately 3 months prior to trial Ms Metcalf admitted that her claim should be dismissed because of fundamental dishonesty and agreed to repay the £75,000 interim payment by instalments.
- The Trust issued and served a Claim Form seeking permission to bring committal proceedings.

In his judgment, Griffiths J observed that had Ms Metcalf succeeded in her claim her dishonesty would have extracted millions of pounds from the Trust and the funding of the NHS whose resources were fully

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committed to the health and welfare of patients. He described the dishonesty as an attempt to "*systematically and shamelessly pervert the course of civil justice with a view to financial gain"*. Such conduct and the context of a claim against an NHS entity placed the potential sentence at the upper end of the maximum sentence of two years imprisonment. There were, however, a number of mitigating features which caused the Court to reduce the sentence to six months imprisonment. These included the fact that Ms Metcalf has a young child, her poor health, the fact she did initially have a genuine claim to compensation which had been lost, no previous convictions, a level of remorse for her actions and admissions to the allegations of contempt. It was submitted by way of mitigation on behalf of Ms Metcalf that delay was a consideration; however, the Court found that the Trust had moved forward with *"deliberate speed, at a careful pace appropriate to the seriousness of the implications, both for Ms Metcalf and in terms of the Trust's limited resources"*. Finally, Griffiths J found that the punishment appropriate to these facts could not be achieved if the sentence was suspended: *"Appropriate punishment for faking evidence in support of a claim inflated by some £5 million can only be achieved by immediate custody".*

Practice points:

- Clinical negligence practitioners should routinely and carefully consider the following:
    - Inconsistencies in medical records, accounts to experts and within other evidence;
    - Surveillance of claimants;
    - Intelligence reports with a particular focus on the claimant's social media;
    - The applicability of Section 57 of the Criminal Justice and Courts Act 2015 in liability admitted cases;
    - The timing of disclosure of evidence that supports allegations of dishonesty – for example, service following receipt of a Schedule of Loss verified by a claimant personally or following service of medical evidence or a witness statement that runs contrary to a claimant's presentation on surveillance footage or social media;
    - Applications to amend defences to plead fraud;
    - Applications to strike out or for summary judgment;
    - Orders to set aside QOCS on the basis of fundamental dishonesty;
    - Committal proceedings.

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A Throw of the Dice? Recent Examples

By Junaid Durrani

In cases involving suspect staged accidents and/or low velocity impacts, the only certainties are the uncertainty of the outcome, and whether or not a Court will find a litigant to be dishonest. That much, you may say, is obvious. But how to best advise what the likely outcome may be? Two recent cases provide further assistance.

In the case of Tahir v Azhar and Advantage Insurance Company, heard by Deputy District Judge Stafford, sitting in the County Court in Preston, on 23 November 2021, the Claimant was found fundamentally dishonest following a trial on both liability and quantum.

The Claimant was the driver of a vehicle involved in a collision with D1, who had taken no part in proceedings and D2 was the insurer of D1's vehicle. Unusually, the accident was caught on dashcam and although a staged accident was suspected, no such assertions were pleaded. The Claimant sought general damages and special damages in the form of increased insurance premiums. The Claimant had the benefit of an interpreter and translated documents but had not had his List of Documents translated- the Judge declined to strike out and proceeded to trial.

At trial, the Claimant, his wife and his son who were all occupants of the Claimant's vehicle gave evidence. The dashcam made it clear that whilst the Claimant was proceeding through a green light in the early hours of the morning, D1's car entered the junction (purportedly through a red light) and caused a collision. Despite D1 being clearly visible entering into the junction, there was no observable avoidance and/or braking manoeuvre from the Claimant's vehicle. Photographs were supplied allegedly taken at the scene showing D1 exchanging details. None of the witnesses recalled seeing D1 at any point prior to collision or knew him beforehand.

D2's suspicions led to significant challenges on both liability and causation.

On the issue of liability, the Judge was satisfied that this was a genuine collision and found that the Claimant was also not paying sufficient attention as D1 was clearly able to turn across the front of the Claimant's vehicle before the accident occurred - he apportioned liability 75:25 in the Claimant's favour. Notwithstanding the same, the claim was still found to be fundamentally dishonest and QOCS was disapplied.

The Claimant's medical report commissioned 18 months post-accident asserted that the Claimant had been involved in one accident around 6 years prior, with no relevant ongoing medical history and opined neck, right shoulder and lower back injuries attributable to the accident with an overall prognosis of 2 years for full recovery. The Claimant prior to affirming his written statement revealed that he had been involved in a further accident one year prior to the event in question. He confirmed however that he had no previous physical problems at the time of the accident.

Review of the Claimant's medical records revealed a longstanding history of chronic lower back pain and a diagnosis of cervical spondylosis around 8 months prior to the index accident. It also revealed an additional accident around 5 years prior and a pattern of the Claimant attending his GP for a variety of minor ailments historically. The Claimant had attended his GP and hospital only once in the week after the collision.

The Claimant accepted during cross-examination that:

a) The injuries he had prior to the accident were relevant and long-term injuries;
b) He had not told his expert about these relevant injuries; and
c) That his medical report was potentially inaccurate.

It was put to the Claimant that he was fundamentally dishonest in the presentation of his claim for personal injury. The Claimant's response was that at the time of seeing his expert he "did not have the opportunity to study his medical records". It was then suggested to the Claimant that he had the opportunity to deal with these issues at the time of drafting his witness statement. The Claimant said he did not have access to his records at the time - an assertion where the List of Documents

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became crucial as it clearly denoted that such records were available some 2 months prior to the witness statement being signed. The Claimant's responses when his dishonesty was put to him was that "this is your view"- a response which had dire consequences for the Claimant's credibility.

The Claimant had also presented a claim for recovery and storage that was not pursued but an invoice for the same was included for the trial bundle. It appeared that this claim was fictitious as the Claimant's vehicle was clearly photographed on his driveway and the recovery charges seemed to extend to at least two separate recovery events. The Claimant's explanation as to why these claims were not pursued were that a written agreement for recovery and storage had not been signed and therefore his solicitors advised him not to proceed with those heads of losses.

The Judge did not, at first, make any express finding of fundamental dishonesty. He rejected the Claimant's account of injury on the basis of the medical report being inaccurate and went so far as to state that the Claimant had not been honest about his medical history when seeing the expert. He did not accept the Claimant's explanation as to the recovery and storage claims, or that he did not have access to his medical records or that he had to effectively study them before seeing an expert, as the Claimant would have been undoubtedly aware of his historic physical limitations. The Judge was also concerned as to the manner in which the Claimant gave responses during cross-examination in an almost "catch me if you can" demeanour. The Judge proceeded to dismiss the claim for general and special damages.

D2 then applied for a finding fundamentally dishonest, pursuant to CPR 44:16 against the Claimant on the basis of the Judge's own findings that:

a) the Claimant had been effectively dishonest in the presentation of his symptoms;
b) he maintained his dishonesty up until the date of trial and
c) his explanations about the other heads of losses and his demeanour during cross-examination in the context of the Judge's findings meant that this Claimant had to be found fundamentally dishonest.

The Judge agreed and made the finding of fundamental dishonesty and disapplied QOCS.

Contrast this matter with the case of Chapman v Clements, before Recorder Gallagher, sitting at the County Court in Southend on 2 December 2021. The only issue for determination was causation. The Claimant was a minor at the time of the RTA, had reached her majority in the early part of 2021 and had provided statements from her mother, her sister (who was Litigation Friend) and herself.

The only evidence heard at the trial was from the Claimant. Her claim for personal injury was dismissed but Recorder Gallagher was not prepared to make a finding of fundamental dishonesty.

However, the Judge did make the following findings:

a) The Claimant's witness statement was headed "Statement of the Litigation Friend" and was a carbon copy of the Litigation Friend's statement save for references being changed from the first person to the third person - there was a paragraph in both statements where this position was inevitably clear and notwithstanding the same, the Claimant had the Court's permission to rely on this statement;
b) Nevertheless, following trial, the Judge found that the Claimant's statement was "not in her own words";
c) The Claimant could not recall anything other than what she was told by others about the accident and injuries;
d) There was a claim for physiotherapy endorsed with a statement of truth in the pleadings and the witness statement that was wholly at odds with the invoice;
e) The Judge accepted that the damage that the Claimant stated was caused in the accident was wholly inconsistent with the damage to the Defendant's vehicle;
f) The Claimant's medical report where her mother had attended described the accident as causing the airbags to be deployed but this was clearly not the case- the Claimant herself did not know what the phrase 'deployed' actually meant;
g) The medical report noted no relevant medical history but the Claimant had a longstanding

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history of mental health referrals, lower back pain and headaches;

h) The Claimant reported time off her studies according to her statement but the medical report made no mention of any loss of amenity.

On this occasion, Recorder Gallagher found that this was a naïve Claimant who was pursuing a claim at the behest of her overzealous mother that was poorly prepared in the 'factory floor fashion' common to the personal injury sector. Recorder Gallagher's view was that this individual was a genuinely honest person, but had ended up with a witness statement in breach of the Civil Procedure Rules. Although he accepted that the claim need only be dishonest, not the Claimant, he said that this was a "close run thing" and the case fell just short of fundamental dishonesty. However, the Judge went on to say that if he had found that the Claimant was injured, he would have likely found that the claim had been exaggerated.

These cases show - if further evidence were needed - that there is a fine line between what is considered to be fundamentally dishonest, and what is not. Although the best chance of securing a finding remains thorough preparation, there is always the chance that even with a seemingly strong case, a Judge will still prefer the "naive" claimant.

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