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Fundamental dishonesty: shifting the lexicon of law

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Three years on we are still lacking definitive guidance on 'fundamental dishonesty', writes Jonathan Head.

In 2013 Lord Justice Jackson introduced civil practitioners to a new legal lexicon. From 'Form H' to 'qualified one-way costs shifting' (QOCS), to 'fundamental dishonesty', lawyers across the country were having to update their vocabulary as well as their understanding of the new rules.



But what did 'fundamental dishonesty' mean? The effects of a finding under Civil Procedure Rule 44.16 were clear: if a claim was found to have been fundamentally dishonest the claimant would lose the shield of QOCS and have to pay the defendant's costs. In its use of that novel phrase, it is apparent that the Civil Procedure Rule Committee intended fundamental dishonesty to mean something other than the well-defined concept of fraud.

Three years on, CPR 44.16 seems to have been broadly embraced by the judiciary as a useful tool to deprive would-be dissemblers from the shield of QOCS. As a result, those who may have previously been inclined to make a dishonest claim would now be dissuaded from doing so.

From *Michael Joseph Gosling v Hailo (1) Screwfix Direct (2)* [2014] CC (Cambridge), in which an exaggerated care claim led to a costs order being made against the claimant; to *James v Diamanttek Ltd* [2016] CC (Coventry), in which the court found that the claimant had not been telling the truth concerning the provision of hearing protection, the shield of QOCS is regularly being lifted from false claimants by the courts.

Historically, an insurer whose policyholder told the smallest lie could avoid the whole of the insured's claim. This was due to the duty of utmost good faith owed by the parties to the insurance contract to one another.

This has been seen most recently in *Versloot Dredging BV (1) SO DC Merwestone BV (2) v HDI Gerling Industrie Versicherung AG & six others* [2014] EWCA Civ 1349, in which a false representation by the insured as to how an incident occurred led to the dismissal of the claim, despite that falsehood not having a bearing on the court's ultimate decision. The claim would otherwise have succeeded. The Supreme Court's review of that decision is awaited.

In 2015, the concept of fundamental dishonesty was widened by section 57 of the Criminal Justice and Courts Act 2015. This was introduced in an effort to reverse the perceived injustice in allowing insurers to avoid their insured's claims entirely; whereas a 'third-party' claimant could falsely embroider his claim, or support a bogus claim made by another, but still receive compensation for the 'genuine' part of his claim. Section 57 now empowers the courts to dismiss an otherwise genuine claim where the court is satisfied there has been fundamental dishonesty.

Notably, the draftsmen of section 57 sought to draw several distinctions from CPR 44.16: it is the claimant who the court must find dishonest, rather than the claim. Further, rather than permitting the defendant to recover all of his costs, the court is required to assess the claimant's 'genuine' damages and deduct that figure from the defendant's costs.

While it is perhaps easy to understand how a claim which has been brought dishonestly could be caught by CPR 44.16, the more literally minded reader would be forgiven for querying how a partly genuine claim could be fundamentally dishonest.

It appears that the two rules are aimed at different kinds of dishonesty. CPR 44.16 is aimed at wholly false claims (for example *James*, in which the claimant's evidence as to hearing protection was simply not believed); whereas section 57 is aimed at genuine claims, where there has been an act of wilful exaggeration (as in *Hughes (1) Kindon (2) and Jones (3) v KGM* [2016] CC (Taunton), where the judge found that a two-week whiplash injury had been exaggerated to a 12-month duration).

The practical problem arising is that practitioners have one concept – fundamental dishonesty – addressing two problems. On the one hand, claims which are dishonest to their core (where, for example the accident never occurred); and on the other hand, where there is a genuine claim, but some excessive exaggeration.

This dichotomy has always existed. The term 'fraud' has been used to deal with both types of misrepresentation, with the question as to how far a claimant must exaggerate their claim before they are deemed a fraudster vexing courts for many years.

The nascent concept of fundamental dishonesty is developing, with few decisions yet to have been made on section 57 and without guidance from the appellate courts covering both the fundamentally dishonest claimant and the fundamentally dishonest claim. There is a risk, therefore, either that an interpretation will develop which is well-suited to one rule, but not the other; or of two

different meanings developing, dependent upon which rule is being applied.

It remains to be seen if the courts will be more inclined to make an order for costs under CPR 44.16 than to dismiss genuine heads of claim under section 57. But, unless a clear definition properly suited to both rules is agreed, there is a real risk that applications under one rule may meet with a lower threshold than the other.

While the courts grapple with squaring the circle of fundamental dishonesty between CPR 44.16 and section 57, another elephant lurks in the corner of the room. That is the concept of 'substantial injustice'. This is a mechanism built into section 57, whereby a claimant who has a genuine claim but has been fundamentally dishonest, may yet hold on to their damages.

Clearly, more than simple 'injustice' is required, but how substantial must the injustice be to trigger the exception? One could envisage a situation in which a catastrophically injured claimant who has dishonestly exaggerated a significant part of his claim (and thereby faces losing vast genuine damages which might otherwise sustain him for the rest of his life) might pray in aid of the exception.

The substantial injustice rule should be invoked in only very limited circumstances, where the consequences of depriving the claimant of their genuine damages would be so catastrophic as to have a significant impact on their life. To allow claimants too readily to rely on the exception would otherwise emasculate section 57, and give would-be dishonest claimants a false impression that the courts, parliament and the wider public find the bringing of dishonest claims something other than reprehensible.

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<http://www.lawgazette.co.uk/law/practice-points/fundamental-dishonesty-shifting-the-lexicon-of-law/5055697.article>