

Fundamental Dishonesty: an Update

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The recent Court of Appeal case of *Howlett (1) Howlett (2) v Davies (1) Ageas Insurance Ltd (2)* [2017] EWCA Civ 1696 will not come as a great surprise to many personal injury practitioners.

The case concerned two Claimants (a mother and her son) who both alleged that they had been injured in a car accident caused by the negligence of the Defendant. The insurer did not accept that the accident had happened but if it did, it was denied by the insurer that the accident occurred in the manner in which the Claimants alleged. Significantly, the insurer did not go so far as to plead fraud in its defence but raised credibility as an issue. This approach is commonplace, particularly when one considers claims involving LVI, where there is perhaps insufficient evidence to plead fraud.

At first instance the claim was dismissed. The Judge further held that the Claimants would lose the protection of qualified one-way costs shifting ("QOCS") as CPR 44.16 was engaged. CPR r44.16 states that QOCS will not apply *"where the claim is found on the balance of probabilities to be fundamentally dishonest"*. The Judge had found that this exception applied despite fraud having not been pleaded in the defence.

The Claimants appealed that decision however the Court of Appeal has now dismissed the appeal. It has held that *"the mere fact that the opposing party has not alleged dishonesty in his pleadings will not necessarily bar a judge from finding a witness to have been lying.....The key question in such a case would be whether the claimant had been given adequate warning of, and a proper opportunity to deal with, the possibility of such a conclusion and the matters leading the judge to it rather than whether the insurer had positively alleged fraud in its defence"*.

In this particular case, the insurer had advised of the possibility that the court may find *"elements of fraud to this claim"* and had placed credibility in issue both in its pleadings and through cross-examination. The Claimants had therefore had adequate notice of the possibility that the judge might reach the findings which he did. Crucially, the Claimant's had been given fair notice of a challenge to their honesty and had had an opportunity to deal with it.

In many respects this decision is unsurprising: courts across the land have approached fundamental dishonesty in this manner for a number of years. Nevertheless this judgment will ensure uniformity of approach and serves as a useful reminder to all practitioners that Claimants must be warned of the potential risks of continuing to litigate cases where credibility is firmly in issue.

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