Fraudulent Personal Injury Claims: Tips for Litigating Fundamental Dishonesty

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I. INTRODUCTION

1. The Criminal Justice and Courts Act (**'CJCA'**) 2015 introduced a statutory scheme to deal with fraudulent claims for personal injury which, *inter alia*, imposed:

    1.1. a duty on the court to dismiss any claim found to be fundamentally dishonest unless to do so would result in substantial injustice, (section 57(2)); and

    1.2. specific cost consequences, outside of QOCS, on a finding of fundamental dishonesty, (section 57(5); and CPR r44.16).

2. The scheme formalised the process for dealing with potentially incredible claims, including what had become known as low velocity impacts, (**'LVI'**). In LVI cases, the defendant, although they accepted that a road traffic collision, (**'RTA'**), had occurred, disputed causation in respect of the injuries alleged. What follows is a brief summary of some of the most significant developments in the law over the 4 years since inception. That law has given further specification to the role of expert evidence, the procedural conditions for making an allegation, the matters which will ordinarily be relevant, the evidential threshold for a finding, and the meaning of the doctrine itself. The focus is on RTA claims although the law is no less applicable to other claims for personal injury.

II. EXECUTIVE SUMMARY: TIPS FOR LITIGATING

3. The following represents a rough guide to, and summary of, what comes after. Full references are given in the main body of the text:

(a) Raising fundamental dishonesty: Pleading and Cross-examination

- There is no need for fundamental dishonesty to be pleaded in order for it to be relied upon by a defendant. However, a Claimant must be given *'adequate warning of, and a proper opportunity to deal with, the possibility of'* a finding of fundamental dishonesty, (*Howlet* at [30] to [31]).

- What is *'adequate warning'* will, likely, depend on the complexity of the case including the degree of dishonesty or fabrication alleged and/or the extent of positive evidence the defendant is likely to lead on the question. In many Fast Track claims, pleading will be unnecessary provided the matter is properly dealt with in cross-examination, (*Howlet* at [39]; and *infra* at [9]). However, defendant solicitors will do well to include the allegation in the defence where possible. Claimants will be keen to review the defence and be aware of relevant allegations in cross-examination: the defendant might be barred in case sufficient warning is not given prior to submissions.

(b) The meaning of 'dishonesty'

- The standard for dishonesty is the same as in other areas of the law i.e. the question is whether what the claimant has done would be considered to be dishonest by the standards of ordinary people, (*Ivey* at [62]; and *infra* at [10] to [12]).

- Matters to consider include whether the claimant:

    - sought medical assistance from their GP or by attending A&E;

    - returned in case of non-recovery sought appropriate treatment such as physiotherapy;

    - gave relatively consistent accounts of their injuries including on the progression of symptoms and the timescale for recovery, during medical examination, to solicitors, or in witness statements, (*Richards* at [65]; and *infra* at [9]).

(c) The meaning of 'fundamental'

- Fundamentality is a context- and fact- sensitive question, (*Howlet* at [16] and [17]; and *infra* at [13] and [14]). It is likely that dishonesty will be considered, in most

cases, to have been fundamental where it has *'substantially affected the presentation of [the claimant's] … case, either in respect of liability or quantum, in a way which potentially adversely affected the defendant in a significant way*', (*Sinfield* at [62]; and *infra* at [14]).

(d) 'Substantial injustice'

- The substantial injustice exception remains relatively uncertain. Mere disproportion as between dismissal and the relevant dishonesty is unlikely to suffice provided the first two limbs are satisfied, (*Razmus* at [214]; and *infra* at [15]). It might be that meritorious cases which might previously have been excluded from the definition of dishonesty on the, now displaced, subjective limb of the *Ghosh* test could succeed, *mutatis mutandis,* under this exception, (*infra* at [16]).

(e) Documentary Evidence

- The courts have made it absolutely clear that all the usual documentation is important in personal injury claims. Arguments that inconsistencies in accounts given to medical experts are due to the professional or that CNFs are completed early on, and often in a hurry, risk falling on deaf ears, (*Molodi* at [46]; *Richards* at [7] and [8]; and *infra* at [12]). That is due to the courts' awareness of the need to reduce fraudulent claims in this area, (*Molodi* at [46]). The possibility of committal for contempt of court in relation to oral evidence and/or the contents of CNFs and other documents verified by a statement of truth is a live one, (*Richards* at [8]; *infra* at [12]; and see further *Aviva Insurance Ltd v Kovacic* [2017] EWHC 2772 (QB)).

(f) Expert evidence

- In cases where the defendant wishes to adduce independent expert evidence, either medical or mechanical, they will, likely, still need to comply with the *Casey* guidance, (*Casey*; and *infra* at [17] to [19]). Additionally, defendant solicitors may wish to give consideration to doing the same where there are very good reasons to suspect fundamental dishonesty, but the case therefor may be relatively weak on the claimant's disclosed evidence alone. That might be the case where an individual has made multiple previous successful claims. As always, permission will be subject to proportionality.

- Permission for the defendant to seek and rely on independent evidence will depend, *inter alia*, on whether:
    - the defendant is able to notify the claimant within 3 months of receipt of the CNF or letter of claim;
    - there is a factual dispute which would be likely to resolve the issue of causation in any event; and
    - the proportionality of obtaining the report in terms of both the complexity and value of the claim, (*Casey* at [35]; and *infra* at [18]).
- Claimant solicitors will want, within the bounds of their Code of Conduct, to ensure that their clients are aware of the matters which are likely to be considered in assessing dishonesty, including the importance of the account given to the initial medical examiner, (*Richards* at [65]*; and* see "The meaning of 'dishonesty', *infra* at [10]).
- Joint experts remain inappropriate, for the time being at least, (*Richards* at [36]; and *infra* at [24]).

(g) Appeals

- The usual grounds of appeal will apply in relation to findings of fundamental dishonesty, namely errors of law and/or findings of fact that no reasonable decision-maker could have reached.
- In respect of facts, the question of whether evidence contrary to the finding, either way, has been adequately explained away by the trial judge will be key. That will be most important to defendants where medical reports are weak and *vice versa* in respect of claimants, (*Richards* at [66] and [71]; and *infra* at [25] and [26]).
- Remittal and dismissal, absent a finding of fundamental dishonesty, will be the most likely successful outcomes for defendants owing to the usual lack of first-hand receipt of witness evidence by an appellate court, (*Richards* at [63]; and *infra* at [12]). Practically speaking, claimants will find it hard to dislodge a finding of fundamental dishonesty on an appeal based on error of fact for the same reason.

(h) Costs

- The costs awarded to a defendant on a finding of fundamental dishonesty will be offset against the amount of damages which the claimant would have been awarded but for that finding, (Section 57(5) CJCA 2015; and *infra* at [27]). In such cases, QOCS is excepted on permission of the court, (CPR r44.16).

III. THE NATURE OF FUNDAMENTAL DISHONESTY

4. In LVI cases it is likely that defendant solicitors will first come to suspect that there may be fundamental dishonesty because they are instructed that the impact was at such a low speed that it is unlikely injury was suffered to the degree alleged, or at all. However, that will clearly be insufficient, in and of itself, to establish that there has been dishonesty or that such dishonesty is fundamental. The standard of proof is the balance of probabilities and the burden will be on the defendant, or Part 20 Defendant, to make an application for dismissal on this basis, (Section 57(1)(b) and (8) CJCA).

5. Beyond the evidence on the velocity of the impact there may be initial engineering evidence which tends towards establishing a chain of causation that might explain injury. For example, in an RTA, there may be an engineer's report which shows that, although the exterior damage was light, there was force applied to a more structurally significant part of the claimant's vehicle: for example, a bumper reinforcement bar. The absence of such evidence will be of assistance to defendants, although, again, such evidence or the lack thereof is unlikely to be determinative of the matter. In reality, once alleged, a finding will depend on the overall strength of the evidence in either direction with a particular emphasis on the claimant's credibility. Indeed, an allegation of fundamental dishonesty is simply a serious attack on the claimant's credibility with specific legal and costs consequences.

IV. RAISING FUNDAMENTAL DISHONESTY

(i) Pleading

6. Fundamental dishonesty differs from ordinary species of fraud in two key respects: (1) it is not a substantive cause of action, nor a defence, in the traditional sense, but relates to the presentation of the claim itself; and (2) it applies only as a response to a claim, i.e. it is not open to a claimant to allege that the defendant has been fundamentally dishonest, notwithstanding that they may have successfully challenged credibility to the same degree. (1) puts a finding of fundamental dishonesty in the same arena as the offence of contempt of court. (2) is just a necessary result of the QOCS system.

7. In *Howlet v Davies and anr* [2017] EWCA Civ 1696 the Court of Appeal considered the requirement that fundamental dishonesty be dealt with *'at trial'* as contained in paragraph 12 of PD44. The Court noted that:

> *'… The point of the provision is … to indicate that such issues should generally be decided at the trial rather than some other stage, not to impose any pleading requirement.*
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> …
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> *[T]he 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: … [I]t must be open to the trial judge … to state in his judgment not just that the claimant has not proved his case but that, having regard to matters pleaded in the defence, he has concluded (say) that the alleged incident did not happen or that the claimant was not present. 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.'* ([30] to [31])

8. Defendant solicitors are wise to include an allegation of fundamental dishonesty in the defence where possible. That will mitigate the risk of the matter not being properly put to the witness, or their representatives, at trial. Similarly, claimants will want to be sure that the defence is properly reviewed for the same; it may be that an unanticipated argument arises, at the conclusion of the case, that the allegation was not sufficiently put. It seems likely that the standard is variable so that a serious allegation involving, for example, surveillance over a period of time and/or the calling of defence witnesses on the point, may require a higher degree of warning

(ii) Cross-Examination

9. So far as what will be necessary in cross-examination, in *Howlet v Davies and anr* [2017] EWCA Civ 1696 the Court of Appeal found that:

> *'… [W]here a witness' honesty is to be challenged, it will always be best if that is explicitly put to the witness. There can be no doubt that honesty is in issue. But what ultimately matters is that the witness has had fair notice of a challenge to his or her honesty and an opportunity to deal with it. It may be that in a particular context a cross-examination which does not use the words*

"dishonest" or "lying" will give a witness fair warning. That will be a matter for the trial judge to decide.' ([39])

V. THE MEANING OF FUNDAMENTAL DISHONESTY

(a) The meaning of 'dishonesty'

10. The first issue which a court must decide on the raising of an allegation of fundamental dishonesty, is whether there has been dishonesty on the part of the claimant. Dishonesty is now a single concept applied uniformly throughout the civil and criminal law, subject to any further statutory specification. In *Ivey v Genting Casinos Ltd (t/a Crockfords Club*) [2017] UKSC 67 the Supreme Court, disregarding the second limb of the *Ghosh* test, held that the test was that stated in *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37, by Lord Hoffman at pp 1479-1480:

> *'Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards … [a claimant's] mental state would be characterised as dishonest, it is irrelevant that the [claimant] judges by different standards.'* (see *Ivey* at [62]).

11. As to the question of the matters likely to be relevant to establishing an allegation, the Court of Appeal noted in *Richards v Morris* [2018] EWHC 1289 (QB) that:

> *'The court would normally expect such 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 when questioned about it for the purposes of litigation, whether to their own solicitors or to an examining medical expert or for the purposes of witness statements. Of course, … claimants will sometimes make errors or forget relevant matters and … 100% consistency and recall cannot reasonably be expected. However, the courts are entitled to expect a measure of consistency and certainly, 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 or, at least, deserving of an award of damages.' ([65])

12. The above comments should not be read too dogmatically. Matters of evidence are primarily for assessment by the trial judge who will have the benefit of first-hand receipt of witness evidence. However, they do provide an indication of the type of matter likely to be relevant in LVI, and other personal injury, matters. Similarly, *Molodi v Cambridge Vibration Maintenance Services* [2018] EWHC 1288 (QB) tends towards the conclusion that, as might be expected, evidence of outright lies will be more significant than inconsistency, ([45]). Where there are explanations of inconsistency, alternative to dishonesty, they will need to be carefully addressed by claimants in evidence and submissions. The Court also emphasised the importance of medical reports in providing an account, ([46]). Similarly, in *Richards* the Court made clear that the contents of Claim Notification Forms, (**'CNFs')**, which are signed by a statement of truth, are not trivial, ([7]). CNFs were important documents which aided settlement and might lead to proceedings for committal for contempt of court:

> *'Where the statement of truth is signed by a claims manager on the claimants' behalf, as here, the insurer trusts the claims manager and, through him or her, the firm of solicitors to have taken proper instructions and to have verified the accuracy of the contents of the document.'* ([8])

(b) The meaning of 'fundamental'

13. Where it is established that a claimant has been dishonest, the next question is whether that dishonesty is fundamental. In *Howlet v Davies and anr* [2017] EWCA Civ 1696 the Court of Appeal found that 'fundamental dishonesty':

> *'… [H]as to be interpreted purposively and … in the light of the context. This is, of course, the determination of whether the claimant is 'deserving', as Jackson LJ put it, of the protection … extended, for reasons of social policy, by the QOCS rules. It appears to me that when one looks at the matter in that way, one sees that what the rules are doing is distinguishing between two levels of dishonesty: dishonesty in relation to the claim which is not fundamental so as to expose such a claimant to costs liability, and dishonesty which is fundamental, so as to give rise to costs liability.*
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> …

The corollary term 'fundamental' would be a word with some such meaning as 'incidental' or 'collateral'. Thus, a claimant should not be exposed to costs liability merely because he is shown to have been dishonest as to some collateral matter or perhaps as to some minor, self-contained head of damage. If, on the other hand, the dishonesty went to the root of either the whole of his claim or a substantial part of his claim, then it appears to me that it would be a fundamentally dishonest claim … .' (see *Howlet* at [16] to [17])

14. In *London Organising Committee of the Olympic and Paralympic Games v Haydn Sinfield* [2018] EWHC 51 (QB), Julian Knowles J held that:

> *'… In my judgment, a claimant should be found to be fundamentally dishonest … if the defendant proves on a balance of probabilities that the claimant has acted dishonestly in relation to the primary claim and/or a related claim (as defined in s 57(8)), and that he has thus substantially affected the presentation of his case, either in respects of liability or quantum, in a way which potentially adversely affected the defendant in a significant way, judged in the context of the particular facts and circumstances of the litigation. Dishonesty is to be judged according to the test set out by the Supreme Court in Ivey v Genting Casinos Limited (t/a Crockfords Club) ... .*
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> *…*
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> *By using the formulation 'substantially affects' I am intending to convey the same idea as the expressions 'going to the root' or 'going to the heart' of the claim. By potentially affecting the defendant's liability in a significant way 'in the context of the particular facts and circumstances of the litigation' I mean (for example) that a dishonest claim for special damages of £9000 in a claim worth £10,000 in its entirety should be judged to significantly affect the defendant's interests, notwithstanding that the defendant may be a multi-billion pound insurer to whom £9000 is a trivial sum.'* ([62] to [63])

(c) Substantial injustice

15. There is, as yet, little case law on the exception to the duty to dismiss in section 57(2) CJCA 2015. In *Razmus v Ministry of Justice* [2018] EWHC 215 (QB) the claimant had argued that if he were to lose the claim on the basis of fundamental dishonesty, he would suffer *'substantial injustice'* because of the gross disproportion between the lies and the effect of depriving him of the award. However, citing *Sinfield* the Court found:

' … It cannot … be right to say that substantial injustice would result in disallowing the claim where a claimant has advanced dishonestly a claim which if established would result in full compensation. … .

In the Sinfield case Julian Knowles J had no difficulty in dismissing this argument in the context of a dishonesty which went only to part of the quantum claimed. At [89] he stated that it was plain from section 57(3):

> *"….something more is required than the mere loss of damages to which the claimant is entitled to establish substantial injustice. Parliament has provided that the default position is that a fundamentally dishonest claimant should lose his damages in their entirety, even though ex hypothesi, by s 57(1), he is properly entitled to some damages."'* (*Razmus* at [214])

16. It might be that cases which were precluded from being dishonest under the now displaced second limb in what is known as the *Ghosh* test for dishonesty (*R v Ghosh* [1982] EWCA Crim 2) might be sufficient for these purposes. However, the focus on the state of mind of the defendant under the *Ivey* test anyway allows for some such some cases to be excluded. Examples of such cases include that of an individual who uses a bus in this country, having never used a bus anywhere else, without paying. By analogy, although it would be odd for an individual with legal advice not to understand the need to tell the truth in court, or during the claims process in a personal injury claim, one can imagine a case in which a litigant in person might not understand that need. However, merely being a litigant in person clearly would not suffice. Where such a person formed a self-interested state of mind during the process that might be considered dishonest by ordinary standards under *Ivey*. However, it may be that, all things considered, the substantial injustice exception is made out. It would likely be necessary to establish: (1) a complete unfamiliarity with public fact-finding processes; and (2) a rational basis, notwithstanding any dishonesty, for determining the claim. In any event, the threshold under the exception is likely to be a high one.

VI. THE ROLE OF EXPERT EVIDENCE

(a) Permission for the Defendant's expert to examine the Claimant: *Casey statements*

17. *Casey v Cartwright* [2006] EWCA Civ 1280 was determined prior to the CJCA 2015. However, it involved a low-velocity RTA claim for personal injury which was defended on

the basis that the claim was a fabrication. The Court of Appeal was asked to reconsider HHJ Holman's decision revoking permission to rely on the evidence of a joint expert. He had revoked permission for fear of a lack of objectivity in the expert report, ([20]), and granted permission to appeal on the basis of the lack of guidance in the area. The Court of Appeal noted the relevance of the controversy surrounding *'Delta V'*: namely, the change in velocity caused by the absorption of energy between the two vehicles, estimated to be approximately half of the impact velocity. The Court stated that:

> *'There can be no doubt that the decision of this court in Kearsley was intended to provide guidance as to the correct approach to the permissibility of expert evidence on causation in these cases … . The desirability for … test cases stems from the fact that the potential for low-velocity impact to cause injury ("the causation issue") is a matter of some controversy. Some experts believe that one can never say definitively that, below a certain Delta V, injury is impossible or even very unlikely. They say that there are too many imponderables. Relevant factors include the claimant's age and gender, his previous history of spinal conditions, his vulnerability to injury, whether he was braced at the time of the impact, the position of the head and neck at the time of the impact, the presence and position of any head restraint, the design and construction of the bumpers of the vehicles involved in the collision as well as other factors. Other experts take a different view and say that below a certain Delta V injury is impossible or at any rate very unlikely.'* ([23])

18. The Court of Appeal went on to amplify the guidance it had previously provided in relation to expert evidence in *Kearsley v Klarfeld* [2005] EWCA Civ 1510:

> *'… We should state at the outset that the further guidance that we propose to give is no more than that. Case management decisions are ultimately a matter for the discretion of the court. But it is undesirable that different courts should adopt different approaches to the same general problem. That creates more uncertainty than is necessary or justified.'* ([28])

19. The guidance that was given was as follows:

> *'[I]t is desirable that, if a defendant wishes to raise the causation issue, he should satisfy certain formalities. In this way, the risk of confusion and delay to the proceedings should be minimised. … [H]e should notify all other parties in writing that he considers this to be a low impact case and that he intends to*

raise the causation issue. … [H]e should do so within three months of receipt of the letter of claim. The issue should be expressly identified in the defence, supported in the usual way by a statement of truth. Within 21 days of serving a defence raising the causation issue, the defendant should serve on the court and the other parties a witness statement which clearly identifies the grounds on which the issue is raised. Such a witness statement would be expected to deal with the defendant's evidence relating to the issue, including the circumstances of the impact and any resultant damage.

Upon receipt of the witness statement, the court will, if satisfied that the issue has been properly identified and raised, generally give permission for the claimant to be examined by a medical expert nominated by the defendant.

If upon receipt of any medical evidence served by the defendant following such examination, the court is satisfied on the entirety of the evidence submitted by the defendant that he has properly identified a case on the causation issue which has a real prospect of success, then the court will generally give the defendant permission to rely on such evidence at trial.' ([30] to [32])

(b) Circumstances in which permission might not be granted

20. The Court then provided a list of cases in which permission might not be given notwithstanding a real prospect of success:

'There will, however, be circumstances where the judge decides that … the overriding objective nevertheless requires permission for expert evidence to be refused. It is not … an exhaustive list … . They include the following.

First, the timing of notification by the defendant that he intends to raise the causation issue. Unless the defendant notifies the claimant of his intention to raise the issue within 3 months of receipt of the letter of claim, permission to rely on expert evidence should usually be denied to the defendant. It is important that the issue be raised at an early stage so as to avoid causing delay to the prosecution of the proceedings. The period of 3 months is consistent with para 2.11 of the Pre-Action Protocol for Personal Injury Claims which provides that a defendant be given 3 months to investigate and respond to a claim before proceedings are issued.' ([33])

'Secondly, if there is a factual dispute the resolution of which one way or the other is likely to resolve the causation issue, that is a factor which militates against the granting of permission to rely on expert evidence on the causation issue. In such a case, expert evidence is likely to serve little or no purpose.' ([34])

'Thirdly, there may be cases where the injury alleged, and the damages claimed are so small and the nature of the expert evidence that the defendant wishes to adduce so extensive and complex that considerations of proportionality demand that permission to rely on the evidence should be refused. This must be left to the good sense of the judge. It does not detract from the general guidance given at para 32 above.' ([35])

21. In *Richards* the High Court appeared to confirm, by way of *dictum*, that the guidance in *Casey* continues to apply under the regime for fundamental dishonesty:

> *'… this being a case where the Defendant is alleging that this was a "low velocity impact" case … it is unfortunate that the usual procedure for such cases was not pursued. In Casey v Cartwright [2006] EWCA Civ 1280, the Court of Appeal gave guidance for Defendants who wished to raise causation as an issue.'* ([60])

22. In *Molodi v Cambridge Vibration Maintenance Services* [2018] EWHC 1288 (QB) the defendant had followed the *Casey* guidance although no permission had been granted.

23. Although independent expert evidence is not a requirement, it may aid a defendant's case on fundamental dishonesty if such evidence is obtained and is favourable. Defendant's solicitors should therefore consider as early as possible whether such evidence ought to be obtained. It is unlikely to be proportionate in every case given the general tenor of the QOCS and fixed costs regimes, however, defendant solicitors may wish to follow the *Casey* guidance in cases in which more serious injuries are alleged or where there is some strong reason to believe that there may be dishonesty notwithstanding that the case for fundamental honesty might be weak taking only the claimant's evidence.

(c) The use of single joint experts

24. It seems that independent evidence will, however, be preferable to joint expert evidence:

'We should say something about single joint experts. They have an invaluable role to play in litigation generally, especially in low value litigation. But … judges should be slow to direct that expert evidence on the causation issue be given by a single joint expert. This is because the causation issue is controversial.' (*Richards* at [36])

VII. APPEALS

25. In *Richards* the Court of Appeal dealt with an appeal which alleged, *inter alia,* that fundamental dishonesty ought to have been found. The Court found that:

> *'… the judge, having found that Mrs Richards' evidence was "hopelessly inconsistent", was duty bound to explain why he could nevertheless accept that evidence in relation to both the fact of injury and also the length of the time that the injury was suffered.'* ([66])

26. It was insufficient for the purposes of the appeal that the trial judge had relied on the medical evidence that the claimants had suffered with *'spasm',* which he took to be an objective indication describing involuntary movement, ([70]). The Court of Appeal made the following comment of the medical evidence:

> *'Dr Iqbal's reports were extremely formulaic and did not adequately distinguish between the two Claimants. In both reports he used similar wording … and, most importantly, he made identical recommendations for physiotherapy (eight sessions) and gave an identical prognosis (for resolution between 12 and 14 months from the date of the accident"). In respect of both Claimants he diagnosed "fear of travel" with an identical opinion in respect of the existence of this effect and the prognosis. However, this does not appear to have had a basis in reality … . In the circumstances, it is difficult to see how HHJ Main QC could have placed any proper reliance on these medical reports in view of the inconsistency and unreliability of the factual basis which lay behind them.'* ([71])

28. While the Court was willing to grant the appeal and dismiss the claim it declined to make a finding of fundamental dishonesty having not considered the witness evidence first-hand, ([72]). Accordingly, where a judge declines to make a finding of fundamental dishonesty and grants a claim, an appeal may be open to the defendant if the judge fails to provide reasons why, notwithstanding hopeless inconsistency, he was able to assess the injuries and their duration. On success, the result is likely to be remittance or dismissal only, rather than a finding of fundamental dishonesty.

Claimants will be keen to ask for specific findings in order to limit the scope for appeal. The characterisation of the medical report will be familiar to many personal injury practitioners; it is unlikely that many claims will be saved, on appeal, merely on the basis of apparently objective *indicia* contained in first medical reports. Of course, an allegation of fundamental dishonesty might, anyway, fail for other reasons: there may be no real inconsistency or contradiction, and/or the judge may find that the claim is not made out although there is no fundamental dishonesty. The indication is though, that inconsistency or contradiction by the claimant, may well be capable of displacing a badly composed medical report. However, where a medical report appears strong, a claimant might have similar grounds for appeal depending on the strength of the reasons given for disregarding the report.

VIII. COSTS CONSEQUENCES

27. On a finding of fundamental dishonesty, the judge is required to record the amount of damages that would have been awarded but for that finding. The costs awarded to the defendant will be set-off against the amount of hypothetical damages, (Section 57(5) CJCA 2015). In such cases, QOCS will be excepted where the court grants permission, (CPR r44.16).

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