DISHONESTY & PERSONAL INJURY LITIGATION

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The effects of your client's dishonesty on you and what you can do about it

There are myriad ways in which 'dishonesty' can arise in, and affect, personal injury litigation: a car full of 'hapless victims' of an uncle's rear-end shunt; a person who decides to deny their real recovery. Parliament and the Courts have decided to get tough in relation to dishonesty and providing the powers are used sensibly, who can complain?

First we had **Fairclough Homes Ltd v Summers [2012] UKSC 26**, and since then a rash of other cases, striking out claims, wholesale, or seeking to commit Claimant's to prison: **Homes for Haringey v Fari [2013] EWHC 757 (QB) (January 2013)**

We also know that a claimant can lose the entirety of his/her claim through the new QOCS regime (and cl 49 of the Criminal Justice and Courts Bill).

From the point of view of the solicitor representing a person, what must you do to litigate claims without the constant worry that you may lose all of the costs and end up in a mire of unremunerated applications from an insurer with its tail up and a client with his tail between his legs (or sometimes an aggressive client who blames you for their plight).

Striking out

Striking out a claim still requires "exceptional circumstances" – and a "proportionate response" (Fairclough, Lord Clarke, [48-49]).

Difficult to think of circumstances – "might, however, include a case where there had been a massive attempt to deceive the Court but the award of damages would be very small."

Of course that introduces a balance - I expect the Court to extend its jurisdiction to larger claims where it appears that the dishonesty has tainted the claim.

Scullion v Royal Bank of Scotland (24/5/13, HHJ Cotter QC in the Exeter CC)

Invitation to "tease out, to pick out, "prune out" the elements of honesty"

The Claimant would forego any loss of earnings (22, 27)

To view elements of the case as "compartmentalised" – PSLA was "free from taint" (22)

The key problem for the Claimant is that the claim would have to start from scratch – particularly the medical evidence (28)

One can see that it would be an affront to the overriding objective to re-boot the entire claim – and re-use the court's resources on what might be honest aspects of the claim (would medical experts 'play ball'? new experts? etc).

NB also, under this decision and cl.49 the Claimant would not recover the cost of a written off vehicle – fair enough?

Another example is **Plana v First Capital East Ltd 18/08/13 HHJ Collender QC, CLCC)**. There are plenty more.

The decision to strike out is discretionary, and must be taken in accordance with the revised overriding objective. Decisions will be very difficult to appeal.

Now we have cl.49 of the **Criminal Justice and Courts Bill 2014**
Cl.49 provides that the Court *must dismiss* a claim if satisfied *on a balance of probabilities* C has been *fundamentally dishonest in relation to the claim.* This includes dismissing *ant element* of the claim including those where the the Claimant has *not been dishonest.*

The only reason for not striking out the whole claim is if the Court is satisfied that the Claimant would suffer substantial injustice if the claim is dismissed. That looks like a 'nod' to proportionality.

But in any case, what benefit is it to you to 'survive' a 'strike out' application? Costs are likely (at best) to be reserved to the trial judge in all but the most foolish applications – leaving you to continue running a claim to trial which the Defendant will not settle (probably having a solid and stale offer in place) and in which your client is likely to be undermined.

Another way in which your client's dishonesty can affect you in an unexpected way is illustrated in **Rehill v Rider Holdings Ltd [2014] EWCA Civ 42**

28December 2005	RTA
23 April 2007	D offered £75,000 expired 1 June 2007
8 November 2007	D offered £100,000 under Part 36
18 January 2008	D's Part 36 Offer withdrawn and contrib alleged.
17 June 2008	Issue of claim and further offer
10 June 2009	Part 36 off £40,000
16 May 2012	Appeal on liability allowed in part, 50-50
Quantum trial	C accepted offer of £17,500 just before trial. Parties could not agree liability for costs.

First instance court held that C had failed to beat the Part 36 Offer of June 2009 and therefore made the typical part 36 costs order from 2 July 2009.

The Recorder found that C did embellish aspects of claim and tried to minimise his culpability in relation to the accident by providing an incorrect version of events (crossing from nearside not offside) C also underplayed his recovery: wheelchair for trial 'v' carers seeing him walk upstairs - all experts said he made an excellent recovery – accommodation claim!

What were proper costs consequences?

Did Mr Rehill act reasonably in not accepting either 2007 offer? Discharged from hospital and seen running up and down stairs by October 2007.

"The reality was that there was no significant uncertainty about Mr Rehill's orthopaedic condition…."
So Mr Rehill was ordered to pay the Defendant's costs from 30th November 2007.

The C/A did not interfere with the Recorder's remaining order that Mr Rehill was awarded his reasonable costs before that date, subject to the Defendant being able to take the usual conduct points under CPR44.14.

The effect of such dishonesty on you

Sometimes your client will make it 'your fault' – and transfer the stress to you – *"you didn't tell/warn me…"*

You will be placed under severe (time-consuming) pressure by the Defendant

You will have to continue to litigate the claim, including a strike out application
You are unlikely to be paid

If you have used interim payments to pay for disbursements, these are likely to be ordered to be re-paid: **Plana** - £125,000

What can you do to protect yourself and the firm's position?

Frontload everything even more!

(Providing it is proportionate – the key difficulty on costs!)
Take a statement early
GP records (clue to employment in GP records: **Scullion**)
OH/P Records
Benefit applications

Unravel and understand your client's exaggeration / dishonesty early

Adam tells a medico-legal expert he can walk 100m, but has told a benefit assessor (3 months after) he can only walk 50m. Surveillance footage (3 months later still) shows him walking 800m (1/2 mile)

- Might someone/the benefits assessor might have told Adam (but not recorded telling him) to answer 'as if it was your worst day'?
- The expert might have asked him to answer 'as if it was an average day'.
- The benefit assessment may have been in the middle of winter; the doctor's examination in summer.
- The symptoms may have changed between the assessments.
- Adam may have felt that they should over-emphasise their symptoms to the benefits assessor because, if not, he would score them beneath the threshold at which they would receive any benefits, at a time when they had no income.
- Adam may have over-emphasised their symptoms to an expert to make sure he understood how bad the symptoms could be on his worst day despite what he was asked.
- Adam may have felt considerably improved, but not wanted to acknowledge that improvement as it was very recent and he did not feel it was certain to continue.
- He may have decided not to acknowledge that improvement, so that anyone assessing him continued to believe that his symptoms were as bad.

Get to the bottom of these questions – as objectively as you can

Has Adam lied or exaggerated?
If he has, does it 'matter' / can it be 'innocently' explained?
What are the most likely consequences?
If your client has been dishonest can you protect your firm's position? How?

Explain the importance of absolute honesty – and the protection it affords

Statement of Truth - Strike out – Contempt
Telling the truth is less of a memory test!
Virtually every truthful quantum claim settles

Explain why Defendant's conduct surveillance

It is striking how many claimants *only* feel that surveillance is a gross invasion of their privacy. In fact, the fact that surveillance takes place can be of considerable assistance to a Claimant.

In most cases insurers and Defendant solicitors do not have an opportunity to meet and evaluate the injured person during a claim. Surveillance provides a simple and effective tool to compare the Claimant's daily activities with accounts given to experts, benefits assessors and in a Schedule or statement.

Where it is entirely consistent, it is unlikely to be repeated, and it will lead the Defendant to a different mindset about the claim.

We have all seen the 'gotcha' dvd, and had the hapless Claimant say "you should've seen me the next day" –

In the context of the new attitude to "fundamental dishonesty" it is going to be ever-more difficult to run the "good days bad days" unless the Claimant has laid the groundwork, truthfully, *beforehand*.

In **Plana** the Claimant's case was struck out (in interlocutory application) despite his explanation of him working in the carwash.

Explain the importance of volunteering improvements

The message is absolutely clear.

If you volunteer any significant improvements in your condition to your solicitors (and they communicate these to the Defendant), you do not have to be worried about being 'caught out' by surveillance.

It means never having to 'chase down' a later discrepancy
It actually bolsters credit – so that the court can have greater faith in the Claimant
It may well mean no surveillance is served
If there is a genuine issue/problem of honesty – meet it head on early on

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