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King's Bench Walk

Mustard v Flower & Ors [2021] EWHC 846 (QB)

Master Davison's decision in Mustard v Flower & Ors [2021] EWHC 846 (QB) affirms, per Howlett, that a Defendant does not need to plead fundamental dishonesty to make an application under section 57 of the CJCA 2015 or to disapply QOCS on that ground. Further, there is no need, and it is not appropriate, to plead fundamental dishonesty on a contingent or speculative basis. However, the Claimant must have sufficient notice and opportunity to deal with the issues that could lead a Judge to a finding of fundamental dishonesty. Accordingly, the issues to be explored at trial that may lead to such a finding can and should be set out within the statements of case.

The Proposed Amendments

The judgment deals with the Defendant's application to amend its defence. Two of these amendments were uncontroversial and allowed in full. The third contested amendment was as follows:

"4.4 The Claimant's accounts of the RTA and its immediate aftermath, and the nature and severity of her symptoms both before and after the accident have varied over time, are unreliable and are in issue. They have been exaggerated (or in the case of her pre-RTA history minimised) either consciously or unconsciously – the Third Defendant cannot say which absent exploring the issues at trial. *In the event that the Court finds that the Claimant has consciously exaggerated the nature and/or consequences of her symptoms and losses, the Third Defendant reserves the right to submit that a finding of fundamental dishonesty (and the striking out of the claim pursuant to section 57 Criminal Justice and Courts Act and/or costs sanctions including the disapplication of QOCS) is appropriate.*"

Allowed Amendment

The Claimant wanted the above paragraph to be disallowed in its entirety but only the italicised text was ordered to be removed. The non-italicised text was allowed. Master Davison noted that disallowing the first sentence might be used by the Claimant (as had been unsuccessfully attempted in the case of Pinkus) to limit cross-examination of the Claimant at trial and:

"Plainly, that would be wrong and unfair to the defendant. The defendant has a respectable body of evidence that the claimant has exaggerated (or, in the case of pre-accident symptoms, minimised) her symptoms. It is entitled to explore whether the motivation for any exaggeration or minimisation is benign…"

Disallowed Amendment

However, the italicised text reserving the 'right' to raise the issue of fundamental dishonesty was not allowed. This was primarily because it was not necessary to do so. Further, at the time of the application to amend the Defence it was held that a plea of fundamental dishonesty had no real prospect of success (a requirement for the Court's discretion to be exercised under CPR r.17.1(2)(b)). Further, the amendment prejudiced the Claimant as her legal expenses insurer would need to be notified and might have been invalidated.

Not Necessary to Plead Fundamental Dishonesty

Following Howlett v Ageas Insurance Limited [2017] EWCA Civ 1696 a Defendant does not have to allege that the claim was 'fundamentally dishonest', either to make an application under s.57 of the Criminal Justice and Courts Act ('CJCA 2015') or for qualified one-way costs shifting ('QOCS') to be displaced on that ground.

This is underpinned by the reality that often:

"neither the defendant nor the judge may be in a position to make any conclusions about a party's honesty until that party has given evidence and been cross-examined … So there will be many cases where it would not be practical or proper to require a defendant to have made such an allegation prior to the trial in order to make an application under section 57."

However, an application under section 57 that the Claimant is fundamentally dishonest will not be entertained unless (emphasis added):

…. 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[1] … Or, to adopt the language of HHJ Coe's judgment in Pinkus, whether the claimant had had *"sufficient notice"* of the issues raised and the opportunity to deal with those issues by way of additional evidence, if necessary, including from his experts.

Examples of Adequate Warning / Sufficient Notice

In Howlett the Claimants were held to have been given adequate warning that a Judge might arrive at the conclusion they had been fundamentally dishonest. This was on the basis the Defence expressly stated that Ageas did "not accept the index accident occurred as alleged, or at all", that it was denied that "there was an accident as alleged", that credibility was in issue and that the Howletts were required to "strictly prove" the matters specified in para 7; and listed in para 6 various matters casting doubt on the claim…".

In Pinkus v Direct Line [2018] EWHC 1671 the Claimant had sufficient notice that a conclusion of fundamental dishonesty might be reached because the Defendant's Counter-Schedule set out the specific allegations of conscious and gross exaggeration. Importantly, the Claimant also "had an opportunity to respond … seeking to admit further statements in rebuttal of defence witnesses…"

The Defendant is expected to ensure that the Claimant has the opportunity to address the evidence that points to a conclusion of fundamental dishonesty. This means that not explicitly pleading fundamental dishonesty should be no detraction from the modern 'cards on the table' approach to litigation.

Beware Not Giving Sufficient Notice

Master Davidson cited with approval HHJ Coe in Pinkus who noted that she would not allow any issue to be raised in cross-examination which the Claimant "might have been able to deal with by way of additional evidence or which the experts would have been able to address, but had not and could not in the course of the hearing."

Expert Evidence

The judgment also dealt with the Claimant's application to rely on amended reports from her neurologist and neuroradiologist commenting on the Diffusion Tensor Imaging ('DTI') carried out by Professor Sharp. Professor Sharp had originally prepared a report which was commissioned by the Claimant's solicitors but sent to the Claimant's GP to form part of her clinical records. Master Davison had already made an order excluding Professor Sharp's report on this basis but allowing the other experts to comment on the imaging itself that Professor Sharp had undertaken. However, the Claimant's experts were supplied "not only the imaging, but also the fruits of analysis of that imaging carried out by, or under the control and direction of, Professor Sharp." It was on the basis of this analysis, in the excluded evidence that the updated reports of the neurologist and neuroradiologist "concluded that there is an abnormality in the corpus callosum tract of the claimant's brain "suggestive of the presence of diffuse axonal injury". (The scans themselves show no abnormality.) The amended reports adopting Professor Sharp's analysis were therefore not allowed.

This is a sage reminder that a Judge will not allow a case-management order to be subverted. As Master Davison observed:

"If the claimant's legal team wished to introduce that evidence, the proper thing to have done was to have appealed the order or asked their experts to carry out their own, independent analysis of the imaging."

Practical Takeaways

Defendants

Defendants should ensure that statements of case indicate the issues to be explored which might lead a Judge to a finding of fundamental dishonesty (i.e. matters which point to a lack of credibility or exaggeration). This is important, because otherwise cross-examination on certain issues may not be allowed. However there is no need to plead the specific particulars of conscious or unconscious exaggeration. Further an absence of a positive averment of fundamental dishonesty will be no bar to the trial judge making such a finding, as long as sufficient notice has been provided.

Claimants

For Claimants this case makes clear that fundamental dishonesty cannot be pleaded on a speculative or contingent basis. Further, if a Defendant is to make an application under section 57 of the CJCA 2015 or to disapply QOCS under CPR rule 44.16 the Claimant will need to have been put on notice. The Claimant cannot have issues sprung on them at trial if they might have been countered with further expert or lay evidence not available at trial.

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William Audland QC of 12 King's Bench Walk acted as counsel for the Defendant in this case and Pinkus v Direct Line [2018] EWHC 1671.

[1] Master Davidson cited Newey LJ in Howlett.