Welcome to this week’s edition of BC Disease News.

In this week’s edition, we report on the Court of Appeal judgment in Bussey v Anglia Heating Ltd [2018] EWCA Civ 243, in which Jackson LJ, Underhill LJ and Moylan LJ identified what constitutes ‘safe’ asbestos exposure levels in mesothelioma breach of duty.

In other news, we highlight a forthcoming Solicitors Disciplinary Tribunal hearing, involving ex-head of Asons Solicitors, Kamran Akram.

In this week’s feature article, we summarise the increasing use of ‘fundamental dishonesty’ pleadings, substantiated by s.57 of the Criminal Justice and Courts Act 2015. This provision was most recently applied in the High Court case of Razumas v Ministry of Justice [2018] EWHC 215 (QB), which we examine in detail.

Any comments or feedback can be sent to Boris Cetnik or Charlotte Owen.

As always, warmest regards to all.

SUBJECTS

Anyone who works or lives in proximity to asbestos faces some risk of mesothelioma. It is possible to reduce that risk by taking available precautions. It is not possible to eliminate it altogether. The residual risk or the risk which remains after taking all proper precautions may be regarded as an “acceptable” risk.

In appreciating that “… the Court of Appeal applied the correct legal principle in Williams”, Jackson LJ adapted Aikens LJ’s formulation of the foreseeability test, with respect to the facts in Bussey:

‘During the period 1965 to 1968 out Anglia reasonably to have foreseen that if Mr Bussey cut and caulked pipes in the manner set out in Part 2 above, her would be exposed to an unacceptable risk of asbestos related injury?’

Although ‘Aikens held that TDN13 was the best guide to what were acceptable levels of exposure in 1974’, Jackson LJ found this to be a mixed finding of fact and law, before going on to say, at paragraph 47:

‘In my view, TDN 13 does not establish a “bright line” to be applied in all cases arising out of the period 1970 to 1976. Still less is it a bright line to be applied to asbestos exposure in a different period whether before or after 1970 to 1974.’

Jackson LJ regarded it as important that Jeromson and Maguire were not cited in Williams, and, as such, did not think that:

‘… he [Aikens LJ] would have suggested that TDN13 was a general yardstick for determining the foreseeability issue’.

Instead, Jackson LJ reasoned that a ‘more nuanced’ approach is required to make a determination on foreseeability of exposure, without regarding TDN13 as a ‘universal test of foreseeability’.

In Williams, the deceased’s duration of exposure was short and levels of exposure were low. Jackson LJ therefore clarified that any ruling given, in this instance, would not dispute any of the legal principles stated in Williams.

Jackson LJ held, at paragraphs 59 to 61:

‘TDN13 sets out the exposure levels which, after May 1970, would trigger a prosecution by the Factory inspectorate. That is a relevant consideration. It is not determinative of every case.

If the judge had not felt so constrained he would have looked at the issues of foreseeability more broadly … I have come to the conclusion, with considerable regret, that the Court of Appeal is not in a position to decide the liability issue on the basis of the material before us.

In the result, I would allow this appeal and set aside the judgment in favour of Anglia on liability. I would remit this case to the trial judge for him to re-determine the issue of liability …’

Underhill LJ also agreed to allow the appeal and, with reluctance, compelled that it must be remitted to HHJ Yelton for further consideration. His reasoning for this was that he considered the ”[High Court] Judge was wrong to treat … Williams as having laid down a binding proposition that employers were entitled to regard exposure at levels below those identified in TDN 13 as ‘safe’, even in the period 1970-1976, still less at a period prior to its publication”.

His Lordship did, however, disagree with Jackson LJ, on the adoption of ‘an unacceptable risk of asbestos related injury’, per Aiken LJ in Williams, as an unobjectionable level or risk. Underhill LJ perceived that that phrase was liable to be misleading. As an alternative, he suggested that the foreseeability test should be split into a two-fold test:

1. Was the defendant aware that the exposure to asbestos would give rise to a significant risk of asbestos-related injury?
2. If yes, did the defendant take “proper precautions to eliminate that risk”?

Moylan LJ’s judgment signified unanimous ruling in favour of allowing the appeal. However, he also agreed with Underhill LJ that ‘unacceptable risk’ could cause confusion, rather than ‘determining the
critical question of the foreseeability of the relevant risk’.

He also added that he did not believe the purpose of TDN 13 was to procure a ‘safe’ limit of asbestos, since it was designed to provide guidance on when HM Factory Inspectorate would bring proceedings.

Further, Moylan LJ expressed regret for the Court of Appeal’s decision, as there was ‘strong support for the conclusion that the relevant risk of injury would have been reasonably foreseeable to Anglia’.

Together, their Lordships endorsed Hale LJ, in Jeromson, in identifying that where there is variable exposure to asbestos, the court ought to consider the risks involved in ‘the potential maximum exposure’ and only if there could be reassurance ‘that none of these employees would be sufficiently exposed to be at risk could he safely ignore it’.

We will provide detailed commentary on the appeal decision and its potential implications on breach of duty in mesothelioma claims in a future edition of BC Disease News, especially in light of the Hawkes judgment, which was featured in edition 219 of BC Disease News.

Court Overturns Finding on Costs
Consequences Where Part 36 Offer was Accepted Late: Briggs v CEF Holdings Limited [2017] EWCA Civ 2363

In this article, we discuss the judgement of Briggs v CEF Holdings Limited [2017] EWCA Civ 2363. The Court of Appeal ruled that, even though litigation was uncertain, this was not enough to explain why the offer was accepted late. It is not justifiable to disapply the costs consequences of accepting a Part 36 offer late, even if the claimant’s prognosis was unclear.

The offer in question was made by the defendant, in the sum of £50,000, in September 2012. The claimant, with the consent of the defendant, applied for a stay in proceedings late in May 2013 and District Judge Bellamy granted the stay in July 2013, while the claimant underwent surgery on his right foot.

After the stay was lifted, in April 2014, the claimant ‘drastically’ increased his claim to £248,000. The claimant also successfully applied for a substitute expert. In August of 2014, the defendant disclosed surveillance footage. In October, in light of the defendant’s evidence, a report compiled by the orthopaedic expert stated:

‘Both experts believe on current evidence that he would work to normal retirement age on the balance of probabilities.’

The claimant’s expert concluded that the claimant would be able to work until retirement age.

Consequently, the defendant’s Part 36 offer, made in 2012 was accepted in June of 2015.

The claimant then applied, successfully, to alter the consequences under CPR rule 36.13(5):

At first instance, the claimant was ‘successful in obtaining an order that the defendant pay his costs down to 30 October 2014’, when the optimistic joint expert report was created, as it would be unjust to apply the standard 21-day period to accept because of the claimant’s uncertain prognosis until the joint statement was made in 2014.

On appeal, Lord Justice Gross on appeal, stated ‘it is very important not to undermine the salutary purpose of Part 36 offers, but at the same time not conduct a microscopic examination of the case’.

The judge identified a ‘heavy burden’ on the appellant to prove injustice and establish that the judge’s order ‘fell outside the proper ambit available to him’.

Defendant’s counsel submitted that:

‘...the purpose of Part 36 was to enable a party to protect its position on costs. The offer had been made two years and eight months after the accident and eight months after proceedings had been issued. At the time the offer was made, the claimant had greater information available to him than the defendant. As the case progressed, the only additional information available to the defendant was surveillance evidence – which commenced in March 2013 and was disclosed in August 2014 - but the claimant, of course, was aware of his true condition throughout.’

Gross LJ cited the case of SG (A Child) v Hewitt (Costs) [2012] EWCA Civ 1053 and followed the test of Lord Justice Black, in SG v Hewitt:
‘It is not a question of whether we would have made the order which the judge made. He had a wide discretion and his decision should not be interfered with unless his exercise of discretion was flawed in that he erred in principle by taking into account the wrong matters or reached a conclusion which was so plainly wrong that it could be described as perverse.’

In SG, the claimant suffered with more complex brain damage injuries and Gross LJ was therefore able to distinguish Briggs on the facts:

‘I can see nothing here which is distinguishable from the usual litigation risk.’

He went on to say that:

‘The reality here was that it was the joint report which undermined the claimant’s position. It was not a problem of awaiting the guidance in Mr Chell’s October 2014 report. Until then, there were uncertainties in litigation and the usual contingencies of litigation risks’.

There had been a significant time lapse between the offer made and the offer being accepted. It was concluded, therefore, that the judge at first instance had erred in not giving proper effect to Part 36 and choosing not to make the ‘usual costs order where there was no clear and identifiable injustice’.

Pending Supreme Court Judgements

In this article, we report on 3 Supreme Court decisions, 1 of which was handed down this week, and 2 of which are awaiting the handing down of judgment.

The first case of interest is Pimlico Plumbers Limited v Smith [2017] EWCA Civ 51. We previously discussed the Court of Appeal judgement at Pimlico Plumbers, in edition 173 (here). The court found that a plumber, carrying out plumbing and maintenance work on behalf of a plumbing company, was a ‘worker’, within the meaning of the Employment Rights Act 1996 s.230(3)(b) and not a self-employed contractor.

The case is on appeal from the Court of Appeal on the following grounds:

• ‘Whether the respondent was a ‘worker’ within the meaning of the Employment Rights Act 1996 and Regulation 2 of the Working Time Regulations 1998;’
• ‘Whether the respondent was in “employment” within s.83(2)(a) of the Equality Act 2010.’

This case is relevant because it will affect the position of employee status and have implications in occupational disease law.

The second case of interest is Gavin Edmondson Solicitors Limited v Haven Insurance Company Limited. In edition 217 (here), we summarised the outcome the Court of Appeal hearing. The case, in short, was about advancing claims in the MoJ Portal and insurers attempting to settle directly with claimants to avoid paying fixed Portal costs.

With both the Pimlico and Gavin Edmondson appeals, we await the handing down of judgments.

Barton v Wright Hassall LLP [2018] UKSC 12, however, which is the third case of interest, was handed down on Wednesday. Previously, we discussed the Court of Appeal ruling, in edition 136 (here). This case concerned a litigant in person, who fell short of effecting claims in the MoJ Portal and insurers attempting to settle directly with claimants to avoid paying fixed Portal costs.

We will discuss the implications of the Barton appeal in next week’s issue of BC Disease News.

Solicitors Disciplinary Tribunal Set for Hearing with Former Head of Asons

It has been reported that the former principal solicitor at Asons Solicitors, Kamran Akram, will be appearing before a disciplinary tribunal, over allegations that the claimant firm acted in cases where there had been a conflict of interest and also engaged in the act of inflating legal fees and paying illegal referral fees.

The SRA, in March of 2017, intervened into Asons Solicitor, which reported £2.1 million losses in the year ending 31 May 2016. We reported on this in edition 179 of BC Disease News (here). Coops Law, an offshoot of Asons created before the SRA intervention, was closed down by the regulator 3 months hence. We reported this in issue 190 (here), on the grounds that the SRA had ‘reason to suspect dishonesty on the part of Irfan Kahn Akram in connection with Coops Law Ltd’s business’.

The ex-principal, who was admitted in 2005, will provide answers to six allegations at the tribunal, namely that he:

• ‘Caused or permitted the presentation of applications for costs in PI claims which systematically misrepresented the grade of relevant fee earners so as to increase the level of recoverable costs.
• Caused or permitted the presentation of claims for special damages which contained particulars that were false in that the event, loss or treatment alleged to have given rise to the special damages claim had not occurred or did not exist.
• Caused or permitted Asons to act in circumstances giving rise to a conflict of interest between Asons and its clients, specifically in relation to the resolution of personal injury claims.
• Provided misleading information to the court and/or the SRA in relation to the false and inflated claims for costs and special damages presented on behalf of clients of Asons.
• Caused or permitted payments of prohibited referral fees.
• Failed to run his practice or carry out his role as sole principal, COLP
and COFA of Asons effectively and in accordance with proper governance and sound financial and risk management principles.\textsuperscript{4}\textsuperscript{4}

The allegation referring to the systematic exaggeration of legal costs surrounded a dispute over 65 AXA personal injury files, which were settled between September 2013 and December 2014, where ‘Asons overstated the qualifications and experience of its legal staff to falsely inflate the bills’. This led to the repayment of over £100,000. We discussed this in further detail in edition 173 (here).

The firm, set up in 2008, had also been the beneficiary of a controversial £300,000 grant from Bolton Council in 2016. This was subsequently repaid, following a notice of termination.

The tribunal hearing has not yet been allocated, but we will report on the decision of the SDT in due course.

**American Restaurant Workers Vaccinated Against Hepatitis A**

Humans can contract foodborne illnesses in a range of ways, including bacteria and viruses in undercooked or contaminated food. Common types of foodborne illness include infection with bacteria such as salmonella, E. coli or listeria. Viruses such as hepatitis A can also be acquired through eating contaminated food.

Food-related outbreaks of hepatitis A are usually associated with contamination of food during its preparation, by a food handler infected with hepatitis A. Symptoms do not occur for several weeks after exposure, and it is during this symptom-free time that a person is most contagious. Thus, an infected worker handling food would not yet have developed the illness themselves.

Symptoms of hepatitis A include: feeling tired and generally unwell, joint and muscle pain, fever, loss of appetite, feeling sick, pain in the liver area, yellowing of the skin and eyes (jaundice), dark urine and pale stools and itchy skin. According to the NHS, in most cases, hepatitis A will pass within two months, and there will be no long-term effects. For around one in seven people the symptoms may come and go for six months before disappearing. Rare life-threatening complications such as liver failure can occur, particularly in those with pre-existing liver problems and elderly people\textsuperscript{5}.

In the United States in 2017, clusters of hepatitis A appeared in several states, including 577 cases with 20 deaths in San Diego and 658 cases and 22 deaths in South East Michigan\textsuperscript{6}. In both of these clusters, the affected individuals included restaurant workers.

In the UK, hepatitis A vaccination is not routinely offered, because the risk of infection is low for most people. It is recommended for some high-risk groups, and for people planning to live in or travel to parts of the world where hepatitis A is more widespread.

In the United States, the Oakland County Michigan Health Department has hosted vaccination clinics for restaurant workers\textsuperscript{7}. The department recognizes restaurant workers as a priority target for the vaccination because they handle other people’s food and could unknowingly infect customers. Vaccination of restaurant workers will help to prevent them transmitting the virus, and could help restaurants reduce their risk of ill customers taking legal action.

**Incidence of Rare Skin Cancer on the Rise in the USA**

According to new research presented at the American Academy of Dermatology annual meeting last week, the incidence of Merkel cell carcinoma is rising\textsuperscript{8}. Merkel cell cancers are a rare type of skin cancer that develops in Merkel cells, which are in the top layer of the skin\textsuperscript{9}. Though it is rare, Merkel cell carcinoma (MCC) is highly aggressive and often fatal\textsuperscript{10}.

The researchers used data from the Surveillance, Epidemiology, and End Results Program (SEER-18) database, which contained 6,600 cases of MCC, to determine patterns of incidence of MCC between 2000 and 2013. They also made projections for future numbers of cases by combining this data with United States census data. During 2000-2013, the number of MCC cases increased by 95 %. For comparison, the number of solid cancer cases increased 15 % and the number of melanoma cases increased 57 %. In 2013, the incidence rate of MCC was 0.7 cases per 100,000 people per year, corresponding to 2,488 cases per year in the USA.

The incidence of MCC in the USA increases dramatically with age, increasing 10-fold from 0.1 to 1.0 cases per 100,000 per year between the 40–44 years and 60-64 years age groups, and then again to 9.8 cases per 100,000 per year in the 85 years and over age group. Due to the increasing numbers of older people, total incidence rates are predicted to increase to 3,284 cases per year by 2025.

According to Dr Paul Nghiem, one of the senior researchers, ‘Compared to melanoma, MCC is much more likely to be fatal, so it’s important for people to be aware of it\textsuperscript{11}. Like other skin cancers, MCC is associated with cumulative exposure to ultraviolet radiation from the sun. It is also associated with a virus, known as the Merkel cell polyomavirus, which is common, though the vast majority of people exposed to the virus do not develop MCC. Those most likely to be affected by MCC are people with a prior history of skin cancer, men, Caucasians, and those aged over 50. Age is a particularly significant risk factor, and the ageing population is the main reason for the recent increases and predicted future increases in numbers of cases reported in this study.'
Diabetes Increases Risk of Developing Cataracts

A new UK study has found that those with diabetes are twice as likely to develop cataracts as the general population. A cataract is clouding of the lens of the eye, which leads to a decrease in vision. Cataracts can affect one or both eyes, and often develop slowly. Symptoms include eyesight that is blurry or misty, finding lights too bright or glaring, difficulty seeing low light, and colours appearing to be faded. Cataracts can affect the patient’s ability to drive.

Cataract can be an occupational disease. Cataract appears on the Industrial Injuries Disablement Benefit list of prescribed diseases, in cases where the worker has been exposed to radiation from red-hot or white-hot material. These workers might include glass workers, metal workers and stokers.

In the new study, a group of patients with newly diagnosed diabetes were followed and compared with a similar population of non-diabetics. The incidence rate was 20.4 per 1000 people per year in diabetics, and 10.8 per person per year in non-diabetics, meaning that those with diabetes are about twice as likely to develop cataract. The risk of cataract increased with increasing diabetes duration, and the difference in risk between diabetics and non-diabetics was greatest in those aged 45-54 years.

This is only the second such report on cataract incidence in diabetic UK patients since the 1980s.

Does Stress Cause Dementia?

In this article look into historic studies linking occupational stress and dementia. Dementia is a genetic brain disorder and post-traumatic stress disorder (PTSD), as an example, is said to affect ‘at least half of the US population’, according to Ronald Kessler of Harvard Medical School.

‘We learned that stress is a killer from an important study on civil servants carried out in the UK more than half a century ago.’ This was the conclusion of two studies carried out by University College London, known as the ‘Whitehall Studies’.

The first began in 1967 and consisted of 18,000 civil servants, all of whom were male, over a ten year period. The second study was undertaken in 1985 and confirmed the results of the first study, which found associations between the grade of job and ‘mortality rates from a range of causes’.

The second study confirmed that men in the lower grade of work had a one three times higher mortality rate than those in a higher grade of work. It was said that ‘despite this association – that stressful jobs kill people – the mechanism of how stress causes lethal disease remained elusive.’

More recently studies with rats have shown ‘how stress reduces the growth of neurons and its branches. Like a tree that does not get watered, the brain withers. With a withered brain you are more likely to experience dementia if the few remaining neurons are infected or damaged. We can see how stress can cause dementia, but not all dementia is caused by stress.’


Fraudulent claims and general dishonesty can be opposed by defendants on a number of grounds. In this feature article, we summarise the increasing use of ‘fundamental dishonesty’ pleadings, substantiated by s.57 of the Criminal Justice and Courts Act 2015. This provision was most recently applied in the High Court case of Razumas v Ministry of Justice [2018] EWHC 215 (QB).

Before doing so, we explore the alternative methods by which defendants have endeavoured to strike out suspected fraudulent claims in the past, e.g. by arguing that the statement of case is an ‘abuse of the court’s process’. We then go on to discuss the chronological implementation of ‘fundamental dishonesty’ into legal provisions, initially in respect of CPR Part 44 QOCS disapplication.

Lastly, we analyse the recent decision of London Organising Committee of the Olympic and Paralympic Games (LOCOG) v Sinfield [2018] EWHC 51 (QB), in which Mr Justice Knowles established the current authority on s.57. Did the Razumas case apply LOCOG? This is what the final section of our feature article examines.
In order to make a finding of ‘abuse of process’, Sir James Wigram V.-C., in the case of Henderson v Henderson (1843) 3 Hare 100, held that:

‘... the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time’.

Lord Diplock, in Hunter v Chief Constable of the West Midlands Police [1982] AC 529, provided additional guidance on the power of the court to strike out a statement of case, on the basis of ‘abuse of process’:

‘... an inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty [I disavow the word discretion] to exercise this salutary power’.

In Attorney-General v Barker [2000] 1 FLR 759, Lord Bingham described an ‘abuse of process’ as:

‘... a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process’.

Lord Bingham also ruled in the application for strike out for ‘abuse of process’ in Johnson v Gore Wood & Co [2002] AC 1. Commenting on the favourability of the court to strike out, his Lordship said:

‘Litigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court. This does not however mean that the court must hear in full and rule on the merits of any claim or defence which a party to litigation may choose to put forward’.

He went on to reason that any application for strike out, on the grounds of ‘abuse of process’, would require:

‘... a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court...’

It is clear then, from case authority, that obtaining strike out when defendants allege ‘abuse of process’ of the court, yields a high threshold. Indeed, in the case of Summers v Fairclough Homes Ltd [2012] 1 WLR 2004, Lord Clarke stated:

‘... The draconian step of striking a claim out is always a last resort, a fortiori where to do so would deprive the claimant of a substantive right to which the court had held that he was entitled after a fair trial. It is very difficult indeed to think of circumstances in which such a conclusion would be proportionate. Such 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’.

The position taken by the court, in prioritising access to justice ahead of strike out, has meant that defendants, wary of fraudulent claimant activity, have shown reluctance towards making applications, on the grounds of ‘abuse of process’, to obtain a remedy.

THE CRIMINAL JUSTICE AND COURTS ACT 2015

The Criminal Justice and Courts Act 2015 now provides defendants to personal injury litigation with the ability to dismiss or strike out a claim, on the grounds of ‘fundamental dishonesty’, pursuant to s.57. ‘Fundamental dishonesty’ is a concept which was first introduced in Part 44 of the Civil Procedure Rules, as a means of defeating qualified one-way costs shifting (QOCS).
Section 57 of the 2015 Act states:

### Exceptions to qualified one-way costs shifting where permission required

**44.16**

(1) Orders for costs made against the claimant may be enforced to the full extent of such orders with the permission of the court where the claim is found on the balance of probabilities to be fundamentally dishonest.

Prior to the LOCOG case, there had been no substantive guidance on what constituted ‘fundamental dishonesty’ under the Criminal Justice and Courts Act 2015. Nevertheless, HHJ Moloney QC in Gosling v Hailo (2014), had previously provided commentary on the definition of ‘fundamental dishonesty’, in a judgment on QOCS, at paragraph 45:

‘The corollary term to ‘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: a claim which depended as to a substantial or important part of itself upon dishonesty.’

In the case of Menary v Darnton (2016), HHJ Hughes QC used similar language to describe ‘fundamental dishonesty’, for the purposes of CPR 44.16, necessitating the presence of ‘some deceit that goes to the root of the claim’.

In the same year, HHJ Harris QC, in Rayner v Raymond Brown (2016) contributed towards the dearth of case law defining ‘fundamental dishonesty’, under CPR 44.16, by stating that:

‘... a substantial and material dishonesty going to the heart of the claim - either liability or quantum or both - rather than peripheral exaggerations or embroidery, and it will be a question of fact and degree in each case’.

A year later, in the Supreme Court, the case of Ivey v Genting Casinos Limited (t/a Crockfords Club) [2017] 3 WLR 1212, expanded on the common law definition of ‘dishonesty’. At paragraph 74, the presiding judge stated:

‘When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual’s knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest’.

Although the LOCOG case is the highest authority for decisions of ‘fundamental dishonesty’, several earlier cases commented on the scope of the Criminal Justice and Courts Act provision. Indeed, in
Versloot Dredging BV v HDI Gerling Industrie Versicherung AG, the Supreme Court observed:

‘Parliament has thus gone further than this court was able to do in Summers v Fairclough Homes’.

Elsewhere, District Judge Bishop considered the breaches, omissions and deception, employed by the claimant in Johnson v Qainoo (2017), reasoning that s.57 ‘fundamental dishonesty’:

‘... must be substantial and it must be material to part or all of the claim. It is clearly a question of fact and degree in each case, but it must be crucial to a major part of the claim. It does not include minor exaggerations or fabrications. It is not ancillary or peripheral. It must be crucial to a major part of the claim’.

In Johnson, the judge found the claimant to have been ‘overwhelmingly dishonest’, and went on to say:

‘Section 57 is designed to be punitive. The fact that he has suffered a real and painful injury is irrelevant …’

In the County Court case of Stanton v Hunter (2017), Recorder SA Hatfield QC made a ruling, pursuant to s.57, which was deemed to be similar to the ‘use of the term in the QOCS jurisdiction’. Accordingly, the claim was dismissed in its entirety, after having ensured that the claim had not caused the claimant to suffer ‘substantial injustice’. On this limb of s.57, the Recorder said that:

‘... miserable consequences which are likely to accrue ... cannot here be equated with “substantial injustice”, or the purpose of the legislation would be frustrated’.

Finally, in Barber v Liverpool City Council (2017), which directly preceded LOCOG, the judge ruled in favour of dismissing the claim, finding that the claimant had been ‘fundamentally dishonest’ within the scope of the Criminal Justice and Courts Act. Interestingly, the judge reasoned:

‘It should be noted that the test under CPR 44.16 is whether the claim is fundamentally dishonest. There is a subtle difference from section 57 of the Criminal Justice and Courts Act 2015, where the test is whether the claimant has been fundamentally dishonest. As was pointed out by HHJ Hughes QC in Menary v Darnton (2016), however, the honesty or otherwise of the claimant will often be indistinguishable from that of the claim.

Adopting that purposive interpretation in the context of the policy underlying the QOCS provisions, I have no doubt that the claimant’s dishonesty in the present case was fundamental, in that it went to the root of a substantial part of his claim, rather than some collateral matter or minor, self-contained head of damage’.

THE LOCOG CASE


The facts of the case regarded a claimant, who brought a claim for gardening expenses, among other heads of loss, as a result of an injury sustained while volunteering at the Olympic Games. The claimant had a 2 acre garden and declared that a gardener had been employed for 2 to 4 hours of work per week, at a £13 hourly rate, from the period beginning 9 September 2012, at paragraphs 5 of the Preliminary Schedule of Loss. Special damages also sought future losses for gardening, at paragraph 8. This was calculated as 1 hour of gardening per week and the appropriate multiplier was 13.22. The total gardening expenses claim equated to 41.9% of the special damages presented on the Schedule, which was downgraded to a 28% proportion after PSLA damages were agreed.

Despite the fact the claimant signed a statement of truth which asserted that the facts stated in the Schedule were true, in a witness statement, Mr Price, the gardener, said:

‘I do not know why Mr Sinfield says that prior to his accident in September 2012 he and his wife looked after the garden themselves but following the accident he had to employ a gardener. This is just not true’.

Mr Price also denied that invoices, served in the claimant’s List of Documents, had been issued by him, even though the claimant purported as such.

As a consequence, the defendant sought to set aside the claim on the grounds of ‘fundamental dishonesty’. In a Supplementary Witness Statement, the claimant admitted that the original statement was ‘badly worded’, while the invoices were proof of ‘self-billing’.

At first instance, the judge found that the claimant was ‘with a dishonest state of mind’, although this did not constitute ‘fundamentally dishonesty’, as statements only related to a ‘peripheral’ part of the claim. The defendant subsequently appealed this decision, before Knowles J, who interpreted the methodology of ‘fundamental dishonesty’ pleadings, and formulated a template for applications under s.57, at paragraphs 62 to 65, as follows:
Were Paragraphs 5 and 8 of the Schedule Examples of ‘Dishonesty’?

At first instance, the judge held that the claimant, in wrongly asserting that the employment of the gardener was a matter of choice and not necessity, were a product of ‘muddle and confusion’.

‘In my judgment, a claimant should be found to be fundamentally dishonest within the meaning of s.57(1)(b) 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), supra.

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 £8000 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 £8000 is a trivial sum.

Where an application is made by a defendant for the dismissal of a claim under s.57 the court should:

a. Firstly, consider whether the claimant is entitled to damages in respect of the claim. If he concludes that the claimant is not so entitled, that is the end of the matter, although the judge may have to go on to consider whether to disapply QOCS pursuant to CPR r 44.16.

b. If the judge concludes that the claimant is entitled to damages, the judge must determine whether the defendant has proved to the civil standard that the claimant has been fundamentally dishonest in relation to the primary claim and/or a related claim in the sense that I have explained;

c. If the judge is so satisfied then the judge must dismiss the claim including, by virtue of s.57(3), any element of the primary claim in respect of which the claimant has not been dishonest unless, in accordance with s.57(2), the judge is satisfied that the claimant would suffer substantial injustice if the claim were dismissed.

Given the infinite variety of circumstances which might arise, I prefer not to try and be prescriptive as to what sort of facts might satisfy the test of substantial injustice. However, it seems to me plain that substantial injustice must mean more than the mere fact that the claimant will lose his damages for those heads of claim that are not tainted with dishonesty. That must be so because of s.57(3). Parliament plainly intended that sub-section to be punitive and to operate as a deterrent. It was enacted so that claimants who are tempted to dishonestly exaggerate their claims know that if they do, and they are discovered, the default position is that they will lose their entire damages. It seems to me that it would effectively nullify the effect of s.57(3) if dishonest claimants were able to retain their ‘honest’ damages by pleading substantial injustice on the basis of the loss of those damages per se. What will generally be required is some substantial injustice arising as a consequence of the loss of those damages’.

At paragraph 81, Knowles J, on this 1st ground of appeal:

‘... concluded that the judge was plainly wrong not to have reached the conclusion that paras 5 and 8 of the Preliminary Schedule were dishonest misstatements by Mr Sinfield that he had not employed a gardener prior to the accident, that he and his wife doing all the gardening, but that the accident had resulted in him having to employ one for the first time so as to generate the recoverable losses which he set out’.

Was the Claimant ‘Fundamentally Dishonest’ to the Claim?

At 1st instance, the judge reasoned that the claimant had only been ‘fundamentally dishonest’ in respect of the gardening expenses claim and not the entire claim.

On appeal, Knowles J applied his method to findings of ‘fundamental dishonesty’ (above), at paragraphs 84 to 87, as follows:

‘He presented a claim for special damages in a significant sum, and the judge found that the largest head of damage was evidenced by the dishonest creation of false invoices and by a dishonest witness statement. Both pieces of dishonesty were premeditated and maintained over many months, until LOCOG’s solicitors uncovered the true picture ... Mr Sinfield therefore presented his case on quantum in a dishonest way which could have resulted in LOCOG paying out far more than they could properly, on honest evidence, have been ordered to do following a trial.

I reject Mr James’ argument that the claim was not fundamentally dishonest because, by comparing multiplicands, the overstatement was less than £3000, and so any dishonesty cannot be said to go to the heart or root of the claim. The fact is that Mr Sinfield dishonestly maintained a claim for £14 033.18 which he was not entitled to...

The dishonesty therefore potentially impacted it in a significant way.’
The judge should have concluded that Mr Sinfield had been fundamentally dishonest in relation to the claim and, therefore, prima facie by virtue of s.57(3), the entire claim fell to be dismissed unless, by s.57(2), that would result in substantial injustice to Mr Sinfield. Instead, he asked himself the question (para 22): ‘If the greater part of the claim is genuine and honest, is the dishonesty fundamentally dishonest? I answer that by considering s 57(2)’. In my respectful opinion, that was the wrong question and the wrong answer. If the claimant has been fundamentally dishonest in the way I have indicated then the fact that the greater part of the claim might be honest is neither here nor there (subject to substantial injustice); by enacting s 57(3) Parliament provided that the entire claim, including any genuine parts, are to be dismissed.

As I have said, I consider that even on the findings of dishonesty which the judge made, the claim should have been dismissed (subject to substantial injustice). But if I am right in relation to Ground 1 then, a fortiori, the claim should have been dismissed.

Would the Claimant Suffer Substantial Injustice in the Event of the Claim Being Dismissed?

On this 3rd and final ground, Knowles J opined, at paragraph 89:

‘The starting point is s 57(3) … it follows from this provision that 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. It would render superfluous s.57(3) if the mere loss of genuine damages could constitute substantial injustice. The judge made no findings capable of supporting a conclusion that if the whole claim was dismissed it would result in substantial injustice to Mr Sinfield. Furthermore, the judge was wrong to characterise the gardening claim as peripheral. As I have explained, as originally presented, it was a very substantial part of the claim’.

In conclusion, the judge allowed the appeal, set aside the 1st instance judge’s order and dismissed the claim for damages, pursuant to s.57(2) of the 2015 Act.

Full text judgment of LOCOG can be accessed here.

IMPACT OF LOCOG

Just one week after the LOCOG judgment was handed down, it was reported that a claimant had withdrawn from his pursuit of a personal injury claim, which would have been fully particularised in the region of £1.5 million. Withdrawal occurred following the defendant’s ‘fundamental dishonesty’ pleading.

In this instance, the claimant was injured in a road traffic accident and sustained severe lower limb fractures, leading to compartment syndrome and numerous surgeries. In light of suspicion over the claimant’s credibility, the defendant insurer commissioned surveillance evidence. From this, it was discovered that while extensive rehabilitation and care had been funded by the insurer, the claimant’s continued reporting of immobility, a need for substantial care and an inability to work, was dishonest. In fact, the claimant was found to be fully mobile, capable of riding and working on a motorbike and engaging in home removal activities. Irrespective of the claimant’s regained physical function, he ‘even went through further unnecessary and painful surgeries to perpetuate his fraud’.

The insurer pled ‘fundamental dishonesty’ and ‘when confronted with … [this] … Mr Mervin [the claimant] took the decision to withdraw his claim with immediate effect, with no damages or costs being paid’.

A partner at the law firm which acted for the insurer, at the time, stressed the effect of the LOCOG judgment as a deterrent to bringing exaggerated claims:

‘In particular, despite his serious injuries and his decision to undergo unnecessary further surgery to perpetuate his fraud, the claimant was still prepared to drop his claim, rather than allowing his dishonesty to be further scrutinised via the court process.

This decision is likely to have been a wise one in light of the guidance issued by the High Court in LOCOG, which reflects the hardening legislative and judicial attitudes to fraud’.

THE RAZUMAS CASE


For contextual purposes, it is important to note that Razumas was a case of clinical negligence. The claimant, who spent much of 2010 to 2013 incarcerated, had a fall, in Pentonville Prison, in 2010. Shortly afterwards, a lump developed on the gastrocnemius muscle of his calf. A 10x7 cm mass was observed by a consultant in January of 2011, but it wasn’t until after a non-diagnostic biopsy, conducted in August of 2013, that the claimant received his diagnosis of cancer. As a result of this, knee amputation was performed on 3 November 2013, at which point, the malignant tumour had grown to 20x7 cm mass.

Subsequently, the claimant brought a claim in clinical negligence, against the Ministry of Justice (MoJ), for a breach of its non-delegable duty of care. The claimant alleged that the defendant was responsible for the prison healthcare providers’ failure to diagnose him claimant’s cancer, by failing to communicate appointments and enable hospital appointment attendance.

Did the Defendant’s Causation Arguments Implicate the Claimant in Dishonesty?

During submissions on causation, the defendant argued that the claimant’s
conduct constituted a novus actus interveniens (a new, intervening act), which broke the chain of causation and relieved the defendant from vicarious liability.

Between 11 January 2011 and 4 April 2011 and between 3 August 2011 and 9 July 2012, the claimant was released on license. The defendant argued that the claimant’s omission to seek medical treatment in these periods undid any earlier negligence.

What is more, when the claimant returned to prison in July 2012, he told the healthcare staff that he had seen a GP and been given an operation date of 13 July, at Newham hospital, for removal of the lump. However, the defendant submitted that it had found no record of any medical consultation, while also adducing evidence that ‘healthcare staff in the prison took a number of steps to confirm the identity of the GP and the hospital at which the operation was to be performed, also without success’. Further, the claimant’s evidence was accepting of the fact that he had lied about surgery and this was consistent with the medical expert, Professor Grimer.

On balance, the judge asserted, at paragraph 201:

‘Mr Razumas’ evidence as to the alleged appointment was confused and unconvincing. He accepted that he had lied in one respect about it … I concluded that I could place no reliance on his evidence in this respect … I therefore accept that he failed to seek medical treatment during the relevant period’.

As such, the defendant averred that the claimant’s false intimation, in his Particulars of Claim, were ‘fundamentally dishonest’, arguing that the claim should fail, pursuant to s.57 of the Criminal Justice and Courts Act 2015.

Fundamentally dishonest?

Firstly, on the question as to whether the claimant had acted in a ‘fundamentally dishonest’ manner, the defendant expressed that ‘... although the allegation in question is only one of a number of allegations over a period of time’, the allegation was ‘central’ to the case, not ‘collateral’ or ‘minor’.

By contrast, the claimant urged Cockerill J:

‘... to regard the dishonesty as being some way from the test of fundamental dishonesty. It was submitted that even if the court should find that Mr Razumas lied about the Newham proposed surgery, these untruths “barely scratch the bark” and go nowhere near the root of the case’.

In reaching her decision, the judge applied the test of Knowles J, at paragraphs 62 to 65 of the LOCOG judgment (above), concluding:

‘Did Mr Razumas act dishonestly in relation to the primary claim and/or a related claim? To this the answer must be yes. He has one main claim, and the dishonesty went to one route to succeed on it in full. Has he thus substantially affected the presentation of his case, either in respect of liability or quantum, in a way which potentially adversely affected the defendant in a significant way? Again the answer must be yes. The argument which he advanced went to an entire factual section and pleaded occasion which would have entitled relief on the main claim. Thus the first part, fundamental dishonesty is made out’.

Substantial Injustice?

On the ‘substantial injustice’ limb of s.57, the claimant submitted that there was a ‘gross disproportion between the lies and the effect of depriving him of an award’, and this disproportion should fall within the meaning of s.57(2).

Despite the claimant’s protestation, Cockerill J reasoned:

‘I do not consider that there could be any way out for Mr Razumas via the argument on substantial injustice. It cannot in my judgement 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. That would be to cut across what the section is trying to achieve’.

The judge went on to explain that the LOCOG judgment indicated the need for ‘something more’ than the ‘mere loss of damages to which the claimant is entitled’.

In acceptance of this principle, she said:

‘Something more is required. That something more is not made out here and so, if there were a claim it would fail at this stage’.

The full text judgment of Razumas can be found here.

CONCLUSION

From the decision of Razumas, it is clear that the methodology of s.57, employed by Knowles J in LOCOG, has been followed. To add to that, the case of Razumas is another example of a defendant successfully obtaining dismissal of a claim. This is especially significant, as reliance on ‘abuse of process’, as a means to strikeout claims, has often been unsuccessful, per Lord Clarke in Summers v Fairclough Homes Ltd. That being said, Razumas and LOCOG are just two cases in an otherwise premature area of ‘fundamental dishonesty’ law, under the Criminal Justice and Courts Act.

Uncertainty still remains over what types of conduct go to ‘the root’ of a claim, thereby satisfying the ‘fundamentally dishonest’ limb? Over time, a clearer picture should emerge on this issue. Additionally, the use of ‘something more’, as a test for ‘substantial injustice’, is a vague term, which will undoubtedly be subject to wide interpretation and judicial discretion.

As ‘fundamental dishonesty’ pleadings increase, the use of s.57 as a viable argument, when defendants suspect claimant fraud, should grow in certainty.
References


7 Ibid


11 Ibid


17 Ibid.
Disclaimer

This newsletter does not present a complete or comprehensive statement of the law, nor does it constitute legal advice. It is intended only to provide an update on issues that may be of interest to those handling occupational disease claims. Specialist legal advice should always be sought in any particular case.

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