How dishonest does dishonesty have to be?

Baker v Pellikaan Construction Limited (unreported) – an exercise in judging fundamental dishonesty…

What is and is not fundamentally dishonest – a case in point.

The statutory concept of "fundamental dishonesty" is well known to insurers and is quite rightly deployed as part of the armoury to defeat third party claims tainted by exaggeration and untruths. Once deployed, the perennial question arises – is the claimant's dishonesty sufficiently fundamental?

The law

Section 57 of the Criminal Justice and Courts Act 2015 strengthened the established common law by imposing a duty on a court to dismiss any claim found to be fundamentally dishonest unless to do so would result in substantial injustice (s57(2)).

Dishonesty is relatively easily identified – would what the claimant has done be considered to be dishonest by the standards of ordinary people? There is no "optional scale" of honesty. It is not the claimant's understanding of what those standards are but an objective assessment by reference to those standards, of what they have said or done *(Ivey v Genting Casinos (UK) Ltd t/a Crokcfords [2017] UKSC 67).*

Identifying whether that dishonesty is fundamental, is more difficult and is fact and context sensitive. That said, case law has evolved certain principles. So, dishonesty would be fundamental if it *"went to the root of … the claim"* (*Howlet v Davies & Anr [2017] EWCA Civ 1696*) and *"substantially affected the presentation of [the claimant's] case … in a way which potentially adversely affected the defendant in a significant way, judged in the context of the particular facts…"* (*LOC v Sinfield [2018] EWHC 51 (QB*)).

Can a claimant be repeatedly dishonest, then, but still recover? The unreported claim of *Leroy Baker v Pellikaan Construction Limited* in which judgment was handed down just before lockdown, on 12 March 2020, suggests not.

Mr Baker's claim

Mr Baker was a scaffolder contracted by Pellikaan, an established construction company, to assist in the dismantling of birdcage scaffolding. On 8 January 2013, one of the scaffolding planks became unstable, Mr Baker stepped on it and it tipped. He wore a harness but had unclipped it, and as a result, fell some 20 feet, suffering a broken pelvis and wrist, extensive bruising and later, PTSD.

It became apparent that Mr Baker had not been inducted on site. Had an induction taken place, he would have been identified as an unqualified labourer and would have been instructed not to mount the scaffolding. He was not, and did so. Liability was therefore admitted at 25%.

From then on, it appeared to insurers that Mr Baker was acting as if he had been offered a blank cheque. Damages escalated to almost £0.5m, aided by six witness statements, providing evidence of an isolated somewhat reclusive man, unable and unlikely to find alternative work, with serious mobility issues and requiring significant on-going day-to-day care and assistance. Indeed, a major element of the claim, some £130,000, was for the cost of future care.

Mr Baker's public Facebook posts, though, suggested a different picture. Insurers considered the disparity sufficiently stark to test Mr Baker's evidence at trial.

The claim proceeded in February 2020 before Hellman J at Central London County Court. He found there to have been dishonesty on a number of counts.

Far from being unable to work, then, Mr Baker had had at least two spells of employment, including work as a pallbearer, carrying coffins for a local funeral director. Not mentioned in his statements, he said at trial he had *"forgotten"* this when providing an account of his activities since the accident to the medical experts. Hellman J rejected this explanation, and found him to have been deliberately dishonest – but not fundamentally so.

His Facebook page also suggested that far from being unable to cook, clean and look after himself, Mr Baker was able to do all three, go on holiday, threaten to fight someone and ride a motorbike as well as enjoy an active social life. He was challenged on his witness statements and was said to be deliberately exaggerating. The Judge found this was the case in some aspects, and that the exaggeration was to increase the value of his claim – but again, although he was dishonest, he was not fundamentally so.

Mr Baker even recounted in his statements how he drove to work every day in a car he had to sell, and hence required a replacement. In fact, the evidence at trial established he did not own a car and had not even passed his test – the Judge accepted the claim for a car was substantial and Mr Baker's account was dishonest, but again, not fundamentally so.

In each instance, the Judge distinguished the dishonesty as failing to substantially affect the presentation of Mr Baker's case such that it would have affected Pellikaan in a particular way – neither the dishonest account of his employment, nor of his ability to drive, nor the exaggeration of his symptoms, would have made a substantial difference to the claimed sum. In relation to the car claim, his evidence on ownership, for example, was not the basis on which the claim was being put.

The repeated dishonesty in Mr Baker's evidence was not therefore, fundamental.

One last untruth, however, was found to be Mr Baker's undoing. It may have been something of a surprise to him to find that whilst he provided in his penultimate witness statement, what was an accurate account of his move to a new flat that had reduced his care needs, his Schedule of Loss proposing some £130,000 for future care was not then withdrawn. The Judge noted that he might have considered this a matter for his solicitors presenting his claim to address for him but that was irrelevant to Pellikaan. That failure to withdraw it and therefore its maintenance for some 10 months – it was withdrawn just before trial - affected Pellikaan and was fundamentally dishonest.

The claim was therefore dismissed with Pellikaan's costs to be paid on an indemnity basis.

CPB Comment

This claim was unusual in a number of ways, not least being that the trial of it at Central London County Court was adjourned no less than three times (with the parties' and legal teams' attendance on each occasion) until finally being heard on the fourth attempt, some fourteen months after the first.

Insurers' decision to pursue a robust defence to a claim where primary liability was admitted but untruths strongly suspected, was ultimately validated. The judgment lays bare, though, the need for careful analysis of the decision to defend even where there is repeated and possibly blatant dishonesty on the part of a claimant – that simply may not be enough, no matter the increase in value of the award claimed as a result nor the obviousness of the exaggeration.

In certain cases, what is clear is that that analysis might lead to the conclusion that honesty is not in fact its own reward.

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