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Inconsistencies and Inaccuracies are a Fact of Life; but Lies are Positively Manufactured

Case Note: *Pegg -v- Webb*

[2020] EWHC 2095 (QB)

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Summary

The decision in *Pegg* is, on its face, helpful to Defendants pursuing allegations of fundamental dishonesty.

In this context, there is a distinction between inconsistencies and inaccuracies, which are a fact of life, and lies, which are positively manufactured.

Defendants will succeed when they eliminate all other explanations until all that remains is the inexorable conclusion that the Claimant is a liar.

On the other hand, in order to successfully resist an allegation of fundamental dishonesty a Claimant must identify and explain, at the earliest possible stage, any inconsistency or inaccuracy.

Where an allegation of fundamental dishonesty fails, a Defendant can expect to be penalised in costs.

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Introduction

1. The introduction of qualified one-way costs shifting ("QOCS") fundamentally altered the landscape of personal injury litigation.

2. Under the new rules, Defendants were no longer able to recover their costs of defending most unsuccessful claims (but not *vice versa*): the 'one-way costs shifting' aspect. This was palatable to Defendants because it came with a *quid pro quo*: the abolition of *inter partes* recoverability of success fees and after-the-event insurance premiums.

3. The regime set out, however, a number of exceptions enabling Defendants to enforce costs orders made in their favour: that is, it was 'qualified'. Inevitably, and unsurprisingly, this has led to an ever-increasing appetite on the part of Defendants to bring cases within these exceptions; and this, in turn, has opened up a whole new battleground in the field of personal injury litigation.

4. The hardest-fought QOCS exception is CPR 44.16(1): "*where the claim is found on the balance of probabilities to be fundamentally dishonest.*" Allegations of fundamental dishonesty have increased over the last few years following a number of authorities that have, at least arguably, emphasised the ease with which a judge may find a Claimant fundamentally dishonest. As a consequence, allegations of fundamental dishonesty now find their way into even the simplest of personal injury cases heard in the County Court up and down the country.

5. The added sting is that the consequences of a finding of fundamental dishonesty stray well beyond costs: a fundamentally dishonest Claimant risks having even a successful claim dismissed (by operation of section 57 of the Criminal Justice and Courts Act 2015) and faces the prospect of committal proceedings for contempt of court. Claimants must, of course, be advised of these potential consequences, and even an honest Claimant may well be discouraged from pursuing their claim when they balance its likely modest value against the risks.

6. On the face of it, then, the most recent decision on fundamental dishonesty – that of Martin Spencer J in *Pegg -v- Webb & Allianz Insurance PLC* [2020] EWHC 2095 (QB) – looks troubling for Claimants. It is yet another case in which an appeal judge has overturned the trial judge's finding that a claim was not fundamentally dishonest.

7. *Pegg* is the third decision of Martin Spencer J on the issue of fundamental dishonesty, following *Molodi -v- Cambridge Vibration Maintenance Service* [2018] EWHC 1288 (QB) and *Richards -v- Morris* [2018] EWHC 1289 (QB). As with those two cases, it considers fundamental dishonesty principally in the context of gaps and inconsistences in the Claimant's medical evidence.

8. This case note takes a detailed look at the case of *Pegg* and considers how troubling (for Claimants) or helpful (for Defendants) a decision it is likely to be.

The Facts of *Pegg* and the Decision at First Instance

9. The claim arose out of a road traffic accident on 2 June 2016. The Claimant alleged that he was the front seat passenger in a stationary BMW X5 when it was struck from the rear by a Citroen DS5 driven by the First Defendant (who was insured by the Second Defendant). The Claimant alleged that, as a result of the collision, he suffered an injury to his neck, left elbow and left knee. He pursued a claim for damages for personal injury and physiotherapy charges.

10. The Second Defendant (hereafter "the Defendant") principally contended that the claim was bogus: that the collision never happened or, if it did, was contrived between the Claimant and the First Defendant. The Defendant additionally contended that, even if the Court found that the collision was genuine, the Claimant had been fundamentally dishonest in respect of his alleged injuries.

11. The trial was heard by HHJ Rawlings, the Designated Civil Judge for Stoke-on-Trent.

12. On the Defendant's first contention, that claim was bogus, HHJ Rawlings believed the Claimant: he concluded that there was a genuine collision that was not staged with the Claimant's knowledge. The Defendant did not appeal against that finding.

13. On the Defendant's second contention, that the Claimant was fundamentally dishonest, it is necessary briefly to summarise the progression of the case to trial:

2 June 2016	The index accident.
23 June 2016	The Claimant, having instructed solicitors, underwent an initial physiotherapy assessment with On Medical Ltd, which his solicitors had arranged.
2 July 2016	The Claimant was involved in a further incident in which he rolled his quad bike and suffered a fall.
6 July 2016	The Claimant was involved in a further incident in which he lifted his quad bike and felt a sudden onset of pain in his lower back. He attended A&E the same day and complained of pain in his lower back and left leg.

8 July 2016	The Claimant attended a walk-in centre at which he complained about the two incidents involving his quad bike but did not make any mention of the index accident.
20 July 2016	The Claimant was discharged from physiotherapy with On Medical Ltd, having undergone four sessions of treatment.
17 August 2016	The Claimant attended a medico-legal examination with Dr Shakir (at two-and-a-half months post-accident).
24 August 2016	Dr Shakir provided a report following his examination of the Claimant, recording that: (a) the Claimant suffered an injury to his neck, left elbow and left knee in the index accident; (b) the above injuries persisted at the date of examination; (c) the Claimant's physiotherapy treatment was "*ongoing*" at the date of examination; (d) there was no significant history of relevant musculoskeletal injuries (there was no reference to the quad bike incidents); and (e) in the light of the above, all of the Claimant's symptoms were attributable to the index accident would likely resolve within six months of the accident.
22 November 2017	The Claimant personally signed his Particulars of Claim, which pleaded that he had suffered injuries to his neck, left elbow and left knee that resolved at six months post-accident.
27 April 2018	The Claimant signed his witness statement which, in short, affirmed the report of Dr Shakir.

14. Accordingly, by the time the case came before HHJ Rawlings for trial, there were apparent failures by the Claimant to: seek medical assistance following the index accident; mention the index accident when he attended at a walk-in centre following the quad bike incidents; and mention the quad bike incidents to Dr Shakir. There was also an apparent conflict in the evidence as to whether the Claimant's physiotherapy treatment was ongoing

when he saw Dr Shakir. The evidence was, however (at that stage), consistent in respect of the Claimant's recovery: his symptoms had all resolved over a period of six months.

15. The Claimant then gave oral evidence at trial and was cross examined:

    (a) He conceded that he had recovered from his neck injury within three to four weeks of the index accident and from his left elbow injury within four to five weeks of the index accident (that is, several weeks prior to Dr Shakir's examination at which he reported ongoing symptoms).

    (b) He conceded, in light of his medical records being obtained and disclosed, that he had a pre-existing injury to his left knee and, further, stated that he could not say when, if at all, he had recovered from the left knee injury sustained in the index accident because he was unable to separate out the symptoms caused by the index accident from those which he suffered pre-accident. Indeed, he gave evidence that the physiotherapist had told him that there was nothing which could be done for his knee because it was already damaged before the index accident.

    (c) He stated that he could not recall Dr Shakir asking him about his medical history.

16. The Claimant's evidence at trial was therefore plainly inconsistent with the medical evidence, his pleadings and his witness statement.

17. HHJ Rawlings accepted that the Claimant had failed to provide Dr Shakir with relevant information about his medical history and also accepted that the Claimant's evidence was inconsistent with regard to the longevity of his alleged symptoms.

18. Those issues led HHJ Rawlings to conclude that the reliability of the information contained within Dr Shakir's report was undermined, such he could not rely upon it. Consequently, HHJ Rawlings found that the Claimant had not made out his case on the nature and extent of the injuries he had suffered and dismissed the claim.

19. However, HHJ Rawlings considered that he could not be sure what question Dr Shakir had asked the Claimant about his medical history (albeit he accepted that the Claimant knew that it was relevant to tell Dr Shakir about the quad bike incidents). Given that the trial took place three years after the index accident, he also accepted the Claimant's counsel's submission that the Claimant may have had trouble recalling the precise longevity of what were relatively minor injuries. With those justifications, HHJ Rawlings did not find the claim to be fundamentally dishonest. The Defendant appealed against that decision.

The Appeal

20. The Defendant's appeal was heard by Martin Spencer J, who allowed the appeal and found that the claim was fundamentally dishonest. He concluded at [26] that "*no judge could reasonably have failed to have come to the conclusion that the claim for damages as presented by the Claimant in this action was a fundamentally dishonest one, perpetrated by fundamentally dishonest accounts to the only medical expert and in the various court documents.*"

21. In dealing, first, with whether any dishonesty in respect of the Claimant's injuries could be 'fundamental', Martin Spencer J outlined the well-established test propounded by HHJ Moloney QC in *Gosling -v- Hailo* (unreported) 29 April 2014, County Court at Cambridge (as endorsed by the Court of Appeal in *Howlett -v- Ageas* [2017] EWCA Civ 1696) at [19]:

> "*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.*"

22. At [20], Martin Spencer J concluded that any dishonesty in respect of the extent of the Claimant's injuries would be fundamental to the case "*because the extent of the claimant's injuries is not merely incidental or collateral but forms the very basis of the claim. This is shown by, if nothing else, the fact that the learned judge, having been unable to find the injuries claimed proved, dismissed the claim.*"

23. The issue, then, was whether the Claimant had been dishonest.

24. In determining that question, at [21] Martin Spencer J quoted the Supreme Court's restatement of the test for dishonesty at common law in *Ivey -v- Genting Casinos Ltd* [2018] AC 391 at [74] per Lord Hughes:

> "*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."

25. Although he noted that *Pegg* was not the usual 'whiplash' case, at [24] Martin Spencer J also repeated the remarks which he himself had made in *Molodi* (*supra*, at [42]) as having "*equal applicability*":

"*The problem of fraudulent and exaggerated whiplash claims is well recognised and should, in my judgment, cause judges in the county court to approach such claims with a degree of caution, if not suspicion. Of course, where a vehicle is shunted from the rear at a sufficient speed to cause the heads of those in the motor car to move forwards and backwards in such a way as to be liable to cause 'whiplash' injury, then genuine claimants should recover for genuine injuries sustained. 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 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, I recognise that claimants will sometimes make errors or forget relevant matters and that one hundred percent 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.*"

26. He went on, in the light of those initial remarks, to give a concise summary of the reasons for his finding of fundamental dishonesty at [25]:

"*In my judgment, there are factors in this case which pointed strongly, if not inexorably, to the conclusion that the Claimant had been dishonest in his presentation of his injuries to the expert instructed, Dr Shakir, and also to the court, but which Judge Rawlings failed to deal with, either adequately or, in some cases at all. These factors are as follows:*

i) The fact that the Claimant sought no medical assistance at all after the index accident, whether by attending his GP or by attending A & E or otherwise. He did instruct solicitors and it was the solicitors who arranged for physiotherapy to be carried out and this should immediately have raised at least a suspicion in the mind of the judge.

ii) On 6 July 2016, the Claimant attended A & E in respect of the accident he had sustained involving the quad bike – initially rolling the quad bike on 2 July and then aggravating the injury when lifting the quad bike on 6 July. The Claimant then attended the walk-in centre at Stoke-on-Trent on 8 July and a very full note was made as set out in paragraph 6 above. However, at no stage is there any evidence that the Claimant informed either the A & E doctor (Dr Murphy) or the walk-in centre practitioner, of the injuries he had sustained on 2 June 2016 in the index accident, nor did he tell them that, over the previous four weeks, his symptoms from that accident had been getting steadily worse, as he asserted later in his witness statement (see paragraph 10 above). The failure of the Claimant to inform those medical practitioners of the index accident and the injuries and symptoms arising from it is inexplicable if the Claimant's evidence about the injuries sustained in the index accident is correct or anywhere close to being correct. This is the first deafening silence.

iii) There is then the attendance upon Dr Shakir on 17 August 2016 and the failure of the Claimant to inform Dr Shakir of the quad bike accident and the injuries in that accident. He could not have forgotten about the quad bike accident: it was only a few weeks before. Furthermore, he must have been aware of the significance of the accident and its potential for contaminating any findings made by Dr Shakir about the injuries sustained in the index accident. No-one in the position of the Claimant could have failed to have appreciated the significance of the quad bike accident and the only reasonable inference to be drawn is that the Claimant deliberately failed to tell Dr Shakir about it in order to mislead Dr Shakir about the effects of the index accident. Indeed, this was effectively the finding of the learned judge at paragraph 19 (g) of the judgment (see paragraph 12 above). This was the second incidence of "deafening silence".

iv) The position is then significantly aggravated by what can only have been positive lies told by the Claimant to Dr Shakir in two regards:

> *(a) On the basis of his evidence given at trial, namely that the effects of the injury to the neck were spent by three to four weeks after the index accident and the effects of the injury to the elbow was spent within four to five weeks of the accident, and on the basis that this evidence was true (and there is no reason to believe that it was not thought to be true by the Claimant), he must have deliberately misrepresented the fact that he was still feeling the effect of those injuries when he saw Dr Shakir with the result that Dr Shakir reported that the symptoms were now mild to moderate and intermittent.*
>
> *(b) In addition, he is reported as having told Dr Shakir that his physiotherapy treatment was ongoing. However, as the Claimant must have known, he had been discharged from further physiotherapy by On Medical Limited on 20 July 2016, almost a month previously.*

> *v) The Claimant then compounded the dishonesty towards Dr Shakir by lying about the longevity of the injuries in the Claim Form and his witness statements and, even worse, adopting Dr Shakir's description of the injuries and prognosis of six month's recovery when he knew that Dr Shakir had been misled by him into giving this prognosis. This is not capable of explanation by reference to the passage of time between the accident and the trial. When the Claimant saw Dr Shakir, he had ceased to have symptoms for a month or so, on the basis of the evidence he gave to the court, and when he signed the Statement of Truth in the Particulars of Claim and he signed his witness statements he knew he had not suffered symptoms from his injuries for a period of six months. This formed the basis of his claim for damages."*

27. The appeal was accordingly allowed: see [27]. As to costs, Martin Spencer J considered that it was appropriate in the circumstances to make an order that the Claimant pay the Defendant's costs with a 30% reduction on account of the evidence and court time directed towards the question of whether the accident was bogus. The Claimant was thus ordered to pay 70% of the Defendant's costs, to be assessed on the indemnity basis: see [28]-[30].

Discussion

28. The judgment in *Pegg* will undoubtedly be heralded by Defendants as a further endorsement of the need for judges to take a more robust approach to the consideration of fundamental dishonesty.

29. Indeed, notwithstanding the fact that he did not hear live evidence from the Claimant, and notwithstanding the fact that the Claimant was believed by the trial judge on the Defendant's primary contention that the accident was bogus, Martin Spencer J was prepared – as he was in *Molodi* – to interfere with the trial judge's findings of honesty in respect of the Claimant's injury. In that sense, *Pegg* only adds to the authority of *Molodi*, in which the trial judge was criticised for having adopted a "*much too benevolent approach to evidence from a claimant which could be demonstrated to be inconsistent, unreliable and, on occasions, simply untruthful*" (see [45]).

30. In this context, *Molodi* is already habitually relied upon by Defendants in support of allegations of fundamental dishonesty, and particular attention is often drawn to Martin Spencer J's suggestion that whiplash claims should be approached "*with a degree of caution, if not suspicion*" (see the quotation at paragraph 25 above). Together with the judgments in *Haider -v- DSM Demolition Ltd* [2020] PIQR P3 and *Roberts -v- Kesson* [2020] EWHC 521 (QB), the authorities bundle which a Defendant can produce at trial is becoming rather voluminous.

31. That said, looking at the detail of the evidence and the judgment in *Pegg*, the 'tipping point' for overturning the trial judge's decision is clear: the "*positive lies*" told by the Claimant and the deliberate misleading of Dr Shakir by the "*deafening silence*" as to his medical history.

32. Those "*positive lies*" were the representations which the Claimant made to Dr Shakir: that he had ongoing symptoms (when his evidence at trial was that he had already recovered by the time of examination); and that his physiotherapy treatment was ongoing (when the evidence established that it had concluded). Further, it was held that the Claimant "*deliberately failed to tell Dr Shakir about [his quad bike incident] in order to mislead Dr Shakir about the effects of the index accident*".

33. The same can be said of *Molodi*: aspects of the Claimant's evidence, whereby he told positive lies, operated as a tipping point for overturning the trial judge's findings (see [45]):

> "*… Mr Molodi's clear lie to Dr Idoko, confirmed by Dr Idoko in his Part 35 answers, that he had been involved in only one previous accident when, as conceded by Mr Sweeney, there had been five or six previous accidents or, on Mr Wood's submissions, some seven previous accidents. Not only had the Claimant lied to Dr Idoko in this regard, but he had also maintained that lie in his witness statement, endorsed with a statement of truth. Even when he gave evidence before HHJ Main QC, the Claimant confirmed that he was happy to rely on the contents of Dr Idoko's report even though he must have known that it was wrong in a fundamental respect.*"

34. Thus, in both *Pegg* and *Molodi*, the false statements made to the medical experts, and the absence of statements which should have been made, which both inevitably influenced their diagnoses and prognoses, were found to have no other reasonable explanation other than being lies. On that basis, dishonesty inevitably followed.

35. This can be seen most clearly by contrasting the decisions of *Pegg* and *Molodi* with Martin Spencer J's decision in *Richards*. There, the First Claimant was found by the trial judge to be "*hopelessly inconsistent*" but, despite there being some twenty instances of inconsistency and inaccuracy from both Claimants (set out at [67]), Martin Spencer J was not prepared to make a finding of fundamental dishonesty. Instead, he found that the Claimants had failed to prove their claims. There were no matters of significance which could only be explained as lies – there was no tipping point.

36. Accordingly, a Claimant risks a finding of fundamental dishonesty where the only reasonable explanation for an inaccuracy or inconsistency is that it is a lie.

37. The risk of that conclusion most often arises where there is the total absence of an explanation for the inconsistences and inaccuracies in the evidence, or where an explanation is provided late in the day and simply does not wash. In *Pegg*, as can be seen above, no real reason was put forward for the various inconsistences and gaps in the evidence aside from the mere passage of time and its effect on the ability of the Claimant to remember the duration of his injuries (which was not accepted).

38. There may well be various ways in which inconsistencies and inaccuracies in the evidence can be explained, but it cannot be left until trial for those explanations to be provided. If it is left to trial, the submission on behalf of the Defendant will inevitably be that the Claimant shifted or manufactured their evidence once they were 'caught out'. That runs the real risk, which materialised in *Pegg* and *Molodi*, of a judge concluding that the only reasonable explanation is that the Claimant is lying.

Practical Considerations

39. There is no doubt that the decision in *Pegg* assists Defendants. Its similarity to *Molodi*, especially when contrasted with *Richards*, has clarified the approach that a trial judge should take in analysing a Claimant's evidence: in short, inconsistencies and inaccuracies are a fact of life; but lies are positively manufactured.

40. Accordingly, for Defendants the approach following *Pegg* can be shortly stated:

    (a) The aim is to eliminate all other explanations until all that remains is the inexorable conclusion that the Claimant is a liar.

    (b) The costs order in *Pegg* does, however, sound a note of caution. Where an allegation of dishonesty fails, the Defendant can expect to be penalised – to some extent, at least – in costs.

41. For Claimants, on the other hand, there is more work to be done:

    (a) The evidence in the case, in particular documents such as the Claim Notification Form and the Particulars of Claim, must be reviewed in detail by the Claimant, in the knowledge that any inconsistencies and inaccuracies, no matter how small, may well be raised to support an allegation of fundamental dishonesty.

    (b) Any inconsistences and inaccuracies in the evidence must be identified at the earliest possible stage.

    (c) Those inconsistencies and inaccuracies must be explored with the Claimant and an explanation (if there is one) must be provided as soon as possible.

    (d) Indeed, where there are explanations, they must to be provided well in advance of trial, for example:

        i. by the Claimant providing an explanation in their witness evidence;

        ii. by further evidence from the medico-legal expert dealing with the inconsistency or inaccuracy; or

iii. if the inconsistency or inaccuracy arises from the detail of a medical or other record, by obtaining further evidence from the author of that record.

42. As acknowledged by Martin Spencer J (see the quotation at paragraph 25 above), *"claimants will sometimes make errors or forget relevant matters and … one hundred percent consistency and recall cannot reasonably be expected."* Accordingly, if all identifiable inconsistencies and inaccuracies in a Claimant's case are laid bare and explained well in advance of trial, a Claimant who goes on to make errors or to forget some matters in their evidence at trial is much more likely to be able to defeat an allegation that they are a positive liar.

Conclusion: Watch This Space…

43. *Pegg* will not be the last decision on fundamental dishonesty. Allegations will continue to be made and new points will continue to arise. Those representing Claimants and Defendants alike must now eagerly await the next decision. Perhaps it will be another from Martin Spencer J.

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