

# Fundamental Dishonesty: A Review

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A finding of fundamental dishonesty can be pursued by a defendant in a personal injury or disease claim through two different routes.

The first is to secure the dismissal of the claim under section 57 of the Criminal Justice and Courts Act 1957. Most commonly, it is a weapon used during the trial itself to achieve the dismissal of the claim. Absent a finding of fundamental dishonesty against him or her, the claimant would have “won”, or at least recovered some damages.

The second is to secure the recovery of costs, from what would have otherwise been a QOCS-protected claimant, further to a finding under CPR 44.16. This is a stand-alone remedy which commonly follows a claim which the claimant has lost (not through his fundamental dishonesty dismissing a claim which he would otherwise have won), although it will also automatically follow in the event of a dismissal of the claim for fundamental dishonesty under section 57 (albeit with the damages the claimant would have recovered being deducted from costs now owing).

Provisions under paragraph 12.4 of Practice Direction 44 give guidance on the manner in which the issue of fundamental dishonesty is to be determined.

## Circumstances in which Fundamental Dishonesty Arises

Fundamental dishonesty usually arises in two circumstances: from evidence at large before trial (for which section 57 is usually in play), and from evidence which emerges or develops at trial (for which CPR 44.16 is usually in play, although a section 57 application could also be made at trial).

In the former case, it might be part of the defendant’s case from the outset that the claim is fundamentally dishonest. Examples within the RTA context include phantom passengers, staged accidents involving collusion between motorists, and deliberate “slam-on” braking to induce a collision with another unwitting motorist. This will probably form part of the pleaded defence, or will manifest on exchange of witness evidence.

It might emerge during disclosure or investigations, perhaps most commonly when it is suspected that an injury which was suffered in the course of an admitted accident is being deliberately overstated or exaggerated, or elements of the claim for special damages include confected heads of loss. In such cases, even absent an amended defence, the disclosure of surveillance evidence, or rebuttal evidence on quantum, usually demonstrate that the issue is at large.

In these cases, the defendant will seek to deploy section 57, and dismissal of the claim, usually at trial but possibly on application before trial. This will be rare because an assessment of damages is still required under section 57(4).

In the latter case, due to cross-examination and findings of fact, perhaps suspected but without any clear evidence to support those suspicions, section 57 will commonly be unnecessary, and the claim will fail on its merits further to the dishonesty itself, and CPR 44.16 will probably remove QOCS protection. This does not follow automatically (as it does under CPR 44.15, when striking out of the claim for one of three specified reasons *automatically* removes QOCS protection): the court still has to give permission for costs to be enforced, a discretion exercised with regard to the overriding objective.

## What is Fundamental Dishonesty?

At the heart of all considerations are the twin qualifiers within the words “fundamentally dishonest”.

There are issues of fact in relation to dishonesty, although in essence it is a binary judgment: the claimant was either honest (but mistaken), or dishonest. Degrees of dishonesty may come into play, but really they reflect whether such dishonesty was fundamental to the claim.

The following authorities provide guidance on what fundamental dishonesty means:

1. *Howlett v Davies* [2017] EWCA Civ 1696: A claim is fundamentally dishonest if the dishonesty goes to the root of either the whole of the claim or a substantial part of it, or a claim which depended to a substantial or important part of itself upon dishonesty.
2. *Alpha Insurance v Roche* [2018] EWHC 1342 (QB): There is a public interest in identifying false claims, and claimants who pursue such claims should be required to meet the costs of the litigation. This was a case involving a contention that the claimant was a phantom passenger: he simply was not present in the vehicle during the admitted RTA.
3. *London Organising Committee of the Olympic and Paralympic Games v Sinfield* [2018] EWHC 51 (QB): A claimant should be found to be fundamentally dishonest if he has acted dishonestly and has thus substantially affected the presentation of his case in a way which potentially adversely affects the defendant in a significant way, and by “substantially affects” it is intended to convey the same idea as the expressions “going to the root” or “going to the heart” of the claim. This was a case involving a claim for new gardening expenses allegedly incurred further to the accident, in the sum of £14,000 or 42% of special damages, when the gardener had in fact been engaged long before the accident, and false invoices had been created.
4. *Pegg v Webb* [2020] EWHC 2095 (QB): If the dishonesty went to the root of either the whole of the claim or a substantial part of his claim then it would be a fundamentally dishonest claim.

## Practical Considerations

“Fundamental” is crucial to the exercise of either provision (dismissal of the claim under section 57, or removal of QOCS protection under CPR 44.16). There is self-evidently a material difference between a phantom passenger, for whom the entire claim was a pure fiction, and a genuinely injured claimant who exaggerated his injuries or losses.

But the broad jurisdiction of fundamental dishonesty, at least under section 57, doesn’t really care about the phantom passenger, or the more egregious examples of dishonesty, because the claim will fail on the grounds that he was not injured, or was not present, or has no *bona fide* cause of action. The defendant does not need the helping hand of dismissal provided by section 57. In that sense, all claims which fail under section 57 have some truth to them, so that the dishonesty is almost by definition not entire.

As such, it is commonly only the more marginal issues of dishonesty in which the issue of whether they are fundamental or not comes into play. Judgement calls in whether to pursue allegations of fundamental dishonesty are accordingly important.

And a finding of fundamental dishonesty is of crucial importance, because if the claim is found to be “fundamentally dishonest in relation to the claim for damages in respect of personal injury” the *entire* claim for personal injury (including that part in which the claimant has not been dishonest: s.57(3)) must be dismissed “unless it is satisfied the claimant would suffer substantial injustice if the claim were dismissed” (section 57(2)).

This imports a secondary discretion (“substantial injustice”), which the claimant must satisfy, to prevent dismissal, after the primary discretion (“fundamental”), which the defendant must satisfy.

This dual discretion is why such orders are relatively rare.

If dismissed, the court must still assess the damages to which the claimant would have been entitled absent his fundamental dishonesty (section 57(4)), and when assessing costs, deduct those damages from the costs owing to the defendant (section 57(5)). Those costs would then be payable further to CPR 44.16, QOCS protection being removed, assuming the court gave permission for enforcement.

If in the course of a trial where fundamental dishonesty was not at the forefront of the defendant’s case, or was only a suspicion, but the claimant was found to be dishonest in the course of a judgment which dismisses the claim (not by reason of the dishonesty itself under section 57, but simply because the claim is not proved), the defendant can then argue that the dishonesty was “fundamental”. While the same issues arise as to what is, and is not, fundamental, they will

be fresh issues to be argued on costs under CPR 44.16, because the judgment itself will not usually have described the dishonesty as fundamental, because it will not be using the type of dishonesty to dismiss an otherwise good claim, but rather be dismissing the claim because the claimant had not discharged his burden of proof.

When that situation arises, the advocate will need the definitions of fundamental dishonesty to hand in order to argue that the dishonesty was fundamental, and should thereby engage the exception to QOCS under CPR 44.16, and allow enforcement of costs.

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