



#HardwickeBrew Your Takeaway Cup

These notes follow the #HardwickeBrew given by Hardwicke's Clinical Negligence and Personal Injury Team on 2 July 2020 which looked at recent cases on Fundamental Dishonesty.

Garraway v Holland & Barrett [2020] HHJ Simpkins, County Court at Brighton, Lawtel

- C walked into a partially lowered shutter when leaving a shop. Liability admitted, contributory negligence alleged.
- By the time of trial C, who was in person, had a limited CRO made against her, and was debarred from claiming special damages or damages for psychiatric injury.
- After C had disclosed her witness evidence which described her restrictions in stark detail (“I can’t open doors, I can’t lift anything more than 1kg, unable to sit on soft furnishings”), surveillance evidence was disclosed which showed her doing lots of things she said she could not.
- C’s statement in response was that she couldn’t do these things “without pain”.
- At trial, and on D’s s.57 Application, J found that C was not credible witness and dismissed the case: *“I have come to the conclusion that she has been fundamentally dishonest in the presentation of this case and in her presentation of her condition both to the court and to the experts. She may not have recognised that she was being dishonest because she has become obsessed with this case, and with attributing her current medical condition to the accident. There is a considerable psychiatric element to this. Nevertheless, what she has done was objectively dishonest and in doing so, she has misled the experts. Nothing could be more fundamental in a personal injury claim of this nature than to give the experts a false impression of her condition.”*
- **TAKEAWAY POINTS –**
 - Surveillance is an important tool – make it easy for the J to compare what C says with what the surveillance shows.
 - LiPs can also be found FD.
 - The objective standard of dishonesty is key
 - If drafting a witness statement for a claimant, avoid stark descriptions of what they can/cannot do unless justified.

Grant v Newport City Council [2020] HHJ Howells, County Court at Cardiff, Lawtel

- C was a school cleaner who slipped and fell.
- Surveillance was disclosed and an amended Defence alleged FD under CPR 44 and s.57.
- The surveillance showed C cleaning car, putting the wheelie bins out, putting chairs in car, not using a stick....
- C's explanation was that she had good days/bad days
- J concluded that she was significantly exaggerating, even taking into account good days/bad days.
- D also disclosed evidence that C may have been working – including promotional video on Youtube with C dressed in uniform. C said she was just helping out.
- J found FD as she had claimed LOE on disabled basis and had not mentioned any other work in her Schedule. She had deliberately misrepresented to the experts her level of symptoms.
- Dishonest overstatement of her claim that went to heart and root of the claim and the case was dismissed under s.57.
- **TAKEAWAY POINTS -**
 - Good days/bad days argument may not save a claimant from a finding of FD.
 - Investigations by Defendant, in addition to surveillance, are important.

Roberts v (1) Kesson & (2) Tesco Underwriting Limited [2020] EWHC 521 (QB)

- C's taxi was damaged in an RTA. Claims for credit hire, PAV (£10,400) and storage advanced in addition to general damages.
- C gave a witness statement on 6 March 2018 saying that he sold his car for salvage and used the money to hire another taxi.
- D2 finds out that the taxi passed its MOT on 5 March and that C had tried to sell the taxi on Facebook for £7,000.
- Second witness statement on 21 August 2019 giving an unsatisfactory explanation.
- C admitted in XX that what was said in W/S 1 was a lie. Submissions for dismissal under s.57 made.
- At first instance: Recorder Kelbrick accepted that there was some dishonesty, but that it wasn't material because C didn't persist with it after it had been 'flushed out' by D2.
- Appeal on the basis that the Recorder had not correctly dealt with D2's case on s.57.
- On appeal, Mr Justice Jay said he was entitled to look at the judgment and see if adequate reasons were given as to why C was not FD.
- *'The language of Section 57 is important. The Court must be satisfied on the balance of probabilities that the Claimant has been fundamentally dishonest. The real question is whether the Claimant has been fundamentally dishonest and not whether he has persisted in that dishonesty.'*
- *'What is required is a global assessment in the light of the claim as advanced in its entirety, but also in view of the saliency and importance of the particular claim under consideration'.*
- *'If a party advances a claim which is dishonest and it is significant and substantial, the Court should not be slow to find that the stringent criterion of Section 57 has been fulfilled'.*
- **TAKEAWAY POINTS -**
 - The test is not one of persistence in the dishonesty, it is whether C has been dishonest. Relenting will not absolve the prior dishonesty.
 - A holistic approach is taken: a global assessment in the light of the claim advanced. Be careful. The court must make its determination on FD based on the particular claim

under consideration. The court must not be prejudiced by other 'dubious' claim which are not, on the facts, FD.

- FD can be found in respect of disclosure. See *Haider v DSM Demolition* [2019] EWHC 2712 (QB).

Kilbey v Arien Contractors Ltd – HHJ Yelton Sitting as a Judge of the High Court (13/12/2019)

- This was an accident at work case where C's right hand was injured by falling masonry.
- Liability had been admitted, however, D raised an allegation of malingering in a counter-schedule.
- C's case was that the injury restricted his ability to work, and that he had not worked regularly following the accident.
- CRPS was diagnosed. Although the pain experts disagreed on the extent and prognosis of CRPS, both agreed that C's ability to undertake heavy manual work was adversely affected.
- D obtained surveillance footage showing C lifting trays of food at work. They also relied on social media posts showing C going out and having fun.
- HHJ Yelton found that the evidence was consistent with C's case. He held that the allegation should not have been made, and awarded indemnity costs in favour of C from the date the allegation was first raised.
- **TAKEAWAY POINTS -**
 - Any allegation of dishonesty should be raised after careful consideration and supported by evidence.
 - If it is alleged inappropriately, the defendant may face a costs penalty.

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2nd July 2020

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