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QOCS

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Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018

See also:

- Taylor Review of Expenses and Funding of Civil Litigation in Scotland September 2013
- SPICe Briefing on Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill 24/8/17
- Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill Policy Memorandum
- Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill Explanatory Notes

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Part 2 of the 2018 Act

- Qualified One Way Cost Shifting (QOCS)
- In personal injury claims, expenses no longer follow success for defenders
- Subject to the important qualification that the pursuer "conducts the proceedings in an appropriate manner
- What does this mean?

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Conducting proceedings in appropriate manner

Section 8(4) provides 3 grounds for holding the pursuer loses his protection:

(1)He acts fraudulently or makes a “fraudulent representation in connection with the proceedings”

(2)He behaves in a manner which is “manifestly unreasonable in connection with the proceedings”

(3)He conducts the proceedings in a manner that amounts to an abuse of process

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QOCS Regulations 2021

- Act of Sederunt (Rules of the Court of Session 1994, Sheriff Appeal Court Rules and Sheriff Court Rules Amendment) (Qualified One-Way Costs Shifting) 2021
- Apply to all actions raised after 30th June 2021
- Starting point is section 8(2) of the 2018 Act – "*The court must not make an award of expenses against the [pursuer]...*"

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41B.2.— Application for an award of expenses

- (1) Where civil proceedings have been brought by a pursuer, another party to the action ("the applicant") may make an application to the court for an award of expenses to be made against the pursuer, on one or more of the grounds specified in either or both—
- (a) section 8(4)(a) to (c) of the Act;
- (b) paragraph (2) of this rule.
- (2) The grounds specified in this paragraph, which are exceptions to section 8(2) of the Act, are as follows—
- (a) failure by the pursuer to obtain an award of damages greater than the sum offered by way of a tender lodged in process;
- (b) unreasonable delay on the part of the pursuer in accepting a sum offered by way of a tender lodged in process;
- (c) abandonment of the action or the appeal by the pursuer in terms of rules 29.1(1), 40.15(1) or 41.15(1), or at common law.

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Tenders

- The 2021 Regulations provision for the recommendation in the Taylor report that where the pursuer fails to beat a tender, or unreasonably delays in accepting a tender, the defenders' contra account cannot exceed 75% of the damages awarded.
- Ensures that the pursuer will never lose all of his damages due to presence of a tender.
- Still a major disincentive

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41B.3 Awards of expenses

- (2) Where, having determined an application made under rule 41B.2(1), the court makes an award of expenses against the pursuer on the ground [that he failed to beat tender or delayed unreasonably]
- (a) the pursuer's liability is not to exceed the amount of expenses the applicant has incurred after the date of the tender;
- (b) the liability of the pursuer to the applicant, or applicants, who lodged the tender is to be limited to an aggregate sum, payable to all applicants (if more than one) of 75% of the amount of damages awarded to the pursuer, and that sum is to be calculated without offsetting against those expenses any expenses due to the pursuer by the applicant, or applicants, before the date of the tender;

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Position in England: Civil Procedure Rules

- Part 44 deals with QOCS
- CPR 44.16 provides that
- "Orders for costs made against the claimant may be be enforced to the full extent of such orders with the permission of the court where the claimant is found on the balance of probabilities to be fundamentally dishonest"

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English cases

- Large body of English caselaw, although mostly in the County Court
- Also remember that the provisions in England are different – test of "fundamental dishonesty"
- Different litigation culture in England and Wales?

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Ivey v Genting Casinos (UK) Ltd [2017] 3 WLR 1212

- First step is to ascertain, subjectively, the actual state of the individual's knowledge or belief as to the facts.
- The reasonableness of that belief was a matter of evidence going to whether they had held the belief, but it was not an additional requirement that the belief had to be reasonable; the question was whether it was genuinely held.
- When the state of mind was established, the question whether the conduct was honest or dishonest was to be determined by applying the objective standards of ordinary decent people.
- There was no requirement that the defendant must appreciate that the conduct was dishonest by those standards

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Lord Hughes at para 62

- Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards. The Court of Appeal held this to be the correct state of the law and their Lordships agree.

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Gosling v (1) Hailo and (2) Screwfix [29/3/14] Cambridge County Court

- Claimant suffered serious injury to knee involving ladder manufactured by D1 and sold by D2. Due to exaggerated care claim, a costs order was made against the claimant. Claim for £80,000 settled before trial for £5,000 following surveillance evidence described by the judge as "frankly devastating".
- It was held that to be considered fundamental, the dishonesty would have to go to the root or a substantial part of the claim and not merely some collateral matter or minor, self contained head of damage. However, it was not necessary for the dishonesty to go to the whole of either liability or quantum.
- The purpose of the provision is to test whether the claimant was "deserving" of costs (expenses) protection.

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Howlett v Davies 2018 1 WLR 948 at para 17

- Expressly approved following passages in *Gosling*:
- "44. It appears to me that this phrase in the rules has to be interpreted purposively and contextually in the light of the context. This is, of course, the determination of whether the claimant is 'deserving', as Jackson LJ put it, of the protection (from the costs liability that would otherwise fall on him) extended, for reasons of social policy, by the QOCS rules. It appears to me that when one looks at the matter in that way, one sees that what the rules are doing is distinguishing between two levels of dishonesty: dishonesty in relation to the claim which is not fundamental so as to expose such a claimant to costs liability, and dishonesty which is fundamental, so as to give rise to costs liability.
- "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.

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Zim v London Central Bus Company [8/1/15] Central London CC

- The claim was based on an allegation that the defendant's bus collided with the claimant's car.
- The judge viewed CCTV footage and held that there was no collision and that the claimant could not have honestly believed that there was a collision of the kind claimed.
- Accordingly he was ordered to pay full costs.

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Zurich Insurance plc v Bain [4/6/15] Newcastle CC

- Low speed RTA in which liability was admitted and vehicle repairs paid. The claimant made a claim for a back injury that was held to be entirely fabricated.
- The district judge surprisingly refused to make a costs order against the claimant.
- On appeal it was held that this went beyond mere exaggeration or embellishment and the whole basis of the claim was fundamentally dishonest: “it props up, and provides the sole basis for the claim”.

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Rouse v Aviva Insurance Ltd [15/1/16] Bradford CC

- Deals with claims that are discontinued (abandoned). There may have to be a hearing purely on the question of fundamental dishonesty.
- See also *Kite v Phoenix Pub Group*, where the claimant was not allowed to abandon his claim, the defendants moved to have the case struck out and the protection of QOCS was lost.

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Thompson v Go North East Ltd [30/8/16] Sunderland CC

- Another abandoned claim
- This case went even further, including a wasted costs order against the solicitors after the claimant had attempted to abandon a fundamentally dishonest claim
- See section 11 of the Act, discussed later

James v Diamantte k [8/2/16] Coventry County Court

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- Claim for noise induced hearing loss. The claimant initially alleged that no hearing protection was provided until the last two years of his employment, but later conceded that he had been provided with hearing protection post 2006.
- The judge concluded that the claimant had not been telling the truth at the hearing, rejected his claim and made a costs order against him.
- Although the district judge did not hold this to amount to fundamental dishonesty, the defendants were successful on appeal. Having found that the claimant was not at any time during his employment deprived of hearing protection as he had alleged, she could not justifiably have concluded that the claim was not fundamentally dishonest.
- Crucial finding was that he was not telling the truth – incredible rather than merely unreliable

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Meadows v La Tasca Restaurants Ltd [2016] 6 WLUK 407

- In a slipping case, the district judge held the evidence of the claimant and her supporting witness to be "riddled with inconsistencies" and so removed QOCS protection.
- On appeal, the judge held that plain inconsistencies in the evidence did not amount to fundamental dishonesty. The district judge had been wrong to say the allegations had been concocted

Nesham v Sunrich Clothing Ltd [2016] 4 WLUK 506

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- RTA in which the claimant failed to establish liability because the judge did not accept his version of events. However, this did not amount to fundamental dishonesty.
- Permission to appeal refused:
- "it is the experience of everybody who litigates in this field that drivers involved in accidents will give different and contrary versions of accidents to the extent of not just which lane they were in, but where they had come from, the route that they had taken and so forth. Maybe because they have a poor memory of what occurred; maybe because they have convinced themselves that they were in a particular location on a particular road or for many other reasons, which may not constitute dishonesty, far less fundamental dishonesty."

Menary v Darnton [2016] 12 WLUK 308

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- 36. I return therefore to the question of whether or not this claim was fundamentally dishonest. I am satisfied beyond any doubt that it was. The deputy district judge found that there was no impact. There was therefore no road traffic accident, no damage to the car caused and no consequential injuries to the claimant. The documents subsequently produced were indirectly manufactured by the claimant in pursuit of a claim that had no basis in fact or reality. This was not a case of some exaggeration of loss or symptom, nor a case of inventing an additional head of damage in an otherwise legitimate claim. There was no honest claim here.

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O'Brien v Royal Mail Group [2019] 5 WLUK 646

- The claimant alleged that the defendant had driven into the back of his van at high speed, causing physical injuries that caused him to attend hospital, to be off work for 6 weeks and to suffer restriction in activities for 8 months.
- The defendant contended that the impact was at very low speed and that the claimant had not suffered any injury.
- The judge at first instance held that the impact was no more than 5mph and that the claimant had suffered no personal injury. However, she found that he was not fundamentally dishonest.
- On appeal, it was held that this finding was contrary to the evidence and that QOCS protection should be disapplied.

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Keane v Tollafield [2018] 8 WLUK 30

- This was a clinical negligence claim in which the claimant alleged that she had not given properly informed consent to surgery. Her oral evidence contradicted her written statement in certain respects.
- Her claim failed but the judge held that she was unreliable rather than incredible and that QOCS protection should apply.
- The judgment contains an interesting analysis of the fallibility of the human memory, based on the case of *Gestmin v Credit Suisse* [2013] EWHC 3560 (Comm).

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Haider v DSM Demolition [2019] EWHC 2712 (QB)

- The claimant was driving a taxi which he stopped suddenly and the defendant ran into the back of him.
- The claimant sued the defendant for personal injuries and also credit hire charges amounting to some £30,000. His claim failed and it came out in the trial that he had falsely denied having a credit card, which meant that he did not have to resort to credit hire (*Lagden v O'Connor*).
- On appeal, it was held that he had been fundamentally dishonest and so the QOCS protection disapplied.

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Matthewson v Crump [2020] EWHC 3167 (QB

- 101. In order to establish that the Claimant has pursued a "fundamentally dishonest" claim, it must be shown there was dishonesty which goes to the root or heart of the claim, or to a part of it. Dishonesty which is merely incidental or collateral to the claim will not suffice. Dishonesty for these purposes is subjective. It does not matter if the Claimant was unreasonable in believing in the veracity of his claim. Provided he genuinely believed in the veracity of all the core aspects of his claim, it will not be fundamentally dishonest. In essence a claim will be dishonest if the person putting it forward does not believe that some core aspect of it (whether concerned with liability or quantum) is true.

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and Redbridge University Hospitals NHS Trust [2021] EWHC 290 (QB

- 102. This has been an extremely complex case. However, when I stand back and look at the totality of the evidence I am far from persuaded that the claimant has deliberately made up events that did not occur or that she has deliberately told lies about her condition in order to advance her claim. Applying the two-stage test [in *Ivey*], I am satisfied that the claimant genuinely believed in the truth of the evidence that she gave and that, applying the standards of ordinary decent people I find as a fact that although her evidence was wholly unreliable in the sense that I do not accept it, she has not been dishonest. I therefore reject the allegation of fundamental dishonesty.

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Jeffreys v Commissioner of the Police for the Metropolis

[2017] EWHC 1505 (QB)

- A case may be treated as a personal injuries claim even if some of the claim is not for personal injury
- However, the protection will probably only apply to the personal injury part of the claim
- Case turns on particular wording of the English rules, but section 8 of the 2018 Act ambiguous as to whether claim can be divided in this way

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Counter claims

- Who gets what protection?
- Is the defender entitled to QOCS in relation to the counter claim?
- Conflicting authority in England

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Ketchion v McEwan (2018, Newcastle County Court)

- Claimant sued for financial losses arising from RTA
- No claim for personal injuries
- D counter claimed for personal injuries sustained in accident
- Counter claim was unsuccessful
- Held, on appeal, that D was entitled to QOCS in relation to the whole proceedings
- Presumably this would not apply where counter claim unreasonable or spurious

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Waring v McDonnell (2018, Brighton County Court)

- 2 cyclists collided head on with each other
- W sued McD and McD counter claimed
- W was successful and McD was not
- McD was not given protection of QOCS as he was deemed to be an unsuccessful defendant rather than unsuccessful claimant
- See analysis in JPIL 2019, 1, C55-57

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Multiple defendants

- *Cartwright v Venduct Engineering Ltd* [2018] 1 WLR 6137
- Claimant sued 6 defendants for NIHL
- Successful against D4-6
- D3 sought award of expenses from the principal sum paid by D4-6
- Held that in principle that would be acceptable

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Fundamental dishonesty as bar to proceeding

- Here the question of dishonesty is not just used as a means of enforcing an award of expenses/costs, but as a way of bringing the action to a complete halt
- Used to defeat the whole claim (even honest parts) and may apply even where liability is accepted

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Position in England and Wales

- Section 57 of the Criminal Justice and Courts Act 2015 goes further and allows the court to dismiss an otherwise valid action on the ground that it is "satisfied on the balance of probabilities that the claimant was fundamentally dishonest" in relation to his claim unless that would give rise to "substantial injustice " to the claimant

57 Personal injury claims: cases of fundamental dishonesty

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(1) This section applies where, in proceedings on a claim for damages in respect of personal injury ("the primary claim")—

- the court finds that the claimant is entitled to damages in respect of the claim, but
- on an application by the defendant for the dismissal of the claim under this section, the court is satisfied on the balance of probabilities that the claimant has been fundamentally dishonest in relation to the primary claim or a related claim.

(2) The court must dismiss the primary claim, unless it is satisfied that the claimant would suffer substantial injustice if the claim were dismissed.

(3) The duty under subsection (2) includes the dismissal of any element of the primary claim in respect of which the claimant has not been dishonest.

(4) The court's order dismissing the claim must record the amount of damages that the court would have awarded to the claimant in respect of the primary claim but for the dismissal of the claim.

(5) When assessing costs in the proceedings, a court which dismisses a claim under this section must deduct the amount recorded in accordance with subsection (4) from the amount which it would otherwise order the claimant to pay in respect of costs incurred by the defendant.

Stanton v Hunter [2017] 3 WLUK 797

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- Claimant suffered serious injuries as a result of a fall from height at work
- He required extensive treatment in hospital.
- However, he seriousl exaggerated his inability to work
- Although the defendants admitted liability, the accident was struck out under section 57 for fundamental dishonesty. But for section 57, damages would have been awarded in the sum of £51,625.

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Sikand v CS Lounge Suite Ltd [2016] 7 WLUK 221

- Back injury, liability admitted.
- Claimant alleged inability to work as a result.
- Social media entries on Twitter and LinkedIn showed that in fact he had worked consistently since the accident and frequently attended the gym.
- The claim was struck out as fundamentally dishonest.
- NB the claimant had intended to qualify as a solicitor…

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Hughes v Kindon and ors
[2016] Taunton CC

- Genuine claim for 2 week whiplash injury presented as 12 month injury.
- Claim dismissed for fundamental dishonesty

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London Organising Committee of the Olympic Games v Sinfield [2018] EWHC 51 (QB)

- The claimant suffered a broken arm and wrist
- Liability was admitted
- The claimant sought £14,000 for gardening expenses incurred as a result of the injuries
- This was about 28% of the total value of the claim
- That part of the claim turned out to be fraudulent
- The whole claim was dismissed under s57, applying test for dishonesty in *Ivey v Genting Casinos*

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Razumas v Ministry of Justice [2018] EWHC 215(QB)

- Claim for clinical negligence against prison authorities.
- The claimant's positive averment and allegation in his particulars of claim, and repeated in his evidence, that he had sought medical attention whilst outside prison was knowingly dishonest.
- He had thereby substantially affected the presentation of his case, either in respect of liability or quantum, in a way which potentially adversely affected the MoJ in a significant way, so meeting the test for fundamental dishonesty

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Wright v Satellite Information Services Ltd [2018] EWHC 812 (QB)

- Claimant suffered injury in accident at work
- Liability admitted
- Claim for future care over £73,000
- Actual award just over £2,000
- Judge entitled to hold that the claim was not fundamentally dishonest – just that proper interpretation of evidence did not support the expert report

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Pinkus v Direct Line [2018] PIQR P20

- Claimant was injured in a road traffic accident
- Liability was admitted
- Claimant alleged PTSD preventing him from working
- Claimed value of claim over £850,000
- Actual award £4,200
- Action dismissed for fundamental dishonesty

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Molodiv Cambridge Vibration Maintenance Service [2018] RTR 25

- Low velocity whiplash claim
- Liability admitted but causation disputed
- Judge at first instance held claim exaggerated but not fundamentally dishonest
- Defendant's appeal allowed
- Courts should approach such claims with caution or even suspicion
- Claimant had lied about previous accident history and so was not credible or reliable

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Patel v Arriva Midlands Ltd [2019] P.I.Q.R. P13

- Claimant involved in RTA suffered cardiac arrest and brain haemorrhage
- When examined by medical experts for both sides, he was unresponsive
- Surveillance evidence showed him out and about
- D moved to have the claim dismissed before the trial on quantum
- Motion granted, as claimant had not responded to surveillance evidence

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Grant v Newport [2020] 2 WLUK 94

- School cleaner slipped at work
- Liability was established, no contributory negligence
- The claimant exaggerated her injuries and her disability on the labour market
- Claim dismissed on grounds of fundamental dishonesty
- "105. Whilst this is a draconian step, it was made clear in the case of *Sinfield* that the creators of this section intended to use it to act as a deterrent to dishonest claimants who wanted to dishonestly exaggerate their claim. It is as a result of the claimant's dishonesty that she loses her honest damages."

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Roberts v Kesson [2020] EWHC 521 (QB)

- RTA after which claimant sought *inter alia* replacement cost of vehicle at £10,400.
- In fact vehicle had been successfully repaired. The rest of the claim was only worth about £4,000.
- The dishonest claim had to be assessed globally against the entire claim, having regard to its particular importance. Applying that holistic approach, the claimant's dishonest claim was fundamental. It was not minor or peripheral. A finding of fundamental dishonesty on that claim should have been made by the recorder.

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Garroway v Holland & Barrett [2020] 3 WLUK 582

- The claimant was injured at work when she walked into a partially lowered shutter.
- Claimed for facial and spinal injuries.
- The spinal injuries were held to be fabricated and facial injuries only worth £650.
- Claim dismissed for fundamental dishonesty.

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Sudale v Cyril John Ltd [2021] 2 WLUK 623

- The claimant had sought damages totalling £232,289. The amount of the award that the court would have made, subject to s.57, was £73,959. The entire claim fell to be dismissed under s.57(2) unless the court was satisfied that the claimant would suffer substantial injustice as a result.
- Held: the defendants' conduct was not relevant to the question of the injustice suffered by the claimant.

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Iddon v Warner [2021] 3 WLUK 432

- Delayed diagnosis of breast cancer led to mastectomy and chemotherapy that should have been avoided.
- Claimant sought damages of £900,000 based on serious functional disability.
- Evidence showed she was still able to compete in open water swimming events and so claim dismissed on basis of fundamental dishonesty.
- But for the dismissal of her claim, she would have been awarded £70,050.32

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Hogarth v Marstons [2021] 3 WLUK 229

- 14 year old slipped on grease at the defendants' premises.
- Liability established, subject to 50% contributory negligence.
- Claimant lied about going to hospital after the accident. Sum sought was £6,250 general damages and £91.15 special damages.
- Action dismissed. But for s57, award would have been £2,300 less 50%.

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Smith v Haringey LBC [2021] EWHC 615 (QB)

- Claimant suffered back injury at work, liability admitted subject to deduction of 25%.
- Claimant had suffered back pain before the accident but failed to disclose it. Question whether soft tissue injury had accelerated symptoms from underlying condition and whether there was functional overlay.
- Court held deliberate and fraudulent exaggeration.
- Ultimate award would have been only £3,450 before deduction of 25%.

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Position in Ireland

- Earlier legislation in Ireland due to persistent problem with fraudulent claims
- section 26 of the Civil Liability and Courts Act 2004
- **26.**—(1) If, after the commencement of this section, a plaintiff in a personal injuries action gives or adduces, or dishonestly causes to be given or adduced, evidence that—
- (*a*) is false or misleading, in any material respect, and
- (*b*) he or she knows to be false or misleading,
- the court shall dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.

Ahern v Bus Eireann [2011] IESC 44

(decision of the Supreme Court)

- Understandable exaggeration does not amount to fundamental dishonesty.
- The onus of proof was on the plaintiff to prove her claim on the balance of probabilities. However, when section 26 of the 2004 Act was raised, the onus of proof lay on the appellant/defendant to prove that false or misleading evidence had been given, also on the balance of probabilities.
- The High Court judge, who heard all the evidence and could judge the demeanour of the plaintiff, held her to be an honest woman. The Supreme Court was bound to uphold the findings of fact of the trial judge.

Farrell v Dublin Bus [2010] IEHC 327 p75

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- Where the claim includes a mixture of genuine and dishonest elements, abandoning the dishonest parts will not necessarily avoid a finding of fundamental dishonesty.
- There was damning surveillance evidence and also evidence that she had worked since the accident, contrary to her claim for loss of earnings.
- This was her fourth claim for damages for personal injuries and her second against these defenders.
- The whole action was dismissed.

Dunleavy v Swan Park Ltd 2011 IEHC 232

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- Section 26 "is there to deter and disallow fraudulent claims. It is not and should not be seen as an opportunity to seize upon anomalies, inconsistencies and unexplained circumstances to avoid a just liability."

Carmello v Casey [2008] 3 IR 524

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- Talking about the mandatory nature of section 26: "but it is deliberately so in the public interest, and is mandatory in its terms, once the court is so satisfied on the balance of probability, unless to dismiss the action would result in injustice being done."

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Position in Scotland

- No similar statutory provision
- Reliant instead on inherent jurisdiction of the court
- Only relatively recently that court decided it was prepared to dismiss actions for want of prosecution

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Summers v Fairclough Homes [2012] 1 WLR 2004

- Court has inherent power to strike out a claim that is an abuse of process
- However, would only be exercised at end of trial in very exceptional circumstances
- Would be rare to strike out a case rather than decide it on its merits in the usual way. Normal remedy would be adverse finding in expenses and/or criminal proceedings for contempt of court

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Grubb v Finlay 2017 [CSOH] 81

- Attempt to obtain dismissal on grounds of fundamental dishonesty
- Argument rejected on the facts
- Pursuer not entirely credible and reliable but neither were defence witnesses!
- Liability established and 12 months worth of symptoms
- HOWEVER

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Grubb v Finlay (No. 2)

- 15/9/17 (not reported but available on Compass Chambers website)
- Pursuer's motion for expenses refused
- Expenses awarded to DEFENDER subject to reduction of one third
- Pursuer succeeded in claim; was awarded damages; no tender; proof would have been much shorter if P had been candid
- Case was reclaimed by both sides!

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Inner House, 2018 SLT 463

- Both reclaiming motions were refused
- "The pursuer did not make a fundamentally dishonest claim. He made a good, if exaggerated, claim." See paras 34-36.
- "The Lord Ordinary's view was that, if the pursuer had been candid and forthright throughout, the proof (were there to have been one at all) would have been a short one. In all these circumstances, the court is unable to hold that there are any grounds upon which the Lord Ordinary's discretionary decision on expenses could be successfully impugned." See paras 37-40.

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Imprisonment for contempt of court

- Having the claim dismissed is not the end of the fundamental dishonesty!
- *Calderdale and Huddersfield NHS Trust v Metcalf* [2021] EWHC 611 (QB(6 months)
- *AXA Insurance UK Plc v Reid* [2021] EWHC 993 (QB) (8 weeks)

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