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Lorna & Justin Howlett v. Penelope Davies & Ageas Insurance
[2017] EWCA Civ 1696

Article by David Bowden

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Court of Appeal rules no QOCS protection in '*cash for crash*' insurance claim where judge found claimant '*fundamentally dishonest*'

Lorna and Justin Howlett v. Penelope Davies & Ageas Insurance Ltd - [2017] EWCA Civ 1696

Executive speed read summary

Mrs Howlett and her son along with Mrs Davies staged a car accident. The Howletts claimed they were passengers in her car when it reversed at low speed and crashed into a stationary X3 car. There were no witnesses and neither police nor ambulance was called. The Howletts claimed to have suffered personal injuries. Before consulting a doctor, the Howletts instructed solicitors to bring a claim for personal injury against Mrs Davies. Her insurer resisted the claim. The claim was brought after April 2013 when '*qualified one-way shifting*' applied to personal injury claims. This meant that insurers would usually have to pay a claimant's costs even where a claim failed unless the claim was found on the balance of probabilities to be '*fundamentally dishonest*'. Following a 4 day trial, the judge found that he had been told '*so many contrasting stories about the circumstances surrounding the accident*' and that '*misleading statements*' had been given in evidence that the claim was dismissed. On costs the judge ruled that he had '*made it perfectly clear that there is fundamental dishonesty*' present in this case. The trial judge found that '*both the Howletts had been dishonest and that that dishonesty was fundamental*' with the result that '*the claim should be dismissed with costs*'. An appeal to a circuit judge was dismissed. The Court of Appeal has also dismissed a 2nd appeal. It endorsed a ruling from HHJ Moloney that a claimant should not be exposed to costs liability merely because he is shown to have been dishonest as to some collateral matter or to some minor head of damage. But where the dishonesty went to the root of either the whole of his claim or a substantial part of it then that would be a fundamentally dishonest claim. Lord Justice Newey in giving the unanimous ruling of the Court of Appeal says that an insurer does not need to necessarily allege in its defence that a claim is '*fundamentally dishonest*' for QOCS to be displaced. Where such findings are properly made by the trial judge on the substantive claim an insurer can invoke CPR 44.16(1) regardless of whether there was any reference to fundamental dishonesty in its pleadings. Newey LJ ruled that the trial judge had made it perfectly plain from the get go that he would be considering matters of dishonesty and exaggeration and that every opportunity had been given to the Howletts to defend themselves. The result is that the claimants will have to bear not only their own legal costs in all 3 courts but will also have to pay the insurer's costs in all courts too. Finally the Court of Appeal endorses the approach to burden of proof given in an earlier case that the legal burden of proof in these sorts of case remains on a claimant but where a defendant alleges of fraud in its defence then a substantial evidential burden arises on the defendant.

Lorna and Justin Howlett v. Penelope Davies and Ageas Insurance Limited
[2017] EWCA Civ 1696 *30 October 2017*
Court of Appeal, Civil Division (Lords Justices Lewison, Beatson and Newey)

What are the facts of the case?

Mrs Howlett and her son along with Mrs Davies staged a car crash on 27 March 2013. The Howletts claimed they were passengers in Mrs Davies' car and that when she reversed out of her drive she crashed into a parked X3 vehicle. Although the Howletts lived in Portsmouth they instructed solicitors in Cheltenham to bring a claim against Mrs Davies and this appears to have been done before they sought medical attention for their alleged injuries. The insurer denied liability. The insurer had established that the Howletts had made a similar claim 3 months earlier when they claimed to have suffered a similar fate again in Mrs Davies' car. For her part, Mrs Davies did not appear to be the paradigm specimen of the careful lady driver and had been involved in at least 4 other car accidents between 2011 to 2013.

How was the case funded?

The Howletts' solicitors appear to have acted for them on a 'no win, no fee' conditional fee agreement ('CFA'). Although the staged car crash happened in March 2013, the CFA was not signed until after April 2013 when the LASPO changes had come into effect. This meant that any success fee or 'after the event' premium could not be recovered from the insurer (even had the claim succeeded).

What changes did Sir Rupert Jackson recommend for personal injury cases?

Before the LASPO changes, an insurer who unsuccessfully resisted a personal injury claim would suffer a quadruple whammy on costs. Firstly, the insurer would have to bear its own costs. Then the insurer would have to pay the base costs of the claimant. It would also have to pay a success fee of up to 100% of base costs to the claimant. Finally it would have to pay the ATE premium. The insurers decided that their overall net book position would be better if they agreed to a reform proposed by Sir Rupert Jackson. This was that for personal injury cases, a claimant would not have to pay an insurer's costs if the claim failed. Where a claim succeeded, then the insurer would have to pay its own costs and the other side's

costs. However it would no longer have to pay either success fee or ATE and this represented overall a better deal. It also put pressure on insurers to settle routine personal injury cases at an earlier date as they would, in the ordinary course of events, have to pay their own costs as well as the claimant's. However the insurers did not want to write a complete blank cheque for claimant's costs. So a 'qualification' was put in that where a claim was '*fundamentally dishonest'* then the usual costs rules would apply such that the insurer would seek its costs from the claimant and the claimant would have to bear its own costs. Because there is this qualification, the new costs regime for personal injury claims was labelled '*qualified one-way costs shifting*' or 'QOCS'.

How have the Jackson recommendations been translated into new court rules?
QOCS is laid out in Civil Procedure Rules 1998 part 44.13 to 44.17. For the purpose of this case the '*fundamentally dishonest'* provisions are set out in CPR 44.16 which deals with '*Exceptions to qualified one-way costs shifting where permission required*':

> **'44.16** *(1) Orders for costs made against the claimant may be enforced to the full extent of such orders with the permission of the court where the claim is found on the balance of probabilities to be fundamentally dishonest.'*

How had HHJ Moloney QC previously interpreted the words '*fundamentally dishonest'*?
In *Gosling v. Hailo* (Unreported, 29 April 2014) HHJ Moloney QC sitting in Cambridge County Court had to construe what the expression '*fundamentally dishonest'* meant. He ruled that the expression '*has to be interpreted purposively and contextually in the light of the context*' and a court had to determine '*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'*. Judge Moloney ruled that when he looked at the matter he saw 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'*.

Judge Moloney said that the flip-side to the coin to the word '*fundamental*' would be a '*word with some such meaning as "*incidental*" or "*'collateral*" ' instead. He ruled that 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*' On the other hand he ruled that where '*the dishonesty went to the root of either the whole of his claim or a substantial part of his claim'* then it appeared to him that it '*would be a fundamentally dishonest claim: a claim which depended as to a substantial or important part of itself upon dishonesty.*'

It should be noted that neither counsel sought to challenge Judge Moloney QC's approach in this appeal. Lord Justice Newey labelled his approach as one of '*being common sense'*.

What costs were incurred?
The judgement of the Court of Appeal does not make this clear. However the case was thought to routine and was allocated to the fast track in the County Court meaning it should have been disposed of at a 1 day trial. This did not happen as the case took 4 days to try with the result that it will have to be re-allocated to the multi-track. In addition to the costs in the Court of Appeal there are also the costs of the first unsuccessful appeal to Judge Blair QC. The costs liability must be approaching a 6 figure sum or more by now.

What objections did the insurer take in its defence?
Ageas' defence pleaded that it:

- Did not accept the index accident occurred as alleged, or at all
- Required the Howletts '*to strictly prove'* that:
  - they were involved in the index accident,
  - it was caused by negligence of Ms Davies,
  - they suffered injury and loss in consequence, and
  - the accident, injury and loss were reasonably foreseeable
- If, which is denied, there was an accident as alleged, Ageas will aver that it was a low velocity impact unlikely to cause injury with injury being unforeseeable in any event.

There were 12 particulars given in the defence as to the '*backdrop*' against which the court was invited to judge the claim. These included:

- The Howletts claim to have been injured in the car crash but the damage to the X3 was slight,

- 3 months earlier the Howletts claim they were passengers in Mrs Davies' car and she was involved in another car accident when she was the at fault driver and the Howletts claim they were yet again injured,
- The insurer says that this is' *beyond coincidence'* but rather is indicative of a staged or contrived accident,
- Mrs Davies has been involved in at least 4 road traffic accidents between 2011 and 2013 which the insurer says is '*beyond coincidence'*,
- Mrs Davies did not co-operate with her insurer who wanted to inspect her car,
- The Howletts and Mrs Davies gave an unlikely or uncorroborated journey purpose and have given inconsistent or unlikely accounts as to injury,
- Despite there being damage and multiple injuries, there would appear to have been no witnesses and neither were the emergency services involved,
- Despite being recommended physiotherapy, the Howletts have not been treated, and
- The Howletts instructed geographically remote solicitors either before or at the same time as they sought medical attention.

What reasons did the insurer give for not wanting to allege fraud in its defence?
The insurer gave these 4 reasons why it did not want to allege fraud specifically in its defence:

- The insurer lacks direct knowledge of the relevant events,
- Lawyer's professional obligations mean that they must be slow to allege fraud,
- A case is more likely to be allocated to the multi-track if fraud is asserted, and
- A trial judge concluding that a fraud defence has not been proved is liable to find for the claimant without sufficiently considering whether he has made out his case or not.

Lord Justice Newey said that the track allocation point was '*unattractive'* but ruled that the other 3 points were '*easier to understand'*.

What evidence was given at trial?
Both Mrs Howlett and her son along with Mrs Davies attended trial and were cross-examined by the insurer's counsel. It appears too that there was some expert evidence.

What ruling did the District Judge give Portsmouth County Court? What did the trial judge make of the witnesses?
At the end of a 4 day trial, Deputy District Judge Taylor gave an oral judgement in which he dismissed the claim. In his concluding comments he ruled that he did '*not believe the evidence of Mr and Mrs Howlett or any evidence that was sought to pray in aid of that case from Ms Davies can be relied on'*. The trial judge commented that he had '*been told so many contrasting stories about the circumstances surrounding the accident*' and that '*misleading statements'* had been '*made in documents that have been supplied to this court as the evidence-in-chief of the various witnesses*' that he was '*afraid that there is not one part of the stories explained to me by Mr and Mrs Howlett that gives me any confidence that the accident as described by them and Ms Davies on 27 March 2013 happened as described or at all'*. He concluded that he found '*that no injury was suffered by them as a result of any accident and any claim they make in respect of damages must of course fail in addition*.'

As to costs, the trial judge ruled that he had in his judgment '*made it perfectly clear that there is fundamental dishonesty'* that was been present in this case. Accordingly his finding was the '*both the Howletts had been dishonest and that that dishonesty was fundamental'* with the result that '*the claim should be dismissed with costs*'.

What ruling did HH Judge Blair QC give on 1st appeal at Swindon County Court?
Judge Blair QC dismissed the Howletts' appeal.

Are there any prior authorities of relevance?
Yes. These are the main authorities referred to in the judgement and are listed in chronological order:

Browne v. Dunn **(1894) 6 R 67** (House of Lords - Lord Herschell LC)
Where it is intended to suggest that a witness is not speaking the truth about a particular point, his attention must be directed to the fact by cross-examination showing that that imputation is intended to be made so that he may have an opportunity of making any explanation which is open to him. This does not apply where it is otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of his story or the story is of an incredible and romancing character.

Vogon International Ltd v. Serious Fraud Office **[2004] EWCA Civ 104** (Court of Appeal – Lord Phillips MR, May and Jonathan Parker LJJ)
The trial judge had been wrong to make findings against Vogon that it had been 'opportunistic' and 'dishonest' where dishonesty had not been argued by the SFO and Vogon had been given no warning or opportunity to defend itself against such findings.

Francis v. Wells **[2007] EWCA Civ 1350** (Court of Appeal – Laws, Rix and Lloyd LJJ)
Even apart from the coincidence of the 3 accidents there would still be plenty of material on the basis of which to question the reliability of the respective claimants. The inconsistencies in the evidence were not only between the different witnesses but within the evidence of each separate witness. At no point did the judge address in terms the combined effect of the various factors. The judge should have looked at it as a whole and considered whether the combined effect of the striking coincidence of 3 incidents involving the Tyrone Reeves and Mr Senghore and all the inconsistencies in the evidence of the witnesses was sufficient to satisfy him that the claim was not genuine or at least to show that the claim was not proved on the balance of probability. The judge was also wrong to proceed straight from the proposition that the claimants had not made out their claim of an invented accident to the conclusion that the insurer had proved their claims on the balance of probability. Even if the case was not one of fabrication it remained for the defendant's insurer to make out their case and in the absence of findings of fact that showed the basis on which the judge found in favour of the respondents it was not clear how he reached that conclusion.

Haringey v. Hines **[2010] EWCA Civ 1111** (Court of Appeal – Pill & Rimer LJJ & Peter Smith J)
The conclusion that the local authority had made good its narrowly pleaded case against Hines in deceit was unsound. Nowhere in the trial judge's judgment did he address the only case in deceit that was before him. The local authority also failed to put its deceit case to Hines in cross-examination. That was a serious omission. It was a basic principle of fairness that if a party was being accused of fraud who was then called as a witness, then the particular fraud alleged should be put specifically to that party so that she might answer it. That was not done here. Before a finding of dishonesty could be made, it had not only to be pleaded but to be put in cross-examination.

Abbey Forwarding Ltd v. Hone **[2010] EWHC 2029 (Ch)** (High Court, Chancery – Lewison J)
Before a finding of dishonesty can be made it must not only be pleaded but also put in cross-examination. In *Dempster v. HMRC* **[2008] STC 2079** HMRC alleged that certain alleged transactions were a dishonest sham. On appeal from the VAT Tribunal. HMRC argued that because their statement of case before the tribunal had constituted a case of dishonesty, it was unnecessary for it to be put specifically in cross-examination to the taxpayer either that he was a knowing party to a VAT fraud, or that he knew, or turned a blind eye to the fact, that the software which he traded was fake or worthless. It is a cardinal principle of litigation that if serious allegations, in particular allegations of dishonesty are to be made against a party who is called as a witness they must be both fairly and squarely pleaded, and fairly and squarely put to that witness in cross-examination.

Hussain v. Amin **[2012] EWCA Civ 1456** (Court of Appeal – Lord Dyson MR, Davis and Treacy LJJ)
As to the pleaded defence, it was perfectly proper to join issue on the primary facts alleged in the particulars of claim and as to whether there had been negligence or whether the claimed losses had been caused by it. However the defence went much further setting out a number of matters which it claimed raised significant concerns as to whether or not this had been a staged accident requiring further investigation. This sort of defence can be justified as an initial holding defence. However this was a case pleaded on insinuation rather than allegation. If a defendant considered that it had sufficient material to justify a plea that the claim was based on a collision which was a sham or a fraud, it behoved it properly and in ample time before trial so to plead in clear and unequivocal terms and with proper particulars. Thereafter the burden of proof would is on the defendant to establish such a defence.

On what basis was permission given for a 2nd appeal?
Permission was granted for a 2nd appeal under CPR part 52.7(2) on the grounds that this case raised an important point of principle or practice.

What did the Court of Appeal decide were the issues it had to determine?
Lord Justice Newey decided that the Court of Appeal had to determine these 2 issues to dispose of the appeal:

- Had the insurer's defence been drafted sufficiently clearly to put the claimants on notice that fraud or fabrication was being alleged?
- What findings could properly made as to dishonesty from the oral evidence at trial?

What did the Court of Appeal rule on the insurer's defence?

Lord Justice Newey gave the unanimous judgment of the court. He started by observing that it was not *'unusual for insurers to file defences comparable to that put in by Ageas in the present case in response to claims in respect of personal injuries alleged to have been caused by low-speed traffic accidents'*. However Newey LJ said that the '*present case raises the question of whether a trial judge can find that QOCS has been displaced because of "*fundamental dishonesty*" without fraud having been alleged in terms in the insurer's defence'*. He said this case was '*readily distinguishable'* from *Vogon* where there had been an '*opportunistic attempt to exploit the perceived commercial naivety'* of the defendants.

As to the Practice Direction to CPR part 44, Newey LJ ruled this did not '*take things any further forward in the present context*'. Although paragraph 12.4 of this PD states that a court '*will normally direct that issues arising out of an allegation that the claim is fundamentally dishonest be determined at trial'*, he ruled that he did '*not think this means that, for one-way costs shifting to be displaced because of fundamental dishonesty, there need have been a pleading to that effect in the defence*'. Newey LJ ruled that the point of this provision was only '*to indicate that such issues should generally be decided at the trial rather than some other stage*' rather than '*to impose any pleading requirement*'

Going further Newey LJ ruled that '*the mere fact that the opposing party has not alleged dishonesty in his pleadings will not necessarily bar a judge from finding a witness to have been lying'*. He added that '*it must be open to the trial judge*' to state in his judgment '*not just that the claimant has not proved his case but that, having regard to matters pleaded in the defence, he has concluded (say) that the alleged accident did not happen or that the claimant was not present'*. Newey LJ said that an appropriate safeguard was '*whether the claimant had been given adequate warning of, and a proper opportunity to deal with, the possibility of such a conclusion and the matters leading the judge to it rather than whether the insurer had positively alleged fraud in its defence*'.

He went on to add that he did not think '*an insurer need necessarily have alleged in its defence that the claim was "*fundamentally dishonest*" for one-way costs shifting to be displaced on that ground*'. Where such findings are properly made by the trial judge in his judgment on the substantive claim and they '*warrant the conclusion'* that it was '*fundamentally dishonest'*, an insurer can '*invoke CPR 44.16(1) regardless of whether there was any reference to fundamental dishonesty in its pleadings'*.

Finally Newey LJ said that whilst Ageas' defence eschewed '*a positive case of fraud at this stage*' it had nevertheless '*adverted to the possibility of the Court finding'* that there were '*elements of fraud to this claim*'. He noted in particular that insurer's averments that '*facts that were stated in terms to be "*beyond mere coincidence*" '* and were '*indicative of a staged/contrived accident and injury'* which he said '*gave the Howletts sufficient notice of the points that Ageas intended to raise at the trial and the possibility that the judge would arrive at the conclusions he ultimately did*'. Newey LJ ruled that the Howletts cannot '*fairly suggest that they were ambushed'*. Concluding on this point Newey LJ ruled that '*it was proper for Ageas to contend, and the District Judge to hold, that the findings made in the judgment showed the claim to be "*fundamentally dishonest*" within the meaning of CPR 44.16(1)*'.

What did the Court of Appeal rule on the findings from the oral evidence at trial?

Newey LJ started by noting that the Howletts' counsel had accepted that the insurer's counsel '*had put inconsistencies to the Howletts in cross-examination and, more specifically, put to them matters mentioned in the various sub-paragraphs of paragraph 6 of Ageas' defence*'. Although the insurer's counsel did not use the words '*fraud*' or '*dishonest*' when cross-examining the Howletts, he said this '*was not necessary in the context*' and that his recollection was that '*he suggested that it was patently clear at the time that he was putting in issue the Howletts' honesty, not just their credibility*'. Newey LJ also noted that '*Mrs Howlett was asked in re-examination whether the evidence she had been giving had been honest*'.

Although no transcript of the trial had been obtained by the Howletts (which they could have easily obtained), Newey LJ said that '*the correct inference'* was that the trial judge '*disagreed with the suggestion that Ageas had not pleaded a case of dishonesty or cross-examined on that basis'* and that the Howletts '*knew what they were facing'*. Further the trial judge had made it '*perfectly plain from the get go*' that he would be '*considering matters of dishonesty and exaggeration'*. Newey LJ noted that '*every opportunity had been given to the Howletts to defend themselves*' and that the insurer's case '*had been put fairly and squarely'* such that the Howletts '*might understand and answer that case being made against them'*. Newey LJ observed that there had been '*sufficient explanation and description of the allegations made in the defence*'.

Newey made these 2 final comments:

- Where a witness' honesty is to be challenged, it will always be best if that is explicitly put to the witness. What ultimately matters is that the witness has had fair notice of a challenge to his or her honesty and an opportunity to deal with it.
- The fact that a party has not alleged fraud in his pleading may not prevent him from suggesting to a witness in cross-examination that he is lying.

What did the Court of Appeal rule on burden of proof? How is this relevant to other fields?
Newey LJ referred to an earlier Court of Appeal decision in *Francis v. Wells* **[2007] EWCA Civ 1350.** In that case it was held by Lord Justice Lloyd that whatever the position may be as regards evidential burdens, the legal burden of proof remains on a claimant even where a defendant alleges fraud. Lloyd LJ had ruled that '*clearly the burden is on the claimants to prove that the collision occurred*' and that '*unless that is proved on the balance of probability, the claim of any particular claimant cannot succeed*'. Lloyd LJ noted that a '*judge might dismiss a claim, even in those circumstances, as not proved on the balance of probabilities but equally he might hold that, despite a good deal of inconsistency and internal conflict, there was enough common ground between the parties to find that the case was proved*'. Where this happened the '*legal burden then remains on each claimant, but with the allegation of fraud by way of defence an evidential burden would arise on the defendant, and a substantial burden at that.*'

Section 140B(9) of the Consumer Credit Act 1974 provides that where a debtor '*alleges that the relationship between the creditor and debtor is unfair to the debtor, it is for the creditor to prove the contrary*'. In *Bevin v. Datum Finance* **[2011] EWHC 3542 (Ch)** Peter Smith J had ruled that it was not incumbent on a debtor '*to show a* prima facie *case as to unfairness or any case as to unfairness. As the section says, all he has to do is to make an allegation of unfairness. If he makes that allegation, the legal burden is on the creditor to prove that the arrangement was not unfair. The creditor in this case, Datum, has not adduced any evidence on unfairness whatsoever'*. He also said that he did not '*accept that Mr. Bevin has a burden at this stage, in effect, to reverse that legal burden by putting a showing on first*'.

As later cases have shown the decision in *Bevin* is now highly questionable and it is very doubtful it would be decided in the same way now following cases (some on appeal) such as *Bluestone Mortgages v. Momoh*, *Carey v. HSBC* and *Axton v. GE Money Mortgages*. However with the Court of Appeal ruling in this case endorsing the approach to burden of proof taken earlier by the Court of Appeal in *Wells*, it is now abundantly clear that the decision in *Bevin* is wrong. The position is correctly set out in the Encyclopedia of Consumer Credit Law at §**2222/88** where it says that '*even if the debtor is a defendant , if the creditor's evidence provides no suggestion that the relationship is unfair, the court is likely to regard the creditor as having discharged the burden of proof*'.

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David Bowden is a solicitor-advocate and runs David Bowden Law which is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation. He is the cases editor for the Encyclopedia of Consumer Credit Law. If you need advice or assistance in relation to consumer credit, financial services or litigation he can be contacted at info@DavidBowdenLaw.com or by telephone on (01462) 431444.