An update on recent Personal Injury cases

By Michael Dougherty

WILLIAMS -V- THE SECRETARY OF STATE FOR BUSINESS, ENERGY & INDUSTRIAL STRATEGY [2018] EWCA Civ 852

Significance: Consideration of the circumstances in which costs can be limited to fixed costs, when a claim should have been brought in the Portal under the Pre-Action Protocol for Low Value Personal Injury (Employers Liability and Public Liability) Claims, but settles before proceedings are commenced.

Facts

The claimant could not initially begin with a Claim Notification Form within the Protocol as the claim was intimated against two different previous employers.

Whereas one employer admitted liability, the claimant chose not to continue against one of the employers upon disclosure of materials indicating protective measures had been provided and encouraged.

Part 36 offers resulted in settlement prior to the commencement of proceedings. The question arose as to whether costs should be limited to fixed costs and disbursements.

Submissions

The claimant position was that fixed costs did not apply, as Part 7 proceedings had not been commenced, and nor had there been judgment ordered for the defendant – the two triggering provisions for fixed costs in CPR r45.24.

The defendant argued that only fixed costs ought to be recoverable as

a) The claimant should have proceeded as against one former employer only, with the result that the Protocol should have been followed, or
b) The two triggering conditions represented a mistake in drafting and should be corrected, or
c) By CPR 44 the court's general powers arising from conduct could be used to restrict costs to those recoverable within the Protocol

Judgment

In a case not covered by CPR r.45.24, a defendant can rely upon the Part 44 conduct provisions to argue that only the EL/PL Protocol fixed costs should apply.

1. Rule 45.24 was not apt to apply – absent part 7 proceedings or judgment. These were not examples of provisions to trigger fixed costs, rather these are specific circumstances that give rise to the exercise of discretion.
2. There is no drafting error in r.45.24. As these pre-conditions are specified, the Court is not prepared to rewrite r.45.24 to meet the facts of this case.

3. The claimant's costs could be reduced by CPR Part 44. The unreasonable failure of the claimant to follow the Protocol triggers the Part 44 conduct provisions. At this point, paras 2.1, 3.1 and the warning at para 7.59 of the Protocol take on relevance. These provide a clear indication that where a claim which should have been started under the Protocol was unreasonably not so commenced, then by Part 44, the claimant should be limited to the fixed costs which would have been recoverable under the Protocol

THE BOSWORTH WATER TRUST -V- SSR AND AB AND JBW [2018] EWHC 444 (QB)

Significance

This case considers the respective duties owed by the operator of an adventure golf course, and the parents of a child causing injury to his party guest with a golf club. The attendant risks were sufficiently foreseeable to import concurrent duties on both operator and parents.

Facts

J's 10th birthday party was organised by his parents at an amusement park owned by Bosworth. During a game of adventure golf, J swung a golf club into the face of SSR, his 9 year old party guest, causing permanent sight loss. No safety instructions were displayed. J's parents were present but not directly supervising at the time of the incident.

At first instance Bosworth was found liable to SSR, but J's parents were not. Bosworth appealed the adverse finding, and SSR appealed (supported by Bosworth) against the dismissal of the claim against J's parents.

Bosworth's Appeal

Bosworth submitted that: a) the Judge imposed too high a duty on Bosworth, amounting to a requirement to police the behaviour of players, b) the risks were so obvious that no warning was reasonably required, and c) the need for firm handling of J was known to his parents but not capable of being known to Bosworth.

Held: Bosworth's Appeal dismissed

Either a rule should have been in place as regards safe use of the clubs, or, as a matter of fact, if Bosworth had carried out a risk assessment as it should have done, it would have appreciated the risk and therefore would have gone on to post such a warning to mitigate the risks.

As was noted by the first instance Judge, a risk assessment was in fact undertaken after the incident, revealing a risk of personal injury to players by inappropriate use of equipment, and Bosworth did in fact go on to post such a warning.

The risk was reasonably foreseeable, even obvious, of children carrying metal putters potentially causing serious injury by inappropriate use, but not so obvious as to not benefit from mitigating measures.

Claimant's appeal re J's parents: -

It was submitted that: J's parents had primary responsibility for supervising J and friends, and if Bosworth was to be liable for a failure to warn or supervise, so must J's parents.

Held: Claimant's appeal allowed

J's mother told them to 'keep their distance' but did not in terms specify not to swing the putters.

The remaining question therefore was whether J's mother, by failing to instruct not to swing the putters was in breach of the duty of care she owed to the boys.

She knew Bosworth had given no instruction. If, as was the case, she was not going to directly accompany and supervise the boys on the course, there was a heightened requirement for clear safety instructions. J's mother knew of his boisterous and impetuous nature.

In sum, the minimum requirement necessary was a clear instruction not to swing the putters.

DRYDEN AND OTHERS (APPELLANTS) V JOHNSON MATTHEY PLC (RESPONDENT) [2018] UKSC 18

Significance:

A hidden and symptomless injury can comprise an actionable and compensable injury in circumstances where the claimant is caused to make adaptations resulting in loss.

Facts:

The Respondent employed the Appellants to manufacture catalytic converters. The Appellants developed an immune system deficiency caused by inadequate cleaning of the Respondent's facilities.

The deficiency, platinum salt sensitisation, did not present as an injury, rather the heightened sensitivity brought with it an increased risk of developing conditions in the form of allergies. It precluded the Appellants from continuing to work in their existing roles.

As a consequence, the Appellants variously had their employment terminated or were caused to taken new roles on reduced pay.

Issues:

At first instance and before the Court of Appeal, two key questions were answered in the negative. Argument was ventilated before the Supreme Court to address these questions:

1. Does a claim for actionable injury arise from platinum salt sensitisation?
2. Could the Appellants alternatively recover for economic loss in negligence and / or under an implied contract term?

Held: Appeal allowed unanimously

Personal injury can be hidden and symptomless. Individuals sensitised in the instant case experienced changes to their body rendering it impossible to work in their existing environment.

Analogy was drawn with a person who develops sensitivity to sunlight - who would thereby sustain actionable damage - and no distinction could be drawn. The Appellants' lives required adaptation to avoid exposure to the risk created by the sensitisation.

The Appellants' capacity for work was impaired and had resulted in financial damage. The injury was actionable in its own right, and accordingly any submission by the Respondent that the claim was for pure economic loss had no relevance.

MRS RHONDA STEWART -V- LEWISHAM AND GREENWICH NHS TRUST [2017] EWCA CIV 2091

Significance:

The question of whether a detailed risk assessment is required under the Manual Handling Operations Regulations 1992 is not resolved by reference to strictly defined categories, rather by guidelines to be considered in all the circumstances.

Facts

The Claimant suffered a back injury in the course of her employment as a Community Midwife, while lifting an Oxygen Box for home birth use, which weighed between 7 and 8kg. Whereas no risk assessment had been undertaken, the Box was frequently lifted and used by the Claimant and other midwives, with no prior issues or complaints. Training had been provided as to assessment of, and execution of, the lifting of items generally.

Relevant Legal Framework:

The Claimant submitted that lifting the Box was sufficiently hazardous to require a risk assessment under the Manual Handling Operations Regulations 1992.

The duties provided for in Regulation 4(1)(b) are to (i) make a suitable and sufficient assessment, and (ii) to take appropriate steps to reduce the risk of injury.

These duties are subject to a 'risk assessment filter' in Appendix 3 of the Guidance on the Regulations - with the intention of setting out approximate boundaries within which a load is likely or unlikely to create a risk of injury, such as to warrant a detailed assessment.

if the load is easy to grasp, in a good working environment and the activity is assessed as low risk, no other form of assessment will usually be required. If however the filter approach shows activity exceeding guideline figures then a more detailed assessment is required, examples of which are provided with guideline figures in Appendix 4.

Claimant's Appeal:

At first instance the Claim was dismissed. It was held that the failure to carry out a risk assessment did not amount to a breach of the 1992 Regulations, the Claimant having failed to prove that a detailed assessment had in fact been required.

The Claimant posited that the burden rested with the Defendant to show that a risk assessment was not required. The filters in the Guidance to the Regulations suggest that when lifting a load of 7kg or more in the manner in which the Box was used, a detailed risk assessment is necessary. Paragraph 30 of Appendix 3 states, 'where doubt remains, a more detailed risk assessment should always be made.'

Held - Appeal Dismissed.

On a proper analysis of the Recorder's judgment, he found that there was no real risk of injury, and therefore that no detailed risk assessment was required. The Recorder had been presented no evidence that any complaints or issues had arisen regarding the Box over many years of regular use, by women midwives of same or older age.

For the purposes of Appendix 3, the weight of the Box belonged in the top end of the 7kg category, or the bottom end of the 13kg category, and these are rough guidelines, not mandatory statutory categories with suddenly changing legal implications.

MR MATTHEW ROBINSON -V- ABELLIO GREATER ANGLIA LIMITED [2018] EWHC 272 (QB)

Significance

Given ongoing disputes between Rail Operators and Trade Unions regarding the operation of 'driver only' trains, this case is of interest due to analysis of the ability of drivers, guards and platform staff to prevent injuries arising at the point of exit and entry of trains at station platforms.

Facts:

The Claimant travelled regularly, as a season ticket holding commuter, between Bishops Stortford and Liverpool Street Stations. Having disembarked a train, he believed he had left his wallet on board. He suffered severe injuries including bilateral amputations when he fell between the train and the platform edge while walking at pace alongside the departing train.

The platform involved had a concave curve along its length giving rise to a gap between the platform and trains. As a result, Regulations require consideration by Railway Operators of measures including warning signs, platform markings, announcements and staff attendance. Industry Standards recognise the existence of a "Dispatch Corridor" comprising a strip of approximately 1.5m width along the length of the train.

The train involved was a driver only class, with no guard on board. A member of platform staff was available to observe the train departing and clearing the platform. The train had external cameras fitted, and CCTV was operational on the platform.

Drivers preparing to depart the platform are required to check it is safe to close external doors, check that the door interlock light is lit, and undertake a train safety check before applying power.

The Claimant alleged that the Defendant had failed in its duty to devise suitable and sufficient control measures to reduce risk of injury to the lowest level reasonably practicable.

Both parties accepted the duty was measured in line with the judgment in *Whiting v First/Keolis Transpennine Ltd* including the observation that,

> "It is important that the courts do not impose too high a duty of care upon those involved in services, such that their jobs become unreasonably difficult and it becomes unreasonably difficult for the provider to maintain an efficient service."

Evidence available

Where in conflict, the Court preferred the opinions of the Defendant's expert, derived from direct experience, as distinct from the Claimant's expert, whose view that the rail industry's approach was inherently flawed were described as "trenchant and extreme".

An external camera mounted on the train depicted the majority of relevant events, along with CCTV images from the platform. A Data Recorder evidenced the actions of the driver, whose external CCTV access ceased display by design when the train reached 3mph.

Held - Claim dismissed

1. The Claimant failed to establish breach of duty on the facts
2. Causation was not established in relation to breaches of duty alleged.

The Claimant was well aware of the significant gap, and would have been exposed to announcements about it on numerous occasions. He chose to place himself in a position of very real danger as the Train was leaving.

Points of Analysis in Judgment

There was no cause for criticism of the driver - it was evident from CCTV that at the time the driver undertook his safety check the Claimant was not in the dispatch corridor. Even if the driver had seen him jogging, this was unremarkable. The Claimant only moved towards the train after it had begun to move and the driver's focus was on the route ahead.

Criticism of the Defendant's procedures were misplaced - there was no history of poor platform safety, the platform being unexceptional. More widely, the greater majority of train platforms include a gap between platform and train. Of 3 billion annual customer interactions with UK train platforms there is less than 1 fatality per year involving train dispatch. Dealing with more commonly occurring issues such as those involving level crossings is a more realistic use of resources.

In such a highly regulated industry, the relevant industry standards must be given full and proper weight when assessing issues of breach of duty. The Defendant's method statement and Train Dispatch Risk Assessment were appropriate and in any event, any failure was not causatively relevant on the facts of the instant case.

A guard on-board the train would have been impotent - even on trains on which a guard carries direct responsibility for dispatch, once the guard re-boards the train after his safety check and signals the driver to proceed, there is no further monitoring of the platform interface by the guard.

The platform staff were unable to intervene effectively - There is no means by which the driver of a train can or could be sent an emergency stop signal, therefore the platform staff could not have halted the train in any event.

There was nothing in the behaviour of any of the passengers observed on CCTV, including the Claimant, which should have caused the platform staff any concerns, until such time as the Claimant placed himself close to the platform edge and the moving train, at which point it was too late to stop or communicate a warning, and / or for the Claimant to act on any such warning.

ROBINSON -V- CHIEF CONSTABLE OF WEST YORKSHIRE POLICE [2018] UKSC 4

Significance:

A consolidated review of the development of the concept of the duty of care in negligence, applied to the particular duty of the Police in the execution of their duties.

This appeal was heard by 5 Justices of the Supreme Court. While all 5 allowed the appeal, reasoning derived from the judgments of Lords Reed, Mance and Hughes. This review focuses on the analysis of Lord Reed. This included elucidation as to why the three stage test in *Caparo Industries v Dickman* has been variously misunderstood and misapplied.

Held: Claimant's appeal allowed

Facts

Mrs Robinson was injured when knocked over by a group of men, comprising two Police Officers attempting to arrest a drug-dealer in a town centre shopping street.

Two further officers were positioned further up the street, to prevent the escape of the drug-dealer. Mrs Robinson was one of a number of pedestrians walking on the pavement. The arrest was instigated almost immediately after she had passed the drug-dealer. He resisted arrest, and as the men tussled they collided, causing her to fall, and the group of men to land on top of her.

Procedural History

The case was concerned with a) whether the Police Officers owed a duty of care to Mrs Robinson and b) if so, whether they were in breach of such a duty.

At first instance, the Recorder considered that the Police Officers had been negligent but that the Police enjoyed an immunity from suit which was not confined to cases of omission.

The Court of Appeal held that no duty was owed, and there would have been no breach of it even if it were. It was said that a claim against the Police for negligence in act or omission while investigating and suppressing crime, and / or apprehending offenders, would fail the third stage of the *Caparo* test. The courts have

concluded that the public interest is not best served by imposing a duty. While the authorities indicated exceptions to the general principle, the present case did not meet any of those exceptions. Mrs Robinson's claim arose from an omission - the failure to prevent the drug-dealer from injuring her.

Lord Reed's analysis:

Caparo:

The proposition that the third stage of the *Caparo* test applies to all claims in negligence is mistaken.

It was decided in the aftermath of *Ann's v Merton London Borough Council,* which, in trying to lay down a consistent approach to determining the existence of a duty of care, had major implications for public authorities, which were rendered able to limit liability only on public policy grounds.

Where existence or otherwise of a duty has been established, the law had arrived at that principle by, amongst other things, consideration of justice and reasonableness, rendering it unnecessary and inappropriate to reconsider whether the existence of a duty is fair, just and reasonable. It is normally therefore only in a novel type of case, where established principles do not provide an answer, that further analysis is required to determine whether a duty should be recognised. Decisions cited by Hallett LJ in the Court below, to demonstrate the three stage test, did not concern an established category of liability.

Therefore, in the ordinary run of cases, a court should consider what has been decided previously and follow the precedents, unless it is necessary to consider whether the precedents should be departed from.

Where direct analogous precedent is not available, the courts should consider the closest analogies of the existing law, to maintain coherence, and avoid inappropriate distinctions. At this stage they will also weigh up reasons for and against imposing liability, in order to decide the questions of justice and reasonableness.

The instant case, therefore, depended upon the application of the established principles of the law of negligence.

Negligence of the Police:

Public authorities generally are under a duty of care to avoid causing actionable harm in situations where a duty of care would arise under ordinary negligence principles, unless the law provides otherwise. There does not exist a general duty to prevent the occurrence of harm - the omissions principle.

The Police owe a duty to the public at large, but when a member of the public attains standing to enforce that duty, they are not enforcing a duty owed to them as individuals.

The general duty of the police does not extend to a private law duty towards individual members of the public. For example, police officers investigating a series of murders do not owe a duty of care to the murderer's

potential future victims to take reasonable care to apprehend him. The immunity absents a duty of care only in relation to the protection of the public from harm through the performance by the police of their function of investigating crime.

There is no general rule that the police are not under a duty of care when discharging their function of preventing and investigating crime. On those principles, they may be under a duty of care to protect an individual from a danger of injury which they have themselves created. They are however not normally under a duty of care to protect individuals from a danger of injury which they themselves have not created, including injury caused by the conduct of third parties, absent special circumstances such as assumption of responsibility.

Omission or positive act

This was not an instance of pure omission on any analysis. The complaint was as against a positive act - the actions of the Police Officers in deciding to effect the arrest when they did caused the injury, as distinct from any omission in failing to prevent injury.

Foreseeability

It was both reasonably foreseeable, and actually foreseen, that the drug-dealer was likely to resist arrest. This foresight was implicit in the proximate placement of other officers to prevent escape. This was sufficient to impose a duty of care towards those in the immediate vicinity.

Causation

The chain of events was initiated by the attempt to arrest. The drug-dealer's attempt to escape was not a novus actus interveniens, as it was the very act which the Police were under a duty to guard against.

JACQUELINE SMITH -V- LANCASHIRE TEACHING HOSPITALS NHS FOUNDATION TRUST & ORS [2017] EWCA CIV 1916

Significance:

A declaration that the effect of s1A Fatal Accidents Act 1976 to preclude a co-habiting partner from receiving bereavement damages is incompatible with the co-habitee's rights under Article 8 and / or Article 14 ECHR.

Facts:

Ms Smith and Mr John Bulloch lived for 11 years in the same household, within a relationship equal to marriage in terms of love, loyalty and commitment. Mr Bulloch's death occurred as a result of admitted negligence on

the part of the NHS Trust. The Secretary of State for Justice was joined as Defendant to enable pursuit of bereavement damages which Ms Smith was otherwise barred from claiming.

Fatal Accidents Act 1976

Whereas s1 provides for recovery of damages, to be quantified on the index facts, as against a liable party, s1A allows for a claim for a fixed sum in bereavement damages.

Actions for damages in s1 are for the benefit of dependent parties, which classification can include, inter alia, by s1(3)(b), a person who has lived as husband / wife / civil partner in the same household as the deceased for at least two years leading up to the date of death.

s1A, however, does not carry equivalent provision for such a 'co-habitee'.

The Claimant sought interpretation of the 1976 Act such as to permit a claim, and an award of damages, or a declaration that s1A was incompatible with her rights by Article 8 and / or 14 of the European Convention on Human Rights.

Held: - Claimant's appeal allowed, order of Judge set aside, declaration of incompatibility made.

Applicability of ECHR - Where the State has created a positive measure which though not required by Article 8 is a *modality of the exercise of the rights* guaranteed by Article 8, the State will be in breach of Article 14 if the measure has a more than tenuous connection with one of the core values protected by Article 8, and is discriminatory without justification.

Analogous position of Ms Smith as against persons eligible for bereavement damages - a person in a long and stable relationship equal to a marriage is sufficiently analogous to a surviving spouse or civil partner to require justification of any discrimination to avoid infringing Article 14 alongside Article 8 ECHR. It was plainly material that Parliament elected to treat cohabitees of 2+ years status as being in a comparable position for purpose of s1 dependency damages.

Attempt to read down by s3 Human Rights Act 1998 - whereas a power exists in s3 to read the legislation so as to achieve compliance with ECHR, the court cannot adopt a meaning inconsistent with a fundamental feature of the 1976 Act, nor can the court make decisions for which it is not equipped. Any such reading down would have consequences beyond those the court can provide for, such as determinations where more than one party has an entitlement within any revised s1A. Accordingly, the appropriate relief was a declaration of incompatibility.

LONDON ORGANISING COMMITTEE OF THE OLYMPIC AND PARALYMPIC GAMES (IN LIQUIDATION) -V- HAYDN SINFIELD [2018] EWHC 51 (QB)

Significance: The first claim to come before the High Court within the purview of s.57 of the Criminal Justice and Courts Act 2015, in contemplation of alleged fundamental dishonesty on the part of a Claimant. It is also noteworthy that the first instance judgment pre-dated the restatement of the common law test for dishonesty by the Supreme Court in *Ivey v Genting Casinos.*

Facts:

The Claimant was injured while volunteering at the 2012 Games. His provisional schedule included two paragraphs describing claims for gardening which had been necessitated by the injury, said to have caused the Claimant to hire a gardener, and which were supported by evidence including, inter alia:

a) falsified invoices, said by the Claimant to have been created simply to evidence money that he had spent, on a 'self-billing' basis

b) the Claimant's first witness statement, which included at paragraph 30 an assertion that prior to the accident, the Claimant and his wife did all the gardening.

The total special damages claim was £33,340, of which past gardening expenses were £4,992 plus interest, with future gardening claims of £8,961. These values comprised 41.9% of the aggregate amount claimed for special damages, and 28% of the total claim including damages for PSLA.

It had been established by the time of the first trial that the Claimant had, in fact, been paying for gardening services prior to the date of injury. He posited latterly that the claim was in recognition of the fact that the injury had resulted in a loss of his choice whether to undertake the gardening or to hire a gardener.

First instance decision:

The first instance court considered the conduct of the Claimant to have been dishonest in so far as it related to the gardening elements of the claim. This arose, it was said, from careless error in the initial documents, compounded by attempts to conceal. These factors were not felt sufficient to contaminate the entire claim. This was not considered fundamental dishonesty, and if it was, it was substantially unjust to dismiss the entire claim.

Held - Appeal allowed, claim for damages dismissed under s57(2) CJCA 2015.

Ground 1 - the judge was wrong to find that initial errors came from 'muddle and confusion'

The decision in the instant case was to come from the documents and from the witness evidence. CPR r.52.21(4) permits the appeal tribunal to draw any inference of fact which it considers justified on all the evidence.

The test for dishonesty as regards the contents of the Claimant's Provisional Schedule is found in *Ivey v Genting Casinos;* where actions are considered dishonest in the eyes of ordinary decent people, there is no requirement for a subjective test as to the awareness or otherwise of the Claimant.

On a reading of the relevant paragraphs, the only reasonable meaning was that the Claimant was describing circumstances which were not true and known by him to be untrue. As the statements were made to support a claim for damages, the judge should have found the statements to be dishonest misrepresentations. The judge did not, but should have, asked himself, "What do the two paragraphs mean, and could Mr Sinfield have genuinely believed that meaning?".

This position was fortified by the contents of paragraph 30 of the Claimant's first witness statement, which reflected the position wrongly advanced in the Provisional Schedule.

Ground 2 - the judge's conclusions on the question of fundamental dishonesty were erroneous

Whereas the judge had determined that there had been dishonesty in paragraph 30 of the first witness statement and the creation of false invoices, and fundamental dishonesty in relation to the gardening claim, it had been reasoned that there had not been fundamental dishonesty in relation to the entire claim.

This was wrong - the Claimant had been fundamentally dishonest in relation to the claim, by substantially affecting the presentation of his case in a way capable of significantly adversely affecting the defendant, in line with s57(1)(b) CJCA 2015.

The fact that a later medical report diminished the value of the gardening claim was not material. The conduct of maintaining an artificially valued claim to which he was not entitled may have led the Defendant to settle at or near the dishonestly stated value.

Further, the Judge erred in asking the question "if the greater part of the claim is genuine and honest, is the dishonesty fundamental?". Subject to the latter test of substantial injustice, the fact that a greater part of the claim is not dishonest is irrelevant.

Ground 3 - substantial injustice must mean more than the mere fact of the loss of damages for heads of claim tainted with dishonesty

The test to be utilised when considering s57 CJCA 2015 applications by Defendants is different to that in CPR r44.16.

In r44.16 the court is concerned with the honesty of the claim, whereas in s57 it is the Claimant who must be found to be dishonest. By s.57, rather than permitting the Defendant to recover all his costs (as is potentially the case by r44.16), the court must assess the Claimant's 'honest' damages, and deduct that figure from any enforceable costs figure awarded to the Defendant.

Parliament legislated by CJCA 2015 to provide that a fundamentally dishonest claimant should lose his damages in their entirety even though he is otherwise properly entitled to some damages. The effect of s57(3) was designed to be punitive and a deterrent, but would be superfluous if dishonest claimants were able to retain 'honest' damages by pleading substantial injustice on the basis of the loss of those damages. Effectively, the result of such reasoning would be to lose only that to which the Claimant was not entitled, and retain the remainder - the position irrespective of the fundamental dishonesty.

What will therefore generally be required in such circumstances will be some substantial injustice arising as a consequence of the loss of those damages. No explicit guidance or examples were given.

Basis of the steps for a court dealing with a Defendant's s57 application:

a) Consider whether the Claimant is entitled to damages within the claim. If not, save that the judge may consider disapplying QOCS by CPR r44.16, that is the end of the matter.
b) If the Claimant is entitled to damages, the court must determine whether the Defendant has proved that the Claimant has been fundamentally dishonest in relation to the primary, or a related claim, on the balance of probabilities.
c) If so satisfied, the claim must be dismissed, including any element of the primary claim upon which there has been no dishonesty, unless satisfied that the Claimant would suffer substantial injustice if the claim were so dismissed.