Neutral Citation Number:

Case No. HQ16P00052

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23.03.18

Before :

MR DEREK SWEETING QC (Sitting as a Deputy High Court Judge)

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Between :

MR SUDHIRKUMAR PATEL

(a Protected Party by his Litigation Friend, Mr Chirag Patel)

Claimant

-and-

(1) ARRIVA MIDLANDS LIMITED
(2) ZURICH INSURANCE PUBLIC LIMITED

Defendants

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Satinder Hunjan QC (instructed by) for the **Claimant**
Alan Jeffreys QC (instructed by) for the **Defendant**

Hearing date 12th march 2018

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Ruling on Applications

Mr Derek Sweeting QC:

1. Mr Patel was knocked over by a bus. Following the trial of the liability issues I gave judgment for Mr Patel against the Defendants reducing the damages to which he would otherwise be entitled to 60% to reflect contributory negligence.

2. There are two consequential applications before the court:

    a. First, an application by the Claimant for his costs in relation to liability issues and for some or all of those costs to be paid on an indemnity basis. Since the Claimant has succeeded in relation to liability he would in the normal course of events be entitled to a costs order in his favour. As to indemnity costs, the application is based upon the fact that the Claimant made a part 36 offer to accept a liability award of 65% in his favour, close to that which the court ordered, and that the Defendants, it is said, have wholly failed to engage with reasonable attempts to settle liability and avoid a contested hearing. There is a statement from the Claimant's solicitor, Nicola Kitchener, in support of the application.

    b. Secondly, an application by the Defendants to adjourn the issue of costs to allow the Defendants to make an application to dismiss the claim in its entirety under section 57 of the Criminal Justice and Courts Act 2015 ("the Act"), that is to say on the basis of fundamental dishonesty. The Defendants contend that if they are successful in that application then the claim will be dismissed in its entirety and they, rather than the Claimant, will be entitled to their costs subject to a determination of the amount of damages which would have been awarded absent fundamental dishonesty (which if those damages exceed costs then operate as a set off rather than a net balance due to the Claimant). There is a witness statement from Jonathan Crookes, the Defendants' solicitor, in support of the application. The Defendants' contention is that the Claimant's apparent continuing and significant

disability is deliberately feigned in an attempt to mislead both them and the court.

3. Dr Simon Fleminger, a consultant neuropsychiatrist prepared a report on behalf of the Claimant following an assessment at Mr Patel's home on the 19th of January 2015. In that report he described Mr Patel's appearance on examination:

"At no stage during the interview did Mr Patel acknowledge my presence, with the exception of one occasion when he briefly made eye contact (see below). I found him lying in bed with his eyes closed. His lips would sometimes move. At times his eyelids flickered. When I tried to interact with him by introducing myself and asked him to look my way this caused no immediate reaction. However after a minute or two of talking to him his eyes opened a little. To start with he stared blankly into space without any eye contact. However with a little bit of further stimulation from both me and his son, he did open his eyes and look around, and at one point made eye contact with me lasting a second or two. Blinking rate was generally reduced, but he did blink on occasion. His facial expression was entirely blank. By and large there was very little movement of his face and no movement of arms or legs. At no time did he speak.

When I approached him and put my fingers in his left hand, which was lying limply by his side, and asked him to grab my hand, there was no movement. There was no movement when asked to raise his hand, or asked to open his eyes. The muscle tone in his arms was not increased. I did not undertake a physical examination."

4. Dr Fleminger concluded that:

"The diagnosis for his present state is a severe conversion disorder (synonymous with dissociative disorder and classified alongside the somatoform conditions) with motor and cognitive symptoms. I think this was

triggered by an adjustment reaction and depression following the injury of January 2013. His present state is attributable to the injury of January 2013."

5. In May of 2016 covert surveillance was undertaken on behalf of the Defendants and video footage recorded. The recording shows an asian man in his 60s who can be seen to leave a property accompanied by a younger man; both get into a silver car and are followed as they visit a number of garages in the Leicester area. At each visit the older man gets out of the car, moves around, without any apparent mobility issues, and engages in conversation with both the younger man and third parties. The Defendants say that the older man who can be seen in the video recordings is Mr Patel.

6. Dr Schady, consultant neurologist, prepared a report on behalf of the Defendants following an examination of Mr Patel at his home on the 25th of August 2016. He was unaware of the surveillance evidence at that stage. He reported:

"He lay in bed and made no eye contact. Indeed, his eyes were half closed and his gaze was averted. He lay quietly. He was wearing pyjamas and seemed well cared for. There was no spontaneous movement. He nodded briefly in response to some of my questions but there was no attempt at verbal communication. He breathed regularly and did not appear distressed. He kept his mouth partially open.

There was only a flicker of lateral neck movement on request. He seemed unable to stick out his tongue. There was no response to a loud clap. He blinked to a puff of air but not to visual threat. He rolled his eyes around when I lifted his eyelids. There was no jaw jerk. He offered some resistance to passive movement of his neck and jaw. Firm pressure on his forehead caused him to raise his eyebrows.

There was no voluntary movement in his arms. Muscle tone and bulk were normal. When I raised either arm he held it up for less than a second before

dropping it onto the bed. The best he could achieve on request was a slight flicker of his fingers. Tendon reflexes were normal."

7. Dr Schady concluded:

"Based on my examination alone I cannot make a distinction between feigned disability and a subconscious conversion disorder. I agree with Dr Fleminger that the hallmark of the latter is consistency, ie, unchanging disability regardless of circumstances and whether or not the patient is aware that he is being observed. In Mr Patel's current state it is equally impossible to say whether there may be a small core of organic cognitive impairment. Bearing in mind the rapid recovery of a normal GCS and the resolution of the radiological abnormalities, I would not have expected any permanent brain damage and I would therefore say that no such damage has occurred in Mr Patel's case.

I conclude that there is no neurological basis for Mr Patel's apparent disability or any need for care, assistance, therapy or case management. His ability to engage in standard activities of daily living and his potential to return to employment depends on non neurological factors."

8. Dr Schady was subsequently shown the video recordings and in a letter dated 9th September 2016 identified Mr Patel as the man in the footage and commented:

"Under the circumstances the diagnosis of a conversion disorder is no longer tenable. Mr Patel's disability is feigned. Moreover, this must be evident to his son, his description to us of his father's condition can only be described as frankly deceitful. He lied to us. Mr Patel did not do so, as he did not speak, but his pretence of disablement represents an equally regrettable attempt to deceive, presumably for the purpose of financial gain.

It is now possible to go beyond what I stated in my recent report. Not only is there no neurological explanation for Mr Patel's disability but there is no

medical condition, whether physical or physiological to account for it."

9. If the court came to the same view on the evidence that would plainly give rise to a finding of fundamental dishonesty and would call into question the Claimant's status as a Protected Party and his inability to give evidence at the trial which took place before me.

10. The issue of fundamental dishonesty was raised in a detailed amendment to the defence made by way of an application dated 4th October 2017, some three weeks before the liability trial took place. Prior to this, on the 7th of September 2017, the Defendants' solicitors had written to the Claimant's solicitors disclosing the report and letter from Dr Schady together with the surveillance evidence.

11. The Claimant criticises the late disclosure of this material and draws attention to the possibility that not all of the video surveillance material has been made available. In addition it is said that the Claimant's medical condition since the accident has been complex and that he has not had the opportunity to fully investigate it or to advance a detailed case about the nature of his disability supported by evidence. Nevertheless, and whatever may be the force of those arguments, the Defendants have in my view set out a cogent basis on which make an application under s.57 of the Act and have undertaken to do so forthwith as a condition of any adjournment of the costs application; indeed I am satisfied that they would do so whether or not the costs hearing is adjourned. The question therefore is whether the Claimant is entitled to his costs at this stage notwithstanding that such an application will be made and determined.

12. Mr Hunjan QC, on behalf of the Claimant submitted that it was appropriate to make a costs order in the Claimant's favour for a number of reasons:

    a. First, that the Defendants could have made the application at an earlier stage before costs had been incurred. That submission seems to me to

founder on s. 57(1) of the Act which provides that an application can only be made where *the court finds that the Claimant is entitled to damages in respect of the claim*. Where liability is in issue that stage has not been reached and would never have been reached if the Defendants had been successful at the liability trial. The application has been made at the first reasonable opportunity and the fact that the Defendants intended to make it, if it was necessary to do so, was notified prior to trial.

b. Secondly, that the Claimant has in fact been successful and a s.57 application cannot alter the outcome of the liability trial or the normal costs consequences which follow from the Claimant's success at that hearing. Mr Hunjun added that it was important not to confuse the Claimant losing his entitlement to damages with his right to a costs order. Again I think that submission lies uneasily with the legislation. The question of fundamental dishonesty does not arise until the Claimant has established an entitlement to damages. If Parliament had intended that a Claimant should retain an entitlement to costs relating to liability issues notwithstanding a finding of fundamental dishonesty the legislation might have been expected to have made that clear. It does not. The court must dismiss the whole claim not just the the part on which the Claimant has been found to be dishonest and s. 57(1)(5) provides that *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.*

c. Thirdly, that Defendants should not be given a blank cheque to run up costs simply because the claim might in due course be dismissed. It could equally be said that a defendant should not have to incur costs in defending a dishonest claim and that this is the mischief at which the

legislation is directed even if it results in a defendant avoiding a liability to pay damages and costs which might have arisen if the claim had been formulated and presented honestly. In any event the legislation does not purport to disapply Part 44 of the CPR or prevent a Claimant challenging the reasonableness or proportionality of costs.

d. Fourthly, that there were good pragmatic reasons why the Claimant should have his costs, not least that he was funding disbursements privately and would be at a substantial disadvantage if he was unable to fund quantum evidence and related investigations so that there would not be a level playing field in terms of financial resources. For the reasons I have set out above, in my view the Claimant would not be entitled to his costs of the liability trial if a finding of fundamental dishonesty resulted from the s.57 application and the Claimant was unable to satisfy the court that he would suffer substantial injustice as a result of a dismissal of his claim. The Claimant would have had to have funded disbursements through until the conclusion of the litigation had there not been an order for a split trial of liability and quantum. The fact that a split trial has been ordered is not in my view a principled basis for awarding costs to the Claimant which might simply have to be remitted in the near future. I do not in fact consider it at all likely that the Claimant will have to undertake or fund extensive investigations or evidence in order to meet a s.57 application based on the surveillance and medical material which has been produced by the Defendants in support of their application for an adjournment.

13. In those circumstances I make an order in the terms proposed in the Defendants' draft entering judgment for the Claimant as to 60% of the damages he would be entitled to on full liability but adjourning the determination of costs consequent on the judgment and the applications to the judge hearing the s.57 application.