Neutral Citation Number: [2022] EWHC 197 (QB)

Case No: Appeal Ref: QA 2021 000154
County Court case No; E97YJ062

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 February 2022

Before :

Mr Justice Ritchie

- -

Between :

DORINEL COJANU **Claimant**

- and -

ESSEX PARTNERSHIP UNIVERSITY NHS TRUST **Defendant**

- -
- -

(Gemma McGungle instructed by Jefferies solicitors) for the Claimant
(Cecily White instructed by Hempsons) for the Defendant

Hearing dates: 25 & 26 January 2022

- -

APPROVED JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives and BAILII by email. The date of hand-down is deemed to be as shown above.

Mr Justice Ritchie:

The parties

1. The Claimant, at the time of the relevant events, was on remand at Her Majesty's prison in Bedford.

2. The Defendant is an NHS trust supplying medical services to Bedford prison.

The appeal

3. This judgment is given after the full hearing of the appeal made by the Claimant and cross appeal made by the Defendant from the judgment of Mr. Recorder Gibbons delivered on 11 May 2021 at Norwich County court in the trial of a clinical negligence claim. The Recorder dismissed the claim having found fundamental dishonesty under S.57 of the Criminal Justice and Courts Act 2015 (CJCA) by the Claimant, rejected the Defendant's defence of illegality and assessed damages at £8,500.

4. For the reasons set out below I shall: allow the Claimant's appeal and overturn the Recorder's decision on fundamental dishonesty; reject the Respondent's appeal in relation to illegality, and enter judgment for the Claimant for damages of £17,750 plus interest on pain and suffering to be calculated by the parties.

The Bundles

5. For the appeal I had before me an Appellant's bundle, a Respondent's bundle, skeleton arguments and some late handed up cases. The bundles contained the transcript of the judgment, the pleadings, the Claimant's witness statement in the trial, some of the Claimant's medical evidence and some documents relating to the Claimant's earnings. Importantly the schedule and counter schedule were in the bundles.

6. An application was made on the morning of the 2nd day of the appeal for admission in evidence before me of the whole transcript of the trial but I rejected that because the Appellant made it late, failed to serve the transcript on the Respondent soon after it was received (August 2021) and only wished to rely on two pages which, when read (pages 195/196), added little to any issue in the appeal.

The Claim

7. By a letter before action dated the 22nd of June 2018 the Claimant, through his lawyers, asserted a personal injury claim based on the Defendant's clinical negligence whilst he was on remand at Her Majesty's prison Bedford. The Claimant was admitted to the prison on the 17th of June 2015 with deep cuts to

his right ring and little finger. He asserted that the Defendant cancelled pre-arranged day surgery at the Royal Free Hospital listed for the 22nd of June 2015 and thereafter delayed making arrangements for appropriate treatment of his cut fingers. In relation to causation the Claimant alleged that he would have made a "full recovery" had he had surgery within 10 days of suffering the original injury. The Claimant relied on the prison service order, PSO 3200, which requires that prisoners are provided with an equivalent health service to that provided to members of the public. The claim was funded on a CFA.

8. In its response dated the 8th of November 2021 (I am told that is a printing error, it was 23 October 2018) the Defendant admitted a decision was made on the 19th of June 2015 to cancel the Claimant's appointment for surgery at the Royal Free Hospital. It asserted the treatment was available more locally and that a security risk arose when prisoners were given the dates for their appointments in advance of their appointments. The Defendant asserted that it "wrote" to the Lister hospital on the same day asking for an appointment locally. That was delayed.

9. On the 18th of June 2019 the Claimant issued a claim form against the Defendant and ten other Defendants including the Ministry of Justice. All ten other Defendants were deleted before the claim form was served. The claim form alleged negligence by the Defendant in June 2015 and damages were limited to a maximum value of 5,000 pounds.

10. By his particulars of claim dated the 21st of May 2019 the Claimant asserted that he entered prison on the 17th of June 2015 with a laceration on his ring and little fingers on his right dominant hand and that he had pre-arranged surgery to repair those listed on the 22nd of June. However the Defendant cancelled the pre-arranged surgery and delayed arranging local surgery so that he lost the window of opportunity to have his cut finger tendons repaired. He served a report from a medical expert, Mr Henderson, dated the 18th of September 2018 and a schedule which claimed reconstructive surgery costing £15,000, all other items were unquantified. I note that on the front sheet of that report the Claimant's address is a prison.

11. I find as a fact that the Defendant must have been aware from the letter before action and the pleading that the Defendant was a criminal serving time.

12. In its defence stated 12th July 2019 the Defendant admitted responsibility for the health services at Bedford prison. It admitted cancelling the pre-arranged surgery and pleaded at paragraph 7 that it sent a referral letter to the Lister hospital and denied needing to put on that letter that it was a priority. I mention here that there was no pleading that the letter was sent by fax.

13. On causation the Defendant admitted that repair to the fingers was no longer feasible after the 24th of July 2015 but asserted that the Claimant would not have made a full recovery in any event if the repair operation had been done within the window. The Defendant pleaded that the Claimant needed reconstructive surgery to improve his condition.

14. In November 2019 District Judge Reeves permitted the Claimant to amend the claim form to increase the value to £390,000. The Defendant consented to that order.

15. On the 4th of February 2020 District Judge Reeves gave directions in the action. It was allocated to the multitrack. Disclosure was to take place in January 2020, witness statements were to be served in March 2020, experts on breach and causation were permitted on both sides which were to be served in April 2020 and experts on condition and prognosis were to serve their reports in July 2020. The experts' joint reports were to be provided in September 2020 and an updated schedule by the 23rd of October 2020 with the counter schedule in November 2020. The trial window for three days was listed from January to March 2021.

16. On the 22nd of April 2021 District Judge Spencer granted the Defendant's application to file an amended defence. That amended defence dated the 8th of February 2021 alleged fundamental dishonesty by the Claimant. It alleged that the Claimant had attacked his wife with a knife and stabbed her whilst drunk and whilst their children were in the house. It alleged he injured himself in the attack or whilst resisting arrest. It was alleged that he was convicted of attempted murder in December 2015 and imprisoned. It alleged that the Claimant's served witness statement in the personal injury claim contained evidence that was fundamentally dishonest by stating that the Claimant's wife had attacked him and that he had defended himself from the knife attack and that that was how he came to have cuts to his fingers. In addition, the Defendant pleaded that in February 2016 a surgeon offered reconstruction to the Claimant who said he would think about it but never returned and never took up the offer. In addition, the Defendant pleaded ex turpi causa (illegality) and relied on case law stating that his injuries and the claim were result of his own criminal actions and therefore he should be denied any damages. The amended defence went on to suggest further fundamental dishonesty by the Claimant in that the Claimant's evidence and case relating to quantum was based on various dishonest premises. The Claimant was living in Romania by that time, where surgery was cheaper, the Claimant's claim was premised on loss of earning capacity based on UK salaries and yet he intended to live in Romania and the Defendant relied on section 57 of the Criminal Justice and Courts Act 2015 (CJCA). Three weeks later the trial took place.

17. On the 7th of May 2021 judgment was given for the Defendant by Recorder Gibbons, permission to appeal was refused and the Claimant was ordered to pay the Defendant's costs. There is no mention in the order that the Recorder disapplied QOCS protection.

The appeal

18. By a notice of appeal dated the 14th of July 2021 the Claimant appealed the Recorder's order. The notice of appeal had been filed late and permission to appeal was sought.

19. The grounds of appeal are set out at paragraphs 1a-f and 2 a-c. In summary it was asserted that the decision of the Recorder was wrong in relation to his finding of fundamental dishonesty. In ground 1a it was asserted that any dishonesty in relation to the description of the injury or the mechanism by which it was suffered was not relevant to the negligence claim. By ground 1b it was asserted that the criminal proceedings were not a related claim within section 57. By ground 1c it was asserted that the Recorder was wrong in concluding that the Claimant's evidence on the mechanism of injury was "very far from the true picture". In ground 1d it was asserted that the Recorder was wrong to find that the schedule assumed the Claimant would be living in the UK rather than Romania. In ground 1e it was asserted that the Recorder was wrong to find a lack of evidence of employment in Romania. In ground 1f it was asserted that the Recorder failed to take into account the nature of the claim for *Smith v Manchester* damages and failed to take into account that the sum pleaded for the costs of medical treatment was supported by expert evidence.

20. In ground 2a it was asserted that the Recorder wrongly assessed pain suffering and loss of amenity too low at £8,500. At 2b it was asserted that the Recorder was wrong to assess the *Smith v Manchester* claim and the surgery claims at nil. In ground 2c it was asserted that the Recorder was wrong assessing the care and DIY which was pleaded out in the schedule at nil.

21. By an order dated the 18th of August 2021 Mr Justice Stewart gave permission to appeal out of time and granted an extension of time for filing off the appeal bundle.

22. On the 13th of October 2021 Mr Justice Henshaw gave permission to appeal and as his reasoning given was: that it was arguable that dishonesty relating to the cause of injury was not relevant; that the Claimant had made it clear that he was living in Romania in his evidence and, that the Recorder ignored evidence of employment in Romania. For the reasons set out below I agree.

23. On the 27th of October 2021 the Respondent appealed the Recorder's decision as well. The Recorder had decided to dismiss the defence of ex turpi causa

(illegality) and the Respondent sought a finding on appeal that illegality applied as a full defence.

24. More recently Mr Justice Cotter extended the time for the hearing of this appeal to 1.5 days and this appeal was heard before me on the 25th of January 2022 and trickled over into the 26th.

Appeals

25. By CPR 52.21 this appeal is limited to a review of the decision of the lower court unless the court considers it would be in the interests of justice to hold a rehearing. In addition, the appeal will be allowed if the court considers that the decision of the lower court was either (a) wrong; or (b) unjust because of a serious procedural or other irregularity in the proceedings. In addition, by sub-rule (4) this court may draw any inference of fact which it considers justified on the evidence.

The judgment below

26. Between paragraphs 1 and 28 the Recorder considered liability and found against the Defendant ruling that the Defendant failed to fax the referral letter dated the 19th of June 2015 and as a result the Defendant was negligent. The Recorder then went on to consider quantum and the defences of fundamental dishonesty, illegality and contributory negligence.

27. The Recorder dismissed the assertion of contributory negligence.

28. At paragraph 30 the Recorder found that the Claimant had 50% functionality of his right hand. He would have had 80% functionality had the breach not occurred. He would only have had 65% functionality had he taken the option of reconstruction surgery with physiotherapy (which the Claimant had chosen to not to do whilst in prison). Therefore, the Claimant had lost 15% of the functionality of his right hand.

29. The Recorder then turned to deal with the defences of fundamental dishonesty, illegality and the evidence relating to those. At paragraph 31 the Recorder found that the Claimant had been fundamentally dishonest in his claim in a number of respects. Firstly, the Claimant had made no mention of the real cause of his injury in either his letter before action or his statement of case. Secondly, in his witness statement the Recorder judge found that the Claimant described an altercation with his wife which was very far from the true picture. The Recorder found the Claimant perpetrated a misleading impression to the experts as part of the claim never mentioning his conviction for attempted murder. The Recorder noted that the Claimant in his evidence in court persisted to claim his injury resulted from his wife's attack on him with a knife. In addition, the Claimant claimed that his deportation from the United Kingdom would not have

happened if he had not consented to it. All of those the Recorder found to be untruthful.

30. In relation to quantum, at paragraph 32, the Recorder found the Claimant increased the limit on the value of his claim from a limit of £5,000 in May 2019 to £390,000 and then in his schedule claimed £125,300. The Recorder found that all the elements in the schedule other than general damages assumed that the Claimant lived and worked in the UK despite the fact that before the schedule was served and filed the Defendant had been deported to Romania.

31. At paragraph 33 the Recorder found that the claim for special damages made by the Claimant was based upon him being employed in the UK as a Carpenter. The Recorder rejected the Claimant's lawyer's suggestion in submissions that these were simple calculation approaches by the lawyers, not dishonest assertions by the Claimant himself. The Recorder found an evidential gap stating he found little evidence of any sustained employment either in the UK or in Romania. The Recorder found that, at most, the Claimant had earned a few 100 pounds over many years since 2008 during a rather chequered employment history. The Recorder found that the Claimant had no earnings in the UK for the year in which he was in the UK before the offence was committed.

32. Paragraph 34 the Recorder found that the Claimant had no identifiable occupation which could support evidence of regular earnings that would enable the court to quantify a *Smith v Manchester* award and found that the claim for loss of earning capacity was "grossly inflated". Again the Recorder commented that the Claimant had no realistic possibility of living and working in the UK and yet claimed damages on the basis of a carpenter's salary in the UK and the cost of care in the UK and the costs of medical treatment in the UK.

33. At paragraph 35 the Recorder found that the inflated claim on quantum had a substantial and adverse effect on the Defendant's approach to the claim employing different tactics and making different decisions relating to experts.

34. At paragraph 36 the Recorder found that substantial elements of the claim for special damages were fundamentally dishonest and dismissed the entirety of the claim under section 57.

35. As he was obliged to do the Recorder then assessed damages despite the S.57 ruling. The award would have been £8,500 for pain and suffering and the Recorder made no award for the private cost of medical treatment in Romania because no evidence was put before the court in relation to the costs or availability of medical care in Romania. For the same reason, lack of evidence of the Claimant's employability in Romania, the Recorder made no award in relation to *Smith v Manchester*. The Recorder went on to find that paragraph 41

that the Claimant that still retained work capacity in a broad range of employments but noted the Claimant chose not to lead the necessary evidence to prove those aspects of his claim.

36. Finally at paragraph 42 the Recorder dismissed the defence of illegality on the stated basis that the facts of the case were different from the facts in Henderson v Dorset (2020) UK SC43.

Fundamental dishonesty

37. The defence of fundamental dishonesty is a statutory creation. S.57 of the CJCA 2015 created the defence.

38. The political, business and policy background to S.57 does not need stating here, it is summarised in chapter 8 of *Kemp & Kemp on Quantum* and chapter 42 of *Kemp Law Practice and Procedure.* Suffice to say that Parliament intended that Claimants who bring fraudulent claims in whole or in part are to be deprived of the damages which they would otherwise have recovered under valid parts of their claims if they are found to have been fundamentally dishonest. A penalty was therefore intended as the price of the dishonesty. The only escape from the penalty was the creation of the S.57(2): substantial injustice relief. I set the Act out below in full:

> **"S. 57 Personal injury claims: cases of fundamental dishonesty**
>
> (1) This section applies where, in proceedings on a claim for damages in respect of personal injury ("the primary claim")—
>
> (a) the court finds that the Claimant is entitled to damages in respect of the claim, but
>
> (b) 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.
>
> (6) If a claim is dismissed under this section, subsection (7) applies to—

> (a) any subsequent criminal proceedings against the Claimant in respect of the fundamental dishonesty mentioned in subsection (1)(b), and
>
> (b) any subsequent proceedings for contempt of court against the Claimant in respect of that dishonesty.
>
> (7) If the court in those proceedings finds the Claimant guilty of an offence or of contempt of court, it must have regard to the dismissal of the primary claim under this section when sentencing the Claimant or otherwise disposing of the proceedings.
>
> (8) In this section—
>
> "claim" includes a counter-claim and, accordingly, "Claimant" includes a counter-Claimant and "Defendant" includes a Defendant to a counter-claim;
>
> "personal injury" includes any disease and any other impairment of a person's physical or mental condition;
>
> "related claim" means a claim for damages in respect of personal injury which is made—
>
> (a) in connection with the same incident or series of incidents in connection with which the primary claim is made, and
>
> (b) by a person other than the person who made the primary claim."

Case law on fundamental dishonesty

39. To succeed in proving this defence the first matter to note is that the Defendant carries the burden of proof. The second is that the civil standard applies. The third is that the Defendant must prove that the Claimant was:

> "fundamentally dishonest in relation to the primary claim".

There is no issue in this appeal relating to any related claim as counsel for the appellant conceded in submissions when ground 1b was abandoned.

40. Guidance has been provided in quite a few cases since the Act came into force on 13 April 2015. But I shall start with a case decided before the Act which is directly relevant.

41. In Gosling v Hailo (case number IUD17868) Cambridge County Court (Westlaw), HHJ Moloney QC decided an application under CPR r 44.16 to disapply the QOCS (qualified one-way costs shifting) protection afforded to Claimants in personal injury claims when conditional fee agreements were revised in the 2000s. The Defendant asserted fundamental dishonesty by the Claimant in his personal injury claim relying on video evidence showing the Claimant doing what he said he could not do. He claimed much larger sums but settled with D1 for £5,000 and costs and discontinued against D2. D2 sought

to have the costs protection lifted so that it could recover costs against the Claimant. The judge had no case law to look back upon so decided the case from first principles and the wording of the CPR. No oral evidence was heard and the hearing proceeded on paper. The judge was not prepared to find that the Claimant had been fundamentally dishonest about the facts relating to the liability issue. However on quantum the evidence was clearer. The judge stated that the video evidence was "devastating" to the Claimant's evidence of his disabilities (para 34). He then considered what "fundamental dishonesty" meant:

> "43. The Claimant's first submission in relation to this evidence was that, even if I accepted that that evidence was proof of some degree of culpable exaggeration on the Claimant's part, it would not make the claim fundamentally dishonest as a matter of law. This requires consideration to be given of what is meant by a fundamentally dishonest claim in the context of these rules. Neither party took me to any authority on the term in question. Of course, the term "fundamental" is used in various legal contexts that are of little assistance to us here. Dictionary definitions were produced and relied upon; for example, that which was fundamental was "of, or pertaining to, the basis or groundwork of something", "going to the root of the matter", "serving as the base or foundation", "essential or indispensable".
>
> 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."

42. If this approach applies to this appeal before me then I glean from the judgment that dishonesty in relation to incidental or collateral matters is not "fundamental".

43. After the CJCA 2015 came into force the Court of Appeal had an opportunity to consider the words "fundamental dishonesty" in another QOCS case: Howlett

v Davies [2017] EWCA civ 1696. This was a simple road traffic case in which the two Claimants asserted they were passengers in a car driven by the Defendant which crashed. The Defendant put the Claimants to proof of the accident. They did not plead fraud but did cross examine and make submissions in closing of dishonesty. A district judge dismissed the claim rejecting the Claimants' evidence (the passengers) and the Defendant's evidence (the driver). LJ Newey giving the lead and only judgment noted HHJ Moloney QC's ruling in Gosling with approval (paras 16-17). Nothing more was added in that judgment.

44. In the same year Knowles J considered the words "fundamental dishonesty" in relation to a S.57 defence in and appeal in London … Olympic v Sinfield [2018] EWHC 51. This was a personal injury claim in which liability was admitted and the trial related to assessment of quantum. In the defence the Defendant asserted fundamental dishonesty by the Claimant. The Claimant had suffered injuries to his left arm and wrist. He claimed damages including gardening expenses which he asserted were caused by the injuries. His schedule asserted that he did the gardening before the accident and after he hired a gardener at a cost of £4,922 to the date of the schedule and more in future amounting to a total of £13,953. The trial judge found that the Claimant manufactured invoices from the gardener, albeit they did reflect modestly the work which the gardener actually did carry out. The judge also found that the Claimant employed a gardener before the accident. The judge found that the said dishonesty was fundamental to the claim for gardening expenses but not the rest of the claim and was peripheral and ruled that it would be unjust to prevent the Claimant recovering his other damages. So fundamental dishonesty was not proven.

45. The Defendant appealed. Knowles J reviewed the case law on striking out and fundamental dishonesty under QOCS and CPR r.44.16. He reviewed Gosling and Howlett and some county court cases (see paras 57-60) and transcripts of speeches in the House of Lords during the passage of the bill. He then ruled as follows:

> "62. In my judgment, a Claimant should be found to be fundamentally dishonest within the meaning of s 57(1)(b) if the Defendant proves on a balance of probabilities that the Claimant has acted dishonestly in relation to the primary claim and/or a related claim (as defined in s 57(8)), and that he has thus substantially affected the presentation of his case, either in respects of liability or quantum, in a way which potentially adversely affected the Defendant in a significant way, judged in the context of the particular facts and circumstances of the litigation. Dishonesty is to be judged according to the test set out by the Supreme Court in *Ivey v Genting Casinos Limited (t/a Crockfords Club*), supra.

> 63. By using the formulation 'substantially affects' I am intending to convey the same idea as the expressions 'going to the root' or 'going to the heart' of the claim. By potentially affecting the Defendant's liability in a significant way 'in the context of the particular facts and circumstances of the litigation' I mean (for example) that a dishonest claim for special damages of £9000 in a claim worth £10 000 in its entirety should be judged to significantly affect the Defendant's interests, notwithstanding that the Defendant may be a multi-billion pound insurer to whom £9000 is a trivial sum.
> 64. Where an application is made by a Defendant for the dismissal of a claim under s 57 the court should:
>
> a. Firstly, consider whether the Claimant is entitled to damages in respect of the claim. If he concludes that the Claimant is not so entitled, that is the end of the matter, although the judge may have to go on to consider whether to disapply QOCS pursuant to CPR r 44.16.
> b. If the judge concludes that the Claimant is entitled to damages, the judge must determine whether the Defendant has proved to the civil standard that the Claimant has been fundamentally dishonest in relation to the primary claim and/or a related claim in the sense that I have explained;
> c. If the judge is so satisfied then the judge must dismiss the claim including, by virtue of s 57(3), any element of the primary claim in respect of which the Claimant has not been dishonest unless, in accordance with s 57(2), the judge is satisfied that the Claimant would suffer substantial injustice if the claim were dismissed.
>
> 65. Given the infinite variety of circumstances which might arise, I prefer not to try and be prescriptive as to what sort of facts might satisfy the test of substantial injustice. However, it seems to me plain that substantial injustice must mean more than the *mere* fact that the Claimant will lose his damages for those heads of claim that are not tainted with dishonesty. That must be so because of s 57(3). Parliament plainly intended that sub-section to be punitive and to operate as a deterrent. It was enacted so that Claimants who are tempted to dishonestly exaggerate their claims know that if they do, and they are discovered, the default position is that they will lose their entire damages. It seems to me that it would effectively neuter the effect of s 57(3) if dishonest Claimants were able to retain their 'honest' damages by pleading substantial injustice on the basis of the loss of those damages *per se*. What will generally be required is some substantial injustice arising as a consequence of the loss of those damages."

46. Knowles J allowed the appeal, found that the Claimant had been fundamentally dishonest in his claim about the gardening expenses and dismissed the claim. What Knowles J introduced to the understanding of S.57 is consideration of the prejudice or adverse effect on the Defendant caused by the dishonesty found by the court which needed in his judgment to be "significant". In addition, he explained "fundamental" on the basis of the need for the dishonesty to have been proven to have had a "substantial affect" on the presentation of the case on liability or quantum in the context of the facts and in the circumstances. He

used that phrase to cover dishonesty "going to the root of the claim" or "at the heart of the claim".

47. I extract from this judgment and the previous case law that there are 5 steps to be taken by a trial judge when faced with a defence under S.57 before a finding can be made of fundamental dishonesty:
    i) the S.57 defence should be pleaded;
    ii) the burden of proof lies on the Defendant to the civil standard;
    iii) a finding of dishonesty by the Claimant is necessary (more on this below);
    iv) as to the the subject matter of the dishonesty, to be fundamental it must relate to a matter fundamental in the claim. Dishonesty relating to a matter incidental or collateral to the claim is not sufficient;
    v) as to the effect of the dishonesty, to be fundamental it must have a substantial effect on the presentation of the claim.

48. The additional steps to be taken to make a dishonesty finding were considered by the Supreme Court in Ivey v Genting Casinos [2017] UKSC 67. Lord Hughes JSC analysed the differences between the test in criminal law and civil law and ruled as follows:

> "62 Dishonesty is by no means confined to the criminal law. Civil actions may also frequently raise the question whether an action was honest or dishonest. The liability of an accessory to a breach of trust is, for example, not strict, as the liability of the trustee is, but (absent an exoneration clause) is fault-based. Negligence is not sufficient. Nothing less than dishonest assistance will suffice. Successive cases at the highest level have decided that the test of dishonesty is objective. After some hesitation in *Twinsectra Ltd v Yardley* [2002] 2 AC 164, the law is settled on the objective test set out by Lord Nicholls of Birkenhead in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378: see *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476, *Abou-Rahmah v Abacha* [2007] Bus LR 220 and *Starglade Properties Ltd v Nash* [2011] Lloyd's Rep FC 102. The test now clearly established was explained thus in *the Barlow Clowes* case, para 10 by Lord Hoffmann, who had been a party also to the *Twinsectra* case:
>
> > "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 a correct state of the law and their Lordships agree."
>
> 63 Although the House of Lords and Privy Council were careful in these cases to confine their decisions to civil cases, there can be no logical or

> principled basis for the meaning of dishonesty (as distinct from the standards of proof by which it must be established) to differ according to whether it arises in a civil action or a criminal prosecution. Dishonesty is a simple, if occasionally imprecise, English word. It would be an affront to the law if its meaning differed according to the kind of proceedings in which it arose. It is easy enough to envisage cases where precisely the same behaviour, by the same person, falls to be examined in both kinds of proceeding."

He went on to rule that:

> "74 These several considerations provide convincing grounds for holding that the second leg of the test propounded in *R v Ghosh* [1982] QB 1053 does not correctly represent the law and that directions based upon it ought no longer to be given. The test of dishonesty is as set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 and by Lord Hoffmann in *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476, para 10: see para 62 above. When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the Defendant must appreciate that what he has done is, by those standards, dishonest."

49. I take from this ruling that the test for the trial judge to apply when considering making a finding of dishonesty is:

(A) firstly to find on the evidence as a fact what the Claimant's state of mind was at the relevant time on the relevant matters; and

(B) secondly to apply an objective standard to decide whether the Claimant's conduct was dishonest as alleged.

Therefore my step (iii) above has two parts to it: A & B.

50. In a case with similar facts to the current appeal: Razumas v MoJ [2018] EWHC 2015, Cockerell J was tasked with determining fundamental dishonesty alleged against a prisoner who received negligent care whilst serving a prison sentence resulting in an above the knee amputation due to a tumour growing in his leg. The judgment is instructive for the current appeal because Cockerell J had the benefit of the law relating to the duty of care owed by the Defendant in that case to prisoners before her and she summarised the law between paragraphs 7 and 23. There was no dispute that whichever public body was responsible (the MoJ or the NHS) the duty owed to prisoners in relation to medical care was the same

as that owed to all members of the public. It is called the principle of equivalence. I highlight paragraphs 12 -14 which are set out below:

> "12. Prior to 1st January 2010, rule 20(1) of the Prison Rules 1999 provided: "*The medical officer of a prison shall have the care of the health, mental and physical, of the prisoners in that prison*". This rule was amended by the Prison and Young Offender Institution (Amendment) Rules 2009. It now provides that: "*The governor must work in partnership with local health care providers to secure the provision to prisoners of access to the same quality and range of services as the general public receives from the National Health Service*".
> 13. This change reflects what it is common ground was a transfer of headline statutory responsibility from the Defendant to the Department of Health and the NHS. The reason for the change was to improve the chances of giving effect to the principle of "equivalence", ensuring that prisoners had the same access to health as those in the community. This came about because under the old system there had been concerns that prisoners were disadvantaged in accessing healthcare and in ensuring continuity of healthcare when not in prison. Prisoners are repeatedly identified in the documents leading up to the change, and in the documents generated under it, as a particularly vulnerable group in healthcare terms.
> 14. Equivalence also means that in addition to ensuring that the same standard of healthcare is available steps are taken to make sure that, when receiving healthcare, insofar as it is compatible with the custodial setting, a prisoner is treated as a patient. This means that he is afforded the same rights as he would have in the community; a right to refuse treatment, a right to confidential medical consultations and to data protection for his medical records. These are all specifically provided for."

51. In this appeal the principle of equivalence was not in issue between the parties and the Recorder found that the Defendant breached its duty of care to the Claimant and as a result the Claimant suffered permanent injury to the little and ring fingers on his dominant right hand amounting to 15% of the function thereof.

52. In Razumas the Claimant developed cancer whilst in prison and this went untreated. He was out and in prison and never told of the forthcoming appointment because that would give rise to a security risk of planned escape. He was a drug user and committed crimes to feed his habit. Having determined liability Cockerell J addressed fundamental dishonesty in paras. 203 onwards. She adopted Knowles J's approach to the test in Olympic v Sinfield. She found that the Claimant had been dishonest in relation to the following evidence: that when he returned to prison in July 2012 Mr Razumas told the healthcare staff that he had attended a GP and been given a date for an operation at a hospital for the removal of the lump. This was also his pleaded case – identifying Newham as the hospital (para.195). The judge found that he had not sought that

treatment – which would have solved his problem. Tying this to the issue of whether it was fundamental Cockerell J noted:

> "203. The Defendant points out that this conclusion as to Mr Razumas' evidence means the positive averment and allegation in the Particulars of Claim (and repeated in Mr Razumas' evidence) was false to his knowledge. It submits that it follows that he has sought to base one of his allegations of negligence on a false assertion that he sought treatment, and this means that he has been *"fundamentally dishonest"* in an aspect of his claim and the claim fails pursuant to section 57 of the Criminal Justice and Courts Act 2015. "

She then ruled as follows:

> "212 ….Did Mr Razumas act dishonestly in relation to the primary claim and/or a related claim? To this the answer must be yes. He has one main claim, and the dishonesty went to one route to succeed on it in full. Has he thus substantially affected the presentation of his case, either in respect of liability or quantum, in a way which potentially adversely affected the Defendant in a significant way? Again the answer must be yes. The argument which he advanced went to an entire factual section and pleaded occasion which would have entitled relief on the main claim. Thus the first part, fundamental dishonesty is made out."

53. This is an example of dishonesty relating to a cause of action being identified as going to the root of the claim or put the Olympic way, dishonesty which substantially affects the claim and has an adverse effect on the Defendant's defence of the claim and the presentation of the claim itself. So it was held to have been "fundamental".

Applying the law to the facts in this appeal

Dishonesty as to the cause of the cut fingers

54. Recorder Gibbons found that the Claimant's evidence about how his fingers became cut was "very far from the true picture". He also found that the Claimant gave evidence in relation to his deportation which was clearly "not the case". In paragraph 31 he listed those two dishonesty findings just after the following lines:

> "Put briefly they say that the Defendant has been fundamentally dishonest. I find this to be true in a number of respects."

Setting aside the incorrect use of the word "Defendant" which I take must have meant "Claimant", there is a challenge to the finding of the Recorder that the Claimant was dishonest in relation to his evidence to the court about how he came to be cut. Ms. McGungle bravely sought to argue that there was insufficient evidence upon which to base that finding. I did not have the full transcript of the Claimant's evidence before me so could not assess that. I

consider that an Appellant cannot prove a lack of evidence at trial by failing to put the evidence at trial before the appellate court.

55. However in the Respondent's bundle were the Crown Court judge's sentencing remarks when the Claimant was sentenced to 11 years in prison for the attempted murder of his wife which crime was committed on 16 June 2015. On 15 December 2015 HHJ Catterson sentenced the Claimant (using an interpreter to help him understand) after he was found guilty by a jury. The judge stated that the Claimant came into the kitchen when his wife was cooking, he picked up an 8 inch bladed knife, he stabbed her twice down the front of her chest penetrating her abdominal cavity and once in her back as she was bent over. He then stopped the attack. Their 3 children were in the house. At trial the Claimant had denied the offences and denied stabbing his wife and asserted that she stabbed herself before he entered the kitchen. He was found guilty. The jury must have found an intention to murder for that is part of the offence. The attack was not pre-meditated. The Claimant was of previous good character, but the victim asserted a history of domestic violence and drinking by the Claimant. I note that the judge stated that the Claimant "worked in low paid work in the building trade" and had financial troubles. He had come to the UK in June 2014.

56. In his witness statement in the civil claim the Claimant still asserted that his cut fingers were caused by his wife attacking him with the knife. On this fact the Recorder found him to be dishonest. True it is that the Recorder did not break down the finding in the way it should have been broken down according to the guidance in Ivey, but the reasoning is clear. The Claimant did not tell the Recorder the truth about how he got the cut during his crime.

57. I take into account the settled case law which sets out that findings of fact are difficult to overturn on appeal: Per Lloyd LJ in Cook v Thomas [2010] EWCA civ 227 at [48]:

> "an appellate court can hardly ever overturn primary findings of fact by a trial judge who has seen the witnesses give evidence in a case in which credibility is in issue."

I dismiss the Appellant's ground 1.c for the reasons set out above. The Recorder's dishonesty ruling relating to the Claimant's evidence about his crime and cut fingers remains. However, in ground 1a. the Appellant sought to persuade the court that any dishonesty relating to the mechanism by which the Claimant was cut was not "fundamental" to the claim. For the reasons set out below I agree.

58. Soon after his arrest the Claimant was taken to the Royal Free hospital, treated and patched up there and an appointment was made to repair his cut fingers one week later in day surgery.

59. 3 days after the Claimant's fingers were cut and whilst he was in prison the negligence occurred. Having cancelled his listed repair operation at the Royal Free the Recorder found that on 19 June 2015 the Defendant was negligent in failing to fax the urgent referral letter to the Lister hospital. The Defendant therefore deprived the Claimant of his "day case" surgical repair operation.

60. The issues in the civil claim on liability were: (1) whether the referral letter was posted or faxed, if it was not faxed negligence was admitted and (2) the extent to which the symptoms which the Claimant was suffering from the cuts were caused by the failure to repair the cuts in the 10 week window after the injury. There was agreement between the medical experts that this would be 15% of the loss of use of the right dominant hand.

61. I consider that the mechanism by which the Claimant received his cut was irrelevant to success in the clinical negligence claim. The Claimant did not need to prove how he was cut to win the civil action. He was injured before admission to prison. At that time he was not convicted of anything. It matters not whether he had suffered the injury opening a tin of beans, in gang warfare or whilst attempting to murder his wife. In the civil claim at first the Claimant said nothing of the cause of the cuts. Nor did he need to. Later, when the defendant pleaded it out, the Claimant lied about the cause. The Claimant was being dishonest in relation to his crime, during which he was injured and for which he has never admitted his guilt. But the cause of the cut fingers has no relevance to the clinical negligence claim. In my judgment the mechanism of how he cut his finger is incidental to the claim or collateral thereto.

62. The dishonesty in relation to how he suffered the cut only connected with the civil claim because it impinged on the Claimant's credibility, and even then only in relation to his crime. The Claimant's credibility on that issue was not relevant directly to his evidence in the civil claim and did not affect the liability part of the trial because liability was determined on expert evidence not the Claimant's evidence.

63. This gives rise to the question: "can dishonesty affecting the Claimant's credibility in relation to a crime he has committed before the civil claim (and his deportation at the end of his sentence), be fundamental to the evidence on quantum in the civil claim?". Or using the Knowles J wording: "does the Claimant's dishonesty about his crime which affects his credibility when giving evidence about the crime, go to the heart or the root of the civil claim?" In addition, I must ask: "does the Claimant's credibility on that issue have a

significant adverse effect on the way the Defendant should run its defence on liability or quantum?"

64. I have already found that this had no effect on liability. What about quantum?

65. Firstly, all citizens are equally entitled to come before the courts in civil claims. Those with a long list of previous convictions and those without. Some will have better credibility than others, but S.57 is not a credibility filter barring those with previous convictions from bringing civil actions. S.57 focusses on the claim and the matters fundamental thereto and the Claimant conduct therein.

66. Secondly, the Defendant made great play of finding out itself about the Claimant's conviction for attempted murder and then deciding to amend the defence as a result. But the medical report of Mr Bainbridge dated 1.3.2018 set out that he was in prison and the letter before action set out the same. That he was a convicted criminal was an open fact which was not to be avoided. I consider that there was no reason for the Claimant to mention his crime in the letter before action or the statement of claim. It was not a necessary part of the claim. He had nothing to prove in relation to the crime. Insurers and the NHS have to deal with every English and Welsh citizen who is injured. They cannot and do not turn away criminals or any other classes of person. The should and do not discriminate against patients on any ground. The same applies to the civil law. So I consider that this man, who has been convicted and found guilty of the horrific attempted murder of his wife, is not deprived of his right to sue simply because he was convicted or because he was at trial and still is dishonest about what happened during his crime.

67. I understand that in relation to proof of quantum of suffering by a criminal the Defendant would have become much more wary of the Claimant's earning potential due to his criminal conviction but that is part of the factual matrix of any claim by a convicted criminal. Negligent defendants must take their victims as they find them. Not all victims are angels. On quantum the Defendant was no doubt more wary of any assertion the Claimant might make in relation to loss and expense because of the conviction. His lies relating thereto may have increased that wariness. Suspicion and wariness is what occurs in many cases when Claimants, for a wide range of reasons (some psychiatric, some emotional, some educational, some cultural, some criminal) show themselves to be unreliable in some aspect of their own evidence. But I do not perceive these challenges to be within the mischief target of S.57. The primary rationale for S.57 is to stamp out fraudulent and dishonest claims not to bar unrepentant or "in denial" criminals from the civil law.

68. On quantum the only change which the Claimant's dishonesty as to his crime brought about was the amened pleading of the defence by the addition of S.57

and of illegality by the Defendant. The detail of the quantum in the counter schedule dealt with his low earnings and patchy work history and the fact he was a criminal but it did not substantially change the way the quantum defence was approached.

69. Finally, a yardstick I used to measure whether the dishonesty of the Claimant about his crime and deportation was fundamental to the civil claim was to ask what would be the wider effect of such a finding? Regrettably there are hundreds of drugs related gang stabbings in London and around England each year. Young men cut and kill each other over territory and drugs or other matters. If every one of those who were brought into hospital or prison and who denied criminality or starting the fight (and yet was convicted) is to be deprived of any civil claim when the hospital negligently cuts off the wrong leg or fails to treat the young man at all (because he is presumed to be a criminal), then the common duty of care owed by the NHS to all residents would be wholly undermined and likewise the will of Parliament when it imposed the equality principle for medical treatment of prisoners.

70. I rule that the Claimant's dishonesty about his crime was not fundamental to either liability or quantum in the civil claim.

Dishonesty as to quantum

71. The Recorder's finding of fundamental dishonesty on quantum related to two factual findings: the correct country for the assessment of damages and the size of the scheduled calculations of the claim. So the Recorder found as follows:

> "33. The special damages the Claimant has put forward relate to losses which are based upon him being employed in the UK as a carpenter. These, I find, are claims which are not just open to legitimate argument due to differences of legal or professional approach to the calculation of damages but, rather, they are predicated on wholly false premises. The Claimant has produced little evidence of any sustained employment either here or in Romania. He has at the most earned some few hundreds of pounds over many years, since 2008, during a rather chequered employment history. He had no earnings in the United Kingdom for the year he was in the UK before the index offence was committed.
>
> 34. He had no identifiable occupation, which is supported by evidence of regular earnings such as would enable the Court to quantify a *Smith v Manchester* award. This element is grossly inflated, which even a superficial comparison with what little documentation there is in the bundle to prove his earnings since 2008 would show. This approach is compounded by the fact that the Defendant knew full well since May of 2016 that he was to be deported at the end of his sentence and that therefore there was no realistic possibility of him living and working in the United Kingdom on his release.

> 35. Miss White submitted to me that an inflated claim on quantum will have a substantial adverse effect on the Defendant's approach to the claim and affect how they would deal with it. She refers me to a passage in *London Organising Committee of the Olympic and Paralympic Games (in liquidation) v Haydn Sinfield* [2018] EWHC 51 (QB). That is referred to in her skeleton argument. I agree with that submission. The Defendant would have been influenced to adopt different tactics, make different decisions on expert evidence and view the litigation risk entirely differently."
>
> "36. Taking all these factors into account, I find that substantial elements of the claim, namely the claims for special damages, are fundamentally dishonest. The entirety of the claim is therefore dismissed on this ground, pursuant to section 57."

72. The Claimant's evidence, so far as it was relevant and in the appeal bundles, was that he would not be able to do his job as a builder "in Romania" (para 17 of his witness statement). The evidence clearly showed that he did some work in prison. He wrote that when he returns to Romania (his witness statement was signed on 20.2.2020 and served the month after, whilst he was in prison) he would keep horses, cows and sheep and he was worried about the restriction his fingers injury would cause (para 23). He asserted he would be unable to go back to meaningful work as a builder "when I return to Romania".

73. When counsel drafted his updated schedule dated 11.12.2020 the Claimant had been long since deported to Romania. The deportation occurred in March-June 2020. Despite this his barrister drafted the schedule relying on UK earnings rates for the *Smith v Manchester* claim and UK care rates for the care claim and UK surgery costs for the medical costs claim.

74. I consider that counsel's calculation using UK figures for medical costs, care and loss of earnings capacity was irrelevant and wrong in law. The UK figures were as irrelevant as were the builders' rates of pay in Monte Carlo or the costs of surgery in New York.

75. The schedule was signed by the Claimant's solicitor. I was provided with no evidence about the factual circumstances relating to the authority given by the Claimant to the solicitor to sign the schedule and the statement of truth attached thereto. The solicitor was not called at the trial. Neither side put any part of the transcript before me relating to this. The Recorder made no findings about the Claimant's evidence about when or even if he gave authority to sign the schedule.

76. I infer under CPR 52.21(4) that the schedule was signed with the Claimant's approval, but he was a Romania builder who needed a translator to understand

English and was in Romania at the time. If presented with an English barrister's schedule of loss, premised on English Law, how could he challenge the way it had been drafted? I do not see how the errors in the drafting of the schedule on the method of calculation of a *Smith v Manchester* award or the other heads of loss can be laid at the Claimant's door and in any event I do not consider that they are proof of dishonesty by the Claimant.

77. In addition, the Claimant did not say in his witness statement that he relied on UK wages rates. No doubt he has never heard of the UK Government's ASHE earnings figures for carpenters which his barrister used in the schedule.

78. I also take into account that the Defendant of course saw through the Claimant's lawyers' errors in the schedule. In the counter schedule, dated 8.2.2021, the Defendant descended into liability submissions (which were themselves irrelevant to quantum) but then on quantum, quite properly they asserted that the UK salary and earnings rates for carpenters were irrelevant and put forwards Romanian employment rates for carpenters at £7,300 pa. Likewise, they asserted Romanian medical costs for surgery would be £3,000 and for physiotherapy they offered £100. For DIY and care, on Romanian rates, they admitted a sum of £2,500. All of the above quantifications were subject to their defences of S.57 and illegality.

79. The Defendant did not put before me any evidence to show that the Claimant himself asserted in his own evidence that he thought he could earn UK builder's rates in Romania or have surgery in the UK. His evidence was that he had been deported to Romania and wanted to work there.

80. But all the evidence shows it was drafted wrongly by his lawyers and the Defendant rightly pleaded out the errors in their counter schedule. I note that even after service of the counter schedule the Claimant's lawyers did not redraft the schedule despite their errors over irrelevant evidence and law having been pointed out to them. In her submission to me Miss McGungle frankly admitted that the errors were hers and took responsibility for them as she did before the trial judge. It is to her great credit that she did so. I do not understand on what evidence the Recorder could have found that the Claimant himself was dishonest in the way his schedule was drafted in relation to the country issue.

81. Turning then to the next issue. It was pleaded that the schedule was "inflated" by the Claimant and was "predicated on a wholly false approach". A dishonesty finding made by the Recorder which appears to rest on the assertion that damages were "inflated". I must therefore look at the claim and the counter schedule and identify the issues.

82. The *Smith v Manchester* damages were claimed on the basis of 2 years loss of earnings. In law the multiplicand for *Smith v Manchester* awards is either the annual salary the Claimant used to earn or that which he will earn in future. Ignoring the Claimant's lawyers' errors in using the UK figures for a carpenter, the Defendant's admitted that a Romanian carpenter would earn 7,300 pa. So the issue between the parties on the multiplicand was which figure to use. Despite this admission by the Defendant, the Recorder refused to find that the Claimant had any earning capacity and found that there was insufficient evidence of earnings. However, the documentation at trial showed the Claimant had low earnings in Romania in 2008, they were 6,381 RON between Feb and Oct 2008. There was no documentary evidence between 2009 and 2014. He also had low earnings in the UK between the summer of 2014 when he arrived and June 2015 when he was arrested, the figure was £775. The documents also showed that the Claimant was made bankrupt in 2006 in Romania. The Recorder also had evidence of his employment as a carpenter in 2005, 2006 and 2008 with official Romanian stamps on the documents and various employers' names. The judge did not mention these in his judgment.

83. *Smith v Manchester* awards are summarised in *Kemp on Quantum* at chapter 10-025. They are rarely awarded in recent years because the changes to the Ogden Tables multipliers take into account loss of earning capacity in the disabled multipliers. However they usually run at between 3 months and 2.5 years and occasionally up to 5 years, with the multiplicand for the assessment being the annual wage for the Claimant's work. The range and size of awards is set out at 10-034 to 10-036. The evidence necessary for a loss of capacity on the labour market award is (1) medical evidence of permanent disability (2) evidence from the Claimant that he wishes to work to support himself and his family and his assertion that the injury affects his ability to do the work he is educated or trained for and (3) if the Claimant is in employment evidence from his employers.

84. For this Claimant whose injury is permanent and who was 30 at the date of the negligence with a working life to say 65 or 68 and who was in occasional manual work before the negligence, there can be no doubt in my judgment that he has lost some work capacity over the course of his working life.

85. The Recorder made findings about the Claimant's pre-negligence work history stating that he "produced little evidence of any sustained employment either her or in Romania. He has earned some few hundred pounds over many years since 2008 during a rather chequered employment history, and he had "no earnings" in the UK for the year before the index offence.

86. Those findings are not in accordance with the documentary evidence before the Recorder. The Claimant earned and declared £775 between the summer of 2014 and the offence and 6,381 Ron in 8 months in 2008.

87. In ground 1d the Appellant contends that the Recorder was wrong to find that the schedule of loss assumed that the Claimant was living and working in the UK rather than Romania. In submissions that was explained as the Recorder being wrong to find that the Claimant dishonestly asserted he would be working in the UK, earning UK rates. I consider that the Recorder did fall into error. He conflagrated the failings of the Claimant's lawyers in their drafting of the schedule, which was drafted wrongly in law and based on irrelevant evidence, with the Claimant's own evidence which was true and honest in that he asserted he was afraid because he was likely to be deprived of work capacity in Romania either tending livestock or as a carpenter/builder.

88. I consider that the Recorder failed properly or at all to consider and apply the 5 steps required to make a finding of dishonesty in relation to the Claimant's evidence on quantum, in particular as set out in Ivey v Genting which I have summarised above.

89. The Recorder failed to assess the Claimant's state of mind as a fact and then failed to apply an objective standard to assess whether the Claimant's conduct was dishonest.

90. I rule that the findings in paragraphs 33, 34 and 36 of the judgment in relation to dishonesty by the Claimant were reached using the wrong test in law, not based on appropriate findings of fact and in addition were unjust to the Claimant on the following matters:

    i) Para 33 of the judgment: I find that the claim was constructed by the Claimant's lawyers on a premise which was irrelevant and was not in accordance with the Claimant's evidence or the law. I find that there was no finding of fact made by the Recorder that the Claimant made any such assertion in evidence and no finding of fact as to what the Claimant was thinking when the schedule was authorised to be signed by his solicitor. Without that evidence the Recorder was wrong to make a finding of dishonesty in relation to the schedule. In addition, there was no finding that objectively the Claimant's state of mind, when he approved the solicitor signing the schedule, and his his conduct (if he did) was dishonest.

    ii) Para 34: I find that the *Smith v Manchester* award was not grossly inflated by the Claimant himself nor did the Recorder make any findings

about what was in the Claimant's mind relating to loss of earning capacity save what he said in his witness statement about his fears for being unable to carry out builders work or livestock husbandry in Romania. The finding that the Claimant knew full well that he was to be deported to Romania and was so deported is nothing to the point. The Recorder misdirected his criticism of the Claimant's lawyers' errors and aimed them at the Claimant. The Recorder failed to apply the correct test to make findings of dishonesty against the Claimant in this paragraph.

iii) Para 36: the finding that substantial elements of the claim namely for special damages were fundamentally dishonest was wrong in law because the Recorder did not apply the 5 necessary steps set out above and specifically the sub steps in Ivey v Genting to the Claimant's state of mind and conduct in authorising the signature on the schedule drafted by his counsel. There can be no criticism of the Claimant's written witness statement which clearly evidenced that he intended to live and work in Romania.

91. In ground 1e the Appellant asserts that the Recorder "was wrong" to conclude that there was a lack of evidence of the Claimant's employment in Romania. I do not uphold that ground of appeal. There was evidence of employment in Romania in 2008 but none thereafter. The finding of the Recorder was that there was little evidence of sustained employment since 2008. Where the judge fell again into error was in relation to the evidence of income in the UK when he found that he had "no UK earnings".

92. I consider that the incorrect pleading and the failure to quantify the claim properly by the Claimant's lawyers in the schedule is not in this case a fundamental dishonesty. It was not a dishonesty at all. In addition, on the facts of this case inadequate pleading is not within the mischief which Parliament aimed to prevent by the passing of S.57. Nor is incompetence, carelessness, negligence or mere omission by the lawyers. The section requires proof of the Claimant's dishonesty not his lawyers' lack of competence. It may be a moot point whether that includes the dishonesty of his lawyers (none is asserted here) but that may be an issue for another case, it was not in issue before me in this appeal.

Ruling on fundamental dishonesty

93. Therefore for the reasons set out above I do not consider that the findings of dishonesty made by the judge in relation to the background and lead up to the civil claim, namely the crime and the way in which the Claimant came to suffer the cut fingers, to be sufficient to come within the term fundamental dishonesty relating to the claim and hence that dishonesty finding falls outside S.57.

94. In addition, I consider that the judge's findings of dishonesty against the Claimant in relation to quantum were wrongly made because he failed to apply the correct 5 step test in law of dishonesty to the facts. For that reason, the Claimant's evidence on quantum does not come within the S.57 ambit.

Illegality

95. The Recorder dismissed the defence of illegality and I agree with that decision.

96. The Respondent's case was and on appeal is that the crime which the Claimant committed bars the Claimant from making the clinical negligence claim. The Respondent relied on Vellino V CC Manchester [2001] EWCA civ 1249; Gray v Thames Trains [2009] EWCA civ 713 and Henderson v Dorsett [2020] AC 563.

97. I draw from those cases inter alia the principle that for ex turpi causa to provide a full defence to a tortfeasor in a personal injury / clinical negligence claim the Claimant's civil claim must be founded on the criminal act or inextricably linked thereto (see Vellino at para 70 Per Sir Murray Stuart-Smith). In my judgment there was no inextricable link between the clinical negligence claim and the crime and the former was provable without reference to the latter. The crime was not a necessary part of the claim. The claim could be won without any mention of it.

98. In Gray it was held that public policy should prevent criminals from recovering damages as a result of their own crimes (Per Lord Hoffman at para 29). In my judgment the loss which the Claimant suffered in the civil claim (15% of his right hand function due to the Defendant's clinical negligence), was not caused by the crime, it was caused by the Defendant's breach of duty in failing to arrange the repair operation.

99. Lord Hoffman also reasoned that it would be offensive to public notions of the fair distribution of the resources of public funds if they were paid to criminals arising from their crimes (para 51). But in Gray the factual matrix was very different. The Defendant's negligence caused the Claimant to suffer PTSD and whilst suffering that condition he killed another man and was thereafter found guilty of manslaughter on the grounds of diminished responsibility and detained under the Mental Health Act. He made the claim for damages arising from the actions he took in killing another person. His claim arose out of his crime. The negligence preceded the crime and caused it.

100. In contrast, in this appeal the Claimant seeks damages for clinical negligence for failing in prison to arrange speedy repair to cuts on his hand which he

suffered during a crime he had committed before he entered prison. The negligence post dated the crime and did not cause it.

101. Nor do I perceive any public approbation for an award of damages to a criminal just because he is a criminal. All are equal before the law. There can be no barring of criminals from their civil rights as some form of additional punishment when the power to punish them is held by the criminal courts. In any event as set out above the law protects the basic human rights of criminals in prison by granting them equivalent rights to NHS treatment to all members of the public. Only Parliament could alter that.

102. I have also considered the judgment of Lord Hamblen JSC in Henderson at paras 58, 66-68, 116, 127-129, 138-145. I do not consider that there is a close connection between the crime and the civil claim. There is no connection. They were separate events.

103. Using the policy balance test set out by Lord Hamblen, I do not consider that public policy is sufficiently engaged to deprive the Claimant of his right to damages in the civil claim and I do not consider that the courts should use the common law doctrine of illegality to take away the force and effect of the decisions of Parliament to grant convicted and unconvicted persons in prison the equivalent rights to NHS care as are afforded to other members of the public.

104. For the above reasons I dismiss the Respondent's appeal.

Quantum

105. The Appellant appeals the awards made by the Recorder on quantum.

106. PSL: Having considered the Judicial College Guidelines I have found no valid grounds for overturning the Recorder's assessment of damages for pain and suffering which he set at £8,500. I do consider that it was a low award, in particular when I take into account that the Defendant suggested that £10,000 would be "appropriate" in the counter schedule (para 12), but not so low that I could rule it was wrong in law. However, the Recorder made no award of interest and that cannot be correct. I award interest at 2% pa from the date of service of the claim form.

107. Smith v Manchester: I have carefully considered whether the Recorder's refusal to award damages for *Smith v Manchester* loss of capacity was wrong. I consider that it was. This young man is now in his mid-30s. He has 3 children. His injury is permanent and is to his dominant right hand. He was a manual labourer or carpenter. The medical evidence shows that his earning capacity in manual labour is reduced. The Defendant maintained that no award should be made on

the basis of their asserted full defences under S.57 and for illegality, however should those fail the Defendant admitted in its counter schedule as follows:

> "16. The Defendant therefore avers that an award reflecting a Romanian wage for 6 months employment would be appropriate (approximately £3,650)."

108. The Recorder rejected any award under this head on the basis that the Claimant had failed to prove that he had any identifiable occupation or regular earnings. Certainly there was poor evidence of income. However the Recorder had the Claimant's hard work in prison which showed he was not work shy. The other evidence in the Romanian documents showed he was a carpenter and had quite a few employers in Romania between 2005 and 2008. He was also in work earning declared sums in the UK (albeit low) in the 12 months before the crime. In my judgment this is not evidence which should have been completely ignored.

109. The Defendant admitted and asserted in its pleadings that the annual wage for carpenters in Romania was £7,300 pa. I consider that the Defendant was bound by those pleaded admissions (made conditional on them not winning their substantive defences) and the Recorder should have dealt with the real issue which was: should the Defendant's or the Claimant's calculations be accepted or something in between? I consider that the Recorder failed to focus on the issues in the pleadings. I rule that he fell into error and should have chosen the Defendant's case and so the award should have been £3,650 as set out in the defence.

110. Medical costs: The Defendant admitted that, subject to the substantive defences failing, the costs of surgery in Romania would be £3,000 with physio costing £100.

111. I was informed by both counsel that although the Claimant's legal team had a letter from Mr Henderson advising on the costs of reconstruction surgery in the UK they failed to put that before the trial judge hence did not put in evidence. In any event the UK costs was not the yardstick. Nor did the Claimant lead any evidence of the cost of such surgery in Romania.

112. The Recorder found that the Claimant had failed to prove that there was any private medical surgery in Romania and failed to evidence the costs thereof. To expect the Claimant to prove in an English court that a European Union member state has private medical care has an air of unreality about it. It assumes that the Recorder started with the assumption that everything had to be proven, judicial notice does not exist and it fails to focus on real issues. This court takes

judicial notice of the fact that as an EU state Romania has both NHS style hospitals and private hospitals numbered in the hundreds.

113. I have considered whether the Appellant failed to prove that he would actually have a reconstruction operation in future if he received an award to fund it. However, no such finding was made by the Recorder. On the evidence before the Recorder the finding he made was that the Claimant was offered the surgery by Mr Goon whilst he was in prison (amended defence para 6) but his refusal was sensible as the Recorder so found at para 40 of the judgment due to the problematic two stage repair and the need for physiotherapy which would be difficult whilst in prison. The Claimant's witness statement makes it clear in paragraph after paragraph that he did want reconstruction surgery. It was not the Defendant's case that the Claimant would have had the surgery done in the Romanian NHS.

114. I rule that the Recorder misdirected himself in relation to what was necessary to be proven in relation to medical expenses. There was no pleaded issue as to the existence of private medical care in Romania and the Defendant admitted the costs would be £3,000 for the operation. The Claimant failed to prove a higher cost so £3,000 plus physio of £100 which was admitted should have been awarded.

115. DIY and Care: The medical experts agreed the Claimant would need two months off work after the reconstruction surgery. The Claimant sought care for that period but on the wrong rates (UK rates). There was no evidence in the Claimant's witness statement in relation to care, DIY or assistance. The Defendant admitted the need (subject to their substantive defences) for post operative care and assistance of £2,500. The issue was to decide between the two cases or choose a figure in between. I consider that the Recorder fell into error in failing to award the Defendant's admitted sums.

116. Total award:

I make the following awards and note the Recorder's award which remains:

i)	Psl	£8,500 (the Recorder's award)
ii)	Interest thereon at 2% pa from the date of service of the claim form	
iii)	Past loss: NIL	
Future loss:		
iv)	Smith v Manchester:	£3,650
v)	Medical expenses	£3,100
vi)	Care post operation:	£2,500
Total:		**£17,750**

plus interest on general damages.

Conclusion

117. The appeal is allowed. The Recorder's findings of fundamental dishonesty and the whole of the order made by Recorder Gibbons on 11 May 2021 are set aside.

118. The cross appeal is refused.

119. Judgment is entered for the Claimant/Appellant for £17,750 plus interest on general damages at 2% from the date of service of proceedings. The damages awards for loss of earning capacity, medical expenses and care are set aside. The different awards made herein are set out above.

120. **Costs:** I award the Appellant the costs of the appeal and of the claim to be paid by the Respondent on the standard basis to be assessed if not agreed.

121. I have considered the Respondent's submission that the Respondent should only pay 66.66% of the Claimant's costs because the Appellants lawyer's identified errors in the drafting of the schedule of loss set out above. There is power for me to do so in CPR r.44.2. I have considered the authorities relied on by the Respondent: *Widlake v BAA* [2009] EWCA civ 1256 and *Morton v Portal* [2010] EWHC 1804 and *Gregson v Hussein* [2010] EWHC civ 165. I do not make such an order. There were two substantive defences raised by the Defendant at the trial and one on the appeal and both defences have failed. Those defences took up a substantial amount of the trial and the whole of the appeal.

Ritchie J