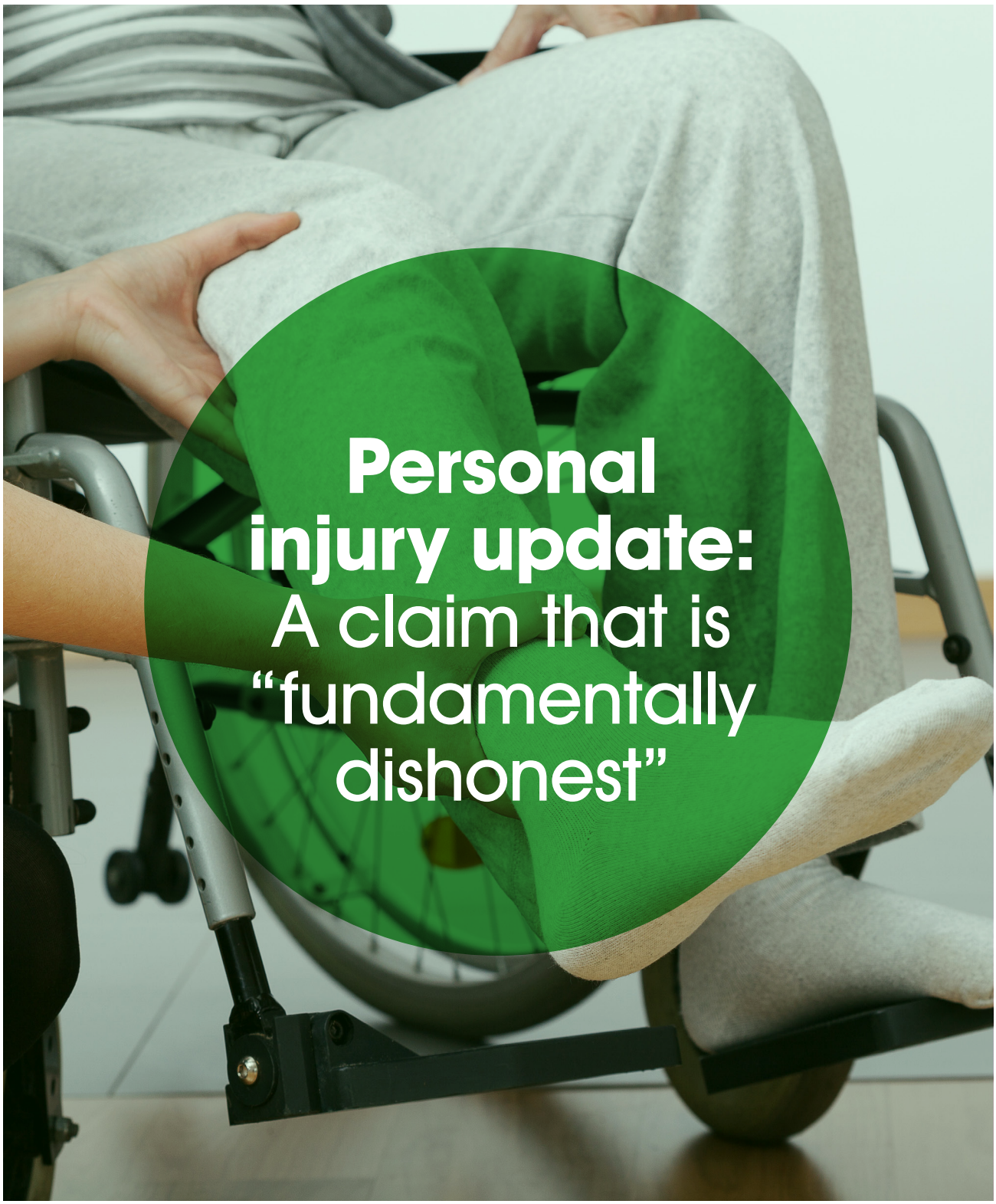
Andrew Jackson
Solicitors LLP



Personal injury update: A claim that is "fundamentally dishonest"

In the recent case of Howlett v Davies, in October 2017, the Court of Appeal considered the correct approach to issues of fundamental dishonesty in what is a crucial decision for claimants and defendants alike.

The case initially came before Deputy District Judge Taylor, who was asked to decide whether two claimants should pay the defendant's costs when they lost their case. The defendant had not pleaded "fraud" in the defence.

Since 2013, claimants in personal injury cases have had the benefit of Qualified One-way Costs Shifting (QOCS), meaning that if they lose their claim they do not have to pay the defendant's costs. However, the important point is that costs protection is lost if the claim is "fundamentally dishonest" and the claimant will then have to pay the defendant's costs. At first instance, the Deputy District Judge found for the defendant insurer. The case was appealed to the Court of Appeal.

The defence clearly set out various allegations against the claimants, putting the claimants to proof that they had actually been in a car when a collision occurred, and that they had actually been injured, referring to a lack of co-operation after the alleged accident; the failure to seek medical attention at the time; the failure to attend physiotherapy during the claim and the fact that the defendant driver had been in four accidents in the previous two years.

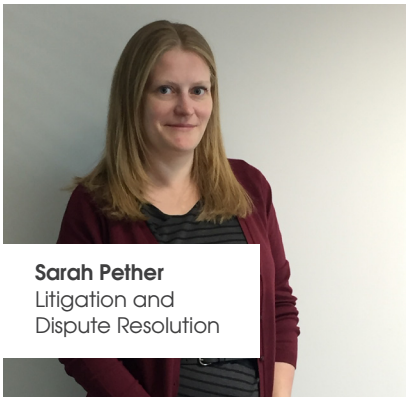
The insurer specifically stated in the defence that the facts were "indicative of a staged/contrived accident." The claimants' case was that the failure to allege "fraud" in the defence meant that they could not be deprived of the protection of QOCS.

Fundamental dishonesty

However, the judge at first instance had found that the two claimants were not believable and had, in fact, been dishonest when giving their evidence. He also found that there had been "fundamental dishonesty" for the purpose of the costs rules. On appeal, the Court of Appeal pointed out that a defendant who alleged fraud faced a substantial evidential burden to prove it as they were not present when the alleged accident occurred.

The issue was whether the claimants had sufficient notice of the allegations and had a proper opportunity to deal with them. As the defence expressly stated that the insurer did "not accept the index accident occurred as alleged, or at all," credibility was in issue and the reference to a "staged/contrived" accident gave the claimants sufficient notice of the issues that would be raised at trial.

The first instance judge was entitled to find there was fundamental dishonesty based on the evidence he heard and the claimants lost the QOCS protection due to their fundamental dishonesty.



Sarah Pether
Litigation and Dispute Resolution

Summary

The Court of Appeal's judgment will no doubt be welcomed by insurers and fraud practitioners, who are faced with the evidential burden of proving fraud.

Whilst the Court of Appeal has confirmed that fundamental dishonesty does not need to be pleaded, care should still be taken when drafting a defence to ensure that the claimant is given fair warning of the defendant's contentions before the case comes to trial.

Shortly after the Howlett appeal, in December 2017 the High Court gave its judgment on a related issue in Liverpool Victoria Insurance v Yavuz and held that lying in witness statements, schedules of loss and statements of case amount to contempt of court for which prison sentences could be given.

For further help and guidance with personal injury claims, please get in touch with Sarah Pether, an associate in our Litigation and Dispute Resolution department, by emailing sarah.pether@andrewjackson.co.uk or speak to one of the team today by calling 01482 325242