

TRAWLING FOR THE TRUTH: duties of care to self-employed crew, and defending claims on the basis of Fundamental Dishonesty.

[Lambert v VJ Glover Ltd & Friday, “REJOICE” \[2019\] EWHC 776 \(Admlty\)](#)

By [James Watthey](#), who appeared for the successful defendants and their P&I Club, instructed by Keoghs LLP.

1. Given how many professional seamen (especially in the fishing industry) have self-employed status, the law on what duties of care are owed to them by shipowners has been surprisingly unclear. Indeed, the only recent law on “share fishermen” (self-employed fishermen who take a share of the catch) has related to their tax status.
2. Those dealing with the concept of Fundamental Dishonesty under the Criminal Justice and Courts Act 2015 are also faced with a lack of guidance, especially on the relationship between this concept and the simple preference of one party’s evidence over another’s.
3. In a judgment handed down on 27th March 2019, the Admiralty Court has now provided a much-needed steer on both issues.

The factual background and contested evidence

3. The MFV “REJOICE” is a scalloper operating from Brixham. The Claimant was a regular deckhand on her, and the defendants were her owner and skipper.
4. On the evening of 6th October 2016, she was lying starboard-side to a quay wall in the “new fishing harbour” in the south-west corner of Brixham Harbour. This was a reasonably sheltered spot but there was undoubtedly heavy weather that night and boats in the harbour were moving around a fair bit.
5. Mr Lambert’s case was that REJOICE’s movement on her berth was made worse and more dangerous because she was only moored with one line for’ard and aft, inadequately fendered and poorly lit. He also claimed that he was ordered to discharge Hoover bags full of spilt protein powder over the side of the vessel into the harbour.
6. Each of these allegations were rejected at trial, but it was common ground that Mr Lambert had been emptying the bags over the side, and indeed over the starboard side, between the vessel and the quay wall, while his left hand rested on a scallop dredge draped over the starboard gunwale.



7. The precise mechanism of the injury only became apparent during cross-examination. The quay wall was faced with vertical piles faced with rubber strips. Mr Lambert's hand was crushed when REJOICE contacted those strips while his hand was over the side.
8. There was no doubt that Mr Lambert suffered a serious injury and that it has affected his personal and working life. At one point, it was suggested that his PSLA, care costs and loss of earnings were in the region of £800,000.
9. Soon after the incident, Mr Lambert had a Facebook Messenger conversation in which he asked the Skipper, Carl Friday, to support his allegations and offered him a substantial sum of money if he did so. It was admitted that these messages were sent, but Mr Lambert said that it was not dishonest conduct because he was only asking Mr Friday to support a truthful account. He also produced a further message (the authenticity of which was disputed and never resolved so that it was left out of account by the Registrar) in which Mr Friday apparently apologised for failing to support Mr Lambert's story and apparently said that his defence of the claim was itself based on lies.
10. The questions were:
 1. What duty and standard of care did Owners and Mr Friday owe to Mr Lambert as a self-employed crewman?
 2. Was that duty satisfied?
 3. To what extent did Mr Lambert cause his own injuries?
 4. If the claim was otherwise a "good" one, was the Court nevertheless required to dismiss it on the basis of Fundamental Dishonesty, due to the attempted offer of money referred to above?

The duty and standard of care to share fishermen

11. Mr Lambert's pleaded case had been that he was entitled to the protection of various Merchant Shipping and general workplace Regulations. By trial, he conceded that this was wrong because they had no application to self-employed crew. He said nevertheless that they would "inform the duty of care"; the Admiralty Registrar rejected this notion in submissions and no mention was made of the Regulations in the judgment.
12. Mr Lambert also pleaded "duties at common law and/or pursuant to an implied contract" to provide a safe working environment and a safe system of work, and a common duty of care under the Occupiers' Liability Act. These were also rejected in submissions and did not feature in the judgment.
13. Against this, it was submitted by the Defendants that the duty and standard of care had to be judged against the inherent danger of life as an offshore fisherman, and that an experienced deckhand had to take responsibility for his own safety so far as he reasonably could.



14. The Admiralty Registrar began by explicitly recognising that seafaring life is hard and dangerous, and that fishing is sadly all the more so. It is a profession that carries “inherent risks” and therefore some extent those who choose that life are “volunteers to the ordinary dangers involved in the industry such as working on an unstable platform in whatever weather conditions are being experienced”.
15. Nevertheless, it was confirmed that self-employed seafarers are owed a duty of care by their skipper as follows:

“a skipper owes a duty to his crew not to negligently expose them to dangerous situations from which they cannot protect themselves by the exercise of good seamanship”.
16. Owners will be vicariously liable for the acts of their employed skipper, or perhaps one over which they have a large degree of control, but Mr Friday was self-employed too so there was no room for that concept to operate. The only basis for liability of Owners in this context was therefore under the Occupiers’ Liability Act, which required them to ensure “that both the equipment is in good order and that the person appointed as skipper is reasonably competent”.
17. Meanwhile the corollary is that a fisherman is expected to exercise good seamanship, which “invariably involves the exercise of common sense as exemplified by the old adage *‘one hand for the ship and one hand for yourself’* with respect to how a seaman ship perform his duties”.

Application to the facts

18. On the findings of fact referred to above, none of the allegations of breach by Owners or the skipper were made out. Mr Lambert was simply asked to clear up the galley and neither this nor the disposal of the powder overboard was inherently dangerous “provided that the member of the crew doing that did not place a part of his body in an obviously dangerous place”.
19. The fact that REJOICE was moving around in the heavy weather was “obvious to those onboard” and “it is a fundamental tenet of good seamanship not to place any part of one’s body between any part of a ship and a jetty whatever the weather conditions. This is something which is, or should be, obvious to every person in any way involved in the operation of any vessel however large or small”.
20. Thus on the facts, the Admiralty Registrar held that the casualty was caused by Mr Lambert “failing to take sensible and reasonable care of himself”.

Fundamental dishonesty

21. Given the dismissal of the claim on the “traditional” basis, Fundamental Dishonesty did not need to be considered, and it was not. Nor would it be right (at least for me) to speculate on what findings might have been made. However, the judgment is an interesting illustration of how the pleaded dishonesty can be used to assess witness credibility.



22. Section 57 provides that where:

“(1)(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.”

23. London Organising Committee of the Olympic and Paralympic Games v Sinfield [2018] EWHC 51 remains the leading case on the meaning of Fundamental Dishonesty:

“...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 ... 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.”

24. The Fundamental Dishonesty pleaded in the Defence was an offer of money to Mr Friday to persuade him to back up Mr Lambert’s story.

25. Because the claim failed, the Court did not need to grapple with whether this satisfied the statutory test as interpreted in Sinfield, or indeed the issue of substantial injustice; but the very same factor was regarded by the Admiralty Registrar as relevant to the more familiar question of witness credibility:

“Mr Watthey has submitted that the court should take cognisance of the Claimant’s conduct insofar as it is relevant to the credibility of the Claimant as a witness. In my view whether and, if so, to what extent the court should do so must depend upon the circumstances of each individual case”.

26. On the facts, the Admiralty Registrar took into account evidence that Mr Lambert had been under stress when sending the messages, but could see no honest reason why anyone would offer money to a witness:

“There is, effectively, a clear offer to share the damages recoverable from the insurers if [Mr Friday] agrees to support Mr Lambert’s version of events, at least with respect to the ropes, fenders and lighting. Whichever version of events the court accepts that appears to me to be an attempt to suborn a witness which can never be the act of an honest man. In my view that is an aspect which I should bear in mind when considering the Claimant’s evidence as a whole”.



What to take home from this judgment

27. This judgment offers no direct guidance on the test for a finding of Fundamental Dishonest but is nevertheless an interesting illustration of the relationship between than concept and more familiar ideas of witness credibility:
1. Every case will depend on its own facts and it will be interesting to see how often a claimant who has been found to be a dishonest witness will nevertheless get his case over the line so that s.57 has to be considered.
 2. Perhaps this is more likely to happen where there is very clear evidence on liability but the claimant has exaggerated quantum (like in *Johnson v Quainoo* [2017] 6 WLUK 614 and *Stanton v Hunter* [2017] 3 WLUK 797).
28. Most important is the Admiralty Registrar's typically robust approach in:
1. establishing for the first time in English law the duty of care owed by skippers and shipowners to self-employed crew; and
 2. reminding us what can be expected of experienced seamen in terms of ensuring their own safety.
29. Ultimately, there must be a safety first approach, proper training and equipment, a good dose of common sense and a constant regard to the requirements of good seamanship from everyone involved in the endeavour. These are and always will be needed if we are to keep our mariners as safe as can reasonably be expected.

James Watthey

28th March 2019

