



NINESTJOHNSTREET

SENTENCING FOR CIVIL CONTEMPT IN PERSONAL INJURY CLAIMS: PRACTICE AND PROCEDURE

1. INTRODUCTION

- 1.1 This paper considers the practice and procedure for sentencing in civil contempt cases arising out of personal injury litigation.
- 1.2 The types of civil contempt that the Court will most likely pass sentence on are:
- (i) False statements in a document, prepared in anticipation of or during proceedings and verified by a statement of truth, without honest belief in its truth pursuant to CPR 32.14.
 - (ii) Interference or attempt to interfere or conspiracy to interfere with the administration of justice.
- 1.3 This paper is not directed to the substantive law of contentious contempt of proceedings, its focus is specific to the process and exercise of sentencing a contemnor for contempt.
- 1.4 In a significant proportion of cases the contempt will be admitted because the underlying elements will have been established in previous civil proceedings either by finding of facts by the trial judge¹ or withdrawal of a claim upon receipt of the material relied on to demonstrate the dishonest conduct.

¹ See paragraphs 34 -39 of **Aviva Insurance Ltd v Kovacic [2017] EWHC 2772 (QB)** in which Spencer J held that a Circuit Judge's findings were conclusive evidence on the issues determined unless new material relevant to the point becomes available.



NINESTJOHNSTREET

- 1.5 It is useful for solicitors and clients to understand the end point of the pursuit of contempt proceedings. What is its purpose in the eyes of the law? What is the likely result applied to the facts of a particular case?
- 1.6 The advent of fundamental dishonesty (s.57 of the Criminal Justice and Courts Act 2015), the prevalence of social media, the availability of private investigators to effect surveillance, increased technological documenting of medico-legal examinations and the revised wording of the statement of truth in CPR pleadings and witness statements have all conspired to result in a statistical upsurge in potential cases of contempt.
- 1.7 The Editors to Arlidge, Eady and Smith on Contempt (5th Edition) comment in the Preface that,

“There have been a surprising number of cases arising out of fraudulent claims for compensation ... dishonest claims and witness statements do not necessarily reach the stage where they are tested at trial, because there may be sufficiently persuasive to lead insurers to settle at an earlier stage. Unless such activities are positively discouraged by the imposition of custodial penalties, the consequences could well be corrosive – quite apart from the impact on insurance premiums”.

- 1.8 Discerning case selection should remain the guiding star of any threshold test before actively pursuing contempt of proceedings particularly in light of the criminal standard of proof and it should be remembered that findings by a Circuit Judge or a District Judge or District Judge do not bind the High Court.

2. THE PURPOSE OF CIVIL CONTEMPT

- 2.1 The purpose of the law of civil contempt is, for the most part, either coercive or punitive. Civil contempt should not be regarded as giving rise to a “private



NINESTJOHNSTREET

law right”.² In reality there is no remedial function to contempt in English law because damages are not available for contempt. In the words of Lord Donaldson MR:

“Proceedings for contempt of court are always in a rather special category because they are intended to uphold the authority of the court and to make certain that its orders are obeyed. They are not intended to provide solace or compensation to the plaintiff. If the plaintiff wants compensation, she must seek it in other forms”.³

2.2 The public policy rationale underlining punishment for civil contempt was reaffirmed by Jackson LJ in **JSC BTA Bank v Solodchenko [2011] EWCA Civ 1241** at [45] as follows:

“The sentence for such contempt performs a number of functions. First, it upholds the authority of the Court by punishing the contemnor and deterring others. Such punishment has nothing to do with the dignity of the court and everything to do with the public interest that court orders should be obeyed. Secondly, in some instances, it provides an incentive for belated compliance, because the contemnor may seek a reduction or discharge of sentence if he subsequently purges his contempt by complying with the court order in question”.

2.3 The continuing value of the contempt jurisdiction more generally was also highlighted⁴ where Rix LJ stated that:

“The authorities demonstrate that it is vital for the court, in the interest of justice, to have affective powers, and affective sanctions. Without these, it would be possible for a defendant (or, in a different situation, a claimant) to fly out the orders of the court, which are the Courts considered means by which to keep the scales of justice for the parties even. If once it became known that the Court was unable or unwilling to maintain the effectiveness of its orders, then it would lose all control over litigation of this kind, with terrible consequences for the administration of justice”.

² See Chapter 3 – 6 of Arlidge et al on Contempt (5th Edition).

³ **Johnson v Walton [1990] 1 FLR 350 at 353 D-E** per Lord Donaldson MR.

⁴ In **JCS BTA Bank v Ablyazov [2012] EWCA Civ 1411**.



NINESTJOHNSTREET

2.4 Whilst the context of the two **JSC BTA Bank** cases arise in the context of a breach of the Court's Order it is contended that the logic underpinning the stated importance of contempt is equally applicable to personal injury claims where Claimants have falsely claimed for monies for which they are not entitled.

3. THE POWER OF THE COURT

3.1 The power to imprison for contempt is a common law power.

3.2 Section 14(1) of the Contempt of Court Act 1981 states:

“In any case where a Court has power to commit a person to prison for contempt of Court and (apart from this provision) no limitation applies to the period of committal, the committal shall (without prejudice to the power of the Court to order his earlier discharge) be for a fixed term, and that term shall not on any occasion exceed 2 years in the case of a committal by a superior Court, or 1 month in the case of a committal by an inferior Court”.

3.3 The overall sentence cannot exceed 2 years, i.e. if there are a number of acts of contempt; there is a limit to the overall sentence.

3.4 The general intention of the Act is that the “occasion” referred to in s. 14(1) is the hearing of which the sentence is imposed, or a suspended sentence is activated, irrespective of the number of contempt's or applications with which the Court is concerned⁵.

3.5 Whether or not or extant contempt allegations must all be dealt with on the same occasion is a matter of the discretion or judgment of the Judge on a fact

⁵ See Chapter 14–16 of Arlidge on contempt (5th Edition) and footnote 58 in the text which leaves open the notion that consecutive sentences can be imposed in some circumstances.



NINESTJOHNSTREET

specific basis, see **Villiers v Villiers [1994] 1 WLR 493** [at 500] but in contempt proceedings involving personal injury litigation in almost all cases there will be one sentencing hearing to deal with all allegations of contempt. Sentence must be for a fixed term.

3.6 Pursuant to s. 258 of the Criminal Justice Act 2003, a contemnor will only actually serve half the sentence ordered. Release is unconditional and contains no parole provision.

3.7 There are also powers to fine or make a suspended order.

- (i) A suspended sentence is a custodial sentence.
- (ii) Only a prison sentence can be suspended.
- (iii) The length of the committed period should be decided without reference to whether or not it is suspended.
- (iv) The period should normally be fixed.
- (v) Conditions should be stated.
- (vi) The period of suspension should not be disproportionate to the sentence.

3.8 Delay is relevant to sentencing:

- (i) **South Wales Fire & Rescue v Smith [2011] EWHC 1749** [at paragraph 23]:
It is vital that such cases are dealt with urgency and speed, so that the all-important message of deterrence can be underlined.
- (ii) **Aviva Insurance v Kovacic [2017] unreported 7.11.17**, a 3 month sentence was suspended when the contempt was 4 years earlier and it had taken 12



NINESTJOHNSTREET

months to issue the application, even though the delay was not the insurers fault.

3.9 In **Aspect Capital v Christensen [2010] EWHC (Ch) 744**⁶ Mr Justice Lewison⁷ referred to valuable guidance to be found in **Crystal Mews Limited v Metterick [2006] EWHC 3087 (Ch)**. He also added his own observations:

- Any custodial sentence should be as short as possible consistent with the circumstances of the case [51].
- The execution of a custodial sentence may be suspended for such period or on such terms as the Court thinks fit (*in reality this means no prison sentence at all*) [51].
- A fine of an unlimited amount may be ordered (*this should be contrasted with any outstanding cost orders or likely cost orders*) [51].
- Whether the contemnor has acted under pressure [51].
- Whether the contemnor has co-operated (*perhaps provision of information leading to detection of other frauds*) [51].
- Whether the contempt has been admitted (*i.e., analogist to receiving credit for a guilty plea in criminal proceedings*).
- A sincere apology.
- Whether the admission is frank.
- Character and antecedents.

⁶ This was a breach of Freezing Order and so not everything said in the case is relevant.

⁷ As he was then.



NINESTJOHNSTREET

- Sentence of a civil court for contempt should not be manifestly discrepant with a sentence in a criminal Court based on the same facts (*perjury usually leads to a custodial sentence in the criminal courts*)⁸.

4. PERSONAL INJURY SPECIFIC EXAMPLES

- 4.1 In **South Wales Fire & Rescue Services v Smith [2011] EWHC 1749 (Admin)** the divisional Court stated that the context of false and lying statements advancing a claim for compensation so interfering with the administration of justice a custodial sentence could be expected.
- 4.2 Contempt involving the invention of a personal injury claim is viewed as more serious and exaggeration of a personal injury claim, see **Liverpool Victoria Insurance Company v Bashir & Ors [2012] EWHC 895 (Admin)**.
- 4.3 A typical sentence in a contrived accident case is 1 year, generally after admission e.g., **Liverpool Victoria Insurance Company v Bashir & Ors [2012] EWHC 895 (Admin)**.

5. RELEVANT FEATURES

- 5.1 It will be important to bring the relevant features of the case to the Court's attention. Whether or not these are properly described as 'aggravating' or simply relevant is a probably a moot point.
- 5.2 Relevant features will include the following:
 - (i) Multiple fraud / false accidents.

⁸ See **R v Hall [1982] 4 Cr App R(s) 153**, Talbot J "... it is almost inconceivable that a sentence of less than 3 months would be given for a deliberate perjury in the face of the Court [since] such false evidence strikes at whole basis of the administration of the law".



NINESTJOHNSTREET

- (ii) The volume / frequency of dishonest representations.
- (iii) The size or scale of the fraud.
- (iv) Endangerment to the public.
- (v) Outrageous conduct i.e. forged documents, deception of multiple expert witnesses' at large expense.
- (vi) The view of the medico-legal experts (where relevant).
- (vii) The effect on honest Claimants (if it is an industry problem i.e. greater scrutiny of chronic pain claims).
- (viii) The need for deterrence of specific claims (i.e. phantom passenger) or geographic areas (preferably supported by cogent industry evidence).
- (ix) Misleading or wasting public money (i.e. NHS professionals / government organisations / local authorities).
- (x) The scale of the specific problem across the industry (i.e. fraud generally, supported by evidence).
- (xi) Whether any criminal offences were committed (civil contempt is not a criminal offence per se).
- (xii) The affect on the Claimant's solicitor (this may be relevant especially where there are significant costs incurred which that firm will not recover).
- (xiii) Whether the Claimant was acting in concert with others or placed others under duress to act in concert with him or her.



NINESTJOHNSTREET

6. MITIGATING FEATURES

- 6.1 A contemnor who admits allegations should receive credit on sentencing for such: **Re (A minor) (contempt: sentence) [1994] 1 WLR 487.**
- 6.2 The objects of sentencing are both punishment and deterrence.
- 6.3 A contemnor is entitled to mitigate, and mitigation broadly falls into two areas:
- (i) Mitigation specific to the contempt.
 - (ii) Personal mitigation.
- 6.4 When presenting a case of contempt to the Court it is somewhat akin to prosecuting a case in the Crown Court, in that the Court will be assisted by clear sighted and objective presentation of the evidence and the law.
- 6.5 Matters which are relevant to personal mitigation are:
- (i) Good character (references / professional role / charitable works, etc).
 - (ii) Health.
 - (iii) Psychological distress.
 - (iv) Family commitments.
 - (v) Extenuating circumstances.
- 6.6 Matters which are relevant to the contempt itself are:
- (i) An early admission of guilt.
 - (ii) Genuine remorse.
 - (iii) Co-operation with the relevant authorities.
 - (iv) Co-operation with the insurer.
 - (v) The scale and extent of the fraud.



NINESTJOHNSTREET

7. LEGAL AID FUNDING FOR DEFENDANTS

7.1 Legal Aid is available without financial or merits test for anyone charged with contempt in the High Court. For a more developed understanding see, **The All-England Lawn Tennis Club (Championships) Limited v McKay (No. 2) [2019] EWHC 3065 (QB)**. In his Judgment at paragraph 12 Mr Justice Chamberlain stated:

“[12] Mr Rimmer accepted unequivocally on behalf of the LAA that criminal legal aid is available as of right to any person, such as Mr McKay, facing High Court committal proceedings for breach of an order. In the light of the statutory scheme as set out above, I have no doubt that he was correct to do so. To summarise:

- (a) the proceedings involve the determination of a criminal charge for the purposes of Article 6(1)(ECHR): Hammerton v Hammerton, [9];**
- (b) therefore, they are prescribed as ‘criminal proceedings’ for the purposes of s.14(h) of LASPO by Reg. 9(v) of the General Regulations;**
- (c) therefore, criminal legal aid is to be available if the means tests and ‘interests of justice’ test are met: s.16(1) of LASPO;**
- (d) in relation to criminal proceedings before the High Court, both tests are met automatically: Reg.39 of the Financial Resources Regulations (in relation to means) and Reg.21 of the General Regulations (in relation to ‘interest of justice’);**
- (e) so, legal aid is available as of right”.**

He goes on to say at paragraph 13:

“[13] Thus, the statutory scheme governing eligibility for legal aid properly recognises that the potential consequences of an application to commit (which include imprisonment) require that legal aid be available without any assessment of either the means of the Applicant or merits of the case (or the ‘interests of justice’) factors that would otherwise apply under s.17 of LASPO when determining eligibility Criminal Legal Aid). That is so even when the application arises from civil proceedings in which legal aid would not otherwise be available”.



NINESTJOHNSTREET

- 7.2 There is a useful link to Legal Aid agency website:
www.gov.uk/guidance/apply-for-legal-aid-for-civil-contempt-cases.
- 7.3 Defendants in civil contempt proceedings who are not legally represented should be provided with a clear recommendation to obtain representation and (in my view) should be provided with a copy of the website link referred to above and a copy of the authority of **McKay**. Whilst it is laudable to advise Defendants to seek independent legal advice in light of these well-known and accessible tools to assist a Defendant obtaining the appropriate legal representation there really is no excuse for failing to give them a clear steer and point them in the right direction to obtaining proper legal representation. Otherwise, the reality is that proceedings will be adjourned, delayed and likely the party bringing the contempt proceedings (if legally represented) may face criticism for failing to do so.

8. PRACTICAL GUIDANCE

- 8.1 Even when the contempt is admitted the process of resolving contempt proceedings at a sentencing hearing is a niche exercise which is easy to get wrong.
- 8.2 It is sensible for there to be active supervision at partner level.
- 8.3 Involvement of Counsel at an early stage will avoid some of the potential procedural pitfalls in CPR Part 81.



NINESTJOHNSTREET

- 8.4 Preparation of a sentencing bundle is important and although this may have been undertaken (to some degree) at the permission hearing stage, a relevant bundle should include:
- (i) Orders of the Court.
 - (ii) All pleadings (including relevant pleadings from original civil proceedings).
 - (iii) Statement of Grounds.
 - (iv) Schedule of allegation of contempt.
 - (v) Affidavit of the solicitor together with accompanying exhibits appropriately labelled.
 - (vi) Documents relied on by the Defendant.
 - (vii) Appropriate copies / links and facilities for any video or audio evidence.
 - (viii) A costs schedule.
- 8.5 It is important to remember that at a sentencing hearing, even if an indication has been given at the permission hearing that the contempt will be admitted, it is still necessary to formally prove the same at Court. This will normally involve each allegation of contempt being formally put to the contemnor, either by the Judge or the Court Clerk.
- 8.6 The Judge may request that for ease of reference in a sentencing procedure that individual allegations of contempt are grouped into common denominators or specific themes.



NINESTJOHNSTREET

- 8.7 It will normally be necessary for Counsel to settle a skeleton argument setting out the important features of the offence and the relevant authorities to assist the Court (together with an authority bundle).
- 8.8 The draft order is essential, see a copy of a sample draft order appended to this talk.
- 8.9 Section 14(1) preserves the power to release a contemnor at a point earlier than the end of the fixed term of detention required by that section. Relevant factors will include:
- (i) Can the Court conclude, in all the circumstances of the case as they are now, that the contemnor has suffered punishment proportionate to his contempt?
 - (ii) Would the interest of the State in upholding the rule of law be significantly prejudiced by early discharge?
 - (iii) How genuine is the contemnor's expression of contrition?
 - (iv) Has he done all that he reasonably can to demonstrate or resolve an ability not to commit a further breach of discharge early?
 - (v) Are there any special factors which impinge upon the exercise of the discretion one way or the other?
- 8.10 CPR 81.10 provides the procedural mechanism through which an application to discharge committal order should be made, see **Aviva Insurance Limited v Ahmed [2018] EWHC 423 (QB)** for an example of an application in a personal injury context and see more generally **CJ v Flintshire Borough Council [2010] EWCA Civ 393** at paragraph 21 of Wilson LJ's Judgment.



NINESTJOHNSTREET

8.11 Publicity and deterrence are often part of the insurers' objectives, there must be some care taken with press releases. This is because of the "public function" aspect of committal proceedings. Gloating or emphasis upon the insurer driving the committal might look unsavoury if it came to the attention of the Court. Better to focus on the actions of the Court rather than the heroic efforts of the insurer and their legal team.

MATTHEW SNARR

9 St John Street

Manchester, M3 4DN

13th March 2021



NINESTJOHNSTREET

Claim No: _____

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

BETWEEN:

XX

Claimant

-and-

YY

Defendant

DRAFT ORDER

Before [INSERT] sitting as a Judge of the High Court pursuant to Section 9(1) of the Senior Courts Act 1981 hearing the case on [INSERT].

UPON hearing [INSERT] of counsel for the Claimant and [INSERT] of counsel for the Defendant

AND UPON the court being satisfied and sure that the Defendant has been duly served with the committal application and notice of this hearing

AND UPON proceedings being brought by the Claimant dated [INSERT] for committal of the Defendant to prison for attempting to interfere with the administration of justice by his/her false statements and representations made to CPR Part 35 medical experts and his/her making false statements in documents verified by statements of truth



NINESTJOHNSTREET

AND UPON the Court reading the affidavit of [INSERT] sworn [INSERT], the witness statement of [INSERT] dated [INSERT] and the statement of the Defendant dated [INSERT] (in which s/he admits [INSERT] counts of contempt of court)

AND UPON the Court considering the committal sentencing bundle

AND UPON the Court being satisfied and sure, on the admission of the Defendant, that the false statements and representations made to the Claimant's nominated CPR Part 35 medical experts and the false statements made by the Defendant and verified with a statements of truth (as set out in the appendix to this order) were false, were made without an honest belief in their truth and that the Defendant knew that the said false statements were likely to interfere with the course of justice

AND UPON the court finding that the said false statements constitute a contempt of court.

IT IS ordered that:

- 1) By reason of such contempt the Defendant is committed to HM Prison [INSERT] for a period of [INSERT] to run concurrently on each count of contempt from the date of his/her apprehension.
- 2) A warrant for the committal of the Defendant shall be issued forthwith by way of execution of the above order.
- 3) The Defendant shall pay the Claimant's costs of the application for committal summarily assessed in the sum of [INSERT].



NINESTJOHNSTREET

- 4) The Court shall ensure that a transcript of the Judgment of [JUDGE] is published on the website of the Judiciary of England and Wales and is served on the parties as soon as possible pursuant to CPR rule 81.8.