



NINESTJOHNSTREET

FRAUD AND COLLATERAL
ILLEGALITY IN PERSONAL INJURY
LITIGATION

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INTRODUCTION

1. This paper intends to examine the Courts' approach to dishonesty within personal injury litigation. This paper adopts a review of the authorities considering the sanctions for fraud or dishonest illegal conduct¹ in a genuine personal injury claim. In particular, it focuses on the concept of abuse of process and whether it is possible to prove that a claim tainted by dishonesty can constitute an abuse of process. It considers whether the common law or the Civil Procedure Rules ("CPR") provide a legal basis for dismissing a claim tainted by dishonesty.
2. Dishonesty and illegality can arise in high value litigation or more modest claims. At the lower end, dishonesty most frequently finds the form of a fake accident or a pretend low-grade injury. In higher value claims, it often takes the guise of exaggeration of symptoms or overstatement of the extent of the injured party's disability.
3. The growth of fraudulent insurance claims², or at least the perception of growth³, rising 30% from 2007 to 2008 has led, within the sphere of personal injury, to a quest for legal penalties to combat the rising tide of different shades of dishonest litigation. The insurance industry is increasingly becoming aware of and, aided by technology and information resources, getting better at detecting dishonest claims.

¹ i.e. where the Claimant has sought to benefit from his illegal activity as opposed to a general review of the doctrine of *ex turpi causa*.

² Figures taken from ABI paper – 'Research Brief – July 2009'. They are not restricted to personal injury claims but cover insurance claims generally.

³ See <http://archive.cabinetoffice.gov.uk/brc/upload/assets/www.brc.gov.uk/betterroutes.pdf>

'Better Route to Redress May 2004' paper which seeks to 'explode the urban myth of compensation culture.'

GENESIS OF THE DEFENCE OF TAINTING

4. In recent years insurance lawyers have looked across to related fields of the common law, in particular insurance law and contractual principles, in a quest to attain the legal means to bar dishonest Claimants from recovering damages at all. There is an increasing drive to import the harsher sanctions found in related legal doctrines such as that of utmost good faith (“*uberrimae fidei*”) inherent in insurance contracts (especially at the formation stage).
5. The search for the elusive trump card, cancelling a party’s right to any damages by virtue of their dishonest behaviour, in personal injury litigation should not be confused with the common law rule which subsists in insurance litigation whereby an insured bringing an insurance claim which is partly false forfeits their entire entitlement to redress under the insurance contract; the duty of utmost good faith. A Court will not permit an insured to recover at all if it has not been brought honestly. The entire claim will be forfeit, see the recent restatement of this principle in *Axa v Gottlieb [2005] EWCA Civ 112*.
6. There is no common law rule that applies directly to claims founded in tort that entitles a Defendant to argue that a fraudulent claim automatically results in the Claimant forfeiting his right to damages.

DISPARITY OF SANCTION

7. The special common law rule in insurance claims leads to a position whereby a party who has a genuine insurance claim will forfeit the entire claim if he presents a small part of that claim

dishonestly but a Claimant who significantly exaggerates the effects of an injury will still be able to recover such damages as they are able to prove attributable to the accident⁴.

8. It is consequently legally permissible to defraud third party insurers without fear of losing the 'right to claim' but not one's own insurer. This position could be construed as unfair to both parties in each scenario; the insured client who gently massages the value of his insurance claim loses everything and the insurer faced with a large scale exaggeration of an injury is likely to have to pay some damages.

DISHONESTY - A PARTIAL DEFENCE

9. Public policy and abuse of process arguments invariably apply where the dishonesty or illegality is central to the foundation of the claim. Contentious litigation, however, often involves collateral wrongdoing or dishonesty on the part of the Claimant, where the conduct complained of is not central to establishing his claim for damages. Collateral or insignificant wrongdoing is unlikely to warrant the entire claim being dismissed on the grounds of public policy.

LOSS OF EARNINGS: FAILURE TO PAY TAX

10. An example of collateral wrongdoing is where a Claimant has falsely declared his tax accounts to the Inland Revenue. A failure to pay tax before a serious accident resulting in disability or

⁴ Which in the context of an objectively verifiable injury, i.e. fracture, should not be too difficult.

death leading to a significant past and future loss of earnings claim does not negate a Claimant's entitlement to loss of earnings.

11. In the case of *Duller v South East Lincs Engineers [1980] unrep*. Mr Jowett QC sitting as a Deputy High Court Judge held that a Claimant was entitled to receive compensation for loss of earnings despite previously failing to declare his earnings to the Inland Revenue. The Defendant had sought to argue that the Claimant was not entitled to any compensation for loss of earnings as the whole of the money had become tainted by his illegal behaviour in not disclosing the earnings to the Inland Revenue. The Court held that the earnings themselves were not illegal and therefore, provided that the appropriate reductions were made to account for tax and NI, an award for loss of earnings was justified.

12. However, in *Burns v Edman [1970] 2 QB 541* the deceased was a career criminal. His wife brought a dependency claim which failed on the basis that the source of his income was entirely illegal⁵. The editors of Kemp⁶ express caution at whether the same result would be achieved if the Courts reconsidered the case today on the basis that the Claimant's cause of action did not arise ex turpi causa and the loss of dependency claim was a legitimate one. The case of *Hewison v Meridian Shipping PTE & others [2002] EWCA Civ 1821*, considered below, is credible authority for arguing that the loss would not be recoverable.

⁵ Similarly in the case of *Hunter v Butler [1996] RTR 396* the Court of Appeal refused a loss of earnings claim based on moonlighting.

⁶ Volume 1 – Chapter 8-006.

13. Consideration on the issue of failure to pay tax or NI contributions was given in ***Newman v Folkes [2002] EWCA Civ 591***. Garland J hearing the case at first instance held that, *“I am in no doubt that the Claimant’s failure to pay tax and NI contributions in no way debars him from advancing a claim for lost past and future earnings...”* The Court of Appeal held that it was quite correct that no appeal against that ruling was brought. The Defendant only sought to appeal the amount awarded not the principle as to whether an award ought to have been made.

EARNINGS DENIED BY DISHONESTY

14. In ***Hewison v Meridian Shipping PTE & others [2002] EWCA Civ 1821*** the Court of Appeal held, by a majority, that a Claimant who had lied about his epilepsy to obtain employment as a crane operator on an oil rig was not entitled to any loss of earnings arising out of genuine and serious injury to his back consequent upon the negligence of his employers. Clarke LJ held:-

“The principle can perhaps be stated as a variation of the maxim so that it reads ex turpi causa non oritur damnum, where the damnum is the loss which would have been recovered but for the relevant illegal or immoral act.”

15. In applying the law Clarke LJ held the test to be:-

“If a plaintiff comes to court and asserts as part of her case that she would have committed criminal acts and bases her claim on such an assertion she cannot recover in a court of law on that basis.”

16. In the case of *Molloy v Shell UK Limited [2001] EWCA Civ 1272* the Court of Appeal awarded the Defendant all of its costs, from the date of its Part 36 Payment⁷, in a case where the Claimant had dishonestly claimed £300,000 of loss of earnings despite the fact he had continued working in his original job as a scaffolder on oil rigs, since shortly after the original accident. Laws LJ stated, obiter dicta, at paragraph 18, “*For my part I entertain considerable qualms as to whether, faced with manipulation of the civil justice system on so grand a scale, the court should once it knows the facts entertain the case at all save to make the dishonest Claimant pay the Defendant’s costs.*”
17. In *Major v MOD [2003] EWCA Civ 1433* the Claimant lied, when applying to become an officer in the RAF, that she had not previously self harmed. The MOD denied her loss of earnings claim, arising out of an accident which pre-dated her application to join the RAF, on the basis that it would not have employed her if it had known of her previous problems. However, the Court of Appeal distinguished *Hewison* on the basis that the original tort had put her in the position that in order to gain employment she had to behave deceitfully, that was a matter she was entitled to complain about.

ABUSE OF PROCESS - A NEW APPROACH

18. The authorities considered above relate to instances where the Courts have seen fit to penalise Claimants by way of partial reduction of damages, often the dismissal of an entire head of loss. These losses are invariably dismissed where the Court is satisfied that the loss is not made out or that public policy should prevent the Claimant from recovering the particular head of loss sought.

⁷ As opposed to 75% as ordered at first instance.

19. Increasingly insurers have sought to advance the proposition that where fraud or dishonest illegal conduct is relied on in pursuit of a claim, such conduct ought to warrant more than simply forfeiting a discrete head of loss. Public policy and/or the CPR, it is argued, ought not to reward such claims. The argument advanced is that fraudulent conduct or dishonest illegal conduct constitutes an abuse of process which offends against the civil justice system and ought not to be countenanced, by forfeiting the award of any damages.

CHURCHILL v KELLY – ILLEGALITY & DISHONESTY – A PERFECT DEFENCE?

20. In *Churchill v Kelly [2006] EWHC 18* the Claimant represented himself following a road traffic accident. Despite concerns as to the credibility of some of the heads of loss advanced, particularly a loss of earnings claim⁸, the Court⁹ found that the Claimant was entitled to most of his damages and a reduced costs bill. The Defendant contended that given the Claimant's exaggeration he ought not to be entitled to any costs.
21. In support of an appeal the Defendant produced a statement from the Claimant's former employer stating that the reason why the Defendant was dismissed was because he stole a motor vehicle tax disc from the company. More importantly, the Claimant displayed the stolen tax disc on his vehicle at the time of the accident.
22. The Defence argued on appeal:-

⁸ Which the Claimant alleged flowed from his dismissal by reason of his accident related injury whereas the Defendant alleged he was dismissed for gross misconduct.

⁹ The Judge who, incidentally, was counsel for the Respondent in the appeals in *Shah v Ul Haq et al [2009] EWCA Civ 542*.

- (a) The scale of the fraud was such that the Claimant ought to be entitled to nothing as a matter of public policy.
- (b) The Claimant's injury arose *ex turpi causa*, he needed to rely on driving unlawfully, displaying a stolen tax disc, as the immediate cause of the accident.

No argument was advanced that the Court had a discretion to strike out the entire claim pursuant to the CPR.

23. The Court rejected the appeal argument that the Claimant ought to receive nothing. Gibbs J held:-

- ***“The fact a Claimant dishonestly puts forward unjustified heads of loss should not disentitle him in law from recovering such head or heads of loss as are indisputably made out.”*** see paragraph 15.
- *“Whilst his conduct was reprehensible, it remains the case that the accident had no sensible causal connection with the use of the tax disc, but arose directly from the negligence of the driver”* see paragraph 15.
- *“I have no doubt that the seriousness of the Respondent's conduct should be reflected by an order setting aside the order as to costs made by the Recorder, and by ordering the Respondent to pay the cost of the original claim and of this appeal, both on an indemnity basis.”* see paragraph 19.

UL-HAQ et al v SHAH – 1st APPEAL

24. The opportunity to argue that a fraudulent claim might warrant the sanction of strike out, pursuant to a discretion within the CPR, was seized upon in *Ul Haq et al v Shah [2008] EWHC 1896*. This appeal arose of a road traffic accident in which the mother of the First

Claimant was found to have presented a dishonest claim as she was not a passenger in the motor car at the time of the accident. The First Claimant and his wife, the Third Claimant, had supported her claim for personal injury and lied about the presence of the mother in their motor car.

25. At first instance it was argued that notwithstanding the First and Third Claimants were present in the motor car, and potentially injured, their claims out to be dismissed. The Defendant contended the Court had discretion to strike out their claims as an abuse of process, they had acted contrary to CPR 3.4:-

3.4 (1) In this rule and rule 3.5, reference to a statement of case includes reference to part of a statement of case.

(2) The court may strike out a statement of case if it appears to the court –

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or

(c) that there has been a failure to comply with a rule, practice direction or court order.

(3) When the court strikes out a statement of case it may make any consequential order it considers appropriate.

(4) ...

(5) Paragraph (2) does not limit any other power of the court to strike out a statement of case.

26. The Defendant relied on rules 3.4(b) and (c) as the provenance of a discretion held by the Court to dismiss a claim tainted by dishonesty. The Defendant sought to rely on the leading

case on the court's discretion under CPR 3.4, ***Arrow Nominees Inc v Blackledge [2001] BCC 591***.

27. The ***Arrow Nominees*** case involved a shareholder dispute, alleging unfair conduct in the relation to the affairs of the company. The petitioner Claimants initially swore affidavits confirming they had forged letters within an accountancy file and changed diary entries in support of their claim. At the conclusion of the full trial the judge, Evans-Lombe J, concluded that there was a real risk that the Claimants had forged or destroyed other documents relevant to the case. Evans-Lombe J declined to strike out the claim on the basis that although the Claimants' fraudulent conduct prevented a fair trial of part of the petition it did not affect other parts of the petition which could be resolved.
28. The Court of Appeal acceded to the Defendants' request to strike out the Claimants' petition in its entirety. The judgment is lengthy but the ratio of the case can be distilled to these quotes:-

Lord Justice Chadwick at para 54:-

"...But where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled - indeed, I would hold bound - to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him. The reason, as it seems to me, is that it is no part of the court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the court is to do justice between the parties; not to allow its process to be used as a means of

achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke...

Lord Justice Walker at paras 74 & 75:-

“74. This was, therefore, a flagrant and continuing affront to the court. Striking out is not a disproportionate remedy for such an abuse, even when the petitioners lose so much of the fruits of their labour.

75. Even if the judge were correct in his analysis that all effect of the 1994 agreement could be excised from the petition and a prima facie case could be made out of what remained, I am quite clear that, if the CPR are to receive a correct start, then this court must make the clear statement that deception of this scale and magnitude will result in a party's forfeiting his right to continue to be heard.”

29. At first instance in ***UI-Haq*** the Claimant’s counsel did not seek to challenge the jurisdiction of the Court to strike out the claim for an abuse of process. The debate turned on whether the Court ought to exercise its discretion. The Court declined to do so, on the basis that the Claimants had not advanced their own claims dishonestly, the case of ***Kelly*** reinforced the primacy of compensating a wronged Claimant’s indisputable losses and a fair trial had been possible; the fraud had been detected.
30. The Defendant sought to appeal ***UI-Haq*** to the High Court arguing:-
- (a) The Claimants were the initiators and prime movers behind the fraudulent claim.
 - (b) The fraud was more than mere over-egging the claim, it was cynically engineering to facilitate a spurious claim.
 - (c) The discretion within CPR 3.4 remained with the Court, even after trial.

(d) Insurance policy holders had a legitimate expectation that the Courts would utilise all their case management powers to discourage fraudulent insurance claims.

31. Walker J upheld the decision of Mr Recorder Parkes QC on the following basis:-

- (a) The discretion under CPR 3.4 remained with the judge, even after the trial had finished.
- (b) The case of *Kelly* was of limited assistance as Gibbs J had not been referred to CPR 3.4.
- (c) There ought to be an analysis by the Court as to the extent to which the overriding objective had been offended.
- (d) A fair trial had taken place.
- (e) The dishonesty was collateral to their own claims which were genuine.
- (f) The dishonesty was not of ‘the worst kind’ it did not involve the forgery of documents or amount to a determination to preserve with dishonesty even after being discovered by the Court.
- (g) The Court could and did punish the Claimant’s dishonesty by way of costs sanctions.

SHAH v UL-HAQ et al – 2nd APPEAL

32. The Defendant continued her appeal to the Court of Appeal, *Shah v Ul Haq et al [2009] EWCA Civ 542*. The Respondents to the appeal were unrepresented. Smith LJ gave the leading judgment, the Court considered three issues

- (a) Whether it was right, as a matter of substantive law, to strike out a claim where a Claimant has acted dishonestly, see paragraph 16.

- (b) Whether CPR 3.4(2) provided a procedural peg on which to hang a decision to strike out a genuine claim by reason of collateral dishonesty, see paragraph 15.
- (c) If CPR 3.4(2) provided a discretion to strike out a dishonest Claimant, whether the Court ought to exercise its discretion in the Defendant's favour.

33. The Court concluded as follows:-

- (a) There is no general rule of law¹⁰ where the whole of a claim has been dismissed due to the dishonest exaggeration of a Claimant. Smith LJ expressed surprise at the argument.
- (b) The only suggestion of such an approach was *obiter dicta* in **Molloy** but Laws LJ had not expressly considered whether there was a power to strike out or whether such an approach was consistent with authority. His views were 'little more than wishful thinking', see paragraph 18.
- (c) Smith LJ held at paragraph 20, *"In my judgment it is well established that a Claimant will not be deprived of damages to which he is entitled because he has fraudulently attempted to obtain more than his entitlement... ...I can see no logical justification for suggesting that the Claimant who lies about another person's claim should be treated more severely than the Claimant who lies about his own claim..."*
- (d) The argument revolving around CPR 3.4(2) therefore was a 'side issue'.
- (e) Walker J and Mr Recorder Parkes QC were mistaken in concluding there was a discretionary power to strike out a claim at the end of the hearing where there is no suggestion that it has not been possible to hold a fair hearing, see paragraph 28.

¹⁰ Or any reported case, see paragraph 17.

- (f) The discretion provided by 3.4(2) might be utilised during a trial where it became obvious a fair trial was not possible but it would normally be engaged pre-trial. Smith LJ declined to offer a view as to whether it would be appropriate to exercise the discretion at the end of the evidence, see paragraph 29.
- (g) Toulson LJ held at paragraph 50, *“To have struck out the claims of the First and Third Claimants would have been to invoke a case managements power not for a legitimate case management purpose (in other words, for the purpose of achieving a just and expeditious determination of the parties’ rights or avoiding an unjust determination of where a party’s conduct had made a safe determination impossible), but for the very different purpose of depriving those parties of their legal right to damages by way of punishment for their complicity in the Second Claimant’s’ fraudulent claim, which in my judgment he had not power to do.”*

ANALYSIS

34. The Court of Appeal were firm in their view that dishonesty as to symptoms or collateral dishonesty where a Claimant uses his genuine claim as a platform to launch further dishonest claims will not warrant a sanction of strike out. There is no common law jurisdiction to strike out such a claim. If a fair trial is possible, there is no discretion under CPR 3.4(2) to strike out the claim.
35. It is questionable whether the use of the common law relating to an injured party’s claim is good guidance for the interpretation of the CPR rules. In *Ul-Haq*¹¹ the Court asserted the primacy of the common law tort maxim that a party is entitled to a sum of money which will

¹¹ And *Kelly v Churchill [2006]*.

put them into the same position as they would have been if they had not sustained the wrong. The dishonesty, collateral or direct, does not undo the legal wrong that has occurred. It is, perhaps, understandable that the Court of Appeal would be extremely cautious about gifting first instance judges a discretion to strike out claims for acts of dishonesty, inside or outside the litigation.

36. It is proper that precedent ought to inform the Court's approach to arguments of public policy, however, the appeal in *UI-Haq* turned on the application of CPR 3.4(2). The argument unashamedly turns on the application of the CPR and the overriding objective as a tool to deter and punish fraudulent claims.
37. The CPR rules were intended to bring a fresh approach to civil litigation, they are frequently described as requiring the parties to adopt a 'cards on the table approach'. Fraud is the antithesis of the candid resolution of a legal grievance yet, post *UI-Haq*, it is tolerated by the rules. The CPR, and its application by the Courts, can lead to the strike out of a claim by defaulting against Court orders, however trivial. Yet if a party breaches the bedrock of the CPR [rules 1.1 and 1.3] by dishonestly using their claim as the device to enable others to bring an entirely dishonest claim, they are immune from strike out.
38. It will be interesting to see whether the threat of a costs sanction is likely to deter Claimants in bringing either low level fake claims or from exaggerating their injuries in higher value claims. It is doubtful that the sanction of costs is likely to be effective, in lower value claims, where fraudulent Claimants are often motivated by harsh economic circumstances to pursue or support fraudulent claims. The resources of the authorities in prosecuting cases of dishonesty

are often diverted to more serious non-insurance related crimes i.e. violent crime or the prosecution of only the most serious type of insurance frauds¹².

POST UL-HAQ:- A NEW DAWN?

39. It remains to be seen whether the Court of Appeal's decision that there is no discretion to strike out personal injury claims tainted by dishonesty, either where the dishonesty directly affects the Claimant's claim or constitutes a collateral dishonesty, will have any effect on the approach of Defendants.
40. It is suggested that the following tactics are likely to be deployed in the future:-
- (a) Pre-trial applications to strike out the Claimant's case pursuant to CPR 3.4(2) on the basis that a fair trial is not possible.
 - (b) A fair trial might not be possible where:-
 - A Claimant significantly misleads a medical expert who, in turn, accepts his expert opinion is contingent upon the subjective reporting of the Claimant i.e. low grade whiplash injuries or chronic pain cases.
 - A Claimant or Defendant refuses to disclose relevant evidence i.e. medical records, occupational health records etc.
 - A Claimant or defendant¹³ forges, alters or destroys a document or piece of evidence relevant to the determination of liability.

¹² Hence a growing inclination on the part of the insurance industry to look for further sanctions such as private contempt of court proceedings, see *Kirk v Walton [2009] EWHC 1780*.

¹³ It should not be assumed that the argument as to dishonest conduct only applies to Claimants.

- (c) An attempt to force Claimants to repeatedly restate or affirm the alleged dishonesty throughout the litigation, via Part 18 Requests etc, so that the Defendant can argue the fraud was sustained.
- (d) An increase in disclosure applications. Defendants are more likely to look for documents that will demonstrate that the Claimant has lied or sought to forge a document to hide the true position.
- (e) Calderbank letters offering damages but no costs.

CONCLUSION

- 41. The law has been brought to a more certain state. Prior to the appeals in *Ul-Haq* Claimants and Defendants suffered under the uncertainty of knowing which, if any, sanction was to be applied. Claimants now have the security of knowing that they will be compensated for their indisputable losses caused by the Defendant's wrong. The primacy of compensating the tortfeasor's wrong has been asserted over public policy concerns surrounding fraud within personal injury claims.
- 42. The issue of fraud remains sensitive to the insurance industry. It is likely that new approaches and challenges to recovery will be mounted in the future in cases involving established dishonesty. Costs arguments are likely to become more prevalent with both parties seeking to protect themselves through the communication of written offers. However, the determination of costs arguments remains heavily within the Court's discretion.

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