

Lying Shame

Should those who exaggerate personal injury claims be forced to forego the aspects of payouts to which they are entitled? By Alejandra Hormaeche

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Those advising claimants in personal injury (PI) actions need to be mindful of the potential consequences of dishonesty being established in a claim that would otherwise be bona fide. Claimants who have suffered injuries arising out of an accident and bring genuine claims for damages can be prone to exaggerate the extent of their losses, or even to fabricate a particular head of loss altogether, in an attempt to increase the overall level of award made. This is often done in the mistaken belief that the defendant's insurance company will settle the claim and that any fraudulent element to it will not bear closer scrutiny.

In practice, however, even relatively small claims are being vigorously defended and the opportunity to challenge the credibility of claimants and probe the authenticity of documents adduced in support of a claim is increasingly being taken on behalf of defendants at assessment of damages hearings.

In the context of insurance claims, a common law rule has developed to the effect that, if part of a claim is fraudulent, then this has the net result of the whole cause of action being barred, so that the insured cannot recover anything from the insurance company in respect of the genuine parts of a claim (see Lord Justice Millett's judgment in *Galloway v Guardian Royal Exchange* (1999)). The question, however, arises as to whether the application of the principle extends to PI actions based on the negligence of an insured driver and, generally, brought in tort against the insured.

Fraudulent claims

An unsuccessful attempt was made in the recent case of *Churchill Car Insurance v Victor Kelly* (2006) to argue on appeal that a PI claim, which was partly tainted by fraud, should be disallowed altogether, on the basis that extreme cases of dishonesty were an abuse of the process of the court.

The claim arose out of a road traffic accident in which liability was

not in dispute. The claimant was awarded damages for personal injuries and various other losses arising out of the accident. The claimant's credibility had already been called into question at the assessment of damages hearing in respect of a loss of earnings claim. The claimant contended that he had been dismissed from his employment due to absence from work and attributed his non-attendance to the accident. Counsel for the defendant submitted that the claimant's evidence in this regard should not be believed.

Although the recorder at first instance disallowed certain parts of the claim, general damages were awarded for pain, suffering and loss of amenity and an award was also made for loss of earnings. On appeal it was argued that the award of damages should be set aside in full on the grounds that fresh evidence, obtained after the assessment of damages hearing, demonstrated that the respondent was guilty of fraud in his conduct of the proceedings.

The appellant was granted permission to adduce fresh evidence to the effect that the respondent had not been dismissed due to his absence from work, but rather he had been dismissed for the theft of a tax disc belonging to his employer, which was displayed in the vehicle that the claimant had driven on the accident date.

The fresh evidence clearly demonstrated that the loss of earnings claim was false and fraudulent. The claimant had forged a letter of dismissal for the purposes of the assessment of damages hearing. Mr Justice Gibbs gave permission to appeal.

Court abuse

The appellant contended that the respondent should not be entitled to receive any damages, even in respect of the heads of loss that were indisputably made out. The argument advanced was that, as a matter of public policy, the entirety of the claim should be disallowed as it was an abuse of process of the court.

Gibbs J cautioned that it would be difficult in practice to decide on where to draw the line in cases involving dishonesty. He considered that it was not uncommon for a claimant to be believed on one issue, but disbelieved on another, and was unwilling to depart from the basic, common law principles of negligence by disallowing compensation for proven or admitted losses. The correct approach, in his view, would be to set aside or vary the awards made in respect of those heads of loss that were not made out and, in addition, to penalise the respondent in costs. Consequently, the

damages awarded for loss of earnings, the fraudulent part of the claim, were set aside.

Gibbs J also set aside the damages awarded for pain, suffering and loss of amenity. The reason for this was that the medical evidence in support was based solely on the respondent's account of his symptoms. Gibbs J penalised the respondent for his conduct by disallowing interest and setting aside the order as to costs made below, substituting it with an order that the respondent pays the costs of both hearings on an indemnity basis.

It is important for claimants to appreciate that, although a finding of serious dishonesty is unlikely to result in no damages being awarded, it could lead to a referral of the matter to the Director of Public Prosecutions and a subsequent prosecution for fraud. Also, it will almost certainly result in a punitive costs order.