

# The one that got away

Can a claimant get away with exaggerating in court?

Roger André investigates

**A**bsent proof of the catch, an angler will be doubted as to the enormity of the 'one that got away'. In court it is increasingly argued by defendant insurers that claimants exaggerate the extent of their, or another's, personal injury or loss. While not fatal to a case, exaggeration is not free from consequences.

The courts have demonstrated repeated unwillingness to strike out the entirety of a claim because of the existence of an element of fraud; for example, in *Shah v UlHaq & Oth* [2009] EWCA Civ 542 (CA), it was held that the claimant was not to be deprived of damages that he was entitled to under his own genuine claim in a personal injury case just because he had supported a fraudulent claim made by another.

In *Hedges v Mahendran* (28 June 2010 Bournemouth County Court) the judge accepted the extent of injuries claimed from a road traffic accident were improbable and inconsistent with the fact that on the same day the claimant and two accomplices "perpetrated a serious and extremely unpleasant assault involving penetration by the claimant on a young woman", which they filmed and he pleaded guilty to in criminal proceedings. Although the judge held that there were inconsistencies throughout H's evidence, he was prepared to rely on evidence which was corroborated (i.e. hospital attendance) and awarded £750 for general damages.

This approach has rendered defendants frustrated and claimants content in the knowledge that the reported case law largely supports the notion that the courts would award damages on the truthful aspects of a claim despite exaggeration on the remainder.

## Discredited claimants

However, the courts remain open to the argument that a claimant's credibility has been so discredited that he fails to prove any part of his loss (*Shah*). This depends on factual findings at the conclusion of trial, rather than a procedural bar such as strike out. To aid this decision, the court will have used its powers of case management to facilitate relevant disclosure, and questions of witnesses and experts.

In *Yagenah v Zurich plc* [2010] EHC 1185 (QB), although a lack of motive was fatal to an insurer's defence of arson, the judge found that the claimant had made a dishonest claim for property contents. The dishonesty finding was influenced by a false council tax claim which the judge found "goes, in my judgment, to more than his credibility as a witness. It points to a tendency consistent with the fraud."

The claimant had not hesitated to be untruthful when it was in his financial interest to do so. As a consequence of the finding of fraudulent and/or dishonest property contents claims, the entire claim, including for reinstatement of the property (notwithstanding no finding of arson) was dismissed. This finding was based on the common law insurance rule that the insured who has made a fraudulent claim may not recover the claim which could have been honestly made.

This rule (which is commonly in policy wording) entirely relieves the insurer, where the insured presents partial dishonesty and/or fraud. Arguably, the courts should consider extending the rule to non-insurance claims, where third parties are found to have been dishonest in part of a claim but in limited circumstances of findings of substantial dishonesty and/or fraud.

While it appears the standard of proof for civil fraud is the balance of probabilities, the more serious the allegation, the more cogent the evidence needed to establish it. There is, I believe, force in reserving the pleading of fraud to a point in the defendant's investigation when the evidence justifies.

In *Hussain & Anr v Sarkar & Anr* [2010] EWCA Civ 301, the Court of Appeal held that a judge had erred in refusing an insurer leave to amend its defence to include fraud, one week before trial, where the insurer's counsel had rightly observed the rules concerning the pleading of fraud allegations contained in *Medcalf v Mardell* (wasted costs order) [2002] UKHL 27. Equally, the court returned to a case where fresh evidence of fraud came to light after the trial in *Noble v Owens* [2010] EWCA Civ 224.

Concerning the defence of 'illegality/*ex turpi causa*' (i.e. that a person could not

recover for damage which flowed from loss of liberty, a fine or other punishment lawfully imposed upon him in consequence of his own unlawful act), the Law Commission does not recommend legislative reform outside the area of trust law. Rather the court's case-by-case with policy approach is preferred.

## Exercising discretion

Although willing to award damages, notwithstanding exaggeration, the courts have shown willingness to exercise considerable discretion as to the award of costs (CPR rule 44.3). In *Widlake v BAA Ltd* [2009] EWCA Civ 1256 (CA), by making no order for costs of either party, the court balanced the exaggerated and dishonest aspects of the claim against the fact that the (much lower) award did marginally beat the defendant's CPR part 36 offer. A warning to the overly bold accuser of fraud is found in *Clarke v Maltby* (costs) [2010] EWHC 1856 (QB), where it was held that a defendant was to pay costs on an indemnity basis (CPR 44.4(1)).

The courts are also willing to grant permission for committal for contempt (e.g. *Caerphilly County Borough Council v Hughes & others* [2005] (personal injury fraud); *Kirk v Walton* [2008] EWHC 1789 (QB) (personal injury exaggeration)).

It appears the courts are attempting to strike a balance between splitting the wheat of truth from the chaff of exaggeration, and facilitating the defendant to put its case of fraud and/or exaggeration. It is possible to totally discredit a claimant's case. The court will use discretion as to costs and is willing to commit for contempt.

The angler may exaggerate the size of 'the one that got away' without consequence. In contrast, an exaggerating claimant runs the risk of being snared in the net of an empiric victory.

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