

## Contrasting decisions for dishonest claimants

The courts have recently considered two cases involving fraud arising from road traffic accidents.

The first case is helpful to insurers and demonstrates the courts' disapproval where personal injuries are falsified.

The second case will be less well received by those representing defendants. It illustrates a judicial reluctance to punish genuine claimants where they have assisted in a fraud related to the claim.

### ***Carol Walton v Joanne Kirk [2009] EWCH 703 (QB)***

*In a landmark decision for insurers a claimant was found to be in contempt of court as a result of false statements she made during the course of personal injury proceedings.*

#### *Contempt of Court – the relevant law*

CPR32.14 allows for the possibility of a person being prosecuted for contempt of court if he or she makes or causes to be made a false statement in a document which is supported by a Statement of Truth.

In order to succeed with such an application the applicant has the burden of proving contempt to the criminal standards.

#### *Background*

The claimant brought a claim for personal injuries sustained in a minor road traffic accident. She claimed damages in the region of £800k. The claimant relied upon expert evidence which suggested that she had developed fibromyalgia.

The defendant's expert doubted the diagnosis of fibromyalgia and concluded that she did not have the condition.

The defendant obtained surveillance footage on the claimant which showed her walking, driving and shopping. Following disclosure of this the claimant served witness evidence responding to and explaining the contents of the footage.

The claimant's claim was subsequently settled for £25k.

#### *Proceedings for contempt of court*

Proceedings for contempt of court were subsequently brought against the claimant. Whilst the bulk of the allegations against her failed she was found in contempt on two grounds of lying in court documents. On this basis the claimant was held in contempt of court. She was ordered to pay her own £125k legal bill, a £2.5k fine for contempt and half the defendant's costs

#### *Conclusion*

This is a positive judgment for insurers in cases where they have reasons to suspect that a claimant is lying. It reflects the strong public interest in penalties for dishonest personal injury claims.

The judgment does, however, give scope for a claimant to respond that they were not lying but were merely 'exaggerating'. Coulson J concedes in his summing up that – in light of the high standard of proof – he had on occasions felt it appropriate to give the claimant the benefit of the doubt in considering the allegations of contempt through gross exaggerating.

#### Contempt of Court – guidance for insurers

In order to succeed in an action for contempt of court insurers must prove each of the following three elements beyond a reasonable doubt

- (1) the falsity of the statement in question;
- (2) that the statement has interfered with the course of justice; and
- (3) when the false statement was made the maker had no honest belief in its truth.

#### ***Shah v UI-Haq, Khatoon and Parveen [2009] EWCA Civ 542***

*In contrast to Walton v Kirk, the courts have taken a more lenient approach to claimants where they been found to be assisting in fraud. Shah v UI-Haq, Khatoon and Parveen tackled the issue of whether to strike out genuine claims on the grounds that the claimants had been involved in a fraud upon the court in respect of an associated claim.*

#### *Background*

In May 2006 the defendant, Mrs Anita Shah, negligently drove her Peugeot car into the rear of Mr Wasim UI-Haq's Rover. Mr UI-Haq and his wife, along with their two children, were in the car at the time. The car sustained minor damage while Mr UI-Haq and his wife claimed they suffered minor whiplash injuries. Mr UI-Haq's mother, Mrs Khatoon, alleged that she too had been in the car and had also suffered a whiplash injury. Mr UI-Haq and his wife gave evidence to support Mrs Khatoon's claim.

#### *Decision not to Strike Out Claims*

The court of first instance found that Mrs Khatoon had neither been a passenger nor suffered injuries. It also held that Mr UI-Haq and his wife had conspired to support Mrs Khatoon's fraudulent claim. While costs were awarded against the claimants the judge considered Mr UI-Haq's and his wife's injuries to have been genuine. He refused to strike out their claims under the court's case management powers under CPR3.4(2) and awarded damages for Mr UI-Haq and his wife.

The decision not to strike out the claims was appealed to the Court of Appeal but the appeal was dismissed. It was pointed out to the Court of Appeal that fraudulent claims were a major problem for the courts and insurance companies. However, it was held that a claimant will not be deprived of damages because he has fraudulently attempted to obtain more than his entitlement. By extension, a claimant should not be deprived of his claim where he has lied to support the claim of another.

## *Conclusion*

The case will not be welcomed by those defending similar claims. In effect, a claimant will not be punished with strike out where he has a genuine claim even if there are related allegations of fraud. To moderate this the courts will take a harsher line on costs and are prepared to penalise claimants by this means, as happened in *Shah v Ul-Haq, Khatoon and Parveen*.

## **Amendments to the Civil Procedure Rules**

The 49th set of amendments to the Civil Procedure Rules – together with amendments to the relevant Practice Directions – came into force on 6 April 2009. Of specific note are:

### *Fast Track Limit*

For claims issued on and after 6 April 2009 the financial limit for allocation to the Fast Track has increased to £25k. Now only claims exceeding £25k can be issued in the High Court.

### *Pre-Action Conduct*

A new Practice Direction has been created covering the pre-action conduct of parties. This is essential reading for anyone involved with pre-action proceedings and describes the conduct the Court will expect from the potential parties.

### *Costs Capping Order*

The insertion of Rules 44.18 – 44.20 now provide for Applications for costs-capping orders (NB: a costs capping order is an order limiting the amount of future costs (including disbursements) which a party may recover pursuant to an order for costs subsequently made.) A full copy of the Rules can be accessed at <http://www.justice.gov.uk>

## **Civil Litigation Costs Review**

Jackson J has recently completed his preliminary review into the costs of civil litigation. His review opens noting that he had been asked to review the rules and principles governing civil litigation and to make recommendations in order to promote access to justice at proportionate cost. The review is detailed and includes specific chapters on a) the funding of litigation b) fixed costs and c) personal injury litigation.

The preliminary review is currently open to a public consultation and a final report will be published in December 2009.

A copy of Jackson J's preliminary report can be accessed at [http://www.judiciary.gov.uk/about\\_judiciary/cost-review/preliminary-report.htm](http://www.judiciary.gov.uk/about_judiciary/cost-review/preliminary-report.htm)

## CASE LAW ROUND-UP

*Smith v Finch [2009] All ER 158*

The claimant sustained a serious traumatic brain injury when he was knocked off his pedal bike by a motorcycle.

The defendant argued, inter alia, that the claimant was at fault and partly to blame for his brain damage due to his failure to wear a cycle helmet.

On the facts of the case it was held that no deduction to the claimant's damages should be made as the defendant had failed to prove that a helmet would have made any difference to the claimant's injuries.

In passing comments, however, Griffith Williams J suggested that whilst there is no legal compulsion for a cyclist to wear a helmet there is no doubt that the failure to wear a helmet may expose the cyclist to the risk of greater injury. Subject to issues of causation any injury sustained may be the cyclist's own fault and he only has himself to thank for the consequences. Whilst this Judgment raises issues of freedom of choice - and has caused discourse within the cycling community - it does pave the path for future contributory negligence arguments.

*Orchard v Lee [2009] EWCA 295*

The claimant was a lunchtime assistant supervisor at a school. One of the pupils – a 13 year old boy – was playing tag with another pupil. In the course of this game he collided with the claimant causing her to sustain injury.

The claimant brought a claim against the pupil in negligence. The claim failed at first instance and the claimant appealed.

The Court of Appeal dismissed the claimant's claim. The schoolboy's conduct was simply the conduct to be expected of a 13 year old boy, and therefore did not amount to conduct in which he would reasonably foresee that there was likely to be injury beyond that normally occurring. This case does not break new ground but is a good reminder to consider what constitutes negligence on the part of an individual.

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