

When is exaggeration fraud – penalties/remedies when fraud is established.

“All this against a background, freely accepted by counsel on both sides, that a distressing feature of contemporary England is a willingness on the part of many people to put forward bogus claims for damages of a kind which the defendant’s insurer cannot properly evaluate without recourse to the type of expert evidence that features in the present case. This court received a similar explanation of the insurer’s dilemma in *Armstrong v First York Ltd* (see the judgment of Brooke LJ at para 20).”
[From *Alan Kearsley v Daniel Klarfeld* [2005] EWCA Civ 1510.]

Defining “Fraud”

Distinguish between a case where you will allege “fraud”, and those which involve the more usual “exaggeration”, “malingering”, or “causation” issues.

Fraud as in the tort of Deceit

Derry v Peek (1889) 14 AC 337, Lord Herschel, P374

“... fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth.”

I.e:

- A false representation
- Where C does not believe it to be true
- Made deliberately, or recklessly, i.e. careless whether true or false

Fraud in the criminal context

Archbold says of “defrauding”,

“ “To defraud” or to act “fraudulently” is dishonestly to prejudice or to take risk of prejudicing another’s right, knowing that you have no right to do so.”

Scott v Commissioner of Police for the Metropolis [1974] 3 All ER 1032 (HL)

The Headnote says,

“Conspiracy to defraud did not necessarily involve deceit by the defendant of the person intended to be defrauded. A person could be convicted of the offence where it was shown that he agreed with one or more persons to deprive another by any dishonest means of something that either was his or to which he was or would be or might, but for the perpetration of the fraud, be entitled.”

Distinguished from “Malingering”

The purposeful creation or exaggeration of physical or psychological complaints with the goal of receiving a reward.

DSM-IV V65.2

“The essential feature of malingering is the intentional production of false or exaggerated physical or psychological symptoms, motivated by external incentives

Essentially a medical diagnosis which will probably require elimination of an organic cause and a Psychiatric or Psychological input.

It is **not** necessary to allege and prove “fraud”:- in *Alan Kearsley v Daniel Klarfeld* [2005] EWCA Civ 1510, it was said,

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“ In [*Cooper v P&O Stena Line Ltd*] the Defendant’s medical expert had said in his report that he believed that from a date three months after the incident the plaintiff had been fabricating his symptoms and disability, and distorting physical signs for his own ends. A direct quotation to this effect was then included in the defendant’s original reply to the plaintiff’s schedule of damage.”

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“ The amended defence in the present action was very different. Para 3 contained a substantive allegation that the incident occurred when the defendant’s vehicle was travelling at only a few miles per hour, with Mr Ralph’s report being referred to in this context. Para 4 contained a substantive allegation that Mr Newman ... had reached the conclusions that are set out in Para 7 above. These included his view that it was very unlikely that the claimant had suffered injury in the accident.”

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“We cannot help thinking that if the defence in the *Cooper* case had been pleaded along those lines, coupled perhaps with a general traverse of the assertion that injuries were suffered, the deputy judge would have been satisfied that the defendants had satisfactorily pleaded the facts and matters on which they relied. There was no burden on them to prove fraud. It was sufficient that they set out fully the facts from which they would be inviting the judge to draw the inference that the plaintiff had not in fact suffered the injuries he asserted.”

Look for a marked distortion of symptoms to injury with little or no organic explanation.

Distinguished from “Exaggeration” – Conscious and Unconscious

Conscious exaggeration is or is tantamount to “malingering”

Unconscious exaggeration is or is akin to “functional overlay”. Sometimes called “illness related behaviour” and refers to disparity between clinical findings and complaints of symptoms. Frequently found in Whiplash and in Low Back claims.

It is unintentional.

Tainted with “Illegality” – sometimes “Ex Turpi Causa”

Where the Claim is founded on something illegal then it may be possible to defeat the claim.

Duller v S E Lincs Engineering [1970] 2 QB 541. The Claimant worked as a barman and failed to pay tax on his earnings. Claim allowed to proceed (with damages reduced for tax) on basis that earnings were lawful, it was his conduct afterwards that was unlawful. So claim not founded on illegality.

Hunter v Butler [1996] RTR 396. C was the Deceased widow. The Deceased had claimed supplementary benefit fraudulently. C not allowed to use that as part of her dependency.

Hewison v Meridian Shipping [2002] EWCA Civ 1821. C had obtained employment on the basis of false answers to questionnaires, failing to reveal his history of epilepsy. He would not have obtained the employment if he had been honest. His claim for past loss of earnings was rejected because he had to rely on his own unlawful and immoral act of lying.

Major v MOD [2003] EWCA Civ 1433. C had failed to reveal information about self-harming in order to join RAF. Her claim was for loss of future earnings and loss of pension. *Hewison* distinguished on the basis that here C was claiming general damages for loss of future earnings, and was relying on pre-accident employment as evidence of what capable of earning, and therefore she could recover.

Pitts v Hunt [1991] 1 QB 24. The Claimant was pillion on D's motorcycle. It was found that he had encouraged D's dangerous riding. In effect there was a joint enterprise. No claim.

Clunis v Camden & Islington HA [1998] QB 978. C had a mental disorder and required continuing treatment. He failed to attend his treatment and then committed manslaughter. He claimed damages on the basis that D's failure to treat him resulted in him causing death. The claim was struck out. It was founded on his own illegal act of manslaughter.

The Questions to ask yourself where you are suspicious of Fraud

1. What are the suspicious circumstances?
2. Could they have an innocent explanation – if so, can you dispel that “innocent” explanation by evidence, and does that mean dishonesty on C's part?
3. Can you prove that C is making a false representation which he cannot / does not believe?
4. Are there inconsistencies in C's evidence which can be proved?
5. Why is fraud more likely than some other explanation?
6. Can you prove
 - A false representation
 - Which C does not believe to be true
 - Which C made deliberately, or recklessly.
(i.e. careless whether true or false)?

How to recognise Fraud when you see it

Accident “hotspots”

Accident with unusual basis (low velocity impact; multiple occupants; oddly severe injury)

Claimant with claims history

Claimant with significant reason for false claim (e.g. failing business, unemployment)

Claimant or witnesses not on electoral role (or at different address)

Severe inconsistencies in story or account of story

Soft tissue injuries where no organic basis, odd “chronic pain”

What needs to be done where you suspect Fraud

1. Urgent examination of the evidence.

Consider whether the car needs to be examined and if so has it been secured?

Is there a need for engineering evidence either/both of the car and of the scene?

If the suspicion has been raised by something said by the Insured or a witness then obtain a detailed statement at the earliest opportunity. Take it yourself and cover all the issues in detail.

Check Claimants against all databases (Electoral role; Insurance Fraud Bureau, Theft Register).

Consider raising questions of the issue with C (i.e. has C been involved or made a claim for personal injuries in the last 3 years, if so obtain details) – CPR Part 18

Consider obtaining disclosure – GP and Medical records.

2. Consider using enquiry agent to dig out evidence in support.
3. Consider using Video Surveillance if the issue is one related to medical symptoms.
4. Once satisfied there is a case to answer then notify the Claimant in writing.
5. Is this a case which ought to be reported to the Police – what is the protocol with your insurer on this?

Rules of Evidence and CPR

Pleadings

CPR Part 16.5(2) deals with Defence.

“ Where the Defendant denies an allegation [in the particulars of claim]-

- (a) He must state his reasons for doing so; and
- (b) If he intends to put forward a different version of event from that given but the claimant, he must state his own version.”

The effect of this is that although there is not a strict requirement to plead fraud (as is the case with the particulars of claim – see Part 16.4(1)(e)), if you intend to allege “fraud”, then it cannot be advanced unless “fraud”, or a similar expression of the deception, is pleaded.

NB neither a Solicitor (Law Society Code for Advocacy §6.6(c)) nor a member of the Bar (Bar Code of Conduct §708) may plead or allege fraud unless they have

- (1) clear instructions to make the allegation and
- (2) reasonably credible evidence which establishes a *prima facie* case of fraud.

Proof of previous Inconsistent Statements – classically from the medical notes. See *Denton Hall Legal Services & Others v Fifield* [2006] EWCA Civ 169:

One issue in the case was the date when C’s symptoms started. Her evidence was different from that contained in the medical records. It is not clear that C had ever been properly cross-examined by having these records put to her. See also Eady J in *Sean Healy v Cosmosair Plc* [2005] EWHC 1657.

Although strictly *obiter* Buxton LJ made clear what he considered to be the necessary legal criterion of using such records:

- The records record what C told her Doctor and the record was hearsay

- If it is alleged the record contradicts C then it qualifies as a previous inconsistent statement
- If it is put to C and she admits that the record is accurate then it is admissible
- If she does not admit it then unless it is proved as hearsay under the Civil Evidence Act 1995, or is otherwise proved, the content of that record is not admissible as being true, it merely goes to the credibility of the witness (under S.4 of the Criminal Procedure Act 1865 – see S.6(3) of the Civil Evidence Act 1995).

The CA suggested that the best way to establish the medical records would be to plead reliance on the records in the Defence (? Counter Schedule), putting the onus on C to indicate the extent to which they dispute the accuracy or truth of the record. It may then be necessary to call the author of the notes.

Note S.2 of the Civil Evidence Act 1995 and CPR Part 33.2

S.2(4) failure to give advance notice does not automatically render the evidence inadmissible, but leaves you in the discretion of the Judge and the Overriding Objective, together with the possibility of costs sanctions.

In practical terms this has effects: surprise is lost; finding the Doctor and hoping (s)he remembers how the record was made is often a hopeless task.

Video Surveillance Potentially useful evidence. The following principles are now reasonably clear:

- *Jones v University of Warwick* [2003] EWCA Civ 151: D obtained video and audio evidence of C by using deception. He gained access to her home posing as a market researcher. There was consideration of the Human Rights of the Claimant and the need to promote a just result. The video evidence was compelling. CA admitted the evidence, although commenting that a judge had a discretion to exclude applying CPR Part 32.1, even though evidence “admissible”. This decision does not mean that all video evidence obtained in breach of C’s human rights will be admitted.
- *Rall v Hume* [2001] EWCA Civ 146: Trial by ambush will not be countenanced, and the court retains power to prevent D from using admissible evidence (CPR Part 32). A video is a “document” and must be disclosed even though privileged, although unless it is to be deployed by D it need not be subject to inspection.

Standard of Proof for Fraud

The usual civil standard is applicable, namely on the balance of probability; however, applying *Hornal v Neuberger Products* [1957] 1 QB 247 (CA) and *Re H & R (Sexual Abuse : Standard of Proof)* [1996] AC 563 (HL) the more serious the allegation so must the evidence adduced be more cogent.

Of course the Burden of Proof will rest on the Defendant to prove the fraud, whereas the general burden of proving the claim remains on the Claimant.

Tactical Approach and Sanctions

Strike Out

If it can be shown that the claim is an “abuse of process” then consider using CPR Part 3.4 (2) (“Power to strike out a statement of case”)

- (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.*

Also Part 1 and the Overriding Objective – requiring the parties to assist the court in furthering the overriding objective, particularly to deal with cases “justly”.

See the helpful comments of Laws LJ in *Molloy v Shell UK Ltd* [2001] EWCA Civ 1272; see also Ward LJ in *Arrow Nominees Inc v Blackledge* [2000] Lawtel 22/06/00 CA. There the CA struck out the claim for persistent cheating (failure to disclose documents, tampering with documents which he then sought to pass off as genuine). His conduct was or was tantamount to contumacious / fraudulent conduct.

Contempt of Court

In *Caerphilly BC v Hughes, Verity and Rowlands* on Lawtel, 16/02/05 Silber J was persuaded to imprison respondents for 14 days. Hughes had made a claim against Caerphilly BC for injury caused by tripping on their highway. He signed a case statement to that effect. Verity and Rowlands had served witness statements in support. Later Hughes admitted that the injury had been sustained playing football and Hughes then discontinued.

NB the Criminal standard of proof applies.

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News Release 26 July 2006

The Insurance Fraud Bureau set to expose organised insurance frauds

The new Insurance Fraud Bureau launched today (26 July) will clamp down on organised insurance frauds, that now earn criminal gangs up to £4 million a week.

The Bureau will look for evidence of organised fraud on industry databases, develop cross-industry intelligence and co-ordinate investigations between insurers, the police and other agencies. It will also run a confidential Cheatline where people can report suspected insurance frauds.

Stephen Sklaroff, Deputy Director General of the Association of British Insurers, said:

“Insurers already stop a lot of fraud. Last year we detected fraudulent claims worth more than £400 million. But the growth in organised fraud requires a new approach. The launch of the Insurance Fraud Bureau shows the industry’s determination to expose the organised criminal gangs who often use insurance payouts to fund other crimes, and put lives in danger.”

John Beadle, Chairman of the Insurance Fraud Bureau, said:

“Today’s launch follows a highly successful six month pilot where the IFB worked with insurers in identifying fraudulent networks, sharing intelligence and supporting a co-ordinated response to investigations. The Bureau is building powerful relationships with the police and law enforcement agencies. We are confident that the IFB will play an important part in protecting the honest policyholder. We will find, expose and pursue those involved in organised insurance fraud.”

Notes

1. Enquiries to:
Alan Leaman 020 7216 7440 (Mobile: 07957 482 330)
Malcolm Tarling 020 7216 7410 (Mobile: 07776 147 667)
Jonathan French 020 7216 7392 (Mobile: 07958 330 480)
Lucy Butler 020 7216 7411 (Mobile: 07712 841 184)
Kelly Ostler 020 7216 7415 (Mobile: 07968 364 302)

For the IFB, Anne Staunton, Peak Marketing & Communications Services: 020 8873 2886 / 01813 339 840.

2. Key statistics on insurance fraud:
 - Bogus and inflated insurance claims cost over £1.5 billion a year. This adds 5% to the premiums paid by honest customers.
 - Insurance companies stopped fraudulent claims valued at more than £400 million in 2005, up 50% on 2004.

Common types of organised insurance frauds include:

Staged and induced motor accidents, where fraudsters deliberately stage an accident with an innocent motorist, then claim against the innocent motorists insurer for replacement vehicle and fictitious injuries.

Disability claims made against several insurers, for non-existent or exaggerated injuries, such as back problems. The fraudsters may also dishonestly claim state benefits.

Fraudulent arson, where cash – strapped business owners resort to burning down their premises for the insurance money.

3. Organised scams uncovered by insurers include:

- A garage owner was jailed for four years for making bogus claims for repairs to damaged vehicles. He was convicted of inflating the cost of vehicle repairs and submitting invoices for work not done, to the value of £900,000.
- Twenty people were jailed for insurance frauds involving claims for damage to vehicles and personal injury arising from invented accidents. Often, already damaged vehicles were used to fit with the phoney accidents.
- Ten members of the same family were jailed after being found guilty of a £3 million insurance and benefits conspiracy. The ringleader, his children and sons-in-law, were involved in frauds including staged accidents and bogus disability claims against insurers and the Government.
- A fraudster was caught making a lucrative living from staged motor accidents. He was exposed when he purchased a Mercedes as scrap. Following a tip-off he was put under surveillance. He was filmed at night moving the car from his home to an unlit car park, where it was hit by another vehicle that was part of the scam. He then notified his insurer that the car had been hit and crashed into a pedestrian island at the very time he had been filmed staging the crash. Inspection revealed old damage, inconsistent with the fraudster's story. There was no evidence of any accident at the alleged scene. He was arrested and evidence relating to staged motor accidents and other criminal activities was secured, ultimately leading to further arrests and subsequent prosecutions in respect of extended criminal activity.

4. About the IFB:

- The IFB will analyse data from industry databases: the Claims and Underwriting Exchange (contains details of household, motor, and personal injury claims made in last five years); the Motor Insurance Anti – Fraud and Theft Register (stolen and written-off motor claims) and the Motor Insurance Database (details of all motor policies).
- The IFB is led by an Operational Steering Group of insurance fraud risk managers from Royal and SunAlliance, AXA UK, RBS Insurance, Norwich Union, Esure, Zurich, Allianz Cornhill, and representatives from the database administrators, ISDL and Polaris. The Bureau is based in London.
- The IFB supports the wider insurance industry and the ABI's anti - fraud strategies. Activity is aligned with the National Fraud Strategy and Serious and Organised Crime Agency, enabling the insurance industry to make a case for effective prosecutions.
- The IFB also operates the Fraud Cheatline. Anyone with information on a suspected insurance fraud can call this free, confidential helpline on: 0800 328 2550.
- For more information: www.insurancefraudbureau.org

5. The ABI is the trade association for Britain's insurance industry. Its more than 400 member companies provide over 97% of the insurance business in the UK. We represent insurance companies to the Government, and to the regulatory and other agencies, and provide a wide range of services to our members. ABI member companies account for more than a fifth of investments in the London stock market.

6. An ISDN line is available for broadcasts.

Association of British Insurers

<http://www.abi.org.uk/Newsreleases/viewNewsRelease.asp?nrid=13328>