

## **Lord Clarke at the Annual Bracton Lecture, University of Exeter, Law School**

### **What shall we do about fraudulent claims?**

**8 November 2013**

1. This is the second time that I have had the privilege of delivering the Bracton Lecture. This year I am delighted to be here as part of the Law School's 90<sup>th</sup> Anniversary Celebration. I propose to speak on the question what shall we do about fraudulent claims? I confess at once that I am responsible for choosing the topic; so if it is very dull you can blame me. However, it does seem to me to be a subject which has some interest and I hope that you will express your own views at the end. At the very least I hope that everyone present will think of a question for discussion at the end. I reserve the right to pick out someone and ask them for a view or at least a question; so you must all think of one.

2. There had been a good deal of publicity about the prevalence of fraudulent claims. Many questions spring to mind. Are ships scuttled as much as ever? Do the claimants get away with making fraudulent claims? Do people really invent motor accidents which never happened in order to

3. You will be pleased to hear that I am not talking about every type of fraudulent claim, of which there are very many. In particular I am not going to carry out an analysis of the obligations of an insured to his insurer pursuant to his duty to act in good faith, an insurance contract being the classic example of a contract *uberrimae fidei*.

4. The idea for my topic arose out of a case we had some time ago in the Supreme Court. I concede at once that I wrote the judgment, so that, if (as some think) we were too feeble minded in that case, I am to blame. In our case it was asserted by counsel for the defendant employer, who was in effect speaking on behalf of the employer's liability insurers, that false and exaggerated claims are rife and that it was time to do something about it. It was a case called *Summers v Fairchild*<sup>1</sup>, which was decided in June 2012. Reduced to their bare minimum the facts were these.

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<sup>1</sup> [2012] 1 WLR 2004.

5. The claimant was 26. He was injured in an accident at work in May 2003. He fell from a stacker truck and suffered both a fractured right hand and a fractured heel. He claimed that his fall and consequent injuries were caused by his employer's negligence. In October 2003, the defendant admitted liability through its insurers. In May 2006 the claimant issued a claim form which alleged negligence but did not contain detailed particulars of quantum. In July 2006 the defendant applied for and subsequently obtained permission to withdraw the admission of liability after seeing medical records which appeared to cast doubt on the claimant's account of the accident. After a trial on liability alone, in August 2007 the trial judge gave judgment for the claimant on liability, with damages to be assessed. He made an interim award of £2,000 on account of costs. The defendant did not appeal against the judgment on liability. On the contrary, it subsequently made a voluntary interim payment of £10,000 on account of damages.

6. On 4 October 2007 the defendant for the first time obtained video pictures of the claimant by use of undercover surveillance. On 5 October the claimant signed a witness statement which included the assertion that he was not able to stand for more than 10 to 15 minutes. Between then and late September 2008 the defendant continued the undercover surveillance, the last such surveillance being on 25 September 2008. In November 2008 the

without either

expert seeing the surveillance videos. In December 2008 the claimant served his first schedule of loss. In it he claimed £838,616 on the basis that he could no longer work because of the accident.

7. In December 2008 the defendant disclosed the surveillance evidence to the claimant and served a re-amended defence alleging that the claimant's claim was grossly and dishonestly exaggerated and asserting that it should be struck out in its entirety as an abuse of process. Detailed particulars of the dishonesty were given. In January 2009 the claimant made a Part 36 offer to settle for £190,200. On 9 February 2009 the orthopaedic experts, who had by now seen the surveillance material, met again and prepared a second joint statement. In May 2009 the Department of Work and Pensions (DWP) disclosed surveillance showing the claimant apparently working without difficulty in 2009. In June 2009 the claimant served a second schedule of loss valuing the claim at £250,923. He made a Part 36 offer to settle for £150,000. The trial of quantum was adjourned because of the DWP disclosure. In November 2009 the claimant's solicitors invited the defendant to attend a joint settlement meeting but the defendant declined to do so. In December 2009 the claimant served a third schedule of loss in almost the same sum as the second schedule. The claim was put at £251,481.

8. That claim was maintained at the trial in January 2010. In the light of the joint statement, neither of the orthopaedic experts was called to give oral evidence and the surveillance evidence was not challenged. The principal, if not the only, witness to give oral evidence was the claimant. There was however a good deal of written medical evidence before the judge, together with extracts from the claimant's wife's diary which appeared to show him working and playing football.

9. In February 2010 the judge handed down a detailed judgment. His conclusions can shortly be summarized thus. He accepted that the claimant had suffered the fractures alleged which required at least two operations. However, he noted that in his oral evidence the claimant did not accept the joint view of the experts. The judge held that the effect of the second operation was to make the claimant asymptomatic, as demonstrated in the videos. He held that the claimant was clearly fit for work in early October 2007. Indeed, he concluded the claimant was fit for work some months earlier than that and that he was capable of getting a job, including a job as a site supervisor, which was the job he had had before the accident and which

10. In addition, although the claimant was not fit for work between the date of the accident and the end of June 2007, in that period he was not as housebound and incapable of activity as he maintained. Although he had psychiatric problems which were genuine initially and were materially contributed to by the effects of the accident, the judge accepted the doctors' evidence that such problems had to all intents and purposes been resolved by about June 2007.

11. The judge thus rejected as deliberately untrue what the claimant said to his doctors and the medical experts as to ongoing symptoms in and after March 2007. He did so because (a) what was seen on the video tapes was absolutely inconsistent both with such disabilities and with the claim made in the DWP application form; (b) the claimant's explanation that when he was being filmed he was taking strong pain killers in order to force himself, with the object of getting back into work, was not credible given that he was seen on two separate occasions going to and from two separate medical experts' consulting rooms without crutches when leaving and returning home

12. In short, the judge concluded that the evidence before him was sufficiently cogent to sustain a case of fraud, not only applying the civil standard of being satisfied on the balance of probabilities, but also on the criminal standard of being satisfied beyond reasonable doubt. He said that the claimant had deliberately lied to the medical men and to the DWP on the application form when he said he had ongoing symptoms after March 2007. The claimant was clearly able to work without difficulty or pain when filmed in October 2007 driving and loading a van with kitchen fitting components and again in 2009 when filmed with a mobile food van. His wife's diary confirmed he was working at various other times. The judge rejected the claimant's assertion that he was working for free. In short the judge held that he had told a pack of lies.

13. The claimant had a third operation which he said was attributable to the accident. The judge however held that that operation was not attributable to the accident but to the lies when he told the doctor that he was in continuous horrible pain. If he had told the doctor the truth, namely that

14. So large parts of the claimant's claim were found to be deliberately false. The judge assessed general damages in the sum of £18,500 and the parties subsequently agreed that, on the basis of the judge's conclusion that the claimant was fit to go back to work by June 2007, the loss of earnings and other small sums recoverable amounted to just over £70,200. In the result the total damages found by the judge were just over £88,700.

15. The insurers fought hard to avoid paying the claimant a penny. They first submitted to the judge that the court should strike out the whole claim as an abuse of process on the ground that it was tainted by fraud. However, there were two previous cases in the Court of Appeal that stood in the way



*BAA Limited*<sup>3</sup>, which followed it. They were striking cases on the facts, as I will show in a moment. However the insurers appreciated that the judge, and indeed the Court of Appeal, were bound by those decisions. He did not therefore consider the application to strike out on its merits but gave permission to appeal upon the basis there was a real prospect that the Supreme Court would take a different view from the Court of Appeal in the future.

16. So, before the judge, the argument was limited to interest, costs and contempt of court. As to interest, it was argued that the claimant should have no interest on his claim after 30 June 2007 because of the lies told by the defendant throughout his evidence. The judge accepted those points but rejected the defendant's argument on the basis that the defendant could have made a Part 36 offer. He also noted that the insurers had refused to negotiate on the basis that they wanted the issue of principle, namely whether the court had power to strike the action out, determined by the Supreme Court and were therefore not interested in settlement at all. The claimant's solicitors were realistically willing to negotiate and, at any rate on

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<sup>2</sup> [2010] EWCA Civ 542; [2010] 1 WLR 616

<sup>3</sup> [2009] EWCA Civ 1256

the assumption that the cases in the Court of Appeal were correct, the judge held that the defendant ought at least to have attempted to reach a settlement. The defendant did not challenge this decision in the Court of Appeal or the Supreme Court.

17. As to costs, the defendant submitted that the claimant should pay all its costs from the date of judgment on liability; alternatively that there should be no order as to costs on the ground that his fraudulent conduct had increased the costs. The judge followed five principles which had been laid down by the Court of Appeal in *Widlake v BAA Ltd*. They were these: (1) If, as here, the conduct of the claimant is unreasonable the court must take it into account. (2) As regards such conduct, the court should principally inquire into its causative effect. To what extent did the claimant's lies and gross exaggeration cause costs to be incurred or wasted? (3) In addition, the court is entitled in an appropriate case to say that the conduct is so egregious that a costs penalty should be imposed on the offending party. There is, however, a considerable difference between a concocted claim and an exaggerated claim and the court must be astute to measure how reprehensible the conduct is. (4) Defendants have the means of defending themselves against false or exaggerated claims by making a Part 36 offer. (5)

18. The judge was again struck (a) by the fact that the insurers wanted this to be a test case in the Supreme Court and (b) by the fact that they had ample information upon which they could have made a Part 36 offer, which they did not. The judge ordered the defendant to pay the defendant's costs of obtaining the surveillance evidence and made no order for costs after March 2008. Again the defendant and their insurers did not seek to appeal against the judge's order for costs.

19. As to contempt, it was accepted that, although the Attorney General could bring contempt proceedings, the defendant could only do so with the permission of the court. The judge refused permission. He correctly recognized that there was a strong prima facie case for contempt, since by CPR 32.14(1), proceedings may be brought against a person if he makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth. However, the judge held that contempt proceedings were not in the public interest. He relied on much the same points as he had in relation to interest and costs. The judge said that the defendant could attempt to persuade the Attorney General to bring

20. In the Court of Appeal they simply held that they were bound by the previous decisions of the court. And so the case arrived in the Supreme Court, which considered first the question was whether the two Court of Appeal cases were wrongly decided and, secondly, whether the court had power to strike out the action in its entirety. *Ul-Haq v Shah* was in some ways a remarkable case. It certainly shows what sometimes goes on. There was a collision between a car driven by Mr Ul-Haq and a car driven by Mrs Shah. It was Mrs Shah's fault because she negligently drove into the back of Mr Ul-Haq's car. Mr Ul-Haq claimed for damage to the car and minor whiplash injuries. His wife also claimed for minor whiplash injuries. So did Mr Ul-Haq's mother. The problem was that the judge held that the mother had not been in the car. So she had had no opportunity to suffer a whiplash or any other injury. The defendants sought an order striking out the claims of Mr Ul-Haq and his wife on the ground that they had conspired to advance a claim on behalf of the mother. The application was put under CPR 3.4(2).

21. The Court of Appeal held that (as they put it) it is the policy of the law and the invariable rule that a person cannot be deprived of a judgment for damages to which he is otherwise entitled on the ground of abuse of process. Interestingly, the Court of Appeal refused to apply the general principle of insurance law that an insured cannot recover in respect of any part of a claim in a case where the claim has been fraudulently exaggerated or where a genuine claim has been supported by dishonest devices. But they said that the principle relates only to fraudulent insurance claims and it is restricted to the period prior to the issue of proceedings. For that last point they relied upon a paragraph in the speech of Lord Hobhouse in the House of Lords in *The Star Sea*.<sup>4</sup>

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<sup>4</sup> [2003] 1 AC 469 at [77]

22. In the Supreme Court those conclusions were challenged. We concluded that the two Court of Appeal cases were wrong and that the court does have jurisdiction to strike out such a claim, even after the trial of an action and even though the claimant has established liability in a particular sum, as in our case. Moreover that jurisdiction exists both under the CPR and under the inherent jurisdiction of the court to control its process. I gave our reasons in what you would probably think a very boring passage in paragraph 35 sub-paras (i) to (v). I will not repeat those reasons here.

23. We then summarised the position as being that, either under the CPR or under its inherent jurisdiction, the court has power to strike out a statement of case at any stage on the ground that it is an abuse of process of the court, but it will only do so at the end of a trial in very exceptional circumstances. We gave our reasons at paras 36 to 45. Essentially we concluded that one should never say never but that it must be a very rare case in which, at the end of a trial, it would be appropriate for a judge to strike out a case rather than dismiss it in a judgment on the merits in the usual way, especially where, as in *Fairchild*, the court is able to assess both the liability of the defendant and the amount of that liability.

24. We rejected the suggestion that to strike a claim out in such circumstances would inevitably infringe a party's right to access to a court and to a fair trial under Article 6, or his property rights under Article 1 of Protocol 1, of the European Convention on Human Rights, but we recognized that the court must examine the facts scrupulously in order to ensure that to strike out the claim is a proportionate means of achieving the aim of controlling the process of the court and deciding cases justly. In my opinion, that is a critical principle.

25. We tried quite hard to think of circumstances in which it would be proportionate to strike a claim out after a trial on liability and quantum. The only possibility that occurred to us was one where there had been a massive attempt to deceive the court but the measure of damages would be very small. But, on reflection, such considerations seem more appropriate before a trial than after it. There may of course be other circumstances. Only time will tell. It is difficult to predict the future.

26. The insurers of course argued that fraudulent claims must be deterred, which is undoubtedly correct. However there are surely many ways of deterring fraud short of striking out a valid claim. They can be summarized in this way:

- (1) A party who fraudulently or dishonestly invents or exaggerates a claim will have considerable difficulties in persuading the trial judge that any of his evidence should be accepted.
- (2) As to costs, in the ordinary way one would expect the judge to penalize the dishonest and fraudulent claimant in costs. So the claimant can be ordered to pay the costs of any part of the process which have been caused by his fraud or dishonesty on an indemnity basis, often leaving the claimant substantially out of pocket.
- (3) There is no reason why a defendant should not make a form of *Calderbank* offer<sup>5</sup> in which it offers to settle the genuine claim but at the same time offers to settle the issues of costs on the basis that the claimant will pay the defendant's costs incurred in respect of the fraudulent or dishonest aspects of the case on an indemnity basis. Such an offer can be made outside Part 36.
- (4) The court can also reduce interest that might otherwise have been awarded to a claimant if time has been wasted on fraudulent claims.

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<sup>5</sup> [1975] Fam 93



(5) As to contempt, we saw no reason why contempt should not be an effective sanction. We gave a number of examples in the judgment of contempt being established for the kind of behaviour evidenced in this case.

27. We were referred to a number of cases, notably a case called *South Wales Fire and Rescue Service v Smith*<sup>6</sup>, where an application was made to commit the defendant to prison for contempt of court on the ground that, having been injured at work as a fireman, he made a false claim that since his accident he had been unable to work. The Divisional Court sentenced him to 12 months' imprisonment for the contempt. The sentence was suspended for 12 months on certain terms because of the particular circumstances of the case, notably the delays since the offence. However Moses LJ set out the general approach to be adopted. He said this:

“2. For many years the courts have sought to underline how serious false and lying claims are to the administration of justice. False claims undermine a system whereby those who are injured as a result of the fault of their employer or a defendant can receive just compensation.

3. They undermine that system in a number of serious ways. They impose upon those liable for such claims the burden of analysis, the burden of searching out those claims which are justified and those claims which are unjustified. They impose a burden upon honest claimants and honest claims, when in response to those claims,

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<sup>6</sup> [2011] EWHC 1749 (Admin)

understandably those who are liable are required to discern those which are deserving and those which are not.

4. Quite apart from that effect on those involved in such litigation is the effect upon the court. Our system of adversarial justice depends upon openness, upon transparency and above all upon honesty. The system is seriously damaged by lying claims. It is in those circumstances that the courts have on numerous occasions sought to emphasize how serious it is for someone to make a false claim, either in relation to liability or in relation to claims for compensation as a result of liability.

5. Those who make such false claims if caught should expect to go to prison. There is no other way to underline the gravity of the conduct. There is no other way to deter those who may be tempted to make such claims, and there is no other way to improve the administration of justice.

6. The public and advisors must be aware that, however easy it is to make false claims, either in relation to liability or in relation to compensation, if found out the consequences for those tempted to do so will be disastrous. They are almost inevitably in the future going to lead to sentences of imprisonment, which will have the knock-on effect that the lives of those tempted to behave in that way, of both themselves and their families, are likely to be ruined.

7. But the prevalence of such temptation and of those who succumb to that temptation is such that nothing else but such severe condemnation is likely to suffice.”

28. The Supreme Court expressed its agreement with those views. That decision has been followed in other cases where sentences of between three and nine months' imprisonment have been imposed. We also expressed the view that there was in principle no reason why the trial judge should not

hear proceedings for contempt, although he or she would have to sit in the High Court.

29. Finally, the possibility remains of criminal proceedings being brought for, say, perjury or fraud. It would be open to the judge to refer the matter to the Crown Prosecution Service or the Director of Public Prosecutions in an appropriate case.

30. On the facts we concluded that it was not a case for a strike out, largely because this was treated a test case and that, but for that, contempt proceedings might have been appropriate.

31. So, ultimately the position is that the principles applied by the Court of Appeal will ordinarily stand but in an extreme case it might be possible to strike a claim out even after trial. But there are many other ways of deterring fraud which we tried to identify. Two further points. First, nothing we said affects the correct approach in a case where an application is made to strike out a statement of case in whole or in part at an early stage. One of the objects to be achieved by striking out a claim at an early stage is to stop proceedings and prevent the *further* waste of resources on

32. The decision has come in for a certain amount of comment, not all of it favourable. Both leading counsel in the case have had their say. I am not sure whether it is surprising or not, but their views reflect the arguments they advanced on behalf of their clients. In my defence, I have Craig Sephton QC and Hugh Davies<sup>7</sup>, who were counsel for the claimant. I also have Lord Kerr, who recently discussed the case in a lecture. I must however admit that he was a member of the Supreme Court who was a party to the decision and might therefore be expected to support it. For the prosecution, on the other hand, are not only William Norris QC, who was counsel for the employer and, in reality, for the employer's liability insurers, but also Professor Adrian Zuckerman, who is a distinguished academic and, in particular, a great expert in civil procedure.

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<sup>7</sup> JPI Law 2012, 3, 238

33. The headline to William Norris' article is "Look Out: I've got a Power ... But I am not going to use it."<sup>8</sup> Professor Zuckerman's criticisms are also quite trenchant. His article is entitled: "Court protection from abuse of process – the means are there but not the will."<sup>9</sup> Part of the thrust of the adverse comment is that, while the recognition of a power to strike out after a trial on the merits is welcome, it is pusillanimous not to exercise the power except in an exceptional case. In particular it is suggested that abuse of process and forfeiture go hand in hand and the right to have one's claim adjudicated go hand in hand. After making that point Professor Zuckerman continues (at p 378):

"Parties are entitled to legal process in order to prosecute legitimate causes. Since access to justice is available for the redress of wrongs, a party who uses it for the commission of a crime or a wrong forfeits the right of access in relation to the particular cause. Striking out a case for abuse of process is primarily designed to protect the legitimacy of the court's own process. For a court that suffers its process to be used for the commission of a crime or a wrong will lose public confidence in its ability to maintain the rule of law."

34. Professor Zuckerman then refers to the principles of illegality and *ex turpi causa non oritur actio*, in which relief is refused, not because of the

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<sup>8</sup> JPI Law, 2012, 3, 169.

<sup>9</sup> (2012) 31 CLQ, Issue 4, 377.

need to deter others but because of the need to maintain confidence in the administration of justice. He correctly recognizes that in *Summers* we considered that the jurisdiction to strike out for abuse of process was founded on the public policy of protecting the legitimacy of the court process. He also recognizes the relevance of proportionality in deciding what action to take in response to an abuse of process. However he then says that we erred in focusing on deterrence rather than the principle of *ex turpi causa*. As I see it, at any rate at present, the problem with the *ex turpi causa* approach is that the court has no discretion. Where the principle applies, the court has no alternative but to strike the whole case out, which may be too blunt an instrument to deal with the particular case. However that may be, as ever, Professor Zuckerman's views merit careful consideration. I commend them to you, even if I do not entirely agree with all of them.

35. I note in this context that Lord Kerr said this<sup>10</sup>:

“ ... let me express a purely personal view on the question whether an all-embracing, universally applicable rule can be applied in order to determine whether a particular species of fraud will bring about dismissal of the action. I appreciate that most insurers would appreciate welcome a fairly precise, easily applied rule to decide this

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<sup>10</sup> IFIG Conference Belfast, 11 September 2013.

question. But is such a rule either feasible or desirable? I should own up immediately to an instinctual aversion to the devising of an overly technical rule for the resolution of most legal issues. But, quite apart from that, I do not believe that such a rule in the present context is likely to prove helpful in the long term. In my experience, such rules promise more than they can deliver on purported application.”

As ever, I agree with Lord Kerr.

36. It is important to appreciate that this is the first case in which it has been held that the court has power to strike out an action as an abuse of process in circumstances in which a party has advanced a claim which is in part fraudulent but in which the judge was able to determine the true facts and the correct measure of damages. As I see it, in many cases the position is likely to be different. Applications are likely to be made at a comparatively early stage of the proceedings. The correct approach in such cases will have to be left to evolve on a case by case basis.

37. The underlying principle seems to me to be that to which I have already referred, namely that the court must examine the facts scrupulously in order to ensure that to strike out the claim is a proportionate means of achieving the aim of controlling the process of the court and deciding cases justly. As so often, this will involve a consideration of all the circumstances of the case in order to arrive at a balanced and proportionate result.

38. Finally, I recognize that, as some of the commentators have said, the various ways in which fraudulent claims may be deterred which I have discussed have their difficulties but, in my opinion they provide a significant armory in the possession of the court in its aim to deter fraud and to protect the integrity of the court's process. The effect of *Summers v Fairchild* is that that armory includes the power to strike out a claim at any time. We will have to leave it to the good sense of the judges to develop sensible principles in deciding whether and in what circumstances to exercise that power.