



Exemplary damages: credit hire, fraud and QOCS

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Patrick West looks at the latest cases and explores the future of the law's oldest way of punishing wrong-doers



"That the law never admits of a general search-warrant. That in France, or Spain, even in the Inquisition itself, they never delegate an infinite power to search, and that no magistrate is capable of delegating any such power...That the constitution of our country had been so fatally wounded that it called aloud for redress of a jury of Englishmen."

That was the Court of King's Bench in *Wilkes v Wood* (1763) Lofft 1, an action for damages by the radical politician and journalist John Wilkes who loudly criticised George III in print for a peace treaty with the French. It was one of the earliest cases of what have come to be known as exemplary damages. Humbling the Crown, the Court ruled that the actions of the King's messengers in breaking into Wilkes's house and seizing his papers without a search warrant justified damages of £1,000 (a lot of money in them days!).

Fast forward past the Spanish Inquisition and John Wilkes to the present day and the recently reported case of *Sayeera Hassan v (1) Sandra Cooper (2) Accident Claims Consultants Ltd* [2015] EWHC 540 (QB) in which Mrs Hassan was held liable to pay exemplary damages of £7,250 for her part in an exaggerated claim for damages arising from a road traffic accident.

Mrs Hassan was driving her car when it was involved in a collision with Mrs Cooper's car. Mrs Cooper conceded negligence. There was it appears a genuine but modest claim for repairs and personal injury. However, Mrs Hassan's claims management company (ACC) made a deliberate attempt to exaggerate her claim which Mrs

Hassan actively supported even though initially she had been an innocent party. Credit hire in the sum of £42,045.12 and recovery and storage charges of £5,808.00 were added to the Claim. Surprisingly the repairs were said to have cost precisely the same as the estimate (£3,598.00) and when the repair shop was contacted by investigators they said the invoice produced by Mrs Hassan was a forgery. Later ACC tried to make the garage owner sign a statement stating he had forgotten he had in fact repaired the car. He refused to be intimidated, denied the allegation and furnished witness evidence for the D. On the day of trial the D successfully made application to amend to plead fraud and bring a Pt 20 claim for exemplary damages. Staggeringly, the Amended Defence pleaded that ACC had prepared the invoice themselves as the garage owner was "too busy" and had asked them to do it instead (!). The credibility of the C's case collapsed and the D obtained summary judgment. At a further hearing the D obtained judgment in the tort of deceit and the entire claim was struck out. The instant case was an assessment of damages hearing heard by HHJ Butler sitting as a High Court Judge at Preston. Perhaps foolishly, Mrs Hassan took the stand to give evidence and it emerged she had lied about the recovery of the car from the scene, admitting she drove it home herself. She verified by signature a claim for credit hire for a different car to that which was obtained, verified the falsified repair invoice and also exaggerated her whiplash claim by some months. She was held to be 10% responsible for the continued pursuit of the claims. HHJ Butler described the case as "a very serious false exaggerated claim". ACC had gone into liquidation by the date of the damages hearing.

Exemplary damages may be awarded in three categories of cases (*Rookes v Barnard* [1964] A.C.1129):

- i) Cases of oppressive, arbitrary or unconstitutional acts by government servants (e.g. *Wilkes*);
- ii) Cases where the defendant's conduct had been calculated by him to make a profit for himself which might well exceed the compensation payable to the plaintiff;
- iii) Where expressly authorised by statute.

It is the second category which was applied in *Hassan* and which is of relevance in fraud cases. The burden of proof is still the civil one and a claim for exemplary damages must be specifically pleaded (CPR 16.4). Although the point remains

undecided, it has been assumed that exemplary damages can apply in cases of vicarious liability (*Racz v Home Office* [1994] 2 AC 45, [1994] 1 All ER 97, HL).

There are a variety of methods for calculating exemplary damages. In *Axa v Jensen* (2008) CC (Birmingham) (Recorder Lochrane) 10/11/2008, a fraudulent insurance claim was lodged by the C who sold her caravan but was not paid for it. She concocted a claim that it was stolen to recoup her losses. Police simply gave her a caution. Being careful to avoid double punishment the Court decided (considering *Axa v Thwaites* Lawtel) that a caution was insufficient punishment and that exemplary damages should be awarded given the large sum involved in the fraud and the need to provide deterrence. The insurer outlay was £8,100. The Judge noted the wide discretion afforded judges in cases of exemplary damages and decided that a proportion of 50% of that outlay was the appropriate figure to award.

In *Tasneem & ORS v Lorraine Morley* (2013) CC (Central London) (Judge May QC) 30/09/2013, a case involving nine fraudulent crash for cash claims, the Court was invited to make awards of £1,000 each as a conservative estimate of the investigation costs of the target insurer (Direct Line) and such damages were awarded. In addition, exemplary damages were sought. The Court held that deliberately causing a crash was outrageous and dangerous behaviour done for profit; potentially criminal as fraud and dangerous driving; the police did not take up the case avoiding the risk of double jeopardy; the claimants had failed to take the opportunity to show evidence they did not have means to pay and so no restriction was placed on exemplary damages. Deterrence was a key factor weighing in favour of an award as such fraudulent claims were widespread and undermined the foundation of insurance contracts and claims. Fairness operated to lead to a tariff style award of £2,000 in respect of the drivers and £1,000 in respect of the passengers (the drivers' claims being greater than the passengers). The lead case was not subject to an award as it bore most of the costs awarded to the defendant insurer which were already well in excess of the claim.

In another recent but as yet unreported case at Milton Keynes County Court DJ Hickman chose a novel third way and awarded 50% of the damages sought by the claimant as exemplary damages after a road traffic accident was found to be a "slam-on" type incident. A total of £9,500 was awarded to the defendant insurer

and driver. Although this was a QOCS case the claimants' undoubted fundamental dishonesty clearly brought it within the exceptions envisaged by CPR 44.16 (1).

Qualified One Way Costs Shifting ("QOCS") is now affecting almost all personal injury cases coming before the courts the only way to pierce the QOCS shield (regarding costs) is fundamental dishonesty (or abuse of process/obstruction of the disposal of proceedings if strike out is achieved). Credit hire frequently accompanies PI claims in road traffic. With credit hire fraud a growing problem (Keoghs estimate that 10% of the annual credit hire bill of £800,000,000 is accounted for by fraudulent credit hire organisations and claims) more victories like *Hassan* are urgently needed. And in other areas of civil fraud the Jackson reforms and insurer action have made a significant dent in the problem defence firms do not expect it to disappear any time soon. *Hassan* demonstrates that exemplary damages gives a defendant who has the ability and the resources to properly investigate a claim the chance to recoup some, if not all, of the extensive outlay they are likely to have incurred in defending fraudulent claims. Not all cases will attract such a heavy penalty but the threat of exemplary damages, and the use of them when opportunities arise, will undoubtedly serve as a deterrent to fraudsters. As the US President Theodore Roosevelt said: "Speak softly and carry a big stick".

Law/Procedure: *Sayeera Hassan v (1) Sandra Cooper (2) Accident Claims Consultants Ltd* [2015] EWHC 540 (QB); *Tasneem & ORS v Lorraine Morley* (2013) CC (Central London) (Judge May QC) 30/09/2013; *Axa v Jensen* (2008) CC (Birmingham) (Recorder Lochrane) 10/11/2008; *Rookes v Barnard* [1964] A.C.1129; CPR 44.16.

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