More than a slap on the wrist

Matthew Lawson and Rani Mina examine the possibility of bringing an action in contempt against witnesses whose statements contain falsehood

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'Evidence that a person has exaggerated the truth will not of itself mean they did not have an honest belief in the statement, and any genuine doubt must be resolved in their favour.'

Those who make false or misleading statements in civil court cases have always run the risk of private proceedings for contempt of court. In practice, however, the threat has often appeared more illusory than real. Either proceedings have not been brought (perhaps due to the successful party or victim of the falsehood not wishing to appear vindictive) or, where they have, the penalty, which in theory can amount to a hefty fine and/or imprisonment, has been little more than a slap on the wrist.

Two recent legal decisions, however, present something of a shift in attitude and serve as a stark reminder to lawyers and clients alike of the importance of ensuring that statements of case and witness statements filed in court proceedings contain 'the truth, the whole truth and nothing but the truth'.

In *KJM Superbikes Ltd v Hinton* [2008] the Court of Appeal, in granting permission for contempt proceedings to be brought, was keen to dispel the notion that such proceedings would be unlikely to result in a significant penalty or significantly influence the administration of justice in the future.

In the more recent High Court decision in *Walton v Kirk* [2009] the insurance industry appears to have heeded this message by bringing what are said to be the first private contempt proceedings against a personal injury claimant who exaggerated the effect of her injury in a claim against the policyholder. Given that identifying and preventing fraudulent activity is likely to be a priority for insurers if predictions of a rise in fraud prove accurate, private contempt proceedings may become just as much a sign of the times.

KJM Superbikes in the Court of Appeal

The case involved proceedings by Honda Motor Co Ltd and its UK subsidiary against KJM, in which it was alleged that KJM had infringed Honda's trade marks by the parallel importation of motorcycles from Australia. KJM had purchased the motorcycles from an Australian dealer, Lime Exports.

On an application for summary judgment brought by Honda, KJM served witness evidence from Lime Exports explaining that its sales to KJM had been approved by Honda Australia. In reply, Honda filed a statement by Anthony Hinton, the general manager for Honda Australia, in which this was denied. Mr Hinton claimed that Honda Australia dealt with Lime Exports from time to time only for the purpose of permitting Lime Exports to export motorcycles to the Pacific Islands.

Following refusal of summary judgment, it became apparent from documents obtained on disclosure that much of Mr Hinton's statement was false. There had been almost continuous contact between Honda Australia and Lime Exports over a prolonged period and Honda Australia was fully aware that Lime Exports had been supplying motorcycles to dealers in Europe and elsewhere. Mr Hinton, having received a warning from KJM's solicitors that he may be in contempt of court, made a second statement for the trial, admitting that his first statement was not accurate.

Directly after Mr Hinton had finished giving oral evidence at the trial, KJM applied for permission to bring contempt proceedings under CPR 32.14. This rule allows contempt proceedings to be commenced, with the Court's permission, for the purpose

of prosecuting a person who is said to have made or caused to be made a false statement, in a document verified by a statement of truth, in circumstances where the maker does not have an honest belief in its truth.

While the judge at first instance accepted that Mr Hinton's behaviour amounted to a serious contempt, he dismissed the application for permission. The judge considered that Mr Hinton had already experienced a difficult cross-examination at the trial, considerable costs would be incurred in bringing contempt proceedings, and they would be unlikely to promote the integrity of the legal process in the future. Contempt proceedings were therefore held to be disproportionate on balance.

It was submitted by KJM on appeal that these were matters that should not have featured to any great extent in the exercise of the judge's discretion. The Court of Appeal agreed. It held that the only relevant question on such applications is whether it would be in the public interest to allow a private litigant to pursue what became public law proceedings. The Court identified a number of relevant factors to consider:

- whether there is a strong case to show that the statement was false and that it was known at the time to be false;
- the circumstances in which it was made;
- its significance, having regard to the nature of the proceedings;
- any evidence of the maker's state of mind, including their understanding of the likely effect of the statement; and
- the use to which the statement was put in the proceedings.

This is the first occasion on which guidance has been provided by the Court of Appeal in relation to the test for permission to bring a contempt application.

In allowing the appeal, the Court was clearly influenced by the fact that Mr Hinton had admitted that the relevant parts of his first statement were to his knowledge at the time untrue and that he did not withdraw the statement until confronted with evidence of his falsehoods. That the statement was made in support of an application for summary judgment was also important. Evidence on summary judgment applications is rarely subject to cross-examination, giving rise to a strong inference that Mr Hinton was aware that his statement was likely to be accepted on its face as correct and that it could, therefore, interfere with the administration of justice.

The Court accepted that only prominent cases of the kind that are widely reported in the media are likely to influence the general public. Jeffrey Archer's trial for contempt in 2001 is one such example. The Court nevertheless emphasised that the pursuit of contempt proceedings in 'ordinary cases', where appropriate, is important, as these can draw the legal profession's attention, and through it the attention of potential witnesses, to the fact that statements of truth really do matter.

The Court accepted that only prominent cases of contempt, of the kind that are widely reported in the media, are likely to influence the general public.

Walton v Kirk

It would seem that Mrs Kirk also gave little thought to the risk of possible contempt proceedings when making a personal injury claim following a minor road traffic accident, in which she sought damages in excess of £750,000. Having engaged a surveillance company to film Mrs Kirk going about her daily business, the insurers of the defendant (the other driver in the accident) paid £25,000 into court on the basis that the video evidence revealed a 'huge gulf' between Mrs Kirk's statements of case and witness statements (each of which were verified by statements of truth) and the reality of her medical condition.

Faced with the compelling video evidence and a subsequent damning report from her own medical expert, who concluded that she had exaggerated her disability during the course of her examination, Mrs Kirk eventually accepted the payment into court some time after the 21-day period allowed. As a result, she was obliged to meet the insurer's costs, to the tune of £21,000, meaning she essentially recovered nothing for her troubles. Worse was to come, however. Having clearly taken a very dim view of Mrs Kirk's conduct, the insurers issued an application for contempt.

In its recent judgment in those proceedings, the Court found Mrs Kirk to be in contempt for making false statements, not in her witness statement, but in answers given in response to a request for further information (RFI) under CPR 18. These formed part of her statement of case and were themselves required to be verified by a statement of truth. Mrs Kirk was ordered to pay a fine of £2,500, together with half of the insurer's (presumably not insignificant) legal costs.

The relevant answers given by Mrs Kirk in her response to the RFI related to statements she had made when completing an application for disability benefits, shortly after she commenced the personal injury claim, as well as in a subsequent application for a disabled parking badge. The RFI asked Mrs Kirk to confirm whether each of these prior statements were true, which she did in her response. The Court found that Mrs Kirk had falsely completed these benefit claims by painting an unremittingly bleak picture of her condition and failing to describe its variable nature. This equated to a deliberate choice by Mrs Kirk to give incomplete and inaccurate information and generally to exaggerate her symptoms to a significant and unconscionable degree. When she was asked in the RFI whether the statements she had made in those applications were true, she deliberately re-stated them to assist in her personal injury claim.

These false statements would have interfered with the administration of justice because Mrs Kirk would have relied on the statements in support of her claim for damages. It was irrelevant that the answers were given after the point at which Mrs Kirk's solicitors at the time had informed the applicant's solicitors that they wanted to negotiate a settlement. This simply meant that Mrs Kirk had given the false answers when she needed to bolster her case for the purposes of negotiation.

Summary

- Two recent decisions mark a shift in attitude towards private contempt proceedings, which should no longer be expected to result in nothing more than a slap on the wrist.
- *KJM Superbikes* [2008] is the first occasion on which the Court of Appeal has given guidance on the test for permission to bring contempt proceedings.
- *Walton v Kirk* [2009] is the first private contempt proceeding by insurers against a claimant who deliberately exaggerated the effect of her injury. This suggests moves by the insurance industry to pursue fraudulent activity, even if not by the policyholder.
- Exaggeration by a witness will not always amount to contempt. Allegations of dishonesty must be capable of proof beyond reasonable doubt.
- The courts will not allow contempt proceedings to be used to stifle claims or intimidate witnesses before trial: suspected false statements in statements of case or witness statements will first have to be tested in cross-examination at trial.
- Legal practitioners must give clear advice about the potentially serious consequences of giving false information (in a statement of case or a witness statement) that purports to be verified by a statement of truth. Clients will wish to avoid conduct that might expose them to these risks and ultimately be damaging to their reputation.

The limits of contempt

The other important aspect of this decision is that the Court rejected the bulk of the allegations of contempt, emphasising the high (criminal) standard of proof that is required in these matters. Evidence that a person has exaggerated the truth will not of itself mean they did not have an honest belief in the statement, and any genuine doubt must be resolved in their favour. This will be a particularly significant factor in personal injury claims where the type of injury or its consequences may lead to a genuine perception on the part of the victim that their symptoms are more serious or debilitating then may be the case medically. Mrs Kirk, for example, was diagnosed with fibromyalgia, a condition in which the patient's perception of their disability is often greater than their physical capability, and they tend to feel pain more keenly than others. It may be difficult for others to empathise with people such as Mrs Kirk, but the temptation to jump to assumptions about their honesty or truthfulness should be avoided.

Furthermore, meticulous care needs to be taken when pleading a case on contempt, since the Court will be at pains to ensure that its analysis is focused entirely on the pleaded particulars. While other potential examples of contempt might be identified during the course of the trial, the Court will ignore these in reaching a decision, unless they have been pleaded, although such matters might be relevant to the witness's credibility.

It was for these reasons that most of the contempt allegations against Mrs Kirk, such as those made in respect of her first witness statement, were dismissed, despite the Court's finding that she was an unreliable witness and that parts of her first statement were 'highly misleading', 'simply untrue' and a 'serious attempt to mislead the court'.

Advising clients about statements of truth

There have been some comments in the media suggesting that Mrs Kirk was not represented by solicitors until the start of the contempt proceedings and that had lawyers been involved from the beginning, it is more likely that her claim would have been filtered out due to checks undertaken by personal injury lawyers to avoid fraudulent claims.

While it does appear from the Court's judgment that Mrs Kirk drafted some (if not all) of her statements of case and witness statements herself, it seems she certainly had solicitors acting for her when she signed the statements of truth and throughout the course of the settlement negotiations. This gives rise to the question of whether Mrs Kirk was adequately advised in relation to the potential consequences of giving false information that purports to be verified by a statement of truth. It is incumbent on legal practitioners to ensure that they properly explain these matters to their clients, particularly if these recent decisions indicate a growing intolerance for dishonest claims and a move away from a 'slap on the wrist' approach.

When it is appropriate to bring an application for contempt

In emphasising that the pursuit of contempt proceedings in 'ordinary cases', where appropriate, is important, the Court of Appeal in *KJM Superbikes* also stressed that parties who suspect false statements (in statements of case or witness statements) and who then seek to use committal applications to get that statement or evidence withdrawn or to otherwise pressure their opponents, are likely to get short shrift. While a party who considers that a witness might be in contempt should warn them of that at the earliest opportunity, the proper course will usually be to test that evidence with cross-examination at trial. The appropriate time for a committal application is after the witness has given oral evidence.

A matter of fact and degree

While these cases offer a wake-up call to litigants and provide useful guidance regarding the way such applications will be determined, they also demonstrate that grey areas remain. In an adversarial system of civil justice such as ours, a party is not obliged to make out the other party's case, but at what point does legitimately leaving out certain facts or matters shade into not being entirely truthful? The decision in *Walton v Kirk* also makes it clear that, particularly in personal injury cases, some exaggeration may be understandable and forgivable.

The issue of whether discrepancies in a party's case or evidence amount to contempt of court will ultimately be a matter of fact and degree. As ever, these are issues that need to be resolved by careful reference to the issues in dispute, the evidence available at the time the statements are provided, and the evidence that emerges under cross-examination.

In the final analysis, a key concern for clients will be to steer clear of conduct that might tarnish their reputation. It is unlikely ever to be in a client's interest to risk misleading the court or damaging a witness's credibility, still less to expose themselves to the real possibility and serious consequences of contempt proceedings. ■

KJM Superbikes Ltd v Hinton
[2008] EWCA Civ 1280

Walton v Kirk
[2009] EWHC 703