

Fraudulent Misrepresentation: Fraudulent Claims That Cannot Be Challenged

The Case of *Hayward v Zurich Insurance Company Plc* [2015] EWCA Civ 327

The Facts

In June 1998, Mr Hayward suffered an accident at work in which he injured his back.

In 1999, Mr Hayward's employer obtained video surveillance evidence which appeared to show Mr Hayward carrying out heavy work at home ('the 1999 video').

In May 2001, Mr Hayward issued proceedings against his (now former) employer claiming (a) his injury continued to cause him serious lumbar pain which restricted his mobility (b) in turn, he had developed a depressive illness and (c) his ability to work was seriously impaired. Mr Hayward claimed special damages just under £420,000 plus general damages for pain and suffering. Mr Hayward's claim was supported by evidence from an orthopaedic surgeon, Mr Bracegirdle.

The employer's defence was conducted by its insurer ('Zurich'). Zurich admitted liability for the accident but disputed quantum on the ground that Mr Hayward had "*exaggerated his difficulties in recovery and current physical condition for financial gain*". Zurich relied on the 1999 video and the evidence of another orthopaedic surgeon, Mr Sharp. (It should be noted, however, that Mr Sharp had examined the 1999 video but fell short of stating that Mr Hayward was 'shamming' and to have sustained far less harm than was being claimed).

Zurich did not believe Mr Hayward's representations were true but recognised that there was a real risk a judge would accept them as true and so, on 3 October 2003, Zurich entered into a settlement agreement on terms that Zurich would pay Mr Hayward the sum of £134,973.

In around 2005, Mr Hayward's neighbours, Mr and Mrs Cox, approached the employer to say that they believed Mr Hayward's claim to have suffered a serious back injury was '*dishonest*' because, from their observations of his conduct and activities, they believed he had entirely recovered from his injury by 2002 at the latest.

In February 2009, Zurich issued proceedings against Mr Hayward claiming he had fraudulently misrepresented the extent of his injury. Zurich sought rescission of the settlement agreement and repayment of £134,973.

Trial took place in November 2012 and the judge found Mr Hayward had indeed dishonestly exaggerated the effects of his injury and he went on to set aside the settlement agreement. A judge subsequently found Mr Hayward was entitled to damages in the sum of £14,720 and so the judge ordered him to repay £134,973 to Zurich less £14,720.

Mr Hayward did not challenge the judge's finding that he had dishonestly exaggerated the effects of his injury. Nevertheless, Mr Hayward appealed against the judge's decision to set aside the settlement agreement, and to order him to repay £134,973 less £14,720, on the grounds that Zurich believed his representations were false and "*a man cannot be deceived if he knows the truth*".

The Court of Appeal's Judgment

Lord Justice Underhill gave the Court of Appeal's leading Judgment on 31 March 2015 to which Lord Justice Briggs and Lady Justice King agreed.

The Court of Appeal expressed the opinion that it would be fair to treat Zurich, when entering into the settlement agreement, as having taken the risk of Mr Hayward's representations in support of his personal injury claim being ill-founded but it would be unfair to treat it as having taken the risk of Mr Hayward's representations being dishonest "*absent of any indication to the contrary*".

However, the Court of Appeal had initially noted that Zurich's claim for rescission of the settlement agreement due to fraudulent misrepresentation was based on the same representations contained in Mr Hayward's personal injury claim. This was not a case involving collateral representations designed to induce the settlement.

The Court of Appeal also stated that Zurich's defence to Mr Hayward's claim (which alleged he had "*exaggerated his difficulties in recovery and current physical condition for financial gain*") constituted a positive assertion that Mr Hayward's representations were dishonestly advanced and, therefore, the defence contained a plea of fraud.

In the circumstances, the Court of Appeal held that it was sufficiently apparent that Zurich intended to settle Mr Hayward's claim notwithstanding the possibility that the claim was fraudulently advanced and so there can be no reason in principle why it should not be held to its settlement agreement even if the fraud subsequently becomes demonstrable.

Lord Justice Underhill stated "*It may stick in the throat that [Mr Hayward] can retain the reward of his dishonesty but [Zurich] will have made the deal with [its] eyes open to the possibility of fraud and there is an important public interest in the finality of settlements*".

The Court of Appeal concluded that it was necessarily implicit in the settlement agreement that Zurich gave up the right to have it set aside if it was subsequently in a position to prove the dishonesty.

The Court of Appeal allowed Mr Hayward's appeal and set aside the trial judge's decision to rescind the settlement agreement and the order requiring him to repay £134,973 less £14,720.

Opinion

It is the writer's respectful opinion that the Court of Appeal was wrong to apply such a broad interpretation to the words Mr Hayward had "*exaggerated his difficulties in recovery and current physical condition for financial gain*" to find that Zurich's defence to Mr Hayward's claim included a plea of fraud (this being one of the reasons preventing Zurich from arguing fraud after having entered in to the settlement agreement).

In any event, the settlement agreement itself merely provided for Zurich to pay a sum of money to Mr Hayward in consideration of his agreement to abandon his claim and consent to a stay of the proceedings. Neither side accepted the other's case in relation to the nature and degree of Mr Hayward's injuries. Nothing in the settlement agreement involved an admission by Zurich that Mr Hayward's claim was genuine and Zurich did not withdraw its allegation of exaggeration.

Nevertheless, the Court of Appeal believed there can be "*no reason in principle*" why Zurich should not be held to its settlement agreement even if Mr Hayward's fraud subsequently becomes demonstrable. The Court of Appeal also believed there is an important "*public interest*" in the finality of settlements.

It is respectfully submitted that there are sound reasons in principle why Zurich should not be held to its settlement agreement, for example, one should not financially gain from civil and / or criminal wrongs such as fraud. It is also regretful that the Court of Appeal did not consider the competing public interest arguments between (a) finality of settlements and (b) the need to discourage fraudulent claims, the need to encourage members of the public to report fraudulent claims and / or the impact fraudulent claims have on the level of insurance premiums paid by employers, businesses and members of the public.

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