

Contempt Applications Following Clinical Negligence Claims:

Lessons from *Atwal v. Calderdale*

James Todd QC
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Sandip Singh Atwal



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The Facts

- Suffered serious assault outside a pub (Jun '08).
- Attended A&E with extensive injuries which included minor injuries to a finger and his lip.
- Trust admitted negligent treatment, leaving Atwal with a slightly crooked index finger on his dominant right hand and a scar on his lip.
- He alleged major disability, chronic pain, psychological effects: could not work in taxi firm or as DJ; could not socialise; turned to alcohol; severely depressed; extensive care.



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The Claim

- £30,000 Part 36 offer made with letter of response admitting breach of duty (Dec '11).
- C rejected the offer, so evidence gathering began.
- Expert evidence in six (!) fields: oral and max fax, orthopaedics, chronic pain, psychiatry, care/OT, employment.
- Final schedule: £837K.



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The Lie

- Surveillance showed him working as a courier, using injured hand freely
- Social media also showed him DJ'ing:



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And, best of all:

<https://www.youtube.com/watch?v=TYeRBP8IH0>



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The Outcome

- The Trust amended Defence and applied to strike out the claim on an interlocutory basis (pre-section 57 CJCA).
- In response, whilst denying the fraud, Atwal accepted the £30K out of time and with the usual costs penalties so that he received nothing.



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Atwal – the committal

- NHSLA (as then) considered the issues carefully and decided to pursue Mr Atwal for contempt
- First committal application by the NHS: *NHS resolution – Board meeting minutes (Part 1) 18.07.18*



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The Supreme Court and contempt: *Summers v Fairclough*

"Those who make false claims if caught should expect to go to prison. 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."
(para 57)

"...it is open to the defendant (or its insurer) to seek to bring contempt proceedings against the claimant, which are likely to result in the imprisonment of the claimant if they are successful..."
(para 61)



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The Law

Interference with due administration of justice (CPR Part 81, Section 3):

- It is contempt of court to engage in any conduct which involves an interference with the due administration of justice, either in a particular case or generally as a continuing process
- *“It is justice itself that is flouted by contempt of court, not the individual court or judge who is attempting to administer it.” AG v Leveller Magazine Ltd* [1979] A.C. 440, Lord Diplock at page 449



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[Continued...]

- forms of conduct which fall into this category are numerous
- overlaps with making false statements of truth or disclosure statements (also CPR 81, Section 6)
- also covers the claimant who deliberately set out to deceive the medico-legal doctor or expert by falsely representing the extent of his continuing symptoms, either in the physical manner of his presentation or by lies told to the doctor or expert, or both



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[Continued...]

- the claimant must have intended by their conduct to interfere with the due administration of justice;
- the conduct complained of must have had a tendency to interfere with the administration of justice;
- It is beyond argument that to forge the signature on a WS may constitute an attempted interference with the administration of justice:

LV v Khan and others [2018] EWHC 2591 (QB)



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Making a false statement (CPR rule 32.14 and Part 81, Section 6):

CPR, rule 32.14:

"Proceedings for contempt of court 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."

See also CPR, rule 31.23 in respect of false disclosure statements, and note that false statements in affidavits are not covered by this section or, pursuant to **International Sports Tours Ltd v Shorey** [2015] EWHC 2010 (QB) Green J, by Part 81 at all.



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Cont.

- Part 81, Section 6 applies in respect of committals for making a false statement of truth or disclosure statement
- If the grounds are a mixture of allegations under Section 3 and Section 6 of Part 81 then rule 81.17(5) provides that Section 3 applies, unless the court has directed the matter be referred to the AG
- Per Keith LJ **Nield v Loveday** [2011] EWCA Civ 2324 (Admin) in order for an allegation to succeed, it must be shown that in addition *"to knowing what you are saying is false, you have to have known that what you are saying is likely to interfere with the course of justice."*



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Cont.

- A statement made by someone who is reckless whether it is true or false is liable as if that person knew what was said was false, but simple carelessness will not be sufficient: **Berry Piling Systems Ltd v Sheer Projects Ltd** [2013] EWHC 347 (TCC), para 7-12
- It was not enough for recklessness that the maker did not take sufficient steps to check whether the statement was true; there had to be conscious engagement with the issue which was the subject of the statement before it could be said that the statement, if untrue, was made recklessly and thus without an honest belief in its truth: **Newson-Smith v Alawi Quais Abdul Mumem Al Zawawi** [2017] EWHC 1876 (QB)



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Cont.

- Permission of the Court is required (r.81.18)
- In order to prove the committal, the applicant needs to prove:
 - (i) the statement in question was false;
 - (ii) the statement has, or if persisted in would be likely to have, interfered with the course of justice in some material respect.



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[Continued...]

(iii) at the time it was made the maker of the statement:

- (a) had no honest belief in the truth of the statement or was reckless whether it was true or false; and
- (b) knew of its likelihood to interfere with the course of justice.



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Standard of Proof in committal

- The criminal standard, i.e. beyond a reasonable doubt.

In other words:

- The judge has to be satisfied so that he / she is sure that the contempts have been committed.
- The obligations to ensure a fair hearing are the equivalent of those applicable to criminal proceedings: *LV v Khan and others* (ibid)



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Procedural Aspects

- County Court claims go up to the High Court using the Part 8 procedure
- High Court matters the committal proceeds by way of an application made under Part 23
- Nb. if solely proceeding in respect of a false statement in the High Court or CoA then permission must be sought from the court dealing with the claims



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Permission Application

- Process is governed by CPR r. 81.14:
 - permission is required in every case
 - Application for permission can be determined without a hearing (rule 81.14(4))
 - Note the decision of Goose J in **Zurich Insurance plc v Romaine** [2018] EWHC 3383 (QB) to allow the application for permission to be renewed orally pursuant to CPR, rule 3.1 in a committal commenced using Part 8.



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Permission Application

- Process is governed by CPR r. 81.14:
 - personal service required (unless an order for substituted service is made)
 - because custody is a possible outcome, respondent will be entitled to legal aid from the outset and must be made aware of that entitlement: PD81 para 15.6



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Permission Application

- failure to give respondent sufficient time to arrange legal representation can result in a committal being quashed: ***Douherly v The Chief Constable of Essex Police*** [2019] EWCA Civ 55



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Permission Application [Continued...]

- At the permission hearing, need to show a strong *prima facie* case and that contempt proceedings are in the public interest, proportionate and in accordance with the overriding objective
(see ***Zurich v Romaine*** (ibid) where the speed of the respondent's capitulation in the face of fraud evidence persuaded Mr Justice Goose permission should not be granted)
- A claimant who wants to contest the allegations will try to have them knocked out at the permission stage.



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Main Hearing

- Before single High Court judge.
- Affidavits replace witness statements, although all important evidence must be given live.
- Hearings frequently run to several days.



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**Tactics:
What We Learnt From Atwal**

Only consider contempt proceedings in the very strongest cases

- The evidence will normally have to show three things...



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1. Very strong proof of inconsistency between, on the one hand, the actual symptoms being experienced by the claimant and, on the other, those reported and represented by him / her.

Put another way, the party bringing the contempt proceedings should be in a position to say that the claimant must have been lying.



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- that usually means dynamite surveillance and/or social media evidence;
- and it requires there to be (very) close proximity in time between the surveillance films / social media and the most recent of those reports and representations;
- any significant time-gap opens the way for the claimant to create reasonable doubt in the judge's mind



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e.g.

- *'That was my condition when I reported it to [the expert / my solicitor / my witness]. It has improved since then and no-one has asked me for an update.'*
- *'I left my solicitor to get on with the claim and didn't realise that I had to tell her that my symptoms were getting better.'*



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- *'My symptoms vary according to the time of year. They are better in the summer / warmer weather.'*
- *'When I signed the statement of truth I didn't pay much attention to the contents of the document. It's all legal blurb to me. In fact I don't remember reading it at all and I don't remember signing it.'*



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- *'I told my solicitor all of this but he refused to listen to me / said it would be better for my claim if the other side didn't know my symptoms were improving.'*
- *'Good days, bad days'*
- *'I am dyslexic and don't read very well.'*
- *'I finally decided to try taking my medication.'*



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Any of those may be enough to create a doubt in the judge's mind and bring the proceedings to an expensive, embarrassing end.



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2. The evidence must be of really gross exaggeration of symptoms. Note the words of Coulson J in:
Kirk v. Walton [2009] EWHC 703:

“Some exaggeration may be natural, even understandable.... On the other hand, gross exaggeration and dishonesty will not be tolerated...”



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By the way...

- It is normally necessary to have the experts on board for the dishonesty case.
- That can mean the other side's experts as well.



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3. The way the claim came to an end should point strongly to guilt.

- Obviously, a finding of dishonesty in the original trial is the best springboard for a contempt application but does not bind the Judge on the committal
- But what about cases that discontinue or settle?



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- It will be a matter of inference; a claimant's solicitor rarely admits in open correspondence that their client has been found out.
- But the judge will scrutinise the manner in which the claim ended carefully and a full and reasoned explanation will be required from the other side if there was a discontinuance or acceptance of a low/drop hands offer.



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- If only one inference is reasonably possible – that the claimant accepted a Part 36 out of time / took a low offer/discontinued / made concessions on costs because he knew that the game was up – then that is powerful evidence of guilt (as in *Atwal*).



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On the other hand, if some alternative explanation is available then it will certainly be offered and relied on heavily by the claimant.

For example:

- If the defendant has paid a significant sum to settle (more than the claim was really worth); or
- has not raised or pursued a plea of fundamental dishonesty...



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...the judge may take heed of that in considering whether the contempt proceedings are in the public interest/proportionate/in accordance with the overriding objective.



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Other Evidential Considerations

- Medical records and DWP records are likely to be a crucial part of the evidence.
- In *Atwal*, they showed what was really going on.



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Sentencing

- Really gross liars can expect immediate custody.
- Statutory provisions: one half to be served.
- The alternatives: a suspended sentence, a fine.
- Purging the contempt will often reduce the sentence: **Aviva v Ahmed** [2018] EWHC 423 (QB)



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Publicity

- There is real press interest in these cases.
- All the more so if there is an interesting hook for the news story: in Atwal it was the DJ'ing and the record release.



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Costs

- These are expensive cases to run: NHSR's costs in Atwal were £90K and that was without a full hearing of the allegations.
- Unless the defendant has means, there is no real chance of any recovery.



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Poor Mr Atwal: 3 months imprisonment



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Questions?

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