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**TIME'S UP FOR WHOLLY FRAUDULENT INSURANCE CLAIMS: THE CASE FOR NEW  
STATUTORY REMEDIES  
Dr Katie Richards\***

**Abstract**

The Insurance Act 2015 codified the civil response to insurance fraud; the forfeiture rule. However, this rule fails to deter the wholly fraudulent claim such as the 'crash for cash' or the marine scuttle. This article critiques the Law Commissions' justifications for inaction and contends that further remedies, namely damages for wasted costs and exemplary damages, are required in statute to deter wholly fraudulent claims.

**INTRODUCTION**

Neither insurance fraud nor the legal imperative to control it is new. Indeed, the latest statistics compiled by the Association of British Insurers (ABI) demonstrates that 113,000 fraudulent claims were made in 2017 which represent a cost of £1.3 billion.<sup>1</sup> Undetected fraud is thought to cost a further £2.1 billion.<sup>2</sup> However, to simply refer to 'fraudulent claims' overlooks the considerable variations in such claims and, significantly, has resulted in an insufficiently nuanced legal regime. Fraudulent claims may be made by an assured against his insurer (a first-party claim) or by a person who has sustained some loss due to an insured person's negligence and brings a claim against that party's underwriter (a third-party claim). Further distinctions exist in the type of wrongdoing which constitutes the fraud. A wholly fraudulent claim, for example, exists where the loss has been deliberately concocted for the purposes of bringing a claim or in the absence of any loss whatsoever. By contrast, an exaggerated claim, typically designed to increase the indemnity, is made following a genuine

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<sup>1</sup> ABI, 'One scam every minute – ABI reveals the true extent of insurance fraud in the UK' (22/08/2018), <https://www.abi.org.uk/news/news-articles/2018/08/one-scam-every-minute/> (accessed 10/07/2019).

<sup>2</sup> Insurance Fraud Taskforce, Insurance Fraud Taskforce Final Report (January 2016), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/494105/PU1817\\_Insurance\\_Fraud\\_Taskforce.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/494105/PU1817_Insurance_Fraud_Taskforce.pdf) (accessed 10/07/2019), [2.4].

loss. The data does not distinguish between the split between first- and third-party fraud or the type of wrongdoing in which the fraudster has engaged. Indeed, further detail is only available to subscribers at prohibitive expense.<sup>3</sup> Significantly, this data has been readily accepted by the courts as evidence of the social problem insurance fraud represents<sup>4</sup> and has shaped the legal response to first- and third-party fraud.

The legal response to insurance fraud has developed differently in the first- and third-party contexts. In the former case, fraud results in the forfeiture of the entire claim, including any genuine portion of loss.<sup>5</sup> This is an intentionally harsh sanction which is designed to deter insurance fraud.<sup>6</sup> However, this rule, recently codified in the Insurance Act 2015,<sup>7</sup> is largely ineffective where the claim is entirely fraudulent since there is no genuine loss at risk of forfeiture. As such, the absence of a remedy tailored to wholly fraudulent claims in the 2015 Act is disappointing. In the third-party context, courts can strike out fraudulent claims<sup>8</sup> - the procedural equivalent of forfeiture – but will also award further remedies, namely damages for investigation costs to compensate the insurer<sup>9</sup> and exemplary damages to deter wholly fraudulent claims.<sup>10</sup>

Against this backdrop, two major arguments are developed in this article. First, the logic underpinning the deterrent effect of forfeiture does not apply in the context of wholly fabricated claims because there is no genuine loss at risk. It is contended, therefore, that two further statutory remedies are required to combat wholly fraudulent claims. First, insurers should be able to recover the costs expended in uncovering the fraud. To make this recommendation, this article will examine both the objections raised by the Law Commission

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<sup>3</sup> J Davey, 'Fraud: Lies, damned lies and insurance claims' (BILA presentation, 15/03/2019), <http://www.bila.org.uk/news/post/friday-15th-march-professor-james-davey-fraud-lies-damned-lies-and-insurance-claims/> (accessed 10/07/2019).

<sup>4</sup> *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2016] UKSC 48, [56] per Lord Hughes; *Royal & Sun Alliance Insurance Co v Fahad* [2014] EWHC 4480 (QB), [24] per Spencer J; *Direct Line Insurance plc v Khan* [2002] Lloyd's Rep. IR 364, [38]-[39] per Arden LJ; *Khan v Hussain* (16 May 2007, Huddersfield CC) [9] per Judge Hawkesworth QC.

<sup>5</sup> *Britton v Royal Insurance* (1866) 4 F&F 905.

<sup>6</sup> *Galloway v Guardian* [1999] Lloyd's Rep. IR 209, 214 per Millett LJ; *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2015] Lloyd's Rep IR 115, [75] per Christopher Clarke LJ; *Axa General Insurance Ltd v Gottlieb* [2005] Lloyd's Rep. IR 369, [31] per Mance LJ.

<sup>7</sup> Insurance Act 2015 s.12

<sup>8</sup> Criminal Justice and Courts Act 2015 s.57; Civil Procedure Rules 3.4(2)(b).

<sup>9</sup> *Direct Line v Akramzadeh* (unreported) 15 June 2016, QBD; *Tasneem v Morley* (unreported) 30 September 2013, Central London CC; *Liverpool Victoria v Ghadhda & Iqbal* (unreported) 29 June 2010, Central London CC.

<sup>10</sup> *Akramzadeh* (n9); *Tasneem* (n9); *Ghadhda* (n9); *Axa v Shaikh* (unreported) 09 February 2010, Birmingham CC; *Vasile v Pop Loan* (unreported) 17 November 2015, Willesden CC.

and cases where insurers have successfully recovered these costs in third-party frauds. However, to cohere with the judicial rhetoric that harsh legal sanctions deter, insurers should also be entitled to exemplary damages. The article identifies the juridical basis for punitive awards and justifies their use in the context of wholly fraudulent claims. It concludes by underlining the importance of enshrining these rights in statute and addresses potential objections to these new causes of action.

### A TYPOLOGY OF FRAUDULENT CLAIMS

Part of the longstanding difficulty of the civil response to insurance fraud, as I have identified previously,<sup>11</sup> is that it treats fraud as a singular offence. In reality, however, no two fraudulent claims are the same and may differ considerably. The primary distinction is that which exists between the first-party and third-party insurance claim. In the former case, the assured makes a fraudulent claim against his underwriter for loss which is *prima facie* covered by the policy. By contrast, in a third-party claim, the fraudster has no direct contractual relationship with the insurer but instead brings a claim against an insured person or company. It is that party's insurer who pay any compensation.<sup>12</sup>

A further distinction relates to the nature of the fraud which is carried out. Three types of wrongdoing are considered in this context; the wholly fraudulent claim, the exaggerated claim and the use of false evidence<sup>13</sup> all of which can be committed whether the claim is brought by an assured or third party.

A wholly fraudulent claim exists where the loss has been deliberately caused by the assured or is brought in the absence of any loss for the sole purpose of financial gain. In the first-party context, typical examples include arson<sup>14</sup> and the marine scuttle.<sup>15</sup> By contrast, the paradigm example of a wholly fraudulent third-party claim is the 'crash for cash,' "a collision...deliberately contrived in order to make a false claim for damages [which] mimics

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<sup>11</sup> K Richards, 'Deterring insurance fraud: A critical and criminological analysis of the English and Scottish Law Commissions' current proposals for reform' (2013) 24 ILJ 16; J Davey and K Richards, 'Deterrence, human rights and illegality: The forfeiture rule in insurance contract law' [2015] LMCLQ 314.

<sup>12</sup> *Hayward v Zurich Insurance Co* [2016] UKSC 48, [51] per Lord Toulson.

<sup>13</sup> This article does not consider the suppression of a defence given the absence of case law and the fact that this does not map well in the third-party context.

<sup>14</sup> *S & M Carpets (London) Ltd v Cornhill Insurance Company* [1982] 1 Lloyd's Rep. 423.

<sup>15</sup> *Kairos Shipping Ltd v Enka & Co LLC (The Atlantik Confidence)* [2016] 2 Lloyd's Rep. 525.

the commonest form of genuine road traffic accident, a rear end shunt.”<sup>16</sup> These claims may flow from a single collision<sup>17</sup> or, as in *Axa v Financial Claims Solutions*,<sup>18</sup> involve multiple contrived accidents, several defendants and a claims management company which had deliberately misrepresented its legal standing to the court. While these claims will often be brought by a third party, a close examination of the case law and incidents reported by the Insurance Fraud Enforcement Department (IFED), the section of City of London Police funded by insurers to target fraud,<sup>19</sup> reveals that contrived crashes generate first-party claims<sup>20</sup> and can constitute a conspiracy between assureds and third parties.<sup>21</sup>

An exaggerated claim is made where the party has suffered genuine loss but inflates the extent or value of that loss. The exaggeration may be an attempt to extract financial gain or may reflect the commercial reality of negotiation in claims settlement.<sup>22</sup> Such wrongdoing is apparent in both first<sup>23</sup> and third-party claims.<sup>24</sup> In the latter context, such claims tend to follow a genuine injury where the person at fault is covered by insurance, most typically an employers’ liability<sup>25</sup> or public liability policy.<sup>26</sup>

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<sup>16</sup> *Aviva v Ahmed* [51] per Spencer J.

<sup>17</sup> *Wrobel v Georgerazvan* (18 November 2016, Central London CC); *Akhtar v Ball* (10 July 2015, Walsall CC).

<sup>18</sup> *Axa Insurance v Financial Claims Solutions* [2019] RTR 1.

<sup>19</sup> City of London Police, ‘Press releases’,

<http://news.cityoflondon.police.uk/Releases/ReleaseSearchPage.aspx?category=IFED> (accessed 10/07/2019).

<sup>20</sup> City of London Police, ‘Fraudster sentenced after he hired camper van to make £22,500 theft claim’ (19/12/2018),

[http://news.cityoflondon.police.uk/r/1172/fraudster sentenced after he hired camper van to](http://news.cityoflondon.police.uk/r/1172/fraudster%20sentenced%20after%20he%20hired%20camper%20van%20to) (accessed 10/07/2019); City of London Police, ‘Convicted money launderer sentenced after making bogus insurance claim for his Rolex’ (22/02/2019),

[http://news.cityoflondon.police.uk/r/1202/convicted money launderer sentenced after making](http://news.cityoflondon.police.uk/r/1202/convicted%20money%20launderer%20sentenced%20after%20making) (accessed 10/07/2019).

<sup>21</sup> City of London Police, ‘Nine men sentenced for staging bus crash and faking injuries’ (12/10/2017),

[http://news.cityoflondon.police.uk/r/920/nine men sentenced for staging bus crash and faki](http://news.cityoflondon.police.uk/r/920/nine%20men%20sentenced%20for%20staging%20bus%20crash%20and%20faki) (accessed 10/07/2019); City of London Police, ‘Four family members sentenced for ‘crash for cash’ claims, worth over £40,000’ (22/08/2018),

[http://news.cityoflondon.police.uk/r/1092/four family members sentenced for crash for cash](http://news.cityoflondon.police.uk/r/1092/four%20family%20members%20sentenced%20for%20crash%20for%20cash) (accessed 10/07/2019).

<sup>22</sup> *Orakpo v Barclays Insurance Services* [1995] LRLR 443, 451 per Hoffmann LJ; *Diggins v Sun Alliance* [1994] CLC 1146, 1165 per Evans LJ; M Stockdale, ‘Fraud’ in R West (ed.) *Kennedys Claims Handling Law and Practice* (3<sup>rd</sup> ed. Kennedys, 2018), 1052.

<sup>23</sup> *Galloway* (n6); *Orakpo* (n22); *Nsubuga v Commercial Union Assurance* [1998] 2 Lloyd’s Rep. 682.

<sup>24</sup> *Fairclough Homes Ltd v Summers* [2013] Lloyd’s Rep IR 159.

<sup>25</sup> *Ibid*; City of London Police, ‘Insurance fraudster sentenced after surveillance caught him red handed’

(31/07/2017), [http://news.cityoflondon.police.uk/r/877/insurance fraudster sentenced after surveillance](http://news.cityoflondon.police.uk/r/877/insurance%20fraudster%20sentenced%20after%20surveillance) (accessed 10/07/2019).

<sup>26</sup> City of London Police, ‘Cyclist sentenced for £175,000 fraudulent pothole injury claim’ (05/06/2018),

[http://news.cityoflondon.police.uk/r/1045/cyclist sentenced for 175 000 fraudulent pothole](http://news.cityoflondon.police.uk/r/1045/cyclist%20sentenced%20for%20175%20000%20fraudulent%20pothole) (accessed 10/07/2019).

Until recently, the use of fraudulent evidence to support a genuine claim also constituted fraud. Such evidence could include falsified records, sham invoices or a misleading account of the loss.<sup>27</sup> In *Versloot*,<sup>28</sup> the Supreme Court took the view that while dishonesty of this nature was wrong, it should no longer constitute fraud in the first-party context. In third-party claims, fraudulent evidence is typically used to bolster exaggerated or wholly fraudulent claims<sup>29</sup> and, to the author's knowledge, has not been before the court as a distinct type of wrongdoing. This recent development is included here to frame subsequent discussion.<sup>30</sup>

These distinctions matter because the legal responses to first and third-party frauds has differed. In the first-party context, the forfeiture rule operates to deprive the assured of the entirety of the fraudulent claim, including any portion of genuine loss.<sup>31</sup> This rule is underpinned by several significant policy considerations, most notably the deterrence of fraud and the protection of the underwriter from information asymmetries in the claims process. An explicit reference to deterrence is found in Millett LJ's judgment in *Galloway v Guardian*,<sup>32</sup> where the assured had exaggerated burglary losses:

The making of dishonest insurance claims has become all too common. There seems to be a widespread belief that insurance companies are fair game, and that defrauding them is not morally reprehensible. The rule which we are asked to enforce today may appear to some to be harsh, but it is in my opinion a necessary and salutary rule which deserves to be better known by the public.

The clear implication here is that fraud is deterred through the imposition of harsh legal sanctions. Indeed, one can readily see the judicial logic which inspired, and continues to permeate, this explanation of deterrence in relation to exaggerated claims. As Lord Hobhouse argued in *The Star Sea*,<sup>33</sup> there should be a sanction attached to fraud: "the logic is simple.

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<sup>27</sup> *Agapitos v Agnew (The Aegeon)* [2003] QB 556, *Versloot* (n4)

<sup>28</sup> *Versloot* (n4) [23] per Lord Sumption.

<sup>29</sup> *Financial Claims Solutions* (n18) [10] per Flaux LJ.

<sup>30</sup> See later, text to fn 116.

<sup>31</sup> *Britton* (n5) 909 per Willes J.

<sup>32</sup> *Galloway* (n6) 214 per Millett LJ.

<sup>33</sup> *Manifest Shipping Co Ltd v Uni-Polaris Co Ltd (The Star Sea)* [2003] 1 AC 469, [62] per Lord Hobhouse.

The fraudulent insured must not be allowed to think: if the fraud is successful, then I will gain; if it is unsuccessful, I will lose nothing.”

Remedies were also required to counter the information asymmetries inherent in the claims process, which create incentives for the assured to mislead his underwriter. Specifically, the underwriter was said to be reliant on his assured for information about the cause and scale of loss. As Willes J stated in *Britton v Royal Insurance*:<sup>34</sup>

the office did not know, and could not be supposed to know, the real value... the policy was effected through an agent, who could not be supposed to be skilled in the value of the stock in all sorts of businesses, or to know within a hundred or two the value of stock in a business different from his own.

Viewed from this perspective, forfeiture minimises the assured’s incentives to lie and “in the result to recover more than he is entitled to...”<sup>35</sup> This remains a key element of the modern narrative surrounding forfeiture. In *Versloot*,<sup>36</sup> Lord Sumption recognised that the rule reflected “the law’s traditional concern with the informational asymmetry of the contractual relationship, and the consequent vulnerability of insurers.” Lord Sumption did subsequently concede, however, that informational asymmetry may no longer create the same problems in “modern conditions,”<sup>37</sup> no doubt attributable to the detailed pre-contractual disclosure regime and information sharing between underwriters. Nevertheless, the courts have accepted the ongoing threat of information asymmetries and, importantly, have used this to justify the shape of the forfeiture rule.

Forfeiture was codified in Insurance Act 2015.<sup>38</sup> Further contractual and statutory controls delineate the scope of the underwriter’s liability, namely that the loss was proximately caused by a covered peril,<sup>39</sup> was notified to the underwriter<sup>40</sup> and was not wilfully caused by the assured.<sup>41</sup> The latter prohibits recovery where the loss “is attributable to the wilful

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<sup>34</sup> *Britton* (n5) 910 per Willes J.

<sup>35</sup> *Ibid* 909 per Willes J.

<sup>36</sup> *Versloot* (n4) [26] per Lord Sumption.

<sup>37</sup> *Ibid* [10] per Lord Sumption.

<sup>38</sup> Insurance Act 2015 s.12(1)(a)

<sup>39</sup> Marine Insurance Act 1906 s.55(1)

<sup>40</sup> E.g. International Hull Clauses 2003 cl.43

<sup>41</sup> Marine Insurance Act 1906 s.55(2)(a)



misconduct of the assured.” This rule demarcates the scope of cover on public policy grounds and aims to prevent the assured profiting from wrongdoing.<sup>42</sup>

Clearly, contractual controls on fraud do not exist in the third-party context. Instead, courts may strike out fraudulent claims by virtue of statute<sup>43</sup> and as part of their inherent jurisdiction to prevent abuse of the court’s process.<sup>44</sup> Courts retain some discretion under the statute, however, to order payment in personal injury claims if “it is satisfied that the claimant would suffer substantial injustice if the claim were dismissed.”<sup>45</sup> In recent years, underwriters have also recovered damages in deceit from fraudulent third-party claimants.<sup>46</sup>

Whether brought by the assured or a third party, a fraudulent claim constitutes a criminal offence under the Fraud Act 2006.<sup>47</sup> Traditionally, however, police resources have been insufficient to deal with the scale of insurance fraud and other wrongdoing has taken priority. The creation of IFED in 2012<sup>48</sup> responded to this concern to a certain extent by centralising resources and investigative expertise pertaining to economic crime. However, as the police remain under-resourced in this respect,<sup>49</sup> the civil law occupies a more significant role in deterring fraud.<sup>50</sup> This further underlines the need for a comprehensive and efficient remedial framework.<sup>51</sup>

These distinctions underpin the argument that forfeiture is an ineffective response to the wholly fraudulent claim. As noted above, the forfeiture rule is said to deter because it creates a sanction for fraud, namely the loss of the genuine portion of the claim. However, where the claim is wholly fraudulent, the forfeiture rule has nothing on which to bite; there is nothing for the fraudster to sacrifice. This was recognised by the Law Commissions<sup>52</sup> but was not reflected in the Insurance Act 2015. Significantly, the wilful misconduct exception does

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<sup>42</sup> This is akin to *ex turpi causa*, see *Beresford v Royal Insurance Co Ltd* [1937] 2 KB 197.

<sup>43</sup> Criminal Justice and Courts Act 2015 s.57. See *Stockdale* (n22) 1087.

<sup>44</sup> CPR 3.4(2)(b); *Summers* (n24) [33] per Lord Clarke.

<sup>45</sup> Criminal Justice and Courts Act s.57(2).

<sup>46</sup> See later, text to fn 73.

<sup>47</sup> Fraud Act 2006 ss.2, 3.

<sup>48</sup> IFED, ‘About Ifed’, <https://www.cityoflondon.police.uk/advice-and-support/fraud-and-economic-crime/ifed/Pages/About-IFED.aspx> (accessed 10/07/2019).

<sup>49</sup> Axa, Behavioural Fraud Report (2016), <https://www.axa.co.uk/contentassets/4a476aed40ff44e0b3b449c9d03783c5/axa-behavioural-fraud-report-final.pdf/> (accessed 09/08/2019), 21; *Akramzadeh* (n9) [2] per Flaux J.

<sup>50</sup> Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers’ Remedies for Fraudulent Claims; and Late Payment* (Law Comm 353, 2014), [19.3].

<sup>51</sup> Space dictates that the impact of IFED will be considered in future work.

<sup>52</sup> Law Commission, *Insurance Contract Law: Post Contract Duties and Other Issues* (Law Comm 201, 2011), [7.29].



nothing to mitigate this nor does it cohere with the judicial logic surrounding the rule, that deterrence is dependent on harsh sanctions. This is because it effectively restates the forfeiture rule in statute as far as wholly fraudulent claims are concerned: the assured is prevented from recovering where the loss has been caused deliberately but it contains no explicit deterrent or punitive element as forfeiture does for the exaggerated claim. Accordingly, it will be argued that additional statutory remedies – damages for the costs of investigating fraud and exemplary damages – are required to deter these claims.

### **DAMAGES FOR THE COSTS OF INVESTIGATING FRAUD**

The forfeiture rule pays no attention to costs incurred by the insurer to uncover fraud. Of course, where the claim is exaggerated, these costs may well be offset by the savings of no longer having to indemnify genuine loss. This is not the case where the claim is wholly fraudulent since there was never any genuine liability that the insurer was contractually bound to meet. This led the Law Commissions to recommend a right to damages in statute in their 2011 consultation paper:

Insurers can incur substantial costs in investigating increasingly sophisticated fraud. To make damages available in some cases would provide a deterrent to claims which are entirely fabricated, and the remedy of forfeiture has little practical effect...Insurers should not be entitled to “double recovery”, where the savings made from the forfeited claim already offset the costs of investigation.<sup>53</sup>

This proposal was eventually abandoned at least in part because of the ways in which insurers could already recover these costs at common law. Indeed, three possibilities exist; by express contractual clause, the tort of deceit, and a conventional costs order. However, none of these options provides insurers with a failsafe route to recovering the often substantial<sup>54</sup> costs

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<sup>53</sup> Ibid [7.37], [8.20].

<sup>54</sup> Law Commission, *Summary of Responses to Issues Paper 7* (December 2010) [4.36]; JD Decker, ‘Special investigative units battle insurance fraud, ‘Crime of the 90s’’ (13/11/2000), <https://www.insurancejournal.com/magazines/mag-features/2000/11/13/21264.htm> (accessed 31/07/2019); S Rainey and D Walsh, ‘Remedies for insurance fraud under the Insurance Act 2015’ in M Clarke and B Soyer (eds.), *Insurance Act 2015: A new regime for commercial and marine insurance law* (Informa, 2016), 69.

incurred in fraud investigation and, critically therefore, fail as a deterrent. As such, the discussion now identifies the shortcomings of the current mechanisms, critiques the Law Commissions' decision not to progress their damages proposal and, lastly, assesses what kinds of costs should be available.

### ***Current Routes to Recovery***

#### *Express contractual clause*

Provided a clause is clear and unambiguous,<sup>55</sup> there is nothing to prevent insurers contracting for the right to recover their wasted costs in the event of fraud. This is replicated in the 2015 Act provided that the non-consumer assured is aware of the disadvantageous term and its effect before entering the contract.<sup>56</sup> There is force in the argument that insurers should bear responsibility for obtaining further remedies fraud given that they will typically have superior bargaining power. Indeed, this was the very justification used in *The Star Sea*<sup>57</sup> to dismiss the argument that avoidance *ab initio* was appropriate in fraud cases:

The potential is also there for the parties...to provide by their contract for remedies or consequences which would act retrospectively ...the courts should be cautious before extending to contractual relations principles of law which the parties could themselves have incorporated into their contract...

Interestingly, while express clauses restating or extending<sup>58</sup> the forfeiture rule are common, insurers have generally not contracted to recover investigation costs.<sup>59</sup> This is somewhat surprising since a contractual remedy would overcome many of the difficulties involved in bringing an action in deceit.<sup>60</sup> It may be that underwriters are reluctant to specify the precise

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<sup>55</sup> *Fagnoli v GA Bonus Plc* 1997 SCLR 12, [1997] CLC 653.

<sup>56</sup> Insurance Act 2015 s.16(2)

<sup>57</sup> *The Star Sea* (n33) [61] per Lord Hobhouse.

<sup>58</sup> Law Com 201 (n52) [8.24]; Law Com 353 (n50) [20.32]; International Hull Clauses (01/11/03) cl.45.3

<sup>59</sup> Law Comm 353 (n50) [22.30].

<sup>60</sup> See later, text to fn 72.

consequences of submitting a fraudulent claim. However, the discussion in *Orakpo*<sup>61</sup> suggests that courts will take a dim view of such behaviour:

...it has been very common for insurance policies to state expressly that, if any claim is made which is false or fraudulent, all benefit under the policy will be forfeited. There is no such provision in the insurance contract in this case. What is more, the contract bears all the signs of having recently been rewritten in plain English... Why did the draftsman omit the provision which had previously been so common? Can he have done so by accident? Or was he afraid to spell it out in words that all would understand?

However, placing responsibility on insurers in this context creates a strange proposition, namely that the courts and the legislature are willing to develop sanctions – the forfeiture rule and prospective termination – to respond to exaggerated claims, but are unwilling to do so in respect of more serious wrongdoing. If insurance fraud is so serious that it justifies intervention in the former case, it is impossible to understand why this same logic does not permit the development of remedies for wholly fraudulent claims.

### *Tort of deceit*

The earliest reported mention of deceit as a basis for recovering investigation costs is *London Assurance v Clare*.<sup>62</sup> In dismissing the claim for contractual damages as too remote, Goddard J recognised that damages in deceit might be available if specifically pleaded.<sup>63</sup> While this dictum does not appear to have been employed for the following eight decades,<sup>64</sup> the

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<sup>61</sup> *Orakpo* (n22) 450 per Staughton LJ.

<sup>62</sup> *London Assurance v Clare* [1937] 57 Ll L Rep 254.

<sup>63</sup> *Ibid* 270 per Goddard J.

<sup>64</sup> Westlaw, '*London Assurance v Clare* – Case Analysis', <https://login-westlaw-co-uk.abc.cardiff.ac.uk/maf/wluk/app/document?&srguid=i0ad832f100000164d065270bc0a26ccf&docguid=IE2AC4890E42711DA8FC2A0F0355337E9&hitguid=IE2AC4890E42711DA8FC2A0F0355337E9&rank=1&spos=1&eps=1&td=1&crumb-action=append&context=33&resolvein=true> (accessed 25/07/2018).

availability of deceit was subsequently affirmed by Mance J, as he then was, in *ICCI v McHugh*,<sup>65</sup> although the underwriter declined to pursue the point to trial.

A claim in deceit requires the insurer to prove, on the balance of probabilities, a false statement of fact, made “without belief in its truth, or recklessly, careless whether it be true or false”,<sup>66</sup> designed to be relied upon by the insurer<sup>67</sup> and that the insurer did so rely.<sup>68</sup> In the context of insurance fraud, reliance does not require the insurer to believe the truth of the suspect claim. Rather, it will suffice where the insurer, suspicious of fraud, expends considerable sums to uncover and resist the claim.<sup>69</sup> Provided the insurer can establish these criteria to the requisite standard, deceit represents an attractive mechanism to recover wasted costs. First, the action is not dependent on a contractual relationship between fraudster and insurer and, therefore, means that deceit can be employed in both the first- and third-party context. In addition, deceit entitles the successful claimant to a generous measure of damages, namely all those which flow directly from the deceit.<sup>70</sup> This is particularly useful when, as discussed below, there is doubt surrounding what costs are recoverable at the end of trial.<sup>71</sup>

To be clear, these benefits do not mean that deceit is a sufficient deterrent to wholly fraudulent claims. Significantly, as Keoghs highlighted during the Law Commissions’ consultation, actions in deceit can be “expensive and complex.”<sup>72</sup> This may deter insurers from pursuing fraudsters if there is doubt regarding their ability to satisfy a judgment in damages. Furthermore, in the cases to date, we have seen considerable variation in the assessment of quantum. This is somewhat unsurprising; this is a jurisdiction in relative infancy and as awards are intended to compensate the insurer, it is inevitable that investigation costs will vary. Notwithstanding this, there has been inconsistency in how the courts have approached damages. In some cases a flat rate of £1000 per claim has been preferred<sup>73</sup> while

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<sup>65</sup> *Insurance Corporation of the Channel Islands v McHugh* [1997] 1 LRLR 94, 135 per Mance J.

<sup>66</sup> *Derry v Peek* (1889) 14 App Cas 337, 376 per Lord Herschell.

<sup>67</sup> *Peek v Gurney* (1873) LR 6 HL 377, 411-413 per Lord Cairns.

<sup>68</sup> *Hayward* (n12) [26] per Lord Clarke.

<sup>69</sup> *Owners of the Ship "Ariela" v Owners and/or Demise Charterers of the Dredger "Kamal XXVI" and the Barge "Kamal XXIV"* [2009] EWHC 3256 (Comm), [2010] 2 Lloyd’s Rep. 247, [34]-[36] per Burton J.

<sup>70</sup> *Doyle v Olby Ironmongers* [1969] 2 QB 158, 169 per Lord Denning MR.

<sup>71</sup> A Padfield, ‘Bad pennies’ (2012) Jul/Aug CLJ 14, 15; Stockdale (n22) 1091.

<sup>72</sup> Law Com 201 (n52) [7.31].

<sup>73</sup> *Joynton v Allianz* (unreported) 2 November 2016, Chester CC, [2] per DJ Sanderson; *Akramzadeh* (n9); *Tasneem* (n9).

other courts have awarded costs based on the duration of the investigation.<sup>74</sup> But even this latter method has varied; contrast the hourly rate of £10 in *Kelly*<sup>75</sup> with the £40 in *Shajahan*.<sup>76</sup> If the court is taken to reflect the geographical location of the insurer's investigations, this significant difference cannot, for example, be attributed to London weighting; *Kelly* was heard in Liverpool and *Shajahan* in Birmingham,<sup>77</sup> and nor is there anything else in the judgments to explain this divergence. While this lack of consistency can, to some extent, be understood, it is nevertheless problematic from the perspective of legal certainty. If there is doubt surrounding which costs, and the extent to which, they are recoverable, this may impact the resources insurers are willing to commit to investigation and consequently affect the detection of fraud.

### *Costs order*

The costs of investigating fraud may also be recovered by a costs order at the end of trial. Following the introduction of the Civil Procedure Rules, costs are dictated by the track to which the claim is allocated in the interests of promoting access to justice at proportionate cost.<sup>78</sup> The frauds under discussion will typically be allocated to the fast or multi-track.<sup>79</sup> Fast-track claims are those valued below £25,000 which can be dealt with in less than one day with limited expert evidence.<sup>80</sup> This is likely to include relatively simple frauds such as the 'slam on' crash for cash claim.<sup>81</sup> More complex and commercial frauds which exceed £25,000 and

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<sup>74</sup> *QBE v Kelly* (unreported) 14 July 2017, Liverpool CC; *Churchill v Shajahan* (unreported) 11 September 2015, Birmingham CC.

<sup>75</sup> *Kelly* (n74) [57] per Gregory HHJ relying on a 2016 Aviva case and describing his calculation as "necessarily broad brush"

<sup>76</sup> *Shajahan* (n74).

<sup>77</sup> For completeness, the uplift in costs allowed under the CPR based on geographical location is limited to greater and central London, see CPR PD 45 2.6.

<sup>78</sup> CPR 1.1, 26.5.

<sup>79</sup> The CPR mandates procedures where liability is not contested in low-value road traffic accident, employer's liability, and public liability claims; Civil Procedure Rules Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents from 31 July 2013; Civil Procedure Rules Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims. Allegations of fraud cause the claim to drop out of the Protocol at Stage 1 and are not considered further.

<sup>80</sup> CPR 26.6(4), (5)(a)

<sup>81</sup> *Qader v Esure Services Ltd* [2017] 1 WLR 1924, [18], [55] per Briggs LJ; Clyde & Co, 'Costs - Fixed costs do not apply to multi-track claims' (17/11/2016), <https://www.clydeco.com/blog/insurance-hub/article/costs-fixed-costs-do-not-apply-to-multi-track-claims> (accessed 24/07/2019).

require lengthier proceedings will be allocated to the multi-track.<sup>82</sup> The award of costs, in all cases, will be influenced by the court's consideration of the parties' conduct, which includes whether the initial claim was reasonable and whether it was in any way exaggerated.<sup>83</sup>

The CPR establishes a fixed recoverable costs regime for claims brought on the fast track.<sup>84</sup> Where the insurer establishes fraud on the balance of probabilities, it will be entitled to certain costs including those of obtaining medical and engineer reports, certain DVLA searches and disbursements for legal representation.<sup>85</sup> Despite the benefits of a streamlined and proportionate costs system, there is a risk, however, that insurers are unable to recover costs not listed in the CPR, such as a review of the alleged fraudster's social media behaviour or covert surveillance. One option is to make use of the caveat in rule 45.29J which specifies that costs can be awarded on an indemnity basis where there are "exceptional circumstances"<sup>86</sup> which has necessitated expenditure of "exceptionally more money...to be expended on the case by way of costs than would otherwise have been the case."<sup>87</sup> Significantly, costs assessed on an indemnity basis must be reasonable but, unlike those elsewhere in the CPR, need not be proportionate.<sup>88</sup> The meaning of 'exceptional circumstance' is yet to be comprehensively settled<sup>89</sup> although there is powerful dicta from Lord Reed in *Summers*<sup>90</sup> and case law predating the CPR<sup>91</sup> that fraud should satisfy this test. The Bar Council also expressed the view that costs awarded on an indemnity basis, alongside the forfeiture rule, constituted an adequate remedy for fraudulent claims.<sup>92</sup> However, despite the fact that the CPR expressly creates a method for overcoming the limitations of the fixed cost regime in fast track cases, it cannot be said with certainty whether insurance fraud will always count as an 'exceptional circumstance'. The resulting uncertainty is unfortunate since

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<sup>82</sup> CPR 26.6(6)

<sup>83</sup> CPR 44.2(a)(5)(b)(d)

<sup>84</sup> CPR 45.18, 45.19(2A), 45.28

<sup>85</sup> CPR 45.29C-E.

<sup>86</sup> CPR 45.29J(1)

<sup>87</sup> *Costin v Merron* [2013] 3 Costs LR 391, [11] per Leveson LJ.

<sup>88</sup> CPR 44.3(3) cf. CPR 44.3(2)(a)(b)

<sup>89</sup> H Murdoch, 'Exceptional circumstances: an escape from fixed costs?' (15/04/2019), <https://www.expresssolicitors.co.uk/news/13564-13564> (accessed 31/07/2019).

<sup>90</sup> *Summers* (n24) [53]; (Lord) R Reed, 'Lies, damned lies: Abuse of process and the dishonest litigant' (26/10/2012), <https://www.supremecourt.uk/docs/speech-121026.pdf> (accessed 31/07/2019), 16.

<sup>91</sup> *Cepheus Shipping v Guardian Royal Exchange* [1995] 1 Lloyd's Rep 622, 647 per Mance J; *Bairstow v Queen's Moat Houses plc* [2000] CP Rep 44.

<sup>92</sup> *Responses* (n54) [4.37].

insurers will be unable to know, in advance, which costs will be recoverable. This may well hamper their ability to prove fraud to the requisite standard.

By contrast, the Court of Appeal determined in *Qader v Esure*<sup>93</sup> that fixed costs should be disapplied in multi-track cases. This appears to overcome the difficulties of a fixed costs regime. However, this judgment gives rise to two specific difficulties in the context of insurance fraud. Briggs LJ's judgment was heavily influenced by the recognition that claimants would often incur substantial costs in defending themselves against serious allegations of fraud which were not recoverable under the fixed regime.<sup>94</sup> While there is merit in this approach, the corresponding impact on insurers is that a wrongful or unproven allegation of fraud exposes them to liability for significant costs. The introduction of assessed costs may well constitute "a disincentive to argue fraud"<sup>95</sup> which is "perverse"<sup>96</sup> given that civil justice reforms were intended in part to reduce fraudulent claims.<sup>97</sup>

Following *Qader*, costs in multi-track cases will be subject to a detailed assessment which, consistent with the overriding objective of the CPR, should ensure costs are reasonable and proportionate in the circumstances.<sup>98</sup> This process requires both sides to submit a budget of incurred and anticipated costs before trial in a pre-determined format, the Precedent H.<sup>99</sup> This provides scope for recovery in several areas relevant to the investigation of fraudulent claims such as witness statements and expert reports. The inclusion of 'Contingent Costs A and B' in the Precedent H for 'anticipated costs which do not fall within the main categories set out'<sup>100</sup> provides flexibility to recover costs not otherwise listed. However, a specific problem relating to the investigation of fraud involves surveillance evidence. The inclusion of projected surveillance costs on the Precedent H may alert the claimant to the possibility of

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<sup>93</sup> *Qader* (n81) [35] per Briggs LJ. The CPR has now been amended to this effect, see CPR 45.29B.

<sup>94</sup> *Qader* (n81) [18]-[19] per Briggs LJ.

<sup>95</sup> M White, 'Qader v Esure Court of Appeal decision:- fixed costs do not apply to ex-protocol cases that are allocated to the multi-track' (16/11/2016), <https://www.stjohnschambers.co.uk/news/qader-v-esure-court-of-appeal-decision-fixed-costs-do-not-apply-to-ex-protocol-cases-that-are-allocated-to-the-multi-track> (accessed 09/08/2019); Clyde & Co (n81).

<sup>96</sup> R Riddell, 'Qader v Esure: An appraisal' in A Johnson (ed.), TGC Fraud Update (September 2017), <https://tgchambers.com/wp-content/uploads/2017/09/TGC-Fraud-Update-Issue-VI-September-2017..pdf> (accessed 09/08/2019).

<sup>97</sup> *Ibid.*

<sup>98</sup> CPR 44.3(1), (2)(a)

<sup>99</sup> CPR PD 3E A(1), B(6), <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part03/practice-direction-3e-costs-management> (accessed 30/07/2019).

<sup>100</sup> Guidance Notes for Precedent H, <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part03/practice-direction-3e-costs-management> (accessed 30/07/2019).



undercover investigation which in turn may trigger further dishonest, malingering behaviour. The problem cannot be solved by simply omitting the surveillance costs from the form since, in the interests of transparency, courts are generally reluctant to award costs which were not indicated in advance.<sup>101</sup> This difficulty was recognised in *Purser v Hibbs*:<sup>102</sup>

The status of surveillance evidence is anomalous in relation to the costs case management and costs budgeting rules. Those rules do not make any express provision for what we are to do about the costs of surveillance evidence... Most litigation is conducted on a “cards on the table” basis... Of course, some degree of cunning is required in the administration of surveillance, for entirely legitimate and understandable reasons, particularly given the appalling level of insurance fraud.

Moloney HHJ held that the insurer was permitted to recover surveillance costs in these circumstances.<sup>103</sup> While this is quite clearly correct given the covert nature of fraud, permitting recovery in such cases does come at the cost of compromising the values inherent in the CPR. This balance may be legitimate in the context of fraud, but it should nevertheless be regarded as a potential shortcoming of the costs order as a method of recovery.

Even where costs for surveillance are awarded in fraud cases, there may be other costs which the costs budgeting system does not permit, either as a head of expense or because they are not proportionate in the circumstances. This is particularly likely in large commercial frauds which may require overseas investigation and the employment of additional experts on top of the routine desk-based and other investigative activities undertaken in relation to a smaller claim. As Grant HHJ noted at first instance in *Qader*,<sup>104</sup> “such cases often involve examination of considerable volumes of documents, analysis of legal principles of fiduciary duty, and consideration of often complex commercial factual matrices.” Indeed, it was for this reason – “[where] there was uncertainty about whether all of the costs of investigating fraud could be recovered as costs of the action”<sup>105</sup> - that led Padfield to recognise that a claim in deceit may be a preferable method of recovery.

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<sup>101</sup> CPR 3.18(b)

<sup>102</sup> *Purser v Hibbs* [2015] EWHC 1792 (QB), [6][D] per Moloney HHJ.

<sup>103</sup> *Ibid* [6][D].

<sup>104</sup> *Qader v Esure Services Ltd* [2015] 10 WLUK 367, [39] per Grant HHJ.

<sup>105</sup> Padfield (n71) 15.

This discussion has demonstrated the shortcomings of the costs order as a method of recovery in fraud cases. On the fast track, the fixed costs regime sets clear limits as to what is recoverable and is likely to affect insurers' willingness of commit resources to fraud detection. By contrast, assessed costs in multi-track claims will increase the risk of a significant liability in costs where fraud is unproven at trial. In these cases, the risk is that insurers refrain from alleging fraud so that the case remains on the fast track. Of course, allocation to the multi-track is unavoidable in more complex frauds and in these cases, the court's role in costs management may preclude a full recovery. These shortcomings affect not only what insurers can recover through this mechanism but also have a correspondingly harmful impact on the deterrence of fraud.

### ***A Critique of the Law Commissions' Decision***

Having outlined the mechanisms by which insurers can recover investigation costs, it is convenient to assess the Law Commissions' decision to abandon the proposal for a statutory right to damages. In their final report, it was stated:

We do not consider that the recoverability of investigation costs will significantly disincentivise policyholder fraud. Indeed, in many cases policyholders are unlikely to be in a position to repay investigation costs. There have also been no major attempts by insurers to bring claims in deceit, nor any industry moves to include express terms in contracts to the effect that costs are recoverable in the case of a fraud investigation. Both of these options are already available to insurers.<sup>106</sup>

The Law Commissions also recognised respondents' concerns about the practicality of a right to damages in the sense that it could be "difficult to assess costs where the investigations are carried out internally"<sup>107</sup> and noted the view that investigation should simply be regarded as part of underwriters' day-to-day business.<sup>108</sup> The brevity of this

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<sup>106</sup> Law Com 353 (n50) [22.30].

<sup>107</sup> Ibid [22.29].

<sup>108</sup> Ibid

dismissal is surprising given that the Law Commissions' had recognised that forfeiture was an ineffective response to wholly fabricated claims. These justifications will now be critiqued not only because this article will argue for additional statutory remedies but also due to the initial support for the Commissions' proposal, as reported in the 2011 consultation paper.<sup>109</sup>

To begin with the lack of insurer demand, the discussion above demonstrates that insurers have been making use of existing avenues for recourse throughout the Law Commission consultation. A notable absence from the above discussion is *Parker v NFU*<sup>110</sup> where the insurer sought damages in restitution for the costs of investigating fraud by its assured. It "was not disputed" that damages were available, and counsel were left to agree quantum. In terms of commenting on the court's jurisdiction in this area, this case is unhelpful since the judicial, and subsequent academic, discussion of damages is practically non-existent.<sup>111</sup> However, not only does this caselaw undermine the 'lack of insurer demand' argument, it similarly undermines the contention that damages would create practical difficulties. Indeed, the Law Commissions were clearly persuaded by arguments that it would be very difficult to accurately estimate investigation costs.<sup>112</sup> They further argued that the availability of damages could encourage the outsourcing of enquiries to enable underwriters to present a paper trail of expenditure to the court.<sup>113</sup> Insurers which were unable to recover these costs could pass these onto policyholders as increased premiums.<sup>114</sup>

It should also be recalled that the initial response to the Law Commissions' proposal was positive with "all but two"<sup>115</sup> respondents in favour of a statutory cause of action. Of course, this is neither necessarily a representative sample nor comprised entirely of insurers but nevertheless it seems somewhat misleading to suggest that insurers did not favour additional

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<sup>109</sup> Law Com 201 (n52) [7.30].

<sup>110</sup> *Parker v National Farmers Union Mutual Insurance* [2013] Lloyd's Rep IR 253, [205] per Teare J.

<sup>111</sup> Westlaw, 'Parker v National Farmers Union Mutual Insurance Society Ltd', [https://uk.practicallaw.thomsonreuters.com/Document/I1727AA30DB6911E19B13FED1720E91DF/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad73aa70000016c5144250a6105a6ed%3FNav%3DRESEARCH\\_COMBINED\\_WLUK%26fragmentIdentifier%3DI1727AA30DB6911E19B13FED1720E91DF%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=ed40c18902226fb208c6d37f96eee1d3&list=RESEARCH\\_COMBINED\\_WLUK&rank=1&sessionScopeId=cd7dff95d0a013732e573fcb35a00173bde0809bf08f28c148b837c9563060&originationContext=Search%20Result&transitionType=SearchItem&contextData=\(sc.Search\)&comp=wluK#co\\_anchor\\_ukReferences\\_books](https://uk.practicallaw.thomsonreuters.com/Document/I1727AA30DB6911E19B13FED1720E91DF/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad73aa70000016c5144250a6105a6ed%3FNav%3DRESEARCH_COMBINED_WLUK%26fragmentIdentifier%3DI1727AA30DB6911E19B13FED1720E91DF%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=ed40c18902226fb208c6d37f96eee1d3&list=RESEARCH_COMBINED_WLUK&rank=1&sessionScopeId=cd7dff95d0a013732e573fcb35a00173bde0809bf08f28c148b837c9563060&originationContext=Search%20Result&transitionType=SearchItem&contextData=(sc.Search)&comp=wluK#co_anchor_ukReferences_books) (accessed 02/08/2019).

<sup>112</sup> Law Comm 353 (n50) [22.29].

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

<sup>115</sup> Law Com 201 (n52) [7.30].

remedies. If, however, the Law Commissions are correct about the absence of insurer demand, this results in a somewhat confusing rhetoric following *Versloot*.<sup>116</sup> In this case, the assured provided a false narrative of the casualty to make a claim for genuine loss caused by an ingress of seawater. The Supreme Court determined that fraudulent evidence used to bolster a genuine claim would no longer result in forfeiture.<sup>117</sup> This decision was criticised by the Association of British Insurers (ABI). Echoing Lord Mance's dissenting judgment,<sup>118</sup> Dalton commented that the judgment could encourage lying during the claims process.<sup>119</sup> This is the industry body advocating the retention of a harsh rule to deter the most minor of fraudulent claims but, according to the Law Commissions, effectively rejecting remedies to tackle the wholly fraudulent claim. If, as both the ABI and the courts have suggested, remedies for fraud are required to overcome information asymmetries within the claims process, these remedies must surely be required to counter all fraudulent claims. To demand protection against collateral lies but to reject greater penalties for more serious frauds appears to be an instance of insurers having their cake and eating it too.

In abandoning the damages proposal, the Law Commissions also argued that financial penalties would not deter fraudsters. This is a notable shift of attitude in the three years between the consultation paper and final report. In practice, this results in a disconnect between the insurance approach to financial penalties and that taken in other areas of the civil law. Most notably, Qualified One-way Costs Shifting (QOCS)<sup>120</sup> has been introduced to "control costs and promote access to justice"<sup>121</sup> in personal injury cases. This measure will protect the litigant by ensuring that any liability he owes in costs to the defendant cannot exceed any amount he has been awarded in damages.<sup>122</sup> Where the defendant has successfully resisted the claim, these reforms will mean that the claimant does not become liable in costs. Significantly, claimants who have been 'fundamentally dishonest' will not be

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<sup>116</sup> *Versloot* (n4).

<sup>117</sup> *Ibid*.

<sup>118</sup> *Ibid* [128] per Lord Mance: "Abolishing the fraudulent devices rule means that claimants pursuing a bad, exaggerated or questionable claim can tell lies with virtual impunity."

<sup>119</sup> J Dalton, 'Lies are lies: Supreme Court ruling sends out the wrong message to customers' (27/07/2016) at <https://www.abi.org.uk/news/blog-articles/lies-are-lies-supreme-court-ruling-sends-out-the-wrong-message-to-customers/> (accessed 12/09/2017).

<sup>120</sup> CPR 44.13. See P Rawlings and J Lowry, 'Insurance fraud and the role of the civil law' (2017) 80(3) MLR 525, 534-536.

<sup>121</sup> R Jackson, *Review of Civil Litigation Costs: Final Report* (December 2009), [i].

<sup>122</sup> CPR 44.14.

entitled to this protection and will become liable for a full costs order.<sup>123</sup> The clear intention behind these reforms is to deter frivolous and fraudulent claims.<sup>124</sup> It is unclear whether either approach has been assessed for deterrent effect empirically but, irrespective of this, it is notable that contradictory approaches to financial orders have been adopted within neighbouring areas of the civil law in recent years.

There was also concern that damages would create a windfall for insurers, allowing them to recover damages as well as removing their liability for genuine loss. This echoes Goddard J's discussion in *Clare*<sup>125</sup> where he noted that the insurer:

chose rightly... to investigate it, and by the investigation which they made they discovered that the claim was fraudulent. They repudiated the contract, and they did not pay, thereby getting, of course, a great advantage because they did not have to pay what they would have had to pay if the claim had not been fraudulent.

But these discussions indicate a failure to distinguish between the exaggerated claim – where there may be savings due to the forfeiture of the genuine claim – and a wholly fraudulent claim where there was never any liability and thus no savings to be made. Despite some lack of clarity, the Law Commissions clarified in 2011 that damages should be available for any underwriter who could establish a net loss as a result of fraud.<sup>126</sup> Even with this clarification, the practical effect of this recommendation would fall disproportionately on the assured who had been comparatively less fraudulent. This is because the assured who exaggerated his claim would sacrifice the genuine claim and make a payment in damages whereas the assured who fabricated the claim would only be liable in damages.

Attention must also be paid to the idea that investigation costs are inescapable costs of doing business and should therefore not be compensable.<sup>127</sup> Ascertaining an indemnity is a complex task<sup>128</sup> and even more so when there is no ready market for the insured property.<sup>129</sup> But to equate an investigation to calculate a genuine indemnity and one to uncover a deliberately orchestrated fraud is to conflate two distinct enquiries. The former is a legitimate

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<sup>123</sup> CPR 44.16.

<sup>124</sup> Jackson (n121) ch.19 [4.5], [4.8]; M Porter-Bryant, 'Fundamental dishonesty' at <http://www.guildhallchambers.co.uk/uploadedFiles/FundamentalDisMPB.pdf> (accessed 30/07/16) 1; A Higgins, 'A defence of qualified one-way costs shifting' [2013] Civ J Q 198, 203.

<sup>125</sup> *Clare* (n62) 270.

<sup>126</sup> Law Com 201 (n52) [7.34].

<sup>127</sup> *Ibid* [7.32].

<sup>128</sup> *Roumeli Food Stores v New India Assurance* [1972] 1 NSWLR 227, 236-237 per Macfarlan J.

<sup>129</sup> *Dawson v Monarch Insurance Co of New Zealand* [1977] 1 NZLR 372, 379 per Somers J.

and necessary part of the insurer's business while the latter is not since there is no loss for which the insurer is contractually liable. Indeed, the distinctive nature of these enquiries was highlighted in *Tasneem*<sup>130</sup> where May HHJ commented that "Direct Line has had to set up special teams around the UK to identify and deal with fraudulent crash for cash claims." Fraud is often, and rightly, treated as a case apart by the courts<sup>131</sup> and so this conflation is an unhelpful diversion in the Law Commissions' evaluation of a remedy in damages.

This discussion has revealed shortcomings in the Law Commissions' justifications for abandoning the damages proposal. This lends weight to the argument that remedies for wholly fraudulent claims needs to be revisited. As such, the discussion now outlines what a statutory cause of action for wasted costs might look like and, in particular, what heads of damage should be recoverable.

### ***Enshrining a Right to Damages in Statute***

The function of damages for wasted costs would be to compensate the insurer for unnecessary outlay expended in uncovering fraud. As such, damages should be available in statute where insurers can prove their expenditure. Although this was an issue which troubled the Law Commissions,<sup>132</sup> this has not proved problematic in the cases in which damages have been awarded at common law.<sup>133</sup> Demanding proof of investigation costs is not, by itself, sufficient since an insurer could use such a provision to run up costs which were not objectively necessary in the circumstances. Accordingly, a statutory right to damages could limit recovery to costs which were reasonable and, similar to damages available elsewhere in the Insurance Act,<sup>134</sup> could specify the factors relevant in a consideration of reasonableness. Courts could, for example be required to have regard to the nature and value of the fraud, the location of the investigation, and whether the assured cooperated. Limiting recovery to damages which were reasonable in the circumstances would have two clear benefits. First, it would introduce remedial flexibility given the fact-specific and variable

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<sup>130</sup> *Tasneem* (n9) [2].

<sup>131</sup> E.g. the law of misrepresentation, *Redgrave v Hurd* (1881) 20 Ch. D 1, 23 per Baggallay LJ.

<sup>132</sup> Law Com 353 (n50) [22.29]

<sup>133</sup> *Akramzadeh* (n9); *Tasneem* (n9); *Ghadhda* (n9); *Shajahan* (n74); *Axa v Thwaites* (unreported) 10 November 2008, Birmingham CC; *Joyson* (n73).

<sup>134</sup> Insurance Act 2015 s.13A(3)

nature of wholly fraudulent claims. Second, it would pay due regard to the overriding principle of the CPR, to enable courts “to deal with cases justly and at proportionate cost.”<sup>135</sup>

A further benefit of statutory damages is that legislators could specify, by way of a non-exhaustive list, the types of costs which, subject to proof, should be recoverable. While fraud investigations are fact-specific, the costs allowed under the CPR should provide some inspiration here, such as medical and police reports, engineer reports, witness interviews and searches of official databases. Further inspiration could be drawn from the relatively uniform approach to fraud in cases allocated to the fast track. Such claims are initially assessed for possible markers of fraud<sup>136</sup> before being passed to an expert claims handler to evaluate the legitimacy of the claim.<sup>137</sup> It is at this stage that further investigation may be triggered, such as social media and undercover surveillance, the appointment of a loss adjuster, medical or other experts.<sup>138</sup> The types of expenses generated in these enquiries should appear in any statutory guidance. Of course, complex commercial frauds will involve further investigation including examination of “considerable volumes of documents, analysis of legal principles of fiduciary duty, and consideration of often complex commercial factual matrices.”<sup>139</sup> A list of this nature would, alongside the requirement of reasonableness, permit discretion and flexibility due to the myriad presentations of fraudulent claims.

Fraud is rarely the only defence employed by an insurer to resist a claim. Often underwriters will allege, for example, that the loss was not caused by a covered peril or to identify breach of warranty at a material time. The one-shot nature of litigation and the complexities of establishing fraud make this a commercially sensible strategy. However, this raises a further question in relation to costs; should the insurer be entitled merely to the costs associated with proving fraud or to all costs associated with bringing the action? In relation to wholly fraudulent claims, it is suggested that the answer is relatively straightforward.

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<sup>135</sup> CPR 1.1(1)

<sup>136</sup> These so-called ‘red flags’ are listed: K Dwyer, *The Extended RTA Protocol Claims Submitted from 31 July 2013 Guide for Claims Handlers* (Kennedys, 2015), 47-49; T Head, *The New Pre-Action Protocol for Fast Track Employers’ Liability and Public Liability Personal Injury Claims* (Kennedys, 2014), 38-39.

<sup>137</sup> Zurich Insurance plc, *Detecting fraud earlier so you don’t pay later* (2014), <https://web.zurich.co.uk/Assets/Lists/Anonymous%20Content/ZM/MCD924806Detectingfraudearliersoyoudontpaylater.pdf> (accessed 05/08/2019), 7; Kennedys (n136).

<sup>138</sup> R Watts, ‘If you make a claim, you may get a detective stalking you’ (02/10/2002), <https://www.telegraph.co.uk/finance/personalfinance/insurance/2828915/if-you-make-a-claim-you-may-get-a-detective-stalking-you.html> (accessed 25/04/2019).

<sup>139</sup> *Qader* (n104) [39] per Grant HHJ.



Where the claim has been entirely fabricated, the fraudulent assured should be liable for all costs incurred by the underwriter. This is because the insurer was never contractually liable for that claim and thus all costs incurred could be said to flow directly from the fraud.

### EXEMPLARY DAMAGES

The difficulty with limiting the underwriter's remedy to an action for wasted costs is that the financial gain targeted by the fraudster may well exceed any sum payable in compensation. To respond to serious fraud in this way is tantamount to allowing the shoplifter to return stolen goods to the shelf with no further penalty. This is counterintuitive and, moreover, would not cohere with the judicial conception of deterrence, namely that it is dependent on harsh legal sanctions. Accordingly, it is further suggested that underwriters should be entitled to exemplary damages via a statutory cause of action.

Exemplary damages are not designed to compensate the non-breaching party but rather to punish the wrongdoer and deter others from engaging in similar conduct. Although the literature refers to such awards interchangeably as punitive or exemplary, this article employs the descriptor 'exemplary' since it better expresses the notion of deterrence. Indeed, as Edelman has noted, the word exemplary comes "from the Latin noun *exemplaris*; an example for others."<sup>140</sup> This is precisely the intent underlying forfeiture and thus a further remedy developed in this vein would cohere with the existing judicial rhetoric around insurance fraud. The Law Commission themselves endorsed supra-compensatory damages in the 1990s, noting that used as a last resort and imposed in a principled manner, exemplary damages could fill "'gaps in the law' – areas in which other remedies or sanctions are inadequate, in practice, to punish and to deter seriously wrongful behaviour."<sup>141</sup> Indeed, the House of Lords described exemplary awards in the landmark case of *Rookes v Barnard*<sup>142</sup> in the following terms:

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<sup>140</sup> J Edelman, 'In defence of exemplary damages' in C Rickett (ed.), *Justifying Private Law Remedies* (Hart, 2008), 225.

<sup>141</sup> Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (Law Com 247, 1997) [1.15].

<sup>142</sup> *Rookes v Barnard (No 1)* [1964] AC 1129, 1228 per Lord Devlin.

If, but only if, the sum which they have in mind to award as compensation...is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum.

Lord Devlin then identified three categories in which courts could move beyond a compensatory function: i) “oppressive, arbitrary or unconstitutional action by servants of the government”<sup>143</sup>, ii) where exemplary damages were expressly authorised by statute<sup>144</sup> and, most significantly for our purposes, iii) where:

the defendant’s conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff...Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay.<sup>145</sup>

To be clear, for conduct to fall within this category, the assured does not have to calculate that his conduct would result in a net financial gain.<sup>146</sup> The test instead requires “a general awareness on the defendant’s part that what he was planning to do was contrary to the law coupled with a hope that the expected benefits would outweigh the possible liability.”<sup>147</sup> This perfectly encapsulates the circumstances in which the assured has submitted a wholly fraudulent claim.

Despite the Law Commissions’ insistence that insurers were not making use of actions in deceit and did not explicitly discuss exemplary awards, it is notable that insurers have successfully obtained such awards in ‘crash for cash’ claims in recent years. This success has mainly been seen in the third-party context<sup>148</sup> but such awards have also been obtained against first-party assureds.<sup>149</sup> In these cases, the courts are clear that exemplary awards function as a deterrent. In *Ghadhda*,<sup>150</sup> for example, HHJ Collender QC endorsed the view that

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<sup>143</sup> Ibid.

<sup>144</sup> Ibid 1227 per Lord Devlin. For example, Crime and Courts Act 2013 ss.34-36; Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s.13(2); High Speed Rail (London – West Midlands) Act 2017 s.51(10).

<sup>145</sup> *Rookes* (n142) 1227.

<sup>146</sup> Ibid; J Goudkamp and E Katsampouka, ‘An empirical study of punitive damages’ (2018) 38(1) OJLS 90, 93.

<sup>147</sup> Goudkamp and Katsampouka (n146) 93.

<sup>148</sup> *Akramzadeh* (n9); *Tasneem* (n9); *Ghadhda* (n9); *Vasile* (n10); *Shajahan* (n74); *Wrobel* (n17).

<sup>149</sup> *Ghadhda* (n9); *Axa v Jensen* (unreported) 10 November 2008, Birmingham CC.

<sup>150</sup> *Ghadhda* (n9), [9], [12]. See also *Akramzadeh* (n9), [19] per Flaux J; *Vasile* (n10), [6] per Recorder Tidbury.

“a clear message is required from the court that those who attempt to commit fraud on an insurance company are at risk of losing more than simply their fabricated claim.” Echoing the judicial rhetoric surrounding forfeiture, in *Tasneem*,<sup>151</sup> HHJ May QC explicitly linked deterrence by exemplary damages with “the openness and honesty which is the foundation for insurance contracts and insurance claims generally.” This reliance on utmost good faith is interesting since this particular case involved a series of third-party ‘crash for cash’ claims in which the duty would not have been owed to the insurer. This is then perhaps further evidence of the judicial desire to protect the insurance contract.

The emerging case law tells us that courts are receptive to claims for exemplary damages. This is confirmed by Goudkamp and Katsampouka’s recent empirical study of punitive damages<sup>152</sup> in which exemplary awards were made in 88.9% of cases involving fraudulent insurance claims.<sup>153</sup> This was more than double the rate across all other cases in their sample spanning a 15 year period.<sup>154</sup> This level of success was attributed, correctly in this author’s view, to “the perceived need for deterrence in this context on the basis that the existence of fraudulent insurance claims is ‘a growing problem’.”<sup>155</sup> This same idea is present in the first instance judgments and thus echoes judicial discussions of forfeiture. Despite this willingness to award exemplary damages, there is, much like in the wasted costs caselaw, confusion surrounding quantum. The absence of actual loss to guide the courts means that the only assistance comes from Lord Devlin’s further comments in *Rookes*,<sup>156</sup> namely that:

- The plaintiff must have been the victim of the punishable behaviour
- The recognition that exemplary damages could result in more severe punishment than under the criminal law.
- The means of the parties.

These factors urge caution in making punitive awards and this is certainly reflected in the caselaw to date. But these criteria provide no indication as to how the courts should calculate

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<sup>151</sup> *Tasneem* (n9) [4].

<sup>152</sup> Goudkamp and Katsampouka (n146), 90.

<sup>153</sup> *Ibid* 113-114.

<sup>154</sup> *Ibid*.

<sup>155</sup> *Ibid* 114.

<sup>156</sup> *Rookes* (n142) 1227-1228 per Lord Devlin; J Edelman, J Varuhas and S Colton (ed.), *McGregor on Damages* (20<sup>th</sup> ed. Sweet & Maxwell, 2017), [13-033], [13-034], [13-038].

the amount of money the fraudster should pay. Awards, for example, have varied from £500<sup>157</sup> to £35,000<sup>158</sup> with the judges expressly taking the nature of the wrongdoing and the offender's means, where s/he (rarely) chooses to participate in proceedings, into account. This has meant that in striving to reach awards which are "punitive and deterrent but not excessive,"<sup>159</sup> courts have on occasion declined to grant an award where the existence of a criminal penalty would mean that the assured was punished twice.<sup>160</sup> But this does not mean, however, that the courts are unanimous on the effect of a criminal penalty. Contrast, for instance, the refusal in *Akramzadeh*<sup>161</sup> to make a punitive award where *any* criminal penalty had been imposed and the more permissive approach in *Thwaites*<sup>162</sup> where the civil court assessed the impact and nature of the criminal penalty as part of the decision to award exemplary damages. The method of assessment has also varied. Some courts have calculated damages by reference to the fraudulent indemnity that was targeted<sup>163</sup> while others have imposed a figure which does not appear to bear any relation to the monetary scale of the fraud.<sup>164</sup> Similarly, while most judges have made orders severally, in respect of each participant in the fraudulent scheme,<sup>165</sup> others have preferred a "single award...made against multiple tortfeasors."<sup>166</sup> The area is no doubt crying out for authoritative guidance on matters of calculation and quantum to ensure that the exemplary jurisdiction is employed in a principled fashion.

The foregoing discussion confirms that insurers recognise the utility of exemplary awards in combatting fraud and that this has been endorsed by the courts. This burgeoning jurisdiction has also been received well in the limited commentary to date.<sup>167</sup> Wilson, a Counter Fraud Manager at Axa, has commented, for example, that successful actions "help[] send out a clear message to anyone attempting to defraud insurance companies and will

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<sup>157</sup> *Ghadhda* (n9) described as "quite modest".

<sup>158</sup> *Joynson* (n73) [9]-[10].

<sup>159</sup> *Tasneem* (n9) [4] per HHJ May.

<sup>160</sup> *Thwaites* (n133).

<sup>161</sup> *Akramzadeh* (n9) [14].

<sup>162</sup> *Thwaites* (n133) noted by A Johnson, 'A sword & a shield' (2013) Dec New LJ 18, 19.

<sup>163</sup> *Shaikh* (n10); *Vasile* (n10); *Jensen* (n149).

<sup>164</sup> *Akhtar* (n17); *Shajahan* (n74); *Joynson* (n73); *Ghadhda* (n9); *Wrobel* (n17); *Akramzadeh* (n9); *Tasneem* (n9).

<sup>165</sup> *Ghadhda* (n9); *Hassan v Cooper* [2015] RTR 26.

<sup>166</sup> *Tasneem* (n9).

<sup>167</sup> See Goudkamp and Katsampouka (n146) 114.

make unscrupulous organised fraudsters pause and think about their actions carefully.”<sup>168</sup> Following *Financial Claims Solutions*,<sup>169</sup> Laver has also suggested that exemplary awards could have much broader utility in combatting fraud:

this case is relevant not merely to low value motor fraud claims but also cases of malingering and dishonesty in large/complex loss cases, where a claim in deceit backed with exemplary damages is a valid alternative to a private prosecution and/or committal proceedings.<sup>170</sup>

Permitting insurers to recover wasted costs and exemplary damages would, alongside the forfeiture rule, establish a more comprehensive response insurance fraud. Since these remedies are already available at common law, it could be argued that the statutory intervention is unnecessary; the onus is on the underwriter to obtain further remedies. However, this would result in inconsistency with some remedies in statute and others at common law. As such, it is now argued that these causes of action should, much like forfeiture, exist in statute.

### JUSTIFYING A STATUTORY CAUSE OF ACTION

It is important to consider whether further legislative activity is possible not least because of the extensive nature of the Commissions’ consultation. In addition, whether s.12 Insurance Act provides an exhaustive account of the remedies for fraud claims is particularly pertinent given the discussion in *Clarke’s Law of Insurance Contracts*:

...the background to the statute may become relevant on this point; in particular, the fact that the Law Commission had tentatively proposed adding a provision to what was to become the Insurance Act 2015 to enable an insurer to recover the costs of investigation... Against that background it might be thought to be in doubt whether

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<sup>168</sup> C Laver, ‘DACB secures major Court of Appeal decision clarifying 50 year old exemplary damages law’ (16/06/2018), <https://www.dacbeachcroft.com/en/gb/articles/2018/june/dacb-secures-major-court-of-appeal-decision-clarifying-50-year-old-exemplary-damages-law/> (accessed 11/07/2018).

<sup>169</sup> *Financial Claims Solutions* (n18).

<sup>170</sup> Laver (n168).

the court will interpret section 12 in setting out the remedies for fraudulent claims as other than an exhaustive statement of the insurer's remedies. However, there remains some doubt on the point.<sup>171</sup>

For Clarke, this doubt stems from the fact that other remedies, such as contempt, adverse costs orders and criminal prosecutions, are already available.<sup>172</sup> The exemplary award in *Financial Claims Solutions*<sup>173</sup> is also discussed Clarke in this context.<sup>174</sup> However, greater doubt flows from the fact that s.16 Insurance Act enables parties to contract out of the statutory regime on fraud.<sup>175</sup> The statutory language envisages that contracting out will render remedies for fraud more severe since alternative clauses will only take effect where both the existence and effect of the disadvantageous term have been drawn to the assured's attention, the so-called transparency requirements.<sup>176</sup> In practice, of course, attempts to contract out will depend on both market appetite and how the courts interpret the transparency provisions. The latter will require a subjective and fact-intensive exercise since the courts are directed to have regard to both the circumstances of the transaction and the assured.<sup>177</sup> This emphasis on freedom of contract reduces the likelihood that the 2015 Act will be amended in the near future.

Nevertheless, assuming that further statutory remedies are theoretically possible, if not immediately probable, two particular arguments exist in favour of statutory codification. First, as discussed above, the courts have not been consistent in their assessment of quantum in claims for wasted costs and exemplary damages. Legislation would provide an opportunity to clarify matters and ensure the consistent and principled application of financial awards. Statutory guidance on compensatory<sup>178</sup> and exemplary<sup>179</sup> damages is not uncommon and, more generally, codification would overcome the difficulties of bringing a claim in deceit which were highlighted during the Law Commissions' consultation.<sup>180</sup>

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<sup>171</sup> M Clarke, *Law of Insurance Contracts* (Service Issue 43 9 January 2019), [27-2C5].

<sup>172</sup> *Ibid.*

<sup>173</sup> *Financial Claims Solutions* (n18).

<sup>174</sup> Clarke (n171) [27-2C5].

<sup>175</sup> Law Comm 353 (n50) [22.13].

<sup>176</sup> Insurance Act 2015 s.17(2)(3)

<sup>177</sup> Insurance Act 2015 s.17(4)

<sup>178</sup> Insurance Act 2015 s.13A

<sup>179</sup> Crime and Courts Act 2013 ss.34-36

<sup>180</sup> Law Com 201 (n52) [7.31].

Statutory codification would also increase the visibility of remedies for insurance fraud which is vital for the law to function as a deterrent. Sanctions can only deter wrongdoing if they are known by potential fraudsters. Communicating an increase in legal sanctions is easiest to achieve if those sanctions are placed on a statutory footing. Interestingly, this was the rationale for codifying forfeiture, “succinct statutory remedies will empower insurers, warn potential fraudsters and generally send a message that society does not tolerate insurance fraud.”<sup>181</sup> There is nothing explicit in the Law Commissions’ report which evidences this assertion and nor does it explain why this same rationale did not cause them to pursue damages for the costs of investigation.

However, the literature on credible deterrence in financial services regulation confirms the intuitive sense that statute has an important role here. The concept of credible deterrence is simply the idea that deterrence strategies are effective in achieving their intended goal.<sup>182</sup> This is achieved *inter alia* by legal certainty. In particular, “to play by the rules, individuals and entities should know what the rules are and the consequences of non-compliance.”<sup>183</sup> This is likely where legislators provide “laws and regulations in plain, easy to understand language [which] can enhance transparency.”<sup>184</sup> Ensuring that the law is intelligible and accessible is evidently far more likely to result from the legislative, than judicial, process. This is not to say, of course, that the majority of would-be fraudsters routinely consult official sources to educate themselves about the potential consequences of wrongdoing.<sup>185</sup> However, codification would provide a platform to communicate the change in sanction to the target audience. This is necessary if the law is to function as intended.

In addition to the severity of legal sanctions, potential offenders must also think it is likely that they will be detected and sanctioned.<sup>186</sup> This perception can follow publicity

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<sup>181</sup> Law Com 353 (n50) [21.9]

<sup>182</sup> International Organization of Securities Commissions, ‘Credible deterrence in the enforcement of securities regulation’ (June 2015), <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD490.pdf> (accessed 09/07/2019), 6.

<sup>183</sup> *Ibid* 11.

<sup>184</sup> *Ibid* 11.

<sup>185</sup> T Brooks, *Punishment* (Routledge Cavendish, Oxford 2012), 47; P Robinson and J Darley, ‘Does criminal law deter? A behavioral science investigation’ (2004) 24(2) *Oxford J of Leg Stud* 173, 175.

<sup>186</sup> IOSCO (n182) 42: “Public messaging can promote deterrence by demonstrating that there are tangible consequences for those engaging or contemplating engagement in misconduct.”



surrounding law change<sup>187</sup> or from the anecdotal experience of one's peers.<sup>188</sup> It is not uncommon to see media campaigns and advertisements around law change<sup>189</sup> and, indeed, increased consumer awareness via such campaigns was recommended in Axa's Behavioural Fraud Report.<sup>190</sup> More specifically, legal penalties could also be publicised via the BBC programme 'Claimed and Shamed'<sup>191</sup> which follows IFED officers as they uncover insurance fraud. Given the types of cases featured to date and the time of broadcast, this is likely to have particular traction in increasing the perception of detection among consumer assureds.

Codifying remedies is also likely to facilitate knowledge of sanctions to a commercial audience. First, the placement of insurance via a broker means that knowledge of sanctions is not dependent on the assured taking steps to acquire information themselves. Instead, the intermediary can provide information regarding potential sanctions of fraud before, and during, the claims process. The broker could also add to the anecdotal development of perception by recounting experiences in which, for example, fraud has resulted in the payment of exemplary damages. Moreover, the way in which commercial assureds organise themselves creates the possibility for increased anecdotal awareness of new penalties. Trade bodies, periodicals and online fora create tangible mechanisms through which the imposition of sanctions for insurance fraud can be communicated within the commercial community.

While further amendment to the 2015 Act is unlikely at present, codifying the right to wasted costs and exemplary damages would serve several useful purposes. First, it would strengthen the legal response to fraud in a consistent manner given the recent codification of the forfeiture rule. It would also provide an important opportunity to clarify the basis for awards and factors relevant to quantum which have troubled the courts. Finally, from the perspective of deterrence, the process of enactment would provide a foundation for the

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<sup>187</sup> Ibid 11: "Publication of enforcement actions, with descriptions of the misconduct and the reasons for the sanction, is an important transparency mechanism."

<sup>188</sup> Robinson and Darley (n185), 177-178; B Johnson, 'Deterrence theory in criminal justice policy: A primer' (January 2019), <https://www.house.leg.state.mn.us/hrd/pubs/deterrence.pdf> (accessed 11/07/2019), 6-7.

<sup>189</sup> NHS Blood and Transplant, 'Organ donation law change awareness campaign launches' (25/04/2019), <https://www.organdonation.nhs.uk/get-involved/news/organ-donation-law-change-awareness-campaign-launches/> (accessed 16/07/2019); DWP, 'Campaign says no compromise in crackdown on benefit fraud' (21/10/2014), <https://www.gov.uk/government/news/campaign-says-no-compromise-in-crackdown-on-benefit-fraud> (accessed 16/07/2019).

<sup>190</sup> Axa (n49) 23, 27.

<sup>191</sup> BBC, 'Claimed and Shamed', <https://www.bbc.co.uk/programmes/b03bki8n> (accessed 02/08/2019).

communication of these sanctions to would-be fraudsters. These benefits cannot be achieved via the common law alone.

### **CONCLUSION**

The arguments made in this paper – that insurers should be entitled to wasted costs and exemplary damages via statute – reflect the fact that, at present, the law does not adequately deter the wholly fraudulent claim. Clearly, however, these recommendations may elicit objections. Some may argue that it is inappropriate for the insurance courts to impose exemplary damages and in any event, that the current civil regime – in concert with the criminal law – functions effectively. And, moreover, even if one recognises the flaws in the current system, insurers have the ability to obtain further remedies without statutory intervention. Notwithstanding this, the courts and parliament have taken the view that insurance fraud is a social ill which merits legal intervention. But, as demonstrated here, these legal responses are largely ineffective in response to the most serious wrongdoing. The result of this, therefore, is that the law is prepared to take the lead in combatting mid-level offending – the exaggerated claim – but views more serious wrongdoing as a matter for the underwriters themselves. This is, with respect, a notable and unjustifiable inconsistency in the treatment of fraud.

The contractual relationship between insurer and insured could also be used to undermine the need for reform. However, forcing an insurer to rely on contractual mechanisms ignores not only the public interest in combatting fraud but also that the social costs of fraud are borne by the public at large, irrespective of whether the fraudster has a direct contractual relationship with the insurer. Not only does fraud increase premiums by the oft-cited £50,<sup>192</sup> wholly fraudulent claims endanger road users, impose an unnecessary burden on emergency services and may have environmental ramifications.<sup>193</sup> These broader consequences merit further legal intervention. Moreover, the deliberate submission of a fraudulent claim is an egregious breach of the principle of good faith which underpins the

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<sup>192</sup> Insurance Fraud Taskforce (n2) 3.

<sup>193</sup> Ibid [2.6]; Richards (n11) 25.

insurance contract.<sup>194</sup> This further justifies additional intervention to uphold the parties' contract and to express law's disdain that the requirement of good faith has been breached. To be clear, this is not an argument that s.17 Marine Insurance Act should provide a cause of action here<sup>195</sup> but rather that the broader contractual context should contribute to any reconsideration of remedies. In contrast to the view that the ability to contract *ex ante* obviates the need for legislative intervention, the argument here is that the sanctity of the parties' agreement actually demands further legal protection.

A final potential objection concerns the point that, like fraudulent claims generally, not all wholly fraudulent claims are created equal. There are notable differences in the level of financial gain targeted and associated wrongdoing between the 'crash for cash' and marine scuttle. It could be argued, therefore, that these recommendations are insufficiently nuanced to reflect these differences. While there is merit in this argument, to treat all wholly fraudulent claims as necessitating a cause of action for wasted costs and exemplary damages is surely preferable to the current position where all fraudulent claims are subject to the inadequate forfeiture rule or reliant on the underdeveloped action in deceit. In any event, statutory guidance on damages would provide judges with the flexibility necessary to distinguish between wholly fraudulent claims of differing severity.

In comparison to the Insurance Act 2015 as a whole, the provisions relating to fraudulent claims have elicited little discussion.<sup>196</sup> This gives the impression that the fraud problem has been resolved through codification and the judicial flexibility to define fraud. But this assumes that these remedies are a comprehensive and effective deterrent to claims fraud. However, this is to be doubted,<sup>197</sup> particularly in the context of wholly fraudulent claims. In this light, Soyer and Tettenborn's discussion of s.17 and the subsequent comment that the 2015 Act "however suited to solving the problem at hand, some difficulty can be

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<sup>194</sup> *The Aegeon* (n27) [21] per Mance LJ; Sir A Longmore, 'Good faith and breach of warranty: Are we moving forwards or backwards?' [2004] LMCLQ 158, 167.

<sup>195</sup> On the future of s.17 see M Hemsworth, 'The fate of "good faith" in insurance contracts' [2018] LMCLQ 144; B Soyer and A Tettenborn, 'Mapping (utmost) good faith in insurance law – future conditional?' [2016] LQR 618.

<sup>196</sup> See generally: M Clarke and B Soyer, *Insurance Act 2015: A New Regime for Commercial and Marine Insurance Law* (Informa, 2016); DR Thomas, *Marine Insurance: The Law in Transition* (Informa, 2006); F Arnold-Dwyer, 'Insurance law reform by degrees: Late payment and insurable interest' (2017) 80(3) MLR 489; L Zhu, X Pan and Z Jing, 'Marine insurance warranty: comparing common and civil law approaches and their implications for the reform of Chinese law' (2017) 3 JBL 218.

<sup>197</sup> Stockdale (n22) 1049: "more still needs to be done to make liability claims less fertile ground for fraud"

trusted to appear”<sup>198</sup> is pertinent to any consideration of insurance fraud. Not only would the additional remedies recommended here overcome this difficulty and provide an opportunity to clarify how the courts should approach these claims, but they would also increase the likelihood that these remedies will function as intended, to deter wholly fraudulent claims.

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<sup>198</sup> Soyer and Tettenborn (n195) 618.