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The Price of a Lie:
Discretionary flexibility in Insurance Fraud

by
Gerald Swaby
(2) In any proceedings in relation to such a claim, the court may, if only a minimal or insignificant part of the claim is made fraudulently and non-payment of the remainder of the claim would be harsh and unfair, order the insurer to pay, in relation to the claim, such amount (if any) as is just and equitable in the circumstances.

(3) In exercising the power conferred by subsection (2), the court shall have regard to the need to deter fraudulent conduct…
“$3000 lost baggage would usually be met even if a fraudulent claim that a camera worth $200 was included in that baggage was rejected.”
Quantitatively = 6%

ALRC in its notes to its draft Bill referred to fraud of A$100 in a claim of A$10,000, and the Explanatory Memorandum leading to the Act referred to fraud of A$50 in a claim of $100,000.”
Quantitatively 1% and 0.05%
Held – House fire – Not minimal or insignificant. = 30-50%

Tiep Thi To v Australian Associated Motor Insurers Ltd [2001] VSCA 48
Held: Stolen car. Entire claim tainted.

Entwells Pty Ltd v National and General Insurance Co Ltd (1991) 6 WAR 68
Held
• C’s directors had connived with 3rd party to set fire to C’s building to claim for the building and stock.
• Entire claim tainted.
Quantitative – Initial claims genuine

- Galloway – Burglary, 11%
- Direct Line v Khan – Fire, 10%
- Gottlieb –
  - 1. Dry rot necessitating alternative accommodation, 33% and
  - 2. An electrician's invoice, 8%
- Micro Design Group – forged documents, 2%

Grey Area

- Tonkin – Fire. Claimed for new kitchen twice, 0.3%
Qualitative

- Aviva v Brown
- Sharon’s Bakery v Axa
A possible FOS solution to Aviva v Brown

- FOS focus on the insurers ultimate liability, based on the Mercandian Continent.
- Aviva v Brown –
  - C would recover.
  - C would not be induced by the misrep.
  - C’s ultimate liability would be to pay for D’s alternative accommodation.
  - Additional possibility for FOS to award compensation for distress caused by C?