

Witness Statements in RTA Cases Where Fraud is Alleged

By Deborah Tompkinson – Clerksroom – August 2012

Telephone 0845 083 3000 or go to www.clerksroom.com

1 Introduction

If you have got this far, then you have already begun working on the case (probably on a CFA if you are for the Claimant) and your interest is engaged.

Witness statements are a crucial part of the evidence. Properly prepared, they:

- a Enable your client and their witnesses to put their case effectively
- b Act as a case assessment tool for you

At the time of writing, the Supreme Court has just handed down its decision in **Fairclough Homes v Summers [2012] EWSC**. The decision contains some very pointed advice to judges as to how they should ensure that a partially fraudulent claim should be handled. This includes ensuring the fraud does not increase the award for damages. While it remains to be seen how this will work out in practice, one very strong hint was dropped. Once a judge is satisfied that a party has been fraudulent on a particular point, that party is likely to have “*considerable difficulties*” (as their Lordships delicately put it) convincing the trial judge to accept any of his evidence, unless empirically supported .

Not so much a nudge as a shove in the small of the back, this could be viewed, on its most liberal interpretation, as an invitation to the lower courts to exercise considerably greater scepticism in future, once part of a case has been proved to be fraudulent. This means that evidence that a claimant has lied about e.g., the existence of previous accidents, may well lead to a judge in rejecting his evidence on liability.

For this reason, the preparation of a statement, and the evidence to support it, will require considerably greater care in future. For Claimant lawyers, this may sound the alarm earlier than has sometimes been the case.

2 A plea for good exhibits

If it is not already your practice to put all your client’s exhibits into a single paginated exhibit bundle, may we plead with you to make it your practice in future.

- a It is much easier for a judge (who you want on your side) to navigate his way around a single paginated exhibit bundle than to thrash amid numerous exhibits, each with a front sheet, identical but for the number. If the exhibits are voluminous, the single paginated bundle is essential. Even if there are only few pages, it shows you are thinking of the judge.

- b If it is acceptable practice in the Commercial Court, it is acceptable in the County Court.
- c It gives you a chance to check that all copies are as clear; legible, in the same colours as the originals; and not cut off or missed out by the photocopier, before they are sent to the court or your counsel.
- d Colour copies: If anyone (your expert, the insurer, your opponent) has sent you black and white copies (and it is distressing how often this happens), insist on colour. There is no excuse these days for black and white copies.
- e If there is a locus or other report, attach it.

3 Be an early bird

Witnesses are human. Memories fade. It is essential to establish a witness's account at an early stage. In our view, one consequence of **Summers v Fairclough** may be that the lower courts may be less ready to overlook lapses of memory, unless a very cogent explanation is offered. Independent support and careful attention to detail will be much more important. It is going to be crucial to pin down a fully detailed recollection at an early stage – whether your client is Claimant or Defendant. If a witness is unable to give a coherent account shortly after the accident, careful consideration will have to be given to whether that witness can be relied upon.

- a Obtain your client's accident report to the insurer (if written) and any records kept by the insurer of telephone calls with them or the broker or accident management company.
- b Such records are, in our view, likely to be disclosable, **Axa v Allianz [2011] Lloyd's Rep IR 544**. This does not, of course, apply to an account given to solicitors.
- c Ensure that the witness or client has confirmed it is their recollection by signing the early account.
- d Speak to your client to flesh out the above – usually scanty - details as soon as possible after instruction. Then send the account to your client for him to sign as his statement on liability and first statement on quantum (if appropriate). If more is needed later on, a supplemental statement can be done. This method should be no more and may be less time-consuming than amending drafts over a period of time. More importantly, it fixes an account in close proximity to the accident, which may be crucial if his memory changes later or the other side put up a different account.
- e If the formal statement is not made contemporaneously or near so, we consider it is quite proper to send a witness a copy of any early account they have given prior to preparing the formal statement or

with the first draft. People's memories do fade and seeing their own contemporaneous document can jog them.

- f Get an early diagram, if the insurer has not already done so.
- g Ask for the documentation as early as possible. If you are for the Claimant, in an RTA most of the documentation should be available before or shortly after you come on board: V5, driving licence, hire documents, repair estimate (if not invoice), recovery (if not storage) bill, confirmation from employer or school of absence; wage slips, receipts for medication, travel, treatment, or other expenses.
- h Compare any statement given after you are instructed with any account, however, informal, before you are instructed. Likewise compare with those given to police (if any).
- i Reporting to own insurers: Pleas about not wanting higher premiums are often made. This is nonsense (for the reasons below). So ask who told your client that they should not inform the insurer. It may turn out to be the Claims Management Company, Credit Hire Company or other intermediary or funder. An accident mid-term does not entitle the insurer to put up the premium for the current year – that is the risk it took when it accepted the premium. The accident is disclosable at renewal, with the same or different insurer, irrespective of whether a claim has been made. Failure to disclose it at that time is breach of utmost good faith and can lead to an insurance being avoided. There is, therefore, no reason not to notify a party's insurer and it may be in his own interest to do so.
- j If there is a personal injury claim, inquire immediately about previous accidents, injuries, pain or symptoms, make a note, and have them sign to confirm it. Insurers are reluctant to allow Claimant solicitors access to such databases. This deprives the vast majority of honest solicitors of a useful resource for checking their own client's' bona fides. If the Claimant has reported the accident to his insurer, however, it might be possible to make a request to them, with the necessary signed release.

4 With an eagle eye for detail

The list of slips that a fraud can make are endless. Here are but a few:

- a Legal slips: Hire or other company used is "Limited" but has no company number; VAT is charged but documents do not bear VAT number; company has no internet presence and is not listed at Companies House.
- b Timing: hire/recovery starts before the date or time of the accident.

- c A man unable to drive (allegedly) was (as shown by his credit card statement) making purchases all round London in the weeks following the accident.
- d Inconsistent signatures on documentation – always compare them. It is not unknown for a party in a credit hire case to deny that a signature is theirs - often after it is clear that they may not recover all of their claim. If this happens, careful investigation is needed into the documentation and circumstances in which it came to be signed. In extreme cases, a good handwriting expert may be needed. Sometimes a party denying a signature backs off when it is clear that this step will be taken.
- e A name (not the Claimant's) was scratched out of the top of a doctor's letter and the Claimant's name written in.
- f A self-employed Claimant produces alleged accounts but they have not been signed by the accountant, or has not kept copies of his tax returns, or has no financial books from which the accountant prepared the account.
- g Impecuniosity: evidence of other accounts, that have not been disclosed; transfers to and from other accounts, or regular savings payments, no evidence of earnings or the repairs cheque, having been paid into the account.
- h **"I thought you/he meant...."** A party has failed to tell a medical expert about relevant previous history or is caught out in some other inaccuracy. Consider his explanation carefully. The equivocator is a very particular type of liar. He will deliberately interpret a question so restrictively as to allow himself to give an answer that is literally truthful but factually misleading. The witness who starts off with "*I thought he/you meant....*" deserves very careful scrutiny. Is he an equivocator or just (like many) unable to admit that he made a foolish mistake?

One solution is to try to head off misunderstandings with precise questions at an earlier stage. For instance, in a case of whiplash, do not ask whether they have had whiplash before. Ask instead: "*Have you had any of the following: neck pain, shoulder pain, upper back pain, mid back pain, lower back pain.*" In the case of an alleged misunderstanding about an expert's questions, consider the context. Can a person who is asked, by a doctor, first about previous accidents, and then about whether she has any outstanding claims, really believe that she did not need to mention a previous accident because she was then only a passenger, not the driver?

- a Modern law practice rarely allows the luxury of face to face meetings with our clients. The quality of those taking witness statements is therefore crucial. The investigator needs to be capable of probing weaknesses. To do that, he must be armed with as much documentation, including previous accounts, as you would have access to if taking the statement yourself.
- b Ideally, statement takers should have some experience in probing for weaknesses and a willingness to be slightly sceptical . Retired police officers and lawyers may be able to offer valuable experience.
- c Insurance databases of previous claims are available to Defendant insurers. They are an invaluable asset for assessing the credibility of a Claimant.
- d Where there are doubts about the damage to the car, a proper engineer's report will be necessary. This is a specialist job. As always, care is needed in selection. A well reasoned report which considers possibilities and gives reasons for preferring one over the other is always best.

6 Probing for worms

Whether for the Claimant or Defendant, you may want to inquire further into an account. In addition to the obvious checks of internet and social networking sites, inquiries can include:

- a Unable to go to the gym, play football, etc. Ascertain the name of the club, how the membership is paid (monthly direct debits are most usual) and does it show up in the bank statements. Get permission to approach the club for evidence of how frequently Claimant used it before the accident. Many health clubs now operate on swipe cards - and keep records of attendance. Check football matches played, what position in a team, recent opponents, reports in local newspapers etc. One solicitor who did this found his client's picture in the local paper having won a match a week after the accident - when he was alleging he was unable to walk.
- b Gardening: check Google maps; what tasks does he do in the garden, what plants grow, how does the work change from season to season.
- c Is there time off work but no claim for loss of earnings? Get permission to approach the employer to confirm. Insist on pay slips.
- d Not so independent witnesses: if one party says that there were no other persons around at the time of the accident, check what are witnesses previous addresses, have they lived near each other, attended the same school, or same place of worship or work.

- e If it is alleged that the accident was contrived, it is important to obtain as much evidence as possible about your client's route and purpose of journey to make sense of the case. Is there any evidence to support the journey, such as a theatre ticket, or restaurant bill, or items purchased on route? In "sudden stop" cases, consider whether the alleged cause of the accident is something the hindmost driver would have seen. If the first car in a line of three brakes suddenly, it might not be reasonable to expect the last driver to realize what caused it. If the second driver brakes because a car ahead has crossed his path or turned right unexpectedly, however, it is more likely that the hindmost driver should see it.
- f Check the route on a map. NB this is not necessarily a matter of fraud. In a crossroads collision, both parties claimed, impossibly, to have been on the main road. One car was rolled over in the crash. It only emerged in court that the occupants, who had not known the route, had driven around the area in the following days, trying to identify a route that explained their understandably addled recollection of where they had landed after the collision.
- g Ask for original receipts and examine them very carefully. We regret to report that there are now websites which offer to assist in the production of what they unconvincingly refer to as "*novelty*" receipts for "*recreational use only*". Be vigilant.

- h Distant relatives: the term “*brother*” or “*uncle*” means different things to different people. Asked whether the uncle who recommended a garage was her mother’s or father’s brother, one Claimant admitted he was not a relative. She did not know his surname. She did not even know his real name - the one by which he was known to her family was a nickname. Similarly, “brother” may mean nothing more significant than a co-religionist.

7 If in doubt - have a conference

Why do we say this? Plausibility is, after all, an essential qualification for a con-man. Some reasons are:

- a Frauds expect to get their money without expenditure up front and without inconvenience. Making them put their hands in their pocket to travel (even for a sum that they may later recover) subjects them to both inconveniences. Advance tickets are available a couple of weeks before travel at relatively low prices. If the client is genuine but unco-operative, why should they be any more co-operative e.g., about travelling to a court which may not even be their home court?
- b Discrepancies between a driver and passengers can be put to them separately before too much time has been expended on them.
- c If both counsel and solicitor are present, two heads are better than one.
- d They receive the gypsy’s warning, which should always be confirmed in writing.

8 The reluctant witness

If you suspect the other side’s witness may not exist but they have provided a statement, issue a summons.

Doing so for one’s own witness is more problematic. If they turn up they may be hostile. If they do not turn up, as can happen, the failure may damage your client’s case.

9 Fair play

A witness occasionally tells counsel outside court that he does not recall seeing a statement before. More often, they say that they have not seen it since it was signed. We have already recommended that a party be sent his earliest accounts before finalizing a statement for court. Simple fairness requires him to be sent a copy with the notice of the hearing so that he can familiarize himself.

10 What if you discover an error in your client’s statement?

A party who discovers that a witness statement which has been served is incorrect, must inform the other parties immediately: see Queen’s Bench Guide,

para. 7.10.4(6) (also Chancery Guide, Appendix 4, para. 6). As indicated above, the reasons for such errors should be thoroughly explored.

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