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## RTA Fraud Manual

The Complete Guide

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the **service**  
the **people**  
the **quality**

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# RTA Fraud Manual The Complete Guide

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**Administration:**

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# Preface

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ROBIN DE WILDE, Q.C. January 2013

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Fraud as defined by the Shorter Oxford English Dictionary, 3rd Edition, suggests that 'fraud' is:

***"... 2. Criminal deception; the using of false representations to obtain an unfair advantage or to injure the rights or interests of another."***

In simple terms, it is: "the obtaining of a pecuniary advantage by deception".

## Growth of RTA fraud

RTA fraud is an increasing problem for the government, insurers and honest drivers. Often omitted from that list, but victims of it nevertheless, are the claimant solicitors who are duped into providing their services, up to the point where the fraud emerges. The fact that a CFA, in theory, entitles a solicitor to recover his costs from a fraudulent client does make the reality of recovery any easier than it is for any other victim of a fraud. If the fraud is successful, the position is equally invidious; it means a reputable professional has been used as a catspaw to perpetrate an act that is damaging the reputation of the firm and the profession.

A further, invidious, but inevitable consequence of fraud, is that honest claimants fall under suspicion. This flows from the fact that most if not all of the most common fraud markers are equally consistent with ordinary explanations. It is imperative, in the interests of justice, that suspicions against such claimants are properly and thoroughly investigated and laid to rest.

We anticipate, therefore, that both Defendant and Claimant solicitors have a powerful vested interest in identifying and eliminating fraudulent claims, and their perpetrators, at an early a stage as possible. Defendants may be armed with the better intelligence resources but Claimants generally have better witness access. The Manual is drafted with both in mind.

For the common lawyer, this is exciting work, because at trial anything can happen!

## Pleading fraud

*If pleaded by the defendant, it means a reversal of the burden of proof.*

## Rules as to pleading fraud

Also, the rules as to pleading fraud are clear and strict. The pleader, in civil cases, is required to have the evidence in his hands, whether by documents (including film/video) and/or signed witness statements of those justifying the allegations. This means that careful planning and preparation is necessary before the allegations are pleaded.

Two recent cases have emphasised the need for such care. In **Revenue and Customs Commissioners v Sunico A/S and others**, [2012] All ER (D) 172 (Oct), not reported elsewhere except in relation to other matters, Warren J. stated what the rules were in respect of pleading fraud when he struck out claims by the Revenue.

## Summary:

***“C’s fraud allegation against the first defendant depended on a key fact. C failed to provide sufficient evidence to prove that the event had taken place. Against the second D, C failed to plead any facts necessary to show that the second Defendant had been party to the alleged conspiracy or dishonesty.”***

The Note of the Judgment records the following:

“(1) It was settled principle that there were two separate aspects of the requirements relating to the pleading of fraud. The first was that there had to be an express allegation of fraud. The words ‘fraud’ or ‘dishonesty’ did not have to be used: the use of words which were inconsistent with an absence of fraud and dishonesty was enough. It was enough, therefore, to plead that a defendant was party to an unlawful means conspiracy since such involvement was wholly inconsistent with an absence of fraud or dishonesty. It was settled law that there was no proper pleading of fraud if the pleaded facts were consistent with an absence of fraud or dishonesty. Simply to allege fraud or knowledge was not enough. The second requirement in a fraud case was that a defendant was entitled to know from the pleadings the fraud which he was alleged to have perpetrated and the allegations of fact which were made against him in order to establish the fraud alleged. Since knowledge was of the essence of fraud, he was entitled to particulars of knowledge. Usually, the knowledge of a defendant was to be inferred from all of the facts. **Accordingly, a plea of fraud was certainly not to be struck out on a pleading point if it alleged: (i) fraud or dishonesty; (ii) the primary facts relied on to found an inference; and (iii) the extent of the knowledge of the fraud which it was said was to be inferred.**

In the instant case, the evidence before the court was insufficient to support the allegation that N had negotiated the commission agreement on behalf of PT Naina. Since that allegation was the only allegation pleaded in support of the fraud claim, the inferences sought to be drawn against N were unsustainable. Further, nothing had been pleaded

on which reliance was placed to show that D had been party to a conspiracy or in any other way dishonest. In all the circumstances, the Revenue should not be allowed to amend their case against N or D. Accordingly, in relation to the conspiracy claim as pleaded in the amended statement of claim, both N and D were entitled to summary judgment against the Revenue dismissing the claims against them."

The underlining and emphasis are mine.

## **'Significant concerns' should not be pleaded**

The second case, **Hussain and (1) Amin and (2) Charters Insurance Ltd [2012] EWCA Civ 1456**, illustrates why the Court of Appeal deprecates the use of a pleaded allegation of "significant concerns" in respect of a car case, where the defendant intimated there was no allegation of fraud, although the so called 'concerns' came close to being an allegation of fraud. The comments of both the Master of the Rolls and Lord Justice Davis were both clear and illustrate the nature of the distaste. The remarks are obiter, but are a clear indication of the approach any other Court is likely to follow.

Lord Dyson, MR, at para 2 states as follows:

*"...Although the terms of the pleaded defence are not relevant to the issues that have been raised in this appeal, I am bound to register my concern with the way in which what is the substance is an allegation of fraud was pleaded..."*

Davis LJ said in the course of his comments on the same matter, at paras 18 and 19, as follows:

*"...But this sort of pleading ought not to be sanctioned..."*

No clearer warnings could be given.

## **Consequences of a 'fraud allegation**

However, the consequences for the party against whom a claim of fraud is proved are dire. There are, inter alia, not only indemnity costs, but proceedings for contempt and abuse of the process of the Court. This may include imprisonment. Recently one fraudster was sentenced to 18 months imprisonment in a flagrant case of fraud in a car related case.

It is often forgotten that the consequences for a party who alleges fraud and then fails to prove it to the satisfaction of the Court are equally dire, depending on the facts and the nature of the failure. That is yet another reason why the rules as to pleading are so strict.

## Counsel should plead the fraud allegations

For the protection of the instructing solicitor, it is essential that counsel should be asked to plead the allegation of fraud.

It is curious to note that commercial practitioners are more likely to be unwilling to plead fraud in gross and obvious cases, I have come across several examples of criminal practitioners being asked to advise in writing to strengthen the resolve of commercial practitioners.

By contrast, the common lawyer is often more willing to plead fraud when it is plain and obvious than his smarter and more highly remunerated brethren. It maybe, in part, that many of us started off at the Bar, prosecuting and defending in criminal cases, whilst building up our civil practices. I recall pleading civil fraud in at least four cases.

## What to do and what not to do

**Fraud is the most serious allegation. It is unfair to delegate it to junior staff. The early involvement of senior staff is necessary to avoid indemnity risk - not so much from the fraudulent clients but from the honest client who is wrongly suspected.**

Do not suggest in writing to your opponent that 'fraud' is in issue or is going to be alleged unless you have clear evidence of fraud. Such conduct is clearly improper. If in doubt, consult a more senior fee earner.

Have a series of check lists, for such cases and ensure that you discuss such a case with colleagues whose views you respect as well as using counsel.

Remember that a fraudulent person, having succeeded once with one particular fraud, is prone to repeat the same conduct. The clever fraud will change his method with each fraud. The less clever fraud will say to himself, that as the scheme has worked before, he will do it again and again. These are the ones that you are most likely to detect.

If you have a client, whether for the claimant or the defendant, when you have evidence of fraud, you must give the fraudster the 'gypsy's warning' both orally and in writing. No one wants to answer the Judge's question: "Did your solicitor not warn you of the consequences?" when the answer is: "Nothing was ever said to me." It also means that there must be impeccable Attendance Notes.

These matters of practice should never be left to a junior employee who has no or little experience. There is a world of difference between the stupid, idle and forgetful or confused client, who does not attend or concentrate on his litigation in a proper manner, and the 'determined fraud'. Do not confuse the two extremes.

I have known the Senior or Managing Partner in a firm of solicitors being required by a Judge to attend Court to answer for his firm's conduct, when a fraud allegation failed completely.

## Conclusion

However, at the end of the day, we all know that fraud is rife, and will continue as long as money is involved and that there are some people who have no moral scruples. Frustrating fraud is the purpose of this Manual.

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**15 January 2013**   **ROBIN DE WILDE, Q.C.** BARRISTER, CLERKSROOM

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# Chapter 1

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## **Whiplash: What is it? - A View from a Consultant Trauma & Orthopaedic Surgeon.**

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DAVID TEANBY October 2012

### **QUESTION: What is whiplash?**

Whiplash is a popular term for injuries to the neck caused by sudden movements of the head. The term cervical acceleration and deceleration (CAD) describes the mechanism of the injury and the term whiplash associated disorder (WAD) describes the overall symptoms. The injury is frequently associated with road traffic accidents from the rear, the side or the front but can also be caused by other sudden movements of the head such as falls from standing, bicycles or horses and as a sport's injury.

### **QUESTION: What areas of the body can whiplash affect and which are the most common?**

The injury affects the head, neck, shoulder girdle, thoracic spine and lumbar spine. The most common symptoms are neck pain, shoulder pain and headaches. Lower back pain can occur, as can pins and needles and tingling in either the legs or the arms and difficulty swallowing. Frequently symptoms do not occur immediately after the accident and start to occur within 24 to 48 hours, increasing over the next few days.

### **QUESTION: What are the objective signs?**

The common symptoms include neck pain and stiffness, neck swelling, tenderness along the back of the neck or muscles that produce movement in the neck or loss of movement. The only objective sign would be of local tenderness and a reduction of the movement. Very occasionally some neurological loss can be shown in the arms or legs, usually of short duration.



### **QUESTION: How is it diagnosed?**

Acute whiplash is usually diagnosed from the history of being involved in a road accident and spinal pain developing. Clinical features as describe include tenderness and a reduced range of motion. Unfortunately there are no scans, x-rays or special tests that can be used to confirm or refute a diagnosis of whiplash.

### **QUESTION: How do I tell if a claimant is misleading?**

As a Doctor I have duties under the rules of the General Medical Council to carry out an assessment and to treat every patient politely and considerately, listening and respecting their views. My duty is to assist the Court in providing advice on causation and prognosis based on following the clinical method by taking a history, examining the client and reviewing the clinical records. Unfortunately there are no signs of inappropriate illness behaviour in the neck. As a Medical Expert I cannot help with whether or not the accident occurred, who hit who, whether or not the claimant was actually in the vehicle, or are they telling the truth about their symptoms.

### **QUESTION: How do I determine a prognosis?**

The majority of injured parties will recover. Studies suggest that 60% of people will recover within a short period of time, 40% will have some symptoms and of those perhaps 5% will be disabled in the long term by these injuries. The majority of people we see will get better. Some factors associated with either delayed or non recovery include pre-existing neck pain, psychological disease, previous whiplash accident whether ongoing or recovered, very high pain level immediately after the accident, radiation of pain to the arms, neurological signs and significant neck stiffness can be associated with prolonged recovery.

### **QUESTION: What to a medical examiner is useful information from the instructing Solicitor?**

Details of the accident and details of previous history is quite helpful. Sometimes claimants cannot remember when they turn up for examination and to actually have something written down to help jog the memory would be of value.

### **QUESTION: How useful is a review of medical records?**

Medical records are useful in showing previous episodes of neck problems and showing the state of the neck at the time of the initial examination either in the A&E or by the GP.

**QUESTION: Can you be certain of a diagnosis of whiplash without medical records?**

The majority of whiplash symptoms are self reported and described by the claimant. The presence or absence of notes does not confirm or refute their diagnosis. Medical records are of use in longer term cases, in very brief whiplash up to three months recovery they are probably not of value.

**QUESTION: At what speed can a whiplash injury occur?**

Whether or not someone sustains injury in an accident depends on many factors, including age, gender, body size, fitness, type of car and stiffness of the vehicle. In order to sustain injury a certain amount of external force must be applied. Studies have suggested that a velocity change such as 2.5 mph, at say a 5 mph accident, is sufficient to cause injury to a vulnerable individual. 5 mph is probably the bare limit of human susceptibility.

**QUESTION: Do you ever see clients who you think are misleading you?**

Yes, I am sure that there are clients who may exaggerate their symptoms and some will attribute every ache and pain in their body to the accident.

**QUESTION: What information is contained in a good medical report?**

1. A description of the accident, nature, development and progression of symptoms.
2. Current symptoms. Thorough and accurate examination of head, neck shoulders, arms and other symptomatic areas.
3. Extent of disability and prognosis.

**QUESTION: Do I encourage a GP or Orthopaedic report as first report?**

In the majority of short term uncomplicated cases a GP report will be suitable, but with more widespread or longer term symptoms, an Orthopaedic report should be obtained.

**QUESTION: What is the benefit of an Orthopaedic report?**

A Consultant Orthopaedic Surgeon will have 10 – 20 years experience of injuries of the spine and musculoskeletal system. In some cases GP's may only have a few weeks of orthopaedic training as an under graduate, with no formal post graduate training.

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# Chapter 2

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## Litigation tactics for fraud cases

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IAN SKEATE, CLERKSROOM

November 2012

### The Trial

This part of the manual seeks to provide some relevant and up to date information about the conduct of trials where fraud is being alleged or where a 'concerns' defence has been pleaded. The aim of this chapter is to prepare and inform solicitors in relation to common issues arising in such trials in order that the attacks of the defendant can be avoided or reduced. Much of the following will have been referred to in the foregoing chapters but the emphasis here will be to highlight once more how important preparation is to winning such cases. This chapter is aimed at a broad cross-section of fee earners from experienced Partners to the most junior paralegal. The more experienced readers will recognise and know much of the advice set out below but I would hope that we can all benefit from recapping these issues no matter how experienced we are.

Many cases involving alleged fraud, perhaps even a majority, settle before the trial – many settling in the last couple of weeks or even days before the trial. However, it is my recent experience that Defendant insurers are increasingly willing to go to trial to defend these claims. The explanation for this so far as I can see is an increasing willingness in judges to make findings of fraud and the vested interests of those firms who are retained by the insurers on fraud cases to fight each one to the bitter end.

Additionally, there has been a sea change over the last year or so in the practice of the courts as to how such claims are heard. The current practice in many areas, and one which seems to be increasing, is for all such cases to be sent to 'specialist' courts with judges who hear large numbers of alleged fraud cases. One example of this includes the Central London County Court which now hears all RTA fraud cases from London County Courts. The judges there are now very experienced in all types of alleged fraud including the ones described earlier in this manual.

My recent experience is that, unfortunately, this is having the effect of making some judges appear somewhat jaundiced from a Claimant's point of view and trial Counsel must be alive to any sign of the appearance of bias and have sufficient experience and ability to decide if a judge has overstepped the mark in any preliminary remarks about the case.

I recently appeared in front of a Circuit Judge who was hearing a Defendant Insurer's application to vacate the trial, (for the third time), and before hearing my submissions he wanted to inform me that in that locality RTA fraud was prevalent, in the real world people don't have multiple accidents over a short period, he had made 2 references to the CPS for fraud prosecutions in separate cases in the last 3 weeks, that he always referred such cases to the CPS requiring them to inform him of the outcome and that judges in his area were determined to 'teach these people a lesson'! Such a situation is fraught with difficulty and is an example of why it is my opinion that fraud cases require experienced and very able Counsel.

In the case just mentioned it was evident that the judge was going to allow the application and the best that could be achieved was a costs order that the Second Defendant do pay the Claimants' costs of and consequent to the application unless fraud was proved at the trial. I have found such an order to be accepted by even the most hardened of judges where the Second Defendant is making a submission of Costs in the Case on the basis that a fraudster should never have their costs. A further albeit slightly oblique benefit to the Claimant in the case above was that the trial being vacated and the dates of availability put forward had the result that the case was not going to be heard by that particular judge.

Once at trial there are some common themes in cross-examination by the Second Defendant and these are worth considering when preparing at every stage of the litigation especially when witness statements are drafted. Fraud trials are invariably about credibility and many poor results could be avoided by recognising and preparing for the defendants' usual case. Witnesses must not be coached but they should be made aware of the likely areas of cross-examination that will be put:

**1. Where were the Claimants coming from and going to and why?** The Defendants almost invariably check out the route suggested by Google or the AA and if the accident did not take place along that route the witness statements must explain this. Timings can be important here as well and a careless comment in a witness statement stating that the Claimants had been in the car for about 20 minutes before the accident (when having travelled 50 miles) can and should be avoided.

**2. Where was each person seated?** This has been covered above but is worth mentioning again.

**3. What injuries were suffered and when did the symptoms start?** This is one of the most common lines of cross-examination that defeats claims at trial in both alleged fraud and LVI cases. If the trial judge is dubious about the case and appears to be looking for a reason to find that, at least, the Claimants have not proven their cases any inconsistencies can be seized upon by the judge to dismiss the claims. The essential matters here are whether symptoms came on at the scene or the next day etc and in what order. It can be very difficult for claimants to remember in the witness box what they told their GP compared with what they said to A&E or the Walk-in Centre and, in my opinion, they should not be made unduly anxious about this before the trial as that could affect their concentration and performance in general.

However, especially where different symptoms came on at different times the claimant should be invited to read their medical report as well as their witness statement in the last couple of days before the trial. In my opinion, reading the medical report as well as the witness statement is vital in many fraud cases but is rarely done by claimants who only review their witness statements.

It should, of course go without saying that there should be no inconsistencies between the witness statement and the medical report but unfortunately I have found this to happen too many times and I can only urge solicitors dealing with suspected fraud cases to be hyper-vigilant and careful when drafting the witness statement to double-cross-check it against both the medical report and the Particulars of Claim.

**4. The circumstances of the accident and aftermath.** The same advice given above applies to all factual areas of the case and pleadings. It is my personal opinion that claimants should avoid being too precise about speeds and distances in their witness statements as very often this can lead to them getting into a tangle as Counsel for the Defendant cross-examines minutely any on such specifics. All too often it is easy for the Defending barrister to lead the Claimant into a corner from which they either have to make a u-turn or, worse, try to justify a clearly un-justifiable position thereby losing credibility.

**5. The absence of passengers as witnesses.** I frequently find myself at trial where one or more of the claimant's passengers do not attend. This can be extremely damaging to the claimant's credibility and more than one judge has remarked that, 'Honest witnesses come to court!'. This is particularly the case where claims have been intimated by a passenger and then not pursued. If there is an explanation for this, such as the fact that the passenger has moved abroad, then it should be stated in open correspondence and same included in the trial bundle. It may be surprising to many experienced litigators but I still experience on a fairly regular basis a claimant telling me that his wife/mother etc is not giving evidence because he was told (usually by the insurer) that she cannot do so because she is a close relative.

**6. Miscellaneous expenses.** A word of warning about this head of loss. It is becoming more common at trial for judges to take a serious credibility/conduct point against claimants who cannot explain or justify this head of loss which is usually pleaded at up to £50.00 and usually awarded at about £20.00. Whereas in the past the sum was looked upon, at worst, as a makeweight and not awarded at all I have experienced judges accepting a submission from the Defendant that this is a deliberate attempt to exaggerate and, whilst small, goes to the heart of the claimant's honesty.

Whilst it may be said that if any given judge is so harsh as to take that point against a claimant then it is likely that he will be finding against the claimant in any event there is no sense in giving the defendant free ammunition and my advice would be to err on the side of caution with this head of loss and to make sure it is justified and calculated within the witness statement.

Every trial carries with it inherent litigation risks including how well the witnesses perform on the day and what judge hears the case, however, there are some matters which can be anticipated and dealt with in advance of the trial. One of these is the issue of interpretation. If, in your judgment, the claimant or any witness cannot speak English to a level whereby they can answer the types of questions which will be put in the way that the defendant's barrister will inevitably put them they should have an interpreter. Where the witness is clearly unable to speak English the decision is simple but it is more difficult where their level of English is passable in conversation as that may not be sufficient to be able to answer cross-examination questions adequately especially under the pressure of being in court.

Whilst it is extra work to get the relevant pleadings and medical reports translated this is, in my opinion, vital in many cases. Quite apart from the issue of the claimant'/witness' performance in court there will be serious costs and credibility consequences if the trial judge deems that the claimant/witness cannot understand or read English sufficiently to have agreed the Statements of Case etc. If fraud is expressly pleaded I advise that a claimant/witness should have an interpreter unless their level of English is clearly good enough for them to cope with cross-examination close to the level of a native speaker of English.

In such a case where an interpreter is desirable the application for this should make it clear that their English level is good enough to have understood the Statements of Case but, given the very serious criminal allegations against them an interpreter at trial is justified. In my experience, the assistance of an interpreter makes it far more difficult for the defendant to cross-examine a poor speaker of English into making an innocent but inadvertent word or phrase that can be used against him.

Finally, all good trial advocates know that their job is not done yet when judgment is given. The issues of costs must be dealt with – win or lose. It almost goes without saying that where an express pleading of fraud has failed and the case has been successful then indemnity costs should follow. However, I advise all solicitors to include within their trial Brief to Counsel an instruction to seek an issue-based costs order in favour of the Claimant who has lost his case but where the Defendant has failed to make out its allegation of fraud.

This is not an uncommon outcome to trials where fraud is alleged as many judges are still reticent to find fraud made out if they properly direct themselves as to the quality of the evidence required to find fraud. Whilst the standard of proof is still the civil standard, i.e. the balance of probabilities, the more serious the allegations the higher the quality of the evidence required to achieve that standard. Consequently, a number of such trial will result in a finding that although fraud is not proven the claimant has failed to persuade the judge on a balance of probabilities that the accident happened as alleged and/or that they were injured in the accident.

In such circumstances a submission that the claimant has won on a very important issue that took up the major part of the trial and the litigation and, as such, he should have his costs of this or at least he should not have to pay the defendant its costs in relation to that issue. Such a submission is fortified by reference to the fact that most ATE insurers will refuse to indemnify the claimant if he discontinues before the trial where fraud is alleged. It should be argued that, because of this, the claimant had no choice but to go to trial and vindicate himself. The alternative was to pay the defendant's costs of several thousands of pounds upon discontinuance.

In conclusion, it must be accepted that all trials carry a risk and where fraud has been alleged or insinuated that risk is all the greater. These risks, however, can be reduced by the litigator giving consideration to the issues and matters set out in this manual and by adopting such of the advice given as appropriate to any given case. Once all that has been done and the case is about to be tried then the final piece of the jigsaw to obtain the best chance of success is to instruct experienced and able Counsel who specialise in such cases.

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**November 2012**

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# Chapter 3

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**Staged or contrived allegations:** What are they, how to investigate them and evidence to obtain.

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JEREMY DABLE, CLERKSROOM

October 2012

## Introduction

Often suspected but not always proved. Whether you are for the claimant for the defendant or for the defendants insurers, it's all about how to "pick a winner". The skill is all about probability. Judgment is based on experience but a systematic approach gives better results than learning by the "school of hard knocks".

### **The elements: –**

- > Parties and witnesses
- > Local and other connections
- > Location location location
- > The vehicles
- > The documents and records

## Parties and witnesses

The earliest accounts reach the legal team usually after some record has been made in either an **insurance claim form** or a **pro forma witness statement** possibly handed on by a claims management representative. Does anything stand out ? Do you get the sense that something is just too "lucky" or "unlucky" and somehow not quite right? First instincts are often but not always correct.

Are there any unusually elaborate accounts? Is anything "over the top"? Compare sketch plans provided by different individuals. Do they show the same locus or are there discrepancies with approaches to the collision and parking positions afterwards? Do they identify the same dramatis personae and witnesses? Do they agree about who was sitting in which seat in the car? Who got out and when? Who spoke whom do after the accident? How the vehicles manoeuvred after the collision and where they came to rest or pulled over? But try to remember that honest witnesses often disagree with each other accounts and recollections.



Arguably, the biggest single clue is that everybody has a claim for injury except the driver notionally at fault. but beware. Just because one or more individual is “trying it on” does not mean that the collision itself or the other claims were staged dishonestly.

You will want to check your clients story. Before arranging an interview, do your homework.

If you are for the insurer, you can check a number of different databases for prior claims. Don't limit yourself to motor claims if you have wider access. By way of example some individuals boast of “losing” their camera on holiday every other year just to be able to upgrade to a better model while being foolish to sell the “lost” one on Ebay. If there is a pattern of repeated claims which defies innocent explanation it may confirm a previous suspicion and help with defending the current claim.

If you are for the claimant or defendant where indemnity has been refused, this is not so easy but you can at least ask your client.

Get to know your client, and if possible the other parties early. Where at all possible, interview them personally rather than use an agent. Even if you use an agent, you should still be able to go over their story by telephone. You can go over the detail picking up points and listening for pauses, content of response, tone and inflection. Whether listening on the telephone or to voice recordings of earlier calls, certain tell-tale terms of phrase should put you on enquiry. Make some allowance for background and education. My two favourite expressions are “I'm lying” and “to be honest”. The first usually means I have made an honest mistake. The second, especially if followed by some justification, makes me seriously worried whether this person is credible about their account.

More important for the claimant or when acting for a defendant where indemnity has been refused, excessive and apparently irrelevant detail, elaborate insight which is not obviously relevant or clear, sudden and inexplicable vagueness or inability to answer a direct question should ring alarm bells.

At this point in the interview mention that sometimes witnesses are disbelieved. Then go through the painful consequences including prosecution, refusal of insurance cover, bankruptcy and the like. Shiftiness or lack of enthusiasm to continue at this stage would suggest the need to attempt early settlement or end the retainer.

## **Local and other connections**

Lawyers for insurance companies make exhaustive enquiries into the addresses, the electoral roll, associations with other parties and claims histories. They usually only go to this trouble when something puts them on enquiry. The most valuable information that can be obtained is whether members of the same household have made multiple insurance claims. However, the fact that opposing parties to a collision live a couple of streets away from each other is, as often as not, pure coincidence.

If the parties are members of the same local community, it should come as no surprise if they have involvement with the same claims management company, the same local credit hire company, the same garage or the same motor salvage business. But if the geographical

distances are greater or there is more diversity of choice in the area, such connections are more difficult to account for and raise suspicion.

Suspicion grows if you have more than one of such coincidences. However, there need to be a good number of them before there is a reasonable prospect of denting credibility and establishing fraud.

Facebook Twitter or other social media may be fertile areas for research. People post the most remarkable information which often shatters their credibility. Diligence pays dividends.

## **Location location location**

The locus in quo should be thoroughly investigated. Staged accidents seldom take place in the rush hour or on busy roads. Locations are often lonely or where the likelihood of a non-arranged witness is poor. A certain roundabout junction on the M6 in Lancashire is popular for “slam on” collisions. Do not get too close to the car in front. It may stop suddenly and the brake lights are not connected. Try to learn the localities such as this so that they ring a bell when a new case comes in.

Try to go to the location yourself if convenient. If not Google Street View is an excellent second best.. Check the lines of approach of the vehicles and their visibility. Check the lines of visibility and vantage points for any witness to confirm that they were able to see what they claim. While you are doing this, do the mathematics on speed and distance. A witness who claims to have had a clear view of the accident three-car lengths before it took place claiming that the vehicle was travelling at 30 miles an hour, saw it for less than one second before the collision. (30 miles an hour equals 44 ft./s). If they claim to have a clear view of the number of occupants and their description in that time, something is not right.

Do not rely on an agent or experts view of the locus. One frequently sees sketch plans with neat lines and marked distances with the note “not to scale”. Are the dimensions therefore reliable? Likewise, engineers will express a firm opinion based on their own observation from personal examination of the scene that it is possible for two vehicles to pass on the same side of the carriageway only for the other party to show video or photographic evidence that this is not so.

## **The vehicles**

The typical suspicious scenario is a collision between two fully occupied vehicles both of which are ageing and of relatively low value and have only recently been insured. Often one or both vehicles will then be written off and disposed of before close examination can be carried out. Photographs taken at the scene will disappear.

Look for inconsistency of damage. Has there been appropriate transfer of paint? Is one vehicle lightly damaged by contrast with any damage to the other. But bear in mind that a solidly built car may show minor damage and still write off a less robust vehicle. If you are suspicious when looking at the photographs statements and descriptions but are not fully confident of your conclusions, by all means instruct an engineer. However, unless the engineer's conclusions are clear and readily understood by you, they are unlikely to persuade your opponent or the court. Beware of overzealous engineers. When they start quoting Newton and the laws of physics, they almost invariably get it wrong. This is normally a clue that they are trying to justify a pet theory. Judges hate pet theories. Any good engineer will make appropriate concessions to what he or she does not know and cannot say;-and usually has just a couple of very good points to make. If you spot an engineer trying to stretch a point with a peripheral consideration, worry about the central conclusions and verify them independently before placing reliance upon them.

The most helpful engineers reports, from the point of view of the insurer, are those which demonstrate that the claimed points of collision are incompatible heights and are not consistent with the description of how the accident happened.

If you get one of these and it stands up, you can start drawing up your bill of costs to post to the other side for payment. Conversely it is almost certainly time to drop your clients if you are for the claimant. However, before you give up, check the engineers findings. They have a tendency to stretch things far more frequently than even the cynical might expect.

Whoever you are acting for, inspect the vehicles early, get photographs, get the accident damage report for estimate, repair records and invoices. Go to look at the vehicles yourself if it is possible and convenient. Look for inconsistent damage and claims for parts which could not possibly have been damaged in the collision. Courts are very interested in parts lists. If a part has been replaced ask yourself why? If it does not appear to be associated with the point of collision, why has it been claimed?

Collisions involving motorbikes are more difficult to assess but they are rarely contrived because of the inability to stack up the claims with additional passengers.

Check the address of the garage and it's ranking. Contrived or staged collisions are more frequently associated with backstreet garages than the main dealers. You may remember the Panorama program on two firms of solicitors in Preston going back some years. A vehicle in the film went into a particularly notorious bodyshop with impact damage to one side but came out with impact damage on three sides!

## **The documents and records**

The main list referred to in this chapter:-

- > Insurance Claim forms
- > Witness pro forma statements

- > Photographs of the Locus
- > Photographs of the vehicles
- > Photographs of the damage
- > Insurance claims histories
- > Electoral roll
- > Social media
- > Medical reports
- > Medical records
- > Accident damage reports
- > Repair bills
- > Parts lists

## **Medical reports and medical records**

I have not discussed medical records elsewhere in this chapter. Now is the time. Whichever side you represent, unless there is no admission of liability, chances are you will want to see a near exhaustive medical history. When a client says that he or she has not had any previous accidents, it is useful to go through the GP history and hospital records to confirm this. Conversely, if the client has “forgotten” about the odd accident it is as well to obtain early explanation about this. Generally, the Lady Bracknell principle applies: to forget one accident is unfortunate to forget more than one is starting to look like carelessness.

Other considerations

## **Race and religion.**

Few practitioners will admit on record but DJs and professionals treat parties with some backgrounds more skeptically than others. Many barristers have come across odd situation such as an Asian claimant confused why his account of an accident and his injuries caused by it is being challenged. He wonders why he has to attend a trial only for the claim to settle at court when the defendant barrister realises that this “Asian” has a Ph.D., and works in the nuclear industry in Oxfordshire. His mistake was to become involved in an accident while visiting a relative in East Lancashire.

Skepticism is one thing but prejudice is unlawful and doesn’t win trials.

## **Litigation**

If you act for the claimant, you may be concerned if the insurers are unusually “tightlipped” during the protocol period. Terms to watch for in correspondence include “ongoing enquiries” and “issues”. If such terms become evident in correspondence, it is a good idea to pull out the stops and exhaust enquiries into credibility before issuing proceedings.

If you act for the defendant, the good news is that following the court of appeal decision in the case of Casey-v-Cartwright (a report more familiar to those looking at low velocity impacts) you can run the defence based entirely on fraud without having to specifically plead it.

This is no small point or small advantage. If you specifically plead fraud but fail at trial, you run the risk of the other side asking you to pay the costs on an indemnity basis wasted and thrown away personally. You may then say “but I have evidence and clear instructions”. However such evidence and instructions may remain privileged so you will not be able to refer to them in order to defend yourself.

The moral is, don’t plead fraud if you don’t have to. With staged or contrived collisions, it is often unnecessary. Just tread carefully around the provisions of CPR 16.5 and put the Claimant to proof that the collision took place in the way alleged or at all. However, if your case is so strong that there is no other way of running the case without expressly alleging that the collision was staged or contrived or the claim is otherwise a fraud, take special care that you have very clear evidence, very clear instructions and permission (recorded in writing) to refer to both if anything goes wrong.

It is a truism to say that where two parties go to court to fight a trial, one of them has made a mistake. Where there are allegations of staged or contrived collisions, mistakes often appear more glaring. Inevitably either the claimant is a poor judge of character or the defendant has shown poor judgement in its prejudice. While one can never fully predict what may happen at trial when witnesses give evidence, it is a delight to prepare for a fraud trial fully confident of being better prepared than the opposition. If trial looms and you don’t feel such confidence, look again at your case.

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**October 2012**

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# Chapter 4

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**Bogus passenger allegations:** what are they, how to investigate them and evidence to obtain.

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December 2012

## 1. Introduction

- a) Insurance fraud is on the increase. Undetected general insurance claims fraud total £2.1billion a year adding on average £50 to the annual costs individual policyholder's policy, on average, each year (Source: Insurance Fraud Bureau).
- b) This is a problem not only for insurance companies, but for the Claimant Solicitors who represent Claimants, involved in these types of collisions, where a case has to be dropped due to an allegation of fraud or in the rare instance that a finding of fraud is made at Trial. This results in wasted costs for the Claimant's Solicitor who has sometimes expedited considerable expense to progress the matter to Trial in both the fee earner's time and disbursements, that are unlikely to be recovered from the Claimant's ATE insurer or the Claimant himself.
- c) In my experience, it is not unusual to see a Claimant's base profit costs for an RTA case to Trial with an allegation of fraud to exceed £15,000. The question therefore is, how does one ensure that an RTA case, with an allegation of fraud, can be given the best possible opportunity to succeed at Trial?
- d) This article will look at the investigations that can be undertaken where an allegation is made by the Defendant's insurer that the Claimant was not present within the vehicle at the time of the collision, and a claim for personal injury is then presented by the Claimant. This is sometimes known as a phantom or bogus passenger allegation.

## **2. Bogus Passenger Allegations: How do they arise?**

- a) It is a 4p.m on dark December evening. The claimant has just picked his two young children up from school, who are five and six respectively. He is travelling home. He is stationary at traffic lights and the Defendant collides with the rear of his vehicle. The Defendant's driver gets out of the vehicle after the accident and walks over to the Claimant's vehicle. The Claimant's driver also gets out, they walk around to the back of the vehicle, examine the damage and exchange insurance details. The Defendant apologies and admits fault.
- b) The day after the accident, the claimant and his two young children start to experience neck and back pain. They attend the GP and are given painkillers. A week later the Claimant and his two children are still experiencing pain so they decide to make a claim for personal injury. They consult Solicitors, think it will be a straightforward claim. The Solicitors send the Claimant and his children for GP reports. The claims are submitted to the low value portal and liability is admitted. The medical reports are submitted to the Defendant's insurer via the low value portal and offers of settlement are awaited.
- c) A straightforward claim you may think? The Defendant's insurer writes to the Claimant's Solicitors after 10 weeks, saying they have concerns about the claim, but nothing more and refuse to disclose their concerns, pending further investigation. The claims are timed out of the low value portal. The Claimant's Solicitor's issue Court proceedings for all three claimants and a Defence is filed stating that there was only one child in the car, a female. They say therefore, one of the infants was not in the vehicle. Does this sound familiar?
- d) Phantom passenger allegations, in my experience, are becoming more and more prolific in personal injury litigation and the Defendant's insurers are holding back the nature of the allegation in more instances, until proceedings are issued.

## **3. How can they be investigated?**

The following provides some guidance in my opinion, as to how such allegations can be investigated quickly and efficiently:-

- a) Where were the claimants going at the time of the accident? Was there a reason for all the claimants to be in the vehicle? It is always worth obtaining any documentary evidence to confirm the reason for the journey.

For example, if the children were on the way home from school, obtain the school register to confirm their attendance at school.

If the claimant has been shopping do they have receipts for items they purchased and/or can they provide bank statements for items purchased?



If the claimant was on the way home from work, can the employer confirm attendance on the day of the accident?

- b) Does the claimant's journey make sense? It is plausible? Can the claimant explain their route to where the accident happened, or where they were going?

Very often in my experience, the claimant's statement, where a phantom passenger allegation is made will not explain this. In my opinion, where fraud is being alleged it is extremely important the witness statement explains the reason for the journey in detail, together with the route taken and the relationship between all the parties within the vehicle. It is always worthwhile sending the claimant a Google map and asking the claimant to mark the map with the route to the destination.

- c) Credibility, Credibility, Credibility! The key to the success or failure of most cases is the Claimant's credibility. When the Defendant's insurer puts the allegation, it is extremely important to have a robust conference with Counsel to assess credibility.

Does the witness answer questions without hesitation? Is the witness evasive in their responses? Does the witness take the allegation seriously? Does the witness maintain eye contact when answering questions? Do the witness's responses lack detail or consistency? Some of these questions may raise red flags as to the credibility of the evidence.

If possible, get the claimants into the office and put the allegation in person, to each claimant separately, rather than over the telephone. The body language of the claimant will be extremely important when assessing credibility overall.

- d) Is there any other evidence that can verify the claimant was at the scene of the accident? Are there any witnesses? Is there any CCTV? Did the police / ambulance attend and speak to the claimant, and if so, is there a report that could place the claimant in the vehicle?
- e) Consider putting part 18 questions to the Defendant, to undermine the credibility of the evidence. Did the Defendant get a clear look into the vehicle? Was there anything blocking his view? Could the claimant have got out of the vehicle, before he looked inside? Was it dark? Was the Defendant's eyesight poor? If he needs glasses, was he wearing them? If it was a small child, could the Defendant have missed the child in the car? Did the Defendant ever go over the Claimant's vehicle? Was he standing some distance away from the Claimant's vehicle? Did the Claimant's vehicle have tinted windows?



In order to find there was a phantom passenger with the vehicle, the Court will need to be sure that immediately after the collision, the Defendant walked over to the Claimant's vehicle, looked directly inside and is 100% sure the Claimant was not there, in the absence of some other objective evidence to show the Claimant could not have been at the scene of the accident.

- f) It will be important to show the alleged phantom passenger did in fact sustain an injury as alleged.
  - i) Did the claimant attend the GP/ hospital? (obtain the notes)
  - ii) Did the claimant have any time off work? (obtain evidence)
  - iii) Did the claimant stop going to the gym? (obtain the records)
  - iv) Did the claimant attend physiotherapy? (obtain the records)

All this evidence may provide some objectivity an injury was sustained as alleged, and can be persuasive to show the claimant sustained an injury.

- g) Does the claimant's story fit? If the claimant was at the scene of the accident, can they describe the other vehicle involved in the accident ie the colour, make and model? Can they describe the other driver? Do they know the name of the road where the accident happened? Can they say what happened at the scene of the accident? Is this consistent with the other witnesses?

A witness who was genuinely at the scene of the accident (other than a younger child), should be able to provide you credible evidence on these points.

## 4. Conclusions

In my opinion, the key to winning alleged bogus passenger cases, as with any other type of alleged fraud is the credibility of the Claimant. Early evidential gathering is key while memories are fresh, together with detailed witness statements.

I would always recommend a robust and early conference with Counsel as soon as the Defendant puts the allegation, to test the credibility of the Claimant's case, and before valuable time and money is spent investigating case that may otherwise fail at Trial, due to lack of credibility. Tactically, robust Part 18 questions will always work well with Defendant insurers and Solicitors, given many alleged phantom passengers cases are run and settled shortly before Trial, as the Defendant has not realised the weakness in it's own case.

As a final word, in my experience most alleged phantom passengers claims, fail at Trial (for the Defendant) and there are few examples in law reports, where the Defendant insurer has succeeds on such allegations, when one compares the number of cases where such allegations are made, as compared to the number that actually succeed at Trial.

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*Please note the above article is not intended to provide binding legal advice. If you have a specific legal problem, you should consult a suitably qualified Solicitor or Barrister.*

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**December 2012**

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# Chapter 5

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**Low velocity impact claims:** what are they, how to investigate them and evidence to obtain.

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November 2012

Low velocity impact (LVI) claims are claims for damages for injuries sustained in a road traffic accident in which the Defendant (whilst often admitting negligently having caused the collision) asserts that the speed of impact was so low that the Claimant cannot have sustained the injury complained of. Such a defence is often, but not always, accompanied by a plea of fraud – the Claimant has made it up.

LVI claims most often involve whiplash injuries to the spine, usually the neck. They are mostly low value claims relating to relatively minor symptoms that resolve over a matter of weeks or months. The value of the claims are invariably such that they fall within the bracket to which, in terms of value, allocation to the fast-track is appropriate.

There is no firm evidence to suggest that an impact below a specific speed simply can't cause anyone an injury, however there are individual factors to consider in each case rather than adopting a blanket approach to all low velocity impact cases. These include the below, but the list is not exhaustive:-

1. the injured party's age;
2. their height and weight;
3. whether they were able to brace themselves prior to the impact;
4. the positioning of the occupant in the car;
5. whether the injured persons headrest was adjusted for that person;
6. the design and construction of the vehicle.

Evidence suggests that due to the structure of new cars, low impacts can still cause injuries. This is because vehicle structures are very stiff. Any impact therefore is passed through the car and to the occupant. The occupant stays in the same place in the car, which means they are then travelling towards the impact which can make injuries more severe.

Evidence can also be obtained from orthopaedic surgeons who are experienced in dealing with injuries sustained in low velocity accidents. They use their experience from examinations with people who sustained such injuries, to substantiate strong cases as to how and why such injuries occur at low speed.

Following the case of **Armstrong and O'Connor v First York [2005]**, some guidance in relation to dealing with “low velocity impact” (LVI) claims was first given in **Kearsley v Klarfield [2005]**, where the court indicated that Claimants should offer access to their car for early examination and give early disclosure of relevant medical notes.

The Court of Appeal then gave more formal guidance for the conduct of an LVI defence in the case of **Casey v Cartwright [2006]**. The Court recognised the “*distressing feature of contemporary life that many people were willing to put forward bogus claims which insurers could not properly evaluate without expert evidence*”. The case established that when a Defendant wanted to argue that the impact was of such low velocity that it could not have caused the alleged (or any) injury, there are certain prerequisite steps that the Defendant has to take before the issue of proceedings:-

1. The Defendant’s Insurers are required to notify the Claimant within three months of the receipt of the Letter of Claim that they consider the matter to be a LVI case, and that they intend to raise causation as an issue;
2. The issue should then be expressly identified in the Defence supported by a Statement of Truth;
3. Within 21 days of serving such a Defence, the Defendant has to disclose lay witness evidence which clearly identifies the grounds on which the issue is raised, to include the circumstances of the impact and any resultant damage.

Only when satisfied that these steps have been taken will the Court consider further directions, such as expert evidence from the Defendant, and whether that should be in a medical or engineering expert’s report to support the Defence in a LVI claim. Generally speaking, the Court will require all of these steps to have been undertaken before the case reaches the Case Management/Directions stage.

Where the Defendant fails to give such notification, through its insurers prior to issue of proceedings, such permission, in the absence of prior notification, is likely to be given in a minority of cases. This issue was discussed again in the cases of **Mahmood v Shaw** and **Buckley v Cargill [2008]**. In both cases, Insurers had admitted liability in actions brought by the Claimants for damages to include whiplash type injuries but had not given notice of an intention to raise LVI as a defence. When the Defendants served a Defence denying causation of injury, in each case the Judge refused the Defendant permission to adduce expert medical evidence to support the LVI Defence. In ***Mahmood***, the Judge considered that any examination four years post-accident would be a waste of time and money because the Claimant had long recovered from the alleged injury.

In **Buckley**, the Judge gave the Defendant permission for a report on condition and prognosis but not causation because the LVI issues raised were issues of credibility and would not be helped by any medical experts. Both Defendants appealed because the Judges had failed to follow the relevant guidance given in *Casey v Cartwright*. Mr Justice Akenhead in Manchester High Court, heard the appeals, and commented that the Defendant's Counsel put their case in a very measured tone. He hastened to say that though there was no complaint about the Judges in question there was information before him, which he had no reason to doubt, that every other designated civil judge who is dealing with such cases in the North West has been following assiduously the guidelines laid down in the *Casey* and *Kearsley* cases. However, if it be the case that there were learned Judges who were not following the guidelines in *Kearsley* and *Casey*, obviously they should seek to do so and hoped that this judgment would be of some assistance to them in dealing with other cases of a similar type.

Therefore both **Kearsley** and **Casey** should be followed in substance and spirit unless there are exceptionally good reasons for not doing so. The appeals were granted, and the Defendants allowed their expert medical evidence, because:

1. The requirement recognised in the overriding objective and in Article 6 of the Convention on Human Rights is that each party should have equality of arms, even in an LVI case involving relatively minor sums of money;
2. It was not disproportionate for the Defendant's medical expert to examine a Claimant. The risk as to costs was the Defendant's unless he won and the evidence was held to be relevant;
3. It was not a waste of time to obtain evidence, even if all the symptoms of alleged injury have disappeared. Discussion with the Claimant can help a medical examiner, even at a late stage, to determine what the problems were, especially if there was a pre-existing degenerative condition present;
4. There need not be a delay because a reasonable timescale can be set for the provision of a report; and
5. Criticism of a Defendant for instructing an expert with a professed expertise or experience in LVI was not a good ground for refusing permission, as without such expertise they would not be qualified to give expert evidence.

LVI claims are rarely reported and are all fact specific. One interesting case is **Mullen v Vaudrey [2008]**, a minor rear end shunt. Insurers settled the Claimant's wife's claim (she was a passenger) but then raised a LVI defence to his claim. He argued that, having settled his wife's claim, Insurers must have accepted that the impact was enough to have caused injury. The Court held that settling her claim had nothing to do with his claim. The damage suffered by his car was such that most modern vehicles would have absorbed the impact without transmitting it into a forward thrusting motion sufficient to cause the alleged injuries. All the evidence pointed to the Claimant exaggerating the claim.

In **Ali v Stagecoach [2011]**, Insurers sent the Claimant a cheque for £3,200 as an interim payment, without admission of liability and pending investigations into the accident, on the basis that, if the Defendant was not liable, or if a lesser sum was awarded, they would seek repayment of any excess. The letter sought an undertaking from the Claimant to repay monies, if appropriate, should he cash the cheque. The cheque was cashed. The Claimant issued for mild soft tissue injuries, £3,000 repair costs and £6,891 hire. The LVI defence failed and the Claimant got £1,400 PSLA, but only £250 repair costs and £100 loss of use for three days. The Judge ordered him to repay the difference of £1,450, gave him no costs and ordered him to pay two-thirds of the Defendant's costs from 21 days after the date of the interim payment letter. The Court of Appeal upheld the Claimant's appeal. The interim payment was not an offer so should not be treated as one. Though the injury claim had succeeded, the Court was entitled to take into account the measure by which the Claimant had failed. The appropriate award of costs was no order as to costs.

### **Social network sites**

It is becoming increasingly easier to obtain evidence from social network sites such as Facebook regarding a Claimant's activities both pre and post-accident. The content on social network sites often assists a Defendant who alleges that there is potential fraudulent activity being carried out by the Claimant. They are also used by Defendant's to establish whether there is any social link between groups of parties such as the Claimant and any witnesses and also the Claimant and any passenger claims. The issue of social media and documentation was discussed in the case of **Locke v Stewart [2011]**. This case involved multi party claims arising out of the same accident and the Defendant's Insurers suspected a staged accident which resulted in considerable investigation including Facebook searches which ultimately indicate links between the parties and passengers involved in the accident.

Evidence pointing to cases involving Claimants all suggestive of systematic fraud were considered. Perhaps not unsurprisingly, the Court held that this was a staged claim and that the Claimant was guilty of dishonesty. As a result of the new form of evidence being submitted to the Courts by way of Facebook, Twitter and other social network sites, the Court suggested that the parties prepare a schedule summarising the primary factual evidence, showing what was disputed and what not. Secondly, the Court would need a generic guidance document setting out how entries on Facebook were created and what inferences could properly be drawn from them. The Court observed that any allegations pleaded by a Defendant of fraud should only be pleaded with care as the Defendant will face a high evidential burden in establishing fraud before the Court.

In my opinion, in addition to the technical statement about, for example, Facebook content, a statement will be required from the person who undertook the searches exhibiting entries contained within those sites that could be relevant to the defence. These statements should be disclosed within the Court time table for exchange of lay witness evidence. Applications to rely upon such evidence at a later stage will be opposed by Claimants, but in my experience the prospect of a Court allowing such evidence, provided it is relevant, is good.

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# Chapter 6

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**Slam on allegation or induced accidents:** what are they, how to investigate them and evidence to obtain.

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ANDREW McKIE, CLERKSROOM

December 2012

## 1. Introduction

- a) The IFB estimates that there is 2 billion of undetected fraud – all of which is adding an extra £50 to the annual household insurance bill and ‘Crash for Cash’ frauds alone cost the industry £392 million each year. It seems that decoy vehicle accidents, or slam on/ induced collisions, are one of the popular choices of collision for fraudsters that engage in this type of activity.
- b) This article will look at the investigations that can be undertaken where an allegation is made by the Defendant’s insurer that the claimant slammed on his brakes for no reason in order to induce a collision and/ or there was a decoy vehicle, that caused the claimant to brake in order to induce a collision.

## 2. Slam ‘On’ Allegations: How do they arise?

- a) The claimant says that he approaches the roundabout, stops at the give way line, and then waits for traffic from the right. The claimant says that as he is stationary at the give way line, the defendant collides with the rear of his vehicle. The defendant’s version of events is very different. He says that the claimant’s vehicle moved off onto the roundabout, there was no traffic travelling from the right, and as soon as his vehicle entered the roundabout, the claimant brakes for no apparent reason, in order to induce a collision.

- b) In a typical decoy vehicle type scenario, the claimant may allege, that he was proceeding around the roundabout, behind another vehicle, and the vehicle suddenly changed lanes, causing the claimant's vehicle to brake, and the defendant then collides with the rear of the claimant's vehicle. The defendant says that although he did collide with the rear of the claimant's vehicle, there was no vehicle which caused the claimant to brake, in front, it simply does not exist.
- c) In an alternative decoy vehicle time scenario, the claimant says he was proceeding along a dual carriageway, in the left hand lane, suddenly and without warning, the vehicle in front takes the exit from the dual carriageway, but suddenly decides at the last minute, to cut back into the claimant's lane, causing the claimant to brake. The defendant's version of events is very different, he accepts that the vehicle in front of the claimant's vehicle was there, but he says that the vehicle which caused the claimant to brake had been travelling in front of the claimant's vehicle for some time before the accident, appearing as though he was trying to brake on a number of occasions, in order to cause the claimant's vehicle to brake.
- d) In an alternative scenario, the claimant may say that he was travelling along a country lane, when an animal runs out in front of his vehicle causing him to brake, and the defendant then collided with the rear of his vehicle. The defendant, in the alternative, says that the animal was simply not there, and the claimant braked for no apparent reason, causing the collision, and as the claimant had been proceeding along a country lane he had braked sharply on a number of occasions, prior to the actual collision.
- e) In a final scenario, the claimant may say that he is travelling along a dual carriageway, when a vehicle suddenly cuts into his lane, causing him to apply his brakes quickly, and the defendant collides with the rear of his vehicle. The defendant in the alternative, says that prior to the accident, the vehicle that cut in front of the claimant, had effectively boxed him in, in the right hand lane, behind the claimant's vehicle, and when the other vehicle cut in front of the claimant's vehicle, he could not avoid the collision. The defendant believes that the vehicles were working together in order to cause a collision.
- f) These are all scenarios, that one may see in an induced accident type scenario.



### 3. How can they be investigated?

The following provides some guidance in my opinion, as to how such allegations can be investigated quickly and efficiently:-

- a) In my opinion, it is important to establish early on in the claimant's case, what caused him to brake. If the claimant had to brake at a roundabout, was there traffic in front of him that caused him to brake. and if so how many vehicles were there? If an animal ran out in front of the claimant's vehicle, what type of animal was it? If there was the vehicle in front of the claimant's vehicle that caused him to brake, what was the make or model and vehicle registration number of that vehicle?
- b) The claimant's first contemporaneous reporting of the accident circumstances, will usually be to the hospital or general practitioner. I would always recommend checking medical records or hospital records note of the accident circumstances as reported by the claimant, to see whether it is consistent with the claimant's instructions.
- c) Another contemporaneous reporting of the accident circumstances, will usually be the medical expert. Before the medical report is disclosed, it is extremely important to check that the accident circumstances as reported to the medical expert, are the ones that were reported by the claimant during the examination. If the accident circumstances are incorrect in the medical report, then it may damage the claimant's credibility later on down the line. This sometimes arises where the claimant's first language is not English and there was no translator for the medical examination. Very often one finds that the reports of general practitioners especially contain little detail in relation to the accident circumstances or do not reflect what the claimant told the expert during the course of the examination.
- d) Likewise, in my opinion it is extremely important, at the outset of the case, to take detailed instructions from the claimant for the purpose of the claims notification form or letter of claim. Very often one sees the accident circumstances recorded in the claims notification form, are simply the rear end collision, whereas the claimant's actual instructions are that there was a vehicle in front that caused him to brake. Where these details are missing in the claims notification form, or the letter of claim, this can damage the claimant's credibility at a later stage, when the claimant is cross-examined as to why these details only materialise at a later stage, when the defendant puts the fraud allegation.

- e) In my opinion, the claimant's credibility is always going to be key, to winning a case where the defendant says that the accident was induced in some way. If the defendant's insurer, makes the allegation pre issue, in my opinion, it is extremely important to take a detailed witness statements from the claimant and any of his passengers before proceedings are issued, to check the consistency of the evidence between the witnesses, especially the reason as to why each of the claimants says that they had to brake. Beware especially of witnesses who, give exactly the same version of events, without any discrepancy.
- f) I would always recommend a conference with counsel, before proceedings are issued in relation to one of these cases, to test the credibility of the claimant and his passengers.
- g) Did police or ambulance attended the scene of the accident? One may wish to obtain the police report or the ambulance records, to check what the emergency service were told about the accident circumstances. In addition, one should always consider whether there is any CCTV footage or independent witnesses, who may verify the claimant's version of events.
- h) In my opinion, one should always question the credibility of a witness, who says that a vehicle caused him to brake, but the witness cannot recall any details about that vehicle such as the make or model, or vehicle registration number.
- i) If the defendant's insurer, is alleging that this is an induced accident one may wish to look for the fraud indicators, associated with this type of fraud. For example, does the claimant had a history of road traffic accidents that he did not tell the expert about? Does the hire or storage claim appear to be genuine?
- j) If the defendant's insurer is alleging that the accident was induced, can the defendant's insurer show any link between, the alleged vehicle that caused the claimant to brake, and the claimant's vehicle? Does the claimant deny this link?
- k) Does the claimant, and his passengers, have a genuine reason to be going, where they say they were going at the time of the accident? For example, if the claimants had just been shopping at Tesco, can they provide any of the shopping receipts in support? Does the claimant's route make sense as to where they were going at the time of the accident? What is the relationship between the occupants of the claimant's vehicle? Did they all have a valid reason to be in the vehicle at the time of the collision? Beware of witnesses who do not appear to have a valid reason for the journey.

- l) Once proceedings are issued, one can look to challenge and/ or undermine, the credibility of the defendant's evidence through part 18 questions for further information. For example, if the defendant says that the vehicle that caused the claimant to brake was simply not there, did the defendant have a good view of the road ahead?, could the defendant's insured simply have missed the vehicle that caused the claimant to brake?, was the claimant's vehicle blocking the defendant's insured's view? Can the defendant's insured be certain that the vehicle was not there?

#### **4. Conclusions**

- a) In my experience, it is relatively rare for the court to make a finding that the claimant braked for no reason in order to induce a collision. Undoubtedly there are criminal gangs that engage in this type of activity, and there have been a number of recent prison sentences for gangs inducing accidents on roundabouts.
- b) However, my experience shows that insurers make far more allegations of slam-on or induced accidents, than are ever made out at Trial. For claimants, in my opinion, the key to winning these cases is the credibility of the claimant, and in particular, the credibility and plausibility of the claimant's journey at the time of the collision, and the credibility and plausibility of the reason for the claimant to have braked.

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*Please note the above article is not intended to provide binding legal advice. If you have a specific legal problem, you should consult a suitably qualified Solicitor or Barrister.*

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**December 2012**

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# Chapter 7

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## Medical evidence, Part 35 questions, medical records and disclosure in fraud litigation.

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October 2012

In a fraudulent or quasi-fraudulent claim, the medical evidence is central to the basis for the claim, even if the value of the P.S.L.A claim is relatively modest, whether for its direct application for a claim for general damages or as the basis for collateral claims for heads of special damage such as care and assistance or loss of earnings.

### A MEDICAL EVIDENCE

1. The medical evidence is likely to be the first evidence disclosed by a claimant that includes an account of any liability aspect that gives rise to the claim. In terms of any liability aspects, the only prior formal account given is likely have been contained in the Letter of Claim. It follows that the consistency and cogency of any liability aspect is likely to be scrutinised in that context and that of the knowledge of the defendant, as well as regards the causation and quantum aspects.
2. Nomination of a reporting expert should be made in accordance with the requirements of the C.P.R. Where the identity of a nominated reporting expert is such as to give rise to an objection to his instruction, the response of a defendant to such an instruction is predictable. Similarly, the identity of a validly-nominated and instructed expert and/or whether that expert has been supplied with relevant medical and other records may give rise to further careful scrutiny. The scrutiny will arise if a reporting expert has:
  - (a.) Attracted a certain reputation with defendants by virtue of matters such as an involvement in particular areas of litigation, of being instructed by a limited class of solicitors, of being instructed largely by claimants.
  - (b.) Not been supplied with any relevant medical records or has only been supplied with a limited extent of any relevant medical records.
  - (c.) If (a.) and (b.) coincide there is an increased prospect of:

- (i.) The use of C.P.R. Part 35 Questions to create a basis for a defendant's application for its own medical expert; and/or
- (ii.) A C.P.R. r. 31.12 application for specific disclosure of the proper extent of any medical and other relevant records; see *Bennett v Compass Group Ltd.* [2002] EWCA Civ 642.

The medical evidence content as to present symptoms, complaints and limitations should be capable of being reconciled with the content of any hospital and G.P. records. Reconciliation of that sort is important because those aspects of any medical report will also be the reference point for any claimed incapacity etc. if video surveillance footage is obtained.

- 3. Medical history and involvement in e.g. previous road traffic collisions or workplace injury claims as given by a claimant to a reporting expert is another source of inconsistency that may be used to undermine credibility where the actual history discloses matters of relevance of which the reporting expert was not informed/mis-informed. The provision to the reporting expert of the relevant medical records should obviate those issues but it should not be assumed that a reporting expert will consider all the relevant records and an instructing party should ensure that such records have been considered. C.P.R. Part 35 Questions will inevitably follow on those relevant records and both the claimant and the reporting expert may be undermined by any such omissions.
- 4. Beware the reporting expert who gives an opinion upon the accuracy of a claimant as an historian; such an opinion offers a hostage to fortune if, for example, the account given of the liability aspect, present symptoms etc. or medical history is later undermined/ shown to be inaccurate.

## **B C.P.R. PART 35 QUESTIONS**

- 5. The narrow view of C.P.R. Part 35 Questions is that they are limited to clarification of the report of a reporting expert; see C.P.R. r. 35.6(2)(c).
- 6. Simon Brown L.J. in *Mutch v Allen* [2001] EWCA Civ 76 quoted with approval 'paragraph 35.6.1 of the [then-current edition of the] White Book:

*'This is a useful provision ... It enables a party to obtain clarification of a report prepared by an expert instructed by his opponent or to arrange for a point not covered in the report (but within his expertise) to be dealt with. In a given case, were it not possible to achieve such clarification or extension of a report, the court, for that reason alone, may feel obliged to direct that the expert witness should testify at trial.'*

and continued:

*'Had Professor Solomon simply been called to give evidence, then, plainly, the defendant could have asked him precisely these questions in cross-examination and, equally plainly, the defendant would have been entitled to rely upon his answers given to prove his own case.'*

7. In *Mutch*, although the C.P.R. Part 35 Questions were wider than provided for by C.P.R. r. 35.6(2)(c), there had been judicial approval and agreement as to them being put. Overall, the better, wider, view appears to be that the ambit of C.P.R. Part 35 Questions may extend to matters not covered by a reporting expert so long as they are within his expertise and may also extend to questions amounting to cross-examination of the reporting expert.
8. It is plain that the party that instructs an expert on a sole basis is not permitted to put C.P.R. Part 35 Questions to that expert unless the court gives permission to do so or the non-instructing party consents: C.P.R. rr. 35.6(1)(a.), 35.6(2)(c)(i) and (ii). The reasons for that provision are clear: an instructing party has the protection of privilege to request that any amendments to the report be made before it is disclosed and the need to put C.P.R. Part 35 Questions should not arise. Tactically, it is likely to raise antennae if C.P.R. Part 35 Questions are put to a reporting expert by an instructing party without the requisite permission or consent.
9. The impartiality of the reporting expert is key: once that impartiality is impugned or the reporting expert adopts the role of an advocate, the reporting expert has issues beyond those of mere credibility and having his evidence accepted by the trial judge. The isolation or marginalisation of a reporting expert in a fraud or quasi-fraud claim by use of C.P.R. Part 35 Questions may also have the same effect: asking the reporting expert whether his opinion e.g. as to claimed symptoms being referable to a particular collision would be maintained if the trial judge found that there were insufficient forces at large to cause the necessary occupant disturbance is a useful approach.

## **C C.P.R. PART 35 QUESTIONS**

10. Medical records are a rich source of material that may be supportive of or capable of undermining a claimant. The fact and extent of such disclosure and how it is given by a claimant is the subject matter of *Bennett v Compass Group Ltd.* [2002] EWCA Civ 642. The medical records themselves may 'flag' a fraudulent claim e.g. records in a name other than that of the claimant, non-practitioner amendments to the records. Content of the medical records may indicate:
  - (a.) No evidence of or a delay in seeking medical advice or attention in relation to the index incident and injury.
  - (b.) Limited consultation of any medical practitioner e.g. a single attendance and no re-attendance notwithstanding symptoms alleged to be continuing.
  - (c.) Prior involvement in e.g. road traffic collisions and/or claims arising from workplace injury (and beware the cross-over from both types of claim).
  - (d.) Inconsistency of accounts etc. recorded in contemporaneous medical records.
  - (e.) An undisclosed and relevant medical history.

The guidance given by the Court of Appeal in *Denton Hall v Fifield* [2006] EWCA Civ 169 should be heeded as to the evidential value of entries in contemporaneous medical records and the procedure to be followed to permit them to be deployed at trial.

11. Consideration of the medical records and review of them with a claimant should form part of a proper analysis of any such claim. The claimant's account should be sought (and recorded with written confirmation to the claimant) as to:
  - (a.) Having not sought medical advice or attention in relation to the index incident and injury or only having done so after a delay.
  - (b.) The injuries alleged and how they compare with the contemporaneous and later medical records.
  - (c.) Any history of involvement in e.g. road traffic collisions and/or claims arising from workplace injury.
  - (d.) Any relevant medical history: previous (especially similar or contiguous) injuries and episodic pain.

The recent case concerning contempt proceedings in *L.B. of Havering v Bowyer & Ors.* [2012] EWHC 2237 (Admin) was a case in which the obvious and amateurish inconsistencies between the claimant's accounts of injury etc. and his medical records should act as a warning that consideration and review with a claimant is required.

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**5 October 2012**

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# Chapter 8

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## Vehicle damage assessment in fraud litigation: the view of a Forensic Engineer.

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October 2012

### Damage Assessment

The assessment of damage to vehicles is a vital part of accident investigation. A thorough examination of the actual vehicles involved, rather than working from photographs or Assessors reports, provides best evidence. Questions to be answered are usually of the form: did the vehicles actually come together; if so, did they come together in the alleged manner and what was the likely speed of impact. Often, a question also asked on the likelihood of occupant movement within the vehicle(s).

To successfully answer these questions an expert examiner should follow a methodology that he or she has developed through training and experience. Visualisation is an important quality. An examiner should have the ability to evolve a mental picture of how the vehicles came together in a collision based on clues that are uncovered during the course of an examination.

An expert examiner should be aware of the implications of Newton's Second and Third Laws of Motion as applied to vehicle collisions. The Second Law states that in a collision between two vehicles there will be a transfer of momentum that will cause one of the vehicles to accelerate and the other vehicle to decelerate. As a consequence, each vehicle will experience a change in velocity ( $\Delta v$ ).

The transfer of momentum is accomplished by a force acting between the vehicles during the brief period of time that they are in contact. Initially, the force starts at zero when the vehicles first touch. It then increases to a maximum as the vehicles interpenetrate and then decreases to zero as the vehicles disengage. This process will be accompanied by a particular damage pattern that is especially visible when there is some lateral or sliding movement between the vehicles such as when one vehicle is passing across the front of the other as the collision occurs.





### lead-in    lead-out    maximum engagement

In the case where there is some lateral movement between the vehicles, the early stage of the collision will be indicated by some linear lead-in damage of gradually increasing intensity. At the end of lead-in there will a region where damage is at its greatest - this indicates where maximum engagement between the vehicles has occurred. Following maximum

engagement, the vehicles will go through the process of disengagement. This will be indicated by linear lead-out damage of decreasing intensity at the end of which the vehicles will no longer be in contact and the collision force will have returned to zero.

Newton's Third Law states that for every action there is an equal and opposite reaction. In terms of a collision between two vehicles (A and B), the Third Law means that at any point in time during the collision period, the force that vehicle A is applying to vehicle B is equal in magnitude but opposite in direction to the force that vehicle B is applying to vehicle A irrespective of any difference between the size, mass or strengths of the vehicles. As a result, it can be stated categorically that the damage to vehicle A must be consistent in its magnitude and location to the damage caused to vehicle B. This does not mean that the damage to each vehicle should look the same because, even though the magnitude of the force experienced by each vehicle is identical at any instant in time, the relative strengths of the vehicles at the points where they come into contact will determine the degree of surface damage and deformation that each vehicle exhibits.



< *Black tyre marks, strong engagement and paint transfer to one vehicle should match the damage, its location and colour of the other vehicle.*

The marks and deformation that appear on one vehicle should be caused by identifiable components and features on the other vehicle. These will also show corresponding signs of the collision. If these matching damage patterns cannot be found then it is possible that the vehicles did not come together.



*The Ford Mondeo (above left) crashed into the back of the Ford Galaxy (above right)*

It is not uncommon for there to be an apparent disparity in the damage to one vehicle compared with the damage to the other vehicle. For example, when a small or medium size car runs into the back of a van, such as a Ford Transit, the front of the car may appear to be severely damaged and deformed but, at first glance, the back of the van looks unscathed. What often happens in these cases is that the car is braking hard just before the collision and this causes a rear-to-front weight transfer that compresses the front suspension and lowers the front of the car. As a consequence, the front of the car pushes or dives underneath the back of the van as they collide. In doing this, the car may come into contact with some strong components, such as steel cross-members, that cause significant damage and deformation to the car but little reciprocal damage. However, there will always be signs that this has happened as under such circumstances there will be significant scuff and scrape marks to the underside of the van's bumper and cross-member and possible paint transfer from the car to the van. Closer inspection of the back of the van will usually reveal further evidence of the collision.

Some damage is not always visible and this is why an expert examiner will always look behind bumpers at the components that are shielded from view. During a collision a bumper can deform considerably and transfer significant forces to the components behind. In the latter stage of a collision the bumper may reform and return to its original shape showing little evidence of the magnitude of force that it has transferred to hidden components. Ideally, the bumper should be removed altogether during an examination although this is not always possible. Behind the bumper may be reinforcers, crash cans, chassis legs, slam panels etc. If these components do not exhibit any marks or signs of damage it will indicate that a relatively low-speed collision has occurred where the bumper may have deformed but did not transfer any force to the components behind. If the components do show signs of damage this will indicate that a collision of greater magnitude has occurred.

An expert vehicle examiner will take many high-quality digital images throughout his inspection. These will not only catalogue all areas of damage but will also serve to record the make, model and colour of the vehicle, its registration and VIN numbers and its mileage.

Controlled and fully instrumented crash testing provides an invaluable database of collisions for training and for use on a comparative basis to assist an expert in his or her investigation into similar collisions.

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**October 2012**

**MICHAEL HALL GBB**

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# Chapter 9

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## Witness statements in RTA cases where fraud is alleged.

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DEBORAH TOMPKINSON, CLERKSROOM

November 2012

### 1. Introduction

If you have got to the statement, 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 to reject 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, this is a plea for 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. One emerging consequence of **Summers v Fairclough** is that the lower courts seem 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 likely to be disclosable, see **CPR 31.3.3**. An given to solicitors, is, of course, privileged. Accounts to employers will depend on the intention of the employer in requiring the account to be made.
- 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, 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.
- k Insurers can and should use the market data-bases available. There may be other checks that can also be made: previous claims involving the same car, claimant, garage or recovery service; certain intermediaries who have previously attracted suspicion; certain addresses and postcodes. Other checks are possible outside the market databases: checking for company identity, VAT registration, directors, and so forth can be done quickly.



#### 4. With an eagle eye for detail

The list of slips that a fraud can make are endless. Some of the points below may be checked before witness statements are drafted but should not be left later than that. Here are but a few that tipped off the vigilant that they were not dealing with an honest claim:

- 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; not VAT registered; 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, and he 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?

## 5. Using other resources

- 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. Even so, this is second best; normally, witness statements should be taken by solicitors where they are instructed, **The Delphine [2001] 2 Lloyd's Rep. 542.**
- b If a solicitor is not used, 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 If the client's or witness's first language is not English, this presents particular problems. Any statements should be taken by someone speaking and in his own language and then formally translated and certified by a professional translator. If, for reasons of economy (or proportionality), the statement is made in English with the assistance of a friend or family member, it should say on its face that this is what has happened. However, this course is fraught with hazard. It is hard to see how it can be justified after fraud has been raised or credibility put in issue.
- d Insurance databases of previous claims are available to Defendant insurers. They are an invaluable asset for assessing the credibility of a Claimant.
- e 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. Employers can provide copies. If he has disposed of bank statements, so can banks, for a small fee.
- 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 one 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 nor recollected 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. "*Friend*" needs even more probing.

## **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 foreign witness

This raises particular difficulties. Many foreign speakers of English have or appear to have an excellent command of the language. Others have very poor understanding. However, the adversarial system is an alien environment even to native speakers. The writer once had clients who worked for a foreign insurance company, speaking immaculate English, but who said that, if they had to give evidence, they would require an interpreter, to enable them to double check that they had not misunderstood anything. Completely honest indigenous witnesses can become very confused or verbose (at one extreme) or overly precise in an effort to avoid error (at the other). Even a native speaker often does not understand how what he sees as a simple statement may be ambiguous or misunderstood. Where fraud or the credibility of the witness, or a party, on his own side or the other side, has been put in issue, failure to ensure that the foreign witness has had the fullest opportunity to understand his own statement may be both catastrophic and (if he is truthful) unfair to the witness.

Accordingly, once credibility of a person speaking English as a second language has been challenged, the course of prudence suggests :

- a If possible, the person instructed to take a statement should speak the witness’s language;
- b If the solicitors do not have a person qualified to take statements, with the necessary forensic skill (which are rarely combined), it is better to use a competent interpreter (not a friend or family member) to assist the qualified statement taker. Remember that the statement should normally be taken by a solicitor (see 5a).
- c Even if they have fair, functional English, the statement should be drawn up in the witness’s own language and signed in that form. Remember: it must, so far as practicable, be in the witness’s own words. If his English in the witness box is of a lesser standard than used in the statement it will do him a disservice. If the statement shows a poor grasp of English it will beg the question of why a translator was not employed. Once drafted, a statement can then be professionally translated.
- d Similar precautions should be taken at any conference.
- e Watch out for the interpreter who goes beyond his role into a discussion with the witness. Their job is to translate, not to comment.

What if you, or your opponent, dispenses with these precautions? In that case, the opposing party may: challenge the admissibility of the statement on the basis that: the statement is not, as it should be, in the witness's own words; cast doubt on the statement of truth; and seek to exclude the statement itself and, by extension, the witness. The consequences will depend on the stage at which that application is made, and importance of the witness to his party's case. If the witness is truthful, this may also be prejudicial to him.

## 9. 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.

## 10. 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. It is 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 of his signed statement with the notice of the hearing so that he can familiarize himself.

## 11. 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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*Please note that this factsheet is not intended to provide binding legal advice. If you require specific advice about a case you should consult a suitably qualified Solicitor or Barrister.*

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November 2012

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# Chapter 10

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## Non-party costs orders in fraud litigation.

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December 2012

### 1. Introduction

- Allegations of fraud against personal injury claimants by insurers and their solicitors are now made as a matter of course; a recent twist has been the receipt of letters from such solicitors (usually accompanied by a defence alleging fraud, often on the most flimsy of premises) requiring effectively an undertaking by the claimant's solicitor to show the letter and defence to ATE insurers and to confirm that the ATE insurers will continue to provide cover. The threat – which is sometimes not implicit but very explicit – is that the defendant (who will of course succeed if one believes everything in the defence) will seek costs against the claimant's solicitor or the credit hire company in the event that it cannot recover costs from an impecunious claimant.
- This is the latest scare tactic – should solicitors (and their indemnity insurers) lose sleep? The answer is, happily, no; there is no special exception or jurisdiction to award non-party costs purely in terms of fraud. The news may not be so good for credit hire firms with a large stake in the proceedings where there is no ATE in place for the claimant, however.

### 2. The Principles

- The power to award costs against a non-party stems from section 51 of what is now the Senior Courts Act 1981, which provides essentially that the costs of and incidental to all proceedings in the civil Courts shall be in the discretion of the court (section 51(1)) and the court has full power to determine **by whom and to what extent the costs are to be paid** (section 51(3)).
- The relevant rule is **CPR 48.2** as follows:

## **Rule 48.2 - COSTS ORDERS IN FAVOUR OF OR AGAINST NON-PARTIES**

- (1) Where the court is considering whether to exercise its power under section 51 of the Supreme Court Act 1981 (costs are in the discretion of the court) to make a costs order in favour of or against a person who is not a party to proceedings -
  - (a) that person must be added as a party to the proceedings for the purposes of costs only; and
  - (b) he must be given a reasonable opportunity to attend a hearing at which the court will consider the matter further.
- It will come as little comfort that the Court of Appeal has stated that an order for the payment of costs by a non-party would always be exceptional (in the sense that it would be outside the normal run of cases) and the judge (who should be the trial judge) should treat any application for such an order with considerable caution. However, it was also stated that any warning that a non-party costs order would be sought should be given to the non-party at an early stage.

## **3. Recent Decisions on Non-Party Costs Applications against Solicitors**

- The power to award non-party costs against solicitors has recently been considered in the case of *TINSELTIME LTD (Claimant) v (1) ERYL ROBERTS (2) M & JT DAVIES (3) DENBIGHSHIRE (4) WELSH ASSEMBLY GOVERNMENT (Defendants/Applicants) & GAVIN EDMONDSON (Respondent)* (2012), a decision of Judge Stephen Davies sitting in the TCC division of the QBD on 28th September 2012. It was not, of course, a PI claim but the manner in which the principles set out above were applied is of general application and makes comforting reading, at least for claimant PI solicitors.
- This was an application for a non-party costs order (and a wasted costs order) against a solicitor (E) who had acted for an impecunious claimant under a conditional fee agreement without obtaining ATE and who had funded disbursements in order to allow the case to proceed on the basis that he would be indemnified if the claim succeeded.
- The first applicant was a building contractor who was engaged by the second applicant to demolish part of a building as part of a road building project. T (the claimant) complained that R's work had created dust which had damaged machinery used by it in the other part of the building. T claimed for damage to the machinery and loss of production leading to loss of profit. The applicants raised issues as to whether T or another company was the occupier of the premises and owner of the machinery.

- The court had decided as a preliminary issue that T had no cause of action in negligence or nuisance against the third or fourth applicants, which had commissioned the project; T was entitled to bring a claim in negligence and nuisance against the first and second applicants for any recoverable loss and damage proved to have been suffered, but the claims for loss of profits and wasted management time had no real prospect of success and were summarily dismissed, leaving only a modest claim for damage to machinery. Costs were awarded against T and its remaining claims were struck out when it failed to make interim payments on account of costs.
- The applicants submitted that E had controlled the litigation and had acted improperly, unreasonably or negligently, in particular in failing to undertake a sufficient investigation into T's title to sue; he had in substance funded the litigation as a business venture for his own financial benefit as well as that of his client and should be treated in the same way as any other commercial funder which could be made liable for the costs.
- The Judge refused both applications. He held that E had not deliberately or recklessly closed his eyes to the difficulties with a view simply to pushing the case forwards for his own financial interests. The outcome of the preliminary issue was not that the claim lacked merit in its entirety. There was no proper basis for suggesting that E "controlled" the litigation any differently from any solicitor conducting litigation for a client.
- Further, there was no difference between the position of a solicitor acting under a CFA who had agreed to fund disbursements under the CFA and one who had not, since both arrangements were permitted and were regarded as meeting a recognised legitimate public policy aim. Nor did it make a difference that the solicitor knew that the client was impecunious and that there was no ATE policy in place; acting for clients who were impecunious did not take the solicitor outside his role as such and there was no obligation on a solicitor acting under a CFA to ensure that ATE insurance cover was in place when his client was impecunious.
- There had to be something beyond that combination of factors which would render it just to make a non-party costs order, such as some financial benefit to the solicitor over and above the benefit which he could expect to receive from the CFA, or some exercise of control of the litigation over and above that which would be expected from a solicitor acting on behalf of a client, or some combination of both.
- There was no basis for concluding that E took on the case in any capacity other than as a solicitor under a CFA who was willing to fund the disbursements. He did not take on the case or control the litigation for his own financial self-interest.
- Importantly, during the course of that judgment it was doubted that the decision in the case of *GILL GERMANY v GAVIN FLATMAN : BARCHESTER HEALTHCARE LTD v RICHARD WEDDALL* (2011) was correct; in that case, Eady J had made a disclosure order against 2 unsuccessful claimants in relation to their funding arrangements who had been represented by the same firm of solicitors who had acted under CFAs but without ATE insurance.

- The order was refused at first instance but on appeal it was held that a solicitor would become a funder if he paid out sums on the basis that they would be recovered from the other side in the event of success, or not at all in the event of failure. A solicitor would then be providing funds in the way of business. Any funding role by a solicitor would only be countenanced if it carried with it the risk of having to pay the defendant's costs if he was ultimately successful.
- It should of course be pointed out that this has not yet come before the Court of Appeal and the two decisions are at first sight incompatible on the question whether or not it is possible to fund disbursements without becoming "the real party" to the proceedings so as to justify a non-party costs order. Given, however, that Flatman was only a disclosure application (and not even a non-party disclosure application either) and Tinseltine a decision on a full blown non-party costs application, I would suggest that Tinseltine should be preferred.

#### **4. Claims/Credit Hire Companies**

- So your ATE insurer has taken fright because of the fraud allegation but you still have an ostensibly innocent claimant and in the wings, a credit hire or claims company with a substantial stake in the litigation. If the case fails, the solicitor might not be at risk of a non-party costs order (provided he has told his lay client he doesn't have any ATE insurance— in those circumstances, it would be a brave claimant who went on with the action without at least an indemnity against costs from a credit hire or claims company), but I would suggest the credit hire or claims company is then exposed to the risk of a non-party costs order.
- In *ADRISS AND OTHERS V BANK OF SCOTLAND PLC AND OTHERS* a non-party costs order was made in consumer credit claims litigation against a claims management company (C) (which accepted its liability so there was no argument on the matter) and a firm of solicitors (S) to whom the claimants (X) had been referred by the claims management company. The claims management company's literature had stated that legal costs insurance would be obtained by the solicitors but S failed to arrange the same and more importantly, failed to tell the claimants that it had failed to arrange the same.
- The judge held that a non-party costs order against the solicitors was clearly justified. It had been S's responsibility to obtain legal costs insurance for its clients and not only had it failed to do so but it had failed to inform them that they had no insurance and that they were exposed to adverse costs orders. That was a gross breach of its duty to them. As the clients were prevented from giving instructions on anything like an informed view, S had effectively been acting without instructions. If its clients had been told the true position, it was likely that they would have instructed S not to progress the claims and the costs would not have been incurred.

- There was a direct causal link between the defaults of S and the costs generated by those cases. It followed that it was in a very real sense controlling the litigation, as decisions were being taken without proper instructions. S had also funded the litigation in the sense that it had borrowed money from C and still owed most of it. That outstanding debt must have put pressure on S but its financial dependence on C did not mean that control was ceded to C.
- However, even though S was the funder it could not be said that it was the “real party” to the litigation. X were the principal and direct real parties. They had agreed to have their potential claims reviewed and taken forward and if they had succeeded would have recovered in the usual way. The only difference was that C would also have benefited in the event of success, but the notion of success fees and other fees payable to claims management companies was not in itself improper and C was at all material times authorised to carry on business. It was possible for there to be more than one real party but X were genuine claimants who had decided to make the claims. The application against S therefore succeeded and there was no reason why C and S should not be liable for B’s costs on a joint and several basis, with each other and with X.
- Note the suggestion that it was possible for there to be more than one real party; credit hire companies are effectively clients, with all the potential for conflict of interest between the lay client and the credit hire company that that might involve. In cases where there is a small PI element but a large hire charge or repair element, this may well skew the balance in favour of the claim or credit hire company being the “real party”; an economic exercise is likely to be undertaken by the court as there will be no hiding behind an impecunious lay claimant without ATE insurance.

## 5. Relative Interests

- As to those “additional factors over and above the normal benefit that might be expected from a successful CFA” which might render a solicitor liable to a non-party costs order, a number of such CFAs against one defendant for relatively small claims but high costs might suffice; or, say, a point arising on the enforceability of a credit hire agreement which involves the same credit hire company in a number of appeals.
- In ***Myatt & Ors. v National Coal Board & Anor (2007)***, a successful defendant (N) in a PI action applied for a costs order against the unsuccessful claimants’ (M) solicitors (O). CFAs between the unsuccessful claimants (M) and their solicitors (O) had already been held to have been unenforceable on appeal due to O’s failure to inform M whether they had considered if he had relevant BTE cover and the question of costs had been adjourned. M had no insurance against liability for costs because their after-the-event policies were only valid if enforceable CFAs were in place. M’s financial interest in the appeals arose from the considerable shortfall they had been left with in the recovery of costs which would have to be paid out of their damages. The issue for the court was whether there was jurisdiction to order that O should pay a proportion of N’s costs, and if so how that jurisdiction should be exercised.



- The Court of Appeal essentially took a monetary approach to the issue: the amount at stake for the 4 claimants in the original appeal (on the enforceability of the CFAs) was about £2,500.00 each, representing the premiums they had paid for ATE insurance; they had received damages of between £3,000.00 and £4,000.00 each. However, the solicitors had lost out on approximately £12,000.00 to £16,000.00 in profit costs as a result of the unenforceability of the CFAs in the 4 cases under appeal. However, the solicitors were running 60 such cases and had about £200,000.00 in profit costs at stake. In those circumstances the Court of Appeal held that the main reason why the appeal had been brought was to protect the claims to those profit costs as it was unlikely that the claimants would have brought the appeals to obtain reimbursement of the premium.
- The Court of Appeal held that in the circumstances, the litigation was being pursued by the client for the benefit, or substantially for the benefit, of the solicitor. It would have been desirable that N warn O at an early stage of its intention to apply for costs against it in the event of the failure of M's appeal, and this was a factor to be taken into account in deciding whether to order costs against a non-party. On the evidence, however, O was unlikely to have abandoned the appeal even if this warning had been given. Taking into account M's real financial interest in the success of the appeals in view of the amount of the disbursements, and the fact that O had not been warned of a potential application for costs, the appropriate order was for O to pay 50% of N's costs of the appeal.

## 6. Advice Every Step of the Way

- So the moral of the story for the solicitors is to tell the lay client that ATE insurance isn't in place, or has been withdrawn due to an allegation of fraud in the defence. Provided the client is kept apprised of the situation, the position in *Adris* as regards the solicitor shouldn't arise and, if the lay client decides to go ahead against advice, that will afford protection for the solicitor as the case of *MANUEL CLEMENTE HERON v (1) TNT (UK) LTD (2) MACKRELL TURNER GARRETT (A FIRM) (2012)* shows.
- In that case the applicant employer (T) applied for a non-party order against the second respondent solicitors firm (M), the former solicitors of the first respondent employee (H). H had been involved in an accident that occurred when he was unloading goods whilst driving a forklift truck, and his right arm had become trapped. The only immediately visible injury was to H's right arm and elbow. Five days later, H developed back pain caused by a disc prolapse. H retained M to act on his behalf in a personal injury claim for the injuries that allegedly occurred as a result of that accident. H entered into a conditional fee agreement (CFA) with M, under which M would only be paid if H's claim were successful.



- T admitted liability and made several CPR Part 36 offers, all of which H rejected, including an offer that was rejected against the advice of M and counsel. No arrangements had been made for H to take out after the event (ATE) insurance, although M had, at one stage, drafted a proposal form for submission to the insurer, that had not been communicated to H, nor was the proposal actually submitted. The lack of ATE insurance meant that H would be liable for any costs liabilities and orders. M also paid several disbursements for H out of its own funds.
- As trial approached, it appeared that there was medical opinion that H's back problems were unrelated to the accident, and that the prolapsed disc would have emerged in any event over the next five years. There had been some delay in M communicating H's wish to T to drop hands on the basis of its final offer to settle, and attempts to revive that offer failed. Around three weeks before trial, T gave M notice that it might seek a wasted costs order or a non-party costs order against it. M came off the record the day before trial.
- At trial, H's claim in relation to his back injury was summarily dismissed given there was no evidence to support it, and in the event he was awarded general damages well below any of the Part 36 offers. H anticipated instigating a future negligence claim against M. The issues were whether (i) M's failure to advise H in relation to ATE insurance meant that M and H had an undeclared conflict of interest, where M stood to recover its costs if H did not settle; (ii) M had controlled the proceedings for its own ultimate benefit and had acted beyond the ordinary remit of a solicitor; (iii) M's failure to provide insurance inhibited H from settling; (iv) T could maintain a negligence claim against M.
- The judge held that there was no evidence that M ever provided proper advice to H as to the availability or desirability of obtaining ATE. That failure was negligent. However, questions surrounding whether H would have accepted that advice could only be resolved in anticipated negligence proceedings between M and H. However, the failure to obtain ATE did not amount to M and H having an undeclared conflict of interest; there was no evidence that M appreciated that there was a conflict of interest, let alone conducted the litigation in accordance with that appreciation. There was no evidence to suggest any conscious impropriety, as opposed to ineptitude.
- The judge also held that it was undoubtedly true that M stood to gain a substantial financial benefit from the litigation, but only in the sense that any solicitor engaged in a conditional fee agreement had an interest in the outcome of a case; there had to be additional factors before a non-party costs order would be appropriate. There was no evidence that anything untoward in M's handling of the litigation occurred until the later stages of litigation, save for the ATE issue. Although H had not been advised of the prospective withdrawal of Pt 36 offers, and there had been delay in communicating the drop hands offer, that did not demonstrate that M had substantial control over the litigation; the reality of the situation was that H had made decisions against advice. That was not evidence that M had acted beyond the ordinary remit of a solicitor.

- Additionally, although M had paid disbursements without being in funds to pay them, it had done so expecting to recover those sums from H, who had acknowledged his obligation to meet those payments. Importantly, it was held that the suggestion that M's negligent failure to provide ATE unfairly inhibited H from settling the claim did not form a sound basis for a non-party costs order. Lastly, any free-standing claim T alleged in negligence against M was bound to fail on the basis that M owed no duty of care to T.
- So where the client carries on against advice – and the lines are deliberately blurred between the lay and the credit hire clients here – the solicitor will be protected but it is unlikely that the credit hire company will be protected from a non-party costs order on the basis that it has an interest in the litigation, whether it is funding it or not in the event that the litigation fails.

## **7. Legal Professional Privilege and Third Parties**

- It's unlikely that the solicitor would be able to resist an application for discovery of the extent to which the credit hire company is "interested" in the litigation on the grounds of legal professional privilege as the decision in JOHN THOMSON (Claimant) v BERKHAMSTED COLLEGIATE SCHOOL (Defendant) & (1) IAN THOMSON (2) GRACINDA THOMSON (Interested Parties) (2009) shows.
- T's son (J), a former pupil at B, had brought a claim for damages against B for failure to take proper measures to prevent him from being bullied whilst he was at the school. Two weeks into the trial, J discontinued his claim and B sought its substantial costs in defending the action which it alleged was wholly misconceived. J was unemployed and the costs of his litigation had been met by T. Accordingly, B wished to claim its costs from T on a non-party costs basis. Pursuant to that application B sought orders requiring T to file and serve disclosure statements setting out correspondence between them and J's solicitors, experts and counsel, and orders against J with respect to disclosure and his claim of legal professional privilege.
- It was held that although courts had been reluctant to impose third party costs orders against family members who assisted a party for philanthropic and disinterested reasons, in the instant case, T were not merely funders but were directly concerned with the facts of the claim and played an active role in the litigation. There was substance to the suggestion that the litigation was speculative as to its prospects of success. It was doubtful that it would have been funded if T had not made funds available themselves. Accordingly, an application for third party costs had a reasonable prospect of success. The only doubt was over whether T gained a benefit from the litigation and sought to control its course.

- B could only demonstrate the element of control if it knew what communications T had had with the solicitors, counsel and experts in the case. Restricting the period of time during which the disclosure was required reduced the scale of the disclosure sought and any practical difficulties. J had claimed legal professional privilege but it did not normally exist in communications between a solicitor and third parties that were not immediately connected with that third party's witness statement or the giving of legal advice to the claimant. An analysis of the documents was required to determine which attracted privilege. The correspondence sought was likely to be probative and not privileged in its entirety and it was not disproportionate for the material to be sought.

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**November 2012**

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# Chapter 11

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## Part 18 Questions in RTA Cases Where Fraud is Alleged

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November 2012

### 1. Introduction

If you have received or are preparing Part 18 questions, then you have already begun working on the case (probably on a CFA if you are for the Claimant) and your interest is engaged.

### 2. Points applicable to both parties

- a) Part 18 is a knife with two edges. Where fraud has raised its head, care is needed on both sides. Defendants who suspect fraud often try to play their cards close to their chest. But this is not necessarily allowed, although Claimant<sup>1</sup> solicitors often do not challenge it. Defendants are, however, entitled to seek clarification and may wish to do so. Why?:
  - (i) If Claimant is not a fraud:
    - > He deserves to know the allegations so he can answer/dismiss them
    - > His solicitors need to know them so that they can properly investigate and advise their client.
  - (ii) If Claimant is a fraud:
    - > He should be warned early of the probable consequences of proceeding.
    - > His solicitors need to know so that they can properly advise their client of his jeopardy – and try to persuade him to withdraw.
    - > If the evidence is sufficiently persuasive, a claim may be headed off before issue or withdrawn.

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1. For convenience I have assumed that the suspected fraud is a Claimant but this is not always the case and this section should be read both ways.

- b) Before issue of proceedings, both parties may seek information under the Protocol. Both parties are strangely reluctant to do this where fraud is in the air. But it is worth bearing in mind:
- (i) **Personal Injury Pre-action Protocol Para 1.2** The aims of pre-action protocols are:
    - > *better and earlier **exchange of information** (sic)*
    - > *better pre-action investigation by **both sides***
    - > *to put the parties in a position where they may be able to settle cases fairly and early without litigation; and*
  - (ii) **PIPP Para 3.10** directs that, if the Defendant denies liability, he should enclose with the letter of reply, **documents** in his possession which are material to the issues between the parties, and which would be likely to be ordered to be disclosed by the court, either on an application for pre-action disclosure, or on **disclosure during proceedings**. There is no reason for the force of these obligations to be watered down where fraud is suspected, for the reasons given above; and
  - (iii) The duty on parties imposed by CPR r.1.3 requires that they should co-operate in making a real attempt to explore the significant narrowing of, or compromise of, that dispute **Lexi Holdings v Pannone and Partners [2010] EWHC 1416 (Ch), June 18, 2010**.
- c) There are sanctions for non-compliance. If you can think of any documents or information, that clearly ought to have been disclosed and have not – ask.
- d) Pursuant to the Protocol, both sides should have, preferably prior to Part 18 arising:
- (i) An accident report form, possibly more than one;
  - (ii) Notes of telephone calls to their insurer, broker, or Accident Management company giving accounts of the accident.
  - (iii) Any independent witness questionnaires. There is no property in a witness.
  - (iv) MOT certificate - if there is doubt as to the roadworthiness of a vehicle.
  - (v) Engineer's reports or repair estimates or repair invoices, so as to compare accounts of the accident with the damage sustained.
- e) Irrespective of who it was reported to, or how, none of the reports at (i) to (iii) above is necessarily privileged – not even the one to the insurer or broker (solicitors are covered by legal professional privilege). The test is whether the document was produced for the dominant purpose of litigation, **Waugh v British Railways Board [1980] AC 521**. It is curious how rarely parties press for each other's accident report – even when fraud

is not in the air. It is not a simple point. Differences can arise. Reports to employers, on one hand, may be determined by the intention of the employer, and may attract privilege, see unreported decision of the Court of Appeal **Mcavan v London Transport Executive 1983**. Reports to insurers depend on the intentions of insurers and will be fact dependent. **Axa v Allianz [2011] Lloyd's Rep IR 544** indicates reports commissioned by insurers when a claim is still under investigation will rarely be privileged. **The 2012 White Book at CPR 31.3.3** further suggests that the document will not be held to be privileged where the insurance claim is simple and straightforward, and the insurers' dominant purpose is to assess quantum rather than obtain legal advice on liability.

- f) The earliest account can be illuminating.
- g) Contriving the purpose of a document (e.g., by putting in a statement to the effect that the recipient's primary purpose in asking is to gather information for legal proceedings) is unlikely to deceive the court - **Price Waterhouse v BCCI Holdings [1992] BCLC 583 at 591D**
- h) Insisting on early disclosure of the first reported accounts of the accident can dramatically alter perspective. In one case, a party, Mr A, sought to withdraw a pre-issue admission, where he had driven into an open van door. Examination of his insurer's correspondence revealed that his account had progressed, over some time, thus:
  - (i) Mr A was uncertain of how the van door came to swing open.
  - (ii) Mr A saw Mr B walking to the rear of his van when the door swung open.
  - (iii) Mr A noticed Mr B getting into rear of van.
  - (iv) Mr A saw Mr B get into the rear of the van, which swung down on its hinges, causing door to swing open. Mr B's account of being in the driver's seat was now aggressively disputed.

This progression was pointed out to his solicitors, who had taken over from his insurers, on the eve of their application to withdraw the admission, along with a demand for full disclosure of each account and a reason for the changes. Mr A immediately settled. Had the original report been obtained by either solicitors, it is unlikely it would have progressed so far.

- i) If a party objects to disclosing documents or answering Part 18 requests, there are always sanctions. A suitable sanction might be that the offender be barred from seeking to rely later on any argument, or documents now within their knowledge or power to disclose, unless disclosed in compliance with the order.

### 3. It costs nothing to ask

Part 18 is not available until after issue. But a request can be made before issue for evidence or greater details of a case. Often this will elicit some response. A response to a reasonable request will be consistent with the overriding objective and the breadth of the Protocol. Many will respond to a greater or lesser extent. If the party so asked does not respond, or sufficiently respond, then the Part 18 request should follow after issue.

### 4. What does Part 18 allow?

a) **Part 18 allows questions that:**

- (i) Will clarify any matter in dispute in the proceedings
- (ii) Give additional information about such matter

**Provided it is:**

- (iii) Concise
- (iv) Strictly confined to matters which are
- (v) Reasonably necessary AND
- (vi) Proportionate
- (vii) To enable you to prepare your case OR
- (viii) Understand the case you have to meet

b) **National Grid Electricity v ABB [2012] EWCH 869 (Ch)** - Paras 71-79 of this case make useful reading for those asking and those answering. Among the questions that the CA approved were:

- (i) Questions that would identify possible witnesses so that their evidence could be taken before memories faded further;
- (ii) Questions going to key issues that a party ought already to have investigated or which would not be disproportionate if they had not.

c) **Questions likely to be inappropriate may include:**

- (i) Ones which would force a party to provide premature, fragmentary evidence;
- (ii) Matters not already addressed in evidence.

- d) A question that is inappropriate for answer when first asked, may nevertheless serve a purpose. Asking it puts the questioned party on notice that they need to address the point when it comes to witness statements and disclosure. If it is not then addressed, the questioner may well be justified in issuing renewed Part 18 questions – which are much more likely to result in an order (para 79).
- e) Equally, Part 18 is widely interpreted. The questions may be aimed at discovering whether there is a point of disagreement. (The notice to admit can also be used to that end).
- f) The White Book suggests cross-examination solely as to credit is not allowed. Either this is widely disregarded in fraud cases or, perhaps more likely, the courts are more flexible where the questions are aimed at uncovering material which may cast light – either way – on whether there is an issue of fraud to try. Alternatively, they may be viewed as assisting parties to know what case they have to meet.

## 5. Drafting Part 18 Questions – general points

- a) Questions should be fact and allegation specific. Prolonged and pro forma questions are likely to attract challenges. Before drafting check the current state of play of Part 18 and the Protocols.
- b) Questions should not be cross-examination in writing. It is not good strategy to give a hostile witness (let alone a potentially fraudulent one) time to spot and devise a tight answer to your best points. So keep it factual and aimed at flushing out the case.
- c) Do not ask multiple questions. The following is an example:

1 *Did you ever speak with a representative of [Accident Management Company]? If so, when was this? Was the communication face-to-face or by telephone? What were you told about their services and how payment for those services would be arranged? Were you at all ever advised at any stage from the date [Accident Management Company] first made contact with you to the date you ended contact with [Accident Management Company] that you had entered into an agreement for them to provide you with a replacement vehicle on a credit hire basis for which you would be accepting personal liability for such charges with a basic rate of £ [a lot of money] per day (net) together with additional charges?*

Needless to say, the (blameless) victim of this interrogation answered simply “Yes, phone, can’t remember when”. The questioner was lucky to get that much. The reader can decide for himself how many ways it fails the checklist



- d) Consider carefully whether counsel should draft the Part 18 questions. If you decide to use counsel, pick one who does not ask unnecessary questions. Even if the questions are concise (see above), the responding party will get bored and recalcitrant if presented with too many pages of questions (the above example is taken from one that ran to almost 20 pages).
- e) If you do not want to use counsel:
  - (i) Keep the questions short.
  - (ii) Keep the questions focused.
  - (iii) Check them carefully for ambiguity before sending them. Read them out aloud to a colleague who will play devil's advocate before pressing the print button.
  - (iv) Remember that more than one set of Part 18 Questions can be put.

## 6. Receiving Part 18 Questions – General points

- a) When receiving Part 18 Questions, check the current state of play of Part 18 and the Protocols.
- b) Part 18 requests can only be made after issue. This is implicit in **CPR 18.1** which refers to “the proceedings” and **18 PD 1.6 (1)** which provides that a request must be headed with the name of the court and the title and number of the claim. Prior to issue, a similar effect may be achieved, however, under the **Personal Injury Pre-action Protocol: 1.2** (see section 2 above).
- c) It may be better, therefore, to consider accommodating at least part of a pre-action request, if it is not too onerous, and is the sort of thing that might reasonably be helpful to both parties e.g., in reducing bloated or scattergun pleadings or even in encouraging the Defendant to agree the claim or the Claimant to withdraw it.
- d) If the questions indicate a real problem may exist in your case, you may wish to take them up with the questioner in any event.
- e) After issue, the questioner is entitled to a response. But not necessarily to every question they ask. CPR 18.1 makes it clear that requests must be directed to clarify or give information about any matter in dispute. This applies to the Request generally and to each question on it. So consider carefully whether a request goes to a matter in dispute e.g., if the request is for a colour copy of the passport, has identity been put in issue? If the V5 is requested, is it in issue who owns the car? Beware of knee jerk reactions. Even the most egregious request is likely to have a few justifiable questions tucked away in it. Locate them and answer them.

f) Note: **18 PD 1.2** *a request should be concise and strictly confined to matters which are reasonably necessary and proportionate to enable the first party to prepare his own case or to understand the case he has to meet.*

g) So applying that guidance, what might be objectionable?

- (i) Fishing
- (ii) Cross-examination in writing
- (iii) Cross-examination going solely to credit
- (iv) Questions that will not reasonably assist the questioner to prepare his case.
- (v) Questions that are disproportionately expensive to answer.
- (vi) Questions about privileged material.
- (vii) Prolixity (because it is likely to be disproportionate).
- (viii) Ambiguous questions (unlikely to clarify)
- (ix) Double questions (unlikely to clarify)

h) The following questions are essential in almost every case:

Did you report the accident to:

- (i) The police,
- (ii) Your insurer,
- (iii) Your insurance broker or
- (iv) An accident management company?
- (v) And if not, why not?

Was the report:

- (i) In writing,
- (ii) By telephone or
- (iii) Both?

And the documents should be sought, especially if they have not been disclosed pre-issue, under the Protocol. Remember that most insurers, brokers and AMCs should have some written record system for telephone calls.

- i) Costs. Where an application is necessitated by non-compliance with a protocol or practice direction, the party asking may be able to recover costs even where a CFA does not expressly address them, **Connaughton v Imperial College Healthcare NHS Trust** [2010] EWHC 90173 (Costs). Party asking may have to pay the costs of disclosure but party responding may have to pay costs of unreasonably resisting the request and application, **Bermuda International Securities v KPMG** [2001] EWCA Civ 269.

## 7. Your opponent asks if they can interview your client

- a) What would you do if you were acting in a criminal case and were asked by the other side (whichever) for permission to interview your client, with or without your presence. If you would not do it in a criminal case, is there any more compelling reason to do so in a civil one (irrespective whether fraud is alleged)?
- b) What will be the position of you and your firm if your client makes incriminating or potentially incriminating admissions in the interview and you fail to stop him making them in front of a hostile party? And if that hostile party then uses those admissions - for either civil or criminal purposes ?
- c) So how does a competent solicitor answer such a request? A simple No, may raise the temperature. How about:

*"We are willing, in principle, to consider any reasonable requests. In this case, however, perhaps you could direct us to the facts and passage of the Code of Conduct which would justify so unusual a departure from orthodox professional practice."*

There are exceptional circumstances. Sometimes the same insurer may be on both sides of a case. In those circumstances, it may well be appropriate for an insurer to interview its own client – and hard to see how it can present his case if it does not. Absent such circumstances, there may nevertheless be a meritorious reason for such a request. For a start, the client may be willing. If so, it may still be preferable, from a professional indemnity point of view, for the question to be decided by a court.

- d) If in doubt, pass it up to the Professional Indemnity Partner. That is their job.

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# Chapter 12

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## Pleadings in Fraud Cases

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DEBORAH TOMPKINSON, CLERKSROOM

December 2012

### Drafting generally

- 1 There are ample works on drafting standard claims. As this manual focuses on fraud, this chapter is confined to pleading that particularly delicate point. It assumes that our readers are familiar with pleading the ordinary elements of a claim. In most, though not all, RTA cases, fraud is pleaded (if at all) by the Defendant. The chapter therefore uses that term for convenience, but applies equally to a Claimant who wishes to raise fraud.
- 2 It is rare for a Defendant insurer to feel confident of having enough evidence to justify opening the battle. In those cases, there will be ample evidence of fraud on which to plead. This chapter therefore addresses the more difficult situation where the evidence is more ambiguous. This means that the Defendant will plead a defence in one of three main ways:
  - a Putting to strict proof
  - b Putting to strict proof, with an invitation to infer fraud;
  - c Putting to strict proof, with clear allegations of fraud.
  - d In any of the above there may also be a counterclaim.
- 3 The Defendant may, to a greater or lesser extent, have flagged its concerns to the Claimant in advance of issue. Nevertheless, the courts are alive to the difficulty of a Defendant that believes it has been targeted by a dishonest Claimant, and the risk that forcing a Defendant to disclose too much too soon can play into the hands of a criminal. A Defendant which has indicated it may take this defence will probably get away with playing its cards closer to its chest than would otherwise be the case.

- 4 It is rare for a Defendant not to give any advance indication that it regards a claim as suspect. Claimant solicitors will therefore be on notice that fraud is at least suspected. The prudent Claimant solicitors, however genuine their client seems, will require the Claimant to sign the Claim Form and Particulars personally. This does not mean the solicitors may not sign; the rules permit it. Nevertheless, personal signature, with the attendant warning of consequences, is a not unreasonable test of the client's bona fides.
- 5 Even where the Defendant has given advance notice of its suspicions, the Defence will probably be the first time that the Claimant solicitors have any particulars of what is being alleged against their client. Claimant may, and in most circumstances, will plead a Reply. Strictly, this should only be necessary if the Defence raises new facts. A bare strict proof defence may not, therefore, give rise to any concrete inquiries between a Claimant solicitor and the Claimant. In the last three types of defence listed above, however, a response will be called for.

## **Pleading fraud – ethical considerations**

- 6 Whether a solicitor decides to draft himself or send it to counsel, similar ethical considerations bind both lawyers. In the Bar Code of Conduct this is found at Section 704 – Drafting Documents. In the Solicitors' Code of Conduct it is found at **Chapter 5 – Your client and the court**.
- 7 Each, in very similar language prohibits a lawyer from drafting any document containing any allegation of fraud unless:
  - (i) He has clear instructions to make such allegation AND
  - (ii) He has in front of him material which he reasonably believes shows, on its face, a case for fraud **[IB ( 5.7) (b)]**. The Bar Code says “reasonably credible material which as it stands establishes a prima facie case of fraud. **[Section 704 (c)]**.
- 8 There is no obvious meaningful difference between the two phrasings. Both “prima facie” and “on its face [shows] a case” mean that there does not need – yet - be sufficient evidence to prove fraud at the eventual trial. Nor do you have to show that there is no plausible explanation other than fraud – this means that it is possible to plead the many “red flags” that are also consistent with entirely honest explanations. It will be sufficient to show that there are reasonable grounds for making so serious an allegation.
- 9 Although Paragraph 704 (c) only mentions “fraud” it is generally considered that “fraud” encompasses any allegation of dishonesty or intentional wrongdoing e.g', forging receipts or dishonest exaggeration.

10 When drafting, regard should also be had to the obligations on advocates when presenting a case at trial. These may help focus on whether a point should be pleaded or whether it would be better to wait and perhaps amend when more evidence is available. Again, despite different phrasings, the substance is very similar. An advocate must not **[IB 5.8 and Para 708]**:

(i) Suggest that any person is guilty of fraud or misconduct unless:

- a. the allegation goes to a matter in issue (including the credibility of the witness) . **[Para 708 adds the words in brackets]**.
- b. which is material to the lay client's case and
- c. appears to the advocate to be supported by reasonable grounds.

### **“Strict proof” Defence**

11 Insurers are peculiarly vulnerable to fraud. Their business depends to a very large extent on trust. When claims are presented, they are, at least at first, utterly dependent on the policyholder or claimant against the policyholder, for the information needed to assess the merits of the claim.

### **What must be set out**

12 **16PD.8.2** stipulate that an allegation of fraud or illegality, and knowledge or notice of a fact must be expressly pleaded in Particulars of Claim. **16 PD 10** does not place the same obligation on a Defendant, doubtless recognizing that, in the very nature of such conduct, the facts going to prove it are not ones the Defendant will find it easy to identify. Where the defence turns on challenging a low velocity impact, rather than pleading fraud per se, the pleading guidelines in *Kearsley v Klarfield* [2005] should be observed.

13 In order to avoid the trap of deemed admission (**CPR 16.5.5**), Defendant should plead to each allegation even if only not admitting it. There is no particular pleading advantage to using the words “put to strict proof”. The old general traverse (so rarely seen these days) arguably still has its uses in this sort of case.

### **The limitations of this approach**

14 It is really a holding defence, a step taken until it can be amended to a more specific pleading, following Part 18 questions, and disclosure. Where it is adopted, there is much to be said for diarizing it to be reviewed at appropriate stages, with a view to considering whether to amend to more particular allegations. On the other hand, unlike the approaches below, this approach does not run the risk of strike out or attendant costs orders. Nor does it put the burden of proof on the Defendant – Claimant must still prove the facts making out his case.

## “Strict proof” with invitation to infer fraud

- 15 This may range from putting credibility in issue (which at least flags to the court what the real issue is likely to be) to an open invitation to infer fraud.
- 16 It is a very good idea to consult the Chancery, Queen’s Bench and Commercial Court Guides before commencing drafting. For instance, the Chancery Guide requires credible material to support the contentions. This arguably requires rather more than the “prima facie” case required by the Codes of Conduct.
- 17 Great care is required and it may be worth considering whether given facts can be used to invite a less difficult but no less effective defence than fraud. For instance, if a medical report obtained 2 years after an accident, in which Claimant is claiming continuing intrusive injuries, indicates that a review of records shows Claimant attended his GP only once or twice, those facts could be used to challenge causation, and/or severity and/or duration of the injury.
- 18 A pleading can invite a court to infer fraud. If that course is adopted, the pleading should fully set out the facts or basis which it is alleged justify drawing such an inference (**Chancery Guide 2.8(2); Queen’s Bench Guide 5.6.3 and Admiralty and Commercial Court Guide C1.2(c)**). Inevitably, it will be necessary to set out that the case contains a number of features associated with fraudulent and/or fraudulently exaggerated claims. This is likely to be followed (if not already preceded) by Part 18 questions, to flush out the details of the case.
- 19 At this point it may be necessary to consider carefully whether the facts relied on are sufficient to justify inferring all the elements of fraud (see below). If they are not, you should consider carefully whether the pleading is within the relevant code of conduct or whether it would be better to plead lower and amend when more evidence is available.

## Limitations

- 20 If deployed, this pleading suffers from an internal tension. On the one hand, a claim may have several suspicious features but insufficient clear evidence of wrong-doing to support a stronger pleading. Pleading inference may enable the Defendant to cast sufficient doubt into the trial judge’s mind that he rejects the claim as having failed the burden of proof. But if the thrust of a defence is an invitation to infer fraud, and the evidence, when tested at trial, does not support an inference, then the claim should succeed. This defence will shift the burden of proof to the Defendant to satisfy the court that the inference can properly be drawn. In practice, therefore, this sort of pleading is best seen as giving a Defendant a platform to satisfy a court that there are sufficient facts which require explanation and to pave the way for a rigorous disclosure regime, which may lead in to an amended and more focused pleading.



- 21 The later amendments are the stage most often omitted. Note, therefore the warning of the Court of Appeal in **Hussain v Amin** [2012] EWCA Civ 1456, in which the Master of the Rolls and Lord Justice Davies, albeit on an appeal on costs, uttered an unequivocal, if obiter, condemnation of a pleading which raised no clear allegation of fraud but merely voiced “*a number of significant concerns*” which came close to being such an allegation. Davis LJ thought that – with reservations – such a pleading could be justified as an initial holding defence, which is why we deal with it here. But it was a case pleaded on insinuation, not allegation. If the defendant considered there was sufficient material as to justify an allegation of a sham collision or a fraud, it behooved it to plead it, properly, in clear, unequivocal terms, with proper particulars, and in ample time before the trial. Thereafter the burden of proof would have been on the Defendant to establish the allegation. Instead, the Claimant was faced with a hybrid. He was obliged to deal with an insinuation of fraud without any express allegation to that effect. He concluded: “**But this sort of pleading should not be sanctioned**”. In other words, it may be vulnerable to a strike out application. There is an unequivocal tension here between this thunderbolt and **Kearsley v Klarfield** [2005], with which most readers will be familiar. It may be better to view Kearsley as confined to LVI cases, which can be viewed as ones where the issue is explicable, without resort to fraud, i.e., in terms of causation.
- 22 Some consolation that amendment may be possible even at a late stage is found in **Hussain v Sakrar** [2010] EWCA Civ 301, where the Court of Appeal held that an application to amend to plead fraud in an RTA a week before trial should have been allowed, noting that if a lawyer did not consider he had the necessary material to justify such a pleading until such a late stage it was a responsible act not to apply until such material was available. Claimants should therefore bear this in mind when considering whether or not to apply to strike out a defence which may fall found of Hussain v Amin.

### “Strict proof” with allegation of fraud

- 23 The same requirements apply as set out above.
- 24 The pleading threshold is not high. A prima facie case of fraud or “credible” case in the words of the Chancery Guide, will suffice for pleading purposes.
- 25 The word “fraud” is not an essential element of the pleading so long as it sets out full particulars and, where an inference of fraud is required, the full facts upon which the court is invited to draw the inference e.g. Queen’s Bench Guide Para 5.6.3 (and as approved in Kearsley). If, however, you have at this stage some evidence so compelling that it is hard to reconcile with an honest claim, then you may wish to plead expressly. If not, old cases give some guidance. An allegation that the defendant made to the claimant representations on which he intended the claimant to act, which representations were untrue, and known to the defendant to be untrue, is sufficient (**Davy v Garrett [1878] 7 Ch. D. 473 at 479**, per Thesiger L.J.).



- 26 An allegation of fraud means asserting that the Claimant has deliberately i.e., knowingly, put forward a claim that is false. The state of mind of the alleged fraud is an essential element of that allegation. It must be proved at trial. That is not always easy. Very often a court has to infer knowledge or infer that some thing could not have been said or done honestly. It is often omitted from the pleading because of the difficulty in identifying adequate facts. Nevertheless, omitting this aspect of the pleading risks an application to strike out or, at best, that insufficient attention will be given to what must be proved at trial. When pleading, it should be remembered that the party alleging it will need to show at trial:
- a Claimant has made an allegation or represented a fact on which he relies in advancing the claim. This may be e.g.,
    - (i) the fact of the collision itself [*fake collision*], or
    - (ii) the manner in which it occurred [*contrived collision*], or
    - (iii) part of the claim, such as the number participants in the vehicle, whether there is damage to the vehicle(s), whether there is injury to any of the vehicle occupants, and any number of heads of special damages [*fraudulent exaggeration*], or
    - (iv) the extent of genuine damage suffered [*fraudulent exaggeration*]
  - b That representation is untrue.
  - c When making it, the maker knew or was reckless as to whether it was false.
- 27 The aspect of this process which is most usually forgotten is knowledge.
- 28 There is debate as to whether it is necessary to plead particulars of knowledge. Pre-CPR authority is best regarded with caution. The modern approach is “cards on the table”. The editors of Bullen and Leak prefer the view that any particulars of knowledge should be expressly pleaded. If you will have to ask the court to infer knowledge, then any facts from which it can be inferred that a party knew that part of their claim is untrue, should be pleaded. If they are not, it may not be possible to persuade a judge that there was fraud. It may not be sufficient to say that they ought to have known because it is not an allegation of actual knowledge. **Belmont Finance Corp Ltd v Williams Furniture Ltd [1979] Ch 250** per Millett L.J. at 268.
- 29 It is an uncomfortable fact that RTA fraud may involve an attempt by a fraudulent Claimant to deceive an innocent Defendant, or a conspiracy by two dishonest parties to deceive insurers. The latter, in particular, is not an easy pleading. Failure to identify the facts on which joint knowledge is based, may weaken the preparation for a claim.

## Risks and Limitations

- 30 The burden to prove fraud shifts to the Defendant . As before, if the material is inadequate to support a pleading of fraud, the case may be struck out. In that case, wasted costs may be ordered against the legal advisers responsible. Claimants may also seek indemnity costs. If the judge considers the Defendant did not have enough evidence to justify the pleading, the order is likely. Conversely, if the ethical requirements of pleading have been complied with, it will be much harder to criticize a Defendant who pleaded a case for which there was prima facie evidence.

## Reply to Defence

- 31 CPR 15.8 makes it clear a Reply is optional. So the first question is whether to avail oneself of the opportunity? The answer will lie in whether there are facts (not already in the Particulars of Claim) which the Claimant wants to allege in response to the Defence. Alternatively, it can assist the court (and the parties) by narrowing issues, identifying common ground or defining the real bone of contention.
- 32 Where a “strict proof” defence has been served, a Reply is unlikely to be necessary. Where, however, any facts have been raised which require an answer, it is surprising that Replies are more often not served. This misses an opportunity – for an honest Claimant - to provide the honest explanation for the fact which causes concern.
- 33 If, at this stage, a Claimant is unable to provide his solicitor with a convincing explanation, for instance, is vague and uncertain about the identity of the occupants of his own car, it may indicate that the solicitor needs to make more careful inquiries, or it may indicate a communication problem, in which case, appropriate steps should be taken to remedy it.
- 34 It goes without saying, that any Reply, in these circumstances, should be signed by the litigant.

## Defence to Counterclaim

- 35 Occasionally one sees that this has been forgotten, an omission of which a competent Defendant can take advantage by applying for judgment in default. Other than that, it is no different from any other Defence. It is helpful to the court however, to separate it from any Reply by a clear heading.

## An open mind is critical

- 36 *“There’s no art to find the mind’s construction in the face. He was a gentleman on whom I built an absolute trust.”* said Duncan, of Macbeth’s treacherous predecessor. Claimant solicitors will share this sentiment.

- 37 Sadly, frauds very rarely break down and confess. In the writer's entire time in practice, it has only happened once – to the considerable consternation of her legal team. Equally, a party, particularly one that is often the object of fraud, can be quick to suspect fraud when there is no real evidence of it. Such a belief, once formed, can be hard to abandon,
- 38 Nor is it easy to tell a fraud from an honest man. Lord Bingham in **“The Business of Judging”**<sup>1</sup> notes that neither he, nor other judges, find it easy to tell an honest man from a fraud. Sincerity is a conman's stock in trade. Conversely, is a witness who changes his mind or contradicts himself a liar, or an honest but nervous man, making mistakes under pressure? Lord Bingham notes that demeanour has very little value where the evidence is given either in English as a second or third language or via an interpreter. One might add that the quality of interpreters varies from excellent to atrocious. So if the judges have difficulties, what is a mere lawyer to do, at the early stage of pleading, before all the evidence is in, and where an insurer or other client has fixed on the idea that fraud must be present?
- 39 First, judges have a methodical approach they should use when trying to decide whether a witness is truthful or not. Claimant solicitors and, where they have access to a witness, Defendant solicitors, can and should apply a similar analysis. Lord Bingham reduces it to 5 points:
- a Is the witness's evidence consistent with agreed facts or those clearly shown by other evidence to have occurred?
  - b Is it internally consistent?
  - c Is it consistent with his own evidence on other occasions ?
  - d how good is his credit in matters that are not material to the case (which Lord Bingham regarded as often unreliable).
  - e demeanour (which Lord Bingham demolishes as a reliable test, particularly for foreign witnesses).

This approach should begin at the stage of drafting or responding to pleadings and continue to be applied throughout the litigation process, as more evidence emerges.

## Do you need a translator?

- 40 Second, Lord Bingham also draws attention to the care needed when dealing with a witness whose first language is not English - however good their English may appear to be. Where so serious an allegation is concerned, it is not fair to the witness to take risks with misunderstandings in translation. Prudent solicitors use professional interpreters /translators from the moment fraud is floated, to ensure that any statement supplied is drawn up and signed in the witnesses' first language.

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1. Oxford University Press 2000, Chapter One, The Judge as Juror.

- 41 It is strange then, that pleadings rarely, if ever, are translated. Pleadings are formal documents and do not lend themselves to drafting in another language. A counsel of perfection would be to translate any pleading which a party is to be asked to sign into his own language and have him sign that. An alternative would be to have the pleading signed with a CPR compliant interpreter's statement of truth. The English original can then be signed with confidence by the solicitor. The same step should be taken with a pleading produced by the other side.
- 42 Judges see the witness at trial. Why is translation dealt with under pleadings? There will be cases where a better understanding of the points being made against them will assist an honest Claimant to direct his solicitor to evidence that may help his case. Conversely, if a solicitor is satisfied his client has been given every opportunity to understand a question, or to express himself clearly, that solicitor will find it easier to apply effectively Lord Bingham's tests.

### **Pleadings that differ from the case advanced in the protocol period**

- 43 This happens from time to time, on both sides. Most often, it is caused by a failure in communication between a party and his solicitors, or a careless reading of information a party has supplied. Where fraud is in issue, however, a closer look may be required. Legal professional privilege will apply to most communications but there are one or two that might be called upon. These are accident report forms to insurers, brokers, or AMC or CMCs.
- 44 None of those reports is necessarily privileged. The test is whether the document was produced for the dominant purpose of litigation, **Waugh v British Railways Board [1980] AC 521**. It is curious how rarely parties press for each other's accident report – even when fraud is not in the air. We stress that not all early reports are unprivileged. Reports to employers, on one hand, may be determined by the intention of the employer, and may attract privilege, see unreported decision of the Court of Appeal **Mcavan v London Transport Executive** [1983]. Reports to insurers depend on the intentions of insurers and will be fact dependent. **Axa v Allianz** [2011] Lloyd's Rep IR 544 indicates reports commissioned by insurers when a claim is still under investigation will rarely be privileged. **The White Book 2012 CPR 31.3.3** further suggests, that the document will not be held to be privileged where the insurance claim is simple and straightforward, and the insurers' dominant purpose is to assess quantum rather than obtain legal advice on liability.
- 45 The earliest account can be illuminating. Be wary of labels. Contriving the purpose of a document (e.g., by putting in a statement to the effect that the recipient's primary purpose in asking is to gather information for legal proceedings) is unlikely to deceive the court - **Price Waterhouse v BCCI Holdings** [1992] BCLC 583 at 591D<sup>2</sup>

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2. Although this case has been overruled in part, this passage probably still represents the likely approach of a court.

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**December 2012**

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# Conclusions

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## Fraud Manual Conclusions: The Future of Fraud?

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ANDREW MCKIE & DEBORAH TOMPKINSON January 2013

### 1 RTA Fraud: The Future?

- a) With the post-Jackson reforms upon us, difficult times lie ahead for personal injury firms and those dealing with allegations of fraud. The Government decided to take forward and implement, a number of his recommendations via LASPO Legal Aid, Sentencing and Punishment of Offenders Act 2012 :
  - 1) Removal of recoverability of success fees & ATE from the defendant
  - 2) Introduction of a cap for the success fee under claimant funded CFA of 25% of damages (excluding future losses)
  - 3) Qualified One Way Cost Shifting ( QOCS) in PI cases.
  - 4) 10% uplift on PSLA damages.
  - 5) Introduction of Damages Based Agreements (DBA)
  - 6) Part 36 changes with potential 10% penalty award for claimants who match or exceed their own offer
  - 7) Abolishment of personal injury referral fees from April 2013.

The Government has also signalled an intention to introduce further reforms to minimise costs in RTA claims; consultations are continuing or due to conclude very shortly:

- i) Extending the scope of the RTA PI Scheme to £25,000 (Extended Consultation closed in January 2013)

Details can be found here:-

<https://consult.justice.gov.uk/digital-communications/extension-rta-scheme>

- ii) Small claims limit increased to £10,000 with Fast Track limit retained at £25,000. (Closes 8 March 2013)

Details can be found here:-

<https://consult.justice.gov.uk/digital-communications/reducing-number-cost-whiplash>

- iii) Introduce a new fixed fee structure for RTA claims which exit the Portal that can be found here:-

<http://www.justice.gov.uk/downloads/publications/policy/moj/rta-pi-scheme.pdf>

The full drafts of the implementation of LASPO, from the Ministry of Justice are awaited at the time of writing.

## 2 What is this likely to mean for claims where fraud is alleged?

- a) If the defendant alleges fraud and/ or concerns about the claim, an unintended consequences of the reforms under QOCS, is that the defendant may not be able to recover their costs. It remains to be seen whether there will be exceptions, if the Court were to find fraud.
- b) If fraudulent claimants are no longer at risk of the defendant's costs, this may encourage more to 'have a go'. It is redundant to say this is neither what is intended nor desired.
- c) If the Government extends fixed fees, to more RTA claims this may mean the defendant's insurer may be tempted to settle more claims, rather than alleging fraud, or raising concerns about the claim. The maximum fee a claimant solicitor will be able to recover for an RTA claim under the proposed new fee structure is £2,655 plus 20% of damages, for a claim that exits the portal. Again, poorer scrutiny may exacerbate rather than ameliorate the problem.
- d) If ATE premiums are abolished, and defendants can still recover costs in the event of a finding of fraud (even with QOCS this seems likely - it would be extraordinary if the court's discretion to grant full costs to the successful victim of an attempted fraud were to be overridden), claimant solicitors may experience difficulty in finding appropriate cover to insure cases with allegations of fraud, with Before The Event insurers. This raises real questions of access to justice.
- e) If the Government increase the small claims track limit to £10,000, this may leave claimants in the most unsatisfactory position that they become litigants in person, with allegations of fraud from the defendant's insurer, and the possibility of dealing with such allegations without a solicitor.

## 3 Some Points to Conclude:

- a) **Nobody wants to see fraudulent claims**, and the only winners are the frauds. The fraud who misleads the defendant's insurance / company and solicitor costs the insurance company thousands of pounds, which is unlikely to be recovered. The fraudulent client who misleads his own solicitor, obtains the services of his solicitor by deception. A detailed, critical, and open minded investigation at the outset by the claimant's solicitor will help protect the solicitor from the fraud, if there is one.



- b) **A critical and open-minded investigation**, should start as soon as the whiff of fraud is floated. This is necessary because:
- i) If the claims are bona fide, the litigant deserves to be put in as strong a position as possible to prove it.
  - ii) If the claims are wholly or partially fraudulent, the solicitors need to know as soon as possible, so that they can take appropriate steps to deal with the client and stop incurring time on their behalf
  - iii) If the client is bona fide but for one reason or another will be a poor witness, it is better to discover it early, before significant time has been expended on them.
  - iv) Early investigation is almost always going to be cheaper in the long run than running a case to trial and losing - or folding just short of trial. Failing to grasp the nettle simply increases the risk of having to abandon a case close to trial, and after incurring the maximum amount of file time.
- c) **Credibility**: it is worth bearing in mind that the issue of fraud may arise because of a credibility problem. An honest witness may nevertheless lack credibility because e.g.;
- a Poor memory
  - b Easily confused
  - c Nervousness leading to silly mistakes
  - d Language barriers
  - e Witness expresses himself ambiguously without appreciating it
  - f Self deception
  - g Laziness - guessing at an answer instead of checking his facts

A careful investigation in response to fraud allegations may satisfy a solicitor that the witness is genuine but nevertheless cast real doubt on the case's prospects of success.

- d) **Pressure to continue**, sometimes the claimant feel a pressure to continue event where the prospects of success are poor, because the solicitor threatens the claimant will a bill of costs if he discontinues.

The conditional fee agreement will normally allow the solicitor to terminate the retainer of a client to who materially misrepresented the facts. Even so, this is less likely to occur where a good investigation is conducted at an early stage.

e) **What to do if the investigations have unfavourable results?**

Credibility problems of the non-fraudulent sort would not bar a solicitor from continuing to act on a private basis, were the client determined to pursue the case notwithstanding the prognosis.

In some cases, it may be necessary to notify the court and other side of the finding e.g, that a served witness statement is incorrect - see Queen's Bench Guide, para. 7.10.4(6)

If the client does not want to continue to fund the case privately (and continue on a Conditional Fee basis), the solicitor may have the following options:-

- a) Terminate the CFA and if the case is pre -issue, simply close the case and advise the client he may be able to find a new solicitor.
- b) If the case is issued, terminate the CFA, and allow the claimant an opportunity to find a new solicitor (perhaps 14 days may be reasonable) and then apply to come off the Court record.

Evidence that a client has not told the truth, on the other hand, is likely to engage the overriding duty to the Court and to the other party, so as to prevent the solicitor from continuing to advance at least that aspect of the case.

There are inherent risks for the claimant and the firm, in pursuing a case where the prospects of success are poor and the claimant is at risk of a finding of fraud on the evidence:-

- a) If the BTE/ ATE insurer is not kept informed of the prospects, they may refuse to indemnify the defendant's costs if the case is lost. The claimant may have a claim against the firm, if the ATE insurer was not advised, and the claimant is asked to pay a costs order.
- b) The Claimant could end up bearing the defendant's costs personally. Most ATE and BTE/ LEI policies will refuse to respond if there is a finding of fraud, exaggerated damage or injury, or the claimant has materially misrepresented the facts to his own Solicitor.
- c) The claimant could face committal proceedings for contempt of court, if he or she knowingly or recklessly signs a statement of truth, the claimant knows to be false.

If one is ever in doubt, advice may be sought from the Law Society Professional Ethics Helpline, or the firm's Professional Indemnity Partner.

f) **Do you need Assistance?**

We hope you have found the Fraud Manual interesting.

If you need assistance with any aspect of these cases, please telephone **0845 083 3000** and the Clerks will be happy to assist or go to **[www.clerksroom.com](http://www.clerksroom.com)** to book online.

More details about the Clerksroom Fraud Team can be found at:-

**<http://www.clerksroom.com/group.php?pgid=87&fl=F>**

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*Andrew Mckie and Deborah Tompkinson are Barristers at Clerksroom specialising in Claimant and Defendant Personal Injury Fraud.*

*Please note the above article is not intended to provide binding legal advice. If you have a specific legal problem, you should consult a suitably qualified Solicitor or Barrister.*

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**January 2013**

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## NOTES

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the **service**  
the **people**  
the **quality**