Clerksroom – 2013 Fraud Update

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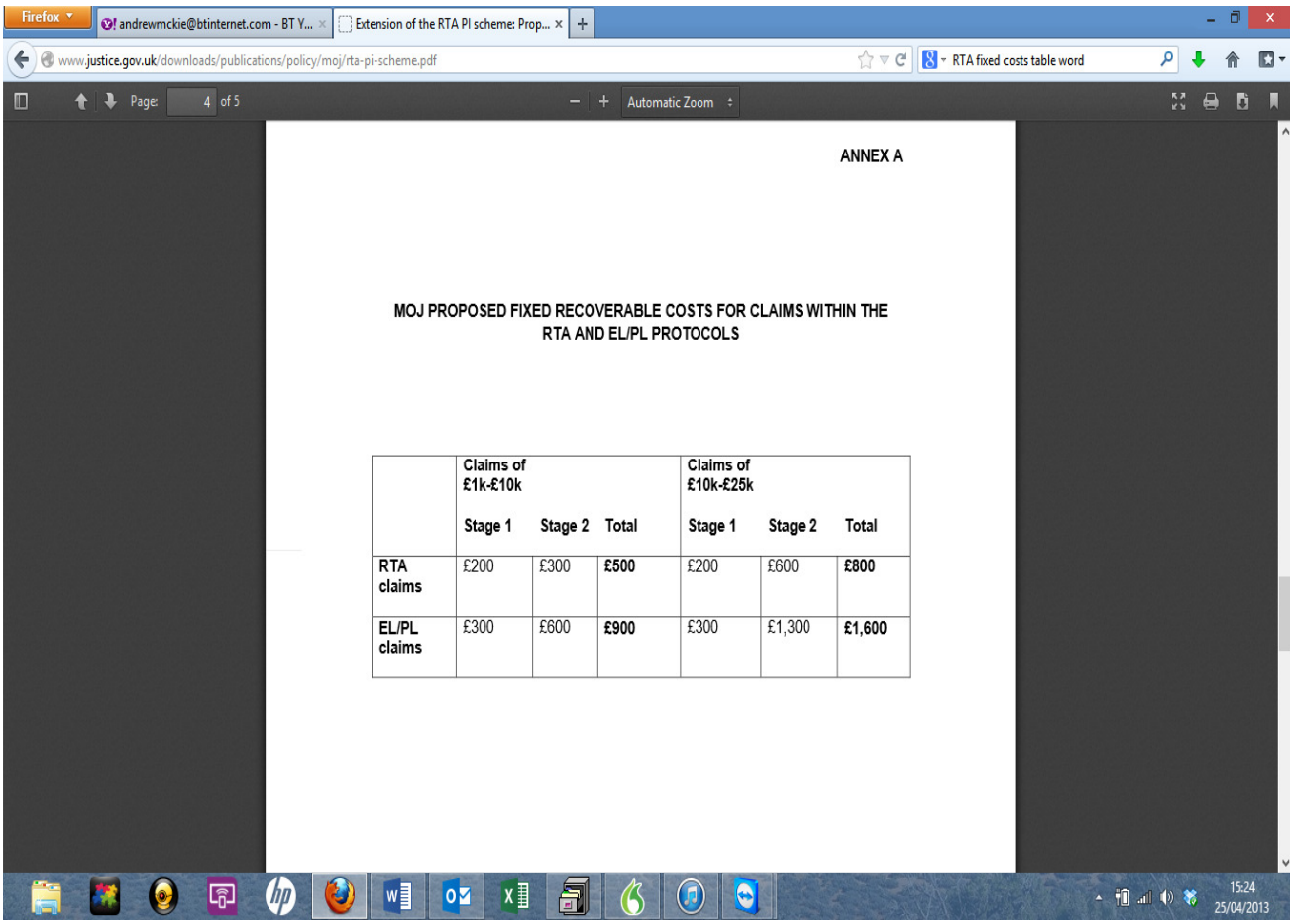
1. Fixed Costs Portal and None Portal for Cases After 31 July 2013

- A copy of the new costs Matrix is below for portal cases and fixed costs cases on or after 31 July 2013.



	Claims of £1k-£10k			Claims of £10k-£25k		
	Stage 1	Stage 2	Total	Stage 1	Stage 2	Total
RTA claims	£200	£300	**£500**	£200	£600	**£800**
EL/PL claims	£300	£600	**£900**	£300	£1,300	**£1,600**

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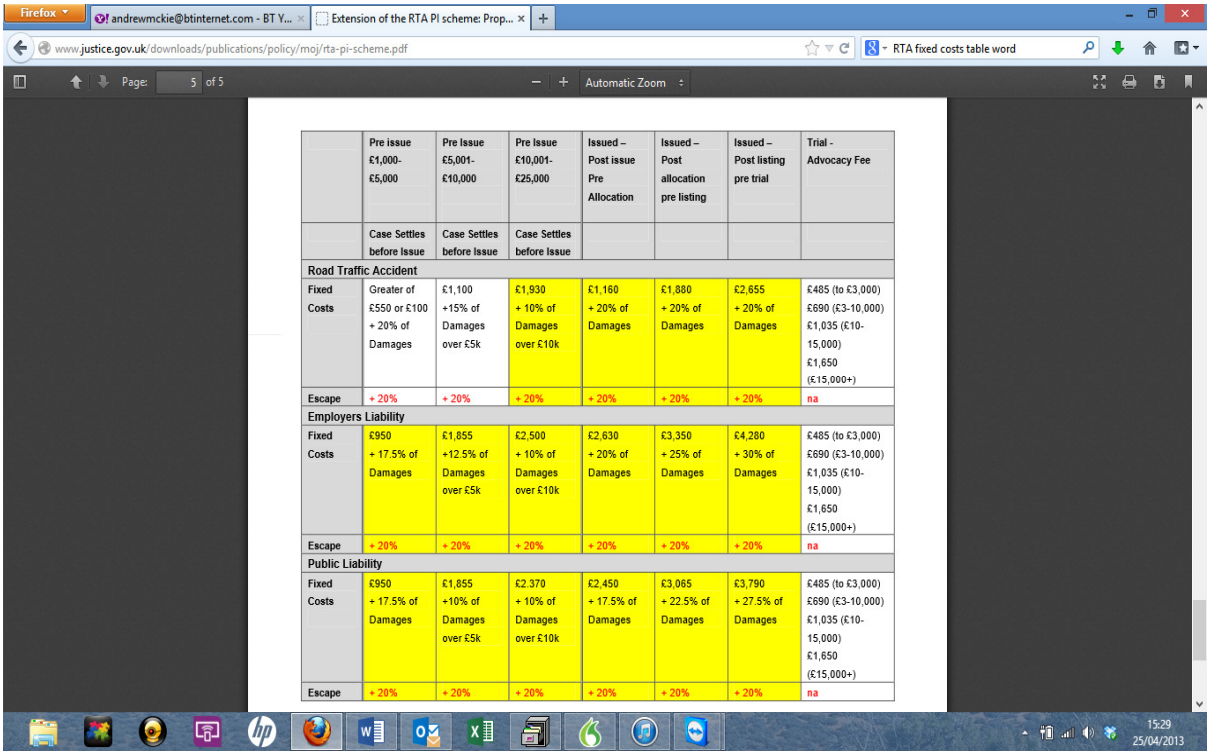

	Pre issue £1,000-£5,000	Pre Issue £5,001-£10,000	Pre Issue £10,001-£25,000	Issued – Post issue Pre Allocation	Issued – Post allocation pre listing	Issued – Post listing pre trial	Trial - Advocacy Fee
	Case Settles before Issue	Case Settles before Issue	Case Settles before Issue				
Road Traffic Accident							
Fixed Costs	Greater of £550 or £100 + 20% of Damages	£1,100 +15% of Damages over £5k	£1,930 + 10% of Damages over £10k	£1,160 + 20% of Damages	£1,880 + 20% of Damages	£2,655 + 20% of Damages	£485 (to £3,000) £690 (£3-10,000) £1,035 (£10-15,000) £1,650 (£15,000+)
Escape	+ 20%	+ 20%	+ 20%	+ 20%	+ 20%	+ 20%	na
Employers Liability							
Fixed Costs	£950 + 17.5% of Damages	£1,855 +12.5% of Damages over £5k	£2,500 + 10% of Damages over £10k	£2,630 + 20% of Damages	£3,350 + 25% of Damages	£4,280 + 30% of Damages	£485 (to £3,000) £690 (£3-10,000) £1,035 (£10-15,000) £1,650 (£15,000+)
Escape	+ 20%	+ 20%	+ 20%	+ 20%	+ 20%	+ 20%	na
Public Liability							
Fixed Costs	£950 + 17.5% of Damages	£1,855 +10% of Damages over £5k	£2,370 + 10% of Damages over £10k	£2,450 + 17.5% of Damages	£3,065 + 22.5% of Damages	£3,790 + 27.5% of Damages	£485 (to £3,000) £690 (£3-10,000) £1,035 (£10-15,000) £1,650 (£15,000+)
Escape	+ 20%	+ 20%	+ 20%	+ 20%	+ 20%	+ 20%	na

- **<u>So what does all this mean for allegation of fraud work?</u>**

- Some firms will choose no longer to undertake this area of work

- If alleged fraud cases stay in the fast track after 31 July 2013 = can be difficult to run them profitably within fixed costs.

- Cases that go to the multi-track, not stuck within fixed costs.

- Ask for a CMC to persuade the Court to put the case into the multi-track with oral submissions i.e see CPR 26.8, more than five witnesses, case likely to last for more than 1 day, need to call oral expert evidence i.e forensic engineers.

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2. <u>What if alleged fraud cases stay in the fast track, could they still be profitable under fixed costs post 31 July 2013?</u>

The answer is yes but consider:-

A) <u>Can you obtain indemnity from the client's BTE insurer?</u>

See **Brown-Quinn & Another -v- Equity Syndicate Management Limited & Another [2012] EWCA Civ 1633.**

Facts

Ms Brown-Quinn, the respondent, had a policy of LEI with Equity Syndicate Management Limited, the appellant. The contract of insurance provided that should the respondent need the assistance of a legal representative, that representative was bound to work under terms provided for the appellant. The appellant had a number of solicitors whom they used on a regular basis. Amongst those terms was a clause that stated that the representative would only be paid at an agreed rate (this was £125 per hour). A further term was that, should the appointed representative cease to act or be dismissed by the respondent, the insurance would end unless the appellant agreed to another representative acting on her behalf. The respondent wished to pursue an employment claim and chose to fund this matter using her LEI. She selected a solicitor who did not work regularly for the appellant and the firm did not agree to act on the terms provided by the appellant. The appellant subsequently refused to assume responsibility for the respondent's legal expenses.

Decision

Applying Article 4 of Council Directive 87/344 EEC (the provisions of which are repeated in Articles 198-205 General Insurance Directive 2009/108/EC). The Court held that the appellant was not entitled to deny the respondent the benefit of her LEI. European Law clearly establishes the right an insured party to choose the lawyer they wish to represent them.

Mr Justice Longmore said in his overall conclusion:

"It is quite wrong that, despite the warning shot delivered to legal expenses insurers by this court in <u>Sarwar v Alam</u> [2002] 1 WLR 125 para 44, insurers should many years later be issuing policies which do not comply with the Regulations."

The decision provides an irrefutable message to insurers against limiting the rights of an individual with LEI to select their own legal representatives.

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a) If there is going to be a dispute over liability, causation etc, and the case falls out of the portal, into the new fixed costs, it is well worth making more extensive enquiries as to BTE cover, and getting copy policy documents and calling the insurers to check, even if the Claimant says there is no cover, they often do not realise. Household, credit cards, bank accounts, car insurance policies etc often have BTE cover. Your clients will often not know, offer to send out an agent to check the policies and make the calls with your client there, it costs £100, but us well worth it, if there is cover.

b) If claimants do not issue cases, then Defendant litigation teams do not have a practice.

B) Alleged Fraud Exits From the Portal

Exit Points	**How?**	**Section of Protocol in Support**
Stage 1	The Defendant makes an admission of liability but alleges contributory negligence (other than in relation to the Claimant's admitted failure to wear a seat belt);	Paragraphs 6.15 (1) of the Protocol.
Stage 1	The Defendant does not admit liability; or liability is denied	Paragraphs 6.15 (2) of the Protocol.

Stage 2 Exit Points

- Where an offer made in the Stage 2 settlement pack, is withdrawn, after the Total Consideration Period. (see paragraph 7.39 of the Protocol). Where D2 admits but then starts to investigate for fraud.
- Where the Court considers that the procedure is not appropriate (see PD 8B 7.2)
- Where a Protocol offer is withdrawn, after proceedings are started (see PD 8B 10.1).
- All allegation of fraud.
- Where an admission of liability/ causation is withdrawn.

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Other revenue streams before you issue:-

C) PAD applications for claimants–

The Pre Action Protocol.

RTA CASES

SECTION A

In all cases where liability is at issue –

(i) Documents identifying nature, extent and location of damage to defendant's vehicle where there is any dispute about point of impact.

(ii) MOT certificate where relevant.

(iii) Maintenance records where vehicle defect is alleged or it is alleged by defendant that there was an unforeseen defect which caused or contributed to the accident.

If a party refuses to disclose the engineer's report pre issue or photographs of the damage to the vehicle, consider a PAD application, if there is a dispute concerning causation, areas or consistency of damage, and then other side refuses to disclose.

Useful where:-

a) D argues causation/ LVI/ no collision / inconsistent damage and refuses to disclose engineering evidence/ photographs.

b) Argue **proportionality** – better to have the engineering evidence pre issue to determine prospects – the pre action protocol says you are entitled to it. There will almost always be a dispute in these cases about nature extent and location of damage.

c) Ask D in open correspondence 'Is the point of impact agreed at ……..?". If the answer is no, ask for engineering evidence and photographs and if not disclosed issue a PAD.

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D) Other routes out of Fixed costs:-

See CPR 45:-

Claims for an amount of costs exceeding fixed recoverable costs

45.13

(1) The court will entertain a claim for an amount of costs (excluding any success fee or disbursements) greater than the fixed recoverable costs ***but only if it considers that there are exceptional circumstances*** *making it appropriate to do so.*

(2) If the court considers such a claim appropriate, it may –

(a) summarily assess the costs; or

(b) make an order for the costs to be subject to detailed assessment.

(3) If the court does not consider the claim appropriate, it will make an order for fixed recoverable costs (and any permitted disbursements) only.

Failure to achieve costs greater than fixed recoverable costs

45.14

(1) This rule applies where –

(a) costs are assessed in accordance with rule 45.13(2); and

(b) the court assesses the costs (excluding any VAT) as being an amount which is less than 20% greater than the amount of the fixed recoverable costs.

(2) The court must order the defendant to pay to the claimant the lesser of –

(a) the fixed recoverable costs; and

(b) the assessed costs.

NB There is no dentition of exceptional circumstances, each case will turn on its own facts.

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E Fixed Costs Post July 2013 Part 36 offers

If the claimant obtains a judgment at least as advantageous as their own Part 36 offer then, unless the court considers it unjust, they will be entitled to:

Their costs up to the end of the relevant period, presumably in accordance with the relevant fixed costs tables

Costs on the indemnity basis from the end of the relevant period

Interest on damages at up to 10% above base for some or all of the period starting with the date on which the relevant period ended.

Interest on the indemnity costs at up to 10% above base.

An additional amount calculated as 10% of the amount (damages) awarded

From a practical point of view in this regard, once a claim has exited the portal, therefore, it will be wise for claimants to consider reasonable early Part 36 offers to encourage defendants to settle.

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3. Fraud: A New Focus?

Ostrach v McGreal and Others 2013 (Central London)

HHJ Mitchell dismissing 8 alleged Linked claims (all alleged staged accidents) stated:-

""it is manifest that dishonesty was rife... I hope the message going out from this Court will be that if people lend their names to this kind of swindle they risk going to prison... I do hope that some publicity can be given to this case so that members of the public can be made aware of the consequences of members of the public getting involved, namely prison."

And went onto give a warning to Solicitors:-

[they] *"**should think long and hard when there are no witnesses being called to corroborate the accident. This may be a pointer to the fact that the accident is staged and in my judgment it could be an abuse of process to proceed with such claims."***

- ***What does this mean?***

a) The Courts are taking a far more robust approach to fraud most notably Central London and Birmingham.

b) It is becoming difficult to win cases, especially in those Courts, without a very credible client.

c) Claims, especially under fixed costs, will require early vetting from Solicitor/ Counsel to test credibility at an early stage. Early conferences with Counsel are now essential.

d) The door is opened for wasted costs orders against firms/ hire companies/ accident management companies that pursue hopeless claims. This will become more prevalent.

e) **Early decisions on case are now essential. To protect your firm:-**

i) Prior to issue a statement should be signed and on file from the claimant.
ii) The client should be seen in person (or if not by telephone), for a conference before issue.
iii) Signed statements should be on file from any keep witnesses.

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If not see: ***Rasoul v Linkevicius & Grouparama Insurance (*Oct 2012):-**

In Rasoul a claim, where fraud was alleged collapsed at trial in what the Judge described as "spectacular fashion". A wasted costs order was made against the Solicitors because of the way in which the litigation had been conducted.

HHJ Collender QC who made the costs decision, placed considerable reliance on the following facts in making a wasted costs order as against the claimant solicitor:

1. *The defendant insurer had placed the claimant (and his solicitor) on notice at an early stage that they had concerns "relating to the bone fides of the claims".*
2. *The "unusually full" defence set out the defendant's position on fraud "clearly and robustly".*
3. *In circumstances where the veracity of the facts in the witness evidence was being challenged, having the statement of truth on a separate sheet rather than in the body of the document was "a serious defect".*
4. *The collapse of the witnesses at trial who abandoned their statements indicted "either extreme incompetence" … "or an attempt to establish a case on fabricated evidence".*
5. *The failure to obtain a signed statement from the claimant or witnesses before the institution of proceedings where fraud was clearly being alleged, was of itself evidence if incompetence (and therefore negligence).*
6. *The collapse of the trial showed the weakness, if not inappropriate nature, of the claim and the collapse supported the early allegation made by the insurer from the outset.*
7. *Proper competent work by a solicitor would have insured this case collapsed long before the trial that took place.*

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4. Fraud: Tougher Case Management Decisions to Come

Mohammed and others v CIS (2013) Central London

The Court struck out the claims of two claimants for none compliance with directions,.

DJ Avent stated:

"There has been a wholesale disregard and/or avoidance of what was necessary and no real attempt, other than to pay it lip service, to comply with the unless order"

"It is an undesirable fact that fraudulent road traffic accident claims are extremely prevalent. They tie up and use vast amounts of Court time but can be very profitable for the fraudster, particularly so if there is a multiplicity of claims by one or more claimants. Fraudulent claims also undermine the integrity of the Courts and of justice generally. As Mr Nugent observed in his Skeleton Argument, where fraud is front and centre of the Defence, two clear principles emerge: firstly, that public policy in the administration of justice require that claims of this nature be properly investigated and deterred where appropriate and, secondly, that this can only happen if the claimant gives full and frank disclosure. In a case where a claimant is alleged to have concocted their claim, it is probable that that claimant will not be willing to assist in establishing the fraud."

"Indeed, in cases where the first defendant, as here, effectively disappears and takes no part in the litigation whatsoever, the insurance company, which is obligated by law to stand, in indemnity terms, behind their insured driver, will be conducting the litigation effectively blind and at an obvious and distinct disadvantage"

"Therefore, where the claimant's solicitors are on notice of fraud then, in my judgment, they have a positive duty to advise their client to render as much assistance to the Court as possible which includes the proper disclosure of relevant documents. In practical terms this is no more or less than the claimant complying with his duty to further the overriding objective pursuant to CPR 1.3 by rendering that assistance. The disclosure of such documents is as central to the Defence as it is to the claimant who wishes to rebut allegations of fraud. Of course, a claimant in such a case may decide not to give this assistance but if he chooses to take that route then the calculus of risk must change"

What does this mean in practice?

a) The Courts will now be more willing to make onerous disclosure orders against claimants where fraud is suspected (all previous accidents, medical reports and engineers reports etc).

b) It is essential to check C's accident history before proceedings are issued, the outcome of any previous (or subsequent) and be concerned about any claims that did not settle or where dropped by C.

c) C should give a full statement before proceedings are issued dealing with any allegations.

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5. What if we do not know the allegations, as D2 does not plead them?

a) ***Hussain v (1) Amin (2) Charters Insurance Ltd : [2012] EWCA Civ 1456*** where LJ Davies stated:-

> *"I would, however, particularly wish to add my own comments about the pleaded defence of the second defendant. It was perfectly proper to join issue on the primary facts alleged in the Particulars of Claim and as to whether there had indeed been negligence and whether the claimed losses had been caused thereby.* ***But the pleaded defence went much further in paragraphs 7 and 9, setting out a number of matters which, it was alleged, raised*** **"significant concerns" as to whether or not this had been a staged accident requiring further investigation.** *Possibly, although I have my reservations, such a pleading could be justified as an initial holding defence.* ***But it is a case pleaded on insinuation, not allegation. If the second defendant considered that it had sufficient material to justify a plea that the claim was based on a collision which was a sham or a fraud, it behoved it properly and in ample time before trial so to plead in clear and unequivocal terms and with proper particulars. Thereafter the burden of proof would of course have been on the second defendant to establish such a defence.***
>
> ***In the event, as I see it, the claimant was faced with a hybrid, he in effect being required at trial to deal with an insinuation of fraud without any express allegation to that effect pleaded.*** *Realistically, the trial judge dealt with the matter in the round, concluding that the claim was not fabricated or fraudulent and that the accident had not been staged****. But this sort of pleading should not be sanctioned. It is in fact something of an irony that the second defendant seeks to criticise the conduct of the claimant's solicitors, when in part at least they were having to deal with an abusive defence.".***

What does this mean?

i) D2 must now set out its full concerns in the Defence. D2 should not plead vague 'concerns'.

ii) The defence must include full allegations which C can reply to.

iii) If the defence is vague, consider an application to strike out

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6. 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

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, of which consultations are on-going 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

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7. 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.

b) If fraudulent Claimants are no longer at risk of the Defendant's costs, this may encourage more Claimants to 'have a go'.

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.

d) If ATE premiums are abolished, and Defendants can still recover costs in the event of a funding of fraud (even with QOCS), 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.

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8. Some Points to Conclude:-

a) **Nobody wants to see fraudulent claims**, and the only 'winners' are the fraudulent Claimants themselves. The 'Fraudster' 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, obtain the services of his Solicitor by deception. An in depth and open minded investigation at the outset by the Claimant's Solicitor will protect the Solicitor from the fraud, if there is one.

b) **A full 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, they deserve to be put in as strong a position as possible to prove it.

ii) If the claims are 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

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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. However, if is essential that this problem was less likely to occur where a good investigation was 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 did not want to continue to find the case privately (and continue on a Conditional Fee basis), the Solicitor may have the following options:-

a) Terminate the Conditional Fee Agreement 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 litigated, 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 had not told the truth, on the other hand, was 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:-

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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 indemnify is 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.

9. Do you need Assistance?

We hope you have found the talk 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 to book online.

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

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

The Author

Andrew Mckie, Barrister of Clerksroom Manchester, is a specialist in claimant and defendant personal injury, with a particular interest in cases involving alleged fraud and credit hire. Andrew is a former Associate Solicitor and Solicitor Advocate, and was called to the Bar in July 2011.

Before qualifying, as a Barrister, Andrew has 6 years advocacy experience, as a Solicitor. Andrew has worked for a number of leading Legal 500 firms specialising in RTA fraud, including Keoghs LLP and Weightmans LLP, acting for some of the leading insurance companies in the UK.

Andrew has also worked for a number of leading claimant personal injury and credit hire law firms, acting for some of the largest credit hire companies in the UK. Most recently, Andrew was the Head of Litigation and In House Solicitor Advocate at a claimant personal injury and credit hire firm, with over 50 staff, and Andrew brings this vast experience, as a Solicitor, to the Bar.

Andrew is a Member of the Personal Injuries Bar Association and Association of Personal Injury Lawyers

Andrew can be contacted by email at andrewmckie@btinternet.com

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