EDITOR: **Anthony Johnson**
ASSOCIATE EDITORS: **Marcus Grant, James Henry**
Issue VI September 2017

TGC Fraud Update

The Newsletter of the TGC Fraud Team

LONDON
1 Harcourt Buildings
Temple, London, EC4Y 9DA
T +44 (0)20 7583 1315

THE HAGUE
Molenstraat 14, 2513 BK
The Hague, Netherlands
T +31 70 221 06 50

E clerks@tgchambers.com
W tgchambers.com
DX 382 London Chancery Lane

Index

Editorial

By Anthony Johnson ajohnson@tgchambers.com

I am pleased to present another issue of TGC Fraud Update. This is actually the biggest edition to date, and the wide variety of articles reflects the diverse issues that insurers have been grappling with in this field and the wide variety of cases in which Members of Chambers have been involved.

Four of the articles deal with Court of Appeal level decisions, which illustrates the rapidly developing nature of binding law in this area. As is always the aim with this publication, we have sought to balance the more cerebral issues of appellate jurisprudence with practical hints and tips to deal with cases of this nature in practice. I suspect that many readers will find that George Davies' article touching upon issues such as advocacy before a Deputy District Judge, cases being 'bumped' and inadequate time estimates strikes a chord with them.

As well as dealing with the past and present of fraud law, in this issue we take a look into the future with a version of an article by Alex Glassbrook, a leading expert in the law as it applies to driverless cars. It certainly makes interesting food for thought for anybody who practices in this field, as a whole host of issues (some familiar and others less familiar) will be raised when driverless cars first become road ready and eventually take over as the norm.

This marks the end of my time as Editor of Fraud Update – I shall be handing the reins over to Assistant Editor James Henry for the next edition with Tim Sharpe taking over as Assistant Editor. A big thank you to all of the contributors during my time in charge, but an even bigger thank you to our readership for your helpful feedback and for staying with us over the last two years.

Lessons from the court of appeal's decision in *Hamid*

Paul McGrath

In March of this year, I appeared in the Court of Appeal in the case of *Hamid v (1) Khalid (2) Co-Operative Insurance* [2017] EWCA Civ 201.

The appeal was against the decision of Mrs. Recorder Howells, sitting in Manchester and hearing a three-day trial on whether the Claimant had proven that a road traffic accident had taken place. The Second Defendant had pleaded fraud. The Judge found that the accident was genuine and that the case had been proved. The Second Defendant appealed. This article concentrates on how the judgment of the Court of Appeal might be relevant in other similar cases, rather than a summary of the specific findings on the individual case.

Firstly, the Court of Appeal provided a useful, and up to date, review of the recent authorities on the appellate Court's function in relation to overturning findings of fact (paragraphs 26–28). This is useful to any party considering an appeal against a finding of fact, not just those appealing in this area of law.

Secondly, the Court also considered the position where an appeal Court is asked to set aside an acquittal of fraud. In *Hamid*, the insurer was **not** asking for the appeal Court to substitute a finding of fraud but was instead asking for the case to be dismissed as not proven or, alternatively, sent back for retrial. The Court of Appeal reviewed the law in this area (as it was plainly a relevant issue for such cases) and stated that an appeal Court should not substitute a finding of fraud on appeal except in the clearest of cases, citing *Akerhielm v De Mare* [1959] AC 789. However, the Court accepted the insurer's submission that a distinction could be drawn where a retrial is sought instead, citing *Glaiser v Rolls* (1889) 42 Ch D 436 @ 459 (paragraphs 29–30). This point of practice is worth noting for potential appeals in such cases.

Thirdly, the Court of Appeal made some interesting comments towards the end of the judgment in relation to the role that proportionality might play when determining whether a Judge has dealt with the evidence sufficiently to explain and justify the conclusion (paragraphs 39–40).

Finally, and in relation to costs, the Claimant and the First Defendant submitted to the trial Judge that as the insurer had pleaded, but failed to prove, fraud, they ought to pay costs on the indemnity basis. The Judge rejected this submission, holding that the decision to plead and argue that the accident was staged or contrived was a reasonable one based upon the evidence before the insurer (they were awarded costs on the standard basis). After the appeal was dismissed, the Claimant and First Defendant sought indemnity costs in relation to the appeal. The Court of Appeal rejected the application (awarding standard costs), holding that the appeal was a reasonable one and noting that the decision at first instance may well have been different before a different trial Judge (referencing paragraph 35 of the judgment).

Claiming against a driver identified as 'person unknown'

Anthony Lenanton

In *Cameron v Hussain* [2017] EWCA Civ 366, the Court of Appeal held that proceedings could be amended to name the defendant as *'person unknown'* and so oblige the relevant s.151 insurer to satisfy any unsatisfied judgment

Facts

The Claimant suffered modest injury and vehicle related damages in a road traffic accident that took place on 26.5.13. The driver at fault did not stop but a passing taxi driver took down the registration number. The First Defendant was the registered keeper but not the driver, the Second Defendant insured the vehicle under a policy it had issued to another person using a fictitious name.

The Claimant sought to substitute for the First Defendant a party identified only as *'the person unknown driving vehicle registration Y598 SPS'*. The District Judge dismissed the Application and granted Summary Judgment in favour of the Second Defendant. The Circuit Judge dismissed the Claimant's appeal.

The issue before the Court of Appeal was whether, in the present circumstances, the Claimant could bring proceedings against an unknown person. If not, the Claimant's only remedy was to claim against the MIB under the Untraced Drivers Agreement (UDA), which was less favourable. If the Claimant was correct, the insurer of a vehicle would be liable under s.151 of the Road Traffic Act 1988 to meet any judgment obtained against the unidentified driver, regardless of whether or not they insured that person.

Arguments before the Court of Appeal

The Claimant submitted that it was established that where it was *'both necessary and efficacious to do justice'* the Court would issue proceedings against defendants identified by description rather than name. C argued it was *'necessary'* because in this case the driver at fault had concealed his identity by failing to stop and *'efficacious'* because the insurer will then be liable to satisfy any unsatisfied judgment.

The Second Defendant submitted that an action against an unnamed person should be exercised in exceptional circumstances only and where there was no alternative remedy, which there was in this case under the UDA. It also submitted that to allow such a claim to proceed would prejudice the insurer and give rise to a range of problems in relation to s.151 claims (including potential fraud) as the insurer would have no way of questioning the driver at fault.

Decision of the Court of Appeal

The Court of Appeal (by a majority, Sir Ross Cranston dissenting) allowed the appeal and granted the Claimant permission to amend proceedings to name *'person unknown'* as the new First Defendant.

The Court of Appeal held there was no reason in principle why, in appropriate cases, it should not be permissible under the CPR for a claimant to bring proceedings against an unnamed defendant, suitably identified by an appropriate description (following *Bloomsbury v News Group Newspapers* [2003] 1 WLR 1633).

The Court of Appeal emphasised that the decision to allow such an amendment to the pleadings was limited to s.151 cases, where the vehicle was insured and the insured and the registered owner are identifiable. Further, to proceed against an unnamed person would be permitted only where it would be *'efficacious'* and consistent with the Overriding Objective to decide cases justly and proportionately.

Comments

The decision has been hailed as a victory for victims of 'hit and run' drivers who will, assuming there is a s.151 insurer, no longer have to rely upon the UDA along with its limited costs recovery and bar on subrogated claims. Claimants will need to identify the unnamed driver by reference to the specific vehicle he or she was driving and at what time and place.

Insurers will, understandably, be concerned about the consequences of the decision. It remains to be seen whether they will seek a declaration avoiding the policy under s.152 with greater frequency. Gloster LJ had little sympathy with the practical problems such claims would pose to insurers and noted that as insurers gain the economic benefit so should they bear the burden of carrying out appropriate checks on the insured prior to inception.

Dealing with the new reality—a personal view

George Davies

Up until a few years ago, allegations of fraud in road traffic claims were taken very seriously by the County Courts. Such trials were invariably allocated to the Multi-Track and heard before a Circuit Judge or Recorder. Time slots for trials usually started at a day and a half (minimum).

Such time estimates were entirely appropriate given the nature of the allegations in fraud cases. A defendant insurer will have more evidence to present than the normal run of the mill PI claim and invariably there will be much more cross-examination to get through. This naturally leads to longer submissions, requires the deployment of Skeleton Arguments and places a greater burden on the trial judge when it comes to his or her final ruling.

Due to the increasing financial pressures on the Civil Court system from about 2010 onwards, it seems that many Circuit Judges are spending more of their time dealing with unrepresented litigants in family cases. In order to accommodate these new listing pressures, fraud cases were initially kept on the Multi-Track but increasingly came to be heard by District Judges (often with a special dispensation from the relevant Designated Circuit Judge). Of course, many DJs are perfectly capable of hearing such cases but, in my view, Circuit Judges and Recorders tend to be better versed in the rules of evidence and tend to be more robust in their assessment of the witness evidence. However, at least the (then) continued allocation to the Multi-Track meant that adequate time was still being given to such cases.

Since the implementation of the Jackson reforms in 2013 onwards, the Courts seem to be increasingly allocating fraud cases to the Fast Track – perhaps in the erroneous belief that all pleadings of fraud can simply be accommodated by a quick assessment of 'fundamental dishonesty' at the conclusion of the case.

What also seems to be happening is that both claimants and defendants have either not demurred from such allocation or they have both actively sought it. Claimants' solicitors presumably wish to do this because, with fixed fees and no uplift, they neither have the financial resources nor incentive to run multiple Multi-Track trials. Meanwhile, defendant insurers often wish to keep such cases on the Fast-Track because the costs risk is much diminished following the introduction of fixed fees.

However, I think that a number of material problems are becoming apparent from the routine allocation of such cases on the Fast Track:

The first issue concerns time. I have already set out above why I think more than a day is required for these cases. The lack of adequate time makes it harder for a defendant insurer to present its case in the best light. It's also much easier for a busy DJ under time pressure to err on the side of caution and give a claimant (accused of fraud) the benefit of the doubt. There is also the related risk of trials going part-heard. This seems to defeat the costs savings justification of allocating to the Fast Track and can become a logistical headache if the trial judge is not sitting full-time.

The second issue concerns judicial experience. The County Court seems to be placing increasing reliance on deputy DJs as fewer full-time DJs are being appointed. Of course, there are many competent deputies who can deal with such cases but there are also many deputies who simply lack any relevant experience. I have had one particularly unhappy and frustrating experience of trying to present several bundles of similar fact evidence to a deputy who was a tenant at set specialising in property law. Ships passed in the night.

The third issue concerns listing. Since 2013, PI and RTA cases appear to be treated as a low priority by the Courts and are often 'bumped' down the list. In my experience, it is not now unusual for a trial to be vacated on at least two occasions because of 'lack of judicial capacity'. It seems to be easier for a Court to bump a Fast-Track rather than a Multi-Track listing. This means that it might have ended up being cheaper to have secured a Multi-Track listing in the first place rather than having to pay for multiple aborted Fast-Track hearings.

The fourth issue concerns the trial setting. In my view, allegations of fraud and dishonesty should be made in a proper, open Court with due formality. They should not be heard in a DJ's Chambers when everyone is hunched around a table within reach of each other. The trial setting will naturally affect the quality of the evidence and any assessment which flows from it. Some witnesses may well take advantage of such relative informality whilst others may well feel intimidated by being in such close proximity to those against whom they are making serious allegations.

The current reality is that we have to litigate with an increasingly imperfect system. In my view, the concerns listed above can be mitigated to some extent. For example, defendant insurers should make effective use of Skeleton Arguments (which save time and can help educate an unenlightened deputy). They should also refuse to put up with a rushed judgment. For example, if submissions don't finish until 4pm, then it would seem appropriate to remind the Judge that full and proper consideration needs to be given to all the evidence and that judgment may well have to be reserved with any future issues to be dealt with in writing (i.e. via Email).

A final thought concerns the latest round of Jackson's reforms. It seems that there will be a new 'Intermediate Track' for claims valued up to £100,000. Fixed fees will apply. Thus, perhaps, the need for longer trials can be balanced with controlled costs. If the Courts can be persuaded to allocate fraud trials to such a Track then that may well meet some of the issues raised above.

QOCS protection in claims against the MIB

Ellen Robertson

The Court of Appeal has held that proceedings brought against the Motor Insurers' Bureau under the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Board) Regulations 2003 constitute claims for damages for personal injuries. The protection of Qualified One-Way Costs Shifting (QOCS) will therefore apply to claims brought against the MIB.

The QOCS regime as implemented by CPR 44 applies inter alia to *"proceedings which include a claim for damages…for personal injuries."* The Claimant sustained serious injury in an RTA in France when a wheel detached from a lorry in front of him. He was unable to trace the other vehicle or its driver. He brought a claim after a long delay which was dismissed on the ground it was statute-barred. The Claimant appealed the decision but the Court of Appeal struck out that appeal on the basis that it was bound to fail in the light of the Supreme Court's decision in *Moreno v MIB* [2016] UKSC 52. The issue was therefore solely concerned with the costs of the claim and the unsuccessful appeal.

The Court of Appeal held that a claim against the MIB did fall within the scope of QOCS. Having regard to the ECJ principle of equivalence, the Court found that unless the QOCS regime encompassed MIB claims, those claimants would be treated less favourably than claimants bringing their claims against insured drivers. The Court held that victims of road traffic accidents should be entitled to the same compensation regardless of which provision of a Directive was relied upon. The Court also agreed with the judge's comments at first instance that the claim was within the rationale that inspired QOCS. The Court also noted that applying common law taxonomy to claims created under EU law may be misleading, noting the relevant Directive required the ability to claim 'compensation' and that the Claimant's claim could be understood without difficulty as a claim for compensation for personal injuries.

The decision is likely to have an effect on other statutory claims, such as RTA claims made directly against insurers under the European Communities (Rights Against Insurers) Regulations 2002. At first glance, the Court of Appeal's decision does not sit well with the same Court's decision in *Nemeti v Sabre Insurance Co Limited* [2013] EWCA Civ 1555, in which the Court considered, obiter, that such a claim was not a claim for damages in personal injury or a claim in negligence, but a claim for indemnity under statute.

It is likely that future claims under the Regulations will be subject to the QOCS regime, as can be seen from the approach taken in the recent decision of Mr Recorder Grahame Aldous QC in Karakus v Tradewise Insurance Services Ltd (Central London County Court, 19.07.17), in which Shaman Kapoor of Temple Garden Chambers successfully represented the Defendant. The Claimant's appeal against the District Judge's decision that a three-year limitation period applied to her claim under the 2002 Regulations was dismissed upon the basis that the *obiter* remarks were not intended to implement a different limitation regime for claims under the Regulations. The claim was, therefore, a claim for damages in personal injury. The judge's attention was drawn to the Court of Appeal's decision in *Howe*, which he considered entirely supportive of the underlying rationale of his reasoning.

Given the interpretive approach adopted in *Howe* to ensure compliance with EU law, it appears likely that QOCS will apply to claims brought against insurers as RTA insurers pursuant to the Road Traffic Act 1988 and to claims brought against the insurer as an Article 75 insurer.

Qader v. Esure: an appraisal

Robert Riddell

The question for the court in *Qader & ors. v. Esure Services Ltd.* [2016] EWCA Civ 1109 was straightforward: do fixed costs continue to apply to a personal injury claim which starts life in the Ministry of Justice Portal but concludes in the Multi-Track? But what appeared to be a simple exercise of statutory interpretation turned into something much more controversial. Although a close reading of the relevant provisions of CPR 45 revealed an answer, it was not one which the Court of Appeal favoured. Accordingly, the Court then considered whether the rules had been incorrectly drafted. In keeping with the spirit of the times, it appeared that some 'fake news' had made its way into the CPR.

Facts

The Claimants in *Qader* (and in the conjoined appeal of *Khan & anor. v. McGee*) had initially pursued PI claims through the RTA protocol. Following denials of liability, the claims exited the Portal and proceedings were issued under CPR 7. Fraud was raised in both Defences: *Qader* was alleged to have been a slam on, while in *Khan* it was suspected that the Claimants had colluded with a stooge vehicle to contrive the accident. Accordingly, the claims were allocated to the Multi-Track.

As the Court of Appeal noted, section IIIA of CPR 45 appears to make comprehensive provision for the recovery only of fixed costs in all cases which start but no longer continue under either of the relevant Protocols (with only limited exceptions). On the face of it, both *Qader* and *Khan* fell within the ambit of the section. However, the District Judges who allocated the claims to the Multi-Track appear to have concluded that allocation to the Multi-Track automatically disapplied the fixed costs regime, as directions were given on allocation for the filing of budgets and Costs and Case Management Conferences.

Both cases generated divergent approaches: in *Qader*, it was held that (notwithstanding allocation to the multi-track) CPR 45.29A unmistakeably provided for the fixed costs regime to apply; whereas in *Khan* the allocation judge considered that there were exceptional circumstances which permitted a claim for costs greater than fixed costs. Both cases were subject to a first appeal, before the matters eventually came before the Court of Appeal.

Judgment

The Court of Appeal (Briggs LJ giving the leading judgment) found that the language of CPR 45.29A and B appeared unambiguously to apply the fixed costs regime to all cases started under the Protocol, wherever the claim ends up. The Court considered that this was not an outcome which could be said to be irrational, even though it would potentially lead to rough justice for some claimants. But (without expressing itself in these terms) the Court plainly considered that outcome unjust. As Briggs LJ noted, where fraud is pleaded, the stakes are high for both claimants and defendants; proceedings are pursued and defended on the basis that no stone is left unturned and, critically, at very substantial cost. In that context, it was "unattractive" that the rules as drafted left claimants defending serious allegations of dishonesty on the basis of a fixed cost regime which was plainly designed to be suitable only for Fast-Track cases.

The Court reached that last conclusion on what it termed a careful analysis of the historic origins of the scheme. Having probed the depths of Jackson Report annexes, Government consultations, and Ministerial correspondence, the Court found that the Rule Committee had apparently failed to implement the continuing intention of the Government to exclude Multi-Track cases from the fixed costs regime which had been enacted for cases leaving the Portal. Further, as identified by Lord Nicholls in *Inco Europe Limited v. First Choice Distribution* [2000] 1 WLR 586, the Court had an exceptional jurisdiction to correct legislation where it suffered from an obvious drafting mistake to make it compatible with the intention of the legislator. Accordingly, the court re-drafted CPR 45.29B to limit the application of the scheme to claims not allocated to the Multi-Track.

Comment

The decision raised eyebrows for the way in which the Court gleaned statutory intent and its creative approach to correcting what it viewed as defective drafting. As Briggs LJ noted, the Rule Committee regularly reconsiders rules when invited to do so by the Court. However, such amendments have no retrospective effect, and in this instance the Court wished to provide more fundamental relief to claimants currently pursuing claims.

The decision in *Qader* was widely interpreted as a setback for defendants in relation to costs. However, whilst it is correct to say that defendants will be unable to limit their liability for claimants' costs to fast track costs, it now seems very likely that such costs will at least be fixed. That was the conclusion of the review into the fixed recoverable costs (FRC) regime published by Jackson LJ in July 2017. As well as extending fixed costs to all Fast-Track claims, the report recommended the adoption of a new 'intermediate' track for claims of modest complexity up to a value of £100,000.

The track would be divided into four bands: from quantum-only personal injury claims (band 1) to claims with liability, causation or quantum disputes (bands 2-4). The intermediate track would be subject to a streamlined procedure to ensure that the matters could be tried in less than three days and with not more than two experts on each side. If adopted, it would almost certainly be the appropriate track for the majority of fraud trials, with the exception of those involving multiple accidents and large-scale fraud rings.

It is not clear whether the decision has generated significant satellite litigation at the allocation stage (as the respondent in *Qader* argued). Insurers will wish to remain vigilant about the potential for a growth in the number of allocation disputes, particularly once the Government's reforms to the small claims track have been implemented. Given one of the Government's stated objectives in the whiplash reforms was to discourage exaggerated or fraudulent claims, it would be somewhat perverse if the reforms (and the decision in *Qader*) in fact increased the costs of fighting such claims.

Bad character evidence in civil claims

William Irwin

In suspected fraudulent claims, the credibility and character of the suspected fraudulent claimant is nearly always central. Anyone practising in this field will have seen a claimant overcome what look like insurmountable evidential obstacles when the Court obtained a positive impression of them. For defendants, then, obtaining and deploying evidence as to the probity and credibility of a claimant is critical, if a Court is not to have the wool pulled over its eyes.

What, then, is the approach taken by the Courts to admitting evidence which goes to the character of a party?

The general approach to the admission of evidence going to character in civil cases is based on an analysis of that evidence as similar fact evidence. In *O'Brien v Chief Constable of South Wales Police* [2005] 2 AC 534, the House of Lords identified a two-stage process for considering the admission of such similar fact evidence. The first stage is for the court to consider whether the evidence is potentially probative of some issue in the action. The second stage is for the court to consider whether to exercise its discretion to exclude evidence which would otherwise be admissible.

In *O'Brien* the following factors were said to weigh against the admission of similar-fact evidence:

(i) The admission of the evidence will distort the trial and distract the attention of the decision-maker by focusing attention on issues collateral to the issue to be decided;

(ii) It will be necessary to weigh the potential probative value of the evidence against its potential for causing unfair prejudice: unless the former is judged to outweigh the latter by a considerable margin, the evidence is likely to be excluded;

(iii) Stress will be laid on the burden which admission would lay on the resisting party in terms of time, cost and personnel resources, the lengthening of the trial with the increased cost and stress, the potential prejudice to witnesses called upon to recall matters long closed, or thought to be closed; the loss of documentation; the fading of recollections; and

(iv) Whether the evidence is likely to be relatively uncontroversial or whether its admission is likely to create side issues which will unbalance the trial and make it harder to see the wood from the trees.

Evidence of a lack of probity will always be admissible as going to the credibility of the witness concerned (see *Laughton v Shalaby* [2014] EWCA Civ 1450 at paragraph 15). There is no closed list of evidence which might demonstrate that an individual lacks probity.

Evidence of previous convictions are potentially especially powerful evidence. That is particularly the case if an individual has been convicted of a crime of dishonesty; or if the individual was charged with an offence, pleaded not guilty but was then convicted. In this latter situation, the obvious submission for a defendant is that the claimant has shown themselves to be willing to lie to a court.

However, caution is needed. Previous convictions which are spent for the purposes of the Rehabilitation of Offenders Act 1974 represent a particularly delicate area. The effect of rehabilitation, as provided in section 4 of that Act, is that where a conviction is spent no evidence will be admissible in any proceedings (including civil proceedings) to prove that any such person has committed or been charged with or prosecuted for or convicted of or sentenced for any offence which was the subject of a spent conviction. The Act provides that an individual is not even to be asked about such spent previous convictions. However, section 4 is subject to section 7(3) which gives discretion to the Court to admit evidence of spent convictions where justice cannot be done without admission of evidence of that spent conviction.

It is worth noting that evidence which is relevant is disclosable even if not admissible. So, a claimant who has previous convictions should disclose the same even if asserting at the same time that it is not admissible because spent. The defendant can then consider an application for its admission.

Other categories of evidence going to probity might include previous instances where an individual has been a party or witness in a court case and has not had their evidence accepted (this goes beyond civil cases; where, for example, an individual has been involved in family or immigration proceedings the outcome of those may well be relevant). Even where an individual has not been found dishonest by a court on an earlier occasion, in a case where an individual's recollection of events is critical a rejection of an individual's account on an earlier occasion may be of assistance to challenging reliability.

Disqualification as a company director, disciplinary proceedings in a workplace, regulatory action in respect of a professional all might represent sources of information relevant to character. So too might public statements and posts on social media.

Defendants should be thorough in exploring a claimant's background and consider evidence not only of previous claims but also anything which might more completely inform a court of that claimant's character and credibility.

Issue based costs orders in credit hire cases

Matt Waszak

Perhaps the majority of what we would consider *motor fraud* work involves defending cases in which claimants are alleged to have brought fraudulent, dishonest or exaggerated personal injury claims. All motor insurers will however be familiar with defending suspicious credit hire claims which arise from genuine accidents, in the Small Claims Track, the Fast-Track and even the Multi-Track. In the latter two categories, we are all familiar with cases in which the only heads of loss are (substantial) credit hire and vehicle damage claims, with no claim for personal injury brought.

Where liability has been admitted, the claim for vehicle damage will often have been agreed. The scope of repair work required to the damaged vehicle or the value of the vehicle before it was damaged in the accident will not be in dispute.

Sometimes though, a dispute as to the correct measure of loss for a vehicle damage claim may remain. This may arise in different ways. There may be a dispute as to the extent of damage sustained by a vehicle in the accident, and thus the extent of the repair work that can be said to flow from the accident. Where a vehicle has not yet been repaired, there may be a dispute as to the proper cost of the repair work required, with each party relying on competing repair work estimates. Or, if the vehicle is written off, there may be a dispute in relation its Pre-Accident Value, each party again relying on different assessments of that value. These discrete points are usually capable of swift resolution by a judge.

A difficult situation that can arise for defendants is what happens where a claim for credit hire is dismissed in its entirety but the claimant obtains judgment for damages in relation to the vehicle damage claim, and where no offers (Part 36 or otherwise) have been made. In other words, what happens when the claimant succeeds on a discrete issue but is unsuccessful in relation to the majority of the claim? Does that mean that the claimant should be entitled to recover costs in their entirety as the 'successful party'? What arguments can the defendant raise in that situation?

Braibente v. QBE Insurance

I acted for the defendant in such a case (*Braibente v. QBE Insurance (Europe) Ltd*, on 20.04.17 in the County Court at Wandsworth before District Judge Parker). The Claimant's motorcycle was damaged in a liability-admitted accident. Substantial claims for credit hire (£32,727.04) and storage (£532) were brought alongside a claim for the Pre-Accident Value of the vehicle. All heads of loss were in issue. The Pre-Accident Value claim was disputed. While the Claimant relied on an inspection report of the motorcycle indicating that it was beyond economic repair, the Defendant relied upon an earlier repair work estimate, which indicated that it could be repaired at much lower cost. At trial, Judge Parker dismissed the Claimant's claim for credit hire and storage in their entirety, but gave judgment for the Pre-Accident Value of the motorcycle.

The issue of costs was considered at an adjourned hearing. The Judge made an issue-based costs order. The Claimant was ordered to pay the Defendant's costs of the action, while the Defendant was ordered to pay only 10% of the Claimant's costs. That Order reflected the fact that the Claimant had succeeded only on the limited claim for Pre-Accident Value.

General Principles

To start with, it is worth (re)stating some general principles:

- Where no personal injury claim is brought, a claimant is not protected by qualified one-way costs shifting (QOCS) pursuant to CPR 44.13.
- A fast-track non-PI claim is not subject to the fixed recoverable costs under CPR Part 45 Section IIIA (Claims Which No Longer Continue Under the RTA Pre-Action Protocols – Fixed Recoverable Costs).
- Costs in a Fast-Track credit hire case are therefore enforceable against a claimant and subject to ordinary assessment.

Under CPR 44.2(1), the Court has discretion as to- (a) whether costs are payable by one party to another; (b) the amount of those costs; and (c) when they are paid.

If the Court decides to make an order about costs- (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but (b) the Court may make a different order (CPR 44.2(2)).

Under CPR 44.2(4), in deciding what order (if any) to make about costs, the Court will have regard to all the circumstances, including- (a) the conduct of all the parties; (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and (c) any admissible offer to settle made by a party which is drawn to the Court's attention, and which is not an offer to which the costs consequences under Part 36 apply.

The orders which the Court may make, pursuant to CPR 44.2(6), include an order that a party must pay-

a. A proportion of another's party's costs;

b. A stated amount in respect of another party's costs;

c. Costs from or until a certain date only;

d. Costs incurred before proceedings have begun;

e. Costs relating to particular steps taken in the proceedings;

f. Costs relating only to a distinct part of the proceedings; and

g. Interest on costs from or until a certain date, including a date before judgment.

Issue-Based Costs Orders

An order by which a successful party is required to pay the costs or part of the costs of an unsuccessful party, known more colloquially as an issue-based costs order, has been the subject of longstanding approval from the Higher Courts.

In *Summit Property Limited v. Pitmans (A Firm)* [2001] EWCA Civ 2020, Longmore LJ, giving the judgment of the Court, held at paragraph 17 that:

"It is... a matter of ordinary common sense that if it is appropriate to consider costs on an issue basis at all, it may be appropriate, in a suitably exceptional case, to make an order which not only deprives a successful party of his costs of a particular issue but also an order which requires him to pay the otherwise unsuccessful party's costs of that issue, without it being necessary for the court to decide that allegations have been made improperly or unreasonably."

In *M v. Mayor and Burgesses of the London Borough of Croydon* [2012] EWCA Civ 595, Lord Neuberger MR (as he then was), giving the judgment of the Court, held, at paragraph 45 that:

"...as has long been the case in English civil litigation, and is expressly stated in CPR 44.3.2(a), the general rule in all civil litigation is that a successful party can look to the unsuccessful party for his costs. Of course, as CPR 44.3(2)(b), (4), (5) and (6) demonstrate, there may be all sorts of reasons for departing from this principle, but it represents the prima facie position. For instance the fact that the successful party lost on, or abandoned, an issue, will often involve his being deprived of some, or even all, of his costs (and, in an extreme case, he may even have to pay some of the unsuccessful party's costs)- CPR 44.3(4)(b)."

As the authorities have made clear, a costs order against a successful party in relation to a particular issue in a case can be made in *"a suitably exceptional case."* That does not require the successful party to have acted improperly or unreasonably. In considering what amounts to a 'suitably exceptional case', in *Activis Ltd v Merck & Co Inc* [2007] EWHC 1625 (Pat), Warren J. held at paragraph 26 that:

"The task is to identify those cases where the loss on an issue carries the costs sanction ranging from deprivation of costs to an order against the losing party on that issue. The test … is that one no longer has to find improper or unreasonable conduct. Instead, as Longmore LJ puts it [in Summit], one has to find a suitably exceptional case so far as concerns making adverse orders".

In summary, therefore:

a. The Court has a wide discretion as to costs. It may derogate from the general rule that the unsuccessful party pays the successful party's costs. The Court may order a party to pay a proportion of another party's costs;

b. In exercising is discretion, the Court will have regard to conduct and whether a party has succeeded on part of its case; and

c. The Court can order a successful party to pay an unsuccessful party's costs in, to borrow from the Court of Appeal's language, a suitably exceptional case.

Conclusion

This is an interesting case study for defendant insurers in the use of an issue-based costs order. The question of costs in a non-PI Fast-Track or Multi-Track claim where the claimant obtains judgment in relation to a limited part of its claim only has to be considered in a nuanced way. In many cases, the distinction of successful/unsuccessful party will be artificial and too simple. Instead, the proper approach will be for the Court will be to exercise its discretion in relation to costs based on the parties' success upon different issues in the case.

Set-off pursuant to CPR 44.12

Paul McGrath

A little while ago I wrote an article concerning the set-off of one costs order against another in the TGC Costs Newsletter http://tgchambers.com/news-and-resources/news/tgc-costs-newsletter. This subject is clearly of relevance to those involved in defending suspected fraudulent claims (where often the damages sought are relatively modest in comparison to the ultimate costs). Therefore, what follows is a summary of the article along with an update, incorporating a recent case that has come to my attention going the other way.

Where the standard provisions of QOCS apply, they do not bar an order for costs in the favour of the Defendant, nor does it prevent an assessment of such costs taking place. It bars enforcement of the costs. This latter bar usually discourages any assessment taking place at all, but it is important to remember that the bar on enforcement does not in any way prevent the costs being ordered and the amount of costs being assessed.

CPR 44.12 provides as follows:

"(1) Where a party entitled to costs is also liable to pay costs, the court may assess the costs which that party is liable to pay and either –

(a) set off the amount assessed against the amount the party is entitled to be paid and direct that party to pay any balance; or

(b) delay the issue of a certificate for the costs to which the party is entitled until the party has paid the amount which that party is liable to pay."

Consider the following situation: a Claimant wins his claim for personal injury damages and receives a costs order in his favour. However, the Defendant receives a costs order in his favour. A Defendant is ordinarily entitled to set-off any costs award in its favour against the Claimant's damages (CPR 44.14(1)).

However, if the Claimant's damages are small, then this might be of little comfort to a Defendant faced with a large costs bill and unable to enforce his own costs bill save to the extent of a small amount of set-off against the Claimant's modest award.

However, if the Defendant were entitled to also set off his own costs order against the Claimant's costs order, then this might significantly reduce / extinguish the Defendant's overall liability.

The question thus becomes: is it appropriate to order a set-off under CPR 44.12 where QOCS applies?

In *Lockley v. National Blood Transfusion Service* [1992] 1 WLR 492 the Court of Appeal considered set-off in the context of a legally aided claimant. In that case the Claimant had been ordered to pay the Defendant's costs of an interlocutory hearing not to be enforced without leave of the Court 'save by way of set-off as against damages and costs'. The Claimant appealed, arguing that a set-off offended against the statutory provisions in place.

Scott LJ started his judgment considering the nature of a set-off as a defence, rather than as a cross-claim. He stated that the 'operation of a set-off does not place the person whose chose in action is thereby reduced or extinguished under any obligation to pay. It simply reduces or extinguishes the amount that the other party has to pay. The operation of a set-off, in respect of the liability of a legally assisted person under an order for costs does not require the legally aided person to pay anything. It does not lead to any costs being recoverable against the legally aided person' (@ 495 F-G).

Scott LJ concluded that the power to order a set-off was available against damages and costs and was 'no different from and no more extensive than the set-off available to or against parties who are not legally aided' (@ 496 G).

In *R (on the application of Burkett) v LB of Hammersmith and Fulham*, [2004] EWCA Civ 1342 Brooke LJ reviewed the authorities relating to set-off and concluded that the Court had a discretion (within the wide power set out in s.51 of the Senior Courts Act 1981) to order a set-off and that this was not dictated (but might be influenced by) the position at equity. At paragraph 50, Brooke LJ approved of the reasoning in *Lockley* that a set-off was not akin to an obligation to make payment, but was instead merely reducing the amount that he could recover. As such, it was not seen as 'contrary to the spirit of costs protection'.

In *Vava v. Anglo American South Africa* [2013] EWCA 2326 (QB); [2013] Costs LR 805 Andrew Smith J. considered a case where the parties had entered into a contractual agreement that a form of QOCS would apply. The question before the Court was whether a set-off could be ordered notwithstanding the contractual agreement. The Court summarised the cases cited above and decided that given the terms of the agreement between the parties, it would be unfair to order a set-off. The case very much turned on the agreement that was reached, as opposed to a different approach to the legal analysis.

I turn now to QOCS specific cases (I know of two, but there may well be more). In *Nathanmanna v UK Insurance Limited* (DJ Avent, reported in TGC Fraud Update, Issue IV (November 2016) http://tgchambers.com/wp-content/uploads/2016/11/TGC023_Newsletter_v4.pdf) the Claimant's claim was struck out, but he received a costs order in his favour in relation to a part of proceedings. The Defendant received an order that the Claimant be otherwise liable for the costs of the action. The costs had not, as yet, been assessed but it was clear that the Defendant's entitlement would dwarf the Claimant's. I was representing the Defendant and submitted that the correct costs order was to set off one costs liability against another, with the effect that the Defendant had nothing to pay and the Claimant's remaining liability for costs, which was to be assessed, was not enforceable due to the operation of QOCS.

The Claimant resisted and argued that the Claimant's costs order was enforceable in the ordinary way but the Defendant's costs order was not enforceable pursuant to QOCS and that a set-off was an impermissible sidestep to the operation of QOCS. The parties referred the Judge to *Vava*, *Lockley*, and *Burkett* and the commentary in the 2nd edition of the Costs Supplement to the White Book at page 189 (see now the 3rd edition at page 259).

The Judge held that it was appropriate to order a set-off between costs. The Judge distinguished *Vava* on the basis that the case largely turned on the meaning of a contractual agreement, whereas the present case turned on the exercise of a discretion within the scope of CPR 44. The Judge held that the QOCS bar on enforcement operated only *after* the Court had decided who was entitled to costs and in what amount (whether assessed now or later); see *Lockley* and *Burkett*. It was only the outstanding balance of costs that would be subject to the bar on enforcement.

However, in *Darini v. Markerstudy Group* (unrep. HHJ Dight, April 2017) the Court decided that a set-off against costs was barred by the QOCS provisions. In short, the Court concluded that CPR 44.13 – 44.17 was a self-contained code and 'A set-off of costs is, in my view, a means of giving effect to an order in favour of the defendant and therefore would be enforcement within the meaning of these provisions'. Accordingly, a Defendant could only seek a set-off as provided for within 44.14 – 44.16 and thus CPR 44.12 was not an available option to a Judge where a case was caught by QOCS.

This is a matter which will clearly come before the higher Courts in due course. In the meantime, Defendants should have CPR 44.12 well in mind whenever costs orders are made going both ways.

Future abuses of driverless technologies and counter measures

Alex Glassbrook

Editor's Note

Alex Glassbrook is the author of *"The Law of Driverless Cars: An Introduction"* (Law Brief Publishing, February 2017), the first British book on the law of autonomous vehicles.

Alex delivered the following paper – on future cybercrime in autonomous vehicles and counter-measures – to an audience including regulators, lawyers and developers, at the Future of Transportation World Conference in Cologne, Germany, on 6 July 2017.

On the first day of the conference, Alex also chaired a panel discussion of experts from the UK, USA, Germany and Belgium, discussing the topics *"Determining Liability – issues for courts, regulators and law enforcement"* and *"what are the legal implications for Original Equipment Manufacturers, suppliers and consumers?"*

Below is an abridged version of Alex's paper; the full version, which cites all sources and includes links, is available on the Temple Garden Chambers website, at **http://tgchambers.com/wp-content/uploads/2016/07/Update-on-Driverless-Vehicles.-7.16.-AG.-V4.pdf**

Introduction

Since 2011, with the first reported hack of a car's internal systems, the vulnerabilities of modern cars to outside interference have been clear. With further advances towards fully driverless technology – and particularly the greater connectivity of vehicles to various devices and the internet – the opportunities for attack have increased.

The road vehicle industry has responded. Faults have been patched. Several actors have suggested the sharing of vehicle information, with the aim of increasing the security of vehicles "organically" by design, across the industry.

So traffic cybercrime is a challenge, both in terms of cybersecurity and as a direct threat to public safety on the roads. Equally challenging, though, is the need to retain the traveller's rights to privacy and confidentiality in an increasingly connected and security-conscious transport network.

Over 21 years, I have appeared and advised in cases involving motor vehicles in many different contexts: in criminal and civil courts and in coroners' inquests into deaths in driving incidents. Increasingly, cases involve the unravelling of apparent 'accidents', which investigations reveal have been staged deliberately, as part of criminal conspiracies to defraud third party motor insurers through false claims for compensation.

Fraudulent compensation claims pursued through the Courts represent the chief financial abuse of the UK's system of compulsory third party motor insurance. These claims range from the small-scale fraud – the instant and opportunistic pretence of injury in an otherwise genuine collision – to the manufacture of false claims on an industrial scale.

Those larger frauds are supported by a criminal infrastructure supplying both the tools of the fraud (including vehicles and false claimants) and the means to secure and launder its proceeds (sometimes including fake accident management companies).

Motor insurance fraud has become a very profitable crime, estimated to cost the British insurance industry over £1 billion annually. Among its effects is the criminalisation of drivers persuaded to take part on the false promise that insurance fraud is a victimless crime. There have been reports of its proceeds being channelled into other, highly serious criminal activities.

Driverless technology will be a target area for criminals. The categories of potential frauds and abuses of automotive technology are not closed. As the technology innovates, so will the opportunities for abuse. The legal profession in the UK has played a key role in the fight against motor insurance fraud.

Future vulnerabilities of driverless technologies to abusive and criminal behaviour

Both mass scale attacks (e.g. denial of service, ransomware) and individual cyber attacks (e.g. a targeted ransomware attack on a moving vehicle) are among the dangers being considered by the transport and security industries.

In addition to those cyber attacks, there are also likely to be attempts at very "low technology" attacks, e.g. fraudsters posing as victims of collisions with automated vehicles, either as:

- drivers of non-automated vehicles inducing a collision by pulling out or suddenly braking in front of an automated vehicle (what is currently known as a "slam-on" type of induced accident); or
- fraudster pedestrians, "stepping out" in front of a driverless vehicle.

Those are both risky frauds: risky in terms of their vulnerability to detection and in terms of the risk of actual injury to the fraudster. But both of those risks have long existed in motor insurance frauds (accompanied by heavy prison sentences) and neither risk has proven to be a complete deterrent to date.

Indeed, improvements in vehicle safety technology (especially in sensors, speed limitation and vehicle body design) might *increase* the number of attempted frauds, by reducing the risk of injury to the fraudster. The emerging liability theory of driverless cars – that either manufacturer or insurer will bear liability and therefore the compensation bill for any injurious fault in an accident involving a driverless car – is also a potential *enticement* to fraudsters, as it tends to increase the perceived chance of compensation.

The practised fraudster will assess risk. He will be skilled at contriving a collision just at the moment when injury is plausible but, simultaneously, when the risk of actual injury is at its lowest. This has been the case in motor insurance frauds in the UK, in which a skilled criminal driver is sometimes in charge of the target car at the point of collision, neatly steering and braking the car into collision precisely at the desired moment, and then switching places with the claimant driver in the moments of surprise after the collision.

It is possible to detect, reveal and demonstrate such frauds to the Courts by careful investigation of the circumstances of a claim, of networks of relationships and by precise representation at trial.

Legal principles such as that set out in the 2005 judgment of the House of Lords in *O'Brien v Chief Constable of South Wales Police* [2005] 2 AC 534 allow a robust, forensic defence of a civil claim reasonably suspected to be fraudulent. That case established the principle that circumstantial evidence of a party's similar misbehaviour requires no test more demanding than *relevance to the issues* to be admissible evidence in a civil claim.

And, after a finding of fraud in a civil trial, the laws of false evidence (perjury) and court procedural rules governing committal for Contempt of Court allow the transformation of a sufficiently serious case from a purely private, financial claim for compensation, into a public and criminal law matter, and thereby to allow perjury to be tried and punished criminally, to the criminal standard of proof, where appropriate. The sentence in such a case is usually imprisonment.

So the tools of detection and trial exist to combat abuse, when it occurs. What are the future risks of abuse? Without meaning to suggest the means of future crime, the foreseeable risks now include the following:

- the staging of fake accidents, as described above, in an attempt to defraud manufacturers or insurers of compensation. Hacking might be used as one of the tools of that fraud;
- a ransomware attack on a moving vehicle. These could be individual or mass ransom attacks, and could be carried out either for payment or maliciously; and
- Thefts of valuable data that are either stored in or pass through the systems of the vehicle.

The categories of potential abuses are sadly not closed. Innovation carries the risk of multiplying the vulnerabilities to abuse (for example, by increasing the number of "attack surfaces" on a vehicle).

What were the lessons of defending fraudulent motor accident claims in the UK?

As an advocate appearing, over many years, for one or other side in the trials of many cases of suspected motor fraud (though chiefly on the side of the insurer asserting fraud), I observed the following trends:

- The frauds grew more sophisticated – and learnt from the legal process; and
- Political attempts to legislate to obstruct such claims at a perceived source (for example, by suggesting the outlawing of whiplash injury compensation claims) have so far been unsuccessful – not only because such attempts would outlaw a large proportion of entirely legitimate claims, but also because the fraudsters would adapt and look elsewhere.

So, the more effective means to fight fraud has tended to be to fight it in Court, and for that effort to be publicised.

The tools of counter fraud litigation have changed. In particular, new technology has been put to the task of fighting fraud. That is true especially of vehicle equipment such as on–vehicle cameras and telematics devices (e.g. accelerometers, showing changes in the motion of a vehicle,) and small mobile devices such as dashboard or helmet-mounted digital cameras, whose images, data and metadata have become useful tools from which to deduce the circumstances of a collision.

Human expert evidence has also been crucial, especially expert forensic engineering evidence, to detect signs inconsistent with the alleged accident, e.g. height differences between the damage marks on allegedly colliding vehicles.

Fighting the cases in Court has been a successful strategy. However, the frauds have also evolved. I can recall one trial in which I had the strong impression that the large group in the public gallery, evidently all supporters of the opposing side, were listening to my cross examination with a close professional interest. Methods have become more sophisticated.

The Courts took some time to realise that motor insurance fraud was a real phenomenon and not merely the product of a suspicious corporate imagination on the part of motor insurers.

As more cases came before the Courts, patterns began to emerge – including the use of particular postal addresses by large numbers of Claimants for road traffic injury, in alleged accidents occurring over certain periods of time and in locations and circumstances very similar to each other. The evidence was often very strongly suggestive of fraud.

As the Courts became more aware of the phenomenon, they responded. For example, the law was altered in the following ways:

- To allow a defendant to a civil claim for damages to defend a claim not only on the basis that the claim was fraudulent but also (in the event that the assertion of fraud was not accepted) on the basis that the claimant had failed to prove his claim on the balance of probabilities. That was the effect of the judgment of the Court of Appeal in the case of *Francis v Wells* [2007] EWCA Civ 1350; and
- To allow a dishonest claim to be struck out as an abuse of the process of the court. That was achieved by judgment of the Supreme Court in *Fairclough v Summers* [2012] UKSC 26.

Awareness of motor insurance fraud and the courts' capacity to deal with it increased, but motor insurance fraud was dealt with essentially as an aspect of civil litigation. That was natural, because the fraud took the form of a civil claim for damages, so the fraud case arose as a civil defence.

But, as the list of potential frauds and abuses in the driverless world shows, many of the foreseeable attacks will not arise in this way. Those abuses (including ransomware attacks) will not require a civil claim. Those will be unequivocally criminal activities.

That will be a change. As I have described, the defence of fraudulent RTA claims – the major abuse – has taken place mainly (if not exclusively) in the civil courts, by way of defences to civil claims for damages. That has shaped the infrastructure of road traffic fraud defence in the UK. That infrastructure will, in my view, need to change.

How might the law respond effectively to new abuses

British criminal law already provides tools to deal with abuses such as ransomware attacks.

In particular, section 3ZA of the Computer Misuse Act 1990 was introduced by amendment in May 2015, with attacks (including terrorist attacks) on 'critical national infrastructure' in mind.

One leading commentator has expressed the opinion that the Section merely duplicates existing powers and that "*It seems unlikely that s.3ZA will be used often, if at all.*"

But the terms of Section 3ZA (which carries sentences of imprisonment of up to 14 years or for life, if there is risk of serious damage to human welfare) would appear to fit the prosecution of a hacking attack on a moving driverless or driver-assisted vehicle.

Section 3ZA provides that:

"A person is guilty of an offence if—

- *the person knowingly does any unauthorised act in relation to a computer;*
- *causing or significantly risking loss of human life, human illness or injury or "disruption of facilities for transport", and*
- *the offender intends that damage or is reckless as to whether such damage is caused."*

Hacking of vehicles seems capable both of prosecution and of constituting an actionable civil wrong (of trespass against property) in tort law.

But the greater part of the future threat to driverless and driver-assisted cars appears to be in criminal law territory. So there will need to be a strong cyber-security infrastructure in policing.

The British government's current, five-year cyber security strategy seems to recognise that need. It says that *"Law enforcement agencies will collaborate closely with industry and the National Cyber Security Centre to provide dynamic criminal threat intelligence with which industry can better defend itself, and to promote protective security advice and standards."*

The aspiration of inter-agency co-operation is easily stated. But, given the clear likelihood of vehicle cybercrime, traffic police will need much better resources in order to have an effective anti-cybercrime capability. In particular, traffic police will need to be equipped to detect the possibility of cybercrime in road traffic accidents. That is a danger not restricted to fully-automated vehicles, though it is likely to increase markedly as that technology advances.

That detective capacity will require a change in British police investigative policy relating to road traffic accidents. Now, British police policy tends against investigating allegations of suspicious behaviour that might indicate motor insurance fraud. The matter is left to insurers to defend in the civil courts, with little or no police involvement.

The Courts

Could Judges be automated? The International Bar Association's recent report on the effect of Artificial Intelligence and robotics upon the employment market predicts that many human "reasoning" jobs will be carried out by robots. We have seen the beginning of that in risk assessment for insurance underwriting. The counter-fraud writer David Morrow has suggested that fraud detection might itself become fully automated by artificial intelligence.

However, the disadvantage of a fully-automated fraud investigator would be that its artificially intelligent reasoning must be translated back into terms that human intelligence can grasp, dissect and examine in the Courtroom. That process might reveal important gaps in the artificial reasoning process – see by analogy the development over time of safeguards concerning the use of DNA evidence in criminal cases. These points sound trite after the event, but the excitement of an emerging technology can lead to over-optimism as to its capacity.

Accordingly, the automation of judges seems unlikely. The legal questions coming before the Courts will alter. It will be the job of lawyers to assist the Courts in that change.

But the Courts will also need to be better equipped. On a routine level, the high dependence of Courts upon paper must come to an end. Counter fraud cases already turn to a great extent upon originally digital documents – from images taken on smartphones to insurance company records. Those documents are often far more easily navigated and understood on a screen than on paper, because they are digital in their original form.

Again, properly equipping the Courts in terms of judicial training and equipment will require significant investment. But, again, the wider aim is public protection, in which the proper administration of justice plays a crucial part.

In conclusion

The detection of abuses will require greater levels of training and expertise in policing as well as in the criminal and civil courts. This will require investment in Court services (especially digital infrastructure) as well as a change in attitudes, especially towards the use of paper as the main medium in court cases. But the evidence itself will come from a mixture of artificial and human sources. And its interpretation will have to remain a human activity – at least until we can completely explain both our own cognitive processes and those of machines.

Recent Noteworthy Cases

Advantage Insurance Company v. Egner (High Court, Norwich DR 09.08.2017)

Dishonest Litigant – Contempt of Court – Prison Sentence

Tim Sharpe (instructed by Miles Cowan of Horwich Farrelly) represented Hastings Insurance on a committal application before HHJ Moloney QC, sitting as a Judge of the High Court in the Norwich District Registry. The Application for Committal of the Claimant was based upon false statements made in document bearing Statements of Truth, namely his Claim Form, Particulars of Claim and Part 18 Replies.

In summary, Mr Egner's van was damaged by a driver insured by Hastings, as a result of which that individual was prosecuted for causing criminal damage. Some two years after this incident, Mr Egner presented a claim to Hastings for back injuries allegedly sustained by him in that incident. His claim was subsequently issued, and in his Claim Form and Particulars of Claim he claimed to have been the driver of the van at the time it was struck and that as a result he sustained injuries (as also set out in detail in a medical report). He further set out his case on how he was injured by way of Part 18 Replies, claiming that he was jolted in his seat and that the pain was so much that he had to take time off work as he could not lift or even walk.

Hastings contended that the claim was dishonest, and in support of the contention that Mr Egner was not in fact in the van at the material time relied upon statements that Mr. Egner himself and his then partner had provided to the police in connection with the prosecution of the insured driver, in which they confirmed that they had witnessed the criminal damage take place from the pavement. The County Court claim was transferred to the High Court and ultimately Struck Out. Upon the Court granting the insurers' application for permission to bring proceedings for Contempt, Mr Egner admitted his Contempt.

At the hearing on 09.08.17, the Court committed Mr. Egner to an immediate period of custody of eight weeks, reduced from 12 weeks to reflect his admission. He was also ordered to pay £5,000 towards the costs of the original action and a further £9,000 towards the costs of the Committal proceedings.

In the course of judgement, HHJ Moloney QC noted that dishonest but low value 'whiplash' claims cost the insurance industry immense legal costs and that the public pays more in premiums. The Court noted that the background to the claim (a cold call) was typical of the problem, and precisely the type of case to which the policy explained by Moses LJ in South Wales Fire & Rescue v Smith [2011] EWHC 1749 (Admin) applies, namely that those who make such false claims should expect to go to prison and that there is no other way to underline the gravity of such conduct, or to deter those tempted to make such claims. The Court considered that on the facts of the case, to suspend the sentence would detract from the policy of deterrence.

(1) Saeed (2) Mohammed (3) Adnan (4) Adnan v. (1) Lomeka (2) Skyfire Insurance Company (Clerkenwell CC, 07.04.2017)

Liability Dispute – Fundamental Dishonesty

Ellen Robertson (instructed by Gemma Day of Horwich Farrelly) successfully represented the Defendants in a claim brought by four Claimants, two of whom were infants, in a claim for personal injury, credit hire (in relation to the First Claimant) and related losses following an accident on a motorway. The Claimants alleged that the First Defendant had lost control of her vehicle, colliding with the crash barrier before hitting their vehicle. The First Defendant's case was that the Claimant's vehicle had collided with the rear of her vehicle.

DJ Tomlinson found that the First Claimant had given different accounts of the accident, claiming in his oral evidence that there had been a direct collision with the front of the Defendant's vehicle and the crash barrier. He found that the photographs of the First Defendant's vehicle showing no frontal damage demonstrated that this could not have been the case. The judge also found the Second Claimant to have given contradictory evidence, having claimed in his oral evidence that the First Defendant had hit the lorry in front before then accepting that there had been no collision with a lorry.

The Court found that both the First and Second Claimant had attended the trial to mislead the Court, and were therefore fundamentally dishonest pursuant to CPR 44.16. As the dishonesty had become apparent during the trial, no criticism could be made of the Defendants for failing to serve a Costs Schedule and they were entitled to an order for their costs to be assessed if not agreed, the First and Second Claimants being jointly and severally liable for those costs.

Tavares v. Ward (Birmingham CC, 04.07.17)

Fraud – Fundamental Dishonesty – Counterclaim

Edward Hutchin (instructed by Catherine Hanson of Keoghs on behalf of UK Insurance Limited) successfully represented the insurers in this case, in which the judge rejected the Claimant's claim after finding that it was fraudulent and entered judgment in favour of the Defendant on its counterclaim.

The Claimant made a claim for compensation for personal injuries and substantial special damages including credit hire, storage and repair costs following a road traffic collision. Liability and quantum were in issue. A Defence was filed alleging fraud, on the basis that the collision was a deliberately-induced 'slam-on'. A Counterclaim was included, claiming costs associated with damage to the Defendant's vehicle. After a trial before Recorder Readings, the claim was dismissed. The Judge heard evidence from the parties, and from the Defendant's partner (who attended the scene after the collision), and in his judgment confirmed that he preferred the Defendant's evidence. He therefore found that the Claimant had stopped for no good reason in front of the Defendant. He went on to find fraud, holding that, having considered and rejected other explanations, the Claimant had deliberately staged the accident with the intention of claiming compensation falsely.

The claim therefore failed, and as the Claimant was at fault for the collision, judgment was entered in favour of the Defendant on the Counterclaim. Full costs were awarded to the Defendant, and permission given to enforce them, in light of the finding of fundamental dishonesty.

Some useful practice points emerged from the case:

- When running a fraud defence, a strong lay witness, particularly if supported by other witnesses (even if not impartial or if they did not witness the actual moment of impact), can be crucial to lay the groundwork for building a fraud case; and
- Evidence on quantum can influence the judge's decision on liability. In this case, detailed cross-examination on financial disclosure relating to impecuniosity revealed a number of issues (e.g. what the judge described as an 'astute' attitude to payment of tax and a 'ludicrous' suggestion of impecuniosity) capable of undermining the Claimant's credibility generally.

Dhangar v. Esure (Birmingham CC, 06.07.17)

Fundamental Dishonesty – Discontinuance

Anthony Johnson (instructed by Samantha Donovan of Keoghs) represented the Defendant in this Application pursuant to CPR 44 PD 12.4(c) for a declaration that the Claimant was fundamentally dishonest, and therefore that QOCS should be disapplied. His solicitors having come off the record, the Claimant instructed Counsel and attended the hearing in person and sought to argue that he was not dishonest. DJ Truman found for the Defendant and ordered the Claimant to pay costs of £7,474.66.

The Defendant made an Application to Strike Out the Claimant's witness statement at the outset on the basis that it did not contain the correct interpreter's Statement of Truth. Although such an Application was inherently speculative and extremely unlikely to be successful in a situation where the key issue was the Claimant's honesty, the Application was a useful tactical device because it meant that the Defendant was afforded the opportunity to highlight some of the most flagrant discrepancies in the Claimant's evidence at the outset.

The evidence itself was fairly straightforward, as the Claimant was an extremely poor witness who was obviously lying – Counsel for the Defendant recorded that he changed his evidence five times on the same point! The Judge rejected Counsel for the Claimant's attempt to explain away some of the problems with the case as being the fault of the Claimant's previous solicitors. She accepted that pursuant to CPR 22 PD 3.8 the Claimant is bound by his solicitors' signature on the Particulars of Claim, which sought to adopt a medical report which the Claimant sought to allege was inaccurate.

This case serves as a good example of a situation where insurers benefited greatly from not merely accepting the Claimant's Notice of Discontinuance and instead pressing on for a finding of fundamental dishonesty. This is something that should be considered carefully whenever a Claimant discontinues, particularly where there has been a positive averment of fraud as in the present case. Although this particular case was not a close-run thing, even if the Claimant had been a convincing witness then the worst possible case scenario for the Defendant was that it would recover nothing and potentially have to pay the costs of the Claimant. There was no risk of having to pay the Claimant damages given that he had already discontinued, even if the Court had accepted that he was genuinely injured.

Bensley v. NWF Ltd. (Norwich CC, 20.07.17)

LVI – Exaggerated Quantum – Fundamental Dishonesty

Emma Northey (instructed by Rachael Tyrer of Keoghs) appeared in this case, arising from a genuine, very low speed collision between a Land Rover and a small fuel tanker as they tried to manoeuvre past each other on a narrow country lane.

The Claimant was the driver of the Land Rover. He claimed the accident had caused him to suffer neck pain and headaches for two years. He also sought the Pre-Accident Value of his vehicle, which he put at £3,500. There was scraping damage to the vehicle, but no evidence of any deformation of the bodywork. This part of the claim was abandoned shortly before the trial got underway because it transpired that the vehicle had been neither written off nor repaired after the accident.

The Court heard that there was no contemporaneous evidence of injury. The Claimant had been seeing doctors regularly about a relevant pre-existing condition, but he had not mentioned the accident or any neck pain. He had seen his doctor about some headaches, but had accepted the diagnosis of tension headaches. His neck and C-spine had been assessed as normal by his GP three months after the accident, but he had complained of tenderness and a restriction in movement when he saw the medical expert 15 months after the accident. In addition, he had made no mention of any injury when he spoke with his own insurers' investigator about two weeks after the accident – the time when his symptoms were supposed to have been at their worst.

District Judge Reeves concluded that the Claimant had given evasive answers in his oral evidence. There were inconsistencies between his medical records, what he had told the expert, and his witness statement. Although the claim for the PAV had been abandoned, it was of concern that it had been brought at all. The Claimant had sought £3,500 when the damage to his vehicle amounted to a scrape the length of a school ruler. This was a speculative and fundamentally dishonest claim. It was, therefore dismissed with an Order that the Claimant pay the Defendant's costs and QOCS protection was lifted.

Mirga & ors. v. Advantage Insurance (Southend CC, 26.07.17)

Slam-On – Litigants in Person – QOCS – Obstructing the Just Disposal of Proceedings

Richard Boyle (instructed by Karen Mann of Horwich Farrelly) appeared in this case involving an RTA in which the Defendant had pleaded fraud. The Claimants' solicitors came off the record and the claims were struck out for breach of an Unless Order. DJ Ashworth found that QOCS did not apply to three of the claims because of pre-commencement funding arrangements and that the Fourth Claimant had obstructed the just disposal of proceedings.

The claim arose out of an RTA in which the Defendant's insured had hit the rear of the Claimants' vehicle. Proceedings were issued and, shortly afterwards, the Defendant amended its Defence to plead fraud on the basis that the Claimants' vehicle had slammed on its brakes to induce a collision. Further issues were raised with the medical evidence. The Claimants' solicitors came off the record. The Claimants failed to comply with directions set in an Unless Order and their claims were Struck Out.

The Court considered the appropriate costs order. The Claimants had instructed numerous firms of solicitors before issue and a number of Claim Notification Forms had been submitted for three Claimants but not the Fourth Claimant. The first three Claimants' CNFs indicated that they had taken out CFAs and ATE insurance policies before 01.04.13, which meant that QOCS protection did not apply to their claims under CPR 44.17.

The Judge considered whether QOCS could apply if the Claimants had taken out funding arrangements after 01.04.13 with the solicitors that had issued the claims (the case was decided before *Catalano v Espley-Tyas Development Group Ltd* [2017] EWCA Civ 1132 which has resolved this issue). She concluded that the Claimants had failed to produce any evidence of post-01.04.13 funding arrangements and no notice of funding had been served. The claims were not subject to QOCS and any costs order would be enforceable.

The Judge then turned to the Fourth Claimant. He had disclosed a post-01.04.13 funding arrangement and there was no evidence of any pre-01.04.13 funding arrangement. The Judge held that his claim was subject to QOCS. The Judge considered whether any of the QOCS exceptions applied. She concluded that the claim had not been Struck Out for having no reasonable grounds for bringing the proceedings because it had been Struck Out by operation of the Unless Order. She stated that there had been an RTA and liability would have been for the Court to determine at a hearing. This meant that CPR 44.15(1)(a) did not apply regardless of the fact that the Claimants had not disclosed any witness evidence.

The Judge then considered whether the operation of the Unless Order could be interpreted so that the Fourth Claimant's claim was struck out for obstructing the just disposal of proceedings, pursuant to CPR 44.15(1)(c). She pointed out that the Defendant had pleaded fraud. At trial, or following a discontinuance, the Defendant could have sought a finding of fundamental dishonesty so that QOCS did not apply. There was no trial, therefore the Defendant was deprived of this opportunity. The Judge concluded that this was a Strike Out for an obstruction of the just disposal of proceedings so that QOCS did not apply to the Fourth Claimant and the costs order was enforceable.

Shigiwal v. Bailey-Aird (Clerkenwell & Shoreditch CC, 03.08.17)

Early Discontinuance – Fundamental Dishonesty – Induced Collision

James Henry (instructed by Brendan Hill of Horwich Farrelly) appeared in this case arising from an induced collision that also included a fraudulent claim for storage charges. The claim arose from a typical rear-end shunt and included claims for personal injury, credit-hire and storage charges.

The Defence put the Claimant to proof that a genuine accidental collision had occurred, and made a positive pleading of fraud in relation to the storage charges that were claimed. The allegation was advanced on the basis that the Claimant was claiming for storage charges in respect of a period when he was in fact hiring the very car that he also claimed was being stored.

The claim for storage charges was discontinued at an early stage, but the case proceeded to trial on the issues of liability and causation of injury. At trial, the Defendant argued that there was sufficient evidence to find that the claim for storage charges (although by that stage discontinued) was fundamentally dishonest, with the consequence that even if the court found in favour of the Claimant in respect of the personal injury element of his claim, the entire claim should be dismissed pursuant to s.57 of the Criminal Justice and Courts Act 2015.

In the event, DDJ Hughman made a positive finding that not only was the claim for storage charges fraudulent, but also that the Claimant had deliberately induced the collision. The claim was dismissed with an enforceable costs made in favour of the Defendant.

Bilkhu v. Esure (Warwick CC, 03.07.17)

Relief from Sanctions – Strike Out

Anthony Johnson (instructed by Samantha Donovan of Keoghs) represented the Defendant which successfully defeated the Claimant's Application for Relief from Sanctions in a situation where they had failed to file an Amended Particulars of Claim and Claim Form

The explanation that was given for the breach was that the mistake had been the fault of a former employee who had subsequently been dismissed by the firm, a situation which Courts are often willing to accept and give the Claimant another chance in my experience. However, the Judge (DJ Jones) found that the explanation was a particularly bad one as no unexpected disaster had befallen the Claimant's solicitors, and it is never adequate justification for a firm to take on more work than it can adequately cope with. He also observed that the solicitors had not proceeded expeditiously and that the Claimant was still yet to provide a draft of the Amended Particulars of Claim that permission was sought to rely upon.

The Judge formally Struck Out the case and made an enforceable costs order against the Claimant. He also made an Order that the Claimant's solicitors should be jointly and severally liable for the costs liable unless they were to issue an Application to show cause why they should not be so liable.