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TGC Fraud Update

The Newsletter of the TGC Fraud Team

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Editorial

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Welcome to the latest instalment of the TGC Fraud Update.

Our regular readers may have noticed that the timing of this issue has been slightly delayed. We (along with many others) had hoped to receive the judgment in *Cameron v LV* slightly sooner, but now that it is here (and has provided welcome relief for many insurers) we are pleased to be able to offer an article on the decision.

Also in this issue:

- Anthony Johnson gives detailed guidance and a tactical consideration of the practical effects felt following the Judgments in *Molodi* and *Richards*. Has judicial benevolence been eradicated?
- Ellen Robertson analyses the approach of High Court to a high value injury case in *Pinkus v Direct Line*. Her article draws out the useful lessons that apply to claims of all values where there is little or no objective evidence of injury, and the claimant's credibility is a central issue.
- Tim Sharpe provides a valuable practice note on the use of dishonesty findings in committal applications.
- Anthony Johnson tackles the language barrier with an 8-point plan of action for parties to make the most of inadequate or improper translation and interpretation.
- Elizabeth Gallagher examines a very recent decision on contempt.

As always, these articles are accompanied by a host of recent decisions in the types of cases that we all deal with on a daily basis.

Please do contact a member of the TGC fraud team if you have any queries about any of the items dealt with in this issue, or indeed about any other issues relating to insurance fraud and related matters.

I do hope that the contents of this newsletter are both interesting and useful; as ever I would welcome any feedback from our readers.

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Molodi and *Richards* Six Months On: Has Judicial Benevolence been Eradicated?

Anthony Johnson

Two of the most significant fraud decisions of 2018 are the twin judgments in *Molodi v. Cambridge Vibration Maintenance Service* [2018] EWHC 1288 and *Richards v. Morris* [2018] EWHC 1289 which were both handed down by Spencer J. in the Manchester District Registry of the Queen's Bench Division on 24.05.18. Both cases involved successful appeals by Defendants against first instance decisions in favour of the Claimants by HHJ Main QC (who had already retired by the date that the appeals were heard, and so is presumably less likely to have taken the criticism personally).

Now that the judgments have been available for just over six months and are being regularly cited by Defendants in cases up and down the country, it is probably a useful time to take a retrospective look at the most important issues raised by the cases, the best ways of deploying them in support of a Defendant's position, and whether there are any practical points of use to Defendant practitioners in the field or any other considerations that it would be sensible to be aware of.

Judicial Benevolence

Much of the reportage of the judgments in the legal press when they were first handed down focussed upon Spencer J's suggestion that in both cases HHJ Main QC had taken a 'much too benevolent' approach to evidence which should not have been trusted. In §45 of *Molodi* he stated that the judge had *"...adopted a much too benevolent approach to evidence from a claimant which could be demonstrated to be inconsistent, unreliable and on occasions simply untruthful."* Similar comments were made in *Richards* before it was held at §62 that, having found Mrs. Richards to be 'hopelessly inconsistent', *"the Learned Judge did not, in my view, reflect [this] in his overall decision and approach to these claims, as he should have done."*

However, it has to be said that any suggestion that the High Court's judgments in these cases are capable of heralding an end to judicial benevolence are probably putting it much too highly. There are presumably very few judges who consciously set out to take a benevolent approach to suspected fraudulent claimants. Whilst approaches may vary considerably from judge to judge dependent upon their level of experience of background in practice, I consider it incredibly unlikely that any judge would knowingly promote an abuse of the Court's process leading to a miscarriage of justice. Rather, any incidents of benevolence are likely to arise in a situation where the judge has been genuinely persuaded that the claimant has proven their case on the balance of probabilities, in which case a favourable approach towards them is perfectly proper and entirely justified. It is doubtful, therefore, that many such 'benevolent' judges would recognise themselves as being a deserving recipient of the comments made by Spencer J. in *Molodi* and *Richards*. In fact, it is much more likely that they would be angered by being accused of as much by the Defendant's representatives.

In my experience, one of the most common causes of an overly benevolent approach being taken by judges towards suspected fraudulent claimants occurs when a judge with less experience of road traffic/personal injury cases finds themselves hearing the claim (e.g. a Deputy District Judge, a criminal specialist judge or a Circuit Judge specialising in a different field). I would venture that the reason for this is most likely that the inconsistencies and unusual features of a case that might immediately leap out to a practitioner in the field or an experienced District Judge (e.g. seeing a GP for the first time two days after first seeing solicitors) may not look suspicious to somebody without that

familiarity. The best way to deal with a judge like this is to seek to educate them, e.g. by painstakingly taking them through the rules on Claim Notification Forms or the relevant case-law, rather than by criticising their methodology and calling them benevolent.

Whilst *Molodi* and *Richards* will undoubtedly play a more important role at appellate level (see below), not least because it is much easier to criticise a benevolent judge and critique their ruling on paper than to their face, it is important to sound a note of caution. What appears to be obviously unfair benevolence to an experienced Defendant practitioner, may not necessarily seem unusual or unreasonable to a Circuit Judge or High Court Judge on appeal, particularly if they too are not experienced in the field. As is clear from Spencer J.'s judgments, the Defendant has to pick apart exactly why the decision was wrong: if they fall short in that exercise then it may well appear to the appeal judge that the 'benevolence' complained of is something that properly fell within the prerogative of the first instance judge to make findings of fact in relation to the live evidence that they heard at trial.

The 'State of the Nation'

Probably the most repeated and cited paragraphs of the judgments have been the sections in which Spencer J. summarised the 'state of the nation' in relation to claims of this nature and, by doing so, sought to place the claims in a wider context. ¶44 of the judgment in *Molodi* states as follows:

"Before considering the particular issues in this case, it is also pertinent to recognise the problem that fraudulent or exaggerated whiplash claims have presented for the insurance industry and the courts. This was recognised in March 2018 when the Ministry of Justice published a Civil Liability Bill which aims to tackle insurance fraud in the UK through tougher measures on fraudulent whiplash claims, proposing new, fixed caps on claims and banning the practise of seeking or offering to settle whiplash claims without medical evidence. The problem of fraudulent and exaggerated whiplash claims is well recognised and should, in my judgment, cause judges in the County Court to approach such claims with a degree if caution, if not suspicion. Of course, where a vehicle is shunted from the rear at a sufficient speed to cause the heads of those in the motorcar to move forwards and backwards in such a way as to be liable to cause 'whiplash' injury, then genuine claimants should recover for genuine injuries sustained. The court would normally expect such claimants to have sought medical assistance from their GP or by attending A&E to have returned in the event of non-recovery, to have sought appropriate treatment in the form of physiotherapy (without the prompting or intervention of solicitors) and to have given relatively consistent accounts of their injuries, the progression of symptoms and the timescale of recovery when questioned about it for the purposes of litigation, whether to their own solicitors or to an examining medical expert or for the purposes of witness statements. Of course, I recognise that claimants will sometimes make errors or forget relevant matters and that 100% consistency and recall cannot reasonably be expected. However, the courts are entitled to expect a measure of consistency and certainly, in any case where a claimant can be demonstrated to have been untruthful or where a claimant's account has been so hopelessly inconsistent or contradictory or demonstrably untrue that their evidence cannot be promoted as having been reliable, the court should be reluctant to accept that the claim is genuine or, at least, deserving of an award of damages."

This paragraph in particular (repeated in identical terms in *Richards* at ¶65) is potentially the best from a Defendant perspective in any reported case that I have ever come across. Its greatest utility comes in the situations alluded to above where Defendant Counsel may appear in front of a judge who is not well versed in matters of road traffic fraud/personal injury. Even with an experienced District Judge all too familiar with this type of claim, the paragraph provides a useful checklist of matters that they can go through when considering whether the claim has been proven and/or is dishonest (perhaps with the implicit suggestion that they may be thought too 'benevolent' on appeal if they do not follow it).

It is important, however, to bear in mind that Spencer J.'s comments in these paragraphs are strictly *obiter* because they did not feed directly into the determination of the two cases that were in front of him. Further, there is not necessarily a direct link between the Civil Liability Bill and claims of this nature- in actual fact they are two separate ways of tackling the problem of motor fraud rather than two sides of the same coin. In my experience, whilst most County Court Judges are appreciative of some guidance being provided by the High Court, few would go as far as to adopt Spencer J.'s implied suggestion that they should approach every case with suspicion, which might be seen by some to compromise their fairness and objectivity.

Encouragement to Appeal Determinations of Facts

The main thing that Defendant practitioners can take away from *Richards* and *Molodi* is probably that an atmosphere has now been created where Defendants can be more confident in appealing factual determinations of fraud cases, whereas in the past the position usually adopted would have been that significant care should be taken as the appellate judge would be likely to defer to the trial judge's findings because only they would have evaluated the witnesses face-to-face, and that only a truly perverse decision could be successfully appealed. Clearly a greater readiness to appeal is a very valuable tool in the Defendant arsenal: Claimant firms will know when deciding whether to take a case to trial that it will not necessarily be enough to pull the wool over one judge's eyes if the Defendant holds its nerve!

Spencer J. considered the appropriate test for whether the appellate court should interfere with the trial judge's findings of fact at ¶42 of the judgment in *Molodi*:

"If I am satisfied that no reasonable judge, in the position of HHJ Main QC, could have failed to accede to the submission that the Claimant had failed to prove his case, then I would be entitled to allow this appeal and overturn the Judge's order. However, where the trial judge has heard the evidence and had not concluded that the claimant was dishonest, I direct myself that it would require a very clear case indeed for an appellate court [to] effectively overturn the trial judge's conclusion in that respect and find the claimant was dishonest despite not having seen the witnesses give evidence."

It is worthy of note that the Judge went on to find that *Molodi* itself was one such 'very clear case'. The reasoning behind this can perhaps be elucidated by considering his earlier citation of Viscount Simmonds' speech in the House of Lords decision in *Benmax v. Austin Motor Company Limited* [1955] AC 370:

"It is the duty of the Court of Appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liberty to draw its own inference from the facts proved or admitted, and to decide accordingly... This does not mean that an appellate court should lightly differ from the finding of a trial judge on a question of fact, and I would say that it would be difficult for it to do so where a finding turned solely on the credibility of a witness. But I cannot help thinking that some confusion may have arisen from failure to distinguish between the finding of a specific fact and a finding of fact which is really an inference from facts specifically found, or, as it has sometime been said, between the perception and evaluation of facts."

This appears to have been in Spencer J.'s mind in *Molodi* (at ¶42) when he referred to 'demonstrable untruths, inconsistencies and general unreliability", or in *Richards* where the trial judge was chastised for accepting evidence of witnesses at face value he had previously called 'hopeless'. On a proper analysis, the successful outcome of both of these appeals was achieved due to the criticism of the analytical exercise that HHJ Main QC performed in relation to the facts as he had determined them, rather than his initial determination of those facts being itself impugned. This means that in practice, Defendants should be much more careful in a situation where a 'benevolent' judge has found that a suspected dishonest claimant was reliable and believed what they were told by them, rather than in a situation where they have found for them in spite of flaws identified in their evidence.

The other caveat for Defendants to bear in mind when choosing whether or not to pursue an appeal is that Spencer J. was clear that an appellate court would be reluctant to substitute a finding of fundamental dishonesty where the same was not made by the trial judge. Whilst *Molodi* was held to have overcome this high hurdle, *Richards* did not, notwithstanding a list of no less than twenty 'nails in the coffin' of the Claimants' claims in ¶67 of the judgment. The Judge expressed at ¶72 that he would not be willing to make such a finding without having heard the Claimants for himself, but that equally he could not order a re-trial in a situation where he had found that the claims should have been dismissed, leaving the only remaining outcome to dismiss the claims without a finding of fundamental dishonesty.

The Judge explicitly commented upon the fact that Mrs. Richards had undeclared pre-existing symptoms in ¶71 of his judgment, which suggests that he may have been troubled by the possibility of an honest but mistaken attribution of pain that actually was in existence, whereas the position was much more clear cut in Mr. Molodi's case, e.g. at ¶47 the Judge refers to a claim of £1,300 for vehicle repairs which he had conceded under cross-examination had actually been carried out by his friend for £400.

The Role of Claim Notification Forms

James Yapp discussed this aspect of *Molodi* and *Richards* in his article **'The Facts of Life- the importance of a CNF'** in the previous edition of this publication, and I agree entirely with his opinion that these robust judgments will be cited by Defendants in cases where Claimants rely upon 'the facts of life' in relation to Claim Notification Forms, i.e. when it is regularly said that the documents are short, simplistic and in reality very little time and effort are devoted to their accuracy.

Whereas HHJ Main QC had said that he did not find them to be reliable documents to the point that he just ignored them, Spencer J. emphasised that that CNFs are important documents both because they represent the first notification of a claim and because they are verified by a Statement of Truth: insurers should be able to rely upon their contents. Acknowledging in *Richards* that the CNFs had been signed by a claims manager within the Claimants' firm of solicitors as is commonly the case, he held (at ¶8) that *"Where the statement of truth is signed by a claims manager on the claimants' behalf, as here, the insurer trusts the claims manager and, through him or her, the firm of solicitors to have taken proper instructions and to have verified the accuracy of the contents of the document."*

A straw poll of colleagues in the TGC fraud team suggests that, whilst it is certainly right that this section is regularly cited in Court, and indeed that it is sometimes explicitly quoted in judgments in the Defendant's favour, it has not necessarily had the desired effect in every case. Many of the judges who were minded to disregard CNFs prior to these judgments seem to continue to adopt the same stance, often by simply ignoring them in *ex tempore* judgments. Where judgments explicitly disavow reliance upon the Claimant's CNF, in my experience this is often where there has been explicit evidence about the process of their creation that causes the judge to find that it would not be fair to penalise the Claimant, e.g. where they have said that they have never seen the document and that it was not sent to them for approval. Judges are also much less likely to find that CNFs are important documents when they contain obvious typographical errors that cannot merely be attributed to the Claimant providing misleading instructions (e.g. it is not uncommon to see it said that a person has sought zero medical attention on two occasions or was a rear seat passenger in a vehicle with no occupants).

I would suggest that in a case where discrepancies in the CNF are a major part of the case relied upon, Defendants would be better advised to raise Part 18 Questions about the creation of the Form and its contents and/or to pursue enquiries about the same with the Claimant's solicitors in correspondence, rather than merely relying upon the trial judge accepting the contents of the CNF at face value. In my experience, such enquiries often give rise to more discrepancies and other material with which to challenge the claim when they are responded to, but in the more typical scenario that they are not responded to properly or at all, they allow the Defendant to submit in due course that the Claimant failed to take a chance to explain away any problems with the Form filling process.

Defendant Medical Evidence: A New Lease of Life for *Casey v. Cartwright*?

A less widely discussed part of the judgments in *Molodi* and in particular *Richards* relates to the Judge's comments about *Casey v. Cartwright* [2006] EWCA Civ 1280, specifically expressing disappointment that the *Casey* procedure had not been followed in either case (although '*Casey* statements' had been served, as is common practice in most cases where causation is in dispute, the Defendants had not raised Part 35 Questions of the Claimants' experts or adduced their own medical evidence). At ¶61 of the judgment in *Richards* Spencer J. expressed sympathy with a comment made by HHJ Main QC that the Defendant was seeking to 'have his cake and eat it' by running a case that revolved around the velocity of the impact being insufficient to cause injury but then not going to the trouble and expense of collating the evidence to prove the technical side of this.

It remains to be seen whether these comments will make any major difference in practice. It has always been my understanding that the *Casey* procedure sets out what a Defendant should do *if* they wish to adduce their own evidence, not that the procedure should be followed *and* medical evidence obtained in every case. There are many cases (probably most cases?) where Defendant medical evidence can add very little, particularly as most Claimant experts will accept under Part 35 questioning that their conclusions were premised upon there having been occupancy displacement within the Claimant's vehicle, and if there was not then the whiplash mechanism could not possibly have been engaged and therefore injury would have been impossible. Despite the apparent criticism earlier in the judgment, the Defendant's approach in

Richards appears to have been vindicated by the Judge's conclusion in ¶71 that the reports lacked 'basis in reality' following on from ¶70 that the GP's opinion on causation was invalid because it was premised upon an inadequate medical history. In my experience, the utility of Defendant medical evidence in Low Velocity Impact cases comes in the small minority of cases where a Claimant's medical expert has overstepped the mark and/or gone out of their way to seek to please their paymasters.

Where the comments of Spencer J. may offer some succour to Claimant practitioners is that they may support an argument on behalf of the Claimant in appropriate cases that the Court is entitled to draw an adverse inference from the Defendant's failure to adduce its own medical evidence. Whilst I suspect that there are few cases in which this issue is likely to be determinative given that the issue of causation invariable stands and falls with the judicial assessment of the Claimant's credibility, consideration should be given in appropriate cases to obtaining a medical report: *Casey* says that permission must be granted when the procedure has been adequately followed.

Another issue that Defendant practitioners should be wary of is that Spencer J. states unequivocally at ¶62 of his judgment in *Richards* that the case was not suitable for allocation to the Fast-Track *"for no reason other than a shortage of time."* This does not tally with the experience of many of my colleagues that Courts are extremely reluctant to allocate Multi-Track time and resources to cases of this nature (which after *Kearsley v. Klarfeld* [2005] EWCA Civ 1510 have been invariably considered Fast-Track matters), but I am not (as yet) aware of this being an issue that is being pushed by many Claimant practitioners.

Pinkus v Direct Line [2018] EWHC 1671 (QB) – Claim for serious personal injuries dismissed pursuant to section 57 CJCA

Ellen Robertson

A Claimant pursuing initially a 6-figure sum for serious personal injuries following a road traffic accident was found fundamentally dishonest by HHJ Coe QC, leading to the dismissal of his claim and an order that he pay the Defendant's costs on an indemnity basis.

The Claimant was involved in a road traffic accident, for which liability was admitted in full, on the M4 on 21 August 2012. The Claimant's case was that he had suffered significant psychological and psychiatric symptoms in the form of PTSD in addition to minor physical injuries. He maintained that he had been unable to work other than unsuccessful short-term contracts following the accident, and he suffered worsening symptoms which affected his family life and everyday ability to function. The Defendant's case was that the Claimant had suffered minor physical injuries and some short-lived travel anxiety or adjustment disorder which had resolved within a matter of months.

HHJ Coe QC found that the Claimant had consciously and deliberately exaggerated the nature of the accident and his symptoms, deliberately exaggerating the "vast majority of the claim". He also found that the Claimant's wife had exaggerated her account and had lied to the Court (the fundamental dishonesty pursuant to section 57 of the Criminal Justice and Courts Act 2015). But for the dismissal, the judge would have awarded the claimant £4,729 in damages and interest.

Pleading fundamental dishonesty

A preliminary issue was raised on the pleadings, as the question of fundamental dishonesty was first raised in the Counter-Schedule served a few weeks before trial. The judge, following *Howlett v Davies* [2017] EWCA Civ 1696, found that it could properly be raised as it had been apparent throughout from the Defendant's stance, including their use of surveillance, that the Claimant's credibility was in issue. HHJ Coe QC noted that given that it remained open to him, following *Howlett*, to find that the Claimant was lying or exaggerating, the case ought to be put squarely to the Claimant so that he could respond.

Expert evidence

The Judge was critical of some of the Claimant's experts. Both neurology experts, Dr Allder for the Claimant and Dr Britton for the Defendant, agreed that there was no evidence of a traumatic brain injury. The judge preferred the evidence of Dr Kemp, the Defendant's neuropsychologist, to Dr Pierce, the Claimant's neuropsychologist, finding Dr Pierce to lack the objectivity required of an expert and that her evidence lacked thorough analysis. She was criticised for referring to a paper that had not been peer-reviewed and which the judge took the view she had not fully considered. She had also approached a colleague with a view to addressing the Claimant's inconsistencies rather than discussing the same with Dr Kemp and did not make it clear that she had approached that colleague; this was described as a "significant failing" by the judge.

The Claimant's psychiatrist, Dr Howard, also came in for criticism, with the judge preferring the Defendant's psychiatrist, Dr Neal. The judge also considered Dr Howard as an expert who was unwilling to fully acknowledge the inconsistencies in the Claimant's case, and described him as "clinging on" to the possibility of a brain injury.

Was the Defendant's insured an independent witness?

The judge's view on the Defendant's insured is likely to be of relevance to many claims that turn on differing accounts of the severity of a collision where liability had been admitted. The judge found that he had given his evidence in a straightforward and patently honest way. He found that the insured had no interest in the litigation whatsoever and was effectively an independent witness who had nothing to lose or gain from the outcome.

Other evidence

The judge also noted the contrast between the Claimant's claimed difficulties and his Facebook profile, which showed him engaging in various discussions online. He also accepted the accounts given by independent witnesses who had worked with the Claimant, who gave accounts that differed to the Claimant regarding his ability to work and symptoms.

Judgment

Based on the above, the judge found that the Claimant had consciously exaggerated the trauma of the incident and had done so from the beginning. He had been dishonest and lied to the Court, and had reported his symptoms of PTSD dishonestly. He had also deliberately fabricated symptoms such as tinnitus and altered taste.

Unsurprisingly, the judge found, applying the *Sinfield* definition of "fundamental" as whether something went to the root of the matter, that fundamental dishonesty was proved, and so applied section 57 of the Criminal Justice and Courts Act 2015. He found that the obvious reason for the Claimant's fabrication was for financial claim, and found no substantial injustice would occur. The entire claim was dismissed.

The judge indicated that she was satisfied to the criminal standard of proof as to his findings of deliberate exaggeration and dishonesty. The judge's findings may therefore be used as evidence in any subsequent committal proceedings, pursuant to *Aviva Insurance Ltd v Kovacic* [2017] EWHC 2772 (QB) (on which issue see the later article in this issue from Tim Sharpe).

The subsequent use of dishonesty findings in committal applications – a note on practice

Tim Sharpe

The practice of bringing High Court proceedings for contempt of court arising from dishonest personal injury claims has increased in the last few years. Where such proceedings are brought after the Claimant's claim has failed at trial, there is often uncertainty among both practitioners and the judiciary as to the status of those original trial findings in the later proceedings. Some useful assistance on this point can be found in the Judgment of Spencer J in the case of *Aviva v Kovacic* [2017] EWHC 2772 (QB).

In that case, insurers sought to commit Mr Kovacic to prison on the basis that he had allegedly dishonestly exaggerated injuries sustained in a road traffic accident in 2010. Liability was admitted and a schedule of loss was presented (signed as required with a statement of truth) seeking around £1m in damages. By his witness statement in support of his claim (again signed with a statement of truth), Mr Kovacic made various allegations regarding the severity of his injuries. However, many of these were contradicted by video surveillance evidence of him. At trial, Mr Kovacic was found to have grossly exaggerated his continuing disability, having persistently told his experts calculated lies. At the conclusion of the judgment, counsel for the insurer asked the trial judge (HHJ Bidder QC, sitting as a Judge of the High Court) to indicate whether he was satisfied to the criminal standard of proof in respect of the findings of deliberate exaggeration and dishonesty. The judge made it clear he was so satisfied.

The insurer sought permission to bring contempt proceedings. Mr Kovacic did not appeal the original judgment but filed a "Reply" to the contempt proceedings taking issue with the judge's findings and denying all allegations of contempt.

The insurer was granted permission. In granting that permission, Sir David Eady directed as follows:

"For the avoidance of doubt, the findings of HHJ Bidder QC in his judgment delivered on 19th February 2015 shall stand and be admitted as evidence in the application, and to the standard of proof required for a finding of contempt of court for the purposes of the application to commit the Defendant to prison. To that end the transcript of the judgment….shown to the court today shall be admitted as evidence as Judge Bidder's judgment."

At the committal hearing before Spencer J (at which hearing the contempt was proven), the court proceeded on the basis that:

1. the judge's findings are evidence of facts found, including adverse findings as to the defendant's credibility and the deliberate exaggeration of his continuing disability;
2. that the court was entitled to treat them as conclusive evidence on those matters unless there was now further material to show that the finding in question was not justified – i.e. the Defendant cannot be shut out from putting forward material which may cast doubt on a particular finding. On the other hand, the Defendant was not entitled to reopen all the matters upon which the judge found against him;
3. In addition to considering the findings of the judge, which carry "very great weight", the instant court had to consider all the evidence, including the Defendant's evidence in the contempt proceedings, in order to decide whether any given allegation of contempt is proved to the criminal standard.

The rationale behind the above is that a domestic judgment of a court of competent jurisdiction which includes a decision on a particular issue forming a necessary ingredient in the cause of action being litigated will be binding as to that issue in subsequent proceedings where that issue is relevant, but there is an exception where there has become available further material relevant to the correct determination of the point.

This approach is of considerable assistance to the insurer in discharging the burden of proof in subsequent contempt proceedings. It is important therefore that where such proceedings are a possibility, the trial advocate should seek the court's clear indication as to whether the court makes the dishonesty findings to the criminal standard. Some courts will refuse to give such an indication as (a) the standard that they have applied in their judgement is only the balance of probabilities (b) many civil judges will have no experience of considering the higher standard of proof. Other judges however may make these findings of their own volition.

In *Pinkus v Direct Line* [2018] EWHC 1671 (QB) (HHJ Coe QC, sitting as a Judge of the High Court), the Claimant in a personal injury claim with a pleaded claim for special damages in the region of £850,000 was found to have been fundamentally dishonest. The judgment records:

> "211. Through the defendant's counsel, Mr Audland QC, I have been referred to *Aviva v Kovacic* [2017] EWHC 2772 (QB) and I am invited to indicate whether I am satisfied to the criminal standard of proof in respect of my findings of deliberate exaggeration and dishonesty. I confirm that I am so satisfied."

In the matter of *Johnson v Quainoo & CIS* (29th June 2017, DJ Bishop, Croydon County Court, previously reported in the TGC Fraud Update) the court found that it was "utterly convinced that he has without doubt been fundamentally dishonest". In the subsequent committal proceedings, the insurer relied on these findings on the basis that they were a clear expression of a finding to the criminal standard. HHJ Walden-Smith (Sitting as a Judge of the High Court on 30th January 2019, unreported) accepted this argument, noting that the decision had not been appealed and that Mr Johnson (who did not attend the committal hearing) had not put forward any further evidence. Sentencing on this matter is adjourned with an arrest warrant issued (Tim Sharpe represented the insurer, instructed by Kevin Perkins of Plexus Law).

Cameron v LV= [2019] UKSC 6 – Supreme Court restores the normal framework for victims of unidentified drivers

James Henry

On 20 February 2019 the Supreme Court handed down its judgment on an issue that has been troubling insurers and those concerned about the proliferation of motor fraud (not to mention those with conceptual difficulties surrounding the entry of judgment against unidentified persons) since the decision of the Court of Appeal in May 2017.

The Supreme Court has now restored the normal hierarchical framework of motor insurance law, requiring a claimant to obtain a judgment against an identified driver, which the relevant insurer may be obliged to satisfy. If the driver cannot be identified then the claim can only proceed against the MIB under the Untraced Drivers Agreement (UTDA).

Background

Ms Cameron was allegedly the injured victim of a hit and run caused by the driver of a Nissan Micra. The Micra could be identified, but the driver could not. Ms Cameron initially sued the registered keeper of the Micra for damages. She later added the insurer of the Micra, LV, as a Defendant and sought a declaration that it would be liable for any judgment obtained against the registered keeper. LV denied the claim, contending that there could be no judgment against the registered keeper because he was not the driver of the Micra (which was in fact common ground). Ms Cameron sought permission to make one more amendment: to substitute the registered keeper of the Micra for "the person unknown driving [the Micra] on 26 May 2013". DJ Wright dismissed the application. HHJ Parker dismissed Ms Cameron's appeal against that decision, holding that Ms Cameron could pursue her claim against the MIB under the UTDA. On a further appeal, the majority in the Court of Appeal decided that the court had a discretion to permit an unknown person to be sued when it was required by justice, and Ms Cameron was not obliged to pursue the UTDA remedy, which could in any event be regarded as inferior to a court action for damages.

The Court of Appeal decision extended insurers' liability by finding that the driver of an insured vehicle did not have to be named in order for s.151 of the Road Traffic Act 1988 to apply. Before LV's appeal to the Supreme Court was heard the principle was extended in *Farah v Abdullahi & Ors* [2018] EWHC 738 (QB) to cover a situation where the insurer had avoided the policy in question, and there was no s.151 liability. Master Davidson held that the rule in *Cameron* did not rest on the existence of a s.151 liability.

The effect of the judgments was not just to protect innocent victims of unidentified drivers. It meant that insurers could have to satisfy third party claims in situations where fraudsters obtained policies using false details and then staged collisions with co-conspirators (who later became injury claimants) without the fraudulent claimant ever having to reveal the true identity of the 'at fault' policyholder. The benefits to organised gangs of fraudsters, who were no longer restricted to 'one identity per claim' in actions pursued against insurers, would have been clear.

The Supreme Court decision

Lord Sumption (with whom the other Justices agreed) began his judgment by reiterating the fundamental principles of compulsory insurance in the UK, including the fact that the statutory scheme does not confer on victims a direct right of recovery against an insurer for the liability of the driver. The only direct right against an insurer is under s.151, once the driver's liability has been established by the claimant obtaining a judgment against them in proceedings. The object of the current framework of legislation is to enable injured victims to recover from the tortfeasor. If that is not possible, then the judgment is satisfied by the insurer. If the driver is unidentified, then by the MIB. The UTDA assumes that a judgment cannot be obtained against an unnamed driver, making the only recourse in such circumstances the MIB.

Insofar as the MIB regime was criticised as an inferior remedy, Lord Sumption appeared to consider the concern about the UTDA to be misplaced. He observed that the availability of compensation from the MIB made it unnecessary to suppose that some way must be found of making the insurer liable, and commented at the outset that in these circumstances it is usually quicker and cheaper to proceed against the MIB.

The main focus of the appeal was about service. The general rule is that proceedings cannot be brought against unnamed parties. The main exceptions to that rule have been in specific cases such as actions against trespassers and unnamed persons who be connected in some way to the wrongdoing. Lord Sumption drew a key distinction between cases where defendants were identifiable, but their names were not known, and defendants (such as those in hit and run cases) who cannot be identified, save by reference to their past actions and position in a past time and place.

In the first category, it was possible that the defendant could be made aware of the proceedings against them. For example, the enforcement of an injunction may bring the proceedings to the attention of the defendant.

In the second category (which applied in *Cameron*) there could be no possibility of making the unidentified driver aware of the proceedings against them. Proceedings against that type of person would offend the fundamental principle that a person cannot be made subject to the jurisdiction of the court without having had such notice of the proceedings as will enable a fair hearing (para.17-18).

In Ms Cameron's case, service on the insurer could not constitute service on the driver of the Micra. Alternative methods of service, or dispensing with service, would not be appropriate because neither route would (or could) make the driver of the Micra aware of the proceedings.

Conclusion

The decision will be welcomed by insurers. The UTDA is a more rigorous procedure, better suited to protecting the general contributions of insurers against potential fraud. Those insurers who retain their Article 75 status will also have the benefit of the exclusions under the UTDA, particularly with regard to subrogated losses.

Hitting the language barrier head on

Anthony Johnson

Anecdotally, there seems to have been an increase in the number of cases where issues arise of problems related to language/interpretation/certification/ translation etc. Some of the points that can typically arise in relation to these issues are illustrated by the decision in a case in which I was recently involved (*Akhtar & Naeem v. Esure*, Slough CC, 18.12.18), instructed by Nigel Parker of Keoghs.

The Claimants, who were husband and wife, brought a claim for personal injury, consequential losses and credit hire charges. The Defendant denied the case in its entirety, the main argument being that the Claimants did not come close to matching the descriptions of the occupants of the vehicle given by the Defendant's insured. The matter came before the Court for a Fast-Track trial before DDJ Colquhoun, which the Claimants attended accompanied by an interpreter. Although none of the pleadings, statements or the medical reports contained any reference to interpretation, and neither did the Directions Questionnaire, the Claimants' Listing Questionnaire stated, *"[The Claimants] will have an interpreter provided by the Claimant in the language of Punjabi/Urdu to assist as required- although they can speak English, this is to assist with the technicalities of cross examination."*

It appeared to the Defendant's representative that this was perhaps the all too common situation where a claimant who does not require an interpreter chooses to use one, or is encouraged to use one by their solicitors, in the belief that such a course of action will give them additional 'thinking time' and interrupt the flow of the Defendant's cross-examination, i.e. to seek an unfair advantage. Although the Defendant was alive to the possibility that the Claimants may not actually speak English, this seemed unlikely given the lack of any reference to a language barrier in any of the documents and the seemingly carefully chosen words in the Pre-Trial Checklist.

When the parties went into Court, Counsel for the Claimants informed the Judge at the outset that both of his clients could speak English and understand things, albeit that they would be very slow to respond. He confirmed that they could read everything in English and understand it. He said that the only reason for relying on an interpreter was for the types of complicated and involved questions that tend to come up in cross-examination.

I immediately made clear that the Defendant opposed the Claimants being allowed permission to rely on the interpreter, pointing out that one of two things seemed to be happening here: either they were trying to seek an advantage at trial by hiding behind an interpreter that they did not need, or they did need an interpreter in which case their pleadings, Part 18 Responses and witness statements were invalid for not having the correct interpreter's Statement of Truth. The Judge gave a short judgment in which he said that he was not willing to go as far as striking out the claims, but that he would prohibit the Claimants from using an interpreter.

When the First Claimant began his oral evidence, it immediately became apparent that he could barely speak or understand a word of English, e.g. he struggled to read the words on the oath card. He initially claimed to have chosen the precise wording of the statement himself, despite being unable to understand some of the most basic words used, let alone some of the legalistic language that had been adopted. After much pressing, he eventually conceded that he understood only some of the words in the

witness statement and that he had not been able to understand the Particulars of Claim. He said that when they were sent to him he had immediately asked to have them translated, but that this had never occurred.

At that point, I renewed the Defendant's oral application to strike out the First Claimant's claim on the basis that it was clear that justice could not be done to the Defendant's case as the Court would be unable to evaluate any discrepancies in the written documents which had now been disavowed by the First Claimant. Either he was lying when he had said that he had asked to have the documents interpreted, in which case he had lied in the face of the Court and deserved to have his case struck out, or his solicitor had failed to provide interpretation that he had asked for in which case the strike out was their fault and they could be held to account for such obvious negligence.

The Judge gave a detailed judgment in which he confirmed that he was willing to strike out the First Claimant's claim on the basis that he accepted that it would not be possible for there to be to be a fair trial. When asked, he confirmed that the strike out was one that automatically entitled the Defendant to the disapplication of QOCS pursuant to CPR 44.15 in that the failure to apply the correct Statement of Truth was an abuse of the Court's process and/or that a person acting on the Claimant's behalf had obstructed the just disposal of the proceedings. He also made a Show Cause Order in relation to the costs awarded, as it seemed likely that (in the absence of a very good explanation), this was an appropriate case for a Wasted Costs Order to be made pursuant to CPR 46.8.

The Judge then adjourned the case for half an hour for the Claimants' Counsel to take further instructions. At the end of that period of time, it was confirmed that the Second Claimant now intended to formally discontinue the case against the Defendant. The Judge allowed the discontinuance, but gave the Defendant one month to consider whether it wished to make an Application for QOCS disapplication as against the Second Claimant and/or a further Application for Wasted Costs.

There are a number of salient points that are highlighted or illustrated by this decision:

1. It is very important to be aware of the possibility of language/translation issues arising in cases where there is a suggestion that the claimant may not be a UK national (e.g. a foreign driver's licence or the insured refers to communication difficulties at the scene). Many practitioners will have experienced a situation where the issue was not addressed in advance of a trial at which an apparently dishonest claimant were able to 'hide behind the language barrier' by blaming discrepancies between pleadings/statements/reports etc. on a lack of comprehension rather than a lack of consistency.
2. In this regard, it is important to carefully scrutinise the relevant documentation for references to language and translation. Many claimant firms seem to either be unaware of, or to not understand, the provisions of the CPR in relation to interpretation and certification- see CPR 22 and PD 22. The primary documents will inevitably be those which are personally verified by the claimant with a Statement of Truth, including the Claim Notification Form which Spencer J. confirmed in *Molodi* should be treated as having a similar status to a pleading. The medical report is another common source of tension- does it refer to an interpreter having been present or a family member translating? If the latter then it will often be sensible to request that the claimant bring them along to the hearing to be subject to cross-examination (allowing the Defendant to invite the Court to draw adverse inferences in the event that they do not comply). Sometimes the medical expert will be able to communicate with the claimant in their own first language- whilst there is nothing wrong with this in theory, it is arguably improper for the expert not to reveal this on the face of their report.
3. As was explicitly found in the present case, the Directions and Listings Questionnaires can also be important documents- many judges will be persuaded (as DDJ Colquhoun was) that the need for interpretation is an important factor when the Court is considering the management of the case, not least because it will effectively double the amount of time for cross-examination. Although the Directions Questionnaire does not ask an explicit question about interpretation, most judges will accept that it would be best practice to refer to it in Section I dealing with Other Information to help the Court manage the claim. The Listing Questionnaire does ask the question explicitly in section B.3.

4. In the present case, the Judge accepted that the Defendant was taken by surprise by the language issue being raised so late that it was not felt that the Defendant could or should have done anything about it earlier. I would suggest, however, that in cases where the issue becomes apparent earlier (e.g. if the witness statement is interpreted but the Particulars of Clam were not) then the Defendant would be well advised to set out its position very clearly in correspondence that the Judge can then be referred to (along with any response) at the outset of the trial.

5. It will often be an effective tactic to make an Application to strike out at the start of the trial on the basis of the lack of interpretation invalidating the pleadings, even though I suspect that (as in the instant case) such an Application will probably rarely be successful. The Application forces the claimant to an election as to what their case is in relation to interpretation, and limits their ability to try to use the interpreter to seek a tactical advantage. There will no doubt be situations where the Application will succeed, particularly if the Judge has had the opportunity to read all of the papers and considers that the claimant faces other problems in addition. Even if the Application does not succeed and the claimant is allowed to continue with the interpreter, it will almost always be helpful to have highlighted the issue in detail before the outset of the trial, and can nicely tee up an urgent Application mid cross-examination as happened in this case.

6. As is alluded to above, the importance of issues of this nature cannot be underestimated. Judges will be extremely unlikely to make a finding of fundamental dishonesty if they are not satisfied that the claimant has actually understood the statement or statements that the defendant contends is/are dishonest. Many practitioners will have come across cases where judges give claimants who do not speak English as a first language much greater latitude then they would to any other claimant.

7. Defendants must always be conscious that securing a strike out is not sufficient to secure the disapplication of QOCS in itself; the Court has to go a stage further and find that at least one of the three situations mentioned in CPR 44.15 has been established on the facts. If the judge does not do this themselves, then the Defendant must be sure to raise the point.

8. Wasted Costs Orders should be at the forefront of the Defendant's mind in any situation where a case is struck out or a trial is otherwise ineffective due to problems of interpretation. It should surely be negligent for a solicitor's firm to fail to realise that their own client does not speak sufficient English to understand a pleading or statement. Often, situations such as this can arise where the solicitor is multi-lingual and has been communicating with the claimant in their first language rather than in English. Incidentally, it should not always be assumed that Wasted Costs are an 'open and shut' issue in these situations- it is not uncommon for claimants to not speak to their solicitor by telephone and to have a friend or family member translate letters and e-mails for them, which is potentially not negligent as long as appropriate enquiries were made.

Axa Insurance Plc v Masud (High Court, 12/02/2019)

Elizabeth Gallagher

Judge Peter Blair QC committed the respondent (M) to 16 months' imprisonment for contempt of court after he was found to have deliberately lied to the court and exaggerated his disability for financial gain.

The applicant insurance company applied for committal of M for contempt of court in light of false statements made by him in relation to a personal injury claim brought against his employer. The hearing proceed in M's absence as the court was satisfied that the relevant paperwork had been properly served.

M had injured his back whilst lifting furniture at work. M's case was that: (i) he had been unable to return to his pre-accident employment; (ii) he had not worked since the index accident; (iii) he was unlikely to be able to return to work in the 10 years following the accident; (iv) he could not drive the family car due to his injuries; and (v) he did not know what work he would be able to do in future if his symptoms continued. He claimed net loss of earnings in the sum of £214,000. His schedule of special damages was signed by a statement of truth.

Breach of duty was admitted, but M was placed under surveillance. He was observed to be working in a fast food takeaway shop. He was able to move around without difficulty, including bending, twisting and leaning over. He was also observed driving the family car. His claim for loss of earnings was said to have been exaggerated by approximately £180,000.

The proceedings had been dismissed due to M's failure to file/serve a reply to an amended defence and he had been ordered to pay the insurer's costs on the indemnity basis.

The court found M to be in contempt of court on the following grounds: (1) the statement of truth on his schedule of special damages was false and he had lied to the court by signing it; (2) the surveillance footage was inconsistent with his presentation when he was examined at the hospital; (3) his statement that he had been unable to drive the family car was a lie; and (4) it was clear that he feigned disability when he thought that he was being observed – when he considered that he was unobserved, he appeared to have a good range of movement and was able to work without difficulty.

The judge concluded that M had lied to the court for financial gain. He had not provided any explanation or apology. In view of the quantum of his pleaded case, his age and the serious nature of his lies, it was appropriate to commit him to prison. He was committed to 16-months' custody in relation to each of the grounds above, to be served concurrently.

Recent Noteworthy Cases

Naheed and others v Highway Insurance Company Limited – Luton CC, 15 June 2018 – DJ Andrew Clarke

Paul McGrath appeared for Highway, instructed by Gareth Berry, Keoghs LLP

The four Claimants were involved in a road traffic accident in 2010. The Defendant's insurer refused to provide indemnity to the alleged tortfeasor Defendant. The Claimants sent CNFs to the Defendant's insurer and thereafter further corresponded with the Defendant's insurer including sending letters in March 2011 stating that they were s152 notice of intended proceedings. They threatened to issue proceedings if proposals were not forthcoming within 21 days. The First Claimant's Solicitors sent a later letter in November 2011 which made reference to advising the client of her option to issue proceedings if settlement could not be achieved but also purporting to be s152 notice.

Proceedings were not issued until October 2013 and served only on the Defendant tortfeasor. The Claimants obtained default judgment and had damages assessed. The Claimants sought to enforce the judgment against the Defendant's insurer pursuant to s151 Road Traffic Act 1988. The Defendant's insurer refused to pay. The Claimants issued proceedings against the Defendant's insurer seeking enforcement.

The Defendant's insurer argued that the March 2011 letters, whilst stating that they were s152 notices, were not sufficient as they did not sufficiently identify the proceedings that were issued and were not sufficiently proximate to the proceedings actually issued to provide reasonable notice to the Defendant's insurer. The Defendant relied on *Stinton v Stinton* [1995] RTR 167; *Harrington v Link Motor Policies at Lloyds* [1989] 2 Lloyds Rep 301 and *Wake v Page; Wylie v Wake* [2001] RTR 20.

The Claimant argued, amongst other things, that the letters were expressly stated to be s152 notice and that this was sufficient under s152 to constitute notice, further, there was no requirement for the notice to be sent within any given timescale before proceedings and the time passing in the instant case did not undermine the fact that notice had already been given.

Held: whilst the letters unquestionably stated that they constituted notice under s152, this was not determinative and instead it was a matter of fact and degree whether sufficient notice had been given pursuant to s152 (*Wake v Page*, paragraph 29 applied). In the present case the March letters were unequivocal in that if proposals were not made within 21 days, proceedings would be issued. Proposals were not forthcoming but proceedings were not issued until over 2 years later. Time was a relevant factor in considering whether notice of 'the' proceedings had been given (*Stinton* and *Wake* applied). In the instant case issuing proceedings over 2 years later was not sufficiently proximate and as such the letters in March 2011 could no longer be taken by the insurer to be sufficient notice for proceedings that were issued in October 2013, i.e. the insurer did not have adequate notice under the fifth proposition set out at paragraph 29, *Wake*. Further, in relation to the First Claimant only, the November 2011 letter was equivocal in that it was subject to the client's response to advice and as such fell squarely within the ratio of *Harrington* at page 374E. The enforcement action was dismissed.

Ward v Aviva – Cardiff CC, 27.06.18 – DJ Hywel James

Section 57 – minor but exaggerated injury – fundamental dishonesty

James Henry, instructed by Naila Ali of Horwich Farrelly, acted for the defendant insurer in this exaggerated claim for personal injuries.

D's driver had passed away, meaning D could not advance a positive case on breach of duty or causation. It was, however, able to advance a positive case of dishonesty pursuant to s.57 of the Criminal Justice and Courts Act 2015.

In the course of his cross-examination, C substantially exaggerated the effects of his injuries by describing his pain on a level of 9/10, where 10 was the worst type of pain. He said that he had lost sleep as a result of his injuries for up to 9 months and that the pain lasted for 28 months in total. He sought an award of general damages in excess of £6,000. C saw his medico-legal expert 25 months after the accident, and the expert provided a prognosis of 3 months from that point for a full recovery. D contended that it was no coincidence that C's recovery perfectly aligned with the medical evidence (despite failing to undertake the recommended physiotherapy). Rather it was corroborative evidence that, rather than telling the truth and trying to assist the court, C was willing to go along with whatever was told to him in order to maximise his claim for damages.

The Judge found that on a true analysis of C's injuries, they were worth about £600. The sum being sought was in excess of 10 times that. C had been fundamentally dishonest in relation to his primary claim by seeking to exaggerate the symptoms. The claim was dismissed by application of the mandatory provision in s.57.

Bayram v Yigiturk (1) Sabre (2) – Central London CC, 18.07.18 – DJ Jackson

Discontinuance before application to amend – PD44 §12.4 – fundamental dishonesty

James Henry, instructed by Karen Mann of Horwich Farrelly, acted for the defendant insurer in this claim arising from a staged accident.

Following exchange of witness statements the insurer applied to amend its put-to-proof defence to plead a positive case of fraud. In response (and before the hearing of the application) the claimant discontinued proceedings. Not content with that result, the insurer asked the court to retain the application hearing date to hear submissions on fundamental dishonesty. The guidance in *Alpha Insurance v Roche* (1) *Roche* (2) [2018] EWHC 1342 provided that the consideration of such an issue following discontinuance before trial should neither be considered routine nor exceptional and the court would have discretion whether to hear evidence on the issue. Although the discontinuance was well before trial (and even before permission had been granted to rely on the amended defence) the Judge was content to hear submissions on the papers and made a finding of fundamental dishonesty together with an enforceable costs order.

Kempster v Kelsey – Salisbury CC, 10.08.18 – DJ Bloom-Davis

Liability dispute – FD

James Henry, instructed by Bradley Sutcliffe of Horwich Farrelly, acted for the defendant in this claim arising from a RTA liability dispute.

The claim involved a fairly typical liability dispute. C said that she was trying to turn into a side road and had to stop to give way to an oncoming car. She said that D was trying to make the same turn, failed to stop and hit her in the rear causing injury. D said that C reversed to get the correct angle for her car to continue. D denied liability, and kept causation and quantum in issue to expose inconsistencies in C's evidence that could affect her credibility.

The Judge found that C's account on liability was riddled with inconsistencies which were difficult for C to explain and for the Judge to understand. In contrast, D had a clear recollection and gave her evidence in a balanced and measured way. The claim was dismissed, but the Judge went on to find that the way in which the claim was put forward insofar as the circumstances of the accident were concerned, and taking into account the evidence about C's injury, was sufficiently dishonest to enable her to find on balance that the claim was fundamentally dishonest. Accordingly an enforceable order for indemnity costs was made.

Tang v LV= – Central London CC, 05.09.18 – DDJ Rea

Exaggeration – Causation – FD

James Henry, instructed by Aysha Ahmad of Horwich Farrelly, acted for the defendant insurer in this causation dispute.

This claim arose from an accident in a car park. Causation was denied. C reported that she was in pain for over 3 years. Notwithstanding that report, she had failed to seek any medical attention. The Judge found that C's explanations for not attending her GP were indicative of her attempts to manipulate the evidence beyond reason, disingenuous and spurious. The conclusion provides a useful example of what can happen when a claimant tries to explain away their failure to seek medical attention, but keeps changing their story. In this case the claimant said that she did not seek medical attention because she did not think the pain was serious enough. When cross-examined on the fact that she said she had the pain for over three years, she changed her reason to 'not thinking the doctor could do anything about it'. That inevitably led to the question 'how would know that if you didn't ask?'. The reason changed again to 'not having enough time and having a lot going on life' (another incredible reason if the pain lasted three years). When shown that she had attended for other reasons but not mentioned the pain the final excuse ('my doctor would only let me mention one thing at a time') was stretch too far. The Judge held that C had been dishonest.

Much was made by C of the fact tat she was a professional business woman who would not lie to the court. The Judge did not accept that, and C's obvious intelligence ultimately counted against her. The Judge found that C was articulate and thought she was able to manipulate the evidence. Neither was the pattern of a slow build up of unrealistic expectations. C was insulting the listener. The only conclusion was of fundamental dishonesty.

Amin v McDowell – Wandsworth CC, 20.09.18 – DJ Parker

Section 57 – credit hire, repairs etc. – fundamental dishonesty

James Henry, instructed by Gemma Day of Horwich Farrelly, acted for the defendant insurer in this exaggerated claim for personal injuries.

This claim was for injury and c.£10k of credit hire charges. Breach of duty was admitted. If C had proven his injury claim it was almost inevitable that he would have recovered damages for hire charges.

C was not an impressive witness and was inconsistent in a number of respects. However, he had been to his GP and given a consistent account of his alleged injuries. C's real undoing was the level of exaggeration, describing his pain at a level of 9/10, which he described in cross-examination as 'the most severe pain imaginable'. That went beyond mere exaggeration, and could not be put down to people experiencing pain in different ways. When challenged he maintained that was his case. He also (as many claimants do) described a severe fear of travel, notwithstanding that he hired an alternative vehicle shortly after the accident.

The Judge dismissed the injury claim and found that C had been fundamentally dishonest in relation to that claim, with the consequence that his entire claim (including the claim for hire charges) was dismissed, together with an enforceable order for indemnity costs.

Sheeraz v Saleem & Highway Insurance Company Limited

18th October 2018, Romford County Court. Deputy District Judge Perry.

Quantum – Fundamental Dishonesty

Emma-Jane Hobbs (instructed by Gareth Berry of Keoghs) represented the Defendants in this case in which the Claimant alleged that she and her children had been injured whilst back seat passengers in a parked car which was struck by a car driven by the First Defendant. The Defence admitted that the accident had occurred, but denied that the Claimant or her children were present in the car. The First Defendant did not attend the trial.

The Claimant's evidence was *"littered with inconsistencies"*, both as to the accident circumstances and the injuries she said she'd suffered, which allegedly included fractures to her teeth. The Judge said that as he couldn't believe the Claimant's evidence and the burden of proof was on her, she had not satisfied him on the balance of probabilities that she was in the car when the collision occurred. Even if he had found she was in the car, he would have concluded that no injuries were suffered. Despite the fact the Claimant had claimed that her and her infant children were injured, that her and her son were both bleeding afterwards and that, in particular, she was bleeding from stitches recently inserted after childbirth; she did not go to A & E to seek treatment and /or reassurance. With regard to the alleged dental injuries, when the Claimant attended a dentist after the accident, it was for a routine examination only. She made no mention of the alleged accident damage to her teeth. The Judge *"found that the Claimant has not suffered any injuries as a result of any collision she may have been in. It follows therefore that I have found that the injuries were fabricated and that must go to the root of the claim. I therefore find on the balance of probabilities that the claim was fundamentally dishonest for the purposes of CPR 44.16"*.

Dereli v Carol – Slough CC, 20.10.18 – DDJ Hussain

Findings of FD following discontinuance – PD44 §12.4

James Henry, instructed by Karen Mann of Horwich Farrelly, acted for the defendant in this application for a finding of fundamental dishonesty.

C said that D shunted her onto a roundabout causing her injury and damage to her car that would have cost c.£3,000 to repair. D denied that any contact occurred at all. She defended the claim on the basis of the alleged circumstances, but also on the basis that C had been involved in an undisclosed accident one week before the index incident. Following an application for specific disclosure it transpired the C had previously claimed (and been paid) for the same damage (albeit with a few minor differences) following the earlier accident.

C discontinued her claim 8 days before trial. In response, D applied for a finding of fundamental dishonesty. At the hearing of the issue of fundamental dishonesty, C sought to rely on two arguments which she said absolved her. First, that her solicitors (who had represented her for both actions) had made a mistake by claiming for the same damage twice. That did not explain why she had maintained the claim in her witness statement. Secondly, she argued that discontinuing did not imply guilt; she had a genuine injury claim even if there were some overlap in the repair claim. As to the second argument, the Judge held that she may have been more persuaded if C had only discontinued the repair claim, but she had not. She discontinued the entire claim.

In the circumstances the court was entitled to draw the ready inference that C discontinued her claim in an attempt to avoid her dishonest claim being exposed at trial. The Judge found that the claim was fundamentally dishonest and made an enforceable costs order on the indemnity basis.

Parker v Tesco Stores

23rd October 2018, Peterborough County Court. District Judge Capon.

Put to proof defence

Quantum – Causation – Fundamental Dishonesty?

Emma-Jane Hobbs (instructed by Nasreen Rehman of Plexus, Manchester) successfully represented the Defendant in this case which arose from a road traffic accident involving the Claimant and the Defendant's employee.

The Claimant alleged that he had sustained significant psychological injury (an exacerbation of PTSD) as a consequence of the accident, and claimed general damages for personal injury and special damages including sums for credit hire, travel expenses, psychological treatment and various miscellaneous expenses. The Defendant accepted that the accident had been caused by the negligent driving of its employee (and had made a payment in relation to the vehicle damage), but put the Claimant to proof in relation to the causation and quantum of his claim.

The Judge found that the Claimant was an unreliable witness / historian who had provided accounts (both to the medico-legal experts and in his witness statement) that were inconsistent with the contemporaneous records. As a result of the considerable inconsistencies and the Claimant's failure to provide accurate information, the Judge said he could place no reliance on his evidence. As the psychological medico-legal expert's evidence was based largely on the Claimant's self-reporting, the Judge was unable to place any real reliance on that either. Therefore, the Claimant was not able to satisfy the Judge, on the balance of probabilities, that there was any exacerbation of PTSD as a consequence of the accident. In relation to the credit hire claim, the Judge found that as the Claimant could not prove he was impecunious at the material time, he had failed to mitigate his loss by not having his van repaired prior to hiring a replacement vehicle. Had he done so, there would have been no need to hire a vehicle. The Claimant's claim was dismissed and he was ordered to repay a 'without prejudice' interim payment made by the Defendant.

At the conclusion of the trial, the Defendant made an oral application for QOWCS to be lifted due to the Claimant's fundamental dishonesty. Whilst the Judge accepted that the Claimant wasn't credible, he wasn't prepared to make a finding of fundamental dishonesty on the basis that the Claimant had suffered from significant psychological injury for many years, which might have affected his ability as a historian, or his ability to comprehend what was required of him.

Wells v Zenith – Staines CC, 08.11.18 – DDJ Harvey

Gym records – LVI – fundamental dishonesty – objective test

James Henry, instructed by Katie Islip of Horwich Farrelly, acted for the defendant in this claim for personal injury brought by a fundamentally dishonest claimant.

Breach of duty was accepted but causation denied on the basis of LVI.

There were multiple inconsistencies in C's evidence, but in particular C sought to persuade the court that she was injured by giving evidence that she could not run or attend her gym. In fact, her gym records demonstrated fairly regular visits to the gym after the accident. C's explanations (that she was training her legs, not the affected areas) were not credible, particularly in light of the fact that she described the pain being at its worst in the evenings, which was the very time she was shown to be attending the gym. The Judge considered the authorities in detail and dismissed the claim with a finding of fundamental dishonesty and award of indemnity costs.

It is often clear in claims involving allegations of fundamental dishonesty that the claimant has no honest belief in the truth of what he or she is saying. An interesting feature in this case was that the Judge had to consider and properly apply the objective test for dishonesty set out in *Ivey v Genting Casinos Limited (t/a Crockfords Club)* [2017] 3 WLR 1212 (that whilst dishonesty is a subjective state of mind, the standard by which the law determines whether that state of mind is dishonest is an objective one, and that if by ordinary standards a defendant's mental state is dishonest, it is irrelevant that the defendant judges by different standards). Even if C considered her evidence honest, it was not when her state of mind was judged by the objective standard.

Mahmood v Hosea – Appeal in Reading CC – HHJ Bloom, 28.11.18

Appeal – fundamental dishonesty – QOCS

Edward Hutchin, instructed by Damian Rourke of Clyde & Co, represented the successful Defendant and his insurers in this appeal, which sought to restrict the circumstances in which it is appropriate for judges to find fundamental dishonesty.

The Claimant claimed damages arising out of a road traffic accident. Liability was disputed. There was a stark difference between the parties' accounts of the accident: the Claimant claimed that he was waiting to turn right from a main road into a side road, when the Defendant tried to undertake, mounted the pavement, then cut back in and hit his vehicle, tearing off the front bumper as he did so. By contrast the Defendant alleged that he was travelling normally along the main road, when the Claimant pulled out from the side road and into collision with his vehicle as he passed.

At trial the judge heard evidence and delivered a judgment dismissing the claim, preferring the Defendant's account of the accident. A costs order was made in the Defendant's favour. In the course of his judgment, the judge specifically commented that there were 2 distinct and clear versions of events. He held that this was not a case where a party had been mistaken: someone was not telling the truth. In light of this finding, the Defendant successfully applied for permission to enforce the costs order on grounds of fundamental dishonesty under CPR 44.16(1).

The Claimant appealed. He challenged the judge's decision on liability on the basis that it was perverse, but also appealed the finding of fundamental dishonesty, essentially claiming that the judge should not, having simply preferred one party's version of events to the other, have made a finding of fundamental dishonesty.

At an oral hearing permission was granted in relation to the fundamental dishonesty point only. The Claimant developed his appeal by arguing that the judge had found in the Defendant's favour because he preferred his account of the accident, not because of any other adverse findings relating to the Claimant's general credibility. In these circumstances it was argued that the judge should not have found fundamental dishonesty, but should merely have dismissed the claim on the basis that the Claimant had failed to prove his case.

Following a fully contested appeal hearing before Her Honour Judge Bloom at Reading County Court, the appeal was dismissed. The appeal judge was satisfied that the trial judge had thought carefully about his decision, and had expressly found not just that the Claimant had failed to prove his case, but that he had lied. It was not challenged that his dishonesty was fundamental to the case. The QOCS regime did not make it incumbent on judges to avoid making findings of dishonesty in situations where that was the obvious conclusion, just because an enforceable costs order would then be made. The fact that the consequence of such a finding was that QOCS would be disapplied was a consequence of the Claimant lying about his claim. There was no error of law.

The judge also made an enforceable costs order against the Claimant in respect of the costs of the appeal. She dismissed the Claimant's contention that QOCS should apply to the costs of the appeal, holding that, as QOCS had been disapplied at first instance, the Claimant had lost QOCS protection for the purposes of the appeal too.

The case provides some useful guidance in relation to QOCS and its effects on a judge's findings on liability:

- The appeal confirmed that a trial judge should not avoid making findings of dishonesty just because they might result in an enforceable costs order.
- A judgment based on the judge preferring one party's evidence to the other's was sufficient to support an FD finding, where there were 2 incompatible versions and the judge found that one party was lying.
- The appeal judge pointed to the clear finding made by the judge in relation to dishonesty. Where a judge rejects a party's version of events or finds a claim not proved, it may be worth asking the judge to expand on the judgment or provide further reasons to clarify whether a finding of dishonesty is being made.

Miran v Gym 1 (Luton) Ltd- Bedford CC, 04.12.18 – DJ Falvey

Fundamental dishonesty – EL/PL claims

Edward Hutchin, instructed by Blanche Richards of Clyde & Co, represented the successful Defendant and its insurers in this case which arose out of a public liability claim.

The Claimant claimed damages for personal injuries allegedly sustained when he slipped and fell in a gym changing room. He alleged that he put out his hand to break his fall, and put it through a window in the changing room door. He made claims under the Occupiers' Liability Act 1957 and in negligence, alleging that the gym had failed to install and maintain a non-slip floor, or ensure that the window was made of safety glass. The claim was defended on the basis that the Claimant's account of the accident and his injuries simply could not be believed, and fundamental dishonesty was alleged.

After a trial in Bedford County Court, involving oral evidence from the Claimant and gym staff, the claims were dismissed. The Judge rejected the Claimant's account, holding that the Claimant had failed to prove that the accident had happened in anything like the manner alleged. He went on to comment that, even if the Claimant's account had been accepted, he would not have found any breach of duty by the Defendant, accepting the evidence adduced to show that the floor and window complied with health and safety requirements. He also commented that he would in any event (if the Claimant had proved that he had slipped) have found the Claimant contributorily negligent.

The claims were therefore dismissed. The Judge also made a wasted costs show cause order against the Claimant's solicitors, having held that their approach to the evidence in the case was misconceived.

The case illustrates some useful wider points:

- The specialist counter-fraud skills usually deployed in motor claims have a wider application.
- Carefully targeted investigations, clear pleadings, and thorough cross-examination can produce effective results in other areas such as EL/PL claims, where fraud and FD issues are less commonly encountered by trial judges.
- It is always worth considering whether there have been any conduct issues in preparation or pursuit of the claim which might give rise to a wasted costs application.

Flash for Crash!

Hussain v (1) Skyfire Insurance Company Limited Evolution Insurance Company Limited

(7 December 2018, County Court at Birmingham, DDJ Talbot)

Induced accidents – independent witnesses – Claimant in person at last moment – Fundamental Dishonesty

David R White (instructed by Karen Mann of Horwich Farrelly Solicitors) appeared in this matter, which arose from an unusual set of circumstances that on their face showed the insured driver was clearly at fault. However, the Defendants' case was that the accident was deliberately induced for the purposes of founding fraudulent insurance claims.

The insured driver arrived at a mini roundabout intending to take the second exit, which was to her right. However, the traffic was backing up from the first exit such that she could not enter the roundabout legitimately. Thus, she waited.

The Claimant then pulled up at the give way lines to enter the roundabout from the road to the insured's right. The Claimant could have turned left without trouble, but it appeared he wished to go to his right, which was onto the road on which the traffic was backing up.

The Claimant then flashed his lights at the insured, and beckoned her to come onto, and negotiate the roundabout the wrong way round in order to avoid the traffic jam and reach her intended exit. The insured did so cautiously, but once she was established on the roundabout (albeit illegitimately), the Claimant drove onto the roundabout at speed and caused a head on collision with the insured.

There were some difficulties with the case, in particular that the insured had plainly undertaken an obviously negligent and hazardous manoeuvre. However, her evidence, along with that of her husband, and independent drivers to her rear, was compelling: the Claimant had invited her onto the roundabout, and then deliberately driven into her; this was no accident. The Judge was particularly impressed by the independent witness' vivid account of the events, showing the value of such an account at trial in this kind of case.

In addition to the evidence supporting the insured, there was a reasonable amount of credibility material against the Claimant. For reasons unknown to the Defendants, the Claimant's solicitors came off record on the morning of the trial. The Claimant sought an adjournment, but the same was refused (many judges would have granted him one given the loss of his lawyers, but there were particular circumstances that militated against losing the hearing date, and DDJ Talbot was sufficiently robust to recognise the importance of those and refuse the adjournment).

In a further twist, the Claimant decided to walk out of court part way through the cross examination, never to return. The Judge proceeded to hear the remainder of the evidence, and concluded after consideration that the accident was deliberately induced by the Claimant and that it had been fundamentally dishonest, such that QOWCS protection should be lost.

Ishtiaq v Saul – Birmingham CC, 20 December 2018 – DDJ Burns-Beech

Paul McGrath appeared for the Defendant, instructed by Karen Flemmings-Jordan, Keoghs LLP

The Claimant made a claim for repair costs and personal injury damages. Liability was denied and the Defendant contended that the Claimant abruptly applied his brakes when it was unsafe to do so. The Defendant relied upon paragraph 12 of *Afzali v McLaw Roofing Ltd* [2008] EWCA Civ 1437 and submitted that despite the Defendant hitting the rear of the Claimant's vehicle, the Defendant was nevertheless not to blame for the accident (whether it might be found to have been deliberate or negligent on the Claimant's part). All aspects of causation and quantum were in dispute. The Claimant discontinued a claim for repairs in April 2018, but the Defendant cross-examined on the claim and submitted that it was of importance in relation to credibility.

The Judge accepted the Defendant's submission, finding that the Claimant has been responsible for the collision and dismissed the claim. The Defendant sought her costs and sought a QOCS disapplication pursuant to CPR 44.16(1), in particular focusing on the claim for repairs which the Defendant submitted was fundamentally dishonest. The Judge found that the claim for repairs had been fundamentally dishonest. He accepted a submission that this was a substantial part of the claim as advanced and that this remained the position until April 2018, when that part of the claim was discontinued. He determined that the appropriate way of dealing with the matter was to make the Order that the Defendant would have its costs of the action which were then assessed, and that the costs incurred up to the date of discontinuance of the repairs claim shall be enforceable, with the remaining costs being protected by QOCS. The Judge accepted that 70% of the costs of the action were thus enforceable under CPR 44.16(1) and so ordered.

Sobieraj & 3 Ors v Pilarski (1) Insurer (2) – Bristol CC, 21.12.18 – DDJ Gisby

Staged accident – fundamental dishonesty – adverse inferences

James Henry, instructed by Karen Mann of Horwich Farrelly, acted for the defendant insurer in these four claims arising from a staged accident.

The claims arose from a RTA said to have taken place when D1 collided with a vehicle driven by C1 in which C2, C3 and C4 were passengers. D2 was D1's insurer. C1 and C2's claims were struck out for breach of the directions order although, in an interesting twist, C1 actually attended the trial and made an informal application for relief from sanctions, which was dismissed.

In his report of the accident, D1 denied knowing any of the claimants. It turned out that he knew C1 well. They were friends on Facebook. D2 pleaded fraud alleging that the accident was staged. Analysis of the routes taken by the claimants and D1 showed them to be a little unusual. The claimants said that they were on their way to a supermarket, but seemed to be heading down a back road, rather than taking the direct route. Equally, D1 had made a minor deviation from the route leading to his alleged destination (off the main road) in order to arrive at the scene of the accident. The Judge found that to be too much of a coincidence. He found that C1 and D1 had hatched the plan to stage the accident and then got in touch with C2, C3 and C4 to ask if they wanted to bring claims. Those findings led to the conclusion that although the collision had occurred as the parties described it occurring, the reason it had occurred was because the respective drivers (C1 and D1) had intended it to occur in that way in order to enable fraudulent claims to be made.

In reaching that conclusion, the Judge also drew adverse infer3nces from the fact that neither C1 nor C2 (nor indeed D1) had been asked to give evidence on C3 and C4's behalf, despite them being known to each other. D2 had clearly raised a case to answer (on the adverse inferences) and there was no answer to it given in evidence. The guidance in *Wisniewski v Central Manchester Health Authority* [1998] EWCA Civ 596 and *UK Insurance v Gentry* [2018] EWHC 37 was applied.

The remaining two claims were dismissed with findings of fundamental dishonesty and an award of indemnity costs.

Noah v Insurer – Huntingdon CC, 08.01.19 – DDJ Harrison

Staged accident – fundamental dishonesty

James Henry, instructed by Jessica Bradley of Horwich Farrelly, acted for the defendant insurer in this causation dispute.

D's case was that the collision between the 2 vehicles did not cause any personal injury to C. There was no evidence from D's driver. C inconsistent on virtually every aspect of his evidence and ultimately found to be fundamentally dishonest. What was unusual about this case was that, in the course of cross-examination, C repeatedly conceded that he had lied and told untruths when preparing his witness statement. This led to the rather bizarre situation where C was, by his own admission, a dishonest man. However, he sought to persuade the court against making a finding of FD on the basis that he had finally 'come clean' and was not dishonest in the end. He did, after all, maintain that he suffered some injury. Quite properly, the Judge was having none of it.

Seabrook v. Adam (Norwich CC, 22.01.19)

Fast-Track Causation Dispute – Costs Consequences Following Judgment

Anthony Johnson (instructed by Cara Doherty and Clare Tolson of Keoghs) successfully represented the Defendant in this costs dispute that arose from a Fast-Track trial that took place in October 2018.

At that trial, George Davies persuaded DDJ Buss to accept the Defendant's primary case that, largely due to inconsistencies in the medical evidence, the Claimant had failed to prove the 32-month back injury that he had alleged. However, the Judge did find that the Claimant had proven an eight-week neck injury, awarding him damages of just over £1,500. Ordinarily, the costs consequences of that decision would be that the Claimant would receive fixed costs. However, the Claimant's solicitors (Atherton Godfrey of Doncaster) sought their full costs, having initially sought allocation to the Multi-Track and argued throughout the proceedings that the claim was exceptional and justified greater costs. The Judge adjourned these issues to another hearing.

At that costs hearing, the Claimant argued that the Defendant should pay their full costs of over £33,000, principally for the following four reasons: (i) the Claimant had beaten a 90:10 offer on liability made after liability had been conceded; (ii) the Defendant had unreasonably refused to engage in ADR; (iii) the case was 'exceptional' pursuant to CPR 45.29J; and (iv) the Defendant's conduct had been unreasonable in referring to fundamental dishonesty in correspondence but not pleading the same in its Defence and not relying upon the same at trial. Unsurprisingly the Defendant vehemently opposed all of these contentions.

DJ Reeves held that the Claimant should be restricted to fixed costs, referring to the case as a 'perfectly normal, unexceptional, common-or-garden RTA PI claim', and accepting that the Defendant had been entitled to put the Claimant to proof given the obvious inconsistencies in his claim. He held that it was not unreasonable for defendants to put claimants on notice of the possibility of an FD finding even where the same has not been explicitly pleaded, and accepted that it would have been very difficult for the Defendant to make any offer in a situation where the Claimant's prognosis was 'varying, shifting and altering'.

The Judge found that the Claimant's purported Part 36 offer could not be construed as a genuine attempt to settle the claim given that it related to a matter that had already been conceded 100% by the Defendant- he held that the ordinary, common use of the English language did not support the Claimant's interpretation that liability extended to causation in a situation where the Defendant admitted the former but not the latter. He then held that ADR would not have been realistic or proportionate in a low end Fast-Track claim, and that it is difficult to see what could have been achieved in any event given the causation dispute on the facts- he commented that the Claimant's solicitor's approach would have been more appropriate in a £7M High Court Multi-Track dispute. Having successfully resisted the Claimant's arguments, the Defendant was awarded its costs since the date of the original trial on the indemnity basis, which could be set off against the Claimant's full award of damages pursuant to CPR 44.14(1).

Sharp & Bickerdike v LV= – Hastings CC, 05.02.19 – DJ Collins

Call recordings – fundamental dishonesty – late intimation

James Henry, instructed by Leah Whitehead of Horwich Farrelly, acted for the successful defendant in securing findings of fundamental dishonesty against two claimants and an enforceable order for indemnity costs.

The claims were not intimated until after the claimants' alleged symptoms had fully resolved. While there is nothing technically wrong with the bringing a claim after the passage of time (or after recovery), it inevitably causes some concern about the legitimacy of the claim, and at best undermines the quality of person's recollection about events contemporaneous to the accident. That is what appeared to happen in this case which involved the defendant insurer relying on contemporaneous telephone call recordings. In the course of the telephone calls C1 told D that neither he nor C2 had been injured. Far from that being and end to the matter, both claimants pressed ahead with their claims and sought to persuade the court that they were injured, just not in a way that was serious enough to report it to D.

The Judge rejected the claimants' evidence. He found that it was the cold call from the accident management company that had that prompted the claim and then seduced the claimants into pursuing the claims. Rather than abandoning the claims when they were presented with the contemporaneous evidence of the call recordings, the claimants had persisted in the dishonesty.

Allianz Insurance v Barlow (QB) – 13.02.2019

Fraud – Committal

Edward Hutchin, instructed by Andrew Thomson of DAC Beachcrofts on behalf of Allianz Insurance, successfully represented the insurers in this case, in which a dishonest Claimant was found guilty of 2 counts of contempt of court.

The Claimant made claims for compensation following a road traffic collision. A defence was filed admitting breach of duty, but denying causation and loss, and putting the Claimant to proof of his claims.

In the course of the case, the Claimant filed a witness statement asserting that he had, prior to the accident, worked as a personal trainer and regularly trained and competed as a boxer, but that he had been unable to return to boxing for about 4 months following the accident. Following further investigations, online video footage was discovered, showing the Claimant taking part in a competitive boxing bout only about 2 months after the accident. A successful application was therefore made to amend the defence to allege fraud and fundamental dishonesty, and shortly afterwards the Claimant discontinued his claim.

The insurers were not content to let the matter rest, and an application was therefore made to commit the Claimant for contempt of court relating to false statements made in the course of the proceedings. The Claimant opposed the application, even after Mr Justice Martin Spencer granted permission to bring committal proceedings.

After a High Court hearing in the Royal Courts of Justice, at which the Claimant gave evidence in his defence, HHJ Peter Blair QC, sitting as a High Court Judge, found the Claimant guilty of 2 counts of contempt of court. Having heard mitigation advanced by the Claimant in relation to his means and personal circumstances, the Judge sentenced him to a fine on each count, but commented that it was important that parties knew that lies told in court proceedings would not be countenanced and that an element of deterrence was required.

The case was significant because it showed that there can be wider benefits in pursuing further legal action against Claimants who discontinue. Despite the technicalities and costs of committal proceedings, the insurers took the view that a message ought to be sent out to all claimants, even in low value claims, that exaggeration or dishonesty in their evidence would not be tolerated. The Claimant's lack of means meant that costs orders were unlikely to provide an effective deterrent. However by taking committal proceedings, not only was the Claimant held to account for his actions personally, but the case attracted significant national media attention, enhancing the reputation of the insurers in their attempts to combat fraud.

A. v. B. (Leeds CC, 14.02.19)

Fast-Track Causation Dispute – Costs Consequences Following Judgment

Anthony Johnson represented the Defendant in this Low Velocity Impact trial in which the Claimant was seeking to recover general damages for personal injury along with charges for physiotherapy, vehicle repairs, credit hire and recovery and storage.

HHJ Saffran held that although he was not persuaded that the index collision would have been incapable of causing injury to anyone as had been argued by the Defendant, he did not accept that the Claimant before him had proven that it had caused any injury to him. He commented that the Claimant always seemed to want to blame somebody else for the many inconsistencies and discrepancies with his claim, and concluded that his evidence was so hopelessly inconsistent that he hadn't discharged his burden of proving that he had suffered any injury at all. He said that he had borne in mind the guidance in *Molodi* that whiplash claims are easy to make and difficult to defend, and that they should be dismissed where the Claimant is demonstrably untruthful.

Although the physiotherapy and recovery and storage claims were dismissed, the Claimant did recover damages in respect of vehicle repairs and credit hire in the total sum of £8,835.10. This gave rise to argument over the costs consequences following the judgment- the Defendant's insurers had not protected their position with a Part 36 offer because the Defendant's evidence herself (not accepted by the Judge) had been that the vehicle damage alleged by the Claimant had been pre-existing.

After hearing argument from both Counsel, the Judge accepted Anthony Johnson's argument that costs should be restricted to the costs pursuant to CPR 27.14 that the Claimant would have recovered if he had issued in the Small Claims Track for special damages not exceeding £10,000, as this is what the claim would have amounted to in the absence of the disallowed personal injury element. He rejected the Claimant's argument that the claim should be viewed as a Fast-Track claim that had not succeeded in one aspect, rather than a claim that should never have been in the Fast-Track, holding that the Defendant had been put to additional expense by the Claimant claiming he was injured, which had inflated the claim into the Fast-Track. The fairest way to reflect this additional expense was in a significantly reduced award of costs to the Claimant: the Claimant was awarded costs of £755, whereas Fast-Track fixed costs would have been £6,000-£7,000 including disbursements.

Shaw-Matthews v THO Logistics – Coventry CC, 19.02.19 – HHJ Gregory

Causation – fundamental dishonesty – opportunistic claim

James Henry, instructed by Katie Islip of Horwich Farrelly, acted for the successful defendant in securing findings of fundamental dishonesty against a dishonest claimant.

C's claim was that he was hit in the rear by an HGV, which jolted him with sufficient force to cause about one week of neck and upper back pain, and 10 weeks of shoulder pain. D admitted that its HGV hit C's van, but denied causation on the basis that the incident was relatively minor and caused very little visible damage.

C came undone at trial, giving inconsistent evidence with regard to the site of his injury, the onset of pain, his time off work, his attendance on medical professionals, his physiotherapy treatment and his alleged recovery time. He had also failed to disclose previous accidents and claims that he had been involved in, and gave the incredible account that his pain was 'excruciating' the day after the accident.

The Judge found that in short, in attempting to explain his injuries, C was completely tied up in knots and had been frankly dishonest about the effect of the accident. C knew how to claim for compensation and had opportunistically tried to make a false claim when he knew full well he was not injured. The claim was dismissed with a finding of fundamental dishonesty and an award of costs assessed on the indemnity basis.