**QB-2017-002396**

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**

12 April 2021

**[2021] EWHC 846 (QB)**

Royal Courts of Justice
Strand, London, WC2A 2LL

**Before** :

**MASTER DAVISON**

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**Between :**

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| **SAMANTHA MUSTARD** | **Claimant** |
| **- and -** | |
| **JAMIE FLOWER (1)**<br>**STEPHEN FLOWER (2)**<br>**DIRECT LINE INSURANCE (3)** | **Defendants** |

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**Mr Marcus Grant** (instructed by **Dickinson Solicitors Ltd**) for the **Claimant**
**Mr William Audland QC** (instructed by **BLM**) for the **Third Defendant**

Hearing date: 29 March 2021 (by Microsoft Teams)

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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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## Introduction

1. On 29 March 2021 there was a CCMC at which various matters arose for decision. One of them was the third defendant's ("the defendant's") application to amend its Defence. The proposed amendments were uncontroversial, save the following one concerning fundamental dishonesty (the italics are mine):

> "4.4 The Claimant's accounts of the RTA and its immediate aftermath, and the nature and severity of her symptoms both before and after the accident have varied over time, are unreliable and are in issue. They have been exaggerated (or in the case of her pre-RTA history minimised) either consciously or unconsciously – the Third Defendant cannot say which absent exploring the issues at trial. *In the event that the Court finds that the Claimant has consciously exaggerated the nature and/or consequences of her symptoms and losses, the Third Defendant reserves the right to submit that a finding of fundamental dishonesty (and the striking out of the claim pursuant to section 57 Criminal Justice and Courts Act and/or costs sanctions including the disapplication of QOCS) is appropriate.*"

2. The claimant objected to all but the first sentence of this proposed new paragraph. She said that I should not give permission for these amendments. Because this raised an issue of principle that I did not find altogether easy to resolve and because of pressure of time, I reserved judgment.

3. The claim has already generated one reserved judgment. I take from that earlier judgment a brief introduction to the facts of the case.

4. The claim arises out of a road traffic accident which took place on 21 January 2014 in Milton Keynes. The claimant's stationary Honda Jazz vehicle was struck from behind by a Fiat Punto vehicle driven by the first defendant. Liability is not in issue. The claimant was then 34 years of age and employed as a quantity surveyor. She had a complex medical history. She claims that in the accident she sustained a subarachnoid brain haemorrhage (which manifested itself some 2 days after the accident) and a diffuse axonal brain injury such as to have left her with cognitive and other deficits. But there are marked differences between the experts as to her presentation and the interpretation of her medical records, imaging and history. In part, these differences depend on, or may be influenced by, the court's finding as to the speed of impact. Essentially, the defendant says that the impact was relatively minor, whereas, on the claimant's case, it was at least a "medium velocity impact". In turn, the defendant's medical experts say that the claimant suffered no brain injury, whereas the claimant's experts say she suffered a serious brain injury – albeit that the manifestations of that injury are "subtle".

5. The key experts are in neurology, neuropsychology, neuropsychiatry, neuroradiology and audio-vestibular medicine. The experts have prepared their joint reports and the case is set down for a 10 day trial in November of this year.

6. On 10 February 2021, the defendant applied to amend the Defence – the stated reason being that this was "at the request of the claimant in the light of the evidence now available". Essentially, Mr Dickinson, the claimant's solicitor, had been pressing the defendant to withdraw the averments in the Defence to the effect that the collision speed was only about 5mph and that the defendant's vehicle had sustained no damage and the claimant's vehicle only cosmetic damage. Mr Dickinson had also pressed the defendant to set out with more clarity its case on the medical evidence.

7. The amendments to the Defence did broadly three things.

8. First, they modified the description of the forces involved the accident. The speed was now accepted by the defendant to have been a little higher and the damage to the vehicles a little greater. But the accident was still characterised as minor.

9. Second, they gave a more detailed exposition of the claimant's pre-accident and post-accident presentation from which the following points or propositions emerged: (a) that pre-accident she suffered from a range of neurological and musculo-skeletal complaints which were probably attributable to functional cognitive disorder or somatisation, (b) the injury she suffered in the accident was no more than a minor whiplash, (c) the subarachnoid haemorrhage was a coincidental event (from which she had, anyway, made a good recovery), (d) her problems since the accident were consciously or unconsciously exaggerated (the defendant could not say which) and/or the product of the same functional cognitive disorder from which she had suffered before it.

10. Third, they threatened or foreshadowed the making of an application under section 57 of the Criminal Justice and Courts Act for a finding of fundamental dishonesty. The precise terms of this amendment were as set out at paragraph 1 above.

11. Mr Grant's objections to this paragraph were that the proposed amendment amounted to an allegation of fraud which was not properly particularised and for which there was, in fact, no basis in the evidence. This was not fair to the claimant and was also contrary to Rule 9 of the Bar Standards Board Code of Conduct, which required "reasonably credible material which establishes an arguable case of fraud" before such a case could be pleaded. Mr Audland QC's response to this was that the defendant was not making a "positive averment of dishonesty" but was simply alerting the claimant to the nature of its case at trial. It intended to explore in cross-examination whether the claimant was consciously exaggerating her symptoms for gain and, if appropriate, make an application under section 57. The contentious areas of her evidence had been identified; the detail was for cross-examination. Prior to that, the defendant was "not sure" whether any exaggeration was conscious or unconscious. The purpose of the amendment was to ensure that the claimant was not being "ambushed".

**The law**

12. Section 57 of the Criminal Justice and Courts Act 2015 provides as follows:

> "(1) This section applies where, in proceedings on a claim for damages in respect of personal injury ("the primary claim"):
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> (a) the court finds that the claimant is entitled to damages in respect of the claim, but
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> (b) on an application by the defendant for the dismissal of the claim under this section, the court is satisfied on the balance of probabilities that the claimant has been fundamentally dishonest in relation to the primary claim or a related claim.
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> (2) The court must dismiss the primary claim, unless it is satisfied that the claimant would suffer substantial injustice if the claim were dismissed.
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> (3) The duty under subsection (2) includes the dismissal of any element of the primary claim in respect of which the claimant has not been dishonest.
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> (4) The court's order dismissing the claim must record the amount of damages that the court would have awarded to the claimant in respect of the primary claim "but for" the dismissal of the claim.
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> (5) When assessing costs in the proceedings, a court which dismisses a claim under this section must deduct the amount recorded in accordance with subsection (4) from the amount which it would otherwise order the claimant to pay in respect of costs incurred by the defendant.
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> (8) In this section –
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> "personal injury" includes any disease and any other impairment of a person's physical or mental condition; "related claim" means a claim for damages in respect of personal injury which is made
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> (a) in connection with the same incident or series of incidents in connection with which the primary claim is made, and
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> (b) by a person other than the person who made the primary claim."

13. CPR rule 44.16 states:

> "(1) Orders for costs made against the claimant may be enforced to the full extent of such orders with the permission of the court where the claim is found on the balance of probabilities to be fundamentally dishonest."

14. These statutory provisions do not stipulate a particular mechanism by which a defendant must seek a finding of fundamental dishonesty. All that is required is an "application by the defendant". There are, however, two principal cases in which the courts have considered what notice to the claimant is required.

15. The first is *Howlett v (1) Davies (2) Ageas Insurance Limited* [2017] EWCA Civ 1696. This was a claim for personal injuries arising out of a road traffic accident. The insurers denied that any accident had taken place at all; or, if it had, it was a low velocity impact which was unlikely to have caused injury. Whilst stopping short of using the words "fraud" or "dishonesty" the pleading set out no fewer than twelve particulars in which the claimants' credibility was said to be in question and these included an allegation that the accident had been staged or contrived. The Deputy District Judge dismissed the claim, finding that the claimants had been fundamentally dishonest. For present purposes, the most relevant part of the judgment given by Newey LJ is at paragraphs 31 to 33:

> "31. Statements of case are, of course, crucial to the identification of the issues between the parties and what falls to be decided by the court. However, the mere fact that the opposing party has not alleged dishonesty in his pleadings will not necessarily bar a judge from finding a witness to have been lying: in fact, judges must regularly characterise witnesses as having been deliberately untruthful even where there has been no plea of fraud. On top of that, it seems to me that where an insurer in a case such as the present one, following the guidance given in *Kearsley v Klarfeld* [2006] 2 All ER 303, has denied a claim without putting forward a substantive case of fraud but setting out "the facts from which they would be inviting the judge to draw the inference that the plaintiff had not in fact suffered the injuries he asserted", it must be open to the trial judge, assuming that the relevant points have been adequately explored during the oral evidence, to state in his judgment not just that the claimant has not proved his case but that, having regard to matters pleaded in the defence, he has concluded (say) that the alleged accident did not happen or that the claimant was not present. The key question in such a case would be whether the claimant had been given adequate warning of, and a proper opportunity to deal with, the possibility of such a conclusion and the matters leading the judge to it rather than whether the insurer had positively alleged fraud in its defence.
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> 32. Further, I do not think an insurer need necessarily have alleged in its defence that the claim was "fundamentally dishonest" for one-way costs shifting to be displaced on that ground. Where findings properly made in the trial judge's judgment on the substantive claim warrant the conclusion that it was "fundamentally dishonest", an insurer can, I think, invoke CPR r 44.16(1) regardless of whether there was any reference to fundamental dishonesty in its pleadings. To my mind, there is force in Judge Blair QC's comment (in para 54 of his judgment):
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> > "I observe that one does not have to plead a claim for an award of costs on the indemnity basis (as opposed to the standard basis), so why would one have to expressly plead this more remote stage of the costs determination exercise, namely for an order for the enforcement of an adverse costs order?"
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> 33. Turning to the facts of the present case, Ageas' defence, while eschewing "a positive case of fraud at this stage", adverted to the possibility of the court finding "elements of fraud to this claim"; expressly stated that Ageas did "not accept the index accident occurred as alleged, or at all", that it was denied that "there was an accident as alleged", that credibility was in issue and that the Howletts were required to "strictly prove" the matters specified in para 7; and listed in para 6 various matters casting doubt on the claim, including facts that were stated in terms to be "beyond mere coincidence and, instead, … indicative of a staged/contrived accident and injury". In my view, this pleading gave the Howletts sufficient notice of the points that Ageas intended to raise at the trial and the possibility that the judge would arrive at the conclusions he ultimately did. The Howletts

> cannot, in the circumstances, fairly suggest that they were ambushed. Assuming, moreover, that the views that the judge expressed in his substantive judgment are not open to objection because of how matters were put (or not put) to witnesses in cross-examination (which I shall consider in a moment), it was proper for Ageas to contend, and the district judge to hold, that the findings made in the judgment showed the claim to be "fundamentally dishonest" within the meaning of CPR r 44.16(1)."

16. The second case is *Pinkus v Direct Line* [2018] EWHC 1671 – another road traffic collision claim in which the claimant alleged he had suffered a serious psychiatric injury in the form of PTSD. By way of an updated counter-schedule, the defendant pleaded fundamental dishonesty, setting out "some details of the arguments" and putting in issue the claimant's credibility, honesty and reliability. It also referred to "matters to be explored in cross-examination" and to matters that might "arise in cross-examination". There was an application by the claimant to limit or exclude the defendant from relying on such matters. HHJ Coe QC, sitting as a Judge of the High Court, permitted the defendant to put forward its case of fundamental dishonesty and said the following about the adequacy of the pleading:

> "12. At the beginning of the trial the claimant applied for a ruling that the defendant should not be allowed to run their case on conscious exaggeration, malingering and fundamental dishonesty. I gave an extemporary ruling allowing the defendant to run these arguments. I expand the ruling now to say that I find that in the circumstances of this case the principles set out by Newey LJ in Howlett apply in preference to the principle enunciated in *Three Rivers*. At the beginning of the trial the claimant had known "what he was facing" for some time. He knew he had been subject to surveillance. He knew there were issues in relation to the medical evidence which made conscious exaggeration at least a possibility (including lack of a definitive diagnosis, the unusual pattern of symptoms he was reporting, the failed effort tests, and the dispute about how the accident occurred.) By the time of the trial he knew the detail of the matters in the updated counter schedule and the specific allegations of conscious and gross exaggeration. He had had an opportunity to respond even at that stage, seeking to admit further statements in rebuttal of defence witnesses, including from his son and by seeking to put in evidence of previous convictions, casting doubt on the credibility of one of the defendant's witnesses. The matters to be put to him in cross-examination would not, in my view, have come as any surprise to him.
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> 13. Moreover, since as in any case and as set out in *Howlett*, it must be open to me, having heard all the evidence, to conclude that the claimant is lying or exaggerating in respect of some of his claim, the case ought to be put squarely to him to allow him to respond. This must include issues raised in the course of the trial which go to credibility even where they have not been specifically pleaded.
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> 14. However, as I said when I gave my ruling, I would not allow any issue to be raised of which the claimant would not have any sufficient notice and which he might have been able to deal with by way of additional evidence or which the experts would have been able to address, but had not and could not in the course of the hearing. Thus, I made it clear that I would not allow any specific points to be taken or arguments to be run which caused prejudice to the claimant because they came too late and in respect of which he had had no notice and could not deal with them or any such point where the experts would need to consider matters further and/or prepare supplementary opinion/reports/letters which could not fairly be done in the course of the trial."

17. Once statements of case have been served, amendments, by virtue of CPR rule 17.1(2)(a) & (b), are only available either by agreement or with the court's permission. Permission to amend is a matter of judicial discretion. It is well-established that permission to amend a Defence will be refused if the case put forward by the proposed amendment has no real prospect of success.

**Discussion**

18. Somewhat against my first instinct, I have concluded that I should not allow the italicised section of the disputed amendments.

19. The cases I have referred to establish that it is open to the trial judge to make a finding of fundamental dishonesty whether that has specifically been pleaded or not. To put that another way, an "application by the defendant for the dismissal of the claim" pursuant to section 57(1) of the 2015 Act does not require any particular formality. In an appropriate case it could, for example, be made orally and perhaps at as late a stage as the defendant's closing submissions. But the factors governing whether the trial judge would then entertain it would be as set out by Newey LJ in *Howlett*, namely whether the claimant had been "given adequate warning of, and a proper opportunity to deal with, the possibility of such a conclusion and the matters leading the judge to it rather than whether the insurer had positively alleged fraud in its defence". Or, to adopt the language of HHJ Coe's judgment in *Pinkus*, whether the claimant had had "sufficient notice" of the issues raised and the opportunity to deal with those issues by way of additional evidence, if necessary, including from his experts.

20. A factor underlying these decisions is that (as was explicitly raised in *Pinkus*) neither the defendant nor the judge may be in a position to make any conclusions about a party's honesty until that party has given evidence and been cross-examined. That will especially be the case where honesty or dishonesty turns on the distinction between conscious and unconscious exaggeration. It would also not be professionally proper for a defendant's legal representatives to allege fraud or fundamental dishonesty based upon mere suspicion, or upon a mere prospect that that is how the evidence might turn out. So there will be many cases where it would not be practical or proper to require a defendant to have made such an allegation prior to the trial in order to make an application under section 57.

21. This is just such a case. Whether fundamental dishonesty is pursued will be a matter on which the defendant's insurers and their legal team will have to form a view at the trial. Whether the court then entertains the application will depend on the trial judge's assessment of (a) whether it has some prospect of success and (b) the considerations of fairness described above.

22. Thus it might be said, (as Mr Audland QC does indeed say), that the sort of contingent and provisional plea proposed is simply giving the claimant fair warning that the defendant may, if the evidence turns out a certain way, make an application under section 57. However, on careful reflection, that is not how I would analyse the situation and I refuse permission for the amendment for the following reasons:

    i. The proposed amendment serves no purpose. In the circumstances of this case, the defendant can, if appropriate, make the application without having foreshadowed it in a pleading. The somewhat doom-laden wording that the defendant "*reserves the right* to submit that a finding of fundamental dishonesty (and the striking out of the claim pursuant to section 57 Criminal Justice and Courts Act and/or costs sanctions including the disapplication of QOCS) is appropriate" is unnecessary. It is not quite correct to label an application under section 57 a "right" and, even if it were, there would be no requirement to have "reserved" the right in advance.

    ii. At the present time, a plea of fundamental dishonesty has no real prospect of success and therefore, even pleaded on a contingent basis, does not satisfy the test for granting permission to amend. Dishonesty, as opposed to a functional disorder or somatisation, is not, or not clearly, raised by the medical experts. If it has a basis, that basis is, on present material, slender. By contrast, if the correct diagnosis is a functional disorder, that would seem to have a good "fit" with the claimant's pre-accident history and the fact that she suffered a subarachnoid haemorrhage very shortly afterwards. Even if, as the defendant contends, that was entirely unconnected with the accident, it could hardly have failed to have raised fears and anxieties in the claimant's mind.

    iii. It causes prejudice to the claimant. As Mr Dickinson has explained, a plea of fundamental dishonesty has to be reported to the claimant's legal expenses insurers and opens up a theoretical possibility of them avoiding the policy *ab initio*. At the very least that will create an added burden of administration and costs. Furthermore, a finding of fundamental dishonesty has grave implications for the claimant and the proposed amendment, if allowed, would be apt to raise further fears and anxieties for which, at the present time at least, there is no proper basis.

23. Mr Grant's submission went slightly wider than the italicised words. He wanted me to refuse permission for the preceding sentence and another sentence in a proposed new paragraph 4.6.5. Both these sentences refer to the claimant's "exaggeration of her symptoms". But the defendant does not presently plead that such exaggeration has been or is "conscious". The proposed amendments make it clear that this is a matter which it intends to "explore at trial". If I were to refuse permission for these amendments, Mr Grant would no doubt use that as the basis for an invitation to the trial judge to limit the scope of Mr Audland QC's cross-examination of the claimant. (I note that in *Pinkus* Mr Grant made exactly such a submission to HHJ Coe QC, which she rejected. I note also that she went on to make a finding of fundamental dishonesty.) Plainly, that would be wrong and unfair to the defendant. The defendant has a respectable body of evidence that the claimant has exaggerated (or, in the case of pre-accident symptoms, minimised) her symptoms. It is entitled to explore whether the motivation for any exaggeration or minimisation is benign. That is far removed from threatening, at this stage, an application under section 57 CJCA and is, in my view, a proper pleading. I have no hesitation in allowing these amendments.

24. I emphasise that nothing in the foregoing is intended to detract from the modern "cards on the table" approach. Where the defendant does have a proper basis for a plea of fundamental dishonesty and intends to apply under section 57, then, subject to the direction of the judge dealing with case management or the trial judge, that should ordinarily be set out in a statement of case or a written application and that should be done at the earliest reasonable opportunity. What I am intending to discourage are pleas of fundamental dishonesty which are merely speculative or contingent.

**Neuro-imaging**

25. In order to spare the claimant the cost of a transcript, I take this opportunity of recording my reasons for refusing a separate application by the claimant. This was her application dated 30 April 2020 for permission to rely on amended medical reports of Dr Allder (the claimant's neurologist) and Dr Butler (the claimant's neuroradiologist) commenting on a "DTI scan" of the claimant's brain. This was a scan performed by Professor Sharp's team at Imperial College, London, on 8 January 2019. I quote from Professor Sharp's report of 25 April 2019:

> "Magnetic resonance imaging (MRI) assessment was performed at the Imperial College Clinical Imaging Facility the Hammersmith Hospital, Imperial College London NHS Trust. A 3 Tesla Siemens Vario scanner was used. T1, T2, Flair, Susceptibility Weighted Imaging (SWI) and 64 direction Diffusion Tensor Imaging (DTI) were acquired."

26. The report was the subject of a specific ruling in my judgment of 11 October 2019. The relevant section stated as follows:

> "Professor Sharp is a neurologist at the department of brain sciences within the medicine faculty of Imperial College. He has provided a brief report dated 25 April 2019 on some neuroimaging which was commissioned by the claimant's solicitor in November 2018 and carried out on 8 January 2019. The report is titled "medico-legal neuroimaging report" and it was, at least initially, accepted to have been a medico-legal instruction. At the hearing, Mr Grant told me that that was an error and that the instruction had been paid for by the claimant from her personal funds – its primary purpose being clinical. The imaging has been reviewed by Dr Butler, the claimant's neuroradiologist, in a letter dated 15 July 2019. It has also been reviewed by Dr Stoodley, the defendant's neuroradiologist, in letters dated 29 July 2019 and 21 August 2019.
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> The report from Professor Sharp is a medico-legal report in both form and substance. The contrary does not seem to me to be arguable. Given that the claimant already has an expert neurologist, Dr Allder, I have no hesitation in excluding Professor Sharp's report. However, it would be artificial to exclude the imaging itself which the instructed neuroradiologists have considered and commented upon, and likewise their reports. However unsatisfactory the commissioning of the imaging may have been, this is another genie that cannot easily be put back into the bottle."

27. Thus it was permissible to invite the experts to consider the imaging performed by Professor Sharp's team. But it was not permissible to invite them to consider the substance of his report.

28. Unfortunately, that is precisely what happened. The claimant's neurologist and neuroradiologist were supplied first with Professor Sharp's report with only the "Conclusion" section redacted. Then, following protest by the defendant's solicitors, they were provided with the imaging plus what Dr Allder has described as "the analysis of fractional anisotropy of a number of white matter tracts". This analysis took the form of a table or figure headed "Diffusion tensor imaging assessment of diffuse axonal injury". This figure had been lifted from Professor Sharp's report. As described in the report (and at more length in a paper in the Journal of Neurology, to which I was also taken), in order to produce the figure it was necessary for Professor Sharp to carry out a sophisticated process of analysis. I will set out just the first sentence of the description of the analysis in the report:

> "Diffusion tensor imaging (DTI) was analysed using the FSL diffusion toolkit (Smith et al, 2006) and an advanced Diffusion Tensor Imaging Toolkit (DTI-TK) designed to optimize spatial normalization and atlas construction for the examination of white matter morphometry (Zhang et al., 2006)."

29. It is based upon this process of analysis that Professor Sharp (and now Doctors Allder and Butler) have concluded that there is an abnormality in the corpus callosum tract of the claimant's brain "suggestive of the presence of diffuse axonal injury". (The scans themselves show no abnormality.)

30. I excluded this evidence and ordered that references to the body or substance of Professor Sharp's report of 25 April 2019 be redacted from the joint statements of the experts. I did so because the ruling that I gave in October 2019 clearly and explicitly excluded Professor Sharp's report. The only qualification was that I allowed reference to the "imaging". What was supplied to the claimant's experts was not only the imaging, but also the fruits of analysis of that imaging carried out by, or under the control and direction of, Professor Sharp. That was a clear breach of my order. If the claimant's legal team wished to introduce that evidence, the proper thing to have done was to have appealed the order or asked their experts to carry out their own, independent analysis of the imaging.