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TGC Fraud Update

The Newsletter of the TGC Fraud Team

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Welcome to the latest instalment of the TGC Fraud Update

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At the time of our last Update we were in the midst of the pandemic, a vaccine was a distant dream, and only a handful of remote hearings had led to findings of fundamental dishonesty and the exposure of insurance fraud. As the cases reported in this edition of the Update demonstrate, the assessment of credibility through the medium of a remote video hearing has evolved into a practice with which representatives and judges are now familiar. There does not appear to have been a downturn in the incidence of false claims, and there does not appear to have been a downturn in the exposure of those claims at trial. Those observations seem to be validated by the IFB's estimations that, notwithstanding 3 national lockdowns, there have been 170,000 motor insurance claims in the last 15 months suspected to have been linked to crash-for-cash networks. The way that we deal with cases may have changed, but those statistics and the current backlog of cases in the County Court certainly suggest that insurance fraud lawyers will be kept busy for the foreseeable future.

It is important, however, to recognise that the time for the implementation of the whiplash reforms has finally arrived. It is an opportune moment to focus on the pressing questions for the industry: how will they work, and how will they affect us all? Will they achieve their stated aims of reducing whiplash claims while maintaining access to justice for genuinely injured parties? Will the mechanisms hinder or help the detection and prevention of fraud? We may not have all the answers right now, but Robert Riddell's article ensures we are in the best position to be ready when the first cases cross our desks.

Also in this issue:

- Simon Browne QC and Anthony Johnson report on the latest (and final) instalment in the *Seabrook* trilogy. A victory in the Court of Appeal and clarification on Part 36 Offers.
- Tim Sharpe tells the tale of how Celebrity Big Brother winner Alex Reid was committed to prison for contempt of court.
- Anthony Johnson takes the sting out of the tail of the High Court decision in *Brint v Barking* [2021] EWHC 290 (QB).
- Lionel Stride analyses the proper approach to the particularisation of deceit claims following *Kasem v UCLH* [2021] EWHC 136 (QB).
- James Laughland treats us to the most boring pub quiz question of all time, and then seeks to regain our interest with the tale of a £4M claim gone wrong, for all the right reasons.
- I look at the admissibility of ANPR evidence in light of the latest County Court guidance from HHJ Cotter QC in *Harrison v Buncher*.
- George Davies explores what can happen when the boot is on the other foot: dishonesty of the defendant and indemnity / 'exceptional circumstances' costs.

As always, these articles are accompanied by summaries and interesting practice points taken from 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 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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TGC's Guide to the Whiplash Reforms

Robert Riddell

Introduction

The whiplash reforms are now in force, following the commencement of one of the most significant shake-ups in the personal injury market since – well, the last time the Government intervened to discourage the inflation of spurious claims. This is by no means intended to be an exhaustive guide; but it is hoped to provide a helpful overview of the changes, identifying the impact on litigants, and commenting on some of the issues that may arise.

Summary of the key changes

The framework for the new regime has been established through a number of primary sources: the ***Civil Liability Act 2018*** ("the 2018 Act"); the associated ***Whiplash Injury Regulations 2021*** ("the Whiplash Regulations"); the ***Pre-Action Protocol for Personal Injury Claims below the Small Claims Limit in RTAs*** ("the RTA Small Claims Protocol"); a new ***Practice Direction 27B*** ("PD27B"); and other necessary consequential amendments to the CPR made by statutory instrument.

Even for litigators experienced in the Byzantine provisions of the Pre-Action Protocol for Low Value PI Claims, the volume of required reading material is somewhat daunting. To accompany the Official Injury Claim Portal site ("the OIC"), the RTA Small Claims Protocol is 102 pages long; the new PD27B weighs in at 84 pages; and there is a 64-page ***Guide to Making a Claim***, designed to enable unrepresented claimants to navigate the process (a document recently criticised by a prominent academic as "hopelessly complicated").

The headlines are as follows:

1. The RTA Small Claims Protocol applies to all claims (a) relating to road traffic accidents which occur on or after 31 May 2021 and (b) where the claim for damages for injury is valued up to £5,000.

2. Any such claim, with certain exclusions, must now originate and proceed within the OIC, and is subject to the procedures set out in the RTA Small Claims Protocol and PD27B.

3. All claims for whiplash and associated minor psychological injuries are to be valued in line with fixed tariffs established in the Whiplash Regulations, and no longer qualify for common law assessment.

4. Insurers (known as 'compensators' under the RTA Small Claims Protocol) and claimants are now prohibited from making, accepting or receiving any offers to settle a claim prior to disclosure of a medical report.

The RTA Small Claims Protocol

The general approach

The OIC and Protocol is designed to create an expedited process for resolving low-value whiplash claims without the need for court proceedings. Because each party will effectively bear their own costs, both claimants and compensators are incentivised to engage efficiently and settle at an early stage.

Because claimant representatives will no longer be entitled to any meaningful recoverable costs, the system has been expressly designed to cater for unrepresented claimants. This has included the creation of a Portal Support Centre: a body contracted not only to provide call centre support, but also to enter claims onto the OIC on behalf of unrepresented claimants who are unable or unwilling to use the technology. Given the emphasis on the accuracy of

CNFs in *Richards & Anor v Morris* [2018] EWHC 1289 (QB), it must be hoped that the Centre's obligation to provide assistance does not impact on its necessary neutrality.

Exclusions: (i) Claims

The Protocol does not apply where:

a. The injury is caused by (a) breaches of duty owed to road users by non-road users; or (b) where a defendant owes a duty arising from its health and safety obligations;

b. The claim is subject to the MIB's Untraced Drivers' Agreement 2017;

c. The claimant is a vulnerable road user – for example, motorcyclists and pillion passengers; cyclists; mobility scooter users; or pedestrians;

d. The claimant is a child, protected party or bankrupt;

e. Either party acts as personal representative of a deceased person; and/or

f. The defendant's vehicle is registered outside of the UK.

Exclusions: (ii) Damages

Alongside developing new procedures, the Protocol introduces a new language for damages. General damages for pain, suffering and loss of amenity are referred to as *'damages for injury'*. Other heads of loss are classified as *'other protocol damages'*. These consist of 'other damages – injury related' (for example, treatment charges, loss of earnings or damaged clothing) and *'other damages – property'* (including personal items in the vehicle damaged in the accident and relevant *'vehicle costs'*). Vehicle costs – claims for the pre-accident value, vehicle repairs, insurance excess, hire vehicles and recovery and storage – are divided into *'protocol vehicle costs'* (costs which have been personally borne by the claimant) and *'non-protocol vehicle costs'* (where a third-party organisation is involved).

Accordingly, the Protocol does not apply where there are claims for credit hire and/ or subrogated claims for vehicle damage. This situation is examined further below.

Liability

Each Protocol claim originates with the submission on the OIC of a Small Claims Notification Form (SCNF). This will be a more detailed document than the standard CNF with which insurers will be familiar. As well as providing a description of the accident and their injuries, claimants are required to upload at the same time any evidence on which they are relying (including photographs, witness statements, sketch plans and/ or dashcam footage). Such evidence can be uploaded any time before the creation of a Court Pack (similar to the Court Proceedings Pack under the current MOJ Portal).

Following submission of the SCNF, the OIC will conduct an MID search to identify the correct compensator. Once it has received a claim, the compensator is required to provide its liability response within 30 days (or 40 days where the OIC has directed the claim to the MIB). The compensator will be notified of any claims linked to the index accident.

The compensator has four options for responding: (i) admit liability in full; (ii) admit liability in part (in which case the compensator must provide the specific percentage proportion of liability it accepts); (iii) deny liability; or (iv) admit breach of duty but deny causation. Where the compensator fails to respond, liability is taken to have been fully admitted.

Where there is a liability dispute (either in full or partially), the compensator must provide with its response the defendant's account and any supporting evidence. There are no time extensions envisaged: if, for example, the compensator has been unable to make contact with the defendant within the initial 30 days, the compensator can deny liability and provide a witness summary comprising a summary either of the defendant's evidence (if known) or of those matters which the compensator wishes to pursue with the defendant. In these circumstances, the compensator must also explain their reasons why they have been unable to communicate with the defendant.

On receiving the compensator's response, the claimant may choose either to challenge the defendant's denial and submit further evidence, or to require the Court to determine liability by issuing proceedings under PD27B. If the compensator has made a partial admission, the claimant can, if so wished, engage in up to three rounds of negotiations on the OIC to try and resolve the liability dispute before, if necessary, issuing. Disputes reaching the Court will be dealt with similarly to any liability-only hearing on the small claims track.

Once liability is resolved – either by the parties or by the Court – in the claimant's favour, the claim is formally stayed, and returns to the OIC to follow the identical procedures as liability-admitted claims.

Medical reports

Instructions to the claimant's medical expert for the first report (generated automatically by the OIC where the claimant is unrepresented) must include:

a. the claimant's description of injury provided in the SCNF;

b. whether the claimant considers their injuries to be exceptionally severe or whether their personal circumstances have rendered their injuries exceptional. This is for the purpose of assessing whether the claimant is entitled to benefit from an uplift to the relevant tariff, on which the expert is required to opine; and

c. Whether the compensator asserts that the claimant has been contributorily negligent by failing to wear a seatbelt.

The compensator may, even if liability has been admitted either in part or in full, provide to the medical expert the defendant's account of the accident if it is materially different to the claimant's.

The procedure where the compensator disputes causation is explained further below.

As with the current MOJ Portal, the expectation is that only one medical report will be required. A second report is only justified in prescribed circumstances such as where the first expert recommends a further examination, treatment is continuing, or a claimant has not recovered in line with the original prognosis.

Settlement

Once the medical report has been received and the contents agreed, the claimant will send it to the compensator with any other evidence in support of other protocol damages. This then initiates a process of offer and counter-offer which will be familiar to MOJ Portal practitioners. Any settlement at this stage represents full and final settlement of all claims for damages for injury and other protocol damages; but the claimant is still able to pursue any claim for non-protocol vehicle costs outside the OIC. If the parties cannot reach agreement, the OIC will generate a Court Pack to allow proceedings to be issued and quantum to be assessed by the Court.

Where the parties have been unable to compromise damages for injury and/ or other protocol damages, and there are additional claims for non-protocol vehicle costs valued in excess of £10,000 then the claim will no longer remain within the RTA Small Claims Protocol; such claims will then presumably be allocated to an appropriate track and subject to whatever costs regime applies. For example, a claim for whiplash valued at under £5,000 but with credit hire and storage charges of £15,000 will be allocated to the fast track. It is presumably the intention of the scheme that such claims will then be subject to the usual fixed recoverable costs under CPR Part 45.

Where the overall value of the claim remains below £10,000, the claim will be added to the Court Pack as part of any other outstanding protocol damages before being allocated to the small claims track for a determination of quantum by the Court. Helpfully from an insurer's perspective, a failure to notify the compensator on the OIC of outstanding non-protocol vehicle costs may affect the claimant's entitlement to bring the claim separately.

Causation and fundamental dishonesty

Fraud practitioners will have a particular interest in the procedure where the compensator wishes to allege fundamental dishonesty or dispute that the accident caused injury.

There is a blanket exemption from the RTA Small Claims Protocol where a compensator makes an allegation of fraud or fundamental dishonesty. Any allegation should be explained with reasons. Such claims will fall out of the OIC for allocation to an appropriate track.

LVI cases will be treated somewhat differently. The compensator, on receipt of a SCNF, may choose to deny causation of injury. The compensator should provide reasons for its denial and/ or provide the defendant's account of the accident. The claim will remain in the OIC, but the reasons and/ or defendant's account will be provided to the medical expert for comment on what the impact would be on the diagnosis and prognosis should the defendant's evidence found to be true.

Once the medical report has been disclosed, the compensator has 20 days either to make an offer or continue to dispute the presence of injury. If causation remains in issue, the claim will exit the OIC, and proceedings issued without the need to follow any pre-action protocol. It is worth noting that a

compensator may make offers in respect of other protocol offers – acceptance of which will be treated as full and final settlement of all claims (including damages for injury). This raises the prospect that fraudulent claimants could nonetheless receive damages, albeit not expressly for whiplash, in circumstances where there is little evidential or commercial incentive for an insurer to continue investigations.

The Tariff System

Claims for whiplash injuries where the prognosis is below 24 months – whether brought under the RTA Small Claims Protocol or as part of a higher value claim – are now subject to statutory tariffs set out in the Whiplash Regulations 2021. These tariffs are considerably lower than the relevant brackets in the Judicial College Guidelines:

Duration of injury	One or more whiplash injuries	One or more whiplash injuries and one or more minor psychological issues	Comparable brackets from the Judicial College Guidelines (15th edition)
No more than 3 months	£240	£260	Up to £2,300
+ 3–6 months	£495	£520	£2,300–£4,080
+ 6–9 months	£840	£895	
+ 9–12 months	£1,320	£1,390	
+ 12–15 months	£2,040	£2,125	£4,080–£7,410
+ 15–18 months	£3,005	£3,100	
+ 18–24 months	£4,215	£4,345	

The Court may award an uplift of up to 20% additional damages, when merited by the claimant's exceptional circumstances (and subject, as above, to the opinion of the claimant's medical expert).

Commentary

The Government's primary aims in introducing these reforms was to reduce exaggerated and fraudulent claims and allow insurers to pass on their litigation savings to consumers. It remains to be seen whether this significant intervention in the structure of the personal injury market will fulfil either objective.

It is unlikely that any changes will be visible immediately. While there was a dramatic reduction in the number of road traffic accidents during the national lockdowns, which may have temporarily reduced the scope for road traffic claims, there will be a large volume of claims and potential claims from the last three years which can and will still be litigated under the previous regime. There is also a significant backlog in current proceedings. Low value PI work will continue to be abundant.

One could speculate that in time, the market may contract in the event that claimant firms decide to opt out of claims with low financial incentives.

But at the moment, this is nothing more than speculation. It is equally likely that claimant firms will wish to put the new arrangements to the test before abandoning the space to litigants in person.

The more interesting question then is whether the new system will help or hinder the investigation and prevention of claims involving organised or opportunistic fraud. Without wishing to pre-judge what the impact will be, a number of issues will arise:

1. The central impact on insurers will be organisational. Both the rules and their relationship with other Pre-Action Protocols and Practice Directions are procedurally complex. The RTA Small Claims Protocol identifies 10 separate pathways from the OIC to Court in circumstances where parties require a judicial determination. Despite the intentions, this does not look much like a process which removes the requirement for lawyers.

Not only will insurers require new systems to manage claims passing across all of the different pathways, but new working practices to accommodate dealing directly with unrepresented litigants.

While insurers will not be liable for the same level of litigation costs under the RTA Small Claims Protocol, these claims may take longer to resolve and be more resource-intensive to handle. That is particularly the case in circumstances where the parties are required to await a Court listing to determine liability before they are able to resolve issues of quantum; only to then return to the OIC for further formal negotiation.

2. Compensators have been granted just 30 days from receipt of a SCNF to undertake an inquiry into liability, including taking an account from their insured. That allows a minimal opportunity to make adequate and sufficient inquiries into the bona fides of the accident. Failure to respond within the specified time limit will result in a forced admission. This may be particularly challenging where the insured fails to cooperate, for whatever reason. The Court's approach to applications to resile at a later stage of the RTA Small Claims Protocol is of course untested. Any allegations in respect of fundamental dishonesty and/ or causation will require explanation, and therefore a reasonable evidential basis for making the allegation.

3. On the basis that fraudsters will follow the money, there may be an increase in attempts to ensure that claims exceed the relevant thresholds or are otherwise exempt from the confines of the RTA Small Claims Protocol. Obvious areas for increased fraud activity are claims involving 'vulnerable road users'; claims for credit hire and associated losses; multiple injury cases or cases involving exaggerated psychiatric injuries; and personal injury claims outside of the RTA sphere, such as public or employers' liability claims.

For the moment, we will have to await to see whether these changes represent a last crack of the whip for fraudulent claimants, or a pain in the neck for insurers.

Offering the unofferable: when is a part 36 offer not an offer?

By Simon Browne QC and Anthony Johnson

Clarity in relation to part 36 offers

We recently represented the successful Defendant (instructed by Howard Dean of Keoghs) in the Court of Appeal in the case of *Seabrook v. Adam* [2021] EWCA Civ 382 in which the Court of Appeal gave useful guidance about the need for clarity in the wording of Part 36 offers. The Court's views extended to both Part 36 offers in general, and with a particular focus upon the issues that tend to arise in claims where the Defendant seeks to admit breach of duty in respect of a road traffic collision but to dispute causation of the injuries that the Claimant has allegedly sustained.

Regular readers of this publication may be aware that this is the concluding instalment in a trilogy that began its life in front of the Regional Costs Judge in Norwich in January 2019. The Defendant was successful at the original hearing and on the two appeals before the Circuit Judge and in the Court of Appeal.

The case was initially a straightforward, run-of-the-mill, low-end Fast-Track causation case of the type that it is suspected that most readers of the Update would see as routine. The day after the Claim Notification Form was submitted, the Defendant's representatives admitted liability in a letter which stated, *"We confirm primary liability is not an issue but reserve our position on causation as per the case **Kearsley v. Klarfeld (2005)**."* The liability admission was reiterated by the Defendant on numerous occasions in subsequent correspondence. The Defendant's case developed and it relied upon various inconsistencies in the evidence and documents upon which the Claimant relied, but it never made a formal allegation of fraud.

When the case came to trial in October 2018, it was found that the Claimant had proven an eight-week neck injury but had not come up to proof in relation to a 32-month back injury that he had allegedly suffered. He was awarded just over £1,500 against a claim in which he was seeking just under £10,000.

The DDJ adjourned off the costs issues at the end of the trial because they were complicated by two purported Part 36 offers by the Claimant which it was alleged had nevertheless been beaten, notwithstanding that the Defendant had been largely successful at trial. The Claimant's solicitors (Atherton Godfrey) sent two purported Part 36 Notices, one of which stated, *"To agree the issue of liability on the basis the Claimant will accept 90(Ninety)% of the claim for damages and interest to be assessed"* and the other, *"To accept, on condition that liability is admitted by the offeree, 90(Ninety)% of the claim for damages and interest to be assessed."*

The Claimant's position was that both of the offers had been beaten on the basis that he had gone to trial and recovered 100% of his claim for damages, whereas if the Defendant had accepted the offer then he would have only recovered 90% of the same damages. It was asserted that if the offer had been accepted then the matter could have been dealt with at a Disposal Hearing, as the need for a trial would have been obviated. Counsel for the Claimant argued that it was important to separate out the three elements of the

tort of negligence, i.e. duty, breach and damage – where causation is in dispute it cannot be said that there is a true admission of liability because the damages element remains in dispute. The Claimant relied upon a number of well-known authorities in support of the proposition that a Part 36 offer that makes only a nominal concession on liability that does not reflect a genuine appraisal of the risk profile of the case can nevertheless be valid.

In giving the original judgment in the Defendant's favour, DJ Reeves declined to draw any distinction between the wording of the two offers, holding that the offers could not be considered a genuine attempt to settle within the ordinary, common understanding of English language. He felt that the key consideration was that there could not be a genuine attempt to settle when a party was invited to concede something that they had already admitted. The wording of the offer was 'circular' in that it still required assessment by judgment or some other means as to what the claimant should receive. Neither offer had the effect of being capable of compromising any of the issues between the parties in the proceedings on any construction.

HHJ Walden-Smith rejected the Claimant's first appeal against the decision and found that DJ Reeves had not erred in his interpretation of the offer. She felt that the determinative factor was that the judgment for the Claimant was not 'at least as advantageous' as his Part 36 proposal for the purposes of CPR 36.17. Given that the existence of the duty of care and breach of duty had been conceded by the Defendant in the Defence, accepting the offer would have to be construed as conceding the final constituent element of the tort of negligence, i.e. that the Defendant caused the Claimant some loss. Accordingly, if the Defendant had accepted the offer, then it would not have been open to him to continue to challenge causation, the issue on which he was eventually largely successful.

Further, any award of damages at all would have to be construed as a discount on the offer because a 10% discount will always be better than 100% of the same thing. If the Claimant's interpretation of the offer was correct then claimants could use such offers to place defendants in an impossible position in all cases where causation was challenged in order to prevent them from continuing to defend claims against the background of any award to the Claimant leading to punitive costs consequences. She commented that whilst she accepted that the purpose of Part 36 is to limit claims and encourage settlement, it is not a system that is designed to prevent a realistic possibility of a party arguing fundamental principles.

When the case came before the Court of Appeal, it was framed as raising fundamental questions about when a purported Part 36 offer should be considered a valid Part 36 offer. Can you make an offer on liability when liability has been formally conceded by the defendant and only causation is disputed? If so, what constitutes 'success' in relation to whether or not judgment is at least as 'advantageous' as that offer for the purposes of CPR 36.17? In granting the Claimant permission to appeal, the Court of Appeal emphasised that the appeal was seen as presenting an opportunity to give guidance on the interpretation of Part 36 offers, rather than it necessarily being a case where the Claimant's appeal had been assessed as having reasonable prospects of success.

The Court of Appeal agreed with the Judge below that the Claimant had not beaten the two offers. Giving the lead judgment of the Court, Asplin LJ emphasised at para.14 that the offers should be construed *"...in the light of the pleadings and, in particular, in the light of the fact that Mr. Adam had admitted breach of duty which had been referred to as 'primary liability' but had disputed causation in relation to both heads of damage."* In other words, the appraisal of the meaning of the offer had to take into account the procedural situation and the issues between the parties at the point that it was made. She felt that if the first of the two offers that referred to 'liability' was not construed as referring to 'the entire claim' then it would be 'self-contradictory and meaningless'.

At para.17, she pointed out that both offers referred to 'the claim for damages and interest, to be assessed' but contained no reference to the separate heads of damage in relation to the neck and back injuries. A reasonable reader would construe the offers as a whole as meaning that a concession as to liability and causation was required in relation to both injuries, emphasising that this was 'the natural meaning of the words'. She added that *"...it makes no sense simply to say that someone is liable in tort. He must be liable for something."*

She went on to set out that the implication of the Court's findings was that the Defendant had bettered both of the offers at trial. Further, had the Defendant accepted either offer, it would have admitted liability for both the neck and the back injuries, and would thus not have been entitled to dispute the issue of causation at trial that it was ultimately successful upon. Had either offer been accepted, it would no longer have been open to the Defendant to argue that it did not cause the back injury at all.

The *ratio* of the decision is probably best summarised by para.22 of the judgment which stated: *"Cases of this kind turn, inevitably, on the precise wording of the pleadings and the particular terms of the Part 36 offer. In order to avoid the kind of dispute which has arisen here, especially in a low value claim, it is important to make express reference in the Part 36 offer to whether the offer relates to the whole claim or part of it and/or the precise issue to which it relates, in accordance with CPR 36.5(1)(d). In particular, if the issue to be settled is "liability", it would be sensible to make clear whether the defendant is being invited only to admit a breach of duty, or if the admission is intended to go further, what damage the defendant is being invited to accept was caused by the breach of duty."*

It is suspected that issues identical to the ones raised in this case are unlikely to find their way before the Courts in the future, as the publicity surrounding this decision will presumably prevent them from being made in such imprecise terms in future cases. It is anticipated, however, that the decision may be of wider application by analogy in other situations where the meaning of a Claimant's Part 36 offer is not immediately apparent. It would always be best practice to immediately assert as much in correspondence, to avoid the Claimant's representatives being able to argue that they had no idea that the offer had not been understood to mean what they allegedly intended it to mean.

AXA v Reid

Tim Sharpe

Alex Reid is a well-known personality, having been a professional fighter, actor, and winner of Celebrity Big Brother. He now finds himself in the media again by reason of him having provided false evidence in relation to a personal injury claim, leading to his committal to prison for contempt of court. Tim Sharpe, instructed by Neville Sampson of DAC Beachcroft Claims Ltd, acted for AXA in the County Court and High Court proceedings.

Mr Reid brought a claim in the County Court seeking damages arising out of a road traffic accident that was agreed to have taken place on 29th January 2018 on the A41, between his Audi and a Seat car driven by an individual insured by AXA.

In short, each driver alleged that the other had changed lanes into the other car and caused the collision. The incident was not captured on dash-cam or CCTV, although there were some photographs taken after the incident. Therefore, and as with many such claims, witness evidence was likely to be very important, if not determinative, of the issue of liability.

Alex Reid served his own witness statement, as well as that of one Darren Summers. In his witness statement, Mr Summers claimed to have seen the incident and he placed fault for the incident firmly on AXA's insured driver. By his own statement, Alex Reid expressly denied knowing Mr Summers, stating:

"When we were waiting for the Police to turn up, a motorbike rider came and gave me his telephone number as he said he had seen what had happened. I now know that he is called Mr Summers. I had never seen Mr Summers before. At the scene he said he was into martial arts, so I think he may have recognised me from events as I was a professional fighter, but I don't know him."

Various aspects of Alex Reid's case caused AXA concern, not least that on the face of the above, there was a common interest in martial arts which might imply some connection. Further enquiries were made and AXA located a newspaper article published some 4 months before the collision that demonstrated what AXA considered to be a plain connection between Alex Reid and the witness, and a connection that Alex Reid had sought to conceal. Within the County Court proceedings, an Amended Defence pleading fundamental dishonesty was lodged, and permission was given to rely on the same (although Alex Reid discontinued his claim the day before that permission was given).

The newspaper Article stated (where relevant):

"Alex Reid will be in Ipswich on October 8 giving an MMA masterclass raising money for the ...Trust. The event, ...from 1pm on Sunday, October 8, has been organised by former European and world kickboxing champion Darren Summers... "He trained me for my first cage fight which I won in the first round" said Mr Summers. "We wanted to do something for the Trust and this is our first event. You don't have to be involved in martial arts to come along, it is for anyone of any age from any walk of life. Alex will also be talking about fitness, how to maintain your weight and what to eat and will be answering questions afterwards too."

As the High Court found in making the order for committal:

"This was, as the defendant [Alex Reid] now acknowledges, no mere slip; the defendant went as far as saying that the witness might have recognised him, but he had not seen the witness before (thereby attempting to head off the potential suspicion of the two being acquainted, the defendant having been a

professional fighter, and Mr Summers claiming to be looking for a martial arts shop when he allegedly witnessed the collision)."

AXA contended that this was a plain, deliberate, and dishonest attempt to interfere with the administration of justice in a material way. In particular, it was designed to set Mr Summers up in the eyes of the AXA, and in the eyes of the court, as someone upon whose evidence they could rely as being unconnected to the parties, offering an independent account as to the circumstances of the collision. All those involved in litigation of this nature will appreciate the weight that is often given to such evidence.

In her judgment on the committal application, Mrs Justice Eady said on this point:

"Inevitably, considerable weight is often given to such evidence (in particular where the parties themselves are at odds as to how a collision took place). That is true of a court, where a judge has to adjudicate between two diametrically opposed accounts, but will equally be the case of an insurer that adopts the entirely responsible approach that contested litigation should be the last resort. The false statement was designed to bolster the defendant's chances of proving his claim on liability (or making the claimant insurer accept his version over that of their own insured, who did not have an independent witness), and thereby of recovering some or all of his claim for damages."

Proceedings for committal for contempt of court were commenced by AXA and, shortly before the application for permission to bring the same was due to be heard, Mr Reid admitted his contempt. He further admitted that the contempt was such that the custody threshold was crossed. The matter was then listed for a committal hearing at which time the court would need to determine the appropriate period of committal, and whether that period should be immediate or suspended.

In determining the seriousness of the contempt, Mrs Justice Eady noted:

"Whilst this might not have been the most significant claim, and the defendant did not in the end benefit from his dishonesty, harm in this context is a matter that goes far beyond the particular case pursued by the defendant. The seriousness of the defendant's contempt in this regard is underlined by the observations made by Mr Thornton [a representative of AXA] in his statement in these proceedings, explaining that there is a very real problem of insurers being seen as an "easy target" by litigants who are prepared to try to secure financial advantage through deception, there being a false perception that such dishonest claims are essentially victimless crimes and that litigation is a game where presenting false evidence carries little risk. Of course, none of that is true and there is a very real cost to honest insurance customers in terms of the higher premiums that they then face or because of the additional investigations that have to be undertaken when they make a genuine claim."

The court determined that the appropriate starting point for committal was a period of 4 months, noting that:

"This is a case involving both a high level of culpability and significant harm; as the defendant rightly accepts, it clearly passes the custody threshold."

The court then went on to consider aggravating and mitigating features, as well as the reduction for the early admission, and the issue of suspension of the committal. These issues would allow the court to determine the end point.

The court noted that the lie was maintained for some 5 months, but it was to his credit that he had made an admission. As this admission was not made at the first opportunity, the court made a 25% reduction. The court noted the personal mitigation relating to Mr Reid himself and his family situation. The court gave credit for Mr Reid having expressed remorse, demonstrated some reflection (this being relevant to rehabilitation) and having no previous convictions. The court also took account of his charitable and community work and the various character references provided which presented Mr Reid in a more positive light. The court concluded that the minimum term of imprisonment required was 8 weeks. Half of that period is served in custody.

The submissions for Mr Reid rightly addressed the issue of whether on the facts of the case the committal order should be suspended. The court reflected on the state of the prisons in the pandemic, and the impact on others if an immediate committal order was made, but concluded "I would be failing in my duty to do justice more generally if I did not impose an immediate custodial sentence in this case".

The decision (a copy of which is available on the TGC website at **https://tgchambers.com/wp-content/uploads/2021/04/AXA-INS-v-REID-JMT-approvd-21.4.21.pdf**) should serve as a reminder to all those engaged in litigation that the courts deal with

contempt robustly. This was not a particularly valuable claim, but insurers will be aware that dishonesty in claims of low or modest value soon adds up. Moreover, where all litigants are required to consider proportionality in advancing their cases, fraud in such cases may go undetected. Deterrence is therefore key, and this committal application was brought, in part at least, to assist with that aim. The decision has already been reported in various newspapers, and insurers will hope that those reading the same will not be tempted to abuse the court process or seek to deceive insurers, knowing what consequences they may face if they do. As Moses LJ noted in ***South Wales Fire and Service v Smith*** **[2011] EWHC 1749 (Admin)** (subsequently cited with approval by the Supreme Court in ***Summers v Fairclough Homes Ltd*** **[2012] UKSC 26)**:

"The public and advisors must be aware that, however easy it is to make false claims, either in relation to liability or in relation to compensation, if found out the consequences for those tempted to do so will be disastrous. They are almost inevitably in the future going to lead to sentences of imprisonment, which will have the knock-on effect that the lives of those tempted to behave in that way, of both themselves and their families, are likely to be ruined. But the prevalence of such temptation and of those who succumb to that temptation is such that nothing else but such severe condemnation is likely to suffice."

The immediate committal to prison of Alex Reid for 8 weeks demonstrates that the above approach of severe condemnation holds good today, even where such orders will ruin the lives of the Defendant and/or of their families.

How much do we need to worry about *Brint?*

Anthony Johnson

Some words of comfort for insurers about the decision in *Brint v. LB of Barking NHS Trust* [2021] EWHC 290, QBD, which has been widely reported in some quarters as 'raising the standard' required for a Defendant to plead fraud, or at the very least 'moving the goalposts'.

It is easy to see why the headlines about the decision of HHJ Platts QC (sitting as a High Court Judge) in ***Brint*** have been terrifying for defendants in this area of law given that it is indisputably the case that he declined to find that the claimant was fundamentally dishonest despite characterising her evidence at points in his judgment as misleading, unconvincing, wholly unreliable and inaccurate.

However, it is important to consider the facts that led to what at first blush seems like an extraordinary conclusion. It is this writer's opinion that ***Brint*** is very much a case that turns upon its own unusual facts and that it is rarely likely to be of any wider application, particularly in the context of road traffic fraud which I suspect will be the type of fundamental dishonesty encountered most frequently by regular readers of this Update by some distance. Nevertheless, it may well be the case that the decision serves as a helpful reminder of best practice in all claims of this nature, and there may be some steps that defendants can take to enhance their prospects of securing the fundamental dishonesty finding in appropriate cases.

Brint was a complex clinical negligence claim in which the claimant alleged that she had suffered various, severe medical consequences as a result of a CT scan where she alleged, *inter alia*, that she had not consented to a needle being inserted into her left thumb. The two main reasons that the Judge gave for rejecting her claim were as follows: *(i)* the claimant's suggestion that she was 'fit, healthy and active' before the incident was inconsistent with her extensive medical history of significant and disabling physical and psychological symptoms; and *(ii)* her account of the incident was in many respects at odds with the agreed expert evidence and, in other respects, was inherently improbable. There were inherent inconsistencies in her witness evidence and some of her explicit allegations were inherently unlikely and not supported by the contemporaneous medical records.

The Judge's reasoning for rejecting the defendant's Application for a fundamental dishonesty finding can best be seen in para.102 of his judgment where he stated:

*"This has been an extremely complex case. However, when I stand back and look at the totality of the evidence I am far from persuaded that the claimant has deliberately made up events that did not occur or that she has deliberately told lies about her condition in order to advance her claim. Applying the two-stage test, [from **Ivey v. Crockfords Casinos**] I am satisfied that the claimant genuinely believed in the truth of the evidence that she gave and that, applying the standards of ordinary decent people I find as a fact that although her evidence was wholly unreliable in the sense that I do not accept it, she has not been dishonest. I therefore reject the allegation of fundamental dishonesty."*

This extract should be read in the context of para.101 where he had said, *"Finally, and importantly, my impression of her as a witness whom I heard and observed (albeit over video-link) during extensive cross examination when all these matters were put to her was that she was not a dishonest person. She has a genuine and significant disability which she firmly believes has been caused by the events of the 29th*

December 2013." It is extremely relevant to the outcome that it is stated elsewhere on the face of the judgment that the claimant had been cross-examined for 1½ days of Court time. He commented that a 'failure to give a satisfactory account' (which is how the defendant had put the point) is very different from giving a false account.

In the preceding paragraph, the Judge had given a number of reasons for rejecting the argument that the Claimant was fundamentally dishonest. His reasons included the following:

- The allegation had first been raised extremely late in the litigation. The defendant knew the claimant's account when her witness statement was served, but did not allege that she was dishonest at that stage;
- It is not a case where the spectre of dishonesty had arisen for the first time during the live evidence. It was not clear what had justified the late change of approach;
- None of the experts in the case and none of the claimant's treating clinicians had accused her of being dishonest in her presentation until very late in the litigation, and he had rejected the evidence of the one expert who had;
- The Claimant did not appear to have been motivated by the prospect of financial gain;
- She had made prompt and consistent complaints about her treatment. It is highly unlikely that she would have invented those complaints within such a short period of time and remained so consistent about them thereafter if they were pure invention;
- Her account had striking similarities to an event in which she was involved in 2010, suggesting that she had somehow conflated the two events in her own mind and genuinely believed that what she said happened in fact happened;
- Although she was unreliable when she said that she was fit, healthy and active, this did accord with her perception of her own limitations;
- Her failure to be fully frank from the outset about her receipt of DLA for an unrelated issue was of more concern, but she had never denied receiving the benefit and had volunteered as much to the defendant's care expert; and
- Her evidence had to be viewed against the background of her psychological profile, which had been discussed at length by the psychiatric experts.

The Judge also rejected an Application by the defendant to adduce further evidence relating to the claimant's alleged dishonesty after his dismissal of the primary claim. Although it would be impossible to tell conclusively without having access to the full file of papers in evidence in the case, it may well have been that the outcome could have been different if all of the evidence that the defendant wished to rely upon in relation to the point had been before the Court in the first place.

In conclusion, therefore, whilst it will not surprise me at all if the case starts being referred to by claimants' representatives in letters, pleadings and Skeleton Arguments as a matter of routine, I do not see that it actually alters the current state of the law in any material respect. It is incredibly dependent upon its own unusual facts, which no doubt came about largely because it was a much more complicated scenario than the average RTA claim.

In the vast majority of cases, ***Brint*** will be incredibly easy to distinguish, not least because of how heavily influenced the Judge was by the favourable view that he had formed of the claimant. I don't doubt that there are a tiny minority of claimants who might be able to successfully defend an allegation of fundamental dishonesty on similar facts. However, I strongly suspect that if the facts were unusual enough for an argument based on ***Brint*** to work then that decision would make little difference to the outcome, as I would expect such a case to succeed on ordinary principles within the existing framework.

Nevertheless, having expressed a fairly bullish view about ***Brint*** not being damaging to the defendant's position in the vast majority of fundamental dishonesty cases, it does not follow that there are no 'teaching points' for defendants that can be discerned from the decision. I would suggest that the case highlights the following points:

- Notwithstanding the Court of Appeal's decision in ***Howlett v. Davies*** **[2017] EWCA Civ 1696**, where the defendant seeks to advance a positive case of fraud then it is always best practice to amend the pleadings to set out as much at the first available opportunity, or at the very least to make the defendant's position absolutely clear in correspondence;
- Alleging fundamental dishonesty for the first time at trial should be reserved for those cases where something new and unforeseen emerges during cross-examination;

- Where a medical (or other) expert's prognosis is directly impacted upon by the claimant's credibility, they should be given the chance to comment upon such a point, even if they merely go as far as to defer to the trial judge's appraisal of the credibility of the claimant; and,
- I would suggest that it is always a risky strategy to rely upon a successful Application to adduce further evidence in relation to fundamental dishonesty after the completion of the trial. All evidence that assists the defendant in this regard should be provided in the main part of the action subject to the Court's Directions, or if this is not possible then an appropriate Application should be made at the first available opportunity.

Kasem v University College London Hospitals NHS Foundation Trust [2021] EWHC 136 (QB)

Lionel Stride

Lionel Stride considers the recent case of *Kasem v University College London Hospitals NHS Foundation Trust* [2021] EWHC 136 (QB), where the High Court re-emphasised the stringent pleading requirements applicable when presenting a claim in the tort of deceit.

Background

Mr Kasem ('K') brought a claim against University College London Hospital NHS Foundation Trust ('UCL'), alleging that surgery on his shoulder had been negligently performed. K claimed that he had been left with long-term debilitating problems. His claim was pleaded in excess of £600,000 (£450,000 of which related to ongoing loss of earnings). Both quantum and liability were in issue. However, recognising that there was an element of litigation risk, UCL made a Part 36 offer of £75,000. Exchanges between the parties followed, with UCL fruitlessly seeking disclosure of documents relating to K's finances, employment history and the extent of the alleged injury. UCL eventually threatened a specific disclosure application and, over 7 months after it had been made, K accepted the Part 36 offer (presumably to avoid having to provide further disclosure).

As a result of information which had come to light post-acceptance, UCL refused to pay the offered sum and instead issued proceedings against K. Rather than seeking to set aside the original compromise and to have it struck-out on grounds of fundamental dishonesty under **s. 57** of the **Criminal Justice and Courts Act 2015**, UCL brought an action in the tort of deceit against K, contending that they had been induced into making the offer by K's fraudulent (mis) representations. UCL relied on photographic evidence from social media which, they alleged, was inconsistent with K's claimed disability. UCL's Particulars of Claim included a list of the ways in which K had allegedly sought to present fabricated and/or exaggerated heads of damage but did not seek specifically address each element of the tort of deceit on which the claim was founded.

Strike Out Application

K applied to strike out UCL's claim on two grounds:

i. the claim was an abuse of process in that it relied upon the Part 36 offer made in the original proceedings; and

ii. the claim in deceit was defective because it had not been properly particularised.

That application was partially successful before HHJ Baucher. She found that the reliance upon the Part 36 offer was an abuse of process and ordered that the claim be struck out under CPR 3.4(2)(a). She did not, however, address K's criticism of the particularisation issue and went on to grant UCL liberty to apply to amend its Particulars of Claim and to have its claim reinstated.

Reinstatement of the Claim

UCL duly amended its Particulars of Claim to remove any reliance upon the Part 36 offer, but left the pleading in the tort of deceit unchanged. They then successfully applied to have the claim reinstated. When reinstating the claim, HHJ Baucher found that, applying ***Lipkin Gorman v Karpnale Ltd [1998]*** **1 WLR 1340**, it was clear to K that fraud and dishonesty were being alleged; the claim in the tort of deceit was therefore properly pleaded.

The Appeal

The decision was appealed on the basis that the Judge had erred in concluding that the claim in deceit was properly particularised.

The Judgment

Saini J found that HHJ Baucher was wrong to allow the fraud pleading to stand. He began by setting out some basic principles. In any common law deceit claim a claimant must plead and prove at least the following five matters with sufficient particularity (paragraph 34):

i. A representation of fact made by words or conduct and mere silence is not enough;

ii. The representation was made with knowledge that it was false, i.e. it was wilfully false or at least made in the absence of any genuine belief that it was true or made recklessly, i.e. without caring whether the representation was true or false;

iii. The representation was made with the intention that it should be acted upon by the claimant, or by a class of persons which will include the claimant, in the manner which resulted in damage to him;

iv. The claimant acted upon the false statements; and

v. The claimant has sustained damage by so doing.

Saini J went on to consider what these principles required UCL to plead in the context of the allegations against K, reaching the conclusion that the Particulars of Claim should, at the very least, have included the following (paragraph 42):

i. The precise representations made by K in the course of his civil claim and whether they were express or implied;

ii. The precise respects in which they were factually false;

iii. UCL's knowledge when it made the Part 36 offer and how it relied upon the representations;

iv. The material received by UCL after the Part 36 offer had been accepted which showed that information provided by K had been false, setting out when that information had been received and how that information showed the representations to be false; and

v. The facts that were relied upon which showed that K had knowingly made false representations or made representations being reckless as to whether they were true or not.

Overall, Saini J concluded that UCL's claim in deceit was inadequately pleaded and should not have been allowed to proceed. To allow otherwise would have been to ***"drive a coach and horses through the pleadings requirements and allow ambush in the course of trial"*** (paragraph 47). He also drew a clear distinction between the tough requirements of bringing a claim in the tort of deceit and the less stringent way in which fundamental dishonesty under s.57 can be raised, saying *"The case has been pleaded in the form of a complaint within section 57 [of The Criminal Justice and Courts Act 2015] (which provides no cause of action in itself), as opposed to a deceit claim"* (paragraph 52).

Conclusion

Kasem is a timely reminder to practitioners that any claim in deceit must be properly particularised; that all elements of the tort must be correctly pleaded; and that it is not sufficient to raise general credibility points (as when raising s.57 issues pre-trial). The case also demonstrates the pitfalls that can be encountered where proceedings for civil fraud are commenced by a party who believes it has been deceived into settlement. A rigorous analysis of the available evidence should be undertaken before issue of the claim to ensure that the pleading requirements can be satisfied; in the absence of sufficient evidence to meet the pleading threshold, the claim would be at serious risk of being struck out. The good news is that the case of ***Kasem*** provides a useful checklist for any practitioner when pleading a case that does meet that evidential threshold.

Niche QOCS point for costs nerds

James Laughland

If tasked with setting questions for a niche and rather dull pub-quiz, I can do no better than suggest the following question: *Does QOCS apply to an application made pre-issue for a GLO?* (GLO = Group Litigation Order).

There are, it must be said, few applications that can, or would ever, be made pre-issue in personal injury proceedings. Worldwide freezing injunctions are not our usual bread-and-butter fare. Pre-action disclosure applications are occasionally made and the drafters of the QOCS rules were sufficiently prescient to recognise this to stipulate whether the QOCS rules apply to them (they don't).

What, though, is the position where an application for a GLO is made pre-issue by proposed Claimants and where that application fails? This was the knotty but niche problem facing Her Honour Judge Melissa Clarke in ***Waterfield & 25 others v Dentality Ltd & oths.*** (Oxford CC, 04.08.20 & 13.11.20).

The proposed Claimants or, more particularly, their solicitors intended issuing a claim for damages for personal injury after they had been exposed to the risk of blood-borne infections or viruses because of poor hygiene practices at the dental clinic. Equipment had been re-used between patients without any or any appropriate decontamination and sterilisation procedures. For reasons that need not concern us now, the Judge was not persuaded it was appropriate to make a GLO. That the Defendants had won and that a costs order should be made against the Claimants was not in issue. What was in issue was whether that costs order was enforceable without the permission of the court: CPR 44.14(1).

Was the application one that fell within the scope of the QOCS rules, namely proceedings which include a claim for damages for personal injuries (CPR 44.13(1))? In the Judge's view, that question was answered by considering whether use of the word *"proceedings"* encompasses claims that have not yet been issued.

By reference to earlier decisions where interpretation of that word had been considered by the higher appellate courts (decisions such as ***Wagenaar v Weekend Travel Limited t/a Ski Weekend*** [2014 EWCA Civ 1105, ***Wickes Building Supplies Ltd v William Gerarde Blair (No. 2) (Costs)*** [2020] EWCA Civ 17 and ***Parker v Butler*** [2016] EWHC 1251 (QB)), Judge Clarke concluded that a narrow interpretation was appropriate. Moreover, CPR 7.2(1) was, she said, *"not only relevant but directly on point"*: that rule stipulates that *"proceedings are started when the court issues a claim form at the request of the claimant"*.

The Judge also noted, as mentioned above, the exclusion of pre-action disclosure applications from the scope of the QOCS rules. Her decision in the instant case was consistent with that exclusion.

So, the costs order was enforceable against the Claimants, without requiring the permission of the Court. Such an outcome would have been avoided had the application for a GLO been made post-issue, although if unsuccessful then the consequent adverse cost order would have enforceable later against any order for damages and interest made in the Claimants' favour.

Trouble in Paradise

James Laughland

Who wouldn't want a career as a Chief Officer on Super Yachts? Cruising the Caribbean from November to March and then the Mediterranean from April to September? Board and lodging provided, with tax free pay based on the seafarer's allowance.

That was the career awaiting Mr El-Dorado (not his real name, but close) had it not been for the accident forming the basis of his £4 million personal injury claim. But for the misfortune of an electric shock sustained as he switched on a heater in his rented accommodation, he would have set sail from St Tropez a matter of weeks later, never to be seen again on UK shores until retirement age 68 after a lifetime at sea. Progress through the ranks would have been assured as a result of his hard work, aptitude and general charisma.

Too good to be true? Turned out that it was. His undoing was his greed, undone by hard work and perseverance from the Kennedys team led by Mark Burton, Nicola Smith and Thomas Panter.

The email chain containing the job offer from "Captain Bob"? It all looked legit, with email signatures showing the details of the recruitment website through whose servers it was said the offer and acceptance had passed. Trouble was, use of an @gmail.com account was inconsistent with the website's technology that only permitted use of the website's bespoke email addresses. The email chain was, in fact, the product of some sophisticated use of PDF software and the age-old art of cut-and-paste. We only learnt this by taking the trouble to contact the recruitment website's staff in the South of France and getting statements from them about how their site worked and who was registered to use it at the relevant time.

As we began to pester for answers to our questions about how we might make contact ourselves with "Captain Bob", up popped an email from him saying how all that the Claimant had said about the job offer was true, but that he was very busy and difficult to contact. Imagine our surprise. We persevered, this time threatening an application for inspection of all the Claimant's computers, tablets and mobiles. Our tech advisers assured us they could probably locate manifestations of "Captain Bob" on the Claimant's devices if such had ever been used to generate such content. Even double deleting does not get one the safety you may think.

What about Mr El-Dorado's qualifications for life on the ocean waves? Fortunately, the Maritime & Coastguard Agency do not just let anyone take charge of a Super Yacht. Logs are kept of days at sea, nights on watch. Qualifications must be accumulated to show proficiency in navigation, fire-safety and knot-tying (joke). All this, and more, had been produced. The fact he had gained such qualifications was all the more impressive considering he had been born without one of the two forearms most people are blessed with (this is not a joke).

The MCA's files contained numerous emails concerning the internal discussions their medical advisers had had in considering what fitness certification to give him. Whilst some disclosure had been forthcoming after provision of a Form of Authority, my solicitors kept digging for more, threating non-party disclosure applications even after the intervention of the Government Legal Department's lawyers sought to dissuade us. In the end, the gold seam was located. The Claimant's initial years at sea gaining his initial qualifications had been rather magical. Rather too

magical as they involved him being in two places at once. One was the Caribbean. The other was prison in the United Kingdom.

We had identified his criminal past as a result of Googling his previous name. The fact his name had been changed was evident from his medical records (some things are more difficult to hide than others). Diligent digging had procured the transcript of the Court of Appeal's judgment rejecting his appeal against sentence. Unfortunately for him, this established that he had been detained at Her Majesty's pleasure at a time when the MCA had later been led to believe he had been gaining experience at sea.

That revelation holed his claim below the waterline (groan). When disclosing it we added spice to the letter inviting immediate discontinuance by pointing out that investigations by our fraud investigators had also identified various property assets he held against which enforcement action would, if necessary, be taken.

Taking the case to trial for a finding of fundamental dishonesty, with a subsequent application for contempt of court, was very tempting. As tempting as a Caribbean cruise on a Super Yacht. Unfortunately, the economics of litigation could not justify that indulgence and the notice of discontinuance was received with not a squeak of protest or claim to have an honourable explanation.

Having lived and breathed the case for so long, some two years from start to finish, the legal team felt they too had lost a limb when the end came. The lesson, such as it is? Trust your judgment. Trust your suspicions. Don't take everything at face value. Keep digging (the £4m claim helped with the proportionality considerations for our supportive insurer (credit to MS Amlin)) and enjoy the ride.

ANPR – the latest battlefield

James Henry

The increased deployment of Automatic Number Plate Recognition ("ANPR") evidence in motor fraud and credit hire cases will be familiar to many readers. For those who are not familiar, ANPR evidence is gathered by thousands of cameras across the country and stored by companies who operate the camera systems. The photographs are used to detect when a car enters and exits a designated area. Cameras are often positioned in car parks or traffic management systems so that, for example, Tesco knows how long a vehicle has been in its car park, or TfL knows if a vehicle has entered the London Congestion Charging Zone. In the process of collating that information an enormous bank of data is stored detailing the location, at given points in time, of hundreds of thousands of vehicles. As well as providing a service to car park managers, some of the operators of ANPR systems will also accede to properly framed requests made by insurers for data about vehicles that have registered on their ANPR systems over a given period. Where the request leads to a 'hit', a more detailed ANPR report can be obtained together with the relevant still images.

For the insurance industry the possibilities are significant. In short, ANPR evidence can be used to prove that a motorbike with registration 'CR3D1T H1R3' was not in storage on a given date, or that a car with registration 'STAG3D COLL1510N' was in a car park at the time of an alleged accident, and many miles from the alleged locus. The use of ANPR data by insurers has been met with strong opposition by those representing claimants whose vehicles have been photographed, and often caught out claiming for significant periods of credit hire at times when their damaged vehicles appeared to be in use.

Harrison v Buncher (Unreported, Bristol CC, HHJ Cotter QC, 21.01.21) was a case involving fairly typical facts where ANPR is concerned. The claim was for just over £15,000 in respect of vehicle-related losses, including credit hire charges for a 53-day period. There was also a claim for storage charges covering 16 May 2019. The defendant obtained an ANPR report which included copies of 2 photographs showing the claimant's supposedly damaged vehicle entering and exiting a Tesco car park on 16 May 2019. The defendant did not include the report in its disclosure list, instead giving a 'deliberately opaque' description in the list of documents said to be privileged. The inference drawn was that the defendant did not want the claimant to know about the existence of the ANPR report until the claimant had pinned his colours to the mast in a witness statement. The ANPR data was subsequently exhibited to a witness statement and served at the same time as the claimant's statement. The claimant applied to strike out the witness statement. The defendant argued that the report (and photographs) were privileged, that it was entitled to refuse to permit inspection and waive privilege when it wanted to. It also applied for relief from sanctions in the alternative.

HHJ Cotter held that the report was a privileged document, and that privilege also applied to the copy photographs within the report, even if the original copies of the photographs would not have been privileged. If the report had been properly identified in the list of documents, any application by the claimant for inspection would have failed due to the reliance on privilege. The correct approach would therefore be for the insurer to identify the ANPR report as privileged within the box in the disclosure list referring to documents within the defendant's control to which there is objection to them being inspected (because of privilege).

However, there will be many cases where a defendant does not want to disclose the existence of an ANPR report because of concerns that even knowledge of its existence will lead the claimant to tailor his evidence and avoid pinning his colours to the mast in his witness statement. The defendant will want to catch the claimant unawares. That is a tactical decision, and one which runs contrary to the 'cards on the table' approach encouraged by the CPR, but it will undoubtedly continue to be a course of action adopted on a battlefield where trust is rarely the default position. In a case where a claimant has dishonestly withheld the truth to present an inflated claim for hire charges, many would find it strange to hold a defendant to a higher standard of openness, when the aim of its mischievous obscurity is to expose dishonesty.

More often than not, in cases where the defendant only reveals the existence of an ANPR report at the exchange of witness statements stage, or even later, an application for relief from sanctions will be needed. The failure to disclose an ANPR report will probably be viewed as a serious and significant breach in most cases, and very often the only reason will be to gain a tactical advantage. The court will therefore have to consider all of the circumstances of the case. In ***Harrison*** HHJ Cotter regarded the content (and potential effect) of the ANPR evidence as an important material factor. He also noted the strong public interest in the exposure of dishonesty within litigation. Those were factors to be balanced alongside the promptness of the application, the prejudice to both parties and the need to discourage the 'setting of a trap' by the defendant.

In ***Harrison*** the balancing exercise marginally favoured the granting of relief, but that will not be so in every case. Those wanting to benefit from the deployment of ANPR evidence will have to either comply with the disclosure rules or persuade the court that the potency of the evidence outweighs the factors militating against the admission of the evidence.

The prejudice occasioned by late disclosure can often be offset by allowing the claimant the opportunity to serve a further witness statement addressing the ANPR report. The guidance from HHJ Cotter is that allowing a further statement from the claimant would be the ordinary course of events, and the costs of such a statement will have to be carefully considered at the conclusion of the case.

Although it does not appear that the authorities were referred to in argument in ***Harrison***, the decision and approach to the issues is consistent with the authorities on the deployment of surveillance evidence. When the issue is viewed in that way, the battleground becomes a lot more familiar to experienced PI practitioners. At its core, an ANPR report is simply evidence that will be deployed to undermine the claimant's credibility; to demonstrate that facts that the claimant relies upon to prove his case are untrue or cannot be taken at face value. Often a defendant will not want to disclose that it has potentially useful material (and will retain privilege over it) until the claimant has made his case clear. The similarities to surveillance evidence are obvious. With judicial awareness of ANPR evidence becoming more commonplace, and applications of the type seen in ***Harrison*** becoming increasingly frequent, it seems likely that courts will dip into the authorities on surveillance evidence for some further guidance. For that reason it is notable that in ***Rall v Hume*** [2001] 3 All E.R. 248 the Court of Appeal held that *"where video evidence is available which, according to the defendant, undermines the case of the claimant to an extent that would substantially reduce the award of damages to which she is entitled, it will usually be in the overall interests of justice to require that the defendant should be permitted to cross-examine the plaintiff and her medical advisors upon it, so long as this does not amount to trial by ambush"*. In ***Uttley v Uttley*** **[2002] P.I.Q.R. 12** and in ***Douglas v O'Neill*** **[2011] EWHC 601 (QB)** the defendants were permitted to rely on surveillance evidence undermining the claimants' cases that was only served after the claimants had served witness statements and schedules of loss (i.e. once they had pinned their colours to the mast).

Once the evidence is shown to be of probative value, the key issue with surveillance evidence, which is also likely to be the key issue with ANPR evidence, is whether the claimant has a fair opportunity to deal with the evidence or whether the time and circumstances of disclosure mean that the defendant should not get the Court's permission to rely upon it.

West v Olakanpo [2020] 11 WLUK 451 – The tables can be turned

George Davies

In November 2020, Robin Knowles J gave judgment on appeal from a decision of HHJ Hellman (sitting at Mayor's & City of London) on a costs issue. The decision is of some importance to PI practitioners who have to grapple with allegations and findings of dishonesty and the costs consequences which arise therefrom. However, his decision does not seem to have been given much prominence.

I should declare an interest. I represented the Defendant at the hearing before HHJ Hellman. My colleague, Paul McGrath, had successfully rebuffed the Claimant's attempt to claim indemnity costs at an earlier interlocutory hearing before HHJ Wulwik at Central London CC. Paul had also helpfully prepared a very useful skeleton argument for the hearing before HHJ Hellman.

What was unusual about this case was that the allegation of dishonesty was being levelled by the Claimant (Olakanpo) against the defendant tortfeasor (West). The underlying dispute concerned a road traffic collision. The Defendant had denied liability on the basis that he wasn't at the scene. However, the Claimant had been able to provide the Defendant's details (including his business card and a photo of the Defendant's vehicle) which he said had been provided and taken at the scene.

A Part 36 Offer had been made by the Claimant which was not accepted. The case was listed for a fast track trial but a few days before the trial date, the Defendant's insurers made a late acceptance of the Offer (which had never been withdrawn).

The Defendant accepted that it was obliged to pay the Claimant's fixed costs applicable at the date of settlement. However, the Claimant then made an application (under CPR 44.2) seeking indemnity costs for the entire action or alternatively from the date of expiry of the Part 36 Offer.

At the hearing before HHJ Wulwik, the Claimant soon realised that its reliance on CPR 44.2 was blocked by the line of authority set out in ***Hislop v Perde*** **[2018] EWCA Civ 1786** (as applied in ***Parsa v DS Smith & Another*** **[2019] Costs LR 331**).The Claimant then changed track and applied to amend its application in order to seek its costs pursuant to CPR 45.29J. HHJ Wulwik gave permission for the Claimant to amend his application but ordered the Claimant to pay the Defendant's costs of the aborted application hearing.

CPR 45.29J states:

1. *If it considers that there are exceptional circumstances making it appropriate to do so, the court will consider a claim for an amount of costs (excluding disbursements) which is greater than the fixed recoverable costs referred to in rules 45.29B to 45.29H.*
2. *If the court considers such a claim to be appropriate, it may—*
   (a) summarily assess the costs; or
   (b) make an order for the costs to be subject to detailed assessment.
3. *If the court does not consider the claim to be appropriate, it will make an order—*
   (a) if the claim is made by the claimant, for the fixed recoverable costs; or
   (b) if the claim is made by the defendant, for a sum which has regard to, but which does not exceed the fixed recoverable costs, and any permitted disbursements only.

In the renewed application before HHJ Hellman, the Claimant argued that the Defendant had failed to provide any witness evidence to rebut the Claimant's allegations and that it could be inferred that his conduct was obviously dishonest. The Claimant thus submitted that the Court was entitled to make a costs order because the situation amounted to 'exceptional circumstances' under CPR 45.29J.

The Defendant countered that ***Hislop v Perde*** and ***Parsa v DS Smith & Another*** required a 'high' threshold for an application under 45.29J to be made out. It was submitted that, unfortunately, dishonesty in such litigation was not 'exceptional'. In any event, the Judge should be very slow to make findings of dishonesty without hearing evidence from both the parties at a 'mini-trial'.

HHJ Hellman was against the Defendant and was prepared to make a finding of dishonesty against him on the papers before him. However, permission to appeal was graciously given there and then (based on the premise that this issue clearly had wider ramifications).

On Appeal, Knowles J essentially agreed with the Defendant's submissions put down below and reversed the costs order made by HHJ Hellman. He noted that in fact there was witness evidence before the Court from the Defendant which had been served in accordance with the trial timetable. Knowles J also noted that whilst the Defendant had not actually applied for a 'mini-trial' he had always submitted that the same was going to be necessary before any finding of dishonesty was reached. Knowles J went on to find that the Claimant's allegation of 'outright dishonesty' should not have been determined on the papers and that some form of mini-trial of the parties' evidence had to be conducted before any such findings were made. He did, though leave it open that not all cases of dishonesty had to be dealt with by way of a mini-trial – although he did not specify how such a distinction was to be made.

Therefore, Knowles J did not make any definitive ruling that an application under CPR 45.29J could not be deployed by a claimant in circumstances where dishonesty was alleged against the defendant. This should serve as a warning to defendants. He did suggest that, in future, such situations warranted more discussions between the parties in advance of such applications being made. Presumably, however, in situations where there was no main trial taking place, the parties would then have to agree the logistics of a mini-trial. That would still leave it for a defendant to avoid the same for tactical reasons and argue that dishonesty and therefore exceptional circumstances had not been made out. The risk, though, is that the claimant will contend that their case is suitable for determination by submissions alone and / or in the defendant's absence. I can see the Courts having sympathy with a claimant who suggests a mini-trial but the defendant then goes to ground. In such cases, adverse inferences may well be drawn and findings of dishonesty made in the defendant's absence.

Noteworthy Cases

Saji Kannel Paul v Scott Manning – Luton County Court, DJ Beamish, 25 February 2020

Ellen Robertson (instructed by Emma Kerr of Keoghs LLP) appeared for the Defendant in this case involving a fraudulent claim for personal injury arising out of an accident on 15 March 2018.

The Defendant challenged the veracity of the claim for personal injury on the basis that the Claimant had dishonestly supported an intimated claim for his teenage son when he was not in the vehicle, and on the basis that the Claimant was dishonest about his alleged injuries.

District Judge Beamish found that the Defendant was an open and candid witness whose evidence could be relied upon by the Court. He considered that the Defendant's evidence that he had witnessed the son approach the vehicle on foot after the collision was clear, accurate and detailed, and by contrast found the Claimant to be inconsistent and unclear on the question of his son's presence.

The judge also considered the Claimant's evidence on his injuries to be *"a picture of confusion and inconsistency"*, rejecting his explanation that he had not told the medical expert about pre-existing injuries because he was not asked about them. He found that the Claimant had been dishonest both about his son's presence in the vehicle and about his alleged injuries.

The Claimant was ordered to pay the Defendant's costs and witness expenses in the sum of £10,215. Permission was given to enforce the costs and expenses in full on the basis of the finding of fundamental dishonesty.

Owusu v Greencore Group Ltd Canterbury County Court, 20 July 2020, HHJ Catherine Brown

Personal Injury – Hire – No valid MoT

Paul McGrath (instructed by Ben Parker, Horwich Farrelly solicitors) acted for the defendant.

The Claimant brought a claim for personal injury and a large claim for credit hire. The claim for personal injury was successful, after the Judge accepted that the Claimant had proven that he was injured by reason of the accident. At the time of the accident the Claimant's own vehicle was out of MoT. The vehicle was returned to him in November 2016 and he continued using it – and it remained out of MoT – until July 2017. The Defendant submitted that the claim for hire charges should be dismissed because (i) the Claimant could not prove a valid claim for loss of use; and (ii) the claim for hire charges should be barred on the grounds of *ex turpi causa* relying, in particular, on ***Morgan v Bryson*** **[2018] NIQB 12 (Burgess J, NIHC)**, ***Agheampong v Allied Manufacturing*** **[2009] Lloyd's Rep. I.R. 379 (HHJ Dean QC)** and ***Hewison v Meridian Shipping*** **[2002] EWCA Civ 1821**. The Claimant relied on ***Jack v Borys*** **(unrep. HHJ Freedman, 2020)** and submitted that ***Agheampong*** was no longer good law. The Claimant also cited *Patel v Mirza* [2017] AC 467.

Held: the short judgment in ***Jack v Borys*** made no reference to the decision of Mr Justice Burgess in ***Morgan v Bryson*** and the Judge did not provide any analysis of the authorities. The judgment in *Agheampong* remained good law and it was correctly reasoned. In the present case it could not be assumed that the Claimant would have arranged for an MoT but for the accident, indeed he did not in the event arrange a MoT for some time after its return. It was appropriate to bar the entire claim for hire charges on the basis of the doctrine *ex turpi causa*. ***Jack v Borys*** doubted, ***Patel***, ***Agheampong***, ***Morgan***, *and* ***Hewison*** applied.

Marriott v Pentons Haulage – 31.7.20, Stockport CC

Fraud; fundamental dishonesty

Edward Hutchin, instructed by Peter Smithson of Clyde & Co, represented the successful Defendant insurers in this case.

The Claimant relied on photos allegedly showing that he was involved in an accident with the Defendant's lorry. However the Defendant denied any accident had taken place, and found evidence showing that the photos had been taken several years earlier.

At trial the Claimant dropped all claims at the door of the court, admitted fundamental dishonesty, and agreed to pay towards the Defendant's claims for damages and costs.

The case demonstrates the merit of thorough investigation. Whilst the Defendant's driver denied any collision, it was only after investigating the photographic evidence and a detailed analysis of the Defendant's records that it was possible to prove that the photos were false, evidence so overwhelming that the Claimant admitted fundamental dishonesty.

Ali v. Liviu (High Wycombe CC, 04.08.20)

Previous Compromise – Abuse of Process

Anthony Johnson (instructed by James Lawrence of Irwin Mitchell) represented the Defendant in this case where the Claimant's case was struck out as an abuse of process due to him previously having accepted a compromise in respect of the claim. Although not a fraud case, the case is of interest to readers of this Publication due to its circumstances which frequently do arise in fraud cases in the writer's experience.

The Claimant intimated a vehicle damages claim against the Defendant via a claims handling company. He subsequently signed a Form of Discharge that was sent to the claims handlers which stated that he accepted a sum equivalent to the assessed cost of his vehicle repairs, *"in full and final settlement of all claims (including costs and charges), whether past, present or future, known or unknown, which I may have, or acquire in respect of loss and/or damage and/or injuries sustained by me arising directly or indirectly as the result of an accident..."*

The Claimant's solicitors sought to argue that the settlement agreement was void due to a unilateral operative mistake. It was argued that, as they had sent a letter of claim in respect of personal injuries to the Defendant prior to the date of the purported settlement, the Defendant's representatives had been under a duty to send a copy of the Discharge Form to them in addition to the claims handlers. It was also asserted that the fact that the Claimant had accepted a figure that allowed zero for his personal injury claim despite him having been injured was evidence of the fact that he must have been mistaken or else he would never have signed the agreement. The Defendant responded that parties accept less than the full value of the claim all the time for all kinds of reasons. Further, even if there had been a mistake then it was not an operative mistake because there was no evidence that the Defendant was aware of the mistake or had deliberately tried to take advantage of it.

DDJ Colquhoun did not accept the Claimant's case and acceded to the Defendant's request for a Strike Out and made an Order in respect of the costs of the action that is enforceable pursuant to CPR 44.15(b). The Judge found that the evidence did not point to an operative mistake, but rather to an election by the Claimant to accept monies by way of a compromise. The Claimant was *prima facie* bound by his signature on the

Discharge document. He felt that it would have been up to the Claimant to take legal advice before signing the document, rather than there being a duty on the Defendant's representatives to inform the other of the two companies who had been corresponding with them on his behalf. There was no suggestion that there had been any fraud or misrepresentation on the part of the Defendant's representatives. He commented that whilst the solicitors may have advised him not to sign the document, claimants do not always follow good and sound advice from their legal representatives. He also accepted the Defendant's argument that the Application should have included a witness statement from the claimant rather than just his solicitors – he said that this made it extremely difficult to know what was his direct evidence and what was inference or assumption by his solicitor.

Ukaegbu v ERS Corporate Member Ltd (11th August 2020, Bromley CC – Central London CC blitz list – DDJ Restall)

Fundamental Dishonesty– QOCS

James Yapp (instructed by Meagan Roberts of Horwich Farrelly) was instructed in this case in which contemporaneous medical records proved to be crucial.

The Claimant gave inconsistent and contradictory evidence in relation to the sites of his injuries and how long his symptoms had lasted.

The Claimant gave an incomplete account of his long history of back problems to his medical expert. No mention was made of significant previous surgery to correct scoliosis which the Claimant characterised as *'life-changing'*. The Claimant gave inconsistent explanations as to why he had not reported this.

The Claimant saw his own GP a week after the accident complaining of unrelated back pain which pre-dated the index accident. The Claimant did not mention the accident to his GP. This unrelated issue had not been reported to the medical expert.

The Claimant variously reported having taken 1 day, 2 days, 2 weeks or 17 days off work. His medical expert recorded a history of 2 weeks off work. In his oral evidence he was unable to explain when he had taken time off work, or whether any days off were taken consecutively. Records from the Claimant's employer suggested he worked from home for 2 weeks and took 1 day off work. Importantly, that day off corresponded with the GP appointment for unrelated back pain.

The Judge was persuaded that the contemporaneous medical records were of significant assistance in assessing the true position. The GP record from one week post-accident did not mention the accident at all. This was very difficult to reconcile with the Claimant's case that he had sustained an injury to the very same area in the index accident.

The claim was dismissed with a finding of fundamental dishonesty.

Sargent v ERS Corporate Member Ltd – 25th August 2020, Cambridge CC (CVP), DJ Ragett

Fundamental Dishonesty – QOCS

James Yapp (instructed by Meagan Roberts of Horwich Farrelly) was instructed in this case arising from an accident in a car park. Liability and causation were both in dispute.

The Judge concluded that neither party's account of the accident was quite correct. She found that both vehicles were moving and that the drivers had failed to observe one another. She determined that an appropriate split would be 60/40 in favour of the Defendant's insured.

The Claimant's evidence in relation to his alleged injuries was found to be *'seriously inconsistent'* under cross-examination. These inconsistencies included the sites of his claimed injuries and their duration. His medical report suggested he had taken painkillers for 6 weeks and recovered from his injuries after 12 weeks. In his oral evidence he said he was still taking painkillers 4 or 5 months later.

When presented with these inconsistencies the Claimant embarked on *'long, unconvincing explanations'*. The Judge formed the impression that the Claimant was not clear about his own alleged injuries.

There was no contemporaneous record of injury. An accident management company report form completed the day after the accident made no mention of injury.

The Judge also noted that the Claimant regularly attended upon his GP, but made no mention of his injuries. He had attended for other minor ailments during the period of alleged suffering.

The Judge dismissed the claim and made a finding of fundamental dishonesty.

Ghafoor v. Aviva (Salisbury CC, 28.08.20)

Fraud – Fundamental Dishonesty – Induced Accident

Anthony Johnson (instructed by Jo Boardman of Keoghs) successfully represented Aviva Insurance to trial in respect of this claim for over £30,000 in respect of personal injury, hire charges and various ancillary claims that was dismissed on the basis that the Judge (DJ Bloom-Davis) accepted the Defendant's primary case that the index incident was an induced collision.

The Judge made a finding of fundamental dishonesty and made a costs order in the Defendant's favour assessed on the indemnity basis and enforceable pursuant to CPR 44.16.

The Judge's decision was underpinned by two key findings of fact: *(i)* he preferred the Defendant's insured driver's evidence to the Claimant's wherever the two differed; and *(ii)* the location of the incident had been over the give-way lines leading onto a major roundabout, rather than behind the lines as the Claimant had alleged. He commented that the Claimant was unconvincing and evasive, and that parts of his evidence were inconsistent and implausible. He concluded that, in the light of the Claimant's implausible explanation that he had remained behind the give-way lines at all times, the only logical explanation for what had occurred was that the collision had been deliberately induced.

Fraser v NLH Ltd – 1.9.20 – Liverpool CC

Strike out – fundamental dishonesty

Edward Hutchin, instructed by Damian Rourke of Clyde & Co, represented the successful Defendant insurers in this case in which the Claimant was found to have been working as an MC despite his claimed disability.

The Claimant claimed that he injured his wrist in an accident at work, when medical records revealed that he had in fact been injured when handcuffed in an incident involving the police. He also claimed that he was severely disabled and claimed disablement benefits, but social media evidence showed him performing as an MC at numerous music events and festivals.

The claim was struck out, but the Defendant successfully applied for a finding of fundamental dishonesty, and an enforceable costs order was made in the Defendant's favour on the indemnity basis.

The case illustrates the potential benefits of pursuing a fundamental dishonesty finding even after a claim has been struck out or discontinued. It also highlights how social media evidence can provide crucial evidence to contradict Claimants' accounts of their injuries, as well as the advantages of seeking disclosure of benefits records.

Khan v LV= (Southend CC, 12.10.20)

44PD §12.4 – FD following early discontinuance

James Henry (instructed by Meagan Roberts of Horwich Farrelly) acted for LV= at the conclusion of this long-running case, resulting in a finding of FD against the claimant following early service of a notice of discontinuance.

The proceedings began life as a straightforward injury claim brought by a taxi driver that was defended on causation grounds. The defendant was concerned that the claimant did not appear to have sought any medical attention despite alleging that his injuries were serious enough to require him to stop his gym activities. An order for disclosure resulted in the gym records being produced which, when compared with his GP records, confirmed that the claimant had been a regular attendee at his gym throughout the prognosis period, and had failed to seek any medical attention from his GP. The claimant filed a notice of discontinuance before he ever served a witness statement. The defendant applied to the court for a finding of FD for the purposes of enforcing its costs order. It was a bold approach considering the early stage of the proceedings and the fact that the claimant had not committed to any explanation or account in a witness statement or other document personally verified by a statement of truth.

The hearing was originally listed in March 2019, but was adjourned at the claimant's request so that he could gather further evidence to prove that he used the cafe at the gym as a remote office (explaining his continued attendance even though he was injured) and a witness statement from his wife to support the fact of his genuine injury. He also, unusually, waived privilege on the advices received from his solicitors about his prospects of success and the merits of discontinuing proceedings. At the final hearing DJ Callaghan rejected the claimant's explanations and found that the claim was fundamentally dishonest.

The case demonstrates that, with the right evidence, enforceable costs order can be obtained even after discontinuances filed at an early stage in proceedings.

Hussain v Carey (Oxford CC (remote video), 26.10.20)

s.57 – credit hire dismissal

James Henry (instructed by Kathryn Dingley of Horwich Farrelly) represented the successful defendant following a finding that the claimant had been fundamentally dishonest in relation to an otherwise meritorious claim.

The claim arose from a liability-admitted road traffic accident. The claimant proved his case on repairs, recovery, storage and credit hire. But for his dishonesty in relation to the injury claim his award would have been c.£21,000. In relation to his injury claim, the claimant went to his GP 2 days after the accident and (amongst other things) made a contemporaneous report of injury to his neck and back. His expert (with whom the claimant agreed) gave a prognosis for recovery of 10 months. However, the claimant gave evidence in cross-examination that he achieved a full recovery from neck pain within 3 or 4 weeks. Although he had attended his GP on further occasions, he had not mentioned any ongoing pain. DJ Buckley-Clarke found that the significant exaggeration by the claimant of his recovery period was fundamentally dishonest and dismissed the entire claim with an award of indemnity costs.

Ashur v. Lang (Luton CC, 03.11.20)

Discontinuance – Fraud – Fundamental Dishonesty

Anthony Johnson (instructed by Leanne Hamblett of Keoghs on behalf of Ben Summerscales at Covea Insurance) represented the Defendant in its successful Application for a declaration that the Claimant was fundamentally dishonest and that, therefore, it was entitled to recover indemnity costs and enforce them pursuant to CPR 44.16.

After the Claimant issued his claim against the Defendant, a Defence was filed which called into question the issue of causation and made a positive assertion that the claim was fundamentally dishonest on account of the fact that the Claimant was not present in the vehicle that the Defendant admitted striking at low speed at the material time. The Claimant initially allowed the claim to proceed through Directions, but after receiving a damning forensic expert engineering report from the Defendant alongside compelling lay witness evidence from the Defendant and her husband, he filed a Notice of Discontinuance.

Shortly afterwards, the Defendant made an Application for a determination that the Claimant was fundamentally dishonest pursuant to CPR 44 PD 12.4. The Claimant attended the initial hearing of the Application in March 2020 and managed to secure an adjournment on the basis that he wanted the opportunity to prove his honesty but that: *(i)* his solicitors had just come off the record and he intended to seek alternative legal representation; and *(ii)* Arabic was his first language and he claimed not to have understood everything that had been written in English. In spite of this, nothing further was ever heard from him over the next 7½ months before the Application was eventually listed for a remote hearing, which the Claimant did not attend despite having been made aware of the listing.

DDJ Perry was prepared to determine the Application in the Claimant's absence on the basis that the previous Judge had given him every opportunity to have a 'fair crack of the whip'. He was willing to draw adverse inferences from the time at which the Claimant had discontinued the claim and from the fact that no evidence was forthcoming from the other alleged occupant of his vehicle. He found as a fact that: *(i)* the Claimant had lied about being the driver of the vehicle and that, on the balance of probabilities, he had not been in the vehicle at all; *(ii)* the index collision would not have been capable of causing injury, noting in particular that the Defendant's engine was switched off at the time and the vehicle was actually being pushed to 'bump start' it by her husband who was a retired gentleman; and *(iii)* the Claimant had claimed in respect of vehicle damage that the Defendant's engineering evidence had confirmed was not caused in the incident. The Judge concluded that, bearing in mind the case of *Molodi*, the index claim had all the hallmarks of a case that had to be approached with the utmost suspicion and that, on the balance of probabilities, it was fundamentally dishonest.

Ferris-Mahmood v Liverpool Victoria Insurance Company Ltd. (20th November 2020, Bristol CC, Recorder Mawhinney)

s.57 – Fundamental Dishonesty – QOCS

James Yapp (instructed by Leah Whitehead of Horwich Farrelly) was instructed in this case in which causation of injury and the extent of the damage to the Claimant's vehicle were in dispute.

It was the Claimant's case that a rear end shunt had caused his vehicle to collide with a traffic island. He claimed for damage to the front and rear of his vehicle, and damage to the suspension. He also brought a claim for personal injury.

The Claimant described severe damage to the front of the Defendants insured vehicle. He alleged that the bumper had been split in two. Photographs showed only minor damage. The Judge found that the Claimant had "clearly exaggerated" the extent of the damage.

The Claimant had been involved in two previous accidents. He had been injured in another accident approximately 2 months after the index one. He had denied any history of previous accidents or relevant medical history when examined by his medical expert. In cross-examination the Claimant stated that he had misled the expert, but that this was unintentional.

The Claimant sought no medical attention following the index accident, despite allegedly suffering from '10/10' pain. He had seen his GP, both previously and subsequently, when he had been injured in other road traffic accidents.

The Judge found that this was a minor accident which would be unlikely to cause injury.

Quite apart from this, the Judge found that the Claimant had not been truthful his presentation of his alleged injuries; his credibility was undermined by the failure to report his relevant medical history to the expert; there was no good reason for the failure to seek medical attention; and he had provided inconsistent accounts of timescale of his alleged recovery. While the Claimant had attended physiotherapy, this was arranged by his solicitors and the treatment took place after the intervening accident.

The Judge found that the Claimant had been fundamentally dishonest in relation to the claim for injury.

In relation to the vehicle damage claim, the Judge accepted that the Claimant's car had struck the island and that the front and rear bodywork damage was attributable to the accident. He was not satisfied that the damage to the suspension was accident-related, but he did not consider the Claimant had been dishonest in this respect.

The whole claim was dismissed pursuant to s.57 of the Criminal Justice and Courts Act 2015.

Shah v. (1) Chaudhury (2)LV (Luton CC, 18.12.20)

Phantom Passenger – Fundamental Dishonesty – Section 57

Anthony Johnson (instructed by Gareth Berry of Keoghs) successfully secured the dismissal of the Claimant's case at trial in the above matter.

The Defendants did not dispute that that a collision occurred or that the First Defendant was at fault. The Claimant was put to proof in relation to his injuries, which District Judge Ayers held were genuine. However, the Claimant was found to have dishonestly supported a claim that had been intimated by an adult whom, it was found as a fact, had not been present in his vehicle. The Claimant's claim was dismissed pursuant to section 57 of the Criminal Justice and Courts Act 2015. The Defendants secured an enforceable Order for indemnity costs.

The Claimant and his wife revealed for the first time in their witness evidence that their case was that the alleged phantom passenger had not been visible in their vehicle because he had exited it immediately in the aftermath of the accident and not returned until after the First Defendant had left the scene. The Judge held that although the evidence of the First Defendant and his wife was impressive and that they would have expected to notice a passenger exiting the vehicle, it was possible that they could have not seen this. However, the totality of the Defendant's case persuaded him that, on the balance of probabilities, the passenger had not been present.

For the Judge, the key factor was the Claimant's failure to produce any evidence to support the presence of the alleged passenger in his vehicle. There were no photographs showing him either in the car or at the scene. There was no evidence from the alleged passenger and his medical records had not been produced. There was no evidence from any other witnesses, including the Claimant's father-in-law who had apparently attended the scene. He had not produced photos of or the specifications of his vehicle (the First Defendant denied that it had a third row of seats where the passenger had apparently been seated). The Judge noted that the Claimant's evidence had been that he had not been asked for any of these things and had not appreciated their significance- he said that he was not entirely sure whether the dishonesty finding was down to the Claimant or his solicitors.

The Claimant's Counsel sought and was denied permission to appeal on the basis that the Judge could not properly be sure whether the Claimant really was fundamentally dishonest or whether his solicitors had prepared the case so badly that he had inadvertently appeared as much. It will be interesting to see whether the Claimant pursues an appeal that would presumably have to be based around an implicit or explicit assertion that his solicitors had been negligent.

Wagstaffe v Advantage Insurance Company Limited (7th January 2021, Clerkenwell & Shoreditch CC (CVP), DJ Bell

Fundamental Dishonesty – QOCS

James Yapp (instructed by Aksa Aslam Mohammed of Horwich Farrelly) was instructed in this case arising from a minor road traffic accident.

The Claimant was the rear seat passenger in a taxi. The Defendant's insured driver gave evidence that he did not realise an incident had occurred until the taxi driver flagged him down.

The Claimant's account of how he was moved by the accident was inconsistent. He gave various descriptions and demonstrations of how he said he had been jolted within the vehicle. The Judge ultimately concluded that this was an accident incapable of jolting the Claimant as alleged.

Even if she was wrong about this, the Judge noted a number of issues with the Claimant's evidence.

The Claimant had a history of problems with his neck, back and shoulder which had caused him to give up work the year before the accident. This history did not appear in his expert report and the Claimant's physiotherapy notes stated there was no history of related injuries. An expert report from a previous claim also did not include this history. The Claimant said he had reported these previous issues but that the experts and physiotherapist had failed to record them. The Judge found this to be inherently unlikely.

The Claimant's GP records showed he had not sought attention for his injuries despite suffering what he described as '10/10' pain. He said at times the pain rendered him unable to get out of bed.

The Claimant told his medical expert that he had been to his GP a month after the index accident and was prescribed painkillers. He initially repeated this account in cross-examination. Medical records showed that the Claimant did mention the accident to his GP around 6 months later. He was not seeking treatment, but a sick note for the job centre. The note specifically stated that he had not been to see him GP at the time of the accident.

The Judge found that the Claimant had lied to his medical expert and in his oral evidence about seeking treatment from his GP.

The claim was dismissed with a finding of fundamental dishonesty.

Ise v Ralls (Clerkenwell & Shoreditch CC (remote video), 15.01.21

Staged accident – fraud – false witness

James Henry (instructed by Matthew Hill of Horwich Farrelly) acted for the successful defendant in this case which will probably resonate with a number of readers who are handling cases where similar circumstances arise.

The claimant described himself as a member of the 'Brazilian biker community in London'. He claimed to have suffered injury when the defendant reversed his vehicle into collision with the claimant's motorbike. A claim for credit hire charges totalling over £12,000 was presented to 'mitigate the loss' of the motorcycle, itself valued at £1,900. The claimant purported to substantiate his claim by reference to an independent witness, and the production of photographs of his motorcycle positioned immediately behind the defendant's reversing vehicle.

Unfortunately for the claimant, the defendant denied that he had made any contact at all with the bike, or the claimant. The defence put the claimant on notice that he would be required to disclose any relationship he had with the witness. The claimant was, at best, coy about the relationship in his witness statement. Searches revealed that the witness was in fact one of the claimant's Facebook friends. The Claimant tried to explain that by saying that the witness was not really known to him; the Facebook connection merely reflected the fact that they were 'both members of the big community of Brazilian bikers in London who all work as couriers'. That explanation would perhaps have seemed a little more reasonable had it not been for the fact that the claimant's bank statements showed payments to and from the 'independent' witness in the weeks after the alleged accident.

DJ Swan had no hesitation in finding that the claimant had concocted the accident, probably setting up the scene of a collision behind the defendant's vehicle with accomplices (including the 'independent' witness) in order to present a fraudulent claim for damages.

Konstantinou v Wells, DJ Davies, Edmonton County Court, 8.2.2021

Ellen Robertson appeared for the Defendant in this application for a finding of fundamental dishonesty, instructed by Rachael Stirling of Keoghs LLP.

The Claimant had submitted a claim form alleging to have suffered stomach, arm and back pain following an accident on 27 July 2015. The Claimant relied on a medical report which recorded that the Claimant was removing shopping from his car when the Defendant drove into his vehicle, ripping off his car door. The matter proceeded to disclosure and exchange of witness statements, and following the Claimant's refusal to fully answer Part 18 questions, he discontinued his claim.

The Defendant applied for a finding of fundamental dishonesty, alleging that the Claimant had been dishonest in claiming he was struck by the vehicle, had failed to disclose his history of abdominal pain to the medicolegal expert, and that the Claimant had lied to the Court regarding his alleged injuries. The Claimant failed to submit any evidence in response or to attend the hearing.

DJ Davies found that the claim was dishonest. He accepted that the engineering evidence showed the Claimant's account of the car door being ripped off was not true and that the Claimant had lied about suffering injuries to the expert and the Court. He therefore found that the claim had been fundamentally dishonest and ordered that the Claimant pay the Defendant's costs of £7,748.28.

Antao v. Le Neveu (Plymouth CC, 15.02.21)

Causation- Put to Proof – Medical Evidence

Anthony Johnson (instructed by Tony Iantosca of Direct Line via Nigel Parker of Keoghs) successfully secured the dismissal of the Claimant's case at a Fast-Track trial in the above matter.

The matter arose from a road traffic accident in respect of which breach of duty had been compromised on a 50:50 basis between the parties' representatives. The Defendant had not co-operated with her insurers and so it was not possible to advance a positive case on her behalf. However, her insurers nevertheless took the case to trial in order to put the Claimant to proof in relation to his claims of vehicle damage and personal injury, each of which were accompanied by minor associated losses. Although the Judge (DDJ Whiteley) found as a matter of fact that the Claimant was honest and had done his best to assist the Court, he nevertheless found that neither facet of his claim had been proven.

In terms of the vehicle damage claim, the Defendant relied upon a forensic engineering report which suggested that the damage sustained by the two vehicles was inconsistent. The Claimant failed to ask Part 35 Questions of the expert despite having permission to do so, nor did they seek to rely upon their own alternative report. The Claimant was denied an adjournment to deal with this point, which was only pursued for the first time by way of an oral Application on the morning of trial. In evidence, the Claimant freely admitted that he had no explanation for significant parts of the damage referred to in the assessor's report upon which he relied. The Judge held that whilst the Claimant had satisfied him that his vehicle had suffered some damage in the index incident, he was unable to prove the extent of any such loss in the light of the issues posed by the unchallenged engineering evidence.

Turning to personal injury, the Judge held that whilst he accepted that the Claimant had suffered some injuries, he had not discharged his burden of proving that they were sustained in the index accident. The Claimant had freely admitted to having been involved in a previous road traffic accident the year before the index accident, whereas the GP report upon which he relied expressly stated that he had no history of neck injury. As that statement was demonstrably false, it would be unsafe to place any reliance upon the conclusion that followed on from it. He commented that Courts are bound by expert medical opinion in all soft tissue injury claims, and that it was for the Claimant to show attribution. This was something that was entirely within the control of the Claimant- he had had the report and had approved its contents. It would have been possible to revert to the expert. It was important that the report had to be credible and supportable and that all relevant facts were dealt with.

Alves v Ocado (Central London County Court, 25 February 2021, Mr Recorder Mayall)

Dishonesty – Credit Hire – Need – Illegal Use

Paul McGrath (instructed by Nasreen Rehman, Plexus Law) acted for the defendant.

The Claimant made a claim for financial loss only arising from a road traffic accident. The Defendant was successful on liability but the Judge went on to consider and make findings in relation to quantum.

The Claimant made a claim for damage to his motorcycle helmet. However, a comparison between dash cam footage and the images of the supposedly damaged helmet showed them to be different. The Claimant's explanation was not accepted. The Judge found that the Claimant had submitted photographs in support of his claim of a damaged helmet that was not the same as the helmet that the Claimant had been wearing at the time. The claim was found to be 'totally dishonest'.

In relation to credit hire, the Claimant claimed that he needed his motorcycle for work purposes. He also claimed, in a one line paragraph, to have used the motorcycle for social, domestic and pleasure purposes. The Claimant was not insured to use his vehicle for work and therefore the Court accepted that he could not justify his need to hire a vehicle insured for work when his own vehicle was not so insured. Further, the Claimant had not proven that he needed a vehicle solely for social, domestic and pleasure purposes given that his statement was so laconic on this and the real reason that he said he had hired was for work purposes. Therefore, the inference mentioned by Lord Mustill in *Giles v Thompson* did not arise. The claim would have been dismissed.

Blythe v Sabre Insurance, HHJ Ingram, Birmingham County Court, 26.02.2021

Ellen Robertson, instructed by Shannon Cottam of DWF Law and Matt Parker of Sabre Insurance, appeared for the Defendant in this case described as "unusual" by HHJ Ingram, arising out of an accident on 4 December 2018.

The claim concerned an accident involving two vehicles parked outside a hospital, the Defendant's vehicle behind the vehicle the Claimant was travelling in. The Claimant and her parents gave evidence that the Defendant driver's vehicle had driven forwards, pinning the Claimant's parents between the vehicles and injuring the Claimant, who was sat in the rear seat of her parents' vehicle. The Claimant maintained that despite her parents' presence between the vehicles, the impact had still been sufficiently forceful to jolt the vehicle and to cause her to sustain injury. She claimed to have suffered a soft tissue injury for five months.

HHJ Ingram formed the view that the Claimant's evidence was "very inconsistent" and that she did not make much effort to recall events when questioned. She found that there had been no impact to the car that would have been sufficient to cause whiplash to the occupants. Given that finding and that there was no reasonable explanation for the Claimant suffering her claimed injuries, the judge found the claim fundamentally dishonest. The Claimant was ordered to pay the Defendant's costs of £9,000.

Liaqat v Dar – 8-10.3.21, Central London CC

Fraud – occupancy

Edward Hutchin, instructed by Andrew Burkitt of Keoghs, represented the successful Defendant insurers in this case in which the claims of 3 Claimants were dismissed on grounds of fundamental dishonesty, the judge finding that 2 of them were not present in the car at the time of the accident.

The Claimants claimed that they were all travelling together in a car when it was involved in a road traffic accident, and sustained injuries as a result. The Defendant disputed the Claimants' account of the accident, and called evidence denying that there were any passengers in the vehicle at the time of the accident.

After a 2 day trial in Central London the judge dismissed all the claims, finding that there were no passengers in the car, and the account of the alleged passengers was 'fictitious'. The claim of the alleged driver was also dismissed under s.57 CJCA 2015, the judge finding that he had conspired with the passengers to make false claims for damages (as well as exaggerating his own claims). The Defendant was awarded indemnity costs and a substantial payment on account.

Occupancy cases can be difficult: this case demonstrates that, with the right evidence, occupancy defences can succeed, and result in the dismissal of related claims by actual occupants.

Rossiter v EUI (Bristol CC (remote video), 18.03.21)

s.57 – fundamental dishonesty – late notification

James Henry (instructed by Ryan Curley) represented the defendant insurer in the successful defence of this claim arising from a liability-admitted road traffic accident that occurred in 2016 said to have caused the claimant permanent back and shoulder pain.

The claimant presented his claim for the first time a little over a year after the accident. Recorder Mawhinney found that on any view the accident was capable of causing injury. The claimant went to his GP about a week after the accident complaining of neck pain. The GP recorded that he advised it should resolve within about 6 weeks. The claimant's case was that the pain did not resolve, but remained at a relatively high level for a year or so, before improving slightly and plateauing to a state of permanent residual neck and shoulder pain. His case was supported by medicolegal reports from a GP and an orthopaedic surgeon, who examined the claimant 3½ years after the accident. The defendant did not call any evidence, but robustly tested the claimant's account by reference to the medical records and reports to physiotherapists. By the end of the claimant's evidence the defendant was able to advance a positive case of fundamental dishonesty. Recorder Mawhinney found that the claimant had been genuinely injured, for the six-week period that his GP had originally predicted, but that beyond that the claim was not proven. On consideration of the defendant's positive case, the Recorder agreed that the evidence went further than simply a want of proof, and found that the claimant had been fundamentally dishonest in relation to his injury claim, with the consequence that the entire claim was dismissed.

Gunzell v Ocado (Central London County Court, 16 April 2021, HHJ Hellman)

Section 57 – Fundamental Dishonesty – Hire

Paul McGrath (instructed by Nasreen Rehman, Plexus Law) acted for the Defendant.

The Claimant succeeded in proving liability, injury and some losses. However, the Defendant submitted that his claim should be dismissed pursuant to section 57 Criminal Justice and Courts Act 2015.

The key facts were as follows: by CNF dated 2 September 2018, the Claimant said that he required, and was hiring, an alternative vehicle. On 25 January 2019 the Defendant discovered that the Claimant's own vehicle had passed a MoT on 13 October 2018, but it was not known whether the vehicle had been returned to the Claimant after the MoT. On 28 January 2019, the Claimant's solicitors wrote to the Defendant's solicitors stating that the Claimant's vehicle was at the repairing garage pending payment and collection and that the Claimant could not pay for repairs until put into funds. In fact, the Claimant had already paid for the repairs and collected his vehicle. The Claimant said that he did not use the vehicle but instead gave it to his brother and he was waiting for an interim payment to allow him to buy a new vehicle. This information was only provided when his statement was served, much later on in proceedings (but considerably before trial). The Defendant submitted that the letter sent by his solicitors on his behalf contained a fundamental dishonesty: his vehicle was not at the repairers awaiting collection and neither was the Claimant unable to pay for the repairs.

Held: It was inferred that the letter sent on 28 January 2019 was sent on the Claimant's instructions. The leading authority on Section 57 fundamental dishonesty was the *LOCOG* decision [2018] PIQR P8 and page 133 (Mr Justice Knowles). The fact that the Defendant was not taken in by the dishonesty is immaterial once it has been established that the Claimant has been fundamentally dishonest. Here the assertions made in the letter dated 28 January 2019 were dishonest and the dishonesty was fundamental to the claim for hire (which was a substantial part of the case). The dishonesty had the potential to have a significant and adverse effect and just because it did not have such an effect on this particular Defendant did not mean that it was no longer a fundamental dishonesty pursuant to s57. Accordingly, it was appropriate to dismiss the claim entirely and the Claimant will have to pay the Defendant's costs on an indemnity basis (less the damages that otherwise would have been awarded).

Mumtaz v AXA – instructed by Claire Parker of Horwich Farrelly – Brentford County Court – 20 April 2021 – DDJ Colquhon

Tim Sharpe represented the successful defendant.

DThe Claimant claimed that he had been injured when the Defendant's insured drove into the rear left corner of his vehicle at traffic lights, while the Defendant was in the process of changing lanes to be in the lane to the left of the Claimant. The insured denied that any contact had been made, and said that if there was any contact it was so minor that he had not felt the same and it had caused no new damage to his own vehicle. The insured denied that the large dent on the rear bumper of the Claimant's car was caused in this incident and adduced engineering evidence that supported his case. The Claimant adduced engineering evidence that said that the damage was consistent with the circumstances and that the lack of new damage to the insured vehicle was explicable by means of the differing construction of the two vehicles. The court heard evidence from the two drivers, and reviewed the expert reports. The court consider that the report for the Defendant was the reliable report and was not satisfied therefore that the damage or injury claimed resulted from the alleged incident. The court therefore dismissed the claim, finding that the Claimant was not able to prove his claim to the civil standard. In considering whether the resulting costs order in favour of the Defendant should be an enforceable one, the court determined that there had been an element of exaggeration on the part of the Claimant in ascribing the damage to the collision. The court found that this claim fell to be dealt with in a different way to the normal rule and that the protection of QOCS should not be maintained.

Nicholls v Advantage — Stoke on Trent County Court – 06 May 2021 – DJ Hammond

Tim Sharpe, instructed by Jon Galloway of Horwich Farrelly, secured a finding of fundamental dishonesty following a case of road rage and slam-on.

The Claimant alleged that his vehicle was struck at the rear by the Defendant's insured. The Defendant's insured had emerged from a supermarket car park, turning right across the path of the Claimant without incident, but that the Defendant's insured had then turned his car around and followed the Claimant at speed, driving too fast and close to the Claimant. The Claimant said that he slowed and stopped his car due to the presence of a vehicle ahead seeking to make a turn, but that having done so the Defendant's insured failed to stop and collided with the rear of his vehicle. By contrast, the Defendant's insured said that while he was making the turn out of the car park, the Claimant (who was known to him and who had a misplaced grudge against the insure due to family issues) swerved towards him before driving away.
The Defendant's insured accepted that he had then turned his vehicle around in order to confront the Claimant, and in catching up with the Claimant had driven at speed on the wrong side of the road, overtaking other cars. He accepted that these actions were immature and unnecessary, and he accepted that just prior to the collision he was driving about one car length from the Claimant's car. However, he said that there were no cars ahead of the Claimant when the Claimant stopped, and that the Claimant had slammed his brakes on when there was no good reason to do so. The Claimant denied this and maintained that there was traffic ahead of him. The Claimant denied swerving towards the insured, maintained that he did not know the insured, and also denied head-butting the insured after the collision. Each driver called their passenger as a witness at trial (the Claimant calling his wife, and the insured calling his now ex-partner).

At trial DJ Hammond noted multiple inconsistencies in the accounts of the Claimant and his wife, and reflected on whether the same might be the product of the Claimant being deaf and therefore errors arising from translation issues. However, having regards to the nature and amount of those inconsistencies, the court held the Claimant and his wife to be unreliable witnesses who had colluded to provide false accounts to explain why they had stopped prior to the collision, and who had sought to conceal their knowledge of the

insured. The court considered the insured to have driven dangerously, but that he was a demonstrably honest witness. The court therefore accepted that the collision had occurred when the insured was driving too fast and too close to the Claimant's vehicle, and when the Claimant had slammed on his brakes for no good reason and probably to scare the insured driving too close behind him. The court considered carefully whether in those circumstances the Claimant had shown breach of duty, or whether the claim should fail. The court noted that the following driver is expected to drive at a distance that will allow them to stop, and to be able to avoid reasonably foreseeable hazards. The court concluded on the evidence, having regards to the insured's candid account, that he had been driving too close and too fast and that a prudent driver would have kept back, the Claimant being know to the insured to be erratic, given that he had swerved at the insured shortly before the collision. The court found breach of duty made out but found that the Claimant had contributed to the incident by 80%. However, the claim was dismissed on the basis that the Claimant could not prove that any of his subjective injuries were either present or related to the collision, the Claimant being a dishonest and unreliable witness. The claim was therefore dismissed and an enforceable costs order made in favour of the Defendant. The court noted that if it was wrong to dismiss the claim for injury, the claim would have been dismissed in any event pursuant to s57 Criminal Justice and Courts Act 2015 on the basis of the same fundamental dishonesty.

Bujor & Tirsina v AXA — Romford County Court – 7 May 2021 – DDJ Vokes

Tim Sharpe (instructed by Neville Sampson of DAC Beachcroft Claims Ltd) represented the defendant in this case.

The Claimants alleged that they were injured in a road traffic collision in September 2019. By their Amended Defence, the Defendant alleged that the whole claim was fraudulent and that if the two vehicles said to have collided had in fact made contact, then the same was done to generate purported evidence to support the false claims. The solicitors for the Claimants came off the court record shortly after that application was made and in July 2020 DDJ Vokes granted the Defendant permission to rely on the Amended Defence and a forensic engineering report that set out how the damage to the two vehicles was inconsistent. The Amended Defence also summarised the history of the two vehicles (as often the case, recent keeper changes and a newly incepted policy of insurance) and also a short history of previous accidents involving the same parties, who now claimed not to be known to each other. The court made an unless order in July 2021 relating to Part 18 Answers, and the Claimants failed to comply such that their claims were struck out and they were ordered to pay the Defendant's costs. The Defendant then applied for an order disapplying the provisions of QOCS. The Claimants did not serve evidence or attend the hearing and the court accepted that this was a clear case of fundamental dishonesty. The decision is notable however as the court also determined that pursuant to CPR 44.15(1), the claims were struck out on the grounds that the conduct of the Claimants was likely to obstruct the just disposal of the proceedings.