Disclosure

By Luke Ashby

3PB

Ethical disclosure

2 key duties for disclosure:

- Not misleading the Court; and
- Acting in the best interest of each client.

Code of Conduct

O5.1 do not attempt to deceive or knowingly or recklessly mislead the Court.
O5.2 you must not be complicit in another person doing the same.
O5.3 you must comply with Court orders.

IB5.1 advising clients to comply with court orders and advising of the consequences of failing to do so.
IB5.4 immediately informing the Court, with your client's consent, if you become aware you have inadvertently misled the Court or ceasing to act if the client does not consent to you informing the court.
IB5.5. refusing to continue acting if you become aware the client has committed perjury, misled the court or attempted to mislead the court, in any material manner unless the client agrees to disclose the truth to the court.

10 all-pervasive principles

1. Uphold the law and proper administration of justice;
2. Act with integrity;
3. Not allow your independence to be compromised;
4. Act in the best interests of each client;
5. Provide a proper standard of service to your clients;
6. Behave in a way that maintains the trust the public places in you and in the provision of legal services;
7. …

Barristers have similar duties. Their guidance explicitly states they cannot continue to act if they become aware the client has a document which should be disclosed, has not been disclosed and which the client refuses to disclose.

No solicitor or barrister can ever advise evidence be obtained illegally.

NB. *Dubai Aluminium -v- Al Alawi [1999] 1 WLR 1964*, Rix J found, "criminal or fraudulent conduct for the purposes of acquiring evidence in or for litigation cannot properly escape the consequence that any documents generated by or reporting on such conduct and which are relevant to the issues in the case are discoverable and fall outside the legitimate area of legal professional privilege." Although it might be possible to claim privilege from self-incrimination, see the obiter comments at para 42 of *Imerman v Tchenguiz [2010] EWCA Civ 908 [2011] 2 WLR 592* - this might cover how someone obtained the documents but might not cover the existence of the documents.

Civil Procedure Rules

Basics

- CPR 31.2A: a party discloses a document by stating that the document exists or has existed.
- Disclosure v Inspection.
- Disclosure should be restricted to what is necessary.
- The duty of disclosure arises if and when and to the extent that the Court orders - useful to remember for FNOL calls.
- Standard disclosure:
  (a) Documents on which you rely;
  (b) Documents which adversely affect your case, another party's case or support another party's case; or
  (c) Documents you are required to disclose by a relevant practice direction.
- 31.7 reasonable search.
- Party in breach cannot rely on the document without the Court's permission (CPR 31.21).

The N265 - the list

- To include documents of which there is a right to withhold disclosure (however see notes on surveillance below).
- A continuing duty throughout proceedings 31.11, supplemental lists required.
- Carefully examine your opponent's disclosure list.
- Who can sign?
  31.10(7) - where party making the disclosure statement is a company…
  31APD4.7 can be an insurer or MIB if they have a financial interest in the claim.
  Global Torch Ltd v Apex Global Management Ltd and others (No 2); Apex Global Management Ltd v Fi Call Ltd and others (No 2) [2014] UKSC 64 [2014] 1 WLR 4495. Lord Neuberger (giving the only majority judgment) said, obiter, he inclines to the view the standard disclosure form by a party does require personal signing (not signing by a solicitor). He says this is the standard practice, something the Court of Appeal and High Court agreed with. However, when good reasons are made out the Court may permit a departure from this. See paragraph 12.

Withholding Inspection

- 31.3. if a document has been disclosed to a party he may have inspection of it unless
  (a) he is no longer in control of the document;
  (b) there is a right to withhold inspection;
  (c) where it is disproportionate to permit inspection within a category but this must be stated;
  (d) CPR 78.26 applies (in relation to mediation).
- Grounds for withholding inspection:
  (a) Legal advice privilege (privileged even though no litigation contemplated);
  (b) Litigation privilege (privileged only when litigation is contemplated);
  Applies when a document comes into existence after litigation is contemplated or commenced and made with a view to such litigation, either for the purpose of obtaining or giving advice in regard to it, or of obtaining or collecting evidence to be used in it, or obtaining information which may lead to the obtaining of such evidence (CPR 31.3.12 notes).
  (c) Documents tending to incriminate or expose to a penalty;
  (d) Documents injurious to public interest;
  (e) Other e.g. without prejudice communication.
  NB. Fraud/illegality can affect this (see above) as can waiver or loss of privilege.
- Dominant purpose test.

Surveillance Case Law

Rall v Hume [2001] EWCA Civ 146 [2001] 3 All ER 248

Issue: disclosure and admissibility of surveillance evidence.

Facts: C suffered injuries to her neck, shoulder and back, anxiety and depression. A large part of the claim was for permanent domestic assistance. Liability was admitted.

Chronology:

February 2000	Surveillance undertaken
2 May 2000	Initial directions hearing
21 June 2000	Surveillance disclosed (post medical report)
21/24 August 2000	Surveillance round two
11 September 2000	Round two of surveillance received by D's solicitors
9 October 2000	Further directions hearing/disposal - errors meant no attendance
10 October 2000	Second round of surveillance disclosed
13 December 2000	CMC - D's application to rely on surveillance heard and dismissed
22 January 2001	Trial listed

Decision: surveillance allowed, the starting point being to allow cross-examination on such matters unless it amounted to trial by ambush.

Key elements of the decision:

- Surveillance recordings are documents so CPR 31 applies.
- If disclosure is made in accordance with the rules then unless the C serves notice that they dispute the authenticity of the recordings it is available for cross-examination. If the C does dispute authenticity then the D must serve a statement from the person who took it.
- Timing is important - *17 "…[Because of the extra time needed for such evidence] It is therefore necessary in the interests of proper case management and the avoidance of wasted court time that the matter be ventilated with the judge managing the case at the first practicable opportunity once a decision has been made by a defendant to rely on video evidence obtained…"*
- The starting point - *19 "…the starting point on any application of this kind must be 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 claimant and her medical advisors upon it, so long as this does not amount to trial by ambush. This was not an 'ambush' case: there had been no deliberate delay in disclosure by the defendant so as to achieve surprise, nor was the delay otherwise culpable, bearing in mind the mutual muddle over the 9 October hearing date…"

- The C had commented on the recordings; no reason to think the experts would be unable to comment.
- The Court had power to order the D to confirm which parts of the footage it wished to rely on.

Utterly v Utterly [2002] PIQR P123

Hallett J.

Issue: costs arising from settlement prompted by surveillance evidence.

Facts: The C was involved in an RTC on 26 December 1995 where he was a passenger in his brother's car. He suffered serious orthopaedic injuries. The claim was pleaded at around £300,000. The key issue was his capability to work.

The D obtained surveillance in July 2000. From 7 August 2000 the D's solicitor repeatedly asked the C's solicitors for their updated witness evidence and updated medical report. This was not provided until 15 December 2000 (the earlier statement of the C being dated 18 August 1999). The D's solicitor did not warn the C's solicitor their delay may cause the trial to be postponed (when they could have done so without causing prejudice). Surveillance was disclosed on 20 December 2000. Trial was due to begin on 21 January 2001; it had to be vacated (even though cancellation costs for the experts had been incurred). However, a further application for surveillance evidence from December 1999 was refused.

Decision: Withholding material to ambush the C is not permissible but this was not an ambush. In the circumstances of this case (and that was emphasised) the D was entitled to hold on to the surveillance for a reasonable period of time. The D was entitled to wait for the updated witness evidence as it is not unheard of for a Claimant to say an expert has misunderstood them or wrongly recorded something. The C had caused delays in serving witness evidence and the D did not need to remind them they might be putting the trial date at risk.

NB. The reference to the case of *Ford v GKR Construction Ltd. [2000] 1 WLR 1397*. A case where the decision is on costs but where there was a long adjournment in the middle of the trial during which surveillance was undertaken. It was admitted in the trial. The long adjournment means this case is on quite unusual facts. There is certainly a question over whether a Judge today would admit such evidence.

Jones v University of Warwick [2003] EWCA Civ 151 [2003] 1 WLR 954

Issue: admissibility of surveillance footage obtained in the C's home by secret camera and deception.

Facts: C alleged she had suffered focal dystonia and she claimed special damages of around £135,000 for significant continuing disability. Liability was admitted but the continuing disability disputed. Secret recordings were taken in the C's home by an agent acting for the insurer who posed as a market researcher. The surveillance had been disclosed at the appropriate time and this was not an ambush case.

Decision: evidence allowed but D severely penalised in costs even though they won the appeal. Conflicting public policy matters were engaged and could not be perfectly reconciled. The truth should be revealed in litigation but the courts should not acquiesce in, let along encourage, a party to use unlawful means to obtain evidence. Articles 6 and 8 of the Human Rights Act 1998 were considered.

Excluding the evidence in this case was wholly undesirable since new medical experts would be required, evidence would have to be withheld from them and the C could not be properly cross examined. The Judge had a discretion under CPR 32.1. But under the CPR a Judge should consider the effect of his decisions on litigation generally and he should seek to deter improper and unjustified conduct. The behaviour of the D's insurer was improper and not justified. The C's solicitors were not to be criticised for not showing the footage to their experts until a decision had been made about admissibility.

The Court expressed its disapproval in costs and ordered the D to pay the costs in front of the DJ, CJ and CA. Their Lordships also told the trial judge to take the D's conduct into account when considering the final costs order and gave a strong steer that the inquiry agents' fees should not be recovered. If the C was ultimately exonerated then this should be reflected in costs, perhaps by ordering the D to pay the costs on the indemnity basis.

O'Leary v Tunnelcraft Ltd [2009] EWHC 3438 (QB)

Issue: admissibility of surveillance evidence where it was served so late as to be an ambush.

Facts: the C was crushed by concrete blocks during the construction of the Channel Tunnel and suffered from severe crushing injuries. The position on liability was agreed.

Chronology:

1 July 2008	Date by which Master Fontaine ordered any application for surveillance
14 July 2008	C's witness statement served
Start of 2009	Surveillance started
March 2009	First surveillance received by D's solicitors
June 2009	C's large schedule of loss served (post medical evidence)
Aug - Oct 2009	Second round of surveillance
27 October 2009	D disclosed some of the surveillance
3 November 2009	D's application to rely on surveillance
10 November 2009	D's application heard (31 days before trial)
Early Dec 2009	Trial due to start for 10 days.

Additional factors:

- At various times the wrong person was subject to surveillance.
- There were concerns about the quality of the footage (it was of poor quality, difficult to see, badly edited and the time shown was not consistent).
- Unedited footage had not been made available.
- The D's witness statements in support were clearly incorrect as they referred to the wrongly recorded person as the Claimant when the witnesses knew this was not the case.
- The C lived in the Republic of Ireland which meant there would be additional delays in taking a rebuttal statement from him.
- A number of the C's experts did not have availability to prepare supplemental reports before trial.
- The trial would need to be extended and it was not possible to accommodate that on the existing listing.

Decision: this was an ambush. The trial was imperilled. There was no reason why footage gathered in August 2009 was not disclosed then (it was the high point of the surveillance

evidence). Surveillance not admitted into evidence. The Court took account of the particular facts set out above.

NB. The Court found (at para 82) it was unsatisfactory for a solicitor not to review surveillance footage that was in the hands of an agent - this was a serious error.

Douglas v O'Neill [2011] EWHC 601 (QB)

HHJ Collender QC (sitting as a DHCJ)

Issue: disclosure and admissibility of surveillance evidence.

Facts: C (a protected party - allegedly) suffered very serious injuries in a road traffic collision such that there was permission for experts in 15 fields. He repeatedly breached court orders so his witness evidence was served only 3 months before trial. Surveillance evidence was served soon thereafter and raised issues over whether there was even anything wrong with the C at all at that stage.

Essential Chronology:

April 08 to Oct 10	Surveillance gathered (total of 5-6 hours).
21 December 2010	C's statement.
13 January 2011	C's SOL.
	D's surveillance disclosed.
17 January 2011	Remaining surveillance disclosed.
14 March 2011	Start of trial window.

Decision: surveillance admitted. The Court must apply the overriding objective when considering its decision. The D disclosed the evidence as soon as was appropriate (paras 57 and 76).

Key elements of the decision:

- Surveillance footage is a document.
- Surveillance footage is privileged so need not feature in part one of the disclosure list. But what about part two of the list? This is a delicate issue so the relevant extracts are quoted directly from the Judgment:

"43. If the fact that a document is video surveillance were to be disclosed in Part 2 that would inevitably alert a fraudulent Claimant to the fact of surveillance and would be likely to deprive a defendant of the privileged opportunity to continue surveillance and to obtain evidence of the kind sought, namely evidence to demonstrate inconsistencies between the truth and the evidence being given by a Claimant.

44. That is not to say that in modern litigation a Defendant can and should be allowed by a court carte blanche, as in past days, to deal with such evidence. As Potter LJ said at paragraph 17 in Rall v Hume:

> *"It is therefore necessary in the interests of proper case management and the avoidance of wasted court time that the matter be ventilated with the judge managing the case at the first practicable opportunity once a decision has been made by a defendant to rely on video evidence obtained.""*

"73… I consider that all the time that the Defendant was in the position, potentially, to obtain by legal means evidence that was helpful to his case by video surveillance, without jeopardising the proper management of the trial, he was entitled to do so and not to disclose the fact he was doing so to the Claimant."

- In respect of the ambush argument the issue was whether the C had a fair opportunity to deal with the evidence (paras 46 and 56).

- The D disclosed surveillance evidence as soon as reasonably possible after having the relevant witness evidence from the C. This is the expectation:

"56… a defendant in possession of surveillance evidence should make the decision to rely upon it and disclose it as soon as reasonably possible after receiving sufficient material setting out the Claimant's case, which has been endorsed with a statement of truth so as to enable the surveillance material to be used effectively. If a defendant fails to do so, and the failure to do so, has unacceptable case management implications, then that defendant risks being unable to rely upon the materials..."

"74. Was the Defendant entitled to wait until the Claimant produced a witness statement with a declaration of truth before disclosing the DVD? I consider he was. Although there is material in the medical reports that is, on its face, damaging to the Claimant's case on the basis that it appears to give a different account to that given by the DVDs, the Courts are well familiar with evidential court discussions with such

witnesses as to the possibilities of confusion or omission from such evidence, the very point referred to by Hallett J in Uttley v Uttley."

Purser v Hibbs & Anor [2015] EWHC 1792 (QB)

19 May 2015, HHJ Maloney QC (sitting as a DHCJ)

The issue here was to do with costs in a case of dishonest exaggeration. The useful point to note is at the end where the Judge found the Court would not want to do anything to discourage the judicial use of surveillance evidence or to alert actual or prospective fraudsters to the likelihood of it. As such the Judge found it was reasonable not to make provision for surveillance in the costs budget. He found there was a good reason to depart from the budget. He recognised some degree of cunning was required in the administration of surveillance.

Hayden v Maidstone & Tunbridge Wells NHS Trust [2016] EWHC 1121 (QB); [2016] 3 Costs LR 547

12 May 2016; Mr Justice Foskett

Issue: admissibility of very late surveillance evidence in a case where exaggeration was alleged.

Facts: C was a cardiac physiologist who had an accident at work. Liability admitted but causation in dispute; ability to work was in question. Pleaded value of the claim was £1.5m. Surveillance disclosed shortly before trial.

Chronology:

23 March 2007	Accident
April 2009	Liability admitted
15 May 2015	D's expert raised prospect of exaggeration.
19 Jan 2016	D's solicitors requested instructions to obtain surveillance.
29 Jan 2016	JSM
17 Feb 2016	D gave instructions to obtain surveillance.
18-24 Feb 2016	First round of surveillance (D solicitors felt it was insufficient).
10 March 2016	Second round of surveillance.
11 March 2016	D listing questionnaire stated need for more directions (but not what).
24 March 2016	Surveillance received by D's solicitors. Surveillance sent to D's experts (experts tainted?). Surveillance sent to C's solicitors (by post, no email warning).
25-28 March 2016	Easter.
29 March 2016	Surveillance evidence received by C's solicitor.
30 March 2016	D's application to rely on surveillance evidence. D asked for this to be listed on morning of trial.
5 April 2016	Supplemental report from D's expert. D's solicitor says unedited footage available if C's solicitor travels 120 mile round trip to see it. C applies to have application heard before trial.
8 April 2016	D's application listed. Hearing adjourned to allow the C's solicitors to take stock. Trial vacated.
11 April 2016	5-day trial due to start (vacated).
29 April 2016	D's application heard. C and her expert strongly resisted inferences in surveillance.

Decision: Evidence allowed in but with considerable misgivings and at considerable cost to D. Overall interests of justice favoured admission.

Key elements of the decision:

- The test was an objective test based on the real effect of allowing the evidence in (on this and other cases).
- It was not necessary to consider if the D's solicitor had a sinister motive.
- When the evidence should be obtained is a very significant factor.

  "[36] ... a defendant is entitled to wait until a claimant has pinned his sail to the mast of a particular level of disability or collection of symptoms (through a witness statement and/or schedule of loss accompanied by a statement of truth) before the defendant needs to undertake the relevant surveillance"

  "[47] A very significant factor in deciding whether to accede to a late application, in my judgment, is the time when a defendant ought reasonably to commission such evidence. Once the claimant's case, both in relation to the disabilities relied upon and their consequences, is clearly articulated and the defendant is possessed of an opinion from an expert upon whom it relies that the claim is "suspect", it seems to me that the obligation actively to obtain surveillance evidence arises if it is considered a proportionate approach to adopt in the particular case. The longer it is left and the nearer the time gets to trial, the more likely it is that the court will regard the delay as culpable. As the C and her expert had been able to comment it levelled the playing field."

  It was wholly unacceptable for the D in this case to wait so long when there was every reason to commission surveillance in May 2015. Foskett J. was emphatic on this point.

- The genie was out of the bottle, especially as the surveillance had been shown to the experts making it difficult (but not impossible) for them to put it out of mind. This was not irrelevant but its importance should not be overstated. It was deeply unattractive to reward poor litigation behaviour.
- Had Foskettt J. had all the relevant information on the first occasion he would have rejected the D's application.
- D's solicitor found to have an, "obstructive attitude." Proper professional co-operation was required. D's solicitor was, "culpable".

- The cost was significant. Foskett J. said it was the clearest possible case for the D to pay indemnity costs. He summarily assessed some of the costs at approximately £40,000. He also ordered the costs of instructing the C's experts to comment on the surveillance and prepare any joint reports would be added to this. Compare this to the size of the award at trial which was £425,515.81 (conscious exaggeration was not found at trial).

Reform

Foskett J. mooted greater control of this issue by the Courts. He has spoken to Master Fontaine (now Senior Master of the QBD) about this issue. Look out for increased use of orders specifying the date by which the D must disclose surveillance evidence.

Note

For those who deal with C 'experts' on surveillance see the comments of Edis J. in this same case on 2 August 2016 where he heard an application for admission of Mr Simm's evidence. He highlights Mr Simm's lack of qualifications, excludes opinion evidence, qualifies *Samson v Ali*, comments on the lack of technical expertise, comments that no knowledge of skill was required and that he was surprised Mr Simm understood the role of expert so poorly. He reminds parties the test for expert evidence is necessity (per *Kennedy v Cordia (Services) Llp [2016] UKSC 6; 1 WLR 597 at 45).*

Hicks v (1) Rostas (2) MIB [2017] EWHC 1344 (QB)

HHJ Reddihough (sitting as a DHCJ), 17 March 2017

On 17 April 2013 the C suffered serious multiple injuries after a collision with a car driving on the wrong side of the road. D1 died in the collision. Liability was not disputed. The main issue was the extent of the C's continuing disability. The C valued his claim in excess of £1m and might even be as much as £2m. Directions were given on 21 December 2015 including permission for experts in 8 different fields, schedule of loss on 31 December 2016, counter schedule on 31 January 2016 with trial to commence on 25 April 2017 for 7 days. Surveillance was conducted during February 2015 and March 2016 and served on 30 June 2016; the application to rely on the same was made on 15 July 2016. There was a long delay in hearing the application which was partly due to both parties. In February 2016 further surveillance was served which had been conducted in December 2013, June, July and October 2016. On 14 March 2017 the C served a statement setting out his response. The D's experts had seen the footage.

In this case it was reasonable to wait for service of the C's statement and for the D to have a conference with counsel before disclosing. It was also reasonable not to have previously disclosed the footage in the disclosure list and costs budget so the C was not alerted before his evidence was complete. There were some delays in the D releasing the unedited footage. This was not a case of out and out ambush. Some consideration was given to the fact the D's experts had seen the footage. The D was permitted to rely on the first set of footage (disclosed June 2016) but not the second set (disclosed February 2017). The trial was vacated but was likely to be vacated in any event. The Judge took account of the fact the C had a substantial interim.

Tactics:

- You can generally wait for statements and possibly the schedule of loss before commissioning surveillance.
- You can generally wait for adverse comment from your expert.
- Being unnecessarily obstructive can cost you dear.
- Consider how you can co-operate without adversely affecting your clients case.
- Consider whether it is a case where putting pressure on the C's solicitors to get the C's view and that of their experts will help you get the evidence in.
- Consider whether giving the surveillance to your own expert will help or hinder. On one hand it could taint them and new experts may be ordered. On the other the genie is further out of the bottle.
- The judiciary view, "attritional warfare," very dimly.

Court circular

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Fraud in motor claims – an overview guide

By Tom Webb

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Introduction

1. The purpose of the seminar and these notes is to provide an overview of some of the key features that arise in RTA litigation where fraud is in issue. It will hopefully provide a useful starting point for those that are relatively new to the area, as well as a reminder of some of the core features for those that are more experienced.

2. The aim is to cover 5 topics:
    a) What is fraud?
    b) What should we be looking out for in practice?
    c) Process;
    d) The consequences of a finding of fraud;
    e) What happens if fraud comes to light after the event?

3. Each will be covered in turn.

What is fraud?

Defining Fraud

4. RTA fraud is a hot topic at the moment. At the time of writing a quick Google search for 'motor fraud' returns more than 64,000,000 results. Politicians, the press, the public and the courts are all taking a keen interest. So must we.
5. But what is fraud? Does it mean pretending to be hurt when you are not? Does it mean pretending to be in an accident when you weren't even there? What about exaggeration? The short answer is that it can be all of these things and more.
6. For a formal definition, we need look no further than the Victorian case of ***Derry v Peek* (1889) 14 App Cas 337, HL**. This is a case that really concerns principles of misrepresentation and negligent misstatement but it also provides what is generally regarded as the leading definition of civil fraud in our legal system. In the case, Sir

Henry Peek and others purchased shares in the "Plymouth, Devonport and District Tramways Company" having been impressed by the fact that according to its prospectus, the company had permission to use steam, rather than horse-drawn, trams. This wasn't strictly true as the company had yet to actually apply for the said permission from the local Board of Trade. The directors nonetheless presumed that obtaining permission would be a mere formality. Unfortunately, permission was actually subsequently refused and so Sir Henry and his fellow investors sued on the basis that they had been induced to purchase shares by the false statement in the prospectus. The claim failed as Sir Henry could not prove that the directors had lacked an honest belief in the content when they drew up the prospectus. Addressing what constitutes a fraud Lord Halsbury LC stated as follows:

"...fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states."

7. How does this apply to modern day RTA practice? In simple terms, if someone is knowingly claiming for loss and damage to which they are not entitled, wholly or in part, then they will be making false representations. That is, at the very least, a potential fraud.

Examples

8. Most reading this handout will be familiar with some of the common examples in practice. These include:
    a) Fabricated accidents – when there was no accident at all;
    b) Staged accidents – a deliberate collision caused by one or both parties and often referred to as "crash for cash";
    c) Phantom passenger claims where it is said that there were multiple occupants in a vehicle when in fact the individuals weren't there at all;
    d) Hire and repair scams where excessive amounts are claimed in respect of unnecessary hire, storage and/or repairs.
9. There are other examples, but these are those most regularly seen by the courts in the writer's experience.

What should we be looking out for in practice?

10. It is of course all very well being alive to the existence of these schemes, but what are some of the warning signs in practice? Again, to list some of the common examples and in no particular order:

    a) Claimants are related / linked (particularly if they deny it);
    b) Claimant and defendant are related / linked (particularly if they deny it);
    c) Multiple occupancy of a vehicle;
    d) Involvement of hire vehicles / private taxis in the accident;
    e) A lengthy hire period from a small hire company / garage post-accident;
    f) Inconsistency in medical reports, statements, reports to insurers etc.
    g) Defendant driver gives a very different account of certain features of the collision e.g. number of passengers in the claimant vehicle;
    h) Unusual circumstances of an accident, for instance sudden and unexplained braking;
    i) Claimant has a history of accidents;
    j) Lack of evidence of damage;
    k) Failure to seek medical attention post-accident.

11. Of course, none of these *automatically* means that the case is one of fraud, but the presence of any of them should mean that you are alive to the potential.

12. If there is a suspicion of fraud, it is sensible to take a few steps to lay the ground work, including:

    a) Having a proper conference with your client (assuming you are satisfied that they are not 'in on it') and assessing how effective they will be as a witness. You may well need them to be robust at trial in due course;
    b) Start tracing and contacting other witnesses if possible. Just because they are not 'independent' it does not mean that they should be ignored. There is no rule in practice that says a witness cannot be relied upon simply because they were a passenger and related to the driver;
    c) Get an engineer to look at the vehicle or vehicles ASAP;
    d) Seek any Police documentation;
    e) Instruct the usual enquiry agents who can look at features such as:
        i. Address history;
        ii. Vehicle history;
        iii. Individual's claim and injury history;

iv. Social media;

f) Why not try Google? If you find a local newspaper report concerning one of the protagonists being convicted of a fraud-type offence, then this may well set the ball rolling in terms of other enquiries.

13. With these steps in place, you can begin the process of defending a claim and making out a case of fraud.

Process

Pre-Action

14. Whilst at the pre-action (i.e. before litigation is formally issued) stage you should be undertaking all of the above steps. It is important that as much evidence is gathered as possible as a proper basis is required for the subsequent pleading of fraud in a defence (on which, see below).

15. When the CNF arrives, do you need to allege fraud at this stage? The writer is not aware of any case law on the point, but it would be surprising if a defendant were to be precluded from later alleging fraud on the basis that it was not mentioned at the portal stage. It would seem wise simply to deny liability and dispute the claimant's version of events for the moment.

16. In terms of correspondence more generally, there is no harm in making it clear that the claimant's version of events is not accepted and that there is a suspicion that the claim is not genuine. This will 'turn up the heat' on the claimant and his or her solicitors.

The Defence

17. Once the particulars of claim is served, matters move to the drafting of the defence. A first question is that of whether you need to expressly plead an allegation of fraud in the defence. Certainly, where a claim is advanced on grounds of fraud, it must be pleaded. The practice direction at Part 16 states that:

8.2 *The claimant must specifically set out the following matters in his particulars of claim where he wishes to rely on them in support of his claim:*

(1) any allegation of fraud…

18. The practice direction contains no such reference in terms of the defence.

19. There is not a straightforward answer here. It is well-established that in LVI cases fraud need not be pleaded. As per ***Kearsley v Klarfield*** [2005] EWCA Civ 1510:

*"**[48]** So long as a defendant follows the rules set out in CPR 16.5 (as this defendant did in those two paragraphs, for which see para 44 above) there is no need for a substantive plea of fraud or fabrication. All that is necessary is to make clear that an assertion along the lines of what is now para 6 is based on the assertions in paras 3 and 4. Of course, if the defendant's medical examiner has examined the claimant and has concluded on the basis of the kind of thorough interview and clinical examination advocated by Mr Nee that there are substantive reasons for disbelieving his account, these reasons also need to be positively asserted.*

*"**[49]** If this guidance is followed, then comments like those of the deputy judge in Cooper about the possibility of criminal proceedings (see para 44 above) and of Judge Tetlow in the present case as to the possible consequences of a finding of fraud against a professional man (see para 16 above) will not be needed, because there is no substantive obligation on the defendant to plead fraud so long as his reasons for resisting the claim are clearly stated in accordance with CPR 16.5."*

20. On that basis, it would seem that provided that appropriate facts are pleaded (e.g. "there was no collision"), there would seem to be no need for an explicit pleading. However, see also Davis LJ in ***Hussain v Amin & Charters Insurance Ltd*** [2012] EWCA Civ 1456:

"If the second defendant considered that it had sufficient material to justify a plea that the claim was based on a collision which was a sham or a fraud, it behoved it properly and in ample time before trial so to plead in clear and unequivocal terms with proper particulars."

21. Then subsequent to ***Hussain***, we have the decision in ***Ahmed v Lalik* [2015] EWHC 1651**:

"...the concern expressed by Lord Dyson MR and the obiter remarks of Davis LJ in that case should not, in my view, be read as casting doubt on well-established authorities such as Kearsley v. Klarfeld [2005] EWCA Civ 1510; [2006] 2 All ER 303, [45], [47]-[49] and Francis v. Wells [2007] EWCA Civ 1350; [2008] RTR 13, [3], which

establish that in this type of case (minor road vehicle accidents) it is not necessary for the defence to make a substantive allegation of fraud or fabrication, but it is sufficient to set out the detailed facts from which the court would be invited to draw the inference that the claimant has not, in fact, suffered the injuries or damage alleged. These authorities recognise the procedural and ethical inhibitions on advocates alleging fraud and the realities in this type of case for defendant insurance companies unearthing evidence of it."

22. As mentioned in the final sentence of that passage, practitioners must be careful here. Both solicitors and barristers have strict professional rules to adhere to when it comes to alleging fraud. For solicitors, the **19th edition of the SRA Code of Conduct** (published 1st October 2017) sets out guidance at Chapter 5:

"Acting in the following way(s) may tend to show that you have not achieved these outcomes and therefore not complied with the Principles:

IB(5.7) constructing facts supporting your client's case or drafting any documents relating to any proceedings containing:

- *(a) any contention which you do not consider to be properly arguable; or*
- *(b) any allegation of fraud, unless you are instructed to do so and you have material which you reasonably believe shows, on the face of it, a case of fraud;*

IB(5.8)suggesting that any person is guilty of a crime, fraud or misconduct unless such allegations:

- *(a) go to a matter in issue which is material to your own client's case; and*
- *(b) appear to you to be supported by reasonable grounds;"*

23. For the bar, it is rule C9 of the **Bar Code of Conduct**:

rC9 -

Your duty to act with honesty and integrity under CD3 includes the following requirements:

2 - you must not draft any statement of case, witness statement, affidavit or other document containing:

a- *any statement of fact or contention which is not supported by your client or by your instructions;*
b- *any contention which you do not consider to be properly arguable;*
c- *any allegation of fraud, unless you have clear instructions to allege fraud and you have credible material which establishes an arguable case of fraud;*

24. It is very difficult to give guidance as to quite *how much* evidence you require in order to plead fraud. As per Lord Bingham in ***Medcalf v Mardell* [2002] UKHL 27**:

"…the requirement is not that counsel should necessarily have before him evidence in admissible form but that he should have material of such a character as to lead responsible counsel to conclude that serious allegations could properly be based upon it."

25. Pleading fraud is plainly not something to be taken lightly. It certainly requires something based in evidence rather than suspicion. Careful judgment must be exercised in each case.

26. The writer's suggestion is that most of the time, particularly in exaggeration rather than outright fabrication claim, the most appropriate pleading is likely to be one that denies the claim and asserts an alternative version of the facts. However, there will of course also be occasions where a pleading of fraud in the defence would be appropriate, such as a crash for cash-type case where it is suggested that multiple parties are in on the scam, or where there is particularly strong evidence in an individual case.

27. It is always worth asking "what is actually to be gained from expressly pleading fraud"? Certainly, for one thing it will avoid any claimant arguments that there is prejudice in alleging fraud 'by the back door' at trial. A judge is also far more likely to be prepared to make an express finding of fraud at trial when it has been pleaded. However, such a finding is not actually necessary in order to unlock the fundamental dishonesty exception to QOCS and that is likely to be the ultimate aim in most low-level cases. Likewise, a subsequent application to bring proceedings for contempt does not require an initial pleading of fraud.

28. There are downsides, not just in terms of potential professional ethics, but also in the fact that such a pleading will place a burden of proof upon the defendant (see below).

A further important consequence is that often cases where fraud is alleged will be allocated to the multi-track due to the complexity and/or likely length of trial. This in turn means that the usual fixed 'portal drop-out' costs under **Chapter IIIA of CPR Pt.45** will not apply and the matter will proceed on a multi-track basis (costs budgets, assessment etc.) even if it is only a low value claim – see ***Qader v Esure; Khan v McGee* [2016] EWCA Civ 1109**. This may be a factor pointing away from an express allegation of fraud at an early stage.

29. A final point to note is that fraud may not just operate as a defence, but can also form the basis for a counterclaim. Often this will be for the benefit of the innocent driver, but the insurer may itself wish to bring such a claim to recover, for instance, an interim payment that was made prior to the evidence of fraud coming to light. In these circumstances an express pleading of fraud will of course be required as it is the very heart of the cause of action.

30. Likewise where both drivers are 'in on it' the insurer may wish to counterclaim against some or all of the parties, pleading fraud and potentially the tort of deceit – more on this below.

Trial

Burden and standard of proof

31. If fraud is pleaded, the burden of proof is upon the defendant to make good that assertion (as per ***Derry v Peek***). The standard of proof is the balance of probabilities but the gravity of the allegation will be taken into account in judgment (***Hornal v Neuberger Products Ltd* [1957] 1 QB 247**.) In other words, there will probably need to be good grounds beyond mere inference.

32. ***Rizan & Rilshad v Hayes & Allianz Insurance PLC* [2016] EWCA Civ 481** provides a useful illustration of the point. This was a collision at a junction near Beaconsfield. The claimants alleged that Mr Hayes had emerged from a side road and into their path, causing a collision at 30-40mph. The insurers smelled a rat, largely based upon engineering evidence that indicated the damage had been caused whilst the claimant's vehicle was stationary. By way of amended defence, Allianz alleged that the accident had either been contrived between the parties (including Mr Hayes), or that the claimants' vehicle had deliberately braked so as to cause the accident. At trial the judge found that the claimants had not proven their case, due to inconsistencies and oddities in their evidence. He did not make any findings of fact

about the alleged conspiracy. At the conclusion of the judgment, the judge said "*if it were necessary to do so (i.e. make a finding of fraud), which it isn't, I would find that this was a fraudulent claim*." On appeal that finding was overturned in the CoA. Aside from being unwise to make comment where unnecessary, the judge had not made findings of fact to support a conclusion of fraud. It is not a binary choice between either the claim succeeding, or it being fraudulent. To put it simply, the options are potentially:

a) Claim proven;
b) Claim not proven;
c) Fraud.

33. The first and second are concerned with what the claimant has or hasn't proven, the latter is concerned with what the defendant has proven. Just because the claimant fails to make out his case, it does mean that a case is fraudulent.

Evidence

34. A fraud case will require a trial bundle along much the same lines as any other RTA trial. However, there may be a significant volume of extra material such as social media print-outs, surveillance evidence, pleadings and statements from previous claims etc. In ***Locke v Stuart* [2011] EWHC 399** the High Court suggested that in such circumstances a 'Scott Schedule' should be produced. This is a document that summarises the evidence and highlights the areas that are in dispute. A simple example might be:

Claimant's Assertion	**Defendant's Assertion**	**For Judge's Use**
C has only had one previous accident – C's statement §14 (page 102)	The records show that C has had 2 prior claims – 301-350	
The claimant and defendant are not known to each other – see C's witness statement §5 (page 101)	The claimant and defendant became friends on Facebook 3 years prior to the accident and were known to each other – screenshot at 430	

35. Use of a schedule will not only provide a useful overview of the case, but it may also dispense with the need to print out long chains of Facebook interactions etc.

36. The writer would suggest that counsel's input is sought when it comes to compiling the schedule. The document is likely to mirror some of the key features of counsel's skeleton argument and so it makes sense for counsel to draft both. The claimant's representative (if any) should compile his or her side of the table.

Experts

37. Experts can be absolutely crucial in a fraud case. Both engineers and medics can fatally undermine a claim, as occurred in ***Rizan*** above. That said, there are points to bear in mind.

38. Firstly, in modest fast track level cases there is no guarantee that a judge will be prepared to grant the defendant permission to rely upon experts. The starting point on the fast track is that there should only be one expert per issue (**CPR r.35.4**). Pleadings and applications need to be carefully drafted such that a judge is left in no doubt that there is a serious concern as to fraud and so may be more amenable to granting applications that differ from the norm.

39. Secondly, if at all possible engineers should physically inspect the vehicle(s). There are too many desktop reports (often months or years later) and they are easily attacked at trial. In ***Liptrot v Charters*** **(10th December 2004 – Unreported) Manchester County Court** the engineer's evidence was criticised in judgment on the basis that he had not actually inspected the vehicle (his report was based upon an examination by another engineer). The engineer had also factored in weight calculations taken from the manufacturer's figures without taking account of the weight of fuel, occupants and luggage. These, amongst other issues, led to the evidence being rejected.

40. Thirdly, beware of engineers with a conflict of interest. In ***Bilal Adam v Lick (UK) Ltd*** **(13th December 2007 – unreported) Leeds County Court** it emerged that the claimant's engineer was employed by a company owned by the same individual as the accident management company. That company directly benefitted from credit hire arrangements whereby it received referral fees. The engineer also gave evidence under one of many aliases. As if that wasn't enough, it became clear that the engineer did not understand his duties under **CPR Part 35**. His evidence lacked all credibility and proceedings to recover earlier payments (made at a point where

liability was admitted) on the basis of fraud succeeded. This is relatively unlikely to be an issue in terms of instructing a defence expert, but is a point to be alive to if there is a need to attack the claimant's own expert evidence.

Lay witnesses

41. In terms of witnesses, it is important to consider not just which individuals are being called, but which are not. In the writer's experience, there is a trend for disregarding passengers as potential witnesses, particularly if they are related to the driver. There is no rule that prohibits the calling of such witnesses. Of course, opposing counsel may call in to question the accuracy or honesty of the witness's recall based upon a wish to support their friend / relative, but the evidence is still valid. If the case would otherwise be one person's word against another, the extra voice in support can be vital.

42. The same point can be used to criticise the claimant's case. If they have potential witnesses, why have they not called them? Where are they? If there were 3 people in the car, but only 2 are giving evidence, why has the third person fallen away? Is it because they got cold feet about the fraud? There may well be a valid reason for their absence, but it is another point that can be used to build upon the picture of something being amiss with the claimant's case.

43. In terms of preparing your own witnesses, it is important that they understand the potential trial process. Emphasise to them the fact that the witness statement is crucial as it is the main source of their evidence to the court. Anything within the statement that is wrong or inaccurate will be used against the witness in cross-examination. Have them read it, consider it and then re-read it before signing the statement of truth. Make them re-read it again the day before trial and ensure that they are ready to tell counsel pre-trial if there is anything that needs changing.

44. Also, explain to the witness what will happen in court. We as counsel do our best to do this before trial, but time can often be limited, particularly if there are negotiations ongoing as well e.g. quantum subject to liability. Tell them that the judge is referred to as sir / madam or 'your honour' depending on which court you are in. Explain that the claimant gives evidence first, followed by the claimant's witnesses and then the defendant and their witnesses. When the witness gives evidence, the order will be as follows:

    a) They will start by taking the oath (religious or affirmation);

b) Counsel will then ask them to confirm their name and address, take them to their witness statement in the bundle and ask the witness to confirm that they have read it recently and that it is true to the best of their knowledge and belief;

c) Counsel can then ask questions to expand upon the statement (examination-in-chief) but will not be permitted to go off on a complete tangent;

d) Opposing counsel will then cross-examine. The witnesses job at all times is to be honest: nothing more, nothing less;

e) Counsel will be permitted to re-examine: that is to ask any (open) questions arising from cross-examination. In practice this is generally limited and is most often used to correct what counsel knows was a mistaken answer;

f) The judge may ask questions as well.

45. The process does not always adhere to this strict order, but most of the time it will be similar to this.

46. Explain to the witness that the matter will conclude with closing submissions (i.e. speeches) and that the judge will then make a decision. This may be delivered orally straight away or could be reserved and delivered at a later date.

47. Ask the witnesses to make a note of their expenses for attending trial so that counsel can seek to recover those costs if required. This includes mileage, parking, train fares and time off work. If the witness wants to recover money for unpaid time off, it would help if they could bring some evidence, perhaps a letter from the employer explaining that the day off is unpaid and that the individual would normally earn X amount net per day.

48. All of these things should be done ahead of <u>any</u> trial, but it is particularly important where fraud is on the table as witness credibility is so crucial. The more at ease the witness, the better they are likely to perform.

The consequences of a finding of fraud

Liability and damages

49. Where a claim is dismissed a finding made that there has been a fraud, then it will be a question of obtaining costs and possibly pursuing the claimant(s) for contempt and/or damages.

50. It is more difficult where the claim is in exaggeration-territory, generally overstating or fabricating an injury in an otherwise legitimate accident claim. In these circumstances, it is likely that the claimant will be entitled to *some* damages, but not to the extent claimed. Following ***Summers v Fairclough Homes Ltd.*****[2012] UKSC 26** we now have **s.57 Criminal Justice and Courts Act 2015** which provides that:

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

51. This section is still awaiting higher court guidance, but in essence the idea is that it permits judges to strike out entire claims where a claimant is found to have been fundamentally dishonest in respect of only part of that claim. For instance, a legitimate hire claim may also be struck out where an injury has been grossly exaggerated.

52. There are interesting arguments yet to be had about this section, not least whether it would apply to an *entirely* fraudulent claim (e.g. phantom passenger claim). After all, the section only applies where the claimant *is* entitled to damages, but has been fundamentally dishonest. If there has been no accident, then of course the claimant has never been entitled to damages. We shall have to await some higher court guidance in this respect.

53. A question that is likely to be subject to argument in exaggeration claims is that of quite how exaggerated a claim must be in order to fall foul of s.57. Last week in the complex case of ***Fletcher v Keatley* [2017] EWCA Civ 1540** the Court of Appeal upheld a trial judge's decision to reduce general damages for the latter period of recovery by 50% to reflect the troubled claimant's deliberate exaggeration and failure to engage with testing and treatment, such that his head injury appeared at face value to be more severe than it actually was. The defendant argued that the claim for damages in respect of the period 2008-onwards ought to be struck out entirely pursuant to ***Fairclough*** (the case pre-dates s.57 but was argued upon similar principles) but that sanction was rejected as disproportionate. The CoA decided that the trial judge's approach had been entirely legitimate and that a justifiable result had been achieved by reducing the damages to reflect the element of exaggeration. Although s.57 is perhaps stricter than ***Fairclough*** (a claim must be struck out unless the claimant would suffer substantial injustice whereas pursuant to ***Fairclough*** proportionality is more of a consideration), the case is perhaps a tentative indication that judges will still take some persuading that an entire case should be struck out on grounds of exaggeration in terms of one aspect. Watch this space for further developments.

Costs

54. If you successfully obtain judgment with a finding of fraud, what actually is the costs benefit? Firstly, it is beneficial in costs terms as it is overwhelmingly likely that QOCS protection will be overcome pursuant to CPR.r.44.16(1):

44.16

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

55. It is all but inevitable that a fraudulent claimant will be found to have been fundamentally dishonest. Where there is such a finding, the defendant is not limited to fixed costs (**CPR r.45.29F(10)**). Make sure that a costs schedule has been filed and served if the matter has remained on the fast track as a judge will generally expect to assess costs summarily at the conclusion of the trial. On the multi-track there is likely to be a further assessment hearing.

56. It is also possible of course that the defendant will beat a **Part 36** offer and therefore enjoy the benefits that come with the same. That said, in cases of outright fraud it is unlikely that a defendant will be making offers. An option to consider where it is accepted that part of the claim is genuine (maybe repairs appear reasonable but there is a serious question mark about an injury) is a *Calderbank* offer which could be deployed in respect of the legitimate aspects only. If the rest of the claim subsequently fails, there would be a good costs argument to be had (a suggestion made in ***Fairclough***).

57. A further weapon in the defendant's arsenal in terms of recovering expenditure is the potential use of proceedings for deceit. It is beyond the remit of these notes to explore the tort in detail, but in terms of proving a case it is similar to fraud. Deceit can be pleaded as a counterclaim and is commonly used when the defendant's insured also appears to be a part of the fraud. In ***Johnson & Ohers v Zurich & Gilchrist*** **(November 2016 – unreported) Manchester County Court** a fraudulent claim was defeated in this way. Zurich's insured (driving a hired vehicle) claimed not to know the occupants of the Ford vehicle that he had struck. Likewise his own passengers, including his brother, put in claims and denied any familiarity with the occupants of the Ford. Not only did social media searches reveal that they were all known to each other, but in fact the van driver lived with one of the passengers in the fraud. In a truly spectacular example of the effective use of social media searches, it also emerged that brother (in the van) was in fact in a relationship with one of the passengers in the Ford!. Whilst the claims were hastily withdrawn, a counterclaim pleading fraud and deceit was successfully pursued. This permitted the recovery of damages in the sum of £5,000 in compensation for time spent working on the case by the insurer. It is also possible to recover exemplary damages using this course – these are essentially punitive damages and are often quantified by reference to the benefit the fraudulent party intended to derive.

58. It is worth remembering that if a claim is found to be fraudulent, the ATE insurer will all but inevitably void the policy and so any costs and/or damages award may prove

to be a hollow victory unless the party has assets. This may be where proceedings for contempt become particularly attractive.

Contempt of court

59. Pursuant to **CPR r.32.14**:

(1) Proceedings for contempt of court may be brought against a person if he makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

60. The statement of truth in question is likely to be found in one or all of the pleadings, the schedule of loss, a witness statement or Part 18 replies.

61. If an individual has misled an expert they may also be committed for interfering with the due administration of justice (**CPR 81.12**) but in the writer's experience the **32.14** route is much the more common and so it is upon that avenue that these notes shall focus. Likewise proceedings can be brought by the Attorney General but these notes shall assume that it is the insurer that wishes to pursue the matter.

62. The aim here is not so much to derive a financial benefit as it is to punish the perpetrator(s). Although an application to bring proceedings for contempt has similarities with **CPR Pt.23** there are also some important distinctions. In particular, the level of judiciary to whom the application must to be made is different. CPR rr.81.14, 81.17 and 81.18 are key here:

a) If the original trial was in the High Court – apply to the trial court;

b) If the trial was in County Court – the application must be made to the High Court and can only be granted by a single judge in the QBD.

63. It is particularly important to note point b) as there are other circumstances in which contempt can be dealt with by a DJ, for instance where a party has breached a County Court order with an attached penal notice. Where the accusation is one of falsely verifying a statement of truth however, the application must go to the High Court.

64. Where the underlying proceedings were in the High Court (or above) the application is made as an application within the proceedings pursuant to **CPR Part 23**. However, where the underlying proceedings were in the County Court, the application is made

to the High Court by way of **Part 8** Claim Form (see the commentary at **White Book 81.18.3**). Either way, there are relatively prescriptive rules as to service of the application at **CPR r.81.14**.

65. Also, unlike applications for e.g. relief from sanctions, you require permission to actually pursue the application to a full hearing. The respondent is entitled to attend the permission hearing (**CPR r.81.14** as modified by **81.18**). Permission is not guaranteed, although an express finding of fraud at first instance is likely to provide a strong basis. As per Cox J DBE in ***Kirk v Walton* [2008] EWHC 1780 (QB)**:

"I approach the present case therefore on the basis that the discretion to grant permission should be exercised with great caution; that there must be a strong prima facie case shown against the Claimant, but that I should be careful not to stray at this stage into the merits of the case; that I should consider whether the public interest requires the committal proceedings to be brought; and that such proceedings must be proportionate and in accordance with the overriding objective."

66. Given the current public interest in exposing and punishing road traffic fraud, applications for permission are likely to be well-received. Some examples where permission was granted:

a) ***Royal & Sun Alliance v Fahad* [2014] EWHC 4480 QBD** – fabricated accident;
b) ***Quinn Insurance Ltd v Nazan Altinas* (26th March 2014 – unreported) QBD** – denial that claimant and witness knew each other; failure to disclose a previous accident.
c) ***Quinn Insurance Ltd v Trifonovs* (9th October 2013 – unreported) QBD** – Fraudulent claim with injury actually suffered in cage fight.

67. If permission is granted, the matter will proceed to a full hearing of the application. The court granting permission has discretion as to directions leading to the full hearing but in reality, the process is likely to be very similar to preparing a Part 23 application or Part 8 trial. It is worth consulting **CPR r.81.28** for the rules on service of evidence and conduct of the hearing. Of particular note the respondent is entitled to give oral evidence whether or not they have filed and served written evidence (**CPR r.18.28(2)(a)**).

68. If the respondent fails to attend the hearing the court has discretion to hear the matter in any event, but to do so is the exception rather than the rule (***Lamb v Lamb***

[1998] FLR 278 CA.) If the respondent is not present and is found to be in contempt, a warrant of committal will be issued (**CPR r.81.30.(1)**).

69. If there has been a first instance finding of fraud, this will be a big help but it is not alone determinative as a committal for contempt must be proven to the criminal standard, i.e. beyond reasonable doubt. It is for the party bringing the application to prove to that standard:

    a) That there was a false statement;
    b) That the statement has or would likely have interfered with the course of justice in some material respect; and
    c) The maker of the statement had no honest belief in its truth and knew it was likely to interfere with the course of justice.

70. The judge will make findings of fact at the conclusion of the hearing and determine whether the contempt has been proven. If it is so proven the court will move to consider sentence.

71. If committed, the High Court can sentence the respondent to a custodial sentence of up to 2 years (**The Contempt of Court Act 1981 s.14**.) The sentence can be suspended. The maximum fine is £2,500.

72. In ***Liverpool Victoria Insurance Co v Bashir*** **[2012] EWHC 895 Admin**, a fabricated accident claim, the court noted that fraud in motor cases could range from exaggeration to entirely fabricated claims. The latter was described as "*far, far, more serious.*" Custody will very likely follow in such matters. In ***Bashir*** the main protagonists were a professional couple and, sadly, had two young children. They were nonetheless sentenced to 6 weeks in custody for their contempt. The sentence would have been *"well in excess of 12 months"* but for the fact that they had admitted their fraud and assisted the defendant insurer in its enquiries. Interestingly, one of the respondent's parents were also in on the fraud. Both were in poor health and so received somewhat merciful suspended sentences.

73. Other sentences of interest:

    a) ***Airbus Operations Ltd v QBE Insurance Co (UK) Ltd v Roberts*** **[2012] EWHC 3631 Admin** – exaggeration of back injury – 6 months' custody;
    b) ***Mitsui Sumitomo Underwriting v Khan*** **[2014] EWHC 1054 (QB)** – significant exaggeration in £1 million brain injury claim – 9 months' custody;

c) ***Royal & Sun Alliance v Fahad* [2014] EWHC 4480 QBD** (after committal hearing) – fabricated accident – 12 months' custody.

74. It is likely that the trend towards lengthy custodial sentences will continue for the foreseeable future.

What happens if fraud comes to light after the event?

75. Lastly, it bears briefly mentioning the position should fraud come to light after proceedings have finished. A common example is where surveillance evidence comes to light post-trial. Is there anything that can be done about it?

76. In short, the answer is yes. The current position seems to be that the original judgment should be appealed. The next steps then depend upon the nature of the evidence.

77. In ***Noble v Owens* [2010] EWCA Civ 224**, liability had been admitted in an accident involving a motorbike. Damages were assessed at trial in 2008 the sum of nearly £3.5 million, based upon the claimant's severely restricted mobility. From December 2008 to March 2009 the claimant was filmed walking without crutches and the defendant obtained an injunction to prevent the claimant from dissipating the remainder of his damages, pending an appeal. At the appeal, the claimant argued that the evidence was perfectly explicable and that there was no fraud. The Court of Appeal confirmed that there are two options here:

a) The court would only allow the appeal, set aside the judgment and order a retrial where the fraud was either admitted or the evidence of it was incontrovertible; or

b) Where the new evidence went to an allegation of fraud that was contested, the proper course was for the allegation to be determined at trial. However, fresh proceedings were not necessary, rather the matter would be referred for determination by the trial judge pursuant to **CPR r.52.10(2)(b)**. If appropriate the trial judge could then reassess damages in light of any new findings.

78. There is also presumably a third option, being that the evidence was so weak as to result in dismissal of the appeal. Quite how far an appeal court can go in delving into the strength of a *prima facie* case in these circumstances is somewhat debatable however.

79. Finally, if the claim has in fact settled (usually of course by way of Tomlin Order) and a potential fraud comes to light, it would appear that the appropriate course is to bring proceedings in contract based upon fraudulent misrepresentations. This was held to be permissible in ***Zurich v Hayward*** **[2011] EWCA Civ 641**.

Conclusion

80. Fraud in the motor claims context is a large and at times complex issue. It is likely to remain at the forefront of road traffic practice for some time to come and so an understanding of the above may prove invaluable to those engaged within the insurance and legal industries.

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Fundamental dishonesty – what does it take?

By Jonathan Gaydon

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1. This handout aims to set out the law as to fundamental dishonesty and to discuss some of the leading (as of October 2017) cases. It will provide a primer for those new to the topic and some tips for those familiar.

2. In 2017, Defendants to personal injury claims predominantly live in a QOCS world. QOCS provides (CPR 44.14): *"Subject to rules 44.15 and 44.16, orders for costs made against a claimant may be enforced with permission of the court but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for damages and interest made in favour of the claimant."*[1]

3. The CPR provides a Defendant with two primary escape routes from QOCS. The first is strike out and the second is fundamental dishonesty.

4. As to strike out, CPR 44.15 provides that QOCS may be disapplied where the claim is struck out on grounds that **(1)** the claimant has disclosed no reasonable grounds for bringing the proceedings **(2)** the proceedings are an abuse of the court's process or **(3)** the conduct of the claimant and/or a person acting on the claimant's behalf and with his knowledge of such conduct, is likely to obstruct the just disposal of the proceedings. Given strike out, costs orders against C may be enforced without the Court's permission.

5. As to fundamental dishonesty (FD), CPR 44.16(1) provides:

[1] QOCS applies to all personal injury cases where the CFA or relevant funding arrangement post-dates 1 April 2013. Given a relevant post 1 April 2013 funding arrangement, QOCS also applies to a claimant under the FAA 1976 and to a claim by representatives of an estate of an accident victim pursuant to the Law Reform (Miscellanous Provisions) Act 1934. QOCS does not apply to proceedings ancillary to personal claims, even where a Part 20 claim (not involving personal injury) is pursued within a personal injury action (*Wagenaar v Weekend Travel Ltd* [2014] EWCA Civ 1105).

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

6. PD44 at para 12.4 provides:

In a case to which rule 44.16(1) applies (fundamentally dishonest claims) –

(a) *the court will normally direct that issues arising out of an allegation that the claim is fundamentally dishonest be determined at the trial;*

(b) *where the proceedings have been settled, the court will not, save in exceptional circumstances, order that issues arising out of an allegation that the claim was fundamentally dishonest be determined in those proceedings;*

(c) *where the claimant has served a notice of discontinuance, the court may direct that issues arising out of an allegation that the claim was fundamentally dishonest be determined notwithstanding that the notice has not been set aside pursuant to rule 38.4;*

(d) *the court may, as it thinks fair and just, determine the costs attributable to the claim having been found to be fundamentally dishonest.*

7. If a judge finds that C's claim is on balance fundamentally dishonest, the Court must dismiss the claim unless it is satisfied that C would suffer substantial injustice.[2] Upon dismissing the claim, the Court will generally order that QOCS be disapplied. Beyond the CPR, the concept of fundamental dishonesty was also introduced under Section 57 of the Criminal Justice and Courts Act 2015 (the Act). Section 57 applies to claims where "*the court finds that a claimant is entitled to damages*", but is also satisfied on balance "*that the claimant has been fundamentally dishonest in relation to the primary or a related claim*."[3] No definition of the term "*fundamentally dishonest*" is provided within the Act.

8. During parliamentary debate, Lord Faulks remarked that a judge: *"…will know exactly what the clause is aimed at – not the minor inaccuracy about bus fares or the like, but something that goes to the heart. I do not suggest that it wins many prizes for elegance, but it sends the right message to the judge."*[4] Was Lord Faulks proved correct? Is the term self-explanatory?

[2] Section 57(2) of the Criminal Justice and Courts Act 2015.
[3] Sections 57(1)(a) to (b) of the Criminal Justice and Courts Act 2015.
[4] Hansard, 23 July 2014, Lords, Column 1268

9. The leading guidance remains the judgment of HHJ Maloney QC in the matter of *Gosling v Hailo & Screwfix* (2014). On 31 July 2008, C suffered a knee injury allegedly due to a faulty ladder made by D1 and sold by D2. C alleged that he required use of a crutch, experienced significant ongoing symptoms and that his ability to work was restricted. C valued his claim at around £80,000 including £17,000 for future care. The Defendants subsequently obtained surveillance evidence. Sight of the surveillance caused both orthopaedic experts to change their evidence against C. One week before trial, C settled against D1 for £5,000 plus £27,000 costs and a CRU indemnity of £18,000. C discontinued against D2. D2 applied that a finding of fundamental dishonesty be made, without setting the discontinuance notice aside[5], in relation to C's case both on liability and quantum.

10. HHJ Moloney QC noted that the surveillance evidence was "*frankly devastating*" (para 34). The evidence was so clear that no oral evidence from C (as to the FD application) was "*necessary or appropriate*" (53). The judge was not willing to consider fundamental dishonesty in relation to liability, but agreed it was "*very clear*" that C's account of his injuries was fundamentally dishonest. The judge ordered that QOCS be disapplied for the full amount of D2's costs. The following paragraphs of the judgment provide illumination as to the meaning of FD:

"44. It appears to me that this phrase in the rules has to be interpreted purposively and contextually in the light of the context. This is, of course, the determination of whether the claimant is "deserving", as Jackson LJ put it, of the protection (from the costs liability that would otherwise fall on him) extended, for reasons of social policy, by the QOCS rules. It appears to me that when one looks at the matter in that way, one sees that what the rules are doing is distinguishing between two levels of dishonesty: dishonesty in relation to the claim which is not fundamental so as to expose such a claimant to costs liability, and dishonesty which is fundamental, so as to give rise to costs liability.

45. The corollary term to "fundamental" would be a word with some such meaning as "incidental" or "collateral". Thus, a claimant should not be exposed to costs liability merely because he is shown to have been dishonest as to some collateral matter or perhaps as to some minor, self-contained head of damage. If, on the other hand, the dishonesty went to the root of either the whole of his claim or a substantial part of his

[5] As envisioned by PD44, para 12.4(c) above.

claim, then it appears to me that it would be a fundamentally dishonest claim: a claim which depended as to a substantial or important part of itself upon dishonesty.

50. It was not suggested on the claimant's part nor, I think, could it be seriously maintained that as a matter of law it would be required that the dishonesty went to the root either of liability as a whole, or damages in their entirety. It must be the case that dishonesty fundamental to a sufficiently major part of the claim would suffice to deprive the claimant of his costs protection, and open him to the court's discretion as to how much of the costs he should pay. I therefore reject the preliminary suggestion that, even if made out, this claim for dishonesty would be insufficient to justify lifting the costs protection."

11. One can glean the following principles from the judgment:
    (1) A claim is fundamentally dishonest when a judge finds dishonesty which goes to the root, i.e. the whole or a substantial part, of the claim. A claim is not fundamentally dishonest where the dishonesty is found only in relation to a collateral matter or a minor/self-contained head of damage;
    (2) The term fundamentally dishonest should be interpreted purposively. The judge should ask whether the dishonesty is sufficient to justify depriving C of some or all of protection from costs.

12. The first principle is straightforward, though doubtless there will be borderline cases. If C dishonestly states that she was injured when she was not, a finding of FD should follow. If C dishonestly states that he undertook 6 sessions of physiotherapy when he undertook 4, or slightly exaggerates the amount of care provided, a finding of FD should not follow from this alone. The second principle asks the judge to consider whether C remains deserving of costs protection in light of the claim's level of dishonesty. The second principle appears to focus on C as well as the claim; thereby giving a broader ambit to judicial discretion and perhaps affording the opportunity for inconsistency between cases.

13. Inconsistency reared its head in the case of *James v Diamantekk* [2016]. C had been employed as a diamond driller between 2003 and 2013. The DDJ found that "*the Claimant has not been telling the truth*" concerning an allegation that C had not used hearing protection. The claim was dismissed. D's application for a finding of FD was refused. The judge stated that C's dishonesty did not amount to his being a "*dishonest person*". On appeal, HHJ Gregory reversed the DDJ's decision citing that the use of

hearing protection was fundamental to the case. C had been found dishonest in relation to that allegation. A finding of FD was therefore appropriate.

14. In *Stanton v Hunter* [2017] in the County Court at Liverpool before Recorder SA Hatfield QC, C sought damages under employer's liability after falling through a roof in June 2002. C sustained multiple rib fractures, a thoracic spine fracture, a left wrist fracture, subluxation of the left shoulder and splenic damage. C spent a month in hospital. He later required shoulder reconstruction surgery. C alleged that he had not returned to work as a taxi driver post-accident and was unlikely to work again. Surveillance evidence showed that he had worked as a taxi driver in February, March and July 2014. In the surveillance, C showed no apparent limitation of movement in his left shoulder. Taxi records showed that C had recommenced work at 3 months post-accident. C had worked on 133 occasions in the period September 2012 to 2015.

15. At trial, C accepted that he had returned to work but blamed the false allegation upon his difficulties with literacy and his post-accident psychological state. D applied that the claim be dismissed on grounds of FD. The judge considered that C's literacy difficulties did not prevent him from understanding the concept of working. The instructed neuropsychologist accepted that return to work was "*central to his examination and conclusion*." The judge agreed that the issue of return to work was fundamental to C's claim. The claim was dismissed and a finding of FD made. As required by Section 57(4) of the Act, the judge went on to record the amount of damages that would have been awarded absent the FD finding, in the sum of £51,525.

16. Note that fundamental dishonesty need only be proved against the claim, not against C as a person. An illustration of a judge eliding the two concepts may be found in *Menary v Darnton* [2016]. D had pleaded fraud on grounds that there had been no collision between D's motorcycle and C's car. At trial, the DDJ found that "*no impact*" had occurred. The claim was dismissed. The FD application was refused. The DDJ was impressed that C had admitted to pre-existing back pain when visiting a walk-in-centre post-accident and had also disclosed a previous PI accident to the physiotherapist during telephone triage. In refusing the FD application, the DDJ stated "*I think that these two disclosures just saved the claimant from a finding of fundamental dishonesty*."

17. On appeal, Judge Iain Hughes QC noted that it is the claim which must be found to be dishonest, "*the defendant does not have to establish fundamental dishonesty on the part of the claimant*." The judge noted that dishonesty means "*the advancing of a claim*

without an honest and genuine belief in its truth" and "*fundamental dishonesty may be taken to be some deceit that goes to the root of the claim*." The judge distinguished FD from "*the exaggerations, concealments and the like that accompany personal injury claims for time to time*." Judge Hughes QC concluded that the DDJ had muddled two different concepts. The DDJ had focussed on whether *the claimant* was fundamentally dishonest as opposed to whether *the claim* was fundamentally dishonest. Judge Hughes QC did not consider that the disclosures made by C could detract from the finding that "*there had been no impact and therefore no collision, and no road traffic accident, and no damage, and no injuries*." The DDJ's decision as to FD was reversed.

18. In the appeal of *Meadows v La Tasca* [2016] before Judge Hodge QC, C had brought a slipping claim arising from an accident at a restaurant. The DJ dismissed the claim citing inconsistencies as to the location of the accident, the substance upon which C had slipped, discrepancies as to what C had said post-accident, the "*curious mechanics of the fall*" and "*discrepancies in the nature of the various injuries said to have been sustained by Mrs Meadows and in her reporting of those injuries*." The DJ made a finding of FD. This finding was reversed on appeal. Judge Hodge QC considered that something more than a series of inconsistencies was necessary for a FD finding. The DJ should instead have dismissed the claim. This judgment perhaps suggests a higher bar for FD than those above.

19. A finding of FD was also made in the recent travel sickness case of *(1) Lavelle (2) McIntyre v Thomas Cook Tour Operators* [2017]. Cs' alleged that they had suffered from gastrointestinal illness while on holiday. The judge found that there had been no illness. The claim was dismissed. In making a finding of FD, DJ Herzog noted that sickness claims were unlike road traffic accidents "*where there might have been a small impact to a car and somebody might or might not have been injured. That is a situation in which people could reasonably be mistaken*." Unlike minor soft tissue injuries, the judge considered that sickness, diarrhoea and vomiting were not matters about which a person could be mistaken.

20. Similarly, in *Creech v (1) Apple Security Group Ltd and others* [2015], C alleged that he had tripped on a pile of mats. At trial, the Court preferred the evidence of three witnesses who stated that there were no mats present at the time. District Judge Rogers emphasised that this was not akin to an RTA matter where C might be mistaken as to the precise location of vehicles upon impact. A finding of FD was made.

21. Taking the above cases together, the following principles may be gathered:

(a) It is the claim, not C, which must be proved on balance to be fundamentally dishonest. Nevertheless, C's level of dishonesty is crucial insofar as it relates to the claim;

(b) Dishonesty is fundamental if it goes to the root of the claim. Root means the whole or a substantial part of the claim;

(c) Dishonesty is not fundamental if it goes only to a minor/collateral/self-contained head of damage. Dishonesty is not fundamental if it amounts only to minor exaggeration or concealment of the type commonly seen in personal injury claims;

(d) If a claim is fundamentally dishonest, C cannot save himself/herself from a FD finding by pointing to examples of his/her honesty elsewhere in the evidence or during the proceedings;

(e) If a root/substantial allegation (whether to liability or quantum) is dismissed and is not a matter about which a Claimant could have been mistaken, a finding of FD should follow;

(f) FD requires more than mere inconsistencies. It will be a case specific matter for the judge to determine whether the gravity and nature of the relevant inconsistencies amount to fundamental dishonesty. This is a matter about which judges may differ;

(g) If a finding of FD is made, the Court retains discretion as to how much of D's costs should be enforceable against C.

22. The following tips for practitioners arise from the above principles:

(a) As with an allegation of fraud, D should generally put C on notice at the earliest opportunity (and certainly within its Defence) that it considers a claim to be fundamentally dishonest. While a judge will in practice likely entertain an application for FD at the conclusion of any trial where C's claim has been shown to be dishonest, the Court may refuse to entertain FD where D was aware but has not placed C on notice at any time prior to trial;

(b) Findings of FD may be made in the absence of oral evidence from C and judges should be invited to do so in suitable cases;

(c) If dishonesty is suspected in relation to an injury and/or a matter which bears on injury, consider asking C's expert, or your own, whether the relevant fact, e.g. time off work, level of needed care etc., constitutes a central or a substantial element of their examination and/or of their diagnosis/prognosis. If the expert agrees, it will be easier to assert to the judge at the trial's conclusion that the relevant dishonesty is fundamental and not peripheral;

(d) Consider whether C might be argued to have been mistaken rather than dishonest. In an RTA claim, a sympathetic judge is apt to find that C was mistaken as to the position of the vehicles or even to an impact's severity. However, C cannot reasonably have been mistaken as to whether an impact occurred or whether they vomited after eating food on holiday;

(e) The battle is not necessarily fully won when a FD finding is made. The judge must still be persuaded that the dishonesty is sufficient such that C should bear all of D's costs, preferably on the indemnity cases. In practice, most DJ's will so order once FD is established;

(f) Practitioner's will be familiar with PI cases where C has had little involvement with the litigation before trial. The claim has, so to speak, sleepwalked into Court. In cases where the claim is found dishonest, the evidence for dishonesty was apparent on paper, and the oral evidence from C makes plain that his solicitors have allowed the claim to proceed without taking appropriate instructions from their client as to liability and/or injury, a wasted costs order from the solicitors should be considered.

23. Thank you for reading.

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Contempt proceedings – procedural matters and the judicial approach to hearing these claims

By Michelle Marnham

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What is contempt of Court?

It is a contempt of court to engage in any conduct which involves an interference with the due administration of justice in a particular case (Attorney General v Leveller Magazine Ltd [1979] A.C. 440, HL, at p.449 per Lord Diplock).

The law relating to contempt of court derives from both common law and statutory sources. The main statutory sources are Contempt of Court Act 1981 and Administration of Justice Act 1960 s 12.

Relevant Procedural Rules:

CPR r81

CPR r32.14

CPR r31.23

CPR Rule 32.14 - False statements

(1) *Proceedings for contempt of court may be brought against a person if he makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.*

(Part 22 makes provision for a statement of truth.)

(Section 6 of Part 81 contains provisions in relation to committal for making a false statement of truth)'

Note a - false statement covers not only a positive false statement, but can extend to a failure to disclose a matter of fact or document which, if disclosed would have a material impact on the proceedings in question, in particular, on the amount of damages.

CPR 31.23: False Disclosure Statements

'*Proceedings for contempt of court may be brought against a person if he makes, or causes to be made, a false disclosure statement, without an honest belief in its truth;*

(section 6 of Part 81 contains provisions in relation to committal for making a false disclosure statement).'

CPR Part 81 (added by SI 2012/2208; and amended by SI 2014/407) of the Civil Procedure Rules sets out the procedure in respect of: (1) contempt of court; and (2) the penal, contempt and disciplinary provisions of the County Courts Act 1984

CPR Pt 81

'*So far as applicable, and with the necessary modifications, CPR Pt 81 applies in relation to an order requiring a person guilty of contempt of court or punishable by virtue of any enactment as if that person had been guilty of contempt of the High Court, to pay a fine or to give security for good behaviour, as it applies in relation to an order of committal: CPR 81.1(2).*'

Unless otherwise stated, CPR Pt 81 applies to procedure in the Court of Appeal, the High Court and the County Court.

The jurisdiction of the High Court and the County Court is substantially different.

CPR 81 - principal objective of the procedure '*is to ensure that the alleged contemnor knows clearly what is being alleged against him and has every opportunity to meet the allegations.'*

Section 81 is divided into sections according to the principal forms of contempt liability and each section provides a bespoke procedure designed to regulate proceedings for the form of contempt to which it relates.

1. For interference with the due administration of justice (either in a case or as a continuing process) – Section 3, r 81.12

2. Committal for contempt in the face of the court (Section 5, r81.16);

3. For the making of a false statement or truth or disclosure statement (section 6, rr81.17 and 81.18);

4. For non-compliance with judgements or Orders (Section 6, r81.19)

Important to note that whilst contempt in the form of false statement is, arguably also[6], an interference with the due administration of justice in connection with proceedings if that is the only type of contempt alleged then use procedure in section 6.

If committal relates to is both False Statement/Disclosure and also other interference with the due administration of justice then use procedure in Section 3

See: CPR r81.17(5)

'*where the committal relates to both-*

A false statement of truth or disclosure statement: and

Other interference with the due administration of justice,

Section 3 (Committal for interference with due administration of justice) applies, but subject to paragraph 6.'

[6] See Airbus Operations Limited and QBE Insurance Company UK Limited v Roberts [2012] EWHC 3631 Admin., para 17 - If a court finds that a person knowingly made false and dishonest statements there is "*likely to be an irresistible inference*" that he acted with the intention of interfering with the due administration of justice.

Which court to make the application?

Procedure under Section 3 and Section 6 differs.

CPR 81.123 Committal for interference with the due administration of justice

Where contempt of court is committed in connection with any proceedings:

1. in the High Court (other than proceedings in a Divisional Court), the application for permission may be made only to a single judge of the Division of the High Court in which the proceedings were commenced or to which they have subsequently been transferred;

2. in a Divisional Court, the application for permission may be made only to a single judge of the Queen's Bench Division;

3. in the Court of Appeal, the application for permission may be made only to a Divisional Court of the Queen's Bench Division;

4. in an inferior court, the application for permission may be made only to a single judge of the High Court;

Note if trial was in the High Court – application can be made to the trial judge and unless concerns of bias that Judge can deal with the permission hearing and the proceedings themselves.

The application for permission is made by a CPR Part 8 claim form (CPR18.14)

CPR 81.18 Application to commit for a false statement of truth or disclosure statement.

CPR81.18:

(1) where the application is made in connection with proceedings in the High Court, a Divisional Court or the Court of Appeal, the court from which permission must be obtained is the court dealing with the proceedings in which the false statement of truth or disclosure statement was made. CPR 81.18(1)(a).

Application should be made by a CPR Pt 23 application notice: CPR 81.18(2)

(2) Where the false statement of truth or disclosure statement was made in connection with county court proceedings the court from which permission must be obtained is not the county court, but the High Court, and specifically, a single judge of the Queen's Bench Division. CPR 81.18(3).

Applications should be made by CPR Pt 8 Claim form: CPR 81.18(4).

Procedure:

Two stages –

(1) Application for Courts permission -CPR 81.14

(2) Committal hearing.

Or court could direct to refer to Attorney General with a request that the Attorney General consider whether to bring contempt proceedings.

Under CPR 81.14:

Part 8 Claim Form/Application Notice must be accompanied with a detailed statement of the applicant's grounds for bringing the committal application and an affidavit setting out the facts and exhibiting all documents relied upon.

See further 81 PD 6. Para 5

'*The affidavit in support of the application must:*

- *identify the statement said to be false;*
- *explain why it is false and why the maker knew the statement to be false at the time it was made; and*
- *explain why contempt proceedings would be appropriate in the light of the overriding objective.'*

The claim form or application notice must set out in full the grounds on which the committal application is made and must identify, separately and numerically, each alleged act of contempt, including, if known, the date of each alleged act. The claim form or application notice, together with copies of all written evidence in support must, unless the court otherwise directs, be served personally on the respondent.

The Claim Form/Application Notice must contain a penal notice – (81. PD. para 12. (4) and 81PD.para 13(4). Annex 3 to PD 81 sets out the appropriate wording.

Should you issue contempt proceedings?

Note CPR PD 81 para 5.7.

The party alleging that a statement of truth or a disclosure statement is false must consider whether the incident complained of amounts to contempt of court and whether such proceedings would further the overriding objective of the CPR.

Will permission be granted?

An application for permission is not a committal application.

Court may deal with the application on paper.

Guidance not given in 81.14 as to when permission will be granted

The question for the court is not whether a contempt of court has in fact been committed but whether proceedings should be brought to establish whether it has or not.

Clear from the Authorities:

Discretion should be exercised with great caution;

Must be a strong prima facie case shown against the respondent;

The court should be (a) careful not to stray at this stage into the merits of the case, and (b) should consider whether the public interest requires the committal proceedings to be brought and such proceedings must be proportionate and in accordance with the Overriding Objective.

In GB Holdings Ltd -v- Short [2015] EWHC 1378 (TCC) Mr Justice Coulson reviewed the authorities and principles relating to applications for contempt of court when it is alleged that a witness has forged documents in relation to the action

He referred to decision of the Court of Appeal in KJM Superbikes Ltd v Hinton (Practice Note) [2008] EWCA Civ. 1280; [2009] I WLR 2406.

In that case, Honda were claiming damages for infringement of its trademarks against KJM arising out of the sale of Honda motorbikes imported from abroad. The allegation was that the motorbikes had been supplied to an Australian dealer trading under the name of 'Lime Exports' for sale within that country and then wrongfully exported by Lime Exports to the United Kingdom. Mr Anthony Hinton provided a supporting statement in which he said that neither Lime Exports, nor any of Honda's other distributers in Australia, was authorised to sell its products for export. However, it later became clear, from documents made available on disclosure, that much of what Mr Hinton had said in his witness statement was completely untrue.

Sir Andrew Park, sitting at first instance, refused KJM's application for permission to bring proceedings for contempt against Mr Hinton. KJM successfully appealed Moore-Bick LJ, the modern approach to applications for permission to bring committal proceedings was outlined, in particular the following passages were noted by Mr Justice Coulson:

"9. *Although some may find rather distasteful the prospect of a successful litigant's pursuing proceedings for contempt against a witness who gave evidence against him, that is not a matter that can properly influence the court's decision…Nonetheless, because the proceedings are of a public nature "the court from which permission is sought will be concerned to see that the case is one in which the public interest requires the committal proceedings to be brought" (per Sir Richard Scott V.-C.) in Malgar Ltd v R.E. Leach (Engineering) Ltd[2000] FSR 393 at page 396.*

…

12. In Malgar, Sir Richard Scott declined to give permission for proceedings to be instituted against the alleged contemnors because the falsity of the statements in question could not be clearly established without trespassing on the issues in the trial and because in any event the statements themselves had not been persisted in to the point at which they were likely to affect the outcome of the proceedings.

…

16. Whenever the court is asked by a private litigant for permission to bring proceedings for contempt based on false statements allegedly made in a witness statement it should remind itself that the proceedings are public in nature and that ultimately the only question is whether it is in the public interest for such proceedings to be brought. However, when answering that question there are many factors that the court will need to consider. Among the foremost are the strength of the evidence tending to show not only that the statement in question was false but that it was known at the time to be false, the circumstances in which it was made, its significance having regard to the nature of the proceedings in which it was made, such evidence as there may be of the maker's state of mind, including his understanding of the likely effect of the statement and the use to which it was actually put in the proceedings. Factors such as these are likely to indicate whether the alleged contempt, if proved, is of sufficient gravity for there to be a public interest in taking proceedings in relation to it. In addition, the court will also wish to have regard to whether the proceedings would be likely to justify the resources that would have to be devoted to them.

…

19. In some cases, of which this is an example, it may be possible to deal with an application of this kind at a much earlier stage, especially if the alleged contempt relates to a statement made for a limited purpose which has passed and has no continuing relevance to the proceedings. Although we did not hear argument on this point, I think that in general a party who considers that a witness may have committed a contempt of this kind should warn him of that fact at the earliest opportunity (as the appellant did in this case) and that a failure to do so is a matter that the court may take into account if and when it is asked to give permission for proceedings to be brought. However, it is important not to impose any improper pressure on a witness who may later be called to give oral evidence. In particular, if the alleged contemnor is to be called as a witness, an application under rule 32.24 should not be made, and if made should not be entertained by the court, until he has finished giving his evidence.

20. A court dealing with an application of this kind must, of course, give reasons for its decision, but I need hardly emphasise that if the judge decides that permission should be granted he should be careful when doing so to avoid prejudicing the outcome of the substantive proceedings. At the stage of the application for permission the court is not concerned with the substance of the complaint; it is concerned only to satisfy itself that, if established, it is one that the public interest requires should be pursued. If, as in the present case, some aspects of the complaint have been admitted, the judge is free to refer to them, but it will usually be wise to refrain from saying more about the merits of the complaint than is necessary.

…

23 The judge's conclusion that proceedings for contempt in this case would be unlikely to promote the integrity of the legal process or respect for it in the future is one which I find difficult to accept. It is true that only prominent examples of the kind that are widely reported in the press can be expected to make an impression on the public at large, but that is to ignore the fact that the pursuit of contempt proceedings in ordinary cases may have a significant effect by drawing the attention of the legal profession, and through it that of potential witnesses, to the dangers of making false statements. If the courts are seen to treat serious examples of false evidence as of little importance, they run the risk of encouraging witnesses to regard the statement of truth as a mere formality. That is not a matter which the judge appears to have taken into consideration. In my view the prosecution of proceedings for contempt in the present case would be likely to have a salutary effect in bringing home to those who are involved in claims of this kind, of which there are many, the importance of honesty in making witness statements and the significance of the statement of truth."

After referring to 2 other decisions, Justice Coulson adopted the following approach:

1. is there a strong prima facie case of dishonesty;

2. is the case one in which the public interest requires that the committal proceedings are brought and that the applicant is the proper person to bring them;

3. considered the questions of disruption, oppression and proportionality, both in the context of the application as a whole and specifically as to the timing of any committal proceedings.

Aviva Insurance Ltd v Steffen, QBD, 17 May 2016

Aviva was granted permission to bring contempt proceedings against an individual who claimed to have been involved in a road traffic accident. There was a strong arguable case that the individual had fraudulently represented that he was the driver involved in the accident, and it was in the public interest and proportionate to bring the proceedings.

Abstract: The claimant insurance company applied under CPR r.81.18(3)(a) for permission to bring contempt proceedings against the defendant.

Facts:
The defendant had brought a claim for personal injury and consequential loss against the claimant arising out of a road traffic accident with one of the claimant's insured. He made witness statements in support of his claim and produced a schedule of loss in which he sought £1026 in respect of physiotherapy sessions for injuries sustained in the accident. The claimant later sought clarification from the defendant after it became aware that he had never attended physiotherapy sessions; the defendant replied that he had included the charges on the schedule as anticipated expenses, and he subsequently produced an updated schedule which did not include those charges. On the date listed for trial, the two women who had been in the other vehicle involved in the accident attended to give evidence. After seeing the defendant they asserted that he was not the same man as had been driving the car with which they had collided. The trial of the claim was adjourned to allow the claimant to investigate the issue of the driver's identity. The defendant subsequently discontinued his claim.

The claimant argued that permission should be granted because the defendant had prosecuted the claim based on an accident in which he had demonstrably not been involved, that he had provided an account of the accident which was plainly and demonstrably false, and that he had sought damages in respect of physiotherapy charges which had never in fact been incurred.

Held: Application granted.

In order to grant permission, the court had to be satisfied that there was a strong prima facie case, that it was in the public interest to bring the proceedings, and that it was proportionate to do so, Kirk v Walton [2008] EWHC 1780 (QB), [2009] 1 All E.R. 257 applied.

There was a powerful case that the defendant had known when he signed the schedule of loss that he had not undergone any physiotherapy sessions and that no fees had been

incurred. There was a strong, arguable case of fraud on that basis. Further, the witness evidence that the defendant had not been the driver was striking. It was difficult to see how the witnesses' description of the driver could refer to the same person as had turned up to the trial. The case that the defendant had not been the driver was also strong enough to warrant the grant of permission.

The defendant's allegedly false statements had been central to his establishing negligence and to the valuation of his claim. He would have been aware of the potential significance of his evidence in the statements. There was a public interest in the pursuit of contempt proceedings, namely in highlighting the potential consequences of witnesses making false statements. It was difficult to overstate the importance of discouraging fraudulent claims, South Wales Fire and Rescue Service v Smith [2011] EWHC 1749 (Admin) applied. The proceedings were in the public interest.

If the defendant was lying and the claim for the cost of the physiotherapy sessions had been fraudulently advanced, the modest size of that claim would not make prosecution disproportionate. The size of the claim could not govern proportionality. The defendant's prosecution on the facts as advanced would be entirely proportionate to the damage done to the administration of justice by his alleged conduct.

In Aviva v Randive [2016] EWHC 3152 (QB) the court allowed a motor insurer to bring contempt proceedings relating to a claim for injuries arising from a road traffic accident where the claimant had been found to have exaggerated his claim.

While the case did not produce any ‘new’ law, the judgment by Slade J provided a useful recap of where such proceedings are appropriate and will be permitted. No new points of principle arise, but Slade J’s recitation of the existing principles and treatment of the issues in the case is a useful indication of how common RTA issues are treated in contempt proceedings.

In this case, R had brought a claim for personal injury arising out of a road accident. Aviva was the motor insurer for the other party and had made a full admission of liability. The matter proceeded to a trial because Aviva did not accept the claimant’s case as to the nature and extent of his injuries and their impact. At the trial, following cross-examination, R discontinued his claim and the district judge hearing the matter made a finding that the claim had been fundamentally dishonest and awarded the Defendant/Applicant its costs.

Subsequently, Aviva sought permission to bring proceedings against R for contempt of court. The main basis for that application was that R had signed a statement of truth on documents detailing his injuries and their effects, knowing that the contents of the documents were not true. R was alleged to have made comments in his witness statement and his response to a Part 18 request which were false and without an honest belief in their truth. These related both to the nature of the accident's impact and the effect of his injuries and his losses.

R tried to defend the application on the basis that contempt proceedings were intended for 'more serious' dishonesty and not unreliable or inconsistent witnesses and that he had already paid the appropriate penalty for his actions by having a costs order made against him by the district judge.

Slade J took the view that contempt proceedings were not for minor incidences but that this case went beyond a 'minor' dishonesty. Here the claimant had exaggerated his injuries and losses in a claim for thousands of pounds. She held that 'bringing a false claim in the courts is extremely serious. Apart from the dishonesty of bringing such a claim, false claims lead to waste of court time and resources. Although the claim brought by the respondent was small in financial terms and contempt proceedings will be costly, in the interests of justice and the overriding objective, I consider it proportionate for contempt proceedings to be pursued'. She allowed the application on that basis.

The Applicant sought to bring contempt proceedings on the basis of allegedly false statements made in documents verified by statements of truth without an honest belief in the truth of those statements, pursuant to Civil Procedure Rule 81.12(3). The Applicant also pursued contempt proceedings against the Respondent for allegedly false statements made by the Respondent in an affidavit in response to the instant contempt application.

Slade J adopted the summary of the principles relevant to an application for permission to bring contempt proceedings set out by Cox J in Kirk v Walton [2008] EWHC 1780 (QB) at [29]:

"I approach the present case, therefore, on the basis that the discretion to grant permission should be exercised with great caution; that there must be a strong prima facie case shown against the Claimant, but that I should be careful not to stray at this stage into the merits of the case; that I should consider whether the public interest requires the committal proceedings to be brought; and that such proceedings must be proportionate and in accordance with the overriding objective."

The Respondent was alleged to have made four statements in his witness statement and his response to a Part 18 request which were false and which he made without an honest belief in their truth. In the course of this application, his counsel suggested that, although there was clearly a prima facie case of falsehood in relation to three of the statements, they were of differing degrees of gravity and the application "should be looked at in the round". Summarising his submissions, Slade J said:

"... Mr Naik submitted that committal for contempt of court should be reserved for the most serious lies, for example contrived accidents in road traffic claims. Mr Naik contended that courts are routinely faced with unreliable witnesses, inconsistence evidence and make adverse findings against a party but that does not call for contempt proceedings. Mr Naik submitted that the Respondent had already paid the price and had been punished for 'his lies'; he had been ordered to pay over £8,000 in costs to the Applicant. Further, it was said that the likely cost and court time which would be spent on contempt proceedings was not warranted in light of the small sums which had been claimed by the Respondent, the costs penalty which he had been subject and the serious damage which could be caused to his career as an IT consultant."

First statement

The Applicant alleged that the Respondent's claim in his witness statement to have suffered neck and back pain was knowingly false. In order to establish a prima facie case to that effect, the Applicant relied on a letter from the Respondent's insurer confirming that there were no injuries. GP records relating to a consultation five days after the accident made no mention of an injury sustained in the accident, and indeed appeared to refer to pre-existing back pain which had been exacerbated by exercise in the gym. The Respondent relied on the conclusion of Buxton LJ in Denton Hall Legal Services & Others v Kathryn Hilary Fifield [2006] EWCA Civ 169 at [77]:

"What the doctor writes down as having been told by the patient, as opposed to the opinion he expresses on the basis of those statements, is not at that stage evidence of the making of the statement that he records".

The medical report which formed the basis of the claim had been prepared without sight of the Respondent's medical records. In an amended report, the medical expert changed his conclusion in relation to the Respondent's back pain. The expert had originally concluded that the pain was solely attributable to the accident. Having reviewed the Respondent's

medical records, however, the expert concluded that the back pain was due to the exacerbation of a pre-existing condition.

Relying on Denton Hall, Slade J concluded that the absence of a reference to the accident in the GP notes was “not evidence that he made no mention of this”. However, the fact that no mention of the injury was made to the insurers on the day after the accident was said to be “more surprising”. Slade J added, however, that “It is unsurprising if his existing pain was aggravated by his vehicle being hit from behind.” She concluded: “In my judgement it cannot be said on the material before the court that there is a prima facie case that these paragraphs 17 and 18 of the Respondent’s witness statement were false and made without an honest belief in their truth”.

Second statement

The Respondent, in his witness statement, had asserted that he had stopped driving for six months after the accident as he had been advised not to drive. In cross-examination at trial he conceded that he had driven short distances until he felt pain. In his affidavit in response to the contempt application, the Respondent stated that he had driven only on one occasion. Slade J summed this point up bluntly: “The Respondent said that he did not drive for six months after the accident but he did”. There was, therefore, a “strong prima facie case” that this statement was knowingly false.

Third statement

In response to a Part 18 request for further information the Respondent had asserted that the approximate speed of the Applicant’s insured’s vehicle at the time of impact had been 30 to 40 mph and that his vehicle had been shunted “a few metres away” in a “straight direction”. In his evidence at trial the Respondent had reduced the alleged speed down to 20 to 30 mph and admitted that his vehicle had not moved forward, and had only “rocked”. Slade J distinguished between the Respondent’s statements about speed and the movement of his own vehicle. There was, she said, “room for argument” about whether he had known that his original estimate of the other car’s speed was false. There was no such room in relation to his statement that his own vehicle had moved forward. “The Respondent was at the wheel of his car. He must have known whether his car was pushed forward a considerable distance on impact or whether it did not move forward but rocked in its stationary position.” There was a strong prima facie case that he had known this statement to be false.

Fourth statement

The Respondent had claimed in his witness statement to have taken 10 days off work as a result of the accident. The medical report had recorded that he had had four weeks off work. The Part 18 response asserted that he had been off for a few days. In the Claim Notification Form the Respondent's solicitors had stated that he had not had time off work. A letter from the Respondent's accountant purporting to set out the 16 days of absence gave dates which were (almost) all at weekends. The numerous inconsistent statements led Slade J to the conclusion that there was a strong prima facie case that the Respondent's claim to have had 10 days off work due to the accident was untrue and made in the knowledge that it was untrue.

Permission

Drawing the threads together, Slade J summarised the task of a court dealing with an application for permission to bring contempt proceedings:

"40. It is not for a court hearing an application for permission to bring proceedings for contempt of court to decide the merits of the application for contempt. The task is to decide on the material then before the court, which has not heard oral evidence. It is to decide whether the Applicant has established a strong prima facie case as asserted in the grounds relied upon that the Respondent made the false statements in documents attested to by a Statement of Truth knowing them to be untrue.

41. Even if such a strong prima facie case is established, the pursuit of committal proceedings must be in the public interest, proportionate and in accordance with the overriding objective. Applying the overriding objective includes considering the amount of money involved, the importance of the case and allocating to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

As there was no strong prima facie case that the first statement was in fact untrue, permission in respect of that statement was refused.

Permission was granted, however, in respect of the other three statements.

It is useful to note that they were effectively dealt with cumulatively. In respect of the second statement, Slade J stated that she would not have concluded that that statement alone warranted the use of court time and resources which contempt proceedings would have entailed. However, "[t]he untruths which are the subject of Ground 2 contribute to the overall

picture of the injury and loss claimed", and permission was therefore granted in respect of the second statement.

In relation to the third statement, Slade J said this:

"The assertion that the vehicle of the driver insured by the Applicant was travelling at such speed that is caused the Respondent's vehicle to be shunted forward by a few metres gives an impression of the severity of the impact and therefore the likelihood of injury which formed the basis of the claim pursued by the Respondent. Bringing a false claim in the courts is extremely serious. Apart from the dishonesty of bringing such a claim, false claims lead to waste of court time and resources. Although the claim brought by the Respondent was small in financial terms and contempt proceedings will be costly, in the interests of justice and the overriding objective I consider it proportionate for contempt proceedings to be pursued."

The same reasoning applied to the fourth statement, and permission was granted in respect of both.

If permission is granted - 'The Hearing – CPR81.28

In order for the proceedings to succeed in respect of false statement it is for applicant to prove beyond reasonable doubt that the respondent had made the false statements knowing that they were false.

AXA Insurance UK Plc v Rossiter, Queen's Bench Division, 5 December 2013 [2013] EWHC 3805 (QB)

Have to prove beyond reasonable doubt that:

1. That the statement in question was false;
2. That the statement has, or if persisted in would be likely to have, interfered with the course of justice in some material respect; and
3. At the time it was made the maker of the statement (a) had no honest belief in the truth of the statement and (b) knew of its likelihood to interfere with the course of justice.

Reported Decisions

Motor Insurers' Bureau v (1) James Shikell (2) Roebrt George Shikell (3) Diane Glancy (4) Simon Fennell (2011), [2011] EWHC 527 (QB)

J had been injured in a road traffic accident caused by the negligence of an uninsured driver. The MIB admitted liability, subject to a reduction for contributory negligence. J issued a claim for damages against the MIB. In his witness statement he stated that he was unable to play football and when talking to experts he referred to his level of incapacity and his fatigue. His evidence about his symptoms was supported by statements from R, who was his father, G and F. J was later filmed shopping and then playing competitive football. Following a settlement, the MIB made the instant application alleging that J, R, G and F had been actively involved in attempting to pervert the course of justice by lying about significant matters and, in relation to J, that he had also failed to include, in a list of documents served on the MIB, any document relating to him playing football. It alleged that F was also in contempt, insofar as the court found that F had signed a statement of truth relating to his witness statement, without having read the document. J admitted lying in his witness statement. However, J, R, G and F denied that they had made the remaining false statements with dishonest intent.

Nield v Loveday v Loveday, [2011] EWHC 2324 (Admin)

Another example of a claimant who deliberately exaggerated his symptoms is committed for contempt of court.

(Sir Anthony May, Sir John Thomas President QBD, Keith J)

A claimant who had brought a personal injury action following a road traffic accident was committed to prison for nine months for contempt as he had verified his statement of claim and witness statement despite knowing that they contained much false information which tended to exaggerate the value of his claim. His wife, who had verified false statements to support his claim, admitted her contempt and was given a suspended six-month sentence.

L1 had verified his claim and supporting witness statement by statements of truth. He claimed that the accident had caused a soft tissue injury to his neck and lower back and that as a result he could not work or drive, was often reliant on a wheelchair as he could hardly walk, had great difficulty with stairs, had to be cared for by his wife all the time, feared going

out and particularly travelling by car, and could no longer go caravanning or work on cars or engines as he had done. L2 verified a statement supporting L1's claim. Surveillance footage from a private investigator employed by N appeared to show that L1 was far more active and able than his claim suggested. He therefore settled his action for substantially less than he had claimed, and consented to pay N's costs, which far outweighed the damages. N brought the instant contempt proceedings on the basis that L1's claim was inflated and contaminated by dishonesty. L2 admitted her contempt, accepting that she had known that parts of her statement were either not true or no longer true when she signed it.

L1 submitted that when he signed the statements he did not know what he was verifying.

Held:

(1) L1 was guilty of contempt of court. The surveillance footage showed him to be very far from the housebound invalid he had claimed to be. There was footage of him driving, walking unaided, climbing steps, going on a caravanning holiday and working on a vehicle. He had driven to and from Italy on holiday, in contrast to his witness statement which said he had flown (see paras 35-37, 41-45 of judgment). L1 had had many years of intermittent back problems; contrary to his witness statement they had not begun two weeks after the accident. He had misled the solicitor who drafted his witness statement. It was clear that he knew exactly what his witness statement said, as a draft of it was marked with numerous handwritten annotations containing information that only he could have known. His evidence that he had not read what he signed was not true. He and L2 knew that the risks of signing something they did not believe included being imprisoned for contempt because their solicitor had warned them in writing. There was recent medical evidence that he was suffering from depression and post-traumatic stress disorder, but that did not mean that he had not read the documents or lacked the capacity to know whether they were true (paras 30, 32-34, 46-67). (2) L2 deserved some credit for admitting her contempt, and she benefited from several good character references (paras 217, 223). L1 had not admitted his contempt, and even in oral evidence he had attempted to continue with various fabrications. However, he was of previous good character. The court took into account the considerable financial and personal toll the instant proceedings had taken on them both, and their respective health problems.

AXA Insurance UK PLC v Julie Rossiter (2013), [2013] EWHC 3805 (QB)

X had been the insurer of the tortfeasor who had injured R in a road traffic accident. X admitted liability and, in February 2011, R issued a personal injury claim. Judgment was entered in her favour and she served medical reports, a witness statement and an updated schedule of loss asserting that she was suffering from permanent, severe, continuous disability such that she rarely left her house or bed. X subsequently disclosed to R video surveillance evidence of 13 days of filming between November 2011 and January 2012 showing her leaving home unaccompanied, shopping, driving, walking her dogs, collecting her son from school, and walking up and down steps carrying heavy and bulky objects. There was also filming from two days in April 2012 in which she was not seen to have left her house. R's claim was formally compromised in September 2012.

X contended that R was in contempt of court by having fraudulently exaggerated her claim for gain in her statements in the medical reports, witness statement and schedule of loss. It submitted that the surveillance evidence demolished her claim by showing a starkly different picture of her injury from that which she suggested. R asserted that the symptoms described and the picture presented in the reports and her statement were accurate, save that there were periods when she had not suffered quite as much, and where the restrictions on her lifestyle were not as great. She denied any dishonesty but accepted that she should have pointed out the variability in her symptoms. X argued that R had tailored her evidence after seeing the surveillance evidence, and that it was inconceivable that 13 days of random filming should by chance have occurred on R's "relatively good days".

Held: For X to establish the contempt alleged it had to prove beyond reasonable doubt (a) the falsity of R's statements; (b) that those statements had or would have materially interfered with the course of justice; (c) that R had no honest belief in the statements and had known of their likelihood to interfere with the course of justice. On the evidence, R had not been dishonest. Her statements were false in that they did not deal with what she could do, as shown on the surveillance evidence, on good days, but X had not satisfied the court beyond reasonable doubt that she could do more than was shown on the surveillance evidence. R had not generally made false statements to her doctors or in her schedule of loss. The surveillance evidence of April 2012 supported her case that there were days when she was unfit to leave the house. There was a line between exaggeration and dishonesty. Discrepancies between witness statements and video evidence would not automatically amount to a contempt of court: ultimately, that was a matter of fact and degree, and some exaggeration might be natural, even understandable, Walton v Kirk [2009] EWHC 703 (QB) applied. R's evidence raised considerable doubt as to whether she was lying, and X

had fallen short of proving dishonesty. Accordingly, whilst R had made a number of false or inaccurate statements, in the absence of dishonesty there was no contempt (see paras 9, 24, 30, 32, 35-36, 41 of judgment).

Aviva Insurance Ltd v Steffen (2016). QBD (Garnham J) 17/05/2016

The claimant insurance company applied under CPR r.81.18(3)(a) for permission to bring contempt proceedings against the defendant.

The defendant had brought a claim for personal injury and consequential loss against the claimant arising out of a road traffic accident with one of the claimant's insured. He made witness statements in support of his claim and produced a schedule of loss in which he sought £1026 in respect of physiotherapy sessions for injuries sustained in the accident. The claimant later sought clarification from the defendant after it became aware that he had never attended physiotherapy sessions; the defendant replied that he had included the charges on the schedule as anticipated expenses, and he subsequently produced an updated schedule which did not include those charges. On the date listed for trial, the two women who had been in the other vehicle involved in the accident attended to give evidence. After seeing the defendant they asserted that he was not the same man as had been driving the car with which they had collided. The trial of the claim was adjourned to allow the claimant to investigate the issue of the driver's identity. The defendant subsequently discontinued his claim.

The claimant argued that permission should be granted because the defendant had prosecuted the claim based on an accident in which he had demonstrably not been involved, that he had provided an account of the accident which was plainly and demonstrably false, and that he had sought damages in respect of physiotherapy charges which had never in fact been incurred.

Permission was granted:

There was a powerful case that the defendant had known when he signed the schedule of loss that he had not undergone any physiotherapy sessions and that no fees had been incurred. There was a strong, arguable case of fraud on that basis. Further, the witness evidence that the defendant had not been the driver was striking. It was difficult to see how the witnesses' description of the driver could refer to the same person as had turned up to

the trial. The case that the defendant had not been the driver was also strong enough to warrant the grant of permission.

The defendant's allegedly false statements had been central to his establishing negligence and to the valuation of his claim. He would have been aware of the potential significance of his evidence in the statements. There was a public interest in the pursuit of contempt proceedings, namely in highlighting the potential consequences of witnesses making false statements. It was difficult to overstate the importance of discouraging fraudulent claims, South Wales Fire and Rescue Service v Smith [2011] EWHC 1749 (Admin) applied. The proceedings were in the public interest.

If the defendant was lying and the claim for the cost of the physiotherapy sessions had been fraudulently advanced, the modest size of that claim would not make prosecution disproportionate. The size of the claim could not govern proportionality. The defendant's prosecution on the facts as advanced would be entirely proportionate to the damage done to the administration of justice by his alleged conduct.

Aziz v Ali, contempt proceedings [2014] EWHC 4003 (QB)

Two taxi drivers and their passengers who had brought fraudulent personal injury claims based on car accidents which had not taken place were committed to prison for contempt of court. The making of false statements in legal proceedings was so serious that only a custodial term was justified. Such conduct undermined public confidence in the justice system and imposed great burdens upon insurance companies, who had to devote considerable resources to identifying and resisting fraudulent claims.

Network Rail (2) QBE Insurance (Europe) v (1) Anthony James Dermody (2) Anne Marie Dermody (2017), QBD (Manchester) (Judge Main QC) 02/05/2017

Network Rail applied to bring committal proceedings against Mr Dermody and his mother, after contradictory surveillance caused Mr Dermody to alter the claim, then abandon the claim altogether. He had put information on the internet which showed he was able to function much better than he had originally claimed. It turned out that he was the bass guitarist in a busy rock tribute band, ‘Guns or Roses’, and after the accident toured with the band around the UK and Europe. When confronted with this evidence of his attempted deception, he discontinued the original claim.

In granting permission for the contempt of court proceedings, Mr Justice Edis held that there was a strong prima facie case to show Mr Dermody deliberately fabricated his claim to increase its potential value (Network Rail v Dermody & Anor [2016] EWHC 2060 (QB)). He held that such conduct was "gravely damaging to the public interest" and that "fraud in personal injury litigation is a major impediment to the smooth running of the civil justice system, as well as serious crime". Permission was also given for committal proceedings against Mr Dermody's mother, who had signed a witness statement stating that following the accident Mr Dermody was unable to do any of the physical activities he had previously enjoyed.

Mr Dermody was subsequently found guilty of contempt of court, and sentenced on 2 May 2017 by His Honour Judge Main QC in the Queen's Bench Division in Manchester. HHJ Main QC remarked that these actions were more serious than anti-social behaviour and considered this type of behaviour to force genuine claimants to have to jump through hurdles. HHJ Main QC mentioned the words of Moses LJ in South Wales Fire and Rescue Service v Smith [2011] EWHC 1749 (Admin): "…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." He said of Mr Dermody's inflation of the claim "the problem is you have succumbed to the temptation of over-egging the pudding".

Milton Keynes Council v Sturges, HHJ Coe QC, 20 Oct 2016

A claimant who brought a fake personal injury claim against Milton Keynes Council has been sentenced to 8 months in prison for contempt of court. The claimant suggested that he had tripped over a defective drain cover when in fact he had slipped on ice. The fraud came to light after the claimant's medical records were reviewed. His daughter, who supported her father in his claim, was sentenced to prison for 6 months, suspended for 1 year for her part in the fraud.

Background

The claimant, Mr Sturges, brought a personal injury claim against Milton Keynes Council (the Council) as a result of an alleged tripping accident on 4 February 2012. He lied about the circumstances of the accident, pretending that he had tripped on a defective drain cover, when he had in fact slipped on ice.

In support of his claim, Mr Sturges signed Particulars of Claim and a witness statement (both of which contained Statements of Truth) which he knew was not true and lied to the medical expert preparing a report in support of his case, about how the accident had happened.

Mr Sturges was supported by and colluded with his daughter, Danielle Sturges, to recover damages from the Council in the region of £8,000 plus legal costs which potentially could have led to an award of in the region of £30,000.

Analysis and investigation of the circumstances and medical records surrounding the alleged accident revealed that Mr Sturges' claim was fraudulent. In particular he had forgotten that when his daughter had telephoned the Urgent Care Unit earlier in the evening after the alleged incident (and prior to attending hospital) she had already reported that he had slipped on ice. Ms Sturges also signed a false witness statement which she knew was not true.

Prior to trial, Mr Sturges discontinued his claim against the Council and was ordered to pay the Council's costs of the action which was met by his insurers.

The Council commenced contempt of court proceedings against both Mr Sturges and his daughter which were heard by the High Court on 17 October 2016.

Throughout the proceedings, neither defendant took any active steps to address the allegations made. No defences were served and the court's directions were not complied with.

Shortly before trial both Mr and Ms Sturges pleaded guilty to contempt.

Contempt judgment

The matter was heard before HHJ Coe QC who sentenced Mr Sturges to 8 months imprisonment and Ms Sturges to 6 months imprisonment, suspended for 1 year.

In giving judgment, HHJ Coe held that Mr Sturges' actions had been dishonest and calculating for financial gain throughout. She found that there was a high public interest in preventing fraud, it was not a victimless crime, a strong deterrent was needed and the sentence should be significant.

The Judge found that Ms Sturges had also acted dishonestly in lying to the court, to solicitors and in documents. The threshold test for a custodial sentence for her was also

satisfied. However, given her different personal circumstances (she was a single parent with a young child) her sentence would be suspended.

The defendants were also ordered to pay the Council's costs of the contempt action.

Royal & Sun Alliance Insurance plc v Maharouf Fahad (2015) QBD (Judge Collender QC) 20/03/2015.

An individual who had made false statements in a fraudulent damages claim against Royal & Sun Alliance Insurance plc (RSA), in relation to a staged road traffic accident was committed for contempt of court. The application to commit was successful as the evidence adduced satisfied the court, to the criminal standard, that the individual concerned had knowingly and deliberately set out to defraud the insurance company in a false claim for damages.

Following a finding of fraud at a trial at Bromley County Court in 2012 in which the respondent's evidence was found by the trial judge to be "wholly unattractive", "inconsistent" and at times "untruthful", DWF were instructed to apply on behalf of RSA under CPR r.32.14 and CPR Pt 81 for an order committing the respondent to prison for contempt of court for making false statements of truth.

Background

The respondent brought a claim in damages against the applicant arising out of an alleged road traffic accident in 2009. At trial Deputy District Judge Hay found that the accident was entirely contrived and that the respondent had known, and was in a relationship with, the other driver, despite his assertions to the contrary. RSA were the other driver's insurer. The trial judge found the respondent's evidence inconsistent and untruthful and the applicant was granted permission in October to bring committal proceedings on the basis that the respondent had made false statements.

The false statements in question were:

- The allegation in the respondent's particulars of claim that the accident had been caused by the driver's negligence;
- his response to the applicant's Part 18 request (in which he stated that he did not know the driver prior to the accident); and
- his assertion in his witness statement that he did not know the driver at the time of the accident and only became Facebook friends with her some months after the

alleged accident (the driver's former flatmate had been interviewed by the applicant's representative and had given evidence during the trial that the respondent and the driver had been in a long-term romantic relationship and that he was a frequent visitor to the flat that they shared).

The applicant submitted that the respondent had:

- Made the false statements and verified (or caused them to be verified) with a statement of truth;
- knew at the time that he made the statements that they were false;
- acted with the intention of interfering with the due administration of justice; and
- if the false statements had been persisted in, it was likely that it would have interfered with the course of justice.

The applicant further submitted that, in relation to point 3, if the court found that the respondent knowingly made false and dishonest statements of the kind alleged, there was an irresistible inference that he acted with the intention of interfering with the due administration of justice in line with the reasoning in Airbus Operations Ltd v Roberts [2012] EWHC 3631 (Admin), [2013] A.C.D. 25.

The respondent submitted that he had communication difficulties due to English not being his first language and that he had got confused with his tenses when he said in his Part 18 replies that he had not known the driver at the time of the accident and that he did not know her as at the time he signed the replies. The respondent's evidence in respect of his relationship with the driver had clearly altered as additional evidence was served by the applicant and it was submitted that the respondent was tailoring his evidence in order to provide an explanation for his previous false statements.

The committal hearing

The presiding judge was of the view that the issues to be determined before the instant court were essentially the same as those before the trial judge. The central issue was the existence or absence of a relationship between the respondent and the driver at or around the time of the alleged accident. It was for the applicant to prove beyond reasonable doubt that the respondent had made the false statements knowing that they were false, AXA Insurance UK Plc v Rossiter [2013] EWHC 3805 (QB) applied.

The court was impressed by the flatmate's evidence and there was no good reason to disbelieve it. The court accepted her evidence in full. The court could only deduce the

respondent's account of events from the papers before it, as he had not given evidence at the committal hearing and neither had any of the passengers involved in the alleged accident. His right to silence was not absolute and it was submitted by the applicant that this could and should be taken into account. The judge accepted the applicant's submissions on this point.

Overall, the court approached the respondent's evidence with a great deal of caution. He had initially stated that he did not know the driver at the time of the accident. After the applicant served a statement from its solicitors showing that the respondent and the driver were friends on Facebook, he had made a statement claiming that they had only become friends on Facebook after the accident. The respondent had been resident in the UK since 2001 and had attended an intensive English language course. His difficulties with the English language had been overstated and his argument that he had muddled his tenses in his statement was not accepted.

The court was satisfied that the respondent was well acquainted with the driver at the time of the alleged accident and accepted the flatmate's evidence that they had been in a long-term and serious romantic relationship for some time. The court also accepted the flatmate's evidence that the driver had told her that she and the respondent had nearly been caught out by an insurance company because they were friends on Facebook.

The Court was also satisfied that there was a good deal of evidence to show that the respondent had been dishonest. The only credible explanation for the changes in his evidence was that he had been untruthful. The court accepted that the motivation for the respondent to conceal his relationship with the driver was to deceive the applicant into believing that an accident had occurred which had not. The accident was not real and had been staged. It could not reasonably be argued that the respondent had an honest belief in his statements. He had knowingly and deliberately set out to defraud the applicant in a false claim for damages. In doing that he had sought to interfere with the administration of justice and was in contempt of court, Airbus considered. The respondent was sentenced to 12 months' imprisonment

He was found guilty of contempt of court and sentenced to 12 months imprisonment, the sentence reflected not only the seriousness of the offence but also the fact that the respondent had, through his counsel, cross examined the respondent's witnesses at length (including two employees of DWF) rather than enter a guilty plea in the light of the overwhelming evidence put before the court by the applicant.

Motor Insurers' Bureau v Shikell [2001] EWHC 527 (QB), (Belcher HHJ)

Claimant and relative committed to prison for contempt of court for deliberately deceiving the court

The facts: James Shikell (S) was injured in an RTA and liability was admitted on behalf of the uninsured driver by the MIB. The claim was settled for £1.2m on the basis that S was seriously incapacitated and unable to resume playing football. S was later filmed playing competitive football and shopping. The MIB applied to the court to rescind the settlement and alleged that S, his father and witnesses were in contempt of court.

The decision: The trial judge held (applying the criminal standard of proof: beyond reasonable doubt) that S had deliberately made false statements to increase the value of his award, and that his father, Robert, had colluded in the deception by submitting a false statement. Another witness had signed a statement without even bothering to read it, which the judge held to be contempt of court.

S and Robert were convicted of contempt of court and both sentenced to 12 months imprisonment. The witness who signed his witness statement without reading it was fined £750.

Application for Committal for Interference with the Due Administration of Justice: High Court, Divisional Court or Administrative Court

	Steps to be taken	CPR
	Application for permission	
1.	Applicant prepares CPR Part 8 claim form applying for permission to apply for order of committal.	CPR 81.14(1)
	The claim form must:	
	(1) set out the name and description of the Applicant;	
	(2) set out the name, description and address of the person sought to be committed; and	
	(3) include or be accompanied by a detailed statement of the grounds on which committal is sought.	CPR 81.14(1)(a)
2.	Applicant or his solicitor swears affidavit in support.	CPR 81.14(1)(b); CPR PD 81 para 14.1
3.	Applicant files in the High Court, Divisional Court of the Queen's Bench Division or Administrative Court:	CPR 81.13, CPR 81.14(1) CPR PD 81 para 14.2
	(1) claim form (including penal notice);	CPR PD 81 para 12(4)
	(2) detailed statement of grounds (if not included in claim form);	CPR 81.14(1)
	(3) sworn affidavit in support of application for permission.	CPR 81.14(1)(b)
	Listing Office fixes date of hearing.	
4.	Applicant personally serves on Respondent:	
	(1) claim form (including penal notice);	CPR PD 81 para 12(4)
	(2) detailed statement of grounds (if not included in claim form);	
	(3) copy affidavit in support of application for permission.	CPR 81.14(2)
	Response	
5.	Respondent files and serves:	
	(1) an acknowledgement of service; and	CPR 81.14(3)(a)
	(2) affidavit in answer.	CPR 81.14(3)(b); CPR PD 81 paras 14.1, 14.2
	Time: Within 14 days of service of the claim form on the Respondent.	CPR 81.14(3)
6.	*If he intends to appear at the permission hearing*, Respondent:	CPR 81.14(5)
	(1) gives notice in writing of such intention; and	
	(2) at the same time provides written summary of the submissions he proposes to make.	
	Time: 7 clear days before the permission hearing.	CPR 81.14(5)
	Permission hearing	
7.	Applicant makes application either in person or by counsel or solicitor advocate to a single	CPR 81.13; CPR 81.14(4)

	judge of the High Court, or a single judge of the Queen's Bench Division, or a Divisional Court of the Queen's Bench Division or the Administrative Court at a hearing, unless the court considers that the application can be dealt with on paper.	
	Decision	
8.	The Divisional Court, Administrative Court or single judge of the Queen's Bench Division considers application and makes order.	CPR 81.13
9.	*If court refuses permission*: Applicant may appeal in ordinary way.	
10.	*If permission to apply is granted*:	
	[Either: Court gives directions for hearing of committal application at the permission hearing.	CPR 81.14(6)
	Or: If no directions given by court granting permission, Applicant may apply by application notice to single judge, Administrative Court or Divisional Court for order of committal.**]**	
	Time: The application for committal must be listed to be heard not less than 14 days after service of the application notice on the Respondent.	CPR PD 81 para 15.2
	Service on Respondent	
11.	Applicant serves on Respondent application notice endorsed with:	
	(1) penal notice;	CPR PD 81 para 13.2(4)
	(2) date on which and the name of the judge by whom the requisite permission was granted.	
	Committal hearing	
12.	The court usually sitting in public, hears and determines application.	CPR 39.2(1); CPR 81.28(5)
	The Applicant may appear in person.	
13.	Respondent may:	
	(1) give oral evidence on his own behalf and	CPR 81.28(2)(a)
	(2) call witnesses.	CPR 81.28(2)(b)
14.	The court may require or permit any party or other person (other than the respondent) to give oral evidence.	CPR 81.28(3)
15.	The court may require the attendance for cross-examination of any witness.	CPR 81.28(4)

Examples of Grounds

Count 2: Particulars of Statement

On or about 15 October 2007 the First Respondent told (expert) that he was troubled by chronic fatigue.

Particulars of Falsity

This statement was false and misleading, and the First Respondent made it without an honest belief in its truth in that, when the First Respondent spoke to (the expert), he had been playing and/or was capable of playing frequent, vigorous, competitive football."

"Count 4:

Particulars of Statement: The First Respondent caused there to be made on 29 November 2007 (and verified by a statement of truth) and served on the Applicant a list of documents in which no document relating to the First Respondent' playing football was disclosed.

Particulars of Falsity: The list of documents was false in that the First Respondent had or had had in his possession documents relating to his playing football since the accident."

"Count 11: Particulars of Statement.

In his Witness Statement made on 29 October 2008 (and verified by a statement of truth) the First Respondent said "I am deeply saddened that as a result of the injuries I sustained in the accident I am no longer able to play football at the same level that I did prior to the accident. I still love football and not to be able to play as I did before is very depressing for me. I miss playing competitively dreadfully."

Particulars of Falsity

This statement was false and misleading, and the First Respondent made it without an honest belief in its truth in that, when the First Respondent made it he had been playing and/or capable of playing frequent, vigorous, competitive football.

Count 12: Particulars of Statement

In his Witness Statement made on 29 October 2008 (and verified by a statement of truth) the First Respondent gave an account of his typical activities on Saturdays and Sundays which did not include playing football on Saturdays and/or Sundays.

Particulars of Falsity

This statement was false and misleading, and the First Respondent made it without an honest belief in its truth in that, when the First Respondent made it he had frequently played football on Saturdays and/or Sundays."

"Count 15: Particulars of Statement

In the Schedule of Loss and Damage dated 9 January 2009 the First Respondent asserted or caused it to be asserted that he was a seriously disabled person with limited earning capacity who needed an extensive lifelong regime of care and support.

Particulars of Falsity

This statement was false and misleading, and the First Respondent made it without an honest belief in its truth in that, when the First Respondent made it or caused it to be made he was not so disabled and not in need of such a regime"

Application notice for permission to apply for committal: false statement in document verified by statement of truth

IN THE HIGH COURT OF JUSTICE

[Queen's Bench**]** Division

[[*location*] District Registry**]**

Claim No. […]

[*insert name*] Claimant

and

[*insert name*] Defendant

Dated [*date*]

IMPORTANT NOTICE

The Court has power to send you to prison, to fine you or seize your assets if it finds that any of the allegations made against you are true and amount to a contempt of court. **You must attend court** on the date shown on the front of this form. It is in your own interest to do so. You should bring with you any witnesses and documents which you think will help you put your side of the case. If you consider the allegations are not true you must tell the court why. If it is established that they are true, you must tell the court of any good reason why they do not amount to a contempt of court, or, if they do, why you should not be punished. If you need advice, you should show this document at once to your solicitor or go to a Citizens' Advice Bureau or similar organisation.

APPLICATION NOTICE

[*Insert name or, if a solicitor, the name of firm*].

1. I am the **[**Claimant OR Defendant OR Solicitor OR [*as the case may be*]**]**.

   [[*If solicitor*]: I represent [……]**]**

2. I am making this application in proceedings **[**between C. D. and myself OR [*, if solicitor,*] between A. B. and C. D**]**, relating to [*state the nature of the claim*], Claim Number [……].
3 I am asking the court to make an order that:

   a. permission be given to apply for an order that the Defendant be committed to prison;

   b. such further or other Order be made as may seem just for the contempt as set out below;
   c. the costs of this application be paid by the Defendant;

because the Defendant has made a false statement in a document verified by a statement of truth that statement being that (Set out all grounds).

4. I have attached a draft of the order I am applying for.
5. I wish to have this application dealt with at a hearing.

   The time estimate is [……]. The time estimate is **[**not**]** agreed by all parties.

6. The details of any fixed trial date or period are [……].
7. This hearing should be dealt with by a High Court Judge.
8. The parties to be served are [……]

   Service address (other than details of the claimant or defendant) of any party to be served.

9. I wish to rely on the attached affidavit evidence in support of my application[6].

STATEMENT OF TRUTH

[I believe OR the Applicant believes**]** that the facts stated in this section (and any continuation sheets) are true.

Signed [……]

[*applicant or applicant's solicitor or litigation friend*]

Full name [……]

Name of Applicant's solicitor's firm [……]

Position or office held [*if signing on behalf of firm or company*]

Signed [……] [*applicant or applicant's solicitor or litigation friend*]

Dated [*date*]

Position or office held [……] [*if signing on behalf of firm or company*]

Applicant's address to which documents about this application should be sent [……]

[*If applicable*] Phone no. [……]

Fax no. [……]

DX no. [……]

Ref no. [……]

E-mail address [……]

12 October 2017

Michelle Marnham

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