



Civil Justice Council response to Insurance Task Force interim report

May 2015

The CJC welcomes an initiative to combat insurance fraud, which is not always easy to detect, but is a crime, and does lead to consumers facing higher insurance premiums, and higher costs in society.

A number of the questions posed in the task force's interim report are ones which only those in the industry or with access to industry relevant data can answer, and the Council leaves answers to those better placed. Where the CJC feels qualified to offer a view we have done so.

Responses to Insurance Fraud Taskforce Interim Report Questions

Q1) What data sources should the Taskforce use when considering the scale of insurance fraud?

Q2) How does the scale of insurance fraud in the UK compare with other developed countries?

The CJC is not qualified to answer these questions.

Q3) In addition to the financial cost of fraud, what is the wider impact on consumers and society?

Insurance fraud can have a pernicious effect in creating a climate in which legitimate and reasonable claims are either viewed with suspicion or subject to more careful scrutiny, leading to administrative burdens on consumers and delays in their receiving compensation for lost or damaged goods that they have insured. This can in turn reduce confidence in the insurance industry.

Fraud also leads to consumers having access to a more limited range of insurance products, either through high levels of fraud reducing availability of products or leading to higher premiums that make certain products unaffordable for many people. In areas where insurance is compulsory, such as motor insurance, the adverse effect of this on consumers is obvious.

It should also be borne in mind that not all insurance fraud is committed by consumers. As the Financial Conduct Authority has found, there are areas in which people working in the industry can have acted fraudulently (<http://www.fca.org.uk/firms/firm-types/intermediaries/fraud>). Those experiencing

such conduct or reading media reports of cases will have their trust in the industry eroded and this could deter them from being fully and properly insured.

Q4) What particular evidence should the Taskforce take into account when determining the nature of insurance fraud?

The taskforce need to take evidence from all sides, so that evidence from – for example consumer groups, advice agencies and claimant firms is reviewed alongside that from the insurance industry, which is based on estimates and varies in different publications (although all suggest a significant sum is involved).

The need for evidence based conclusions though is accepted and it is important that all sides contribute what data they can. Although the amount of industry evidence is likely to outstrip significantly the evidence available from consumer organisations, this does not in itself indicate a clear problem as consumer bodies are not likely to collect data for this specific purpose.

It is also important to ensure the evidence base used identifies fraudulent behaviour and not, for example, simply an increased level of valid claims (even if these are being encouraged by third parties).

Q5) What trends in insurance fraud should the Taskforce be aware of?

The most visible and publicised area of activity has related to false or staged motor claims, although this has already been the focus of sustained Government reform. The CJC does not have data records to be aware of the most recent trends/statistics.

Another potential trend for the task force to consider is of the practice of pre-medical offers. If an offer to settle is made before any medical evidence has been obtained, the injury suffered by the claimant cannot be properly quantified or validated. The injured person will be offered a sum without knowing whether it is reasonable, and this could lead to the claimant under-settling their claim, and being denied the full and proper compensation that they deserve. Further, medical examinations provide important checks and balances to the process, and ensure that the injury suffered by the claimant is valid. If money is offered in the absence of medical evidence, this has the potential to create an environment of easy money, encouraging opportunistic claims.

There is also a need to examine both claimant and defendant practices. Whilst fraudulent and exaggerated personal injury claims are a serious issue, and need to be addressed, defendant behaviours and business models also need to be examined by the taskforce.

Q6) How could existing industry initiatives be used more effectively?

Q7) Is there anything that could be done to build on existing industry initiatives?

As the report makes clear, there is much greater collaboration between insurance firms that will enable better intelligence gathering and awareness of fraudulent activities. Where it is appropriate to do so, this needs to include consumer organisations and those representing claimant's solicitors, so that measures are demonstrably in the public interest as well as the commercial interest.

External scrutiny of the performance of the initiatives, for example by Parliamentary Select Committees may help to assess their effectiveness in deterring and combatting fraud. Such Committees would though need to accept that measurements of such effectiveness are not always straightforward – by its nature, the scale of fraud is not an easy concept to measure.

The 'askquepi' initiative, which is being introduced for RTA personal injury claims from 1st June 2015, only applies to claims where an injury is sustained. RTA fraud is not confined to claims for injury, so consideration should be given to how this initiative could be extended to cover all RTA damage claims.

Q8) To what extent will the government's civil litigation and costs reforms address insurance fraud? Should these reforms be expanded?

As the task force interim report relates, the Jackson and related Government reforms have contributed to measures to combat insurance fraud, most fundamentally through legislation and other measures in areas such as banning referral fees and limiting recoverable costs in no-win, no-fee claims.

However, this effect can be overstated, and the danger is that the impression is given that the reforms were designed for that purpose, when in fact the reforms were to reduce the number of claims and litigation costs in legitimate claims.

An area where the CJC would like the reforms expanded would be in wider application of fixed recoverable costs. This should reduce litigation costs and indirectly reduce incentives to commit insurance fraud.

The CJC would also like to see further evidence as to the effect of introducing Qualified One-way Costs Shifting (QOCS) in personal injury claims. This was one of the central aspects of Lord Justice Jackson's proposals for costs reform and one supported by the CJC as part of the overall package of measures. The basis for introducing QOCS was as a means of protecting legitimate claimants from the risk of adverse costs and therefore to remove the need for them to buy insurance (ATE insurance) against that risk.

To address the risk of fraudulent claims, the implementing rules included an exemption where the claimant was found to have been "fundamentally dishonest". This was a new concept in drafting terms and to date there have been only a handful of cases where the courts have had to consider its application. It also appears that many personal injury claimants continue to buy ATE insurance: the reasons for this trend, the very cost which QOCS was designed to prevent, need to be understood.

Q9) Are there any other legislative reforms or regulatory changes required to reduce third-party personal injury fraud?

The CJC would welcome further initiatives to support robust regulation of Claims Management Companies (CMCs), particularly in the way in which they engage with consumers. There is a risk that some CMCs give a quite misleading impression to consumers about when they can present a claim, without giving clear information about the benefit that such a claim will have for the CMC.

The claims management industry is subject to regulation, established in 2007, through an arms-length Ministry of Justice body: the Claims Management Regulator (CMR). The CMR has operated to date with limited powers, although it has been effective in closing down non-compliant firms or persuading them to surrender their registration.

The CMR has recently been awarded powers to fine companies, which may further assist regulation in this sector. However, this is a fast growing commercial and diversifying field that is difficult to police, and may need legislative reforms to enable the CMR to respond to practices that have an adverse effect on consumers as they develop.

CMCs are not regulated in the amount they can deduct from a consumer's compensation and there is a risk that this creates an environment in which consumers are pressurised into presenting claims which may be false, for a perceived mutual benefit to the consumer and the CMC.

In contrast, solicitors acting for consumers under Conditional Fee Agreements or Damages Based Agreements are restricted in the amount they can deduct, by caps applicable under the relevant regulations. That is not to say that solicitors are exempt from such pressures, but the CJC recommends that similar caps are considered for charges made by CMCs, so that the consumer has equivalent protection whoever is representing their interests.

Theft and misuse of personal data appears to be a growing problem and may require legislative and regulatory responses. Sale of personal data for commercial gain is an area of growing concern and one where the powers of the regulators are either inadequate or poorly enforced.

Another possible area for reform is how the regulatory bodies work together, and what their role might be in preventing fraudulent practices.

Q10) What practices by those involved in the claims process (including insurers, lawyers, CMCs and other intermediaries) should the Taskforce target?

Others are far better placed to answer this question. However, one suggested target is the passing on of data between companies without the express consent of the accident victim.

Q11) What forms of communications encourage fraudulent claims?

There is extensive advertising and direct marketing encouraging people to make claims, and the practice of speculative text and e-mail messages to people about potential or even hypothetical claims the individual may have. These are intrusive and a nuisance for most people and seem likely to encourage fraudulent claims, but we do not hold evidence on the direct effect of this on the making of fraudulent claims.

Q12) Are any changes needed to the regulation of those involved in the claims process?

See answer to question 9 above, and action to curb the sorts of activities in the answer to question 11 above are likely to be welcomed by the public. This would need to follow a review of such activities. One problem is that not all CMCs are authorised by the regulator-

There is some anecdotal evidence at least that the businesses conducting such activities may be based outside the UK. Indeed the regulation of CMCs does not even extend beyond England and Wales. Whilst recognising that regulation of such cross border activities is inherently difficult, the CJC invites the Taskforce to consider whether further measures are required. The current EU activity on a uniform standard approach to data protection regulation for instance may point the way, as long as the focus is on a uniform standard that is sufficiently high and is uniformly enforced.

Q13) How might coordinated regulatory action against the encouragement of fraudulent claims across different jurisdictions be achieved?

One aspect here would be greater collaboration across parts of the UK, as with three legal jurisdictions (and four statute making assemblies) there is potential for inconsistency, and for gaps to be exploited.

In terms of co-ordination of effort across different sectors, the task force is itself an umbrella body and could itself help forge better links, but as the problems are not restricted to one sphere or regulatory body, co-ordination and co-operation are required. Government and Parliament are well placed to encourage this.

The FCA has already committed to work with the regulators of CMCs and solicitors on the enforcement of the ban on referral fees in personal injury cases, although there is little evidence of active enforcement to date. Such cooperation between regulators is very much to be encouraged, but needs to be seen to deliver results.

Q14) How could engagement with consumers and consumer education be improved to reduce insurance fraud?

The answer to question 15 below addresses third party claims fraud but the Taskforce should also consider the problem of application fraud: that is the taking out of insurance as a means of committing a fraud. This has become increasingly common and is difficult for insurers to pick up when dealing with an individual they do not know, particularly one who may approach them through an intermediary or via internet application forms.

The recent Consumer Insurance (Representations and Disclosure) Act 2012 should have had the effect of making the questions asked on insurance proposal forms, such as disclosure of previous convictions, more targeted and with better explanations of the reason for such questions. This should have had the effect of avoiding unintentional errors or poor understanding of the need for truthful responses, but it does not appear to have deterred those more determined to paint a false picture of themselves for their own profit.

The civil law and the criminal law should both support victims of fraud insurers in dealing with such problems and the Taskforce may wish to consider the extent to which the 2012 Act has achieved this objective.

Q15) How might communications be used to discourage dishonest claims and should these communications emphasise the effect of fraud on honest policyholders?

Media coverage is increasingly critical of insurance fraud, and successful prosecutions should be proactively promoted to the media. Material appearing in the media will carry more credibility than advertising or promotional industry material.

The insurance industry and its associated trade press should consider more active engagement with national and local media and trade press to publicise case outcomes.

There is a sense, quite wrongly, that insurance fraud is a "victimless crime". The cost of such claims should be more prominently publicised, although the difficulty is that in isolation, a single reported case would probably have only a small effect. Insurers and the criminal courts might consider publicising the cost of defending civil claims and prosecuting criminal ones, alongside existing stories.

In the context specifically of fraud in motor claims, there is a case for better publicity of the police's understanding of the concept of 'Criminal Use of the Roads'; something which has been a theme in policing for a long time. This could include raising awareness of the links to money laundering and other financial offences, as well as demonstrating the impact of such offences.

Targeted communications at customers when policies are entered into and information on insurance, claim and consumer websites all have their place, although they must not be seen to deter legitimate claims.

Q16) How common is the perception that insurance fraud is a victimless crime?

There does seem to be growing awareness, based on Government and media reports, that the effects of insurance scams and fraud do result in higher premiums and costs to consumers and society. As such, we are moving on from the traditional picture of insurers having deep pockets and ordinary people not being harmed by false claims.

It may simply be that insurers are often seen as "faceless" or impersonal. The effect of fraud on individual policyholders, especially those faced with defending a fraudulent third party claim, needs to be emphasised.

Q17) Do the actions of any party involved in the underwriting or claims process encourage the perception that insurance fraud is justifiable?

Not directly perhaps, but the ubiquity of some forms of claims advertising may create a climate (as with PPI claims) where people are encouraged to explore claims, not all of which will have any justification.

Q18) What more could be done to make insurance fraud socially unacceptable?

Continued media and political commentary on successful prosecutions and the knock-on costs of insurance fraud.

The sentencing guidelines for fraud offences were only revised in 2014 and so monitoring of compliance with the guidelines should be undertaken to assess if they are working, or whether tougher penalties need to be considered.

Q19) Is there evidence that the legal system in the UK contributes to a higher level of insurance claims fraud than in other countries?

We are not in a position to assess this.

Q20) How effective are current legal deterrents at preventing insurance claims fraud?

Q21) Is there any evidence that insurance fraud is not treated with sufficient seriousness within the criminal justice system?

Again, the impact of the new sentencing guidelines needs to be evaluated.

In civil matters the burden of proof for insurance or other fraud remains high. There are good public policy reasons for this.

As indicated above, the application of QOCS generally and the new test of "fundamental dishonesty" should be monitored closely, to ensure that this retains the balance of interests needed.

Q22) What more can insurers do to challenge potential fraudsters and increase deterrents in the claims process without damaging the customer experience?

This is a question (and a challenge) for the insurance industry. The second part of this question is important, too heavy a touch could see consumers driven away.

Q23) Is fraud data being adequately used, and if not, why not?

Q25) What are the most effective ways to extend fraud data-sharing with the view of tackling insurance fraud?

Q26) Are there any groups outside of the insurance industry with whom fraud data should be more actively shared?

Q24) What impediments are there that hinder fraud data-sharing?

Q27) What are the greatest risks to privacy in fraud data-sharing and what should be done to mitigate these?

These are questions for the industry which the CJC is not placed to answer. There are inevitably data protection and privacy risks and concerns to be addressed in designing any form of data sharing or collaboration process.

Q28) Other than the four areas of interest identified, are there other important issues which the Taskforce should consider?

We are not aware of any.