
# CJC LOW VALUE PI WORKING GROUP REPORT

**October 2020**

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## 1. Introduction

1.1 On 13 October 2017, the then Lord Chancellor and Secretary of State for Justice issued a 'Call for Evidence on personal injury claims arising from package holidays and related matters'[1] Working Groups were set up within the Civil Procedure Rules Committee (CPRC) and Civil Justice Council (CJC) and the Pre-Action Protocol for Resolution of Package Travel Claims was introduced for claims made on or after 7th May 2018 with a value of less than £25,000.00.

Following the Call for Evidence (CfE) the Secretary of State asked the CJC to establish a working group ("the Group") to:

*"…consider the rules around how low value personal injury claims are handled more generally, with a view to identifying further steps to address the incentives to bring unmeritorious claims, both for gastric illness and more widely'. The CfE noted that 'in the recent past we have witnessed sharp increases in the volume of successive types of claims, whether whiplash, noise induced hearing loss, or gastric illness, substantially increasing the associated costs of these claims'. It noted that the CJC was an independent body, chaired by the Master of the Rolls, 'well placed to give independent advice on these issues."*

This report follows on from the CfE which closed 10th November 2017. The Government published its response to the "Package Holiday Claims – The Way Forward" on 12th July 2018.[2]

Submissions were received from Association of British Travel Agents (ABTA) and the Association of British Insurers (ABI). ABTA's response related specifically to package travel claims but where applicable their views have been incorporated in the body of this report.

It should be borne in mind that this report has been finalised during a period of unprecedented challenge to the country and the civil justice regime brought about by Brexit and the coronavirus.

[1] The Pre-Action Protocol is available at *https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/pre-action-protocol-for-resolution-of-package-travel-claims*

[2] Available at *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727255/Package_Travel_Claims-The_Way_Forward.pdf*

In addition, it has been prepared during a period of extensive reform and with numerous other bodies consulting on related topics:

- The Civil Liability Act 2018 and development of the new Official Injury Claim service;
- The MOJ Consultation on extending the remit of MedCo;
- Inquiry into the proposed changes to the small claims track by the Justice Committee;
- The MOJ's post implementation reviews Part 1 and 2 of LASPO;
- The MOJ's fixed fee extension consultation;
- The Courts and Tribunals (Judiciary and Functions of Staff) Act 2018;
- Courts and Tribunals (Online Procedure) Bill;
- The Judicial Executive Board's response to its consultation on the role and regulation of McKenzie Friends;
- The CJC's Rapid Consultation and report on the effect of COVID-19 on the civil justice system.

This Group is of the opinion that once the pending reforms to 'whiplash' claims have been implemented, all would benefit from a period of stability before any further substantive reforms are introduced.

1.2 The members of the Group are:

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|---|---|
| Nicola Critchley | – Chair, CJC, Partner DWF |
| Brett Dixon | – Former President APIL |
| Abi Jennings | – Association of Personal Injury Lawyers (APIL) |
| Brian Dawson | – Mediator and Deputy District Judge (DDJ) |
| DJ Richard Lumb | – District Judge |
| Shirley Denyer | – FOIL Technical Director |
| Nigel Teasdale | – FOIL, Partner DWF, Director of MedCo |
| Lee Watts | – ABI |
| Jonathan Scarsbrook | – APIL, Partner Irwin Mitchell |
| Steven Chahla | – NHS Resolutions |

The Working Group offers sincere thanks to the team at the MoJ, the Civil Justice Council and representatives from the Insurance Fraud Taskforce.

As can be seen from the list above, the Group included representatives from firms of solicitors solely representing claimants or defendants respectively. Those practitioners work within a well-established but adversarial system. It has been recognised by the Group that on some issues there are very different points of view. The Group has endeavoured, wherever possible, to reach consensus and make recommendations. Where this has not been possible the conflicting views have been summarised, so that those reading the report may appreciate factors to be taken into account if and when those issues are revisited in the future.

## 2. Terms of Reference

2.1 The terms of reference for the Group are:

To consider and recommend what further reforms could be introduced for low value (under £25k) personal injury claims, with a view to (i) resolving meritorious claims more quickly and with the costs reduced and (ii) preventing unmeritorious claims.

2.2 The Group agreed that as well as including fraudulent or dishonest claims the term "unmeritorious claims" means those cases where no solicitor, would objectively regard a claim as having any prospects of success.

## 3. Areas of Focus

3.1 This report has been prepared during an extensive period of reform and it considers both the current and the potential future impact on the conduct of low value claims.

This Group offers its opinions on those possible reforms falling within its remit. However, reference is made to other proposals known to the Group and which might be considered to be interlinked. It has been assumed that the Government will seek to implement the report's proposed reforms at or about the same time (i.e. those covered by this report and those falling outside its remit) and whilst this may be considered beneficial the Group repeats its suggestion that nothing more substantive should be done until there are in place effective rules, processes and a robust IT platform where required for those reforms already in the pipeline.

The key areas of focus are:

3.1.1 Resolving meritorious claims more quickly by reviewing the processes, evidence, ways of reducing costs and anticipating new areas of claims

activity;

3.1.2 Preventing unmeritorious claims (including those that are fraudulent) by looking at the sources of such claims; how to detect them; how to discourage them; and the various forms of enforcement action that might be taken.

These two areas are covered in Sections 4 and 5 respectively.

In addition, there are a number of generic issues (claimant support, regulation and costs shifting) that are pertinent in both contexts and are covered in Sections 6 to 8.

## 4. Resolving meritorious claims more quickly

**Key issues**

- Small claims track (SCT) – Pre-Action Protocol (PAP) and directions;
- SCT – non-costs bearing;
- Extension of fixed recoverable costs;
- Extension of MedCo;
- Claims 'Portals' including the Official Injury Claim Portal (OICP);
- Alternative Dispute Resolution (ADR);
- Technology.

### 4.1 Recommendations

Care is needed in the extension of existing systems:

4.1.1 As more cases are allocated to the SCT, LiPs will need to be given access to the OICP; a comprehensive PAP will be required for SCT claims; and there will need to be directions for their case management. All of these must be written in language that is comprehendible by a LiP.

4.1.2 If there is to be any extension of the OICP system to other types of case, it must be undertaken with great care, avoiding a 'one-size fits all' approach. This includes the setting of FRC, which needs to be properly considered in the light of adequate data. Where LiPs are using the process there must be clear guidelines, particularly for LiPs in how to handle 'mixed' claims, i.e. those for both personal injury and non-injury related damage.

4.1.3 At the same time, there must be consistency within the Portal system, so that, for example, there is full provision in all cases for a Stage 3 type adjudication. Clear guidance must be given about the availability of ADR and when and how it should be used.

4.1.4 Correspondingly, care must be taken before there is any further extension of MedCo, to ensure that it is accessible to LiPs and offers only experts who have been audited before registration and who perform to the requisite standard. As discussed in section 7.5, details of any abuse of the MedCo system should be published, along with details of the action taken. The 'randomisation' of expert selection should not apply to more specialist medical experts if MedCo is extended to higher value claims involving more complex injury.

4.1.5 All of the above can only be achieved by monitoring closely how the new SCT and OICP are operating, so that lessons can be learned and acted upon, rather than any problem areas becoming embedded in the next phase of developments. This includes capturing the data necessary to identify and address any abuse.

4.1.6 Key to all of these developments is a supporting IT system which is not only user friendly, with LiPs particularly in mind, but also sufficiently robust to function where the claims will be high-volume.

4.1.7 In due course, the Group recommends that there is a second tranche of the OICP with IT development so that the current portal and the OICP will be able to transfer information automatically between the two. This would greatly assist the consumer journey and permit the automatic collation of data. Although there is no intention of adopting the current Stage 3 process in the OICP, if that happens in the longer term an enhanced system that automatically collates the data will be necessary so that the court proceedings pack before Stage 3 is engaged) is collated from information already entered in the portal. Further development of the OICP should include a process to assist in the provision of rehabilitation.

4.1.8 The Group recommends that the Claims Portal Behaviour Committee have greater powers in order to tackle poor behaviour and that there should be much wider interaction between the Behaviour Committee and the existing regulators in order to stamp out unreasonable behaviours. The Group recommends that a Behavioural Committee be established to monitor the OICP who should report 12 months after the new rules have been introduced.

4.1.9 As an increased number of claims fall to be dealt with on the SCT, there must be an adequate number of District Judges to prevent the system becoming overloaded and claims resolution delayed. There needs to be greater investment in the court system at district judge level.

4.1.10 The Group also recommends that there is a detailed review of the OICP in April 2022, 12 months after its launch.

4.1.11 Clarity is needed on the valuation of multiple injury claims in the OICP to ensure that genuinely injured Claimants receive fair compensation.

## 4.2 Matters discussed and Considered by the Group

### 4.2.1 Small Claims Track: Pre-Action Protocol

**Consensus**

A dedicated PAP for all personal injury (PI) claims dealt with under the Small Claims Track (SCT), which is accessible to litigants in person (LiPs), should be developed. This will need to be written in language that is comprehensible to LiPs (for the proposed OICP, the Motor Insurers' Bureau (MIB) is working to a reading age of 11 years). The vast majority of whiplash claims will be dealt with through a new process due to be implemented in April 2021 (see below). However, with the proposed increase in the SCT limit for employers' liability (EL) and public liability (PL) claims to £2000 and to £5000 for Road Traffic Accidents (RTA), more cases will fall within the SCT limit.

Producing a guide is not a simple task, for example the CJC guide to bringing and defending a small claim in April 2013 ran to 31 pages and had many links embedded within it to wider rules or forms or other websites on various points.

Appropriate directions for the management of cases on the revised SCT will be required, as cases previously dealt with on the fast-track, will now fall into that jurisdiction and will require more specific directions than are currently available. For example, claims involving the proof of causation may need directions relating to the obtaining and disclosure of evidence like those needed in liability disputes.

In addition to a pre-action protocol (PAP) for the SCT, there will need to be an amendment to Part 27 and the associated practice direction.

**Matters discussed and considered by the Group where consensus not reached**

Some members of the Group express concern as to how a LiP will be able to cope with such complexity, for example, how they will deal with arguments on causation in a non-costs bearing process.

4.2.2 **Claims 'Portals'**

**Consensus**

As mentioned above, the Group agrees that as claims become more likely to be brought by LiPs, the rules for SCT claims must be written in a form that is clear and intelligible to the lay individual. This is in relation both to what is required to process a claim and how to use the on-line system. These rules should promote the prompt disclosure of all evidence relied upon and streamline and automate the process.

The Group anticipates that the OICP will follow the current portal process as far as possible, as it is acknowledged by the Group that on the whole the process works well. The Group expects there to be a Stage 3 type process similar to the current Portal albeit this would deal with both liability and quantum, with there being an oral hearing as appropriate. The Group expects the documents and key information to be uploaded in the proposed process and to have been captured in a Stage 3 type pack on issue of proceedings.

The Group notes that the OICP will be a standalone process and will not have any capability to transfer information or automatically communicate with the existing Portal. The Group recommends that, in the long term, this is an area that should be given further consideration to ensure that the processes are streamlined and data is automatically transferred between portals.

The Group is concerned that the lack of effective measures to handle credit hire, credit repair and rehabilitation could result in a claimant with a modest claim under one of those headings being forced to bring conventional SCT proceedings for a modest sum (a few hundred pounds), tying up court resources but potentially waiting around 40 weeks for a hearing to take place. It may be extremely difficult for the average LiP to comprehend which parts of his/her claim should be dealt with through the OICP and which parts cannot, and/or which parts of his claim will be handled on his behalf by a third party under

an industry agreement. The issue will need careful handling: the separation of the different elements of a claim has the potential to raise issues of res judicata.

The Group is highly concerned that the proposed rules, the Practice Direction and Pre-Action Protocol have not been published and that development and testing of OICP is taking place in isolation.

The court service cannot be neglected: more District Judges are likely to be required to handle the increased volume of claims. Even where ancillary special damages are initially dealt with outside the OICP, once the case proceeds to an assessment hearing, the court must deal with all damages.

The Group has concerns. At present and for the foreseeable future there is a nationwide shortage of District Judges coupled with a crisis in recruitment and retention. The underlying ethos of the Reform Programme for modernisation of the Courts depends upon "push down" of work from the Court of Appeal to the High Court Bench, through the Circuit Bench and thereafter to the District Bench. Even if additional District Judge resources could be provided (which is highly unlikely) an increase in small claims hearings would impose even greater burdens on this level of the judiciary.

Clarity is needed as to how a LiP will be able to value his/her damages, particularly when the claimant has a combination of tariff and non-tariff injuries. The Judicial College Guidelines (JC) are unlikely to be signposted on the portal and even if they are, the average LiP may struggle to interpret them. It is therefore important that clarity is given on the valuation of multiple injuries to ensure that generally injured claimants receive fair compensation.

**Matters discussed and considered by the Group where consensus not reached**

Claims Portal (the existing Portal)

Members of the Group have significantly differing views on if, when and how the existing portal should be extended. A summary only of matters debated within the Group is as follows:

Some members of the Group do not believe that the current Portal should be extended for other claims or made mandatory for all low value PI claims. If the scope of the Portal were to be extended to all low value claims, this would include some very complex cases,

including those involving multiple defendants, and those where there are multiple insurers for each defendant. They say there would be very little point in spending time and money further developing the Portal to accommodate all low value personal injury claims, only for 80 or 90% of those claims simply to fall out of the process immediately as they are not suitable.

Reference was made to the fact that the number of claims has reduced substantially in this area, as evidenced by CRU statistics between 2017/18 and 2011/12; 829,252 personal injury claims were recorded by the CRU in 2019/20. This is the lowest number of personal injury claims since 2008/09.

ABTA also has concerns about such an extension, as travel companies are not familiar with the Portal and staff are not trained in its use.

Some of the Group are of the view that further changes to the Portal process would be useful to streamline and shorten the timeline for resolution of claims. Defendant representatives are concerned that under the current rules, there is claims incubation and claims layering, which they say are impacting on the process, causing delay. They would welcome the Medco process allowing for defendants to be informed when a medical expert has been instructed in both the current Claims Portal and the new OICP process. Other members of the Group respond that there is no evidence of the current system being abused in this way and that there is no incentive to delay the resolution of claims.

However, two recent decisions highlight some of the issues in this area. In the first instance decision in *Tandara v EUI Limited (Central London County Court 29 July 2020)* a District Judge struck out the claimant's claim for abusing the process. By issuing in the Portal and then taking no further action, the claimant secured a stay which endured for just over four years and thereby neutered the usual effect of limitation, a defence which would otherwise be open to the defendant. The judge held that no order for costs or selective striking out of certain parts of the claim would, or could, remedy the unfairness or prejudice caused to it. That being so the claim could only be struck out in its entirety. It is not currently known if this decision will be appealed.

However, in *Cable v Liverpool Victoria Insurance Co Ltd,*[3] although the Court of Appeal agreed with the judges below that there had been an abuse of the process, it overturned the decision below striking out the claim finding that in this case there had been limited prejudice to the Defendant and that strike out was not an appropriate or proportionate sanction. There were two appropriate sanctions which would reflect the abuse of process in this case. Firstly, the claimant should pay the defendant's costs on an indemnity basis up to the day before the decision appealed and secondly, that the claimant should recover no interest on his special damages for that same period.

Some of the Group would like to see this aspect of the Portal tightened up and better controlled. One method could be through MedCo including second medical reports within its remit, with fixed costs for those reports. This would remove some of the commercial incentive to obtain further medical evidence and increase the ability to collect data and audit claims to highlight those organisations which abuse the system in this regard.

A further problem identified by the Group is that the Civil Procedure Rules do not formally provide for any further settlement proposals at Stage 3. Those representing defendants and the judiciary advocate a change to the rules so that the parties are able to reach a compromise at any stage in the Portal process. There is currently no provision for settlement once proceedings have been issued but before the assessment hearing has taken place. Others argue that currently offers are regularly made outside of the process and are accepted, dealing with this issue.

Behaviour Committee – sanctions/powers (see also section 7.4 below)

The Claims Portal Behaviour Committee (the Behaviour Committee) undertakes a valuable role and is effective when poor behaviours are highlighted to them but they do not have any powers to sanction. There was support by some of the Group for the Committee to have binding powers although it was accepted that it was difficult to see how this would work.

Claims Notification Forms (CNF)

Some members of the Group are of the opinion that very short CNFs without full information leave them in a position of difficulty in

[3] [2020] EWCA Civ 1015. Available at *https://www.bailii.org/ew/cases/EWCA/Civ/2020/1015.html*

carrying out an analysis of the claim, are likely to create delays and can cause claims to leave the Portal inappropriately. The rules are clear but in practice are insufficient to require claimants to include full details of their claim and better implementation is required.

Other members of the Group point out that this is a behavioural issue which should be addressed by the Behaviour Committee.

Some members of the Group consider that provision for claims notification (i.e. a time limit within which a defendant must be notified of a claim), which is not the same as limitation could be reviewed, to discourage unmeritorious claims. Defendants' representatives feel it would be useful for the MoJ to re-examine the proposals on notification set out in the Insurance Fraud Taskforce Report[4] and the MoJ "Reforming the Soft Tissue Injury (Whiplash) Claims Process" report[5] in that light.

Other members of the Group object to any change in the time limits. Requiring early notification of a claim would prevent access to justice – there are many reasons why a person may decide to bring a claim later on in the limitation period, and this in itself does not automatically mean that the person is anything other than entirely genuine.

They maintain that they have seen no evidence that the late notification of claims is a significant on-going problem that would warrant draconian measures. They believe that requiring early notification will act as a driver for claims management companies to hound the potential claimant to pursue their claim. They rely on the statistics from the Justice Committee report.[6]

Official Injury Claim Portal (OICP)

It is common ground that as small claims are moved increasingly on-line, any systems will need to be 'user-friendly' and intuitive with LiPs in mind.

[4] Insurance Fraud Taskforce, final report. (January 2016). Available at *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/494105/PU1817_Insurance_Fraud_Taskforce.pdf*

[5] Ministry of Justice (2016) Reforming the Soft Tissue Injury ('whiplash') Claims Process: A consultation on arrangements concerning personal injury claims in England and Wales. MoJ, London. Available at *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/581387/reforming-soft-tissue-injury-claims-process.pdf*

[6] House of Commons Justice Committee Report: Small claims limit for personal injury. Available at *https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/659/659.pdf*

In its response to the Consultation on the Future Provision of Medical Reports,[7] the Government has estimated that, in the future, some 400,000 personal injury claims will fall within the SCT, of which 22,000 will be non-soft tissue injury. It is also estimated that about one-third of claimants will not have any form of representation.

As at the date of completion of this report, the MIB was continuing its development of the supporting IT platform, but no further information had been provided about the supporting rules and pre-action protocol, or the Statutory Instrument required to introduce the new tariff of damages.

The implementation date for the new Portal has now been moved from 6 April 2020 to 6 April 2021. Although building and operation of the portal is independent of the MoJ, its completion and effective use have been developed on the basis of Government policy decisions on content and function, e.g. the Government has decided that it is not yet possible to include any form of ADR within the new process. Instead the intention is to develop 'bespoke processes to enable litigants to go to court to establish liability'.

Other issues yet to be properly addressed include the handling of claims for related damage vehicle (including credit hire), credit repair and rehabilitation.

Claims involving infants, are excluded from the increase in the SCT limit, and currently from the OICP but will be caught by the tariffs, and will now be handled within the Fast Track. It appears that this will still leave vulnerable claimants with damages of less than £1,000 without the prospect of being able to find legal representation unless an appropriate claims route can be identified.

The Government has confirmed that the new process will not apply to those who have been termed 'vulnerable road-users', e.g. cyclists, motor cyclists, children or protected parties.

With any IT system there is always a concern around it being sufficiently robust. Some members of the Group advocate that at the same time there must be a mechanism for monitoring abuse. If any system is considered to be working reasonably well, defendants in

[7] Ministry of Justice (2019) *Government Response to the Future Provision of Medical Reports in Road Traffic Accident related personal injury claims consultation.* MoJ, London. Available at *https://consult.justice.gov.uk/civil-law/future-provision-of-medical-reports/results/govt-response-future-provision-medical-reports.pdf*

particular may need to take the initiative in pointing out deficiencies, examples of abuse and how the system(s) can be improved. There needs to be greater power for those managing the platforms and monitoring behaviours so there are effective sanctions that act as a deterrent.

4.2.3 **SCT: non-costs bearing**

**Background**

The SCT rules provide that a successful claimant will recover court fees and, where applicable, limited expenses. Where the claimant fails, the defendant recovers no costs, save in exceptional circumstances.

**Consensus**

CPR 44.13 and CPR 27.14 mean that it is very unlikely that a costs order could be made that could be enforced because of the application of Qualified One-Way Costs Shifting (QOCS). As a consequence, there are limited controls to discourage undesirable behaviour by either party.

Whilst it was accepted that the court has a wide ranging case management oversight and can take various actions to deal appropriately with unreasonable behaviour, for it to have application in Part 27 there would need to be significant amendment to the rules, practice direction and for directions similar to those currently applicable in the fast track.

In a regime without costs-shifting, where costs penalties are unworkable, process is a vital tool in achieving discipline and adherence to the rules.

There needs to be a review of the SCT regime when data is available from the MoJ (post-implementation of the whiplash reforms) and if it becomes apparent that the revised SCT is being abused, for example by claims management companies encouraging small but nevertheless speculative claims or by representatives or compensators taking advantage of the claimant being unrepresented and unfamiliar with the process.

**Matters discussed and considered by the Group where consensus not reached**

Some members of the Group raise concern that the increase in the SCT limit means taking cases out of an efficient portal (the Claims Portal) which keeps costs down and allows the claimant to obtain resolution swiftly, and into a process which does not have the mechanisms or sanctions in place to discourage inefficient behaviour.

It is agreed that Part 36 is a good control of behaviours, and some members of the Group feel this could be adapted to make it suitable for a small claims track environment but it is accepted by all that this goes against the desire for the small claims track to be easily understood by litigants in person and the concept of a non-costs bearing regime.

The Group is in agreement that there needs to be clarity as to how multiple injury claims will be valued to ensure that genuinely injured claimants receive fair compensation.

4.2.4 **Extension of fixed recoverable costs (FRC)**

**Background**

After several years of consideration, the Government issued a consultation on FRC, which concluded on 6 June 2019 and the Government is to set out the way forward in due course.

In the consultation, the Government proposed that the Jackson recommendations should largely be adopted, with just one significant exception in that in place of a new Intermediate Track the Government intends to extend the Fast Track to include 'straightforward cases' worth up to £100,000.

It is proposed that there will be no change to the costs regime for cases concluded in the Claims Portal but for those claims that fall outside of the Portal due to value they would be subject to the new proposed FRC regime.

It is proposed that fixed costs will extend to all Fast Track cases, to be allocated to one of four bands:

- Band 1: Non-personal injury RTA ('bent metal') and defended debt claims;

- Band 2: RTA personal injury claims which start within the Portal;
- Band 3: RTA claims outside the protocol, EL, PL, tracked possession claims, housing disrepair and other money claims;
- Band 4: EL Disease claims other than Noise Induced Hearing Loss (NIHL), particularly complex tracked possession claims.

There are as yet no firm proposals on whether gastric illness holiday claims should be subject to the same FRC as RTA claims or PL claims.

It is proposed that there will be costs penalties under Part 36 when a defendant fails to beat a claimant's offer proposed at 35% of FRC, in place of indemnity costs. Unreasonable litigation conduct may also be penalised in costs. Those representing the claimants say such a change would not reflect the underlying purpose of indemnity costs and the penal nature of Part 36. It is appropriate that a party who through their conduct, in not accepting a reasonable offer and saving court time and expenditure, should bear the cost of the extra work they have put the party who made the reasonable offer to.

A separate regime is to be introduced for NIHL claims including a new process and fixed costs, as developed by the CJC working group on NIHL.

Clinical Negligence claims and claims in the Business and Property Courts will also be excluded. The Government plans to introduce a separate regime for fixed recoverable costs for clinical negligence claims up to £25,000 following recommendations from a Civil Justice Council Working Group. In certain Business and Property Court cases, a voluntary capped costs pilot has been running since 14 January 2019 for cases valued up to £250,000.

**Consensus**

There are concerns about some of the detail of the FRC proposals that have yet to be clarified. It is agreed that child abuse cases should not be caught within the reforms. It is also accepted that it may be appropriate for some multi-party claims to be outside of the proposed FRC regime.

**Matters discussed and considered by the Group where consensus not reached**

Some members of the Group support the FRC extension on the basis that it will bring clarity and costs control to a wider litigation process. That said, they have concerns that the data on which the costs figures are based amounts to no more than 1500 cases, which is a very small sample on which to effect such a significant change to civil justice. It is not clear what type of cases were included within the data and whether they were settled under the old proportionality rules. Some members consider that the level of FRC proposed will therefore be too high, other members say it may be too low but it is difficult to properly consider without the detail.

It is recognised that efficiencies in process and procedure are important, but some members of the Group suggest that in order for there to be fixed costs there must be a fixed process first. Some claims, and especially cases valued over £25,000 do not lend themselves to a fixed process. Imposing fixed fees without a fixed process creates an uneven playing field.

Some members of the Group are concerned that in almost every personal injury case, there will be a vulnerable claimant taking on a well-resourced insurer. This inequality will be exacerbated in a fixed cost regime, as the defendant will have more "buying power" thus automatically increasing their control and the tactical advantage that the insurance company holds over an injured and potentially vulnerable claimant. They believe that due to their complexity the following claims should be permitted to continue as they do now, outside FRC, regardless of any other reforms that are considered:

- Child abuse claims;
- Group actions – these cases involve interlinking liability and causation issues. Evidence must be shared between the parties which would not occur if these were put through a portal system on an individual claimant basis;
- Claims involving multiple defendants and multiple insurers of defendants;
- Fatal accident claims – these have additional layers of work and responsibility which must be dealt with, such as inquests

and the estate becoming the claimant. This adds cost and additional administrative requirements;

- Cases involving protected parties;
- Cases involving accidents outside of England and Wales.

Aside from the two exclusions in the above paragraph the remainder of the exclusions referenced in 4.3 were not agreed by the Group.

Some members raise concerns at unwarranted "claims incubation" (claims taking longer as more steps are taken to grow the claims in the background) and "claims layering" (the adding in of further steps in the legal process), incurring extra legal costs, translation fees and claims for further treatment including physiotherapy and psychological treatment which create unwarranted costs when adopted as costs generators.[8] On the other hand some members recognise that in a fixed cost process that involves a variety of cases with different complexity there will be additional work required. Where it is, additional disbursements may also be incurred as they are required to progress the case. Where they are disputed by the defendant it will be for the court to determine whether they have been incurred reasonably or not.

4.2.5 **Extension of MedCo**

MedCo is dealt with in more detail in section 7.4 below.

**Consensus**

If MedCo is extended there must be pre-registration, auditing and accreditation of all experts beforehand. Many of the problems experienced since MedCo went live, such as new medical reporting organisations of questionable quality registering on the system, have been largely down to this lack of rules, audit facility and accreditation.

It is also unanimously agreed that it would be helpful for there to be a prescribed format for medical reports in the OICP, to make the process easier for claimants and defendants.

[8] *https://www.litigationfutures.com/news/regional-costs-judge-slashes-medical-report-fee*
*https://www.lawgazette.co.uk/law/rule-makers-told-to-look-again-at-disbursement-costs-recovery/5104363.article*
*https://www.bailii.org/ew/cases/EWCA/Civ/2019/1780.html*
*https://www.litigationfutures.com/news/insurers-warned-claims-layering-physiotherapist-suspended-bogus-treatment*

4.2.6 **This Group's views on the use of ADR**

**Consensus**

As the OICP will not include ADR then the Group recommends that the ABI Third Party Assistance Guide should be independently reviewed to ensure it is fit for purpose in the future post reform world. It is understood that this work is already underway. There was noted, however, that not all compensators are members of the ABI.

As a suitable ADR solution has not been devised for the OICP this compounds the Group's concerns regarding a potential huge increase in small claims hearings. The Group consider that many LiPs will opt to "let the judge decide" to ensure that claims are dealt with fairly. This could have a major detrimental impact on the administration of civil justice in England and Wales.

All members of the Group are supportive of ADR, believing that litigation should be the last resort. The most extensive form of ADR for low value claims at present is the Portal, a streamlined process which keeps a significant percentage of claims away from the courts. It is accepted by the Group that this works well with many claims settling within this process without recourse to the courts.

With regard to the wider use of ADR in claims outside the portal, the Group noted that this is an important feature of the proposed online-court. Mandatory Neutral Evaluation (MNE) is also a feature of the proposed new process for lower value clinical negligence claims. The development of the Online Dispute Resolution (ODR) is likely to include an ADR stage, with work already underway under the Online-Court initiative. This will be important to LiPs.

**Matters discussed and considered by the Group where consensus not reached**

It was agreed that ADR can be a useful option to resolve disputes during the life of a claim, and parties should keep an open mind about using different methods of resolution without recourse to the courts. As it works well in the low value Portal cases some members of the Group comment that moving a large number of cases from the Portals back into the small claims track is throwing away many of these benefits that have been achieved by this streamlined process.

Some of the Group consider that the biggest barrier to the use of ADR in low value claims is that it adds an extra layer of cost where

resources are already stretched. There was some concern as to how ADR can be of use in resolving liability disputes and say that it would simply add another layer of complexity that would be difficult to understand for LiPs.

Some of the Group advise that arbitration or adjudication may have a bigger role to play in resolving low value claims, providing a binding decision outside of the court process. It would appear from the Arbitration Act 1996 that (save for the issues of jurisdiction and serious irregularities), appeals are limited to points of law and the parties can contract out of such appeals. If that is correct then disproportionate appeals could be avoided.

In any event if the legislation proved inadequate there is the potential for the Arbitration Act to be amended.[9]

One concern raised was who will pay for the ADR? Some members of the Group consider that making the claimant pay would be a bar to access to justice. While there are fee remissions for those who are unable to afford court fees, it is highly unlikely that similar provision would be available to help pay for ADR.

Some members of the Group express concern that there is not the resource available to increase the amount of ADR that takes place. Further, if there is an increase in arbitration there could be an increase in appeals to the High Court, and some of the Group say it is simply disproportionate to have small claims cases appealed to the High Court.

Other members of the Group disagree that there are insufficient resources to increase the amount of ADR that takes place. Even assuming the worst so far as numbers are concerned, the private ADR sector is in no worse position than the courts in terms of having resources to cope. It is suggested that if that were the only or main issue then the matter should be reviewed when the numbers are better known.

Some members of the Group advise that even outside of the Portal there is already a great deal of work undertaken by practitioners in both lower and higher value claims before issue to ensure that claims do not go to court unnecessarily. Figures from the Compensation Recovery Unit suggest that the vast majority of personal injury claims

[9] Arbitration Act 1996, c.23. Available at *https://www.legislation.gov.uk/ukpga/1996/23/contents*

are resolved before they reach court, with only 15% of claims registered with the CRU in 2015/16 being issued. Some members of the Group consider that if there is already a successful way of keeping most personal injury claims outside of the court, there is no sense in changing the way in which these cases are run by imposing a barrier that must be crossed by litigants should they wish to bring a claim in court.

Other members of the Group disagree that ADR can ever be "a barrier that must be crossed by litigants should they wish to bring a claim in court." Firstly, there would be nothing to prevent claimants carrying on to court if they wished and secondly and most importantly that observation implies that bringing a claim in court rather than resolving the claim is the desired outcome.

Outside of the Portal and online court systems the Group considered that ADR should be voluntary rather than mandatory, but with costs sanctions for those parties who unreasonably refuse ADR (an approach already adopted by the courts). It could be helpful to introduce a requirement that parties are expected to use ADR within a certain period (varying upon the type of claim).

The introduction of mandatory ADR would not be recommended by this Group at this stage because of the argument that ADR only works when the parties are invested in it, and choose to engage with it because it is right for the particular case at hand.

4.2.7 **The use of technology**

**Background**

<u>In court</u>

The COVID-19 crisis has resulted in a very sharp increase in the use of remote hearings, and the use of e-bundles, prepared and delivered digitally. As the Lord Chief Justice indicated to the House of Lords Constitution Committee in May, "the justice system has been involved in the biggest pilot project ever seen" and "it is important that we look carefully at what is happening and that we learn from it." The group supports this view. The Rapid Consultation undertaken by the Legal Education Foundation, on behalf of the CJC in May of this year, provides a detailed picture of the where and how remote hearings have worked over recent months.

The results of the consultation show that there would be benefits in retaining greater use of remote hearings after the pandemic is over. Of the 871 lawyers who responded to the survey on remote hearings, 71.5% described their experience as positive or very positive. There is a hierarchy in the types of claims felt to be successful. Costs hearings were more likely to be experienced positively than interlocutory hearings, and enforcement hearings, appeals and trials were less likely to be experienced positively than interlocutory hearings.

The CJC report concludes that:

"These findings suggest tentative support for reserving remote hearings for matters where the outcome is likely to be less contested, where the hearing is interlocutory in nature and for hearings where both parties are represented. "

The continued use of remote hearings will require detailed examination once the emergency is over, although some general principles are emerging:

- The current processes suffer from a lack of consistency. Although the use of Cloud Video Platform and the introduction of the HMCTS Document Upload Centre will make the situation easier, at present the use of a proliferation of systems, and individual guidance from many judges and courts makes the handling of hearings and evidence complicated and time consuming, and therefore increases costs. A more streamlined approach, with standard processes would deliver significant benefits.

- It cannot be assumed that a remote hearing is merely a court hearing on screen: the preparation and preliminary stages, and the conduct of the hearing must be considered afresh to enable claims to be handed effectively on screen. At a basic level, the respondents to the CJC consultation found remote hearings more tiring, particularly those by video conference, and more breaks may need to be factored into the listing schedule. Issues such as finding alternatives to the traditional advocates' conversation 'at the door of the court', to narrow the issues or settle the claim; the handling of documents on screen; the need for advocates and clients to communicate during the hearing; and what happens if one party's IT fails, need to be built into the process.

- Consideration needs to be given to court administration, and court and judicial IT equipment needs and IT support for remote hearings. The CJC report contains proposals for information on a remote hearing to be included in the Notice of Hearing. It can be difficult to ensure that a judge receives an e-bundle; and communication with the court can be difficult. Effective court processes, with a pro-active focus on ensuring the judge has what he or she requires to enable the hearing to go ahead, and that the parties are informed in the timely manner of the arrangements for the hearing and their obligations, is important if remote hearings are to be effective and cost efficient.

- The CJC report sounds a note of caution: whilst views were positive, the majority of respondents felt that remote hearings were worse than hearings in person overall, and less effective in facilitating participation. The findings also suggest that remote hearings may not necessarily be cheaper to participate in: travel costs and time may be saved but increased preparation may be required. With regard to e-bundles, they offer many advantages over paper versions, being more easily searched, and with reduced printing costs. However, the CJC report notes that extra work is required to prepare them. The value of remote hearings and decisions on when they are best used should be judged against the Overriding Objective, with a particular need to balance the requirement to deal with cases justly, with the apportionment of an appropriate share of the court's resources, at proportionate cost.

Away from the issue of court hearings, other areas of the litigation process should be examined with a view to reform, for example, the rules on service. It should be possible to serve automatically by email, perhaps with law firms required to register with the Law Society an email address for service. Any supporting changes will need to be considered by the CPRC.

The Group has noted the CJC report on the impact of Covid-19 measures on the Civil Justice System that the MOJ impact assessment with regards to LASPO and that in the CJC hearings which formed a

major part of the consultation, only 10.9% of hearings involved LiPs and the findings should be considered against that background.[10]

**Consensus**

The Group agrees that use of new technology in dispute resolution is inevitable and to be welcomed in order to achieve access to justice at proportionate cost, as envisaged by Lord Justice Briggs.[11] The MoJ needs to be ambitious in its long-term thinking – joined up systems have significant potential to streamline processes and cut costs whilst also improving the customer journey and access to justice. By way of example the Lord Chancellor recently announced[12] the establishment of an industry-led Government-supported LawTech Delivery Panel as fostering innovation in the legal services sector and justice system as a priority. It is envisaged the panel will focus on creating an environment which paves the way for legal innovation as well as supports the growth of a thriving LawTech sector and the use of new legal technologies.

Significant work is already underway to develop the new Claims Gateway and the Online Court. These initiatives should be supported but there is a need to utilise best in class technology when implementing change and there is the question of how the IT platform that will be developed for whiplash claims will integrate with an online court system.

At this stage, more work could be done to join up the pre-litigation Portal process with the Stage 3 court process to remove errors due to manual input, and opportunities to manipulate the system.

The Group understands that more than 117,000 cases have been processed by the Online Civil Money Claims (OCMC) pilot scheme since March 2018. There are currently pilots running for the County Court Online (CCO) and OCMC but the pilot for the OCMC has been extended to 30 November 2021 (from 30 November 2019) 'to enable

[10] *http://www.transparencyproject.org.uk/remote-justice-a-family-perspective/*
*Final report CJC 4 June 2020 v2 - 'The impact of COVID-19 measures on the civil justice system'* and *CJC Rapid Review Appendices v2 - 'The impact of COVID-19 measures on the civil justice system – Appendices'.* Report and appendices available at *https://www.judiciary.uk/announcements/civil-justice-council-report-on-the-impact-of-covid-19-on-civil-court-users-published/*

[11] Lord Justice Briggs (2016) *Civil Courts Structure Review: Final Report.* Judiciary of England and Wales, London. Available at *https://www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf*

[12] Press release available at *https://www.gov.uk/government/news/lord-chancellor-announces-new-panel-to-boost-law-tech-industry*

further IT development and testing' and that lessons can be learned from that process.

**Concerns**

The Justice Committee of the House of Commons was concerned that in increasing the SCT limit for PI cases and moving the process on-line many potential claimants, particularly the vulnerable, will be discriminated against. There is also a risk that some claimants may feel required to use a CMC (and incur their fees) if they are not IT confident.

The Government is seeking to address this issue by introducing Assisted Digital Support (ADS),[13] which users will be expected to utilise. A telephone helpline is likely to be the primary means by which this is addressed but other options are to be considered, including face to face advice for those who need it. Some members of the Group advise that it must be borne in mind, that the extent of the advice will be limited to issues of process, is not intended to give legal advice, and may well leave LiPs with unanswered queries. As claims are taken out of the hands of solicitors and progressed by LiPs, the rules and processes for SCT claims must be written in a form that is clear and intelligible to the lay individual.

This applies both to what is required to process a claim and how to use the online system.

There are tools that have long been in existence to value general damages, make basic liability decisions and resolve disputes online. The true value of these tools is open to debate, as is the extent to which they may sometimes lead to satellite litigation. Blockchain technology, in time, may help protect against fraudulent claims. All of these avenues should continue to be explored and the MoJ should take note of the available technology when considering reforms, to make sure that we are taking full advantage of the opportunities out there.

**Matters discussed and considered by the Group where consensus not reached**

Some members of the Group are mindful that technology should only be used where it can improve processes and should not impede

[13] Available at *https://www.gov.uk/service-manual/helping-people-to-use-your-service/assisted-digital-support-introduction*

access to justice by restricting people to using only technological solutions. They say dispute resolution tools can be useful to resolve small claims for faulty or unsatisfactory goods, as demonstrated by the dispute resolution functions available on eBay and Amazon. These are claims, say some members, where two parties have agreed a simple and straightforward contract and cannot be compared even to simple personal injury claims. Whereas in the eBay and Amazon disputes there are set issues and a clear formula for resolution in each case, there are far too many variables involved in the personal injury process for these claims to ever be suitable for such a platform.

Reference was made to Lord Justice Briggs findings in his interim report[14] on the civil court structure, that whilst the online court is envisaged as " for use by litigants without lawyers" he saw benefits in affordable early advice on the merits of a claim and possibly also provision for some representation at trial, with FRC for both elements (para 6.38). An online dispute resolution tool would not be a substitute for legal representation for an injured claimant against an insurer who is a repeat player in the system.

Some of the Group say that with any mention of increased use of technology in the claims process, there must also be consideration that 10% of households in Great Britain still do not have access to the internet, with 20% of those saying that they lack the skills to use it. These people will be amongst the most vulnerable in society, and any move towards greater use of technology must take them into account. Whilst the Group recognises that one of the lasting positive effects on the legal sector of the COVID-19 pandemic may be the adaptation to remote working for many within the industry, this shift has not necessarily been adopted by consumers on the same scale. Justice must be accessible to all consumers and the availability of technology and internet access will be key considerations.

5. **Preventing unmeritorious claims (particularly those that are fraudulent)**

**Key Issues**

- The mandatory disclosure of the original source of the claim;
- Establishing claimant identity;

[14] Lord Justice Briggs (2015) *Civil Courts Structure Review: Interim Report.* Judiciary of England and Wales, London. Available at *https://www.judiciary.uk/wp-content/uploads/2016/01/ccsr-interim-report-dec-15-final1.pdf*

- The signing of the Statement of Truth on the Claims Notification Form (CNF);
- A requirement for greater public awareness of insurance fraud;
- Tougher sentencing/sanctions;
- Changes to the CPR on proceedings for contempt;
- Lack of single validated data source to assist in combatting fraud;
- Qualified One Way Costs Shifting (QOCS);
- The late notification of claims.

5.1 **Recommendations**

The Group considers collation of data and education of the public to be paramount:

5.1.1 It is important that the Government establishes a single, consistent and reliable database to facilitate the identification of the types of insurance fraud, their frequency and their sources. Vast amounts of data are being collected by numerous sources from the portal, the courts, the IFB, the FCA etc. and the Group considers that there has to be an overarching body responsible for monitoring the data, publishing the same as appropriate and ensuring where possible that data sets are consistent. The Group recognises the importance of data and benefits of the same and believes that this will be even more important going forward when LiPs will be dealing with the claims themselves or having support from lawyers, CMCs, McKenzie Friends etc. so that the identity of the party's representative is also a key data field for MI.

5.1.2 Once sufficient data is available, those issues on which this Group has been divided should be revisited, so that more informed decisions can be made on matters such as identifying the source of the claim; verifying the identity of claimants and who should sign the statement of truth on a CNF.

5.1.3 The data should also be used to reconsider how best to co-ordinate the policing of fraudulent activity in this field and whether the current multi-agency approach is effective.

5.1.4 The data collated under 5.1.2 and 5.1.3 above should be used as the basis for a consultation on how best to combat fraudulent/unmeritorious claims in the future.

5.1.5 While this data is being collated and analysed, there should be a coordinated campaign to educate the public as to the true nature of insurance fraud; its cost to the general population; and the criminal and civil penalties for making or supporting a fraudulent claim. It is to be hoped that this campaign would be set against the background of the judiciary taking a hard line against fraudsters.

5.1.6 The suggested publicity campaign should be Government-led but support should be sought from other interested parties, using the ABI to agree how individual insurers should contribute to the cost.

5.1.7 The Group understands that in the OICP there will be askCUE PI checks and a verification identity check system. The Group welcomes this approach and considers that identity checks should form a key part of all types of low value claims preferably at the start of the process.

5.1.8 Consideration of a Government-led verification identity check system for all claimants in all types of low value claim.

5.2 **Background**

There was widespread debate but little consensus within the Group as to the existing level of fraud in insurance claims (specifically personal injury) and the extent to which those risks may increase as a consequence of the changes to the SCT limit and the introduction of the OICP.

The Group has considered the ABI reported statistics on fraudulent claims (for 2019) published on 7 September 2020.[15] These statistics include both personal injury and property claims.

There were 107,000 detected fraudulent claims, up 5% on 2018. The rise was mainly due to increases in motor and property scams. While the volume increased, there has been a small decrease of 2% in the value of detected claims fraud to £1.2billion – the equivalent of £ 3.3m uncovered every day. This resulted in a decrease in the average value of a fraudulent claim to £11,400, compared to £12,200 in 2018.

[15] ABI Press release (7 September 2020). Available at *https://www.abi.org.uk/news/news-articles/2020/09/detected-insurance-fraud/*

The ABI reports that "Motor insurance frauds remained the most common, up 6% in number to 58,000 on 2018, albeit their value, at £605 million, fell slightly. Around 75% of fraudulent motor claims contain a personal injury element – this may reflect some fraudulent activity ahead of the introduction of personal injury reforms in April next year."

Concern is expressed that "These statistics show the problem remains significant and the sad reality is that the frequency of these scams normally only increases in times of recession and financial hardship."[16]

The 2018 ABI report[17] explained that detected insurance fraud refers to both cases of confirmed and suspected fraud.

The ABI bases its data on suspected fraud on the following:

"Where a handler having an actual suspicion of fraud (e.g. manual fraud indicator(s), tip off, system generated "high risk" referral etc.) challenges the applicant/claimant by letter, telephone call or instruction of an investigator etc., to clarify key information, provide additional information or documentation etc. and the applicant/claimant subsequently:

- formally withdraws the application/claim (by phone, email or letter) without a credible explanation; or
- accepts (without a credible explanation) either a substantially reduced settlement offer in respect of a claim, or a substantially increased premium in respect of an application/renewal (other than in cases where there has been a careless misrepresentation); or
- fails to provide further documentation or co-operation; or
- allows all communication with the insurer to lapse despite the insurer's reasonable attempts to re-establish contact.

All other gone away claims/applications arising in the course of normal (i.e. non- exceptional) handling do not represent suspected fraud under this definition. These would include (but not necessarily be limited to):

- gone away/withdrawn claims or applications when no preceding combination of suspicion and subsequent challenge has occurred;

[16] Ben Fletcher, Director of the Insurance Fraud Bureau
[17] ABI Press release (22 August 2019). Available at *https://www.abi.org.uk/news/news-articles/2019/08/detected-insurance-frauds-in-2018/*

- gone away/withdrawn claims or applications where a "challenge" is applied to all new claims/applications of a particular class (e.g. household accidental damage) as a matter of routine;
- lapsed quotes, where no formal application for insurance cover has been made."

Some of the Group believe this overstates the number of fraudulent claims, as the ABI's definition of suspected fraud is very wide, and will capture genuine claims. They say that the number of cases where fraud is suspected far outnumbers cases where fraud has been confirmed.

### 5.2.1 The extent of fraud

**Consensus**

The Group acknowledges the significant work already done by the Government to improve the investigation of the causes of fraudulent behaviour and promote solutions to reduce the level of insurance fraud in order to lower costs and protect the interests of honest consumers. The Group has given detailed consideration to the IFT's interim and final reports published in March 2015[18] and January 2016[19] and representatives from the Working Group and the Insurance Fraud Taskforce met on 21st March 2019 to discuss the IFT's outstanding recommendations and the changing landscape since the report was published. It is acknowledged that there have been a number of developments since the IFT last reported, notably:

- The Financial Guidance and Claims Act 2018[20] – this received Royal Assent on 10 May 2018 and is coming into force in stages. Sections (27-35) in Part 2, relate to claims management services;
- The Privacy and Electronic Communications (Amendment) Regulations 2018[21] – which came into force on 17 December 2018. These give the Information Commissioner's Office (ICO)

[18] Insurance Fraud Taskforce (2015) *Insurance Fraud Taskforce: interim report*. Available at *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/413146/PU1789_Insurance_Fraud_Taskforce_interim_report_-_final.pdf*

[19] Insurance Fraud Taskforce (2016) *Insurance Fraud Taskforce: final report.* Available at *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/494105/PU1817_Insurance_Fraud_Taskforce.pdf*)

[20] Financial Guidance and Claims Act 2018, c.10. Available at *http://www.legislation.gov.uk/ukpga/2018/10/contents/enacted*

[21] *Privacy and Electronic Communications (Amendment) Regulations 2018 (SI 2018, No.1189)* Available at *https://www.legislation.gov.uk/uksi/2018/1189/made*

new powers to directly fine company directors up to £500,000 for breaches of the Privacy and Electronic Communications Regulations (PECR);

- The FCA published a new set of rules and fees applicable to all CMCs[22] from when it took over their regulation in April 2019. The rules apply not only to England and Wales but also to Scotland;

- The General Data Protection Regulations 2016, came into effect on 25 May 2018 and was implemented in the UK by the Data Protection Act 2018.[23] These will deter the illegal use of data to identify and locate potential claimants;

- The Civil Liability Act 2018[24] (CLA) (timetabled for implementation in April 2021 but will introduce a tariff-based system for whiplash injury claims arising from road traffic accidents. At the same time the small claims track limit for RTA related personal injury claims will be increased. It is also anticipated that the fixed costs regime will be subsequently be extended to claims for damages up to £100,000.

Taken together, these will restrict both the incentive to bring unmeritorious low value personal injury claims and the ability to source such claims through activities such activities as 'cold-calling' (see below).

**Matters discussed and considered by the Group where consensus not reached**

Concern is expressed by some members of the Group as to how fraudulent activity can and will be monitored within the new OICP and what steps will be taken where fraud is detected. Ideally (primarily from the perspective of compensators) the system should capture data relating, for example, to parties, dates, time of accident and speed of vehicle, to facilitate cross-referencing and verification of information.

Some members of the Group recommend that the work of the Insurance Fraud Taskforce (IFT) is continued through the Legacy

[22] Financial Conduct Authority (2018) *Claims management: how we will regulate claims management companies* (Policy Statement PS18/23). Available at *https://www.fca.org.uk/publication/policy/ps18-23.pdf*
[23] Data Protection Act 2018, c.12. Available at *http://www.legislation.gov.uk/ukpga/2018/12/contents/enacted*
[24] Civil Liability Act 2018, c.29. Available at *http://www.legislation.gov.uk/ukpga/2018/29/contents*

Committee, to deliver on the recommendations from their previous report and consider whether any further steps need to be taken in order to discourage late, exaggerated or fraudulent claims. They say that more can be done to reap benefit from the work of the IFT, whose recommendations have already been accepted by the Government. Reference is made to the IFT Legacy Committee continuing their work and that they will shortly publish a further annual report on development. It is understood that the IFT Legacy Committee will continue with widened membership and some of the group consider this to be beneficial and for its recommendations to be implemented.

Other members disagree and say that the IFT made recommendations to the Government some of which have been taken forward. One recommendation was that its own group should continue reviewing this area. They suggest that this is not a role for the Legacy Committee and that the IFB should take responsibility for monitoring behaviours within the sector.

### 5.2.2 The mandatory disclosure of the original source of the claim

**Background**

It was a recommendation of the IFT in their December 2016 report (recommendation 17) that identification of the referral source on the CNF used for the Claims Portal should be mandatory. That recommendation was partially implemented in Release 6 of the Claims Portal on 8th October 2018. However, although completion of the field is mandatory, provision of referral source is not and the claimant representative can select the "prefer not to say" option if they do not wish to provide the referral source. The majority of the 340,000 RTA claims[25] submitted via the Claims Portal between November 2018 and April 2019 did not specify the referral source, confirming that this is likely to continue as the chosen option unless changes are made to fully implement the recommendation.

**Consensus**

It is accepted by the Group that if it is found that the "prefer not to say" option is regularly being chosen for referral source this should be brought to the attention of the Government for review.

[25] Data taken from Claims Portal Executive Dashboard. Available at *https://www.claimsportal.org.uk/about/executive-dashboard/*

The new OICP will be used by LiPs and claimant representatives, unlike the current RTA portal which can only be used by professional users.[26] The Group envisage that claimants will be represented in a number of ways, including CMCs, McKenzie Friends, assisted behind-the-scenes support, legal expense insurance and formal representation by legal representatives. They believe it is important to monitor how the removal of costs recovery in personal injury motor claims up to £5,000 and EL and PL personal injury claims up to £2,000 changes the dynamics of the claims market, particularly with regard to misconduct, abuse and fraudulent claims.

**Matters discussed and considered by the Group where consensus not reached**

The majority of the Group considered that there should be no scope to "opt-out" and that provision of this information should be mandatory. Those representing the defendants and judiciary felt that this would help validate the data and provide robust statistical evidence as well as helping identify the small minority of professional enablers who are complicit in submitting and progressing fraudulent claims.

Some members of the Group propose that a sanction for non-completion of the referral source should be introduced preventing the submission of the CNF without that information.

Disclosure of the referral source will also be key to the reforms being introduced by the Civil Liability Act 2018 to help identify behaviours and trends, misconduct, abuse and fraudulent claims. Whilst the claimants' representatives maintain that the opt-out provision should remain, those representing defendants see the opt-out as an unnecessary loophole which should be closed, not least to protect the LiP. It is imperative that LiPs should be clearly identified as such and that assistance via McKenzie Friends for example is also properly identified to ensure that vulnerable claimants are protected.

Other members of the Group are not in agreement with any sanctions being imposed for non-completion of the referral source. They say that making the referral source mandatory without an opt-out clause would make commercially sensitive information available to insurers. It was accepted that the issue might be less sensitive if disclosure of the relevant data was both restricted to the IFB and its use by the IFB

[26] It is envisaged that there will be more than 400,000 claimants using the new portal.

was clearly defined. They say that the sanction proposed above that the CNF could not be submitted to the compensator without the referral source, would prevent access to justice.

### 5.2.3 Establishing claimant identity

**Background**

The Group noted the finding in the SRA's Thematic Review of Personal Injury Legal Services[27] that some claimant firms do not obtain evidence of identity at the outset of a claim, partly because personal injury work does not fall within scope of the Money Laundering Regulations 2017.[28] Those firms that do check client identity use a variety of methods, with a significant number relying upon a telephone call, a home visit, or the medical report process.

**Consensus**

The Group acknowledge that there is no equivalent of the askCUE PI service in other areas of personal injury.

The Group consider that validating the claimant's identity will have its challenges for the compensator in the new OICP where some of the claims will be brought by LiPs without a legal representative. The Group agree that an askCUE PI check must continue to be performed even when the claimant is unrepresented and that the results must be shared with the claimant. An extension of the askCUE PI service requirement to other types of claim would be beneficial as there continues to be new types of claim arising that the market has not seen before.

The Group's alternative recommendation, to address this problem for other claims types, is the Government Verification Identity Check System. Whilst it is appreciated that there is a cost implication to this, the Group anticipates that this will be a notional sum similar to the current DVLA fees. It is appreciated that in the OICP a large number of claims will not be costs bearing, but in costs bearing cases there is no reason why the identity check fee could not form part of the

[27] Solicitors Regulation Authority (2017) *Personal injury report: the quality of legal service provided in personal injury.* Available at *https://www.sra.org.uk/globalassets/documents/sra/research/personal-injury-thematic-review-full-version.pdf*

[28] *Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017* (SI2017, No.692) Available at *http://www.legislation.gov.uk/uksi/2017/692/contents*

"claimed costs" and be recovered as a disbursement at the conclusion of a successful case.

As a minimum requirement, provision should be made for medical examiners always to verify the identity of a claimant presenting for examination, by photo ID, albeit by the time this check takes place the claim is already well underway.

**Matters discussed and considered by the Group where consensus not reached**

With lower value motor cases[29] identification currently has to be carried out by the rehabilitation/medical provider in any event and some members of the Group considered that this, coupled with the party's representatives own internal identity checks is sufficient.

Identity checks provide a first line of protection against fraud. Using the askCUE PI service[30] is a requirement for claims proceeding through the current RTA low value Portal process. This provides the claimant representatives with information relating to their client held on the askCUE PI database concerning previous personal injury/industrial deafness incidents reported to insurance companies.

Some members of the Group consider that the number of potentially fraudulent claims likely to be identified by a more in-depth ID process would be small and if the onus was placed on them to conduct more robust enquiries, it should be reflected in an increase in the fixed costs applicable. Other members of the Group say that it is the responsibility of the claimant's representative to ensure their client's identity at the outset of the claim and it is not sufficient to leave the identity checks to the rehabilitation/medical provider, as is currently often the case.

### 5.2.4 The signing of the Statement of Truth on the Claims Notification Form (CNF)

**Background**

On 4 September 2019, the Law Commission expressed the view[31] that electronic signatures can be used to execute documents, including

[29] 692,000 claims were initiated via the RTA Claims Portal in 2018/19
[30] Information about the askCUE PI enquiry service is available at *http://www.askcue.co.uk/*
[31] Law Commission (2019) *Electronic execution of documents.* Law Com No 386. Available at *https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2019/09/Electronic-Execution-Report.pdf*

where there is a statutory requirement for a signature. This means that, in most cases, electronic signatures may be used as a viable alternative to handwritten ones, although as Law Commission recommendations do not make new law, confirmation of the position would be helpful.

**Consensus**

The Group agree that signing of the statement of truth will have significant consequences for claimants in the OICP and it will be crucial that they fully understand the significance of their actions. The new wording introduced in the 113th update to the CPR is to be welcomed, giving a clear indication of the potential for contempt of court in the event of a false statement. There was concern by some members of the Group as to the weight that would be attached to the statement of truth in the OICP and the need for the parties to be fully guided through the entire claims process, prompting the claimant to include all heads of claim and full details of the accident circumstances and the injuries and the defendant/compensator to provide their response. It was accepted by the Group however that there has to be a balance and that too much prompting could result in claims inflation and areas of loss being claimed that had not previously been an issue.

**Matters discussed and considered by the Group where consensus not reached**

Some members of the Group consider that it should be a mandatory requirement for the statement of truth on the CNF to be signed by the claimant rather than the claimants' representatives. Other members of the Group advise that this is unworkable in an online process and in any event, currently claimant representatives must be able to prove that they have a signed copy of the CNF on file before the CNF is submitted: paragraph 6.6 of the Pre-Action protocol on low value road traffic accidents.

5.2.5 **A requirement for greater public awareness of insurance fraud**

**Background**

The Group is in agreement that where there is proof of fraudulent behaviour, it is right and proper that the full weight of the law is used against the fraudulent party. Whilst it is noted that this is often the claimant there have been instances where defendants, medical

experts and solicitors have been fraudulent and the same penalties should apply to any party involved in fraudulent activity.

**Consensus**

The Group support more public awareness of the implications of insurance fraud, as research has shown a distinct lack of understanding of its consequences.[32] Some members of the Group felt that the IFT, ABI, and Chartered Institute of Insurers should roll-out a public communication strategy, whilst at the same time collating more information and statistics around fraudulent activity. The Group acknowledges that a considerable amount of work has already been done by these organisations along with the FCA, but that this work needs to be built on. The Group acknowledged that the publicity and support of the media regarding holiday sickness claims was extremely effective. However, the message as far as other low value claims is concerned has progressed at a much slower pace because of consumer scepticism and negativity towards insurers. Because of this a prolonged campaign by the industry is needed to change attitudes.

The Claims Portal has now been in operation for nine years and there is no transparency as to the action the Behaviour Committee has taken in that period regarding suspicious activity and unreasonable/fraudulent behaviours. The Group is in agreement that the Claims Portal should publish this data and that similar data should also be published in the future for the OICP.

The ABI recognises and supports the importance of public perception, and social media in tackling insurance fraud and are working on a number of strategies and with industry bodies to deter insurance fraud.

The Group is in favour of a campaign similar to the Government's Drink Driving Campaign making it clear that fraud is not a victimless crime and highlighting the significant adverse effects on the consumer. The Group appreciates that this will require funding but an industry wide campaign supported by the ABI and the various fraud agencies the Group believes it is best placed to take this forward. Given the potential savings in court resources, including judicial time, if fraudulent claims are discouraged, the Group anticipates that the

[32] For example, recent research conducted on behalf of ABTA found that 7 in 10 (70%) people didn't know that making a false claim for holiday sickness could result in a prison sentence in the UK or abroad. Just 2 in 5 (38%) thought people could receive a fine in the UK or abroad.

Government will contribute to this. Insurers might also be encouraged to contribute to this initiative, for example through a levy based on gross premium income from certain types of policy.

**Matters discussed and considered by the Group where consensus not reached**

There were no areas of disagreement.

5.2.6 **Tougher sanctions for fraudulent behaviour and misconduct**

**Background**

One of the problems that the Group identified with the present system is the number of organisations involved in policing the overlapping issues of cold-calling, claims farming and fraud. The FCA, the ICO and the SRA have finite resources and are dependent on information provided by third parties such as the Claims Portal Limited (through its Behaviour Committee), insurers, lawyers and the police.

**Consensus**

The Group welcomed transfer of the CMC regulation to the FCA which came into effect from 1st April 2019. The Group acknowledged that the FCA were adopting a more robust approach. The Group believes that the CMC market will adapt as part of the Civil Liability Act reforms and the passing of the August 2019 deadline on new PPI claims. Robust regulation is needed to ensure that the consumer is protected.

The Group proposes that working within the constraints of GDPR and the Data Protection Act 2018, a comprehensive database is required to capture and then share data relating to claimants, McKenzie Friends, CMCs, lawyers and expert witnesses whose conduct raise suspicions. There would need to be clear guidance as to the nature of conduct sufficient to warrant inclusion on the database, both to satisfy data protection regulations and to avoid 'flooding' the system unnecessarily.

There was agreement that more is needed to be done to target professional 'enablers' (e.g. CMCs, medical experts, solicitors, engineers) who [are suspected of] encouraging or assisting fraud, by their respective regulatory bodies, and by the police and

compensators in pursuing criminal proceedings and contempt of court actions.

The Group consider that the type of comprehensive database detailed above would assist the various agencies and organisations in identifying suspect activity early and deploying a joined-up approach which would contain costs and ensure that all relevant data is shared to support in obtaining appropriate convictions.

**Matters discussed and considered by the Group where consensus not reached**

There were no areas of disagreement.

5.2.7 **Changes to the CPR on proceedings for contempt**

**Background**

In the case of *Jet 2 Holidays v Hughes,*[33] the judge found that, although under CPR 32.14 contempt of court proceedings may be brought on the basis of false statements in a document verified by a statement of truth, the rule applied only to witness statements served after proceedings were commenced.

The Court of Appeal agreed with the judge on his interpretation of CPR 32.14 but held that the court has an inherent power to commit for contempt, expressly recognised in CPR 81. Under CPR r.81 the application for permission to commence proceedings for contempt must be brought in the Administrative Court.

The Civil Procedure Rules 113th update provided significant amendments to the Practice Directions on statements of truth together with mandatory content in statements of claim which include claims for credit hire and these rules came into effect on 6th April 2020. The Group welcome the changes which clearly convey the real and serious consequences of making a false statement and these changes should help to deter fraud.

Separately the rules on contempt are currently under consideration by a sub-committee of the CPRC that is reviewing the guidance and procedure in relation to contempt.

[33] [2019] EWCA Civ 1858. Available at *https://www.bailii.org/ew/cases/EWCA/Civ/2019/1858.html*

**Consensus**

The Group welcomes review of the CPR on contempt. It is recognised that the CPRC are able to deal with procedure, but cannot alter the substantive law of contempt, which may therefore require separate consideration.

**Matters discussed and considered by the Group where consensus not reached**

There were no areas of disagreement.

5.2.8 **Lack of single validated data source to assist in combatting fraud**

**Background**

There are a number of organisations working to tackle fraud. The insurance industry alone spends around £250m a year in tackling fraud,[34] with activity coordinated by the Insurance Fraud Bureau (IFB). The IFB acts as a central hub for sharing insurance fraud, data and intelligence, and supports the police, regulators and other law enforcement agencies in identifying fraudsters and bringing them to justice.

**Consensus**

The Group agree that there are no reliable statistics on the nature and extent of fraud in insurance claims and that such data is vitally important.

**Matters discussed and considered by the Group where consensus not reached**

Some members of the Group believe it is vital that the Government properly assesses the extent and scale of the issue before any further reforms take place. If fraudulent behaviour is to be used as a justification for further revision of the claims process, there must be clear and reliable evidence to demonstrate what the reforms are seeking to address.

Other members of the Group report the difficulties of obtaining reliable statistics on fraud, which by its very nature is covert. Any

[34] ABI Press Release, 22 August 2018. Available at *https://www.abi.org.uk/news/news-articles/2018/08/one-scam-every-minute/*

data on proven fraud, with the high burden of proof this entails, is a significant under-representation of the problem.

5.2.9 **Qualified One-Way Costs Shifting (QOCS)**

**Background**

Where a judge makes a finding at a hearing that a claim is fundamentally dishonest, QOCS will be displaced and the defendant will be able to recover its costs of defending the action. Case law is continuing to refine and define the circumstances (falling short of a finding of fraud) in which courts will disapply QOCS.

**Consensus**

Judicial consistency is required here, to avoid appeals and satellite litigation about costs. This is dealt with in more detail in section 8 below.

**Matters discussed and considered by the Group where consensus not reached**

There were no areas of disagreement.

5.2.10 **The late notification of claims**

**Consensus**

There was no agreement under this heading.

**Matters discussed and considered by the Group where consensus not reached**

There is concern by some members of the Group about the possible interrelationship between the late notification of claims and fraud. Other members of the Group do not share this view and say there is no evidence that it is a widespread problem.

## 6. Claimant Support

Key issues

- Claims management companies (CMCs)
- McKenzie Friends

## 6.1 Recommendations

6.1.1 The increase in the SCT limit and the introduction of the OICP will inevitably lead to an increase in claimants seeking assistance from CMCs. The OICP company should work with the FCA to ensure that CMCs cannot unfairly exploit a market of potentially vulnerable individuals. The OICP should include advice on the possible availability to an individual of legal expenses insurance and/or CMCs should be under an obligation to enquire about such funding before taking on a claim.

6.1.2 Charging by CMCs must be strictly controlled by the FCA to ensure that claimants are not charged unreasonable fees. However the maximum fees are set, they must reflect the fact that the claimant is not in receipt of advice or assistance from a qualified lawyer.

6.1.3 In line with the recommendation of the JEB, McKenzie Friends should not be permitted to charge fees and the Group recommends that this is referred to the CPRC to consider rules of court for McKenzie Friends and a code of conduct.

## 6.2 Consensus

### 6.2.1 The operation of CMCs in the low value personal injury market

The Group accepts that it was too early to predict what impact the GDPR and the Data Protection Act 2018 will have on the ability of CMCs to utilise data and to what extent the ICO will investigate/prosecute more cases.

Although since the introduction of greater regulation, there has been a reduction in the number of CMCs, the Group also accepts that CMCs will remain a part of the claims process.

Based on previous experience the Group anticipates that the reforms to the whiplash regime contained within the Civil Liability Act will lead to some CMCs attempting to exploit the market. The introduction of the tariff will reduce general damages for the whiplash element of a motor-related personal injury claim but still provides an opportunity to maximise general damages in the non-whiplash elements and in special damages areas such as credit hire, credit repairs, storage, recovery, rehabilitation, etc. Whilst the OICP is aimed at unrepresented claimants, the MOJ anticipates that more than two thirds of claimants who use that Portal will be represented but that still leaves a significant number of LIPs. Based on MedCo figures this

would suggest more than 150,000 claimants will be LiPs. The Group has highlighted above the importance, under a digitised process, of verifying the true identity of the claimant.

There is concern amongst the Group that the most vulnerable claimants may be at risk of exploitation in the OICP. The Group welcomes the steps that the FCA have taken so far in respect of regulation of CMCs but detection of the activities referenced above can be difficult and it will require collation and sharing of the OICP data to the various agencies and careful monitoring.

It will not always be apparent when a case first enters the OICP whether its value is within the Small Claims Track as it will often not be possible to value the claim (particularly for a LiP) until the medical report has been obtained. Working on the assumptions in the MedCo consultation that a significant number of LiPs will have legal expenses insurance (LEI) it would clearly be in those claimants' best interests to utilise the LEI policy and be represented for his claim. The Group is concerned that LiPs will not be aware of the availability of various methods of funding. The OICP needs to provide proper advice to the claimant that they may be entitled to free legal advice under an existing motor or household legal expenses insurance policy or by a credit card, bank accounts or membership of an organisation such as a Trade Union.

These problems are compounded by the fact that the new OICP does not distinguish between claims being handled by legal representatives and non-legal representatives such as CMCs.

The Group is hopeful that the FCA applying stricter and more robust regulation of the CMC sector will lead to higher standards of conduct. The OICP will see the migration of some low value RTA claims, from solicitor representation, to CMCs. The Group are concerned that this may lead to various types of adverse behaviours, such as unfair, unwarranted or excessive high-cost Damages Based Agreement (DBA); undercover "service charges", particularly for non-English speakers or those who are not tech 'savvy'; the emergence of claims 'hi-jacking' apps or services, advising clients not to use their own insurer, which is often not in their best interests; and the risk that unrepresented LiPs may be referred to CMCs as a matter of routine by the MRO/medical expert undertaking the medical examination.

**Matters discussed and considered by the Group where consensus not reached**

There were no areas of disagreement.

6.2.2 **The movement of CMCs into new markets**

**Consensus**

Following the expiry of the time limit for bringing PPI claims CMCs have expanded into other existing areas of work and new products. These include claims relating to cavity wall insulation; flight delay; holiday sickness; data protection breaches and all other aspects of personal injury work where costs will no longer be recoverable by solicitors, or where the reduced level of fees become unattractive to solicitors.

There is evidence of new companies being incorporated with a reference to "corona", "COVID" or "Corona Virus." These include seven companies whose names indicate they are CMCs. This would suggest an intention to pursue claims against the background of the COVID crisis.

The FCA needs to monitor entry of CMCs into these markets and regulate accordingly.

**Matters discussed and considered by the Group where consensus not reached**

The Group were divided as to the extent to which certain types of personal injury claim have been or may be subject to exploitation by unscrupulous CMCs. The types of case discussed included those from gastric illness holiday claims and cavity wall insulation claims (respiratory illness).

Some members of the Group perceive that large numbers of unmeritorious claims are/may be brought, whilst others in the Group consider that the unmeritorious claims were still small in number and should not be permitted to taint the larger number of genuine claims that are justifiably made.

6.2.3 **CMCs and costs**

**Consensus**

Another area that needs detailed consideration in order to avoid possible risk of exploitation of claimants is the lack of a cap on the

fees charged by CMCs in personal injury claims. The current regulations only require CMCs to provide clarity as to how their fees are calculated. At present a fee cap only applies to PPI claims and there is consensus in the Group that there should be some control of CMC fees for personal injury claims to ensure that vulnerable claimants are not exploited.

There is no requirement for CMCs to act to the same professional standard as a solicitor, and there was concern within the Group that they would be more likely to commoditise advice, use standard tick box forms etc. to deal with claims more quickly. The Group believes that the quality of advice is also likely to be much lower than if the adviser met with the potential claimant or even spoke to them on the phone. Heads of loss will be missed and the claimant will be undercompensated.

**Matters discussed and considered by the Group where consensus not reached**

Some members of the Group consider that there must be a cap and that claimant costs charged by CMCs in personal injury claims should be controlled in the same way as the costs of financial claims. Without the cap there could be exploitation of claimants and the most vulnerable would be at the most risk. Other members of the Group agree that there needs to be costs control for CMCs but propose that rather than a limit there should be transparency over the fee and what charges can be made depending on the requirements in the case.

The Group was referred to Lord Hunt's proposed amendment at the Committee Stage of the Financial Claims and Guidance Bill to extend the cap on the amount that CMCs can charge on personal injury claims and to prevent them charging their clients at all unless information had been provided on any "free alternative route" to compensation, with the claimant having an opportunity to fully consider it. Some members of the Group support this.

Other members of the Group are concerned that a "free alternative route" may not always be an appropriate substitute for proper legal advice. They point to the problems in the family court, where the help and support provided by leaflets and guides was clearly not sufficient to help claimants navigate the court process alone.

Some members are aware that whilst under the Conditional Fee Agreements Order 2013[35] these are capped at 25% of the damages for past losses that are recovered, in practice, Contingency Fee Agreements are used routinely to fund portal claims, with uncapped deductions, permitted under s.57, Solicitors Act 1974[36] as the work is defined as non-contentious. The average 'market rate' is probably between 30% and 40% - significantly higher than the 25% permitted under the CFA and the DBA regulations.[37][38]

Whatever approach is adopted, it should not be possible for a parallel system to develop where CMCs effectively carry out the work of the solicitors but at an ultimately higher cost to the consumer.

ABTA raises concerns that having a financial interest in the referral may cause lead generators and CMCs to be less than robust in ensuring that the claims referred are genuine and, in the worst cases, cause introducers to encourage exaggerated or false claims in order to benefit from the referral. They point out that it is crucial that consumers know and understand the difference between a firm of solicitors and a CMC so that they can make an informed decision.

### 6.3 McKenzie Friends

A McKenzie Friend assists a LiP at court. They do not need to be legally qualified. Currently there is only a Practice Guidance for McKenzie Friends.

**Consensus**

The Group is in agreement that to provide protection for LiPs rules of court are required to produce certainty and a framework within which McKenzie Friends can operate. The rules should set out the requirements for the appointment and court approval of the use of a McKenzie Friend.

The Group has concerns about the role that McKenzie Friends could play in the future reform programme for low value personal injury claims following an increase in McKenzie Friends who are providing paid professional services when they are unqualified, unregulated and uninsured. Solicitors and barristers have professional obligations and duties which are regulated through their professional bodies, are required to provide transparency of pricing and are obliged to purchase professional indemnity insurance to

[35] Solicitors' fees are capped at 25% of the damages for past losses that are recovered. Available at *https://www.legislation.gov.uk/ukdsi/2013/9780111533437*
[36] Solicitors Act 1974, c.47. Available at *https://www.legislation.gov.uk/ukpga/1974/47/contents*
[37] Available at: *https://uk.practicallaw.thomsonreuters.com/8-599-9865* (free to view)
[38] *https://kerryunderwood.wordpress.com/2016/04/19/contingency-fee-agreements-high-court-guidance/*

protect their clients in the event of negligence. No such requirements exist for McKenzie Friends and a LiP has no protection against unreasonable charges or negligence. The Group agrees with the recommendation of the JEB that the Practice Guidance needs to be replaced with rules of court and a code of conduct for McKenzie Friends.

Some members of the Group strongly believe that McKenzie Friends should not be allowed to develop further into an unregulated branch of the legal profession they should be properly regulated, in the absence of the above and that fee charging McKenzie friends should not be permitted at all.

Whilst the Group notes that the overwhelming response to the consultation was that there should not be a prohibition on McKenzie Friends recovering fees, they unanimously agree that there should be a prohibition on fee charging by McKenzie Friends. If charging by McKenzie Friends is permitted, there should also be a requirement that they carry a level of professional indemnity insurance commensurate with the role they undertake. Proof of such insurance should be a pre-requisite of compulsory registration with the FCA.

**Matters discussed and considered by the Group where consensus not reached**

There were no areas of disagreement.

## 7. Regulation

**Key issues**

- Financial Conduct Authority (FCA)
- Solicitors Regulation Authority (SRA)
- Claims Portal Behaviour Committee (CPBC)
- MedCo

### 7.1 Recommendations

7.1.1 There should be a blanket ban on cold-calling: that is seeking instructions to make a personal injury claim.

7.1.2 The SRA and FCA should operate a coordinated approach to ensure that there is no abuse of the ban on referral fees and to monitor abuses by CMCs.

7.1.3 MedCo should be required to publish detailed data on the frequency and nature of abuses of the system both by users and experts. This information can then be used to consider whether or not any further extension of MedCo is viable. If not already the case, this data should be shared with the MoJ and the relevant regulators.

7.1.4 As mentioned above, great care should be taken to ensure that any extension of MedCo is fit for purpose. LiPs in particular must be assisted in the selection and instruction of an appropriate expert, where the claim is not soft-tissue.

## 7.2 Financial Conduct Authority

### Consensus

The Group welcomes the transfer of regulation of CMCs to the FCA. The effectiveness of the new regime will depend upon the detail of the new FCA rules. In particular, it would be helpful if CMCs were required under the regulations to remind potential claimants that they can bring a low value claim themselves through the OICP, and that they may be able to access legal advice and representation through BTE cover included in their existing insurance policies.

The GDPR and the Data Protection Act 2018 will limit the data that CMCs may legitimately process and/or share. The limits on cold calling will further restrict the ability of CMCs to make contact with potential clients, but how effective these restrictions will depend on the ability of the ICO to detect and punish breaches both in terms of data handling and the unsolicited contact. The Group was disappointed that the Government did not take the opportunity in the Financial Guidance and Claims Bill to introduce a complete ban on cold calling for personal injury claims which the Group considers to be a tasteless and intrusive practice which exploits the most vulnerable people. Although calls can now only be made with consent, in reality it is too easy for permission to be given in error or without the implications being understood fully.

### Matters discussed and considered by the Group where consensus not reached

There were no areas of disagreement.

## 7.3 Solicitors Regulation Authority

### Consensus

In addition to its general role as supervisor of the conduct and standards of the legal profession, the SRA must work as closely as possible with the FCA to police the issue of referral fees and ensure that there is no unlawful trading of claims between solicitors, CMCs and 'claims farmers'.

The SRA's Thematic Review of the quality of service provided in personal injury claims, published in December 2017, noted that concerns had been raised about the effectiveness of the referral fee ban. Previously the SRA had published a Warning Notice in March 2016 highlighting that law firms were failing in their duties to act in accordance with the Principles and Outcomes of the SRA Code of Conduct by allowing third parties to cold-call potential clients and by entering into referral arrangements in breach of LASPO (together with other concerns around bringing personal injury claims without authority). Subsequent press reports since then on SRA fines for referral fee breaches suggest that little has changed since the Thematic Review was published.

The December 2017 report[39] noted that 78% of firms within the review had referral arrangements in place, with 48% having referral arrangements with CMCs. Of the firms that had referral arrangements for PI Claims, 46% used a marketing arrangement; 43% used a hot key arrangement, and 11% used both (page 19). The report notes that one firm was found to have breached LASPO and one firm was referred into the SRA disciplinary processes for possible breaches of LASPO. No evidence of such breaches were found at any other firms within the review.[40]

The report noted that when asked, 88% of managers at firms within the review, reported that they were aware of firms breaching the referral ban (page 21).

As the report notes, "A hot key arrangement is where a third party transfers a telephone call to a firm." Such an arrangement is within the law as "no information is provided to the firm by the third party and the client must provide all relevant details about their claim direct."

[39] Available at *https://www.sra.org.uk/globalassets/documents/sra/research/personal-injury-thematic-review-full-version.pdf*

[40] Personal Injury. The quality of legal services in the personal injury sector. SRA December 2017 page 5

**Matters discussed and considered by the Group where consensus not reached**

Hot keying is not a breach of LASPO, and is important to both claimants and to defendant insurers. However, some members of the Group are concerned that it might be exploited inappropriately by a small number of unscrupulous firms with a view to circumventing the restrictions on cold-calling and referring cases in exchange for fees. The SRA should be vigilant for such activity.

The Group note that there has been no detailed research on referral fees and breaches of LASPO since the SRA's Thematic Review in 2017, and therefore no objective evidence on changes since then. However, the 2016 Warning Notice on risk factors in personal injury claims and a Warning Notice on referral arrangements published in October 2013, were both updated by the SRA in November 2019 and are included in the list of Warning Notices on the SRA website.

The issue of hot-keying is raised in the warning notice under 'transparency', described by the SRA as "complex arrangements", with the potential to mislead clients.

Some members of the Group question the true extent of this problem and suggest that the SRA should be invited to publish data on the number of breaches of this nature; what percentage of all relevant cases those represent; and the action taken. In the light of this information, a more informed view may be taken of whether or not any rule changes are justified.

7.4 **Claims Portal Behaviour Committee**

**Consensus**

The CPBC provides guidance to users of the existing low value Claims Portals; monitors the conduct of users by reference to the user guidance provided; and responds to complaints made by users via behaviour report forms. The Group's views on the CPBC are set out in section 4.2.2 above.

**Matters discussed and considered by the Group where consensus not reached**

There were no areas of disagreement.

## 7.5 MedCo

### Background

MedCo[41] is a portal which facilitates the sourcing of medical reports in soft tissue injury claims brought under the Pre-Action Protocol for Low Value Personal injury claims in road traffic accidents. MedCo is a non-profit making organisation where the board comprises cross-industry representatives and an independent Chair.

Introduced in April 2015, MedCo was part of a package of reforms to tackle the increase in claims for compensation and the significant impact it was having on the motor insurance premiums paid by individuals, families and businesses.

All commissioners of medical reports, such as firms of solicitors, along with medical expert and MRO providers must register with MedCo. All users must also declare any financial links.

There was some criticism in the early days of MedCo as it was set up quickly without the required infrastructure behind it to support. Also, difficulties were caused by the fact that medical experts and Medical Reporting Organisations (MROs) were able to self-certify their eligibility and status as either a High Volume National Provider (tier 1) or a more regional supplier (tier 2). As a result, a significant programme of auditing was introduced to review the capability of all MROs and this resulted in a protracted period of disruption.

### Matters discussed by the Group

#### 7.5.1 Accreditation

The MedCo system of accreditation now sets minimum standards for qualification; accreditation training (occupying some 30-40 hours) and further CPD training each year.

#### 7.5.2 IT/Data

When a firm of solicitors or other instructing party requires a medical report the MedCo system searches for either an accredited direct medical expert (DME) or an audited medical reporting organisation (MRO). From the search criteria entered the system returns an offer from which the solicitor must make a selection. The offer is set by the

[41] Further information is available at *https://medco.org.uk/*

MoJ and excludes any organisation or individual medical expert that has declared a direct financial link to the instructing party.

Once a report has been produced the DME or MRO uploads anonymised case data to MedCo. The report itself is not loaded on the MedCo system. This data is then used by MedCo to monitor and ensure the quality of medical reporting. Data can be collated by an individual expert to examine their diagnosis/prognosis periods. A lot of extra resource has been created to ensure that the data can be used proactively to review an expert's performance and feed that, if necessary, into the relevant Committee to consider whether any action needs to be taken.

In addition, all users of the system are encouraged to provide feedback so that any areas of possible improvement and/or perceived non-compliance can be reviewed.

Formal auditing of medical experts has not yet been rolled out but the quality of their reports is monitored by MedCo's Expert Audit and Peer Review committee ("EAPR"). Where considered appropriate, the EAPR refers individual experts to an independent Medical Advisory Board whose members provide expert advice on the quality of an expert's reports by way of peer review.

**Consensus**

The Group is supportive of the principles of MedCo and believes that its aims of greater independence and improved quality and governance have moved the process of medical evidence in the right direction. The on-going work on accreditation and MI is to be welcomed.

The great advantage of MedCo is that where there is sufficient evidence of unacceptable behaviour, breach of MedCo's user agreement and associated rules by any User, or unacceptable quality of medical reports by a medical expert, MedCo can take appropriate action which, in serious cases, can result in the User's suspension and/or termination of their Agreement.

As of 1st July 2020, the following enforcement action has been taken against medical experts, MRO's and solicitors:

- 1,613 warning letters sent;
- 569 users suspended from MedCo Register;

- 3,040 users have been terminated from the Medco Service.[42]

Current issues with MedCo

*a) Randomisation*

The Group agrees that randomisation of medical experts restricts freedom of choice and limits best service for the claimant. Previously, solicitors used medical experts that they knew would provide an excellent service and instructed them on that basis. MedCo means that there is no longer this choice and some of the firms offering medical reporting services can be poor.

However, the Group recognise that randomisation is currently a part of the MOJ policy to re-inforce the independence surrounding the instruction process

*b) Misuse of the MedCo system.*

The SRA Thematic Review of Personal Injury Legal Services found that MedCo had contacted 25% of the firms included in the review about perceived misuse of the system. MedCo itself is not causing a problem, the issues arise with users incorrectly using the system. In the early years of MedCo there were attempts to manipulate the search process. However, Medco has taken steps to tighten up its monitoring and rules to address this. They monitor the searches made and the percentage that conclude without a selection. The Audit Committee regularly issue reminders and warning to those that exceed threshold limits and in cases where breach of the search system have been identified MedCo have and do take action. Defendants are encouraged to report incidents or multiple searches so Medco can investigate the issue.

*c) Fees and quality*

Often the fee received by the medical expert for the soft tissue injury medical reports has been set at such a level that the quality of the reports is suffering. The fee of £180 for the medical report itself may not be unreasonable but it is the amount that the medical agency deducts for their own fees before paying the medical expert the balance that is the issue. This applies across the board in personal injury claims where medical agencies are involved. The concern is that the agency may take such a high percentage that the medical

[42] Available at *https://medco.org.uk/media/1222/medco-factsheet-july-20-060720.pdf*

expert only receives a very small amount for preparing a report which can only then be viable by compromising on the quality of the report.

**Matters discussed and considered by the Group where consensus not reached**

Some members of the Group feel that in order to make the work worthwhile, experts must see a large number of people in a short period, so the time spent with each claimant is insufficient and the reports produced can be of low quality. The circumstances of the examination will ultimately depend on how much the expert is paid to undertake the examination and provide a report.

It is noted by the Group that MedCo has introduced guidelines setting out expectations about the length of time to be spent with a Claimant, the maximum number of reports that should be undertaken in a normal day and the use of questionnaires.[43]

Some members of the Group felt that the scope of MedCo should be extended to include responsibility for Supplemental Medical Reports in order to ensure that such reports are only commissioned in appropriate circumstances. This should be backed by extending fixed costs to such reports to reduce the profit incentives for organisations obtaining further reports.

7.6 **Extension of MedCo**

**Background**

The Government's response to the consultation relating to the provision of medical evidence under the new portal process, was published on 5 September 2019.

The Government proposes to extend the existing MedCo system to cover all RTA PI claims under £5,000. It is felt that this option will provide consistency for obtaining medical evidence in support of all claims irrespective of whether or not the claimant has legal representation. Additionally, for claims where there is a non-soft tissue injury (whether or not accompanied by a soft tissue injury) reports will continue to be provided by GPs/A&E consultants only. As now, these experts will be able to recommend that further, specialist evidence is obtained.

The existing fixed costs regime for medical reports will also be extended, with the fees remaining the same. Those providing medical reports to

[43] Further information available at *https://www.medco.org.uk/media/1128/medco-examination-guidelines.pdf*

unrepresented claimants must provide adequate support throughout the process.

It is recognised that whilst a case could be made for allowing some specialists to be added, such as psychologists and dentists, identifying the need for such a report could be difficult for unrepresented claimants. Moreover, the number of claims where it would be clear from the outset that such reports would be required are likely to be very few in number.

Identifying, recruiting and accrediting sufficient specialists would also be a time consuming and not likely cost-effective exercise at this stage. The Government will keep under review the possible addition of such experts to Medco, in the future, for the purpose of sourcing additional recommended reports.

The Government does not see there being a strong consumer benefit to amend the system and so does not propose to make any further changes to extend the current regime to alternative practitioners at this time, such as osteopaths and chiropractors.

**Consensus**

As will be apparent from the section below, it was not possible to reach consensus under this sub-heading.

**Matters discussed and considered by the Group where consensus not reached**

There are both pros and cons for extending MedCo and this section considers both points of view.

In a separate report ABTA advised that it is of the view that medical experts and poor-quality medical reporting is a significant problem in holiday sickness claims. The reports are often made months or even years after the illness symptoms have concluded with no contemporaneous medical intervention. The expert is asked to draw conclusions regarding likely causation based on the claimant's verbal report with no objective supporting evidence. In many cases these reports are concluded via a telephone call with no examination or verification of the identity of the claimant. In the absence of contemporaneous medical evidence ABTA state there is little substantive value in the medical report. ABTA would support a process similar to MedCo where the initial report is obtained from a registered and appropriately qualified expert with a face to face appointment. Some members of the Group question whether a face to face appointment is necessary where there

will inevitably be a lapse between the time of the illness and the date of the examination.

Most members of the Group consider that as MedCo has brought improvements to the provision of medical reports in RTA claims there is the potential in the future for its remit to be extended to a wider range of claims and potentially for reports other than medical. The principles of independence, accreditation, data collection to monitor performance, audit, and sanction are all sound. It was noted that:

- The MOJ has recognised in its Consultation response the potential to extend MedCo's remit to cover initial medical reports for all RTA related personal injury claims under £5,000.
- There are other types of claim where MedCo (or the principles behind MedCo) could be extended to add value. Whilst others in the Group agree with this in principle, they believe that any extensions should only be considered once all aspects of the existing process can be proved to be working well.

Possible extensions would then be:

- Extending MedCo's remit to all claims below £25,000 (as if the changes referred to above are implemented, we will still have a situation in claims worth between £5,000 and £25,000 where soft tissue injuries are via MedCo and non-soft tissue injuries are not)
- Second medical reports (as MedCo currently only has control over the initial medical report)
- Back by extending fixed costs to such reports
- Holiday sickness claims (as referred to by ABTA above)
- Rehabilitation in low value claims (RTA and EL/PL) where there are currently suggestions of abuses to the system that could be controlled by a MedCo type overarching body

Other members of the Group disagree, highlighting that there would be particular difficulties if MedCo was extended beyond soft tissue injury reports to more specialist areas. There are experts up and down the country who are able to provide reports on whiplash injuries. If there are only a handful of specialist experts in a particular area to begin with, the randomisation framework would simply involve the claimant having to travel unworkable distances to be seen. They say the claimant should have the freedom to

select a more specialist expert of their choice, should they need to do so. They propose that rather than a wider roll out of MedCo, there should be a system of accreditation of individual experts supported by audit by peer review, with no financial links between the expert and the parties involved. Other members of the Group agree but suggest that this is in fact a description of MedCo without randomisation and the Group is in agreement that randomisation is not necessary and, in some areas, just unworkable.

Some members feel that the scope of MedCo should be extended to include responsibility for supplementary medical reports in order to ensure such reports are only commissioned in appropriate circumstances. They propose this be backed by extending fixed costs to such reports to reduce the profit incentives for organisations obtaining further reports.

## 8. Qualified One-Way Costs Shifting (QOCS)

**Key Issues**

- Potential abuse of process
- Guidance on fundamental dishonesty
- Corresponding provision of fundamental dishonesty applicable to defendants
- Section 57 Criminal Justice and Courts Act 2015[44] (S57)
- Extension of QOCS

### 8.1 Recommendations

8.1.1 In the absence of agreement within the Group on most issues under this heading, it is recommended that the situation is actively reviewed, to see if sufficient guidance and clarification is provided by the courts.

8.1.2 The three main areas of concern are the working of QOCS where there is late discontinuance of a claim; the definition of 'fundamental dishonesty'; and the definition of 'substantial injustice'. There are strong divergent views on these issues within the Group and further time is needed to see whether the existing rules and developing case law satisfactorily resolve these or whether there will be a need for clarification through statutory provision or amendment to the rules. If

[44] Criminal Justice and Courts Act 2015, c.2. Available at *http://www.legislation.gov.uk/ukpga/2015/2/contents/enacted*

reform is anticipated, full consultation would be appropriate to fully inform decision-making.

8.2 **Potential abuse of process**

**Consensus**

There is concern among some members of the Group that as a consequence of QOCS more cases are being brought that would not have been run under the old rules, with a number only discontinuing when the listing fee becomes payable.

There is unanimity amongst the Group however that it would not improve matters if the court was required to approve a notice of discontinuance within 28 days of trial in injury claims. They do not feel this would be an effective solution but rather that it would add extra complexity, additional cost and take up court resource. It is also felt that it would be difficult for litigants in person to comprehend and follow the procedure. It is also pointed out that there would be a risk of satellite litigation if a procedure was be introduced that was different from all other claims.

**Matters discussed and considered by the Group where consensus not reached**

Those members of the Group whose firms have specialist fraud departments advise that it is common practice in cases where notices of discontinuances are filed for the solicitors acting for the claimant to come off record in order to comply with their professional obligations and duty to the court. They have significant concern that if under any proposed new system where the court was required to approve a notice of discontinuance there would be a significant number of litigants in person having to deal with these applications and that in effect these hearings would be a trial, the length of which would be significant due to the claimant representing him or herself.

An alternative approach proposed by some members of the Group is an amendment to the rules which provides for an enforceable costs order to be put in place upon discontinuance within 28 days of trial.

A further approach proposed is to introduce a pre-trial review by the trial judge following disclosure of the witness evidence in cases where fraud had been pleaded. This would be beneficial in discouraging claimants from pursuing unmeritorious claims to such a late stage.

Other members of the Group advise that these proposals would alter the deliberate balance achieved in the rules and undermine the purpose of the

QOCS regime which was introduced as a package of measures to reduce the recoverability of success fees and the after the event insurance premiums as identified by the Court of Appeal as recently as 26th February 2018.[45] It would also be a significant departure from the approach taken in the rules to all other types of litigation and risk over complication of the rules as opposed to simplification.

They feel that no amendments are necessary as the defendant already has the power to apply for a finding of fundamental dishonesty where there is late discontinuance or to force a trial by applying to set aside a notice of discontinuance under CPR 38.4 and PD 44 12.4 (c). They point out that it is open to a defendant who believes after disclosure of witness evidence that a claim is unmeritorious to make an application for summary judgment and there are well established principles supporting that. Placing an additional hurdle in the path to trial could also engage Article 6 of the European Convention on Human Rights.

It is pointed out that simply because a claimant decides to withdraw their claim does not automatically mean it is fraudulent. Reference is made to the many cases where the defendant admits liability or otherwise compromises the action at the door of the court but there is no rule or proposed rule to impose a penalty for such behaviour. Other members of the Group note that a defendant in these circumstances will usually be penalised by the normal operation of the costs' rules in non-portal/FRC cases.

### 8.3 Guidance on fundamental dishonesty

Some members of the Group feel that further guidance is needed on fundamental dishonesty, particularly in light of the likely increase in LiPs resulting from the impending reforms. There must be clear guidance on the circumstances in which fundamental dishonesty can be alleged, and litigants in person must be able to access legal advice if such allegations are made against them.

For these members, the lack of clarity in the rules is evidenced by the number of reported decisions, since a working definition of fundamental dishonesty was provided by HHJ Moloney QC in *Gosling v Hailo & Anor (Cambridge County Court 29/04/2014).* Since then there have been at least 39 reported cases on this subject. What judges have continued to wrestle with is the degree of dishonesty required for a defendant successfully to prove fundamental dishonesty, on the balance of probabilities.

[45] Corstorphine (An Infant) v Liverpool City Council [2018] EWCA Civ 270. Available at *https://www.bailii.org/ew/cases/EWCA/Civ/2018/270.html*

An example of this is *Grant v Newport City Council (Cardiff County Court 18/02/20)* where the Circuit Judge set out his view of the general principles to be applied:

'*The claimant had the burden of proving, on the balance of probabilities, negligence or breach of duty by the employer, that she suffered injuries as a result, and what those injuries were. The employer had the burden of establishing any contributory negligence or dishonesty, also on the balance of probabilities. Pursuant to S57, if it was established that the claimant was fundamentally dishonest, the court had to dismiss the primary claim unless the claimant would suffer substantial injustice. That included both the dishonest and the honest elements of the claim. Dishonesty was a subjective state of mind, but the standard by which the law determined whether a state of mind was dishonest was an objective one.'*

In this case, the claimant had dishonestly presented a claim in which she exaggerated the extent of her ongoing symptoms and failed to disclose post-accident earnings. Her purpose was to create an impression that she was more disabled than she was, thereby increasing the value of her claim. The dishonesty was fundamental to the claim and there was no suggestion that there would be any injustice in applying S57. The claimant's loss of her entitlement to honest damages, which would have totalled some £83,500, was a consequence of her dishonesty. Thus, the claim would be dismissed in its entirety.

The most recent example of the confusion which judges seemingly face is *Pegg v Webb & Anor.*[46] The judge at first instance rejected the defendants' case that the claimant had been fundamentally dishonest in that the claim was bogus and a collision between vehicles had never happened and, in any event, the value of the claim was exaggerated to the extent that it was also fundamentally dishonest.

The judge found that the accident had occurred and was genuine but nevertheless he dismissed the claim for damages. However, he did not make a finding of fundamental dishonesty.

The defendants successfully appealed. There were a number of factors which pointed strongly, if not inexorably, to the conclusion that the claimant had been dishonest in his presentation of his injuries to the expert instructed and also to the court, but which the judge failed to deal with, either adequately or, in some cases, at all. No judge could reasonably have failed to conclude that the claim for damages as presented by the claimant was a fundamentally

[46] [2020] EWHC 2095 (QB). Available at *https://www.bailii.org/ew/cases/EWHC/QB/2020/2095.html*

dishonest one, perpetrated by fundamentally dishonest accounts to the only medical expert and in the various court documents.

There is concern by some that unrepresented litigants may be wrongly faced with an allegation of fundamental dishonesty, for example when they have mistakenly described a "neck injury" in one section and "a neck and back injury" in another, and that this would scare off genuine claimants from making a claim. During the progression of a case inappropriate allegations can be raised but solicitors are equipped to deal with them. An inexperienced litigant in person faced with a letter accusing them of fraud, threatening a fine or possibly even imprisonment, is likely to decide to simply drop the claim.

It is suggested that to assist with the prevention of unmeritorious claims, defendants should be required to plead fundamental dishonesty at the earliest opportunity. They consider that there should be a general requirement applicable to all claims, enshrined in CPR Part 44.16, that as soon as the defendant is in a position to put forward an argument for fundamental dishonesty, they must tell the other party. This will save court time and resources.

Other members of the Group believe that the fundamental dishonesty provisions, under both Section 57 of the Criminal Justice and Courts Act 2015 and in creating an exception to QOCS protection, have bedded down and are working well. They say that it is important to remember that Section 57 only becomes an issue in a very small number of cases. It is accepted that the vast majority of claims are genuine, and treated as such. Where there are allegations that the entire claim is bogus, fraud will be alleged. The statutory principle of fundamental dishonesty will be invoked where it is accepted that there has been an accident but one or more aspects of the claim has been manufactured or exaggerated.

It should be remembered that Section 57 was introduced to address the problem highlighted in *Summers v Fairclough Homes*[47] in 2012, in which the Supreme Court confirmed the courts' ability to strike out a "fundamentally dishonest" claim but stressed that the power should only be used in exceptional circumstances. A ten-fold exaggeration in the value of the claim in *Summers* was held not to be exceptional. Section 57 was introduced to enable the courts to strike out any claim where that has been fundamental dishonesty – the only tool available to counter gross exaggeration of the injury or the loss.

[47] [2012] UKSC 26. Available at *https://www.bailii.org/uk/cases/UKSC/2012/26.html*

Little statutory guidance was provided on the meaning of fundamental dishonesty. Lord Kerr, speaking at the 2013 IFIG Conference took the view that *"You will know it when you see it, but it is impossible to adequately describe it or to write it down. It is therefore a concept that will only be determined through precedent; in reality either the Court of Appeal or Supreme Court".* In fact, a body of case law has built up which gives an appropriate steer to both litigants and the judiciary on what is meant by the term. The definition of Dishonesty was set out by the Supreme Court in *Ivey v Genting Casinos UK Ltd*[48] in 2017, but otherwise there has been no recourse to the Court of Appeal or to the Supreme Court, suggesting that the principles are being applied appropriately in the courts below. (Those members of the Group calling for greater clarification consider the reason why no cases have reached the Court of Appeal or Supreme Court is because those accused of dishonesty are unable to secure representation to challenge the allegations.) As indicated above, HHJ Moloney QC provided a working definition of 'fundamental' in *Gosling v Hailo & Anor* in 2014, approved in *Howlett & Anor v Davies & Anor*[49] in 2017. Further guidance on the meaning of 'fundamental' was provided in *London Organising Committee of the Olympic and Paralympic Games (in liquidation) v Sinfield,*[50] in 2018.

In assessing the extent to which the principle has been developed and applied by the courts, some members of the Group point to the fact that they cannot identify a finding of fundamental dishonesty which has been appealed by a claimant. Appeals by the defendant are rare but do arise, suggesting that judges are applying the rules in a satisfactory manner, and if problems arise they concern decisions which err in favour of the claimant, not the defendant.

In addition to *Pegg v Webb* mentioned above, cases in which a finding of fundamental dishonesty has been made were referenced by some of the Group. The cases, footnoted below, include:

- *Creech v Apple Security Group Ltd & Ors*[51]
- *Haider v DSM Demolition Ltd*[52]
- *Molodi v Cambridge Vibration Maintenance Service & Anor*[53]

[48] [2017] UKSC 67. Available at *https://www.bailii.org/uk/cases/UKSC/2017/67.html*
[49] [2017] EWCA Civ 1696. Available at *https://www.bailii.org/ew/cases/EWCA/Civ/2017/1696.html*
[50] [2018] EWHC 51 (QB). Available at *https://www.bailii.org/ew/cases/EWHC/QB/2018/51.html*
[51] County Court (Telford), 25 March 2015. Claimant said to have fallen over mats, judge preferred evidence of three other witnesses and found the mats were not there.
[52] [2019] EWHC 2712. Available at *https://www.bailii.org/ew/cases/EWHC/QB/2019/2712.html*
[53] [2018] EWHC 1288 (QB). Available at *https://www.bailii.org/ew/cases/EWHC/QB/2018/1288.html*

Cases in which an allegation of fundamental dishonesty was rejected make clear that the courts set the bar reasonably high, and any fears that, for example, an inconsistent description of an injury will result in an allegation of fundamental dishonesty are groundless:

- *Wright v Satellite Information Services*[54]
- *Smith v Ashwell Maintenance Limited*[55]
- *Richards & Anor v Morris*[56]

With regard to the treatment of LIPs, the MIB has made clear that OICP MI will be captured, with any insurer seen to be denying liability excessively likely to attract the attention of the FCA. Any solicitor involvement in such behaviour would be dealt with by the SRA as a matter of professional conduct.

It is accepted that mere withdrawal of a claim does not automatically mean it is fraudulent. Similarly, a defendant deciding to settle a claim does not automatically mean that the defence was without merit or advanced in bad faith.

Fundamental dishonesty cases are inevitably fact specific. There needs to be judicial discretion in applying the objective tests to detailed and varied facts. The flexibility of the statutory provision is a strength, in identifying dishonest behaviour in many different circumstances.

On the issue of early pleading of fundamental dishonesty, some members of the Group advise that evidence often only comes to light during the course of the trial when the claimant gives oral evidence, so there will be a large number of cases where the point cannot be pleaded in advance. They refer to the Court of Appeal decision in *Howlett*[57] which states that there is nothing that prevents in such circumstances a defendant raising any issue of dishonesty at the trial, or a judge making such a finding. What was held to be important was the ability of the party or witness accused of dishonesty to have a fair opportunity of responding to the allegation.

Whilst it is noted that some members of the group are seeking greater clarification of the principle and definition of fundamental dishonesty and when it can be used, some within the group strongly oppose any change.

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[54] [2018] EWHC 812 (QB). Available at *https://www.bailii.org/ew/cases/EWHC/QB/2018/812.html*
[55] County Court (Leicester), 23 January 2019. Obvious contradictions in the claimant's evidence. Objective medical testing revealed exaggeration of injury.
[56] [2018] EWHC 1289 (QB). Available at *https://www.bailii.org/ew/cases/EWHC/QB/2018/1289.html*
[57] See note 49 above.

They argue that the statutory provision provides a disincentive and a remedy for fraudulent behaviour which cannot be addressed by other means, and note that no call for greater clarification has come from the judiciary. It would be inappropriate to tamper with a statutory principle which was a considerable time in the making and subject to full parliamentary scrutiny prior to introduction, without strong evidence indicating it is not working as intended.

### 8.4 Corresponding provision of fundamental dishonesty applicable to defendants

Some members of the Group consider that there should be a corresponding provision applicable to defendants who are fundamentally dishonest in the defence of claims. This provision should allow for the whole defence to be struck out, should the defendant be found to have been fundamentally dishonest in some part of it. This should include instances where for example the defendant in an EL claim, claims that a cleaning regime exists but it does not, produces correspondence which the defence says was sent but which the claimants can prove was either not sent or that the version sent differs substantially from the version produced at court. Any examples of poor behaviour should carry consequences.

Other members of the Group agree that those who act dishonesty should expect sanctions under the existing rules. However, the issue of extending the more recent procedures to tackle fraud was explored during the debates on the Criminal Justice and Courts Bill, when amendments were put forward to extend the concept of fundamental dishonesty to defendants as well as claimants and at the Committee Stage in the Lords the then Justice Minister Lord Faulks rejected that argument.

Some members advise that it was made clear in that rejection that there were other measures such as strike out, adverse costs, contempt or an action in fraud. Such measures though are at the discretion of the judge and must be actively sought, which is very different to the measures in s57 which a judge is required to apply. If that approach is thought to have merit it should be applied equally. It is worth noting that the Supreme Court at paragraphs 95 of *Versloot Dredging v HDI Gerling*[58] noted that the powers in s57 went further than the court was able to, yet were consistent with the courts approach to fraud being dealt with when found. That principle should be applied to proven fraud in whatever form it is found and from whichever party.

[58] [2016] UKSC 45. Available at *https://www.bailii.org/uk/cases/UKSC/2016/45.html*

8.5 **Section 57 Criminal Justice and Courts Act (S57)**

Some members of the Group consider that guidance was required on the term "substantial injustice" included within s57.

S57 provides that the entirety of the claimant's claim must be dismissed if they have been found to be fundamentally dishonest, except where the claimant would suffer "substantial injustice" if it were dismissed. Some of the Group argue that this discretion must be interpreted in such a way to allow for the judiciary to ensure that harsh sanctions do not deny justice to genuine claimants, particularly where the same test for fundamental dishonesty has been adopted in s57 cases as for fundamental dishonesty under CPR 44.16 QOCS.

In the former a claimant has all genuine elements of a claim dismissed as well as being liable for the defendant's costs and in the latter a claimant's claim has failed, likely due to the fundamental dishonesty. The substantial injustice provision was introduced by Parliament to permit the court to do individual justice in cases. Claimant solicitors also say that in serious cases it would mean that the burden of dealing with the care needed by the claimant would then fall on to the state via the NHS and local authorities instead of the wrongdoer and their insurance company that had taken a premium to cover the risk of meeting such awards.

Other members of the Group say that guidance would be provided through decisions in the courts, similar to what has been achieved via fundamental dishonesty decisions. They noted that the issue had been considered in the Lords debate at Report Stage of the Criminal Justice and Courts Bill when amendments to the judicial discretion were not pursued. Lord Faulks, speaking for the Government indicated that in the Government's view "judges will be able to work with these provisions", which has proved to be the case.

8.6 **Extension of QOCS**

As part of the MoJ's post-implementation review of Part 2 of LASPO, questions were raised as to whether QOCS should be extended to other areas of litigation. Claimant representatives argue that QOCS should be extended to a range of other claims, including actions against the police and other public authorities; discrimination cases under the Equality Act 2010; human rights cases; housing disrepair; professional negligence claims (particularly those arising from negligence in a personal injury which was itself subject to QOCS); judicial review; and private nuisance. Others opposed the extension of QOCS.

The Government is still considering whether to extend QOCS and, the Group notes, may decide on an extension of QOCS to other areas of litigation.