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Road traffic accidents: case law update (2020)
29th June 2020

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Road traffic accidents: case law update (2020)

The law as stated during this webinar is up to date as of **24th June 2020**



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Fundamental dishonesty
The law

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Qualified one-way costs shifting (QOCS)

- CPR 45.16(1):
 - *“Orders for costs made against the claimant may be enforced to the full extent of such orders with the permission of the court where the claim is found on balance of probabilities to be fundamentally dishonest.”*

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s. 57 Criminal Justice and Courts Act 2015

- (1) This section applies where, in proceedings on a claim for damages in respect of personal injury (“the primary claim”)—
- (a) the court finds that the claimant is entitled to damages in respect of the claim, but
 - (b) on an application by the defendant for the dismissal of the claim under this section, the court is satisfied on the balance of probabilities that the claimant has been fundamentally dishonest in relation to the primary claim or a related claim.
- (2) The court must dismiss the primary claim, unless it is satisfied that the claimant would suffer substantial injustice if the claim were dismissed.
- (3) The duty under subsection (2) includes the dismissal of any element of the primary claim in respect of which the claimant has not been dishonest.

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s. 57 Criminal Justice and Courts Act 2015

(4) The court's order dismissing the claim must record the amount of damages that the court would have awarded to the claimant in respect of the primary claim but for the dismissal of the claim.

(5) When assessing costs in the proceedings, a court which dismisses a claim under this section must deduct the amount recorded in accordance with subsection (4) from the amount which it would otherwise order the claimant to pay in respect of costs incurred by the defendant.

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What is dishonesty?

- **Ivey v Genting Casinos [2017] UKSC 67**
- *“When dishonesty was in question, the fact-finding tribunal had to first ascertain, subjectively, the actual state of the individual's knowledge or belief as to the facts. The reasonableness of that belief was a matter of evidence going to whether they had held the belief, but it was not an additional requirement that the belief had to be reasonable; the question was whether it was genuinely held. When the state of mind was established, the question whether the conduct was honest or dishonest was to be determined by applying the objective standards of ordinary decent people. There was no requirement that the defendant must appreciate that the conduct was dishonest by those standards.”*
- Two stages:
 - First, what did the person believe?
 - Second, given that belief, would ordinary decent people consider the conduct dishonest?

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When is it fundamental?

- **LOCOG v Sinfield [2018] EWHC 51 (QB):**
- Dishonesty is fundamental if it *“...had substantially affected the presentation of his case, in respect of either liability or quantum, in a way which potentially adversely affected the defendant in a significant way, judged in the context of the particular facts and circumstances of the litigation.”*

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Does the Defendant need to plead it?

- Essentially, no.
- Howlett v Davies [2017] EWCA Civ 1696:**
- *“The key question in such a case would be whether the claimant had been given adequate warning of, and a proper opportunity to deal with, the possibility of such a conclusion and the matters leading the judge to it rather than whether the insurer had positively alleged fraud in its defence.”*
 - *“First, where a witness’ honesty is to be challenged, it will always be best if that is explicitly put to the witness. There can then be no doubt that honesty is in issue. But what ultimately matters is that the witness has had fair notice of a challenge to his or her honesty and an opportunity to deal with it. It may be that in a particular context a cross-examination which does not use the words “dishonest” or “lying” will give a witness fair warning. That will be a matter for the trial judge to decide. Secondly, the fact that a party has not alleged fraud in his pleading may not preclude him from suggesting to a witness in cross-examination that he is lying. That must, in fact, be a common occurrence.”*

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How hard is it to prove FD?

- Varies strongly by judge.
- But consider **Molodi v Cambridge Vibration Maintenance Service [2018] EWHC 1288 (QB)**:
 - An appeal against a FINDING OF FACT by a circuit judge that a claimant was not fundamentally dishonest.
 - APPEAL ALLOWED.
 - The circuit judge had taken a “*far too benevolent*” approach.
 - The claimant’s evidence was “*demonstrably inconsistent, unreliable and untruthful*”.
 - He had lied about the number of previous accidents he had been involved in, and sought to claim £1300 for a loss he knew to be £400.

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Evidence of FD

Common points in RTAs

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Consistency!

- Medical records:
 - A&E, GP or physiotherapy attendance, in good time after the accident, with a consistent explanation?
 - Attendances for other complaints with no reference to accident?
- Expert reports:
 - Consistent account of accident and symptoms?
- Insurer communications:
 - Accident report forms?
 - Calls to defendant insurer?
- Claimant's past history?
- Low-velocity impact (LVI) allegations.

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More overt frauds

- Phantom passengers
- Staged accidents
- Collaboration between claimant and defendant

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Claimant-specific considerations

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Explain! Explain! Explain!

- Set out in great detail the terrible consequences of an FD finding.
- Do this to EVERY SINGLE CLIENT.
- Do it AT THE OUTSET.
- Explain that you tell this to every client, you aren't singling anyone out.
- Then take a very careful look at the evidence.

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Assess the evidence

- Obtain and go through all relevant documents in detail.
- The problem, of course, is the fixed-costs regime.
- You may not have the time available to do this.
- At the very least, do it if the defendant raises an allegation or 'serious concern' or if your own instincts say there's a problem.

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Consequences

- Once FD is a serious issue, it can be very hard for a claimant to escape it.
- Discontinuing often makes matters worse.
- The defendant can apply to reinstate the claim and have FD tried as a separate issue, as in **Rouse v Aviva Insurance (15/1/16, CC)** or **Thompson v Go North East (30/8/16, CC)**.
- This can even lead to a full trial on the evidence, only with no chance of the claimant winning the case, and with the serious disadvantage that he has already accepted he cannot win.
- Defendants may make 'drop hands' offers.
- Sometimes defendants raise weak FD allegations to encourage a nervous claimant to take a 'drop hands' offer.
- Remember the final decision on any settlement is the client's.
- Remember your own professional obligations.

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Defendant-specific considerations

Hand the case over to a specialist team.

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Starting with the Basics

Pleadings

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Pleadings

- Acting for C? Then are you suing D in their name or are you suing the insurer?
 - Benefit of suing the insurer (pursuant to the Reg.3 of the European Communities (Rights against Insurers) Regulations 2002) is you don't have to track down D and make sure you have their current address for service
 - But if insurer is not indemnifying insured then the Regulations won't work as the insurer *'shall be directly liable to the entitled party to the extent that he is liable to the insured person'* (Reg.3(2)) meaning that if the insurer has withdrawn indemnity they have no liability to their insured and thus no liability to C
 - Then you will need to sue D in their name as under S.151 of The Road Traffic Act 1988 the insurer has a responsibility to satisfy any judgement against their insured
 - If any concerns about indemnity sue both D and insurer!
- If acting for Defendant have you taken instructions on a counter claim?
- Keep pleadings short and to the point but they must make sense; if using an old template double check all the allegations actually fit the facts of your case.

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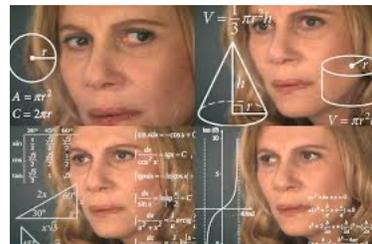
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Schedules

Common mistakes made by Cs:

- no working out shown for how care and assistance or loss of earnings claims have been calculated
 - means D can't respond properly/you can't negotiate
 - including a claim for miscellaneous expenses
 - almost never recovered!
 - take careful instructions- it looks bad for your C if they are asked questions in the witness box they can't answer
 - check, re-check and check your figures again!
- Common mistakes by Ds:

- not showing working out (same goes)
- making zero concessions
- check, re-check and check your figures again!



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Evidence



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Witness Statements - the most important evidence in a RTA trial

- Should be in witness's own words as much as possible. (e.g. avoid using nearside/offside if client is not familiar with use of those terms).
- use short paragraphs
- attach photographs
- Send opposing side's statements to your witness soon after exchange; they should see them before the day of trial!
- Were there any witnesses? Even a passenger's evidence can be helpful don't automatically dismiss it because not independent.
- Is the evidence contemporaneous? If not can you attach an earlier statement e.g. a statement made to insurer before proceedings?
 - also useful to check with insurer client if they have one from the other side- could be helpful for cross examination

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Witness Statement recent CPR changes

- Is English your client's first language? If not check it has been authenticated in the correct way

PD 31 para 18.1

"The witness statement must, if practicable, be in the intended witness's own words and must in any event be drafted in their own language, the statement should be expressed in the first person..."

PD32 para 23.2

"Where a witness statement is in a foreign language:

- (a) the party wishing to rely on it must—*
 - (i) have it translated; and*
 - (ii) file the foreign language witness statement with the court; and*
- (b) the translator must sign the original statement and must certify that the translation is accurate."*

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Witness Statement recent CPR changes cont.

PD32 Para 20.2 New Statement of Truth! (Have you changed your templates?):

"[I believe][the (claimant or as may be) believes] that the facts stated in this [name document being verified] are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth."



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Photographs - the second most important evidence in a RTA trial!

A special note about photographs



- Clients often turn up with photos/video evidence not previously served so check your instructions- helpful to send them with your client's witness statement for signing
- photographs and video footage of the locus/scene are so helpful in RTA cases but never printed clearly enough; print them landscape to fit the whole page and in colour
- if using Google pics make sure you have got the correct location- ask the other side to confirm they agree with the locus
- video footage- if unusual location or if google photos not helpful then your client could take photos and also record video (with assistance) of the accident location
- if client didn't take any photographs have you checked with the insurer whether the repair garage took any- often they do but don't forward if no claim for outlay

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Bundles

↓ Order them and avoid repetition. Suggested order

- PICourt Orders including Disclosure Lists
- Headings (PoC, Defence, Reply, SoL, CSOL)
- C's statements including any colour photographs referred to
- D's statements including any colour photographs referred to
- Medical Evidence
- Locus Report and/or Google Images- print them in colour and landscape to fill the page
- Engineering evidence for C with colour photographs
- C's evidence of Special Damages
- D's Engineering evidence with colour photographs
- any other evidence (eg police report, insurance statements)
- costs schedule (unless they refer to Part 36 Offers)
- useful correspondence (e.g. have specials been agreed in part or in full)



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Bundles Continued...

✓ What to Include...

- Index, case summary, paginate (not by hand) and OCR (Optical Character Recognition)
- send one to your client (and two to the Court)

✗ What not to include:

- Allocation questionnaires (almost never useful)
- applications which have already been determined (include the Order but not the application)
- reams of medical records (often just the relevant entries will suffice)
- Part 36 Offers(!)

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Negotiations

Pre-trial



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Negotiations

- Evaluate your own client's evidence on liability:
 - are they familiar with the road or were they following a sat nav/looking for road signs
 - do they use any of the classic lines e.g. "came out of nowhere" or "split second"
 - does the damage actually fit with their version or does it fit with either version?
 - were they in the correct lane for their exit (off a roundabout) or turn?
- what are the three best points you have- do you think they are enough?
- If there are risks to both sides then walking away with something is often better than nothing
- A good Part 36 early on puts pressure on the other side
- split liability/contributory negligence

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Reconstruction evidence

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Reconstruction evidence

- Permission only likely to be granted in high value MT cases
- The function:

“the reconstruction expert’s role is to provide the judge with the necessary scientific criteria and assistance based upon his or her specific skills and experience, which the lay judge will not usually possess, to enable the judge to interpret the factual evidence.”

Smith LJ in **Liddell v Middleton** [1996] PIQR P 36

- Experts **should not** be giving their evidence on the most likely scenario or theorising about what may have happened
- They **should** be giving evidence or analysis in support of their opinions
- See also:
 - **Michael James Stewart (By His Litigation Friend Christopher Ramwell) v David William Glaze** [2009] EWHC 704 (QB)
 - **Vladimir Mitrasinovic v Evelyn Stroud** [2020] EWHC 914 (QB)

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Remote Trials

Additional considerations on how to prepare for a remote trial



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Remote Trials

- Have been trialled by various courts with varying success
- likely to be used more as Courts start to re-open
- Additional factors to consider:
 - Accessibility- does your client have any disabilities that may make it more difficult for them to engage with the online processes?
 - OCR the bundle (see previous slide on bundles)
 - send a hard copy of the bundle to your client as they may only have one screen
 - before agreeing to a remote trial ask your client to check their internet speed; if it's below 2.0 Mbps then it may be difficult to maintain connection while on video and may be best avoided
 - Arrange a pre-trial conference between Counsel and your Client by telephone/video
 - Set up an email chain between client/solicitor/counsel so that any questions which arise can be dealt with quickly when mid-trial
 - Make sure Counsel has client's contact number in case connection is lost and/or conference needs to be held mid-trial
 - Ensure client understands cannot contact Counsel while giving evidence especially if it goes over lunch
 - Use the mute button!



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Upcoming Personal Injury webinars

- Industrial disease (2020) – 30th June 2020
- Procedural CPR Update (2020) – 22nd July 2020
- Employer and Vicarious Liability (2020) – 24th July 2020
- (LIVE) Personal Injury – end of year round-up (2020) – 24th November 2020



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Thank you and reminders

- This webinar is designed to help solicitors meet requirements A2 (Maintain competence and legal knowledge) and A4 (Draw on detailed knowledge/understanding) of the SRA's Statement of solicitor competence. You may also use the quiz, which can be accessed via the "Take a quiz" link on the webinar details page, to reinforce your understanding of the webinar content. You should answer 7 out of 10 questions correctly and will have two attempts at the quiz.
- Please submit feedback via the survey screen.
- This webinar will be archived immediately, and will be available to view on-demand for 24 months.
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- You can use the training and evaluation record form which is included in the supporting materials for this webinar to log this training activity and how it relates to the continuing competences that the SRA requires from all solicitors.

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