FARRAR'S BUILDING

# CHRONIC PAIN SYNDROMES

## Introduction

1. Incidents of minor injury from modest accidents which are then followed by severe physical disability are extremely difficult cases for any member of the Defendant and their Insurer team. Without giving the game away too much, they are also a nightmare for decent and sensible Claimant's lawyers. Where does the truth lie? How can the obvious dichotomy between modest accident and catastrophic consequence be explained? Why has this Claimant reacted in this way? What sort of life would they have had if they had not suffered the misfortune of this slip, trip or rear end shunt? To paraphrase Don Mclean in Vincent "this world was never made for one as beautiful as some of the brittle and fragile Claimant's that we see from Bolton…".

2. 20 years ago, it was not uncommon to find claimants suffering from far more severe symptoms than could be explained by their initial modest injuries. In those days orthopaedic surgeons described such unexplained symptoms as "functional overlay" – a term that has largely disappeared from use. The diagnosis meant either that the claimant was deliberately exaggerating or that the bulk of the symptoms were psychological in origin. It was not a proper injury and the court rarely regarded it as such.

3. Roll the clock forward to now and the number of claimants who continue to complain of long term disabling symptoms after modest injuries appears to have increased. However, with expert medical evidence matters have moved on. In cases where orthopaedic experts cannot explain ongoing symptoms on the basis of the orthopaedic injury then they will often recommend the instruction of a pain expert, a rheumatologist or a psychiatrist. Often simultaneously. It is often that overlap and the uncertainty that

can exist between the experts that makes these cases difficulties. However, it can also be a source of opportunity in defending these types of claims.

4. Although the orthopaedic experts may suggest that the claimant in question has gone on to develop "chronic pain" this is not in fact a formal medical diagnosis. It is not a recognised medical condition. Don't be misled. It is simply a descriptive term to describe pain that has persisted for more than 6 months or *"pain that extends beyond the expected period of healing"*. Some pain experts may also adopt the generic term "chronic pain" but they certainly should then consider a number of other more specific diagnoses.

## Chronic Regional Pain Syndrome

5. Chronic regional pain syndrome is a chronic progressive disease characterized by severe pain, swelling and changes in the skin in a specific location. It is a local condition. The International Association for the Study of Pain has divided CRPS into two types based on the presence of nerve lesion following the injury.

    - Type I, formerly known as reflex sympathetic dystrophy, Sudeck's atrophy, reflex neurovascular dystrophy or algoneurodystrophy, is the category where the patient does not have demonstrable nerve lesions, and is often triggered by an apparently trivial injury;
    - Type II, formerly known as causalgia, has evidence of obvious nerve damage, and usually follows a more serious injury such as a broken bone, an operation, or a serious infection.

6. About 90% of cases are Type I. Those cases tend to be the cases where the differential between the severity of accident and the severity of the injury is most stark. In the absence of neurological injury, the pain is less readily explicable. These cases are more problematic for lawyers than cases of serious bony or neurological injuries where chronic

pain might reasonably be expected to persist.

7. The cause of the syndrome is unknown. Studies have suggested that the nerves are overreacting to the presence of pain. That it is some sort of heightened neurological reaction but that remains largely supposition. Much like Mr Hunt's plans for the NHS, the medics just don't know. Precipitating factors include injury and surgery, although there are documented cases that have no demonstrable injury to the original site where pain develops.

8. The key symptom of CRPS is continuous, intense pain out of proportion to the severity of the injury (if an injury has occurred), which gets worse rather than better over time. That pattern is very different from an ordinary soft tissue injury though of course CRPS can develop from the same. CRPS most often affects one of the extremities (arms, legs, hands, or feet) and is also often accompanied by:

   "burning" pain , increased skin sensitivity, changes in skin temperature: either warmer or cooler compared to the opposite extremity, changes in skin colour: often blotchy, purple, pale, or red. changes in skin texture: shiny and thin, and sometimes excessively sweaty, changes in nail and hair growth patterns, swelling and stiffness in affected joints motor disability, with decreased ability to move the affected body part, often the pain spreads to include the entire arm or leg, even though the initiating injury might have been only to a finger or toe. Pain can sometimes even travel to the opposite extremity. It may be heightened by emotional stress.

9. The symptoms of CRPS vary in severity and length. Some experts believe there are three stages associated with CRPS, marked by progressive changes in the skin, muscles, joints, ligaments, and bones of the affected area, although this progression has not yet been validated by clinical research studies.

   *Stage one* is thought to last from 1 to 3 months and is characterized by severe, burning pain, along with muscle spasm, joint stiffness, rapid hair growth, and alterations in the

blood vessels that cause the skin to change colour and temperature.

*Stage two* lasts from 3 to 6 months and is characterized by intensifying pain, swelling, decreased hair growth, cracked, brittle, grooved, or spotty nails, softened bones, stiff joints, and weak muscle tone.

In *Stage three* the syndrome progresses to the point where changes in the skin and bone are no longer reversible. Pain becomes unyielding and may involve the entire limb or affected area. There may be marked muscle loss (atrophy), severely limited mobility, and involuntary contractions of the muscles and tendons that flex the joints. Limbs may become contorted.

10. The most recent theories suggest that pain receptors in the affected part of the body become responsive to a family of nervous system messengers known as catecholamines. Animal studies indicate that norepinephrine, a catecholamine released from sympathetic nerves, acquires the capacity to activate pain pathways after tissue or nerve injury. The incidence of sympathetically maintained pain in CRPS is not known. Some experts believe that the importance of the sympathetic nervous system depends on the stage of the disease.

11. Another theory is that Type II CRPS is caused by a triggering of the immune response, which leads to the characteristic inflammatory symptoms of redness, warmth, and swelling in the affected area. CRPS may therefore represent a disruption of the healing process. In all likelihood, CRPS does not have a single cause, but is rather the result of multiple causes that produce similar symptoms.

12. CRPS is diagnosed primarily through observation of the signs and symptoms which should match the criteria referred to. What is important is that the condition causes objective signs and symptoms that can be observed and used to confirm the diagnosis. It is not a condition diagnosed simply on the basis of a Claimant's narrative description of being

pain. The lawyer needs to be aware of an expert simply adopting the Claimant's narrative and giving it some inappropriate medical credence.

13. The relevant expert is a Pain Management Specialist who is usually a Consultant Anaesthetist. My own experience is that it is a difficult and very specific diagnosis for the expert to make. The diagnosis is rejected in far more cases than I have seen it confirmed. That is good for Defendant's in that most Claimant's presenting with chronic pain do not have the objective symptoms of CRPS. However correspondingly it is of course bad when they do have those objective symptoms because there is far less scope to challenge the diagnosis and then less scope to challenge causation. With a temporal connection and a biologically local connection then causation is not a difficult intellectual exercise notwithstanding what might have been a modest injury.

14. Because there is no cure for CRPS, treatment is aimed at relieving painful symptoms so that people can resume their normal lives. The following therapies are often used:

- Physical therapy: A gradually increasing exercise programme to keep the painful limb or body part moving may help restore some range of motion and function.

- Psychotherapy: CRPS often has profound psychological effects on people and their families. Those with CRPS may suffer from depression, anxiety, or post-traumatic stress disorder, all of which heighten the perception of pain and make rehabilitation efforts more difficult.

- Sympathetic nerve block: Some patients will get significant pain relief from sympathetic nerve blocks. Sympathetic blocks can be done in a variety of ways. One technique involves intravenous administration of phentolamine, a drug that

blocks sympathetic receptors. Another technique involves placement of an anaesthetic next to the spine to directly block the sympathetic nerves.

- Medications: Many different classes of medication are used to treat CRPS, including topical analgesic drugs that act locally on painful nerves, skin, and muscles; anticonvulsant drugs; antidepressants, corticosteroids, and opioids. However, no single drug or combination of drugs has produced consistent long-lasting improvement in symptoms.

- Surgical sympathectomy: The use of surgical sympathectomy, a technique that destroys the nerves involved in CRPS, is controversial. Some experts think it is unwarranted and makes CRPS worse; others report a favourable outcome. Sympathectomy should be used only in patients whose pain is dramatically relieved (although temporarily) by selective sympathetic blocks.

- Spinal cord stimulation: The placement of stimulating electrodes next to the spinal cord provides a pleasant tingling sensation in the painful area. This technique appears to help many patients with their pain.

- Intrathecal drug pumps: These devices administer drugs directly to the spinal fluid through a catheter, so that opioids and local anaesthetic agents can be delivered to pain-signalling targets in the spinal cord at doses far lower than those required for oral administration. This technique decreases side effects and increases drug effectiveness.

15. The prognosis for CRPS varies from person to person. Spontaneous remission from symptoms occurs in certain people. Others can have unremitting pain and crippling, irreversible changes in spite of treatment. Some doctors believe that early treatment is helpful in limiting the disorder, but this belief has not yet been supported by evidence from clinical studies. *The likelihood is that a Claimant with the demonstrable condition*

*after 2-3 years is unlikely to make much progress and that the restrictions under which they labour when examined are likely to persist*.

## Fibromyalgia

16. Fibromyalgia is a widespread musculoskeletal pain and fatigue disorder for which the cause is still unknown. Fibromyalgia means pain in the fibrous tissues in the body. The pain comes from the connective tissues, such as the muscles, tendons, and ligaments. Fibromyalgia does not involve the joints, in contrast to rheumatoid arthritis and osteoarthritis. Most patients with fibromyalgia say that they ache all over. Their muscles may feel like they have been pulled or overworked. Sometimes the muscles twitch and at other times they burn.

17. Fibromyalgia symptoms are not restricted to pain, leading to the use of the alternative term fibromyalgia syndrome for the condition. Other symptoms include debilitating fatigue, sleep disturbance, and joint stiffness. Some patients may also report difficulty with swallowing, bowel and bladder abnormalities, numbness and tingling, and cognitive dysfunction. Fibromyalgia is frequently comorbid with psychiatric conditions such as depression and anxiety and stress-related disorders such as posttraumatic stress disorder. Not all people with fibromyalgia experience all associated symptoms. Fibromyalgia is estimated to affect 2–4% of the population, with a female to male incidence ratio of approximately 9:1.

18. To meet the diagnostic criteria, patients must have:

    a. Widespread pain in all ***four quadrants of their body*** for a minimum of three months. Pain is considered widespread when all of the following are present:
        - Pain in the left side of the body
        - Pain in the right side of the body
        - Pain above the waist

- Pain below the waist
- Pain in the neck, front of the chest, mid-back, or low back

b. At least 11 of the 18 specified tender points of fibromyalgia. These are areas of pain on touch but without signs of redness, swelling or heat in the surrounding joints or muscles. So there is no obvious or objective evidence of the cause of pain. For a tender point to be considered "positive" you must feel pain when someone pushes with their finger with an approximate force of 4kg (roughly the amount of pressure needed to change the colour of the skin). Some health care providers may use an instrument called an algometer during the examination of the patient to ensure that only a 4kg load is being placed. The location of the 18 tender points are:

(1 & 2) Occiput: on both sides (bilateral), at the sub-occipital muscle insertions.

(3 & 4) Low Cervical: bilateral, at the anterior aspects of the inter-transverse spaces.

(5 & 6) Lateral Epicondyle: bilateral, 2 cm distal to the epicondyles

(7 & 8) Knee: bilateral, at the medial fat pad proximal to the joint line.

(9 & 10) Second Rib: bilateral, at the second costochondral junction, just lateral to the junctions on upper surfaces.

(11 & 12) Trapezius: bilateral, at the midpoint of the upper border of the muscle.

(13 & 14) Supraspinatus: bilateral, at origins, above the spine of the scapula (shoulder blade) near the medial border

(15 & 16) Gluteal: bilateral, in upper outer quadrants of buttocks in anterior fold of

muscle.

(17 & 18) Greater Trochanter: bilateral, posterior to the trochanteric prominence.

19. Some experts believe that a person does not need to have the required 11 tender points to be diagnosed and treated for fibromyalgia. This criterion was originally intended for research purposes. A diagnosis of fibromyalgia may still be made if a person has less than the 11 of the required tender points so long as they have widespread pain and many of the common symptoms and associated syndromes connected to fibromyalgia, such as sleep disorders and irritable bowel syndrome. In ***Bennett v. Smith [2003] EWHC 1006 QB*** the Claimant recovered damages for fibromyalgia which she developed following a road traffic accident, even though she did not have the requisite 11 trigger points.

20. Fibromyalgia is treated with a variety of methods. Painkillers, anti-inflammatory medication and antidepressants are used to treat pain and any associated emotional and cognitive problems. Physiotherapy can help and physiotherapists can provide a programme of gentle exercise and stretching to help maintain muscle tone, reduce pain and stiffness, lift mood, and boost energy levels. Low-impact aerobic exercises are felt to be best. A Jane Fonda video and leg warmers could become a legitimate head of claim. Emotional support is important, as the long-term nature of this condition tends to drag people down. Depression is common in sufferers and counselling and anti-depressant therapies can be used to overcome this.

21. The prognosis is usually poor and treatment is aimed teaching the patient to cope with his or her symptoms rather than to eradicate them.

22. The cause is unknown and it can and frequently occurs without trauma. There is no obvious reason why trauma causes the same and no clear biological process that can be readily understood. Some studies have suggested that the cause is psychological.

23. My own view for what that is worth is that this presents an obvious difficulty for Claimants

in proving causation. It is perhaps a greater difficulty than for other chronic pain disorders. It is the temporal connection with an accident that is usually relied upon but the same can be coincidental. In addition, most sufferers tend to have very full medical histories and the obvious suggestion is that similar symptoms would have been precipitated in any event by the ordinary vicissitudes of life.

24. Ordinarily a Consultant Rheumatologists will treat and diagnose the condition but neurologists can also assist and often make better forensic experts.

## Chronic pain syndrome

25. As noted above this is not a recognised clinical diagnosis. There is a clear distinction between Chronic Regional Pain Syndrome and chronic pain. Nevertheless a number of pain experts (not all) hold to the view that even in the absence of an orthopaedic explanation for ongoing symptoms, and even in the absence of a recognised pain disorder there remains an organic basis for pain that persists beyond the normal recovery period.

26. The "pain memory" theory is that when a person is injured the damaged nerves at the site of the injury send signals to the brain which are interpreted as pain. If these signals are sent for a prolonged period the brain continues to interpret them as pain, even when the original injury site has healed.

27. Such an approach is more likely to be adopted in a case where the complaint of ongoing pain is restricted to a limited area i.e. the site of the original injury and there are no other psychological factors at play. In most cases those 2 criteria do not apply.

28. This is a condition which seems a little too easy to explain forensically. It is a condition that is far more open to challenge than CRPS. Neurologists can often assist and I have become increasingly aware of Pain Consultants who will not attribute symptoms to an accident if those symptoms do not fulfil the proper criteria of CRPS. It is worth pressing

the point.

## Somatic Symptom Disorder

29. In May 2013 the *Diagnostic and Statistical Manual of Mental Disorders Fifth Edition (*DSM 5) was published. DSM 5 replaced DSM 4 and a number of previous psychiatric diagnoses, including somatoform disorder, pain disorder and hypochondriasis were subsumed under the single, more simple, heading **Somatic Symptom Disorder** (SSD).

30. SSD is a chronic condition in which there are numerous physical complaints. These complaints can last for years and result in substantial impairment. Unlike the previous DSM 4 criteria the symptoms need not be medically unexplained and may or may not be associated with another medical condition. A patient may therefore have a genuine underlying medical condition, such as heart disease, but also warrant a diagnosis of SSD.

31. Typical features of SSD are:
    - Multiple symptoms at different sites.
    - Symptoms that are vague or that exceed objective findings.
    - A chronic, i.e. long term, course.
    - The presence of an underlying psychiatric disorder, such as depression or anxiety.
    - History of extensive diagnostic testing.
    - Rejection of previous medical advice.

32. Particular emphasis is placed on the degree to which the patient's thoughts, feelings and behaviours about their symptoms are disproportionate or excessive. The symptoms complained of are therefore generally severe enough to affect work and relationships and lead the patient to consult doctors on a regular basis and take medication.

33. The literature suggests an association between SSD and other medical conditions such as irritable bowel syndrome and PTSD.

34. Several studies have also suggested an association between somatisation and a history of sexual or physical abuse. This has led some researchers to conclude that SSD results from an unmet need for closeness to others. The somatising patient may also seek the sick role as a means of relief from stressful situations or difficult interpersonal relationships. This is not wholly helpful to the Defendant with the egg shell skull of many Claimant's but the more readily the Claimant appears to adopt the illness role then arguably the more likely the same was to have occurred in any event.

35. The vast majority of psychiatrists would be keen to distinguish SSD from malingering. It is said that the patient with SSD is not aware of the process through which the symptoms arise and cannot will them away. The patient may genuinely suffer from a constellation of symptoms i.e. palpitations, chest pain, abdominal pain, nausea, joint pain, back pain, headaches, low libido, urinary symptoms, and requires reassurance that there is no serious underlying explanation for these symptoms.

36. Psychological therapy such as CBT has been shown to improve the functioning of patients with SSD but this requires an acceptance on the part of the patient that there is a psychological element to their presentation. Many patients with SSD refuse to acknowledge that there might be psychological rather than physical factors at play, indeed that is one of the characteristic features of the condition. Many patients will therefore reject the option of psychological treatment.

37. Obviously, this condition falls within the province of the Expert Psychiatrist. Such a diagnosis is only appropriate when there is no adequate organic physical reasons for the pain. Usually sufferers have a psychiatric history and again it is not stretching the imagination to suggest that other life events would produce the same result. History really does repeat itself.

## Chronic Pain and Fraud

38. To the sceptical defendant lawyer there is always the deep-rooted suspicion that the claimant who claims to be in chronic pain, whether fibromyalgia, CRPS, CPS, etc. is simply not telling the truth: no-one suffering such a modest initial injury, with symptoms that should last for a matter of weeks or months, can truly be experiencing the level of pain and disability very often claimed.

39. Occasionally, and usually through a significant amount of video surveillance evidence obtained over a number of months or even years, robust medical evidence and sheer stupidity on social media, a claimant can be exposed as being dishonest to a degree where 'fraud' is the best characterisation of the bulk of the claim. What to do then?

40. The main avenues to pursue are:

    a. Strike out an at interlocutory stage (or after discontinuance);
    b. Strike out or more usually dismissal at trial;
    c. Enforcement of a costs order against a claimant in QOCS cases for fundamental dishonesty;
    d. Setting aside a settlement or judgment for fraud;
    e. Contempt proceedings.

**Practical Hurdles**

Whilst the courts seem happy, for example, to certify for contempt those involved in staged collisions, phantom passengers, or simply being a bit dodgy, getting someone certified for contempt in relation to an exaggerated chronic pain claim may be less straight forward. Similar considerations are likely to arise in all of the contexts below where fundamental

dishonesty is alleged but they are particularly exposed in contempt proceedings where specific falsehoods are to be pleaded and proved to a criminal standard:

f. Liability is generally not in dispute: the claim starts off life as a very minor accident, liability conceded;
g. The claimant will have suffered genuine, albeit minor personal injury, normally of the orthopaedic type i.e. fractured wrist. There will be an entitlement to some damages;
h. There will be a hugely subjective element of the claimant's pain;
i. There will have been a medical expert who at some stage was supportive of 'chronic pain';
j. Exaggeration may be conscious, but it may also be subconscious.

Two cases show the difficulties for contempt proceedings brought in relation to 'exaggerated' chronic pain type claims:

In ***Walton v Kirk*** [2009] EWHC 703 (QB) as a consequence of a minor RTA, Mrs Kirk developed alleged fibromyalgia, a diagnosis supported by her medical expert. She made a claim for nearly £800,000.

Following disclosure of three separate episodes of video surveillance which caused even her own expert to conclude that she had exaggerated her symptoms, she eventually accepted a Part 36 offer of £25,000 with cost consequences essentially meaning she recovered nothing.

Contempt proceedings were brought on behalf of the defendant. After a lengthy hearing in front of Coulson J, Mrs Kirk was only to be found in contempt in relation to two matters (in relation to filling in an Incapacity for Work Questionnaire and application for a Blue Badge) and fined £2,500.

Coulson J made a number of observations about the nature of chronic pain, truth and exaggeration, that highlight the difficulties of applying a robust black and white view to a complicated 'medical' phenomena:

> *"…There have been a number of cases in which a discrepancy between a claimed condition, and that which is capable of being seen on a secret surveillance video, has not, of itself, been regarded as a contempt of court. Thus, by way of example, in Rogers v Little Haven Day Nursery Ltd (30 July 1999, unreported), a decision of Bell J, the Claimant had said that her injury sustained at work were such that her right wrist was completely useless. The video showed the Claimant using her right hand to carry boxes, hold papers, pens, mugs and a cigarette. The judge found that the video showed that she could use her right hand that she did so without any sign of pain. Having considered all of the evidence, Bell J concluded that the Claimant had exaggerated her condition but that: "…the exaggeration which I have described falls within the bounds of familiar and understandable attempts to make sure that doctors and lawyers do not underestimate a genuine condition, rather than indicating an outright attempt to mislead in order to increase the value of her claim beyond its true worth."*
>
> *"In accordance with the cases noted in section 2.3 above, I consider that I should be slow to criticise Mrs Kirk if, in her statements and her comments to examining doctors, she emphasised the worst elements of her physical condition. This was partly due to her understandable desire to convince others of the extent of her suffering, and partly due to what Dr Johnson called 'her heightened perception of pain."*
>
> *"I consider that Mrs Kirk was, at least from time to time, suffering severe pain and was under a number of disabilities. I also accept Dr Johnson's evidence that she was likely to have a higher perception of pain than many others and that that can be a feature of fibromyalgia. Thus, even if the statement was false, I could not say that Mrs Kirk did not honestly believe it. This particular of contempt of court is therefore rejected."*

*"Accordingly, in my judgment, where Mrs Kirk was at fault was not so much for her endless descriptions of her bad days, but for her failure to identify the relatively normal life (even if it was accompanied by some pain) that she was able to lead on her good days. That has inevitably led me to conclude that some aspects of her presentation of her post-accident condition were very unreliable"*

*"Moreover, even if I was wrong about that, it is clear that Mrs Kirk honestly believed that at the time (January 2005) she was a seriously and permanently disabled woman. What is more, that case was supported by Dr McKenna's of September 2004 (paragraph 36 above). I could not therefore find, even if the impression given in the schedule of damages was false, that Mrs Kirk had no honest belief in the truth of her disabled condition as set out in the schedule. On the contrary, I conclude that she did, and would have been able to rely on Dr McKenna's report in support of that belief."*

*"With one possible exception, I cannot find that these particular statements were false. I am in no doubt that these statements were generally describing Mrs Kirk on her bad days: indeed, she herself makes that very point. There was considerable support in the oral evidence that this was indeed her condition on such bad days. I refer in particular to the evidence of Mrs Campion, Mrs McVeigh and Mrs McQueen."*

In ***Axa v Rossiter*** [2013] EWHC 3805 QB before Stewart J, committal proceedings failed.

Ms Rossiter brought a claim for significant damages on the basis of continuing disability following a minor RTA. She considered she suffered fibromyalgia but this never formerly diagnosed. Disclosure of video evidence meant her accepting a Part 36 offer out of time.

In rejecting the application for committal, Stewart J gave particular consideration to what

was and what was not shown on the surveillance evidence, reiterating:

> *"Accordingly, it seems to me that discrepancies between a statement verified by a statement of truth, on the one hand, and video evidence on the other, will not automatically give rise to a contempt of court. Ultimately it is a matter of fact and degree. Some exaggeration may be natural, even understandable, for the reasons set out by Bell J in Rogers. On the other hand, gross exaggeration and dishonesty will not be tolerated. As Cox J said in her judgment giving permission to bring the present case, "it is in the public interest that personal injury claims pursue honest claims before the courts and do not significantly exaggerate those claims for financial gain."*

> Stewart J place reliance upon an observation by the judge at first instance in ***Ford v GKR Construction*** (22 October 1999, unreported) that :
> *"I do not think that the Plaintiff was deliberately lying. I think there is a failure on her part to recognise that there are times when she can do much more than she does, and in fact to recognise that on occasions she does do more for herself. I think there is force in the submission that once the Plaintiff was regarded as limited in her capabilities, it was easy for her to regard that as the norm, where as in fact it may reflect the situation when she is at her worst. It is the nature of the illness that it fluctuates".*

By way of example only, similar observations were made in a recent case of ***Murphy v MOD*** [2016] EWHC 3 where it was suggested that the claimant's account was unreliable and exaggerated and that this undermined a diagnosis of chronic widespread pain (fibromyalgia):

> *"…the Claimant suffers from CWP. By that very diagnosis, the Claimant is somebody who is focused on symptoms. He is focused on his disability. He will overemphasise his problems. His position and attitude is entrenched. If there is any overstatement of difficulties or problems it is by reason of the Claimant's ongoing symptomatology and*

*not by reason of any lack of veracity"*

Some general observations may be made:

k. Allowances will be made for innocent exaggeration in all claims and particularly where there are pain syndromes;

l. The courts will be slow to conclude that exaggeration is dishonest where there is a genuine significant underlying condition even if it is demonstrated that some statements are objectively false;

m. That will particularly be the case where the exaggeration is mainly omission, ie where a misleading impression is given overall by leaving out accounts of what can be done on good days;

n. Conversely, where the pain syndrome in question relies on the subjective account of the claimant, demonstrating that that account is substantially false (i) erodes the basis on which medical evidence can be given in support and (ii) is less likely to be truthful;

o. What a defendant will need to show is some objective inconsistency amounting to incompatibility between the claimant's symptoms caused by the particular condition as expressed and the claimant's actual abilities. It is important to pay close attention to the particular diagnosis (eg hypersensitivity in CRPS may not be variable).

p. Evidence which shows conscious adjustment of behaviour is likely to be highly persuasive because it shows subjective dishonesty (eg from ***Gosling*** below "that well- known hallmark of dishonesty in these cases, the person who uses a crutch when he is seeing the medical experts but not otherwise. Lying about being unable to work and claiming loss of earnings is also likely to be persuasive, although medical experts may need to be co opted to deal with what that means about the veracity of the condition.

**Strike Out**

In ***Summers v Fairclough Homes Ltd*** [2012] UKSC 26, [2012] 1 WLR 2004 the Supreme Court was asked to consider whether a civil court has power to strike out a statement of case as an abuse of process after a trial. The answer was 'yes', but……

Mr Summers was injured in an accident at work. He suffered a fractured bone in his hand, from which he made a full recovery, and an injury to his heel as a result of which he claimed to be largely dependent on crutches and in constant pain. The claimant submitted a schedule of loss claiming total damages of over £800,000 on the basis that he was grossly disabled, unable to work and likely to remain so.

The employer disclosed surveillance evidence, which showed that the claimant was not dependent on crutches, appeared to be living a normal existence without any significant disability, including playing football, and was in fact working. The employer amended its defence so that its primary case was that the claimant's deliberate, gross and dishonest exaggeration of his claim constituted an abuse of the court's process such that the claim should be struck out in its entirety pursuant to the court's inherent jurisdiction or under **CPR 3.4(2)**.

No offer was made to settle by the defendant.

At the trial on quantum the judge accepted that the claim as presented was substantially fraudulent but he was unable to strike the claim out in its entirety and was bound to award compensation for such injury and consequential loss as he found to be genuine, awarding just under £90,000.

Due to the defendant's refusal to negotiate and make any Part 36 offers, although the claimant's dishonesty caused the proceedings to be extended, the defendant by its own choice caused them to take longer to get to trial and to end in a trial by their refusal to negotiate with a view to settlement, which would in all probability have been achieved if the defendant had been willing to take part in negotiations.

Moreover the defendant was not fooled by the claimant's dishonesty. As such the judge ordered the defendant to pay the claimant's costs up to February 2008, save that the claimant was to pay the defendant's costs of obtaining the surveillance evidence. He made no order for costs after March 2008.

The defendant appealed the decision of the trial judge not to strike out the claim. The Court of Appeal dismissed the appeal in a remarkably short judgment.

Fortunately for Mr Summers, the Supreme Court also dismissed the appeal, holding that, despite the claimant's serious abuse of process, since on the judge's findings of fact he had suffered significant injury as a result of the defendant's breach of duty for which he was entitled to damages, it would not be proportionate or just, and would therefore be wrong in principle, to strike out the action instead of giving judgment for the claimant for the losses which he had succeeded in establishing.

However, useful (?) guidance was provided by the Supreme Court who held that under both its inherent jurisdiction and **CPR 3.24 (2)**, the court had power to strike out a statement of case, on the ground that it was an abuse of the process of the court, at any stage of proceedings, even after trial in circumstances where the court had been able to make a proper assessment of both liability and quantum.

But:

a. That power would be exercised at the end of a trial only in very exceptional circumstances where the court was satisfied that the party's abuse of process was such that he had thereby forfeited the right to have his claim determined;
b. That, while the existence of such a power was in the public interest, in deciding whether to exercise it the court had to have regard to the claimant's Convention rights to have his claim fairly determined by a court and to enjoyment of his possessions and so to examine the circumstances of the case scrupulously in order to ensure that any decision to strike out the claim was a proportionate means of controlling the court's process and deciding the case justly; and
c. It would be a very rare case in which, at the end of a trial, it would be appropriate or proportionate to strike out a case rather than to dismiss it in a judgment on the merits or, where both liability and quantum could be assessed fairly, to give judgment in the ordinary way.

More positively, the Supreme Court provided guidance as to what steps should be taken by the courts and defendants in the case of fraudulent and dishonest claims:

q. All reasonable steps should be taken to deter fraudulent and dishonest claims;
r. In the ordinary way a judge would be expected to penalise such a claimant in costs;
s. A defendant could protect his position by making an offer, outside the framework of CPR Part 36, to settle the genuine part of a claim on terms that the claimant pays his costs with regard to the fraudulent parts of the claim on an indemnity basis;
t. The court could reduce interest which might otherwise have been awarded if time had been wasted on a fraudulent claim;
u. Proceedings for contempt of court were an effective sanction which could, and should, be heard by the trial judge and, if proved, were likely to lead to the claimant's imprisonment;
v. Ultimately, the possibility remained of criminal proceedings being brought against a fraudulent claimant;

w. The combination of those consequences was likely to be an effective deterrent to claimants bringing dishonest or fraudulent claims.

Since ***Fairclough***, there have been a few decisions in which the courts have considered the behaviour and claims so egregious that the claim has been struck off. The Court of Appeal has considered (in a non-PI context) the principles in approaching an interlocutory strike off in ***Alpha Rocks Solicitors v Alade*** [2015] 1 WLR 4534:

> *"21 It is important first to emphasise, as did Lord Clarke JSC in the Summers case, the range of available remedies when a situation arises in which a party to litigation thinks that his opponent has exaggerated his claim, whether fraudulently or otherwise. Establishing fraud without a trial is always difficult. And it is open to a defendant to seek summary judgment on the claim under CPR r 24.2(a)(i) , without seeking a strike out for abuse of process. As Masood's case and the Summers case also demonstrate, striking out is available in such cases at an early stage in the proceedings, but only where a claimant is guilty of misconduct in relation to those proceedings which is so serious that it would be an affront to the court to permit him to continue to prosecute the claim, and where the claim should be struck out in order to prevent the further waste of precious resources on proceedings which the claimant has forfeited the right to have determined. The other available remedies for such a default follow the proceedings once they have run their course, but are none the less important. They include costs and interest penalties and proceedings for contempt of court or criminal prosecution.*
>
> *22 Returning to the early stages of proceedings, it is, of course, always open to the court to strike out or grant summary judgment in respect of the impugned part of the claim, as opposed to the whole. In my judgment, the court should exercise caution in the early stages of a case in striking out the entirety of a claim on the*

*grounds that a part has been improperly or even fraudulently exaggerated. That is because of the draconian effect of so doing and the risk that, at a trial, events may appear less clear cut than they do at an interlocutory stage. The court is not easily affronted, and in my judgment the emphasis should be on the availability of fair trial of the issues between the parties. As CPR r 3.4(2)(b) itself says, "the court may strike out a statement of case if … the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings " (emphasis added).*

*23 There is an analogy with the court's approach in Denton v TH White Ltd (De Laval Ltd, Part 20 defendant) (Practice Note) [2014] 1 WLR 3926 , where the court considered the circumstances in which relief from sanctions should be granted under the new CPR r 3.9 . That rule says that the court "will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need— (a) for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with rules, practice directions and orders" ("factors (a) and (b)"). The first two stages recommended by the court require the court to consider the seriousness or significance of the breach and any explanation offered for it. Lord Dyson MR and I said this in relation to the third stage of the process, at para 32: "Although the two factors may not be of paramount importance, we reassert that they are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered. That is why they were singled out for mention in the rule. It is striking that factor (a) is in substance included in the definition of the overriding objective in rule 1.1(2) of enabling the court to deal with cases justly; and factor (b) is included in the definition of the overriding objective in identical language at rule 1.1(2)(f) . If it had been intended that factors (a) and (b) were to be given no particular weight, they would not have been mentioned in rule 3.9(1) . In our view,*

*the draftsman of rule 3.9(1) clearly intended to emphasise the particular importance of these two factors."*

*24 The cases I have mentioned were right to emphasise in the context of striking out what is effectively factor (a), namely the need for litigation to be conducted efficiently and at proportionate cost. The need for compliance with rules and orders is equally important. But it must be remembered that the remedy should be proportionate to the abuse. In the context of this case, it is also worth emphasising before I turn to the particular circumstances that litigants should not be deprived of their claims unless the abuse relied on has been clearly established. The court cannot be affronted if the case has not been satisfactorily proved. This aspect is obviously inter-related with whether or not a fair trial remains possible.*

Of those reported cases where strike off has happened see:

***Admans v Two Saints Limited*** (2016) Swindon, HHJ Watson QC

Interlocutory application to strike out based on video and social media evidence inconsistent with claim. Claimant was a litigant in person, her solicitors having come off the record.

***Plana v First Capital East Ltd*** (2013) CLCC, HHJ Collender QC

Interlocutory application to strike out based on video evidence inconsistent with claim. Claimant was a litigant in person, his solicitors having come off the record (the committal proceedings failed as a criminal prosecution saw the Claimant not convicted).

***Scullion v Royal Bank of Scotland*** (2013) Exeter, Judge Cotter QC

Interlocutory Application to strike out. Not a litigant in person. The Claimant was found to have been in work from about 10 months after the accident. She had lied to medical expert and signed a number of Schedules of loss claiming ingoing loss of earnings. Trial had been listed for hearing a couple of months after the application.

***Fari v Homes for Haringey*** (2012) CCLC HHJ Mitchell

Grossly inflated claim, video evidence, hearing listed for trial on quantum, litigant in person. Again there was a marked discrepancy between behaviour prior to seeing experts and elsewhere on video. Medical experts agreed that there was significant exaggeration. It was referred for contempt proceedings and ultimately Mrs Fari was sentenced to 3 months imprisonment and her husband 2 months suspended.

## Fundamental Dishonesty and s57 of the Criminal Justice and Courts Act 2015

The striking out of a claim as an abuse of process has acquired much more importance since ***Fairclough*** due to the introduction of the QOCS regime and the exception to the costs protection afforded under **CPR 44.14** by reason of **CPR 44.15(1) (b)** (QOCS dis-applied where the claim has been struck out as an abuse).

However, even if a grossly exaggerated claim is not struck out, defendants can still seek to enforce cost orders made against a claimant with the permission of the court where the claim

is found on the balance of probabilities to be fundamentally dishonest pursuant to **CPR 44.16(1)**. Such a course is open even if a claimant discontinues his claim (Under **CPR 38.4(1)** a defendant may apply to have the notice of discountenance set aside).

To date, there is only persuasive authority of HHJ Moloney QC in ***Gosling v Heilo*** [2014] WL 3002771 as to what is meant by 'fundamental dishonesty':

x. A claimant should not be exposed to costs liability merely because of dishonesty as to some collateral matter or to some minor, self-contained head of damage;
y. Dishonesty that went to the root of either the whole of the claim or a substantial part of his claim would render it fundamentally dishonest;
z. In circumstances where the dishonesty was crucial to around half of the total claim (comprising future care and much of the award in general damages), that was sufficient to warrant the characterization "fundamentally dishonest";
aa. It was not necessary for dishonesty to go to the root either of liability as a whole, or damages in their entirety.

Obviously in a chronic pain claim with proven exaggeration it is likely that such 'dishonesty' was crucial to a significant percentage of damages claims.

Of course, for such an order to be of benefit, there first has to be a costs order for the defendant to seek to enforce and such costs have to exceed the damages recovered by the claimant. If a claim has been discontinued then of course a defendant may seek the benefit of such an order as opposed to a retrospective strike out. A new tactic however has now been thrown into the mix with s57 of the Criminal Justice and Courts Act 2015:

*57 Personal injury claims: cases of fundamental dishonesty*

*(1) This section applies where, in proceedings on a claim for damages in respect of personal injury ("the primary claim")—*

*(a) the court finds that the claimant is entitled to damages in respect of the claim, but*

*(b) on an application by the defendant for the dismissal of the claim under this section, the court is satisfied on the balance of probabilities that the claimant has been fundamentally dishonest in relation to the primary claim or a related claim.*

*(2) The court must dismiss the primary claim, unless it is satisfied that the claimant would suffer substantial injustice if the claim were dismissed.*

*(3) The duty under subsection (2) includes the dismissal of any element of the primary claim in respect of which the claimant has not been dishonest.*

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

*(6) If a claim is dismissed under this section, subsection (7) applies to—*

*(a) any subsequent criminal proceedings against the claimant in respect of the fundamental dishonesty mentioned in subsection (1) (b), and*

*(b) any subsequent proceedings for contempt of court against the claimant in respect of that dishonesty.*

*(7) If the court in those proceedings finds the claimant guilty of an offence or of contempt of court, it must have regard to the dismissal of the primary claim under this section when sentencing the claimant or otherwise disposing of the proceedings.*

*(8) In this section—*

*"claim" includes a counter-claim and, accordingly, "claimant" includes a counter-claimant and "defendant" includes a defendant to a counterclaim;*

*"personal injury" includes any disease and any other impairment of a person's physical or mental condition;*

*"related claim" means a claim for damages in respect of personal injury which is made—*

*(a) in connection with the same incident or series of incidents in connection with which the primary claim is made, and*

*(b) by a person other than the person who made the primary claim.*

These new rules apply to claims issued on or after 13th April 2015 and will apply to both claims and counterclaims. The consequence of a finding of fundamental dishonesty is that the court 'must' dismiss the claim *"unless it is satisfied that the claimant would suffer substantial injustice if the claimant was dismissed"* (section 57(2)). The whole claim must be struck out and not just the part which is founded on dishonesty (section 57(3)).

Although dismissal will only be considered on application by the defendant and not on the court's own accord (section 57(1)(b)).

Dismissal can only be made where *"the court finds that the claimant is entitled to damages"* (section 57(1)(a)) and therefore it is likely to only be applicable where liability is admitted or judgment has been entered. There is real scope here for chronic pain cases, in which liability is admitted and where there is usually at least some genuine element.

There is no definition of fundamental dishonesty but it is specified that it can be in a related claim, which will include supporting linked claims for phantom passengers. However, it would not include a claim for the non-PI elements like vehicle damage and credit hire as it must be for PI. Importantly, the standard of proof is expressed as the balance of probabilities.

Where a claim is struck out under s57 the court will still have its work cut out as the genuine damages still need to be assessed in case of any appeal and also so they are set off against the defendant's costs. The court must record the amount the claimant would have received for any genuine element of the claim had it not been dismissed. The claimant will be ordered to pay the defendant's costs, but the amount recorded for the genuine element will be deducted from the amount that the claimant will have to pay.

As well as using fundamental dishonesty s57 also introduces another term that is undefined: "substantial injustice". As of yet there is no guidance on what substantial injustice means but it would be contrary to the rationale behind the section if it were simply to encompass a situation where the Claimant was losing out on a claim.

The powers under s57 in many instances will overlap with the existing powers that the courts were determined to have in ***Summers v Fairclough Homes***. The Claimant's claim

was not struck out in ***Summers*** as it was found that he had still suffered a significant injury as a result of the Defendant's breach of duty.

Section 57 is expressly stated to extend the previous position after ***Summers***. In particular, it will not be limited to exceptional cases. It is probably best understood as a matter of construction as a statutory provision reversing the effect of ***Summers.***

To date, there has been no binding judicial consideration of this provision, save for a brief mention by the Supreme Court in ***Versloot Dredging BV v HDI Gerling Industrie Versicherung AG*** [2016] UKSC 45 in which a comparison was made with the fraudulent claims rule (the common law rule in contracts of insurance, that an insurer was not liable where an insured had made a fraudulent claim by fabricating or dishonestly exaggerating the claim in order to get something to which he was not entitled, so that the insured forfeited the whole of the claim).

> *"95 The need for such a rule, severe as it is, has in no sense diminished over the years. On the contrary, Parliament has only recently legislated to apply a version of it to the allied social problem of fraudulent third party personal injuries claims. Section 57 of the Criminal Justice and Courts Act 2015 provides that in a case where such a claim has been exaggerated by a "fundamentally dishonest" claimant, the court is to dismiss the claim altogether, including any unexaggerated part, unless satisfied that substantial injustice would thereby be done to him. Parliament has thus gone further than this court was able to do in Summers v Fairclough Homes."*

Besides providing for a rather tortured procedural route in cases where such application is made prior to a full quantum hearing having been undertaken, the key issues for the court to grapple with will be:

bb. The meaning fundamental dishonesty;

cc. The meaning of substantial injustice (it is nice to know that Parliament has deemed it appropriate to permit courts to allow moderate injustice).

The wording is not the same as is CPR 44.16 ("*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"* as opposed to *"where the claim has been found on the balance of probabilities to have been fundamentally dishonest"*). There are three basic ways of construing this:

dd. That fundamental is a qualifying description of dishonesty: any dishonesty which may be regarded as fundamental in relation to a claim triggers the rule. This is not convincing (***Versloot*** notwithstanding);

ee. That fundamental dishonesty in relation to a claim may be found where the dishonesty substantially diminished or prevented recovery of any head of loss in the claim;

ff. That fundamental dishonesty in relation to a claim is only established when the dishonesty is fundamental to the claim (ie that the same test is applied as in CPR 44.16).

There is something to be said for the notion that for dishonesty in relation to a claim to be fundamental it needs to be fundamental to the claim. There has been some attempt to dovetail the costs consequences with CPR 44.14 (usually enforceable to the extent of damages and interest only) and 44.16 (enforceable in a greater amount where there has been fundamental dishonesty) by making costs orders subject to reduction by the damages which would have been awarded. It may be thought that this tends to support a similar approach in construction to the different expressions of fundamental dishonesty.

In any event, it is likely that the narrower construction will apply anyway where the dishonesty is question will in general relate to the extent of existence of the underlying condition which will give rise to a significant portion of claimed losses.

What follows is that the jurisdiction under CPR 3(4) will remain significant for strike out an interlocutory stage. It will be available where the evidence obtained really permits no real prospect of being explained away by the claimant, the fraud means that the claim is an abuse, and the abuse goes to the heart of the claim.

As a determination of damages is required for certification under s.57, that approach will be mandated where the defendant considers that substantial dishonesty has been discovered, but the claimant may have an explanation which could be accepted by the court, or where its fundamental impact on the claim is reasonably disputed. The issue of fundamental dishonesty will have to be tried. The defendant will apply before trial for a s.57 finding based on its pleaded case specifying the extent to which the claim is false or exaggerated.

## Setting aside settlements/judgments and recovery of sums paid

Many of the cases in which contempt proceedings have been brought in exaggeration claims have arisen when a claimant has accepted a Part 36 offer out of time and compromised the claim. In such situation the parties have agreed the cost consequences (save that enforcement issues may still arise).

When a successful interlocutory application is made to strike out a claim, it is usual for an order for repayment of any interim payments made (CPR 25.8).

However, what of the situation when the defendant compromises the claim, suspects gross exaggeration, but only obtains evidence clearly demonstrating fraud after the claim was compromised?

This was the issue in ***Hayward v Zurich*** [2016] UKSC 48. Mr Hayward suffered an injury to his back, claiming damages in excess of £420,000 against his employer. Liability was compromised at an early stage, with an agreed 20% reduction for contributory negligence.

In the defence reliance was placed on video surveillance evidence and it was pleaded, inter alia, that: "*The Claimant has exaggerated his difficulties in recovery and current physical condition for financial gain*."

Shortly before the issue of quantum was due to be tried, the parties reached an agreement, embodied in the Tomlin Order, under which the Defendant agreed to pay £134,973.11 in full and final settlement of H's claim.

In February 2009, H's neighbours approached Z and provided witness statements, to the effect that they believed from their observations that H had entirely recovered from his injury at least a year before the settlement date. Z commenced proceedings claiming damages for deceit, later amended to plead rescission in the alternative, alleging that the statements as to the extent of the H's injury in the Particulars of Claim and Schedule of Loss, and his accounts given to the medical experts, constituted fraudulent misrepresentations. Damages were claimed equivalent to the difference between the amount of the settlement and the damages that should have been awarded if H had told the truth.

After failed attempts by H to strike out Z's claim, the case was eventually tried by HH Judge Moloney QC in the Cambridge County Court in November 2012. He found that H had indeed dishonestly exaggerated the effects of his injury and went on to hold that the settlement agreement should be set aside on the basis that Z had relied upon the representations made by H and had suffered loss as a result, despite holding that *"They*

*[the defendant] may not themselves have believed the representations to be true; but they did believe that they would be put before the court as true, and that there was a real risk that the court would accept them in whole or part and consequently make a larger award than Zurich would otherwise have considered appropriate."*

There was therefore a further trial to assess loss where H was awarded damages in the sum of £14,720 and ordered him to re-pay the sum paid under the settlement less that amount.

H appealed:

gg. In a misrepresentation claim "belief is a necessary component" i.e. the representee must be deceived". Z had not believed the misrepresentation, rather it was concerned that the Court might do so;

hh. Z could not have relied about the statement as it clearly did not trust what it had been told and made its own inquiries. The necessary reliance was missing.

The Court of Appeal agreed, albeit regretfully. Underhill LJ was of the view that parties who settle claims with their eyes wide open should not be entitled to revive them only because better evidence comes along later.

The Supreme Court disagreed. Lord Clarke held that:

ii. In the tort of deceit, it is not necessary, as a matter of law, to prove that the representee believed that the representation was not true. This is not to say that the state of mind may not be relevant to the issue of inducement. Indeed it may be very relevant;

jj. The question in a case such as this is not what view the employer or its insurer takes but what view the court may take in due case. The employer and its advisers must take into account the possibility that the judge at the trial would believe Mr

Hayward. That is because the views of the judge will determine the amount of damages awarded. The representee's reasonable belief as to whether the misrepresentation is true therefore cannot be a necessary ingredient of the test, because the representee may well settle on the basis that he thinks the representation will be believed by the judge;

kk. The representee must have been induced to act as he did in reliance upon the representation. Zurich did not know the extent of Mr Hayward's misrepresentations at the time of settlement and therefore the amount of settlement was very much greater than it would have been but for the fraudulent misrepresentations. Zurich had clearly been influenced by the misrepresentation. It is not necessary for it to have been the sole cause;

ll. A representee has no duty to be careful, suspicious or diligent in research (though here Zurich had done as much as it reasonably could to investigate the accuracy and ramifications of Mr Hayward's representations before entering into any settlement).

Lord Clarke gave consideration to the question of whether, where a representee knows that the representation is false, a claim for misrepresentation could succeed. Zurich conceded that it could not. However, Lord Clarke was not willing to make such pronouncement, indicating that there could be circumstances in which a representee may know that the representation is false but nevertheless may be held to rely upon the misrepresentation as a matter of fact. He gave an example of where such claimant may well establish inducement on the facts:

*"Sometimes (a staged road traffic 'accident' for example) the other party may actually be certain from his own direct knowledge that the statement is a deliberate lie. But even then he and his advisers cannot choose to ignore it; they must still take into account the risk that it will be believed by the judge at trial."*

Lord Toulson also left open the question as to whether a party seeking to set aside a settlement for fraud must prove the fraud by evidence which it could not have obtained

by due diligence at the time of the settlement. This was a point conceded by Zurich (as it made no difference to the outcome of the case), though no argument was given as to whether such concession was correct. Lord Toulson concluded that in the absence of argument "it is better to say nothing about it".

It will be a part of the claim to set aside the settlement that an order is sought for repayment of sums paid under the settlement.

Similarly, a claim may be tried and judgment for a substantial amount entered for a claimant, and the defendant may later be alerted to a fraud.

Reference to a single case will suffice to illustrate this jurisdiction as applied to a questionable road traffic accident in ***Brighthouse Limited v Tazegul*** [2016] EWHC 2277 (QB):

> *"26 There is also agreement between counsel that the test for setting aside a judgment on the grounds of fraud is set out in Royal Bank of Scotland Plc v Highland Financial Partners LP [2013] EWCA Civ 328 . First, there has to be "conscious and deliberate dishonesty" in relation to the relevant evidence given or action taken, statement made or matter concealed which is relevant to the judgment now sought to be impugned.*
>
> *27 Second, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be "material". "Material" means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court's decision to give judgment in the way it did. Put another way, it must be shown that the fresh evidence could have entirely changed the way the court approached and came to its decision. Thus the*

*relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the way it was.*

*28 Third, the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence."*

The facebook evidence was examined to see if fraud was incontrovertible, or if not, whether it raised a prima facie case, so as to warrant it being referred to trial. There is some parallel approach here with the threshold for evidence which may be enough to satisfy a court of abuse at an interlocutory stage.

## Contempt Proceedings

Seeking committal proceedings for contempt of court is an attractive form of revenge deterrent against fraudulent claims. Certain members of the judiciary are happy to entertain an application for a custodial sentence when presented with an individual who has clearly made a dishonest and fraudulent claim and who have obviously sought to manipulate the court process for financial gain. Where the case is strong enough, successful contempt proceedings with a prison sentence may give rise to publicity which can act as a deterrent

**CPR 81** sets out the relevant procedure.

The first step is of course to identify when and what potential contempt has been

committed.

Very often a claimant will accept a Part 36 offer or discontinue a claim before the matter reaches a final hearing. In such situation, either **CPR 81.12** (an interference with the due administration of justice in connection with proceedings) or potentially **CPR 32.14** (committal for making a false statement of truth) would apply.

Permission will have to be sought from the High Court (**CPR 81.13**) via a detailed Part 8 claim form (**CPR 81.14**) with or without an oral hearing.

Where the contempt consists only (!) in making a false statement verified by a statement of truth or a false disclosure statement, without an honest belief in its truth, then **CPR 81.17** is applicable. Here permission under **CPR 81.18** has to be sought with the permission of the court dealing with the proceedings (if a High Court matter) or the Attorney General. If it is a County Court matter, then permission from a single judge of the High Court (or the Attorney General) will have to be obtained. **CPR 81.14** governs the application process.

On granting permission the following summary of principles is useful (see ***William Tinkler v Howarth*** **[2014] EWCA Civ 564**):

*(i) In order for an allegation of contempt to succeed it must be shown that "… in addition to knowing that what you are saying is false, you had to have known that what you are saying was likely to interfere with the course of justice …";*

*(ii) The burden of proof is on the party alleging the contempt who must prove each element identified above beyond reasonable doubt;*

*(iii) A statement made by someone who effectively does not care whether it is true or*

*false is liable as if that person knew what was being said was false but carelessness will not be sufficient;*

*(iv) Permission should not be granted unless a strong prima facie case has been shown against the alleged contemnor;*

*(v) Before permission is given the court should be satisfied that*

*a) The public interest requires the committal proceedings to be brought;*

*b) The proposed committal proceedings are proportionate; and*

*c) The proposed committal proceedings are in accordance with the overriding objective;*

*(vi) In assessing proportionality, regard is to be had to the strength of the case against the respondents, the value of the claim in respect of which the allegedly false statement was made, the likely costs that will be incurred by each side in pursuing the contempt proceedings and the amount of court time likely to be involved in case managing and then hearing the application but bearing in mind the overriding objective*

*(vii) In assessing whether the public interest requires that permission be granted, regard should be had to the strength of the evidence tending to show that the statement was false and known at the time to be false, the circumstances in which it came to be made, its significance, the use to which it was actually put and the maker's understanding of the likely effect of the statement bearing in mind that the public interest lies in bringing home to the profession and through the profession to witnesses the dangers of knowingly making false statements; and*

*(viii) In determining a permission application, care should be taken to avoid prejudicing the outcome of the application if permission is to be given by avoiding saying more about the merits of the complaint than is necessary to resolve the permission*

*application.*

Once permission is obtained it will be for the former defendant to prove the contempt. If committal for contempt is sought for an interference with the due administration of justice, the former defendant will need to prove beyond a reasonable doubt:

mm. The falsity of the claimant's statements;

nn. That those statements had or would have materially interfered with the course of justice; and

oo. That the claimant had no honest belief in the statements and had known of their likelihood to interfere with the course of justice.

41.

**Andrew Arentsen**

**Farrar's Building**

**Temple**

**London EC4**