



**Informing Progress - Shaping the Future**

# **A FOIL Roundtable**

## **Challenging claims for psychological injury**

Hosted by the FOIL Rehabilitation and Fraud SFTs

At DWF's London office

On

20 September 2022

### **Event Synopsis**

The event was hosted by Shirley Denyer (FOIL), Miles Hepworth (DWF and Fraud SFT) and Matthew Ruck (Keoghs and Rehabilitation SFT).

The event aimed to explore the layering of claims by exaggeration and deliberate fraud in the area of psychological injury. A lack of cogency in the medical evidence; a failure to mention psychological injury until the claim is raised; a tick-box approach to claims; recommendations of extensive treatment for minor psychological conditions; and a significant increase in claims for PTSD are typical examples generating concerns in this arena. Equally the specific and deliberate involvement of certain medico-legal agencies as direct enablers in the layering of the claims. The roundtable sought to examine these trends and to consider how claims for psychological injury can be assessed, evaluated and approached, to identify claims that are exaggerated or without merit. The roundtable brought together a distinguished panel of speakers from the legal profession, judiciary and medical profession to kick-start discussion. Miles and Matthew started the session by setting the scene, highlighting some of the challenges faced by defence lawyers and insurers, and questioning the current mindset of much of the judiciary.

First, we heard from Dr Michael Isaac, a consultant psychiatrist and senior lecturer in psychological medicine, and a highly experienced expert witness with a 30-year international career. He started by highlighting the different roles being performed in the clinical and medico-legal context. Where that role is combined it creates possible tension and the potential for a conflict of interests. Generally, it is better to avoid medico-legal instruction where you are already the treating clinician. Dr Isaac also emphasised the importance of in-person consultations in psychiatry – at the very least, you want to avoid an uneven playing field with the opponent's expert (where there is a discrepancy between in-person and remote examination). Choosing the correct expert was also key here: do you need a specialist child or geriatric (age 75+) psychiatrist? In most cases, it is better to start with the instruction of a



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psychiatrist, rather than the instruction of a general psychologist. He spent time explaining his approach to diagnosis and the use of the different diagnostic indicators (ICD/DSM). He also described the development of psychiatric conditions and highlighted that malingering was not a formal psychiatric diagnosis.

Second, we heard from Richard Paige of Park Square Barristers, who specialises in clinical negligence, personal injury and civil insurance fraud. Recently he has been instructed as lead Counsel acting on behalf of several different insurance companies defending claims involving allegations of psychological injury. He sits as a Civil Recorder on the North Eastern Circuit. Richard addressed the importance of how a claim for fraud or exaggeration was put. In many cases, it may not be possible or prudent to advance a positive case until relevant evidence had been exchanged and examined. There was a need for constant examination of the evidence. It may also be necessary to look for wider evidence beyond the individual factual case – for example, where it is necessary to focus on the enablers of these claims and to build up an evidence base that supports a pattern of fraudulent activity.

Thirdly, we heard from Ruwena Kahn of Park Square Barristers, who specialises in personal injury and clinical negligence and has extensive experience acting for defendants in cases involving difficult and complex issues of fraud. She sits as a deputy district judge on the North Eastern Circuit. Ruwena highlighted a range of approaches that Solicitors could use to influence the directions stage and responses of the Courts in this kind of case. She highlighted the importance of making your case and proposed directions stand out. In particular, she emphasised the importance of spelling out headlines or unusual directions – generally making it easier for the judges to progress case management. Emphasising the prior use of Part 35 questions might help if you are seeking permission for your own expert evidence. Highlighting critical directions and seeking interim hearings or CMCs to ventilate these issues is important

Finally, we heard from Richard Wheeler of 3PB Barristers, who specialises in personal injury and clinical negligence. He is frequently instructed by defendants in civil fraud work. He sits as a deputy district judge in Central London and on the South Eastern Circuit. This speaker emphasised the importance of the forensic approach to cases – the little details and factual inconsistencies matter. You need to focus on the building blocks of the expert evidence – can these be undermined and strategically how is this best done? Ideally, you need to pin down by Part 35 questions what those building blocks are. This will give your advocate the tools that they need at a live hearing. Establish how the expert took the Claimant's history and checked for inconsistencies; check whether they considered a range of expert opinions in key areas or other possible explanations for the Claimant's symptoms or behaviour. What diagnostic criteria did they use and how did they evaluate and using what evidence? Again, careful thought needs to go into whether you seek permission and call for live expert evidence at trial. Ultimately it is about providing the judge with a cogent reason or reasons to prefer the Defendant's case

FOIL hopes to continue these conversations and will be looking to run a follow-up event in 2023. We hope that you will be able to join us at this future event.



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