

As with any other type of factual investigating, the crucial term is evidence. Claims or defence are handled in a high judicial forum where the procedures dictate that supposition and suspicion hold no water.

Let us now look more closely at the questions always posed.

### 2.1.1.2. Was there an accident?

An *accident* means not only whether there was a crash, but also whether The *Accident* occurred at the place and time and date alleged, whether it involved the parties alleged, whether it involved the vehicles alleged, who are the witnesses, did police become involved, was anyone charged, was anyone injured, did ambulance attend, is the damage to the vehicles such as to support allegation of extent of injury, were the circumstances correctly declared.

All of these questions had already been asked of the claimant and the insured in the claims documents. Your job is to check what was declared and also to see if new things can be found. If the matter is subject of legal action, then essentially you will be checking the “Particulars of Negligence” as referred to in the previous Section 1 (now attached at end of this file).

Accuracy and detail are essential. Every fact, that is, each item of evidence (say, the place of accident) has to be thoroughly checked. It's not enough to confirm that the accident happened on Edgar Street, Granville about 50 m from Woodville Road intersection. You have to find out precisely the actual point of impact, the distances from the kerb, the intersection, the house or the bus stop, the direction each vehicle (or person) was proceeding, the point where any braking or evasive action commenced, the precise impact points on the vehicles (or bodies).

There are basically two reasons to establish the accurate and detailed facts:

1. a claim can be considered only by the insurance company if the facts of the accident were declared accurately and frankly by the claimant;
2. if the claim is subject to legal action then the action can fall over (require new proceedings to be commenced) on proof of incorrect material facts being declared in the Statement of Claim.

The devious benefit (alas, it's a perfectly legal benefit) for the insurance company is that it can refuse to decide the claim (essentially refuse it) or have a year or two breathing space whilst the plaintiff commences new proceedings (this time accurately) or leaves it alone because it's all too hard.

In most instances a factual investigation is done when legal action from the claimant has been indicated or has commenced. Thus, accuracy is crucial. The plaintiff can only proceed on basis of the facts declared in the Statement of Claim and nothing else. This means the action can be successfully defended if any of the facts as declared (the allegations) are inaccurate or false.

If several material facts are shown to be wrong, the court tends to take the view that other facts may also be wrong (such as the extent of injury, the extent of pain and suffering, the causes of the accident, etc).

Remind yourself, you have to check all of the relevant facts. The relevant facts are those the claimant declared on the claim form or those he declared in the Statement of Claim under “Particulars of Negligence” (at the end of this file).

### **So how do you determine “was there an accident?”. The precise facts of the accident?**

Simple. Ask and look.

- Ask the insured (the defendant), the claimant (but not the plaintiff, as it is unethical to make contact with a plaintiff when legal action has commenced), witnesses, police, ambulance, employers.
- Look at the accident scene, look at records and documents. But not medical reports as we do not usually concern ourselves with issues requiring specialist skills.

The facts of the accident will be the evidence you have thus revealed. How accurate the evidence is depends on how thoroughly and wisely you ask the questions, or how accurately you measure distances, or how well you photograph the scene.

The precise steps to achieve each of these steps is addressed later in this course.

#### **2.1.1.3. Was the plaintiff (claimant) injured?**

**Opinion.** Factual investigators have to deal with facts and resolve opinion. Yet opinion from witnesses, or claimant or the insured, is acceptable because once it is written down and signed in a statement, it is fact, it is evidence.

It's fairly easy to have a witness state an opinion why an accident happened and then explain it all by reference to specific factors surrounding the circumstances. Thus, the opinion can be substantiated.

However, how does one justify one's opinion that the claimant was not in pain even though he was bleeding profusely from the head? More difficult. What if he did not bleed at all and was able to walk about immediately after the accident?

Unless the witness is a skilled medical practitioner, don't allow him to state opinion whether the claimant was injured or was in pain or was in shock. It's all too subjective and we all have different ways of forming impressions. Yet your investigation should and can establish facts whether the claimant was injured.

It's quite simply a matter of persistently asking what did you see and what did the claimant say to you.

What a claimant said to the witness is of course hearsay. However, we are dealing with civil action, the concept of “on the balance of probability” and not the criminal concept of “beyond a reasonable doubt”.

Courts in civil proceedings do often admit hearsay evidence as long as it is first-hand hearsay, that is, from the plaintiff's mouth to the witness's ears. And as long as it is put into proper context and adjunct to a description of things the witness did see.

**For example, the witness might state:**

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*"I jumped out of my car and ran to Mr Jones who was still sitting in his car. I tried to open the drivers door, but it was stuck and I saw Mr Jones slumped forward with his face against the steering wheel. His eyes were open and he was groaning and mumbling, saying: 'oh pain, oh my head'. I grabbed him by the right shoulder and pulled him back and he fell backwards onto his seat and his head slumped back. I did not see any blood....."*

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If the plaintiff said that in court, then the witness supports his case. And so be it. But if the plaintiff alleged he suffered jaw damage and could not move his mandible, then the evidence goes against him. Both because it is evidence that contradicts him and because it is evidence that he was not injured quite as badly as alleged.

Let us remember that no one can irrevocably prove that a person was not injured. No matter how "obviously" healthy and active someone appears straight after a collision or anytime since then, this cannot establish in fact that someone does not suffer pain. Pain is accepted to be the consequence of something being "wrong", thus injured.

Consequently, as a factual investigator the most concrete evidence you can reveal about the extent of an injury is evidence which shows there is serious doubt about the extent or the nature of an injury, that is, there is more reason to think he is not injured than there is reason to believe he is injured.

We will look later at precise questions that have to be covered with the witnesses to establish these facts.

### **2.1.1.4. What caused the accident?**

It's human nature to blame someone else for one's troubles and this is at its worst when it comes to car accidents. It was never my fault and it was always his or something else at fault.

*Because...? Why, Mr Witness, do you believe that?*

No matter how much blaming and how much bias, or simply wrong opinion is shown by the claimant, the insured, the witnesses and even police, by often repeating the leading prompt "...because?", you will find the facts.

You might not agree with the facts, that is, the evidence, but what matters is what does the statement say? If three statements say the defendant was to blame and one says he was not, then more than likely the court will judge it that the defendant was to blame. It is up to you of course to make sure you reveal the detailed explanations, justifications, from each witness, to test their comments, to clarify. The outcome of the legal action, or whether the