

Gathering and Presenting Evidence in Major Loss Recoveries

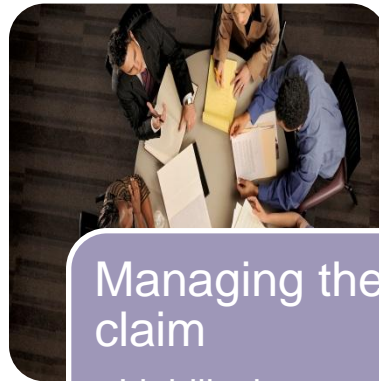
Neil Sanders (Burgoynes), Mark Wing (Clyde & Co), Andrew Rigney QC (Crown Office Chambers)

Overview



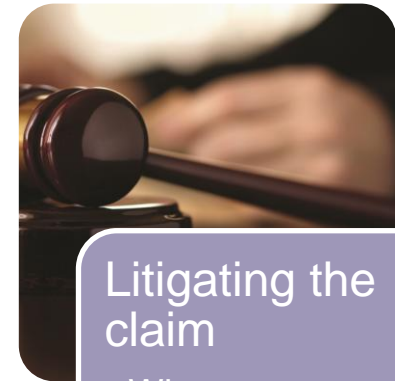
Investigating the claim

- Causation
- Witnesses
- Privilege
- The potential defendants



Managing the claim

- Liability issues
- Policy issues
- Working with the insured



Litigating the claim

- Witnesses
- Experts
- Proving causation

Gathering forensic evidence in major loss recoveries



- Investigation techniques
- Obtaining good forensic reports
- Case progress
- Case examples

Neil Sanders
Burgoynes



Purpose of investigation

- Cause of incident
- Third party involvement
- Compliance with insurance conditions/warranties
- Future risk
- Criminal act
- Damage attributable



Investigation approach

Approach is similar for all incidents

- Gather evidence systematically
- Consider evidence objectively
- Apply scientific knowledge and principles
- Consider guidance and legislation
- Tests, calculations if appropriate
- Test theories and re-evaluate if needed
- Formulate conclusions



Investigation – background information

- Witness evidence
- History of buildings, plant and equipment
- Maintenance work
- Previous problems
- Equipment design and installation
- Alterations
- CCTV, fire detection
- Operational data



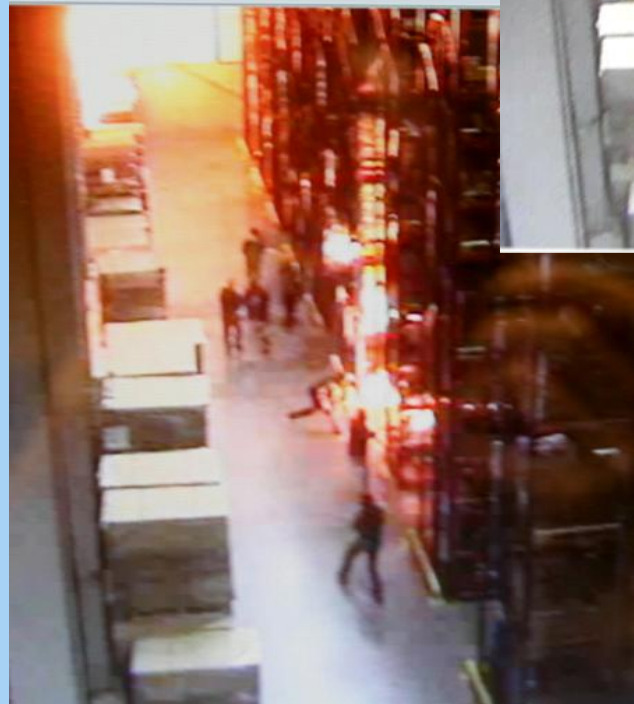
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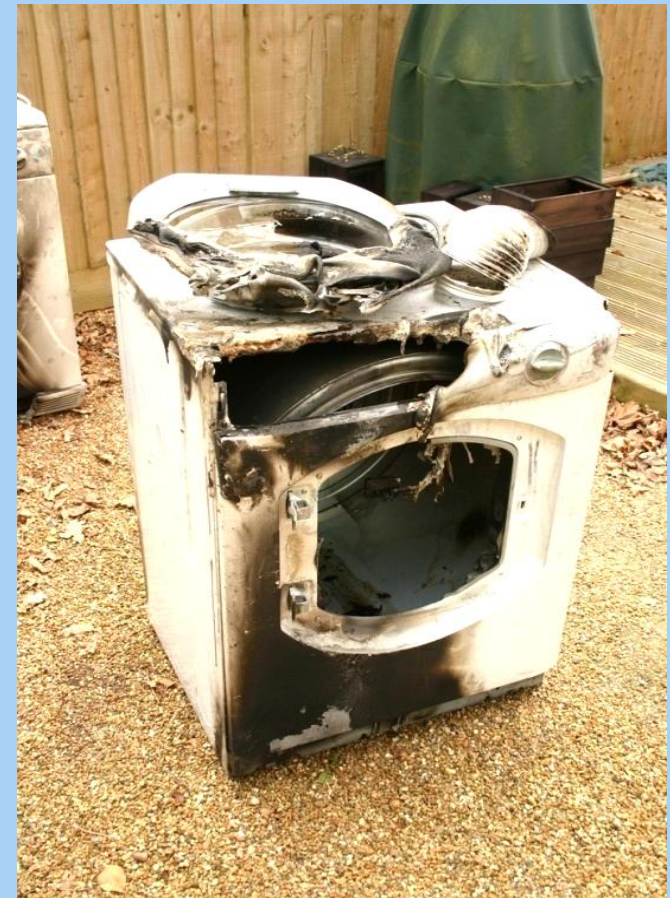
Investigation - inspection

- Preliminary examination without disturbing evidence
- Include peripheral areas:
 - Security
 - Causation
 - Abortive seats of fire
 - Past repairs or incipient problems



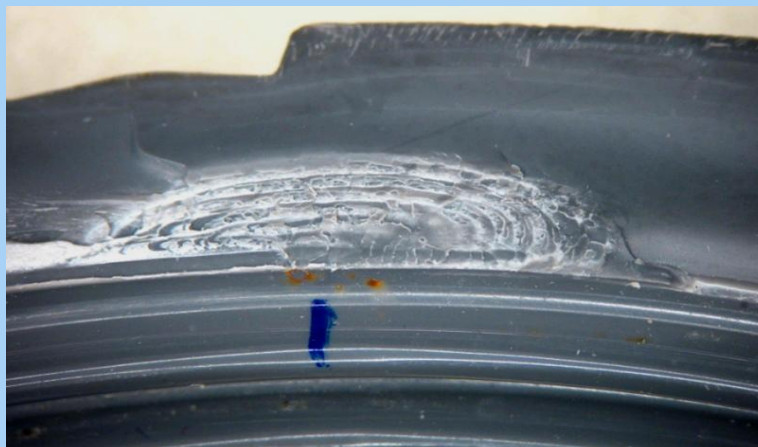
Inspection - next stage

- Detailed inspection of damaged item or area
- Including clearance, cleaning, sample removal
- Contemporaneous notes, photographs, sketches
- Testing, e.g. gas chromatography for fire accelerants; ignition and burning tests; chemical analysis; optical microscopy; metallurgical sample preparation; electron microscopy



Inspection – next stage

- Detailed inspection of item or area
- Clearance, cleaning, sample removal
- Take notes, photographs, sketches
- Testing, e.g. gas chromatography for fire accelerants; ignition and burning tests; chemical analysis; optical microscopy; metallurgical sample preparation; electron microscopy

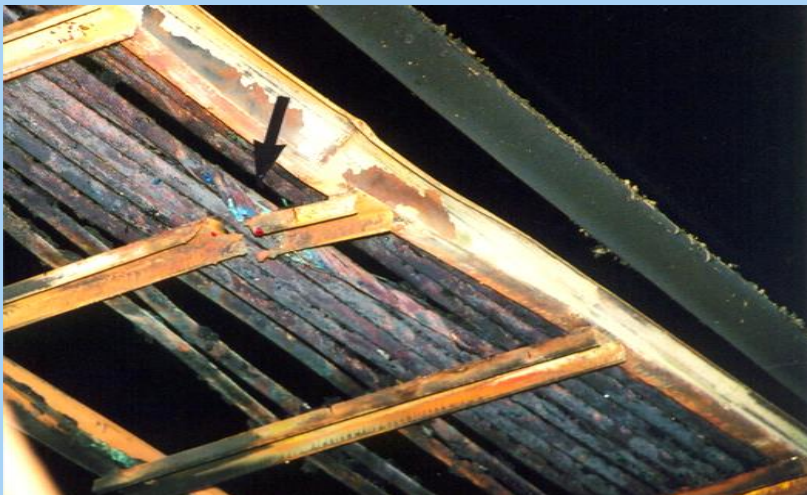


Investigation – example of large fire scene



Inspection – electrical evidence and origin of fire

- Melting of conductors - due to heat of the fire, or alloying, or electrical arcing?
- Arcing damage – cause or due to fire attack?
- Location of arcing may indicate where fire started
- Can electrical cause be eliminated?



Additional investigation

Depends on case:

- Consider insurance policy
- Other documents
- Other expertise e.g. electrical engineer, metallurgist, chemist, chemical engineer
- Calculations, tests
- Literature research
- Legislation, guidance and standards



Formulating conclusions

- Initially form tentative conclusions based on the evidence as a whole and scientific understanding
- Test tentative conclusions against all the evidence
- Finalise conclusions



Formulating conclusions

- What causes can be eliminated?
- For example, did the relevant part of a site or building have electricity at the time?
- Consider what causes remain, and what evidence indicates their relative probability
- How do the remaining causes relate to the parties involved, legislation and guidance?
- Evidence may not allow a single cause to be determined with certainty, but may be able to narrow the range.



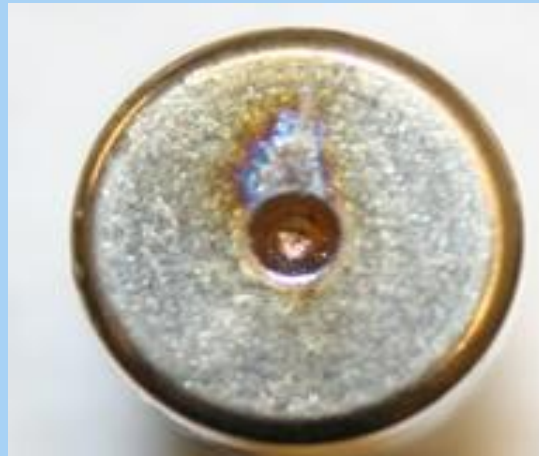
Obtaining a good forensic report

- Early instructions to minimise loss of evidence.
- Brief on purpose of investigation, particular concerns, background and insurance issues.
- Early access to witnesses, documents, policy wording.
- Discuss type of report required.
- Forensic investigator should be competent, independent and objective.
- Need appropriate experience and academic qualifications, understand insurance issues.
- Present evidence and conclusions for non-technical people.



Typical forensic report layout

- Introduction, summarising the incident, the work done and the documents and other information considered
- Background – circumstances, key witness evidence
- Inspection, detailing the physical evidence
- Tests, calculations (if appropriate)
- Discussion, setting out reasons for arriving at conclusions, including consideration of relevant legislation and guidance
- Future risk considerations
- Conclusions



Progress of the case

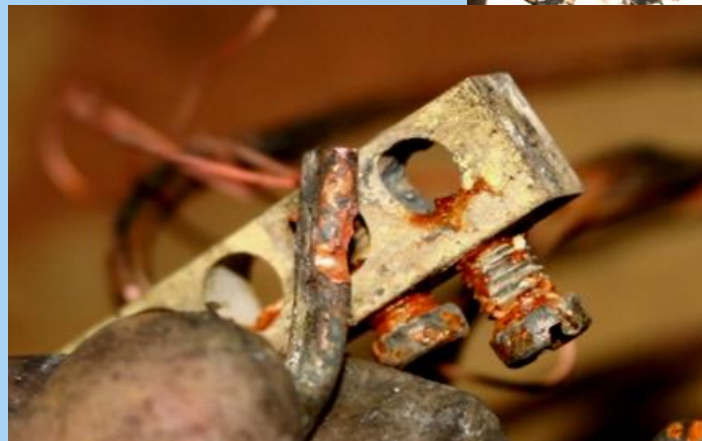
Meeting(s) with clients, lawyers:

- Identifying information not yet available e.g. witnesses, documents
- Identifying other areas of expertise, e.g. architects
- Clear, realistic summary of points in case, both strengths and weaknesses, to allow a proper evaluation



Conference with Counsel

- Expect cross-examination type questions
- Do not give in to pressure – value is in providing a realistic technical assessment of all points
- But be open to a legal way of looking at the case
- Provide a clear summary of views and how they are supported
- Assist with pleadings



Experts' meetings

- Areas to be covered should be agreed in advance
- Meeting(s) often held at claimant's expert's premises
- Preparation very important – photographs, documents circulated well beforehand
- Prior draft to form basis for meeting
- Sign at meeting if possible
- Keep to Court timetables



Court evidence

- Relatively rare these days
- Report must comply with Civil Procedure Rules
- Judges rely heavily on the experts' agreement
- Preparation is vital – be familiar with report, documents and foregoing evidence
- Don't allow questions to lead to unrepresentative views:
qualify answers if needed



Next presentation

From a lawyer's point of view.

Early assessment of merit of claim

What steps do you take to assess and preserve any claim?

Engage with the experts

Identify potential defendants and causes of action

Identify limitation issues

Liaise with the insured to preserve relevant documents

Take witness statements early

- *"It is a truism, ..., that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred."* Lord Pearce in Onassis v Vergottis [1968] 2 Lloyd's Rep 403

Early assessment of the financial merit

Does the potential defendant have any assets to satisfy a successful claim?

Availability of insurance

Scope of public liability insurance

Consider other types of insurance

Common exclusions – e.g. hot works

Common conditions – e.g. claims notification / claims cooperation

Availability of other assets

Existence of other defendants – is it someone else's problem?

Other sources of evidence

What other sources of evidence are available to assess the merit of the claim and when can you get that evidence?

Obtaining evidence from the (potential) defendant

Liaison with potential defendant's experts / adjusters

Pre-action disclosure requests

Pre-action protocol correspondence / requests

Pre-action protocol meeting

Disclosure during proceedings

Evidence of assets / insurance

Obtaining evidence from third parties

Non-party disclosure requests

Freedom of information requests

Investigations and privilege

When does a right of privilege arise and when do you waive privilege?

Types of privilege

How does privilege apply to certain categories of document?

Witness statements

Adjuster reports

Accident / Internal reports

Expert reports / notes

- *“Thus, I hope that, in the future, those responsible for investigating the causes of fire immediately after the fire will continue to take detailed notes and conduct careful interviews with the relevant witnesses. I also hope that those notes are then provided promptly to the other parties should the fire lead on to litigation of this kind.”* Wessanen Foods Ltd –v- Jofson Ltd [2006] EWHC 1325

... the claimant has to prove its case

The relationship with the insured

How do you work with the insured to maximise your chances of success?

Obligations on the insured (... the stick)

Cooperation

Not to compromise the claim

Recovery of uninsured losses (... the carrot)

Subrogation Agreement

Division of any recovery

Payment of legal costs and expert fees

Control of the litigation

Obligations imposed on the insured

Quantum

Liability is only half the battle, how do you best gather and present evidence on quantum?

Measure of damage

Reasonable cost of reinstatement – understand differences to measure of reinstatement under the policy

Does not require the work to be done

The importance of the loss adjuster

- *“if a sum has been assessed as reasonable by an experienced loss adjuster, it will ordinarily take good evidence to demonstrate that the sum was not in fact reasonable”* Brit Inns Limited -v- BDW Trading Limited [2012] EWHC 2143 (TCC)

Uninsured losses

Settling the claim

The underlying aim of all of the above is to maximise the chances of an advantageous settlement

Part 36 offers

Opportunities for settlement

Pre-action protocol meeting

Mediation

Negotiation

Sharing the evidence to facilitate settlement

If settlement is not possible, review merits and proceed ...

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FROM A BARRISTER'S POINT OF VIEW

Andrew Rigney QC

Crown Office Chambers

- **Early instruction of lawyers**
- **Witnesses**
- **Experts**
- **Causation and presentation in Court**

- **Early instruction of lawyers**

- Indemnity and insurance
- *CRS v Taylor Young* [2002] 1 WLR 1419, *Mark Rowlands v Berni Inns* [1986] 1 QB 211
- Potential liabilities to third parties

- **Witnesses**

- **Experts**

6 qualities

- **Genuine expertise**
- **Thoroughness**
- **Impartiality**
- **Ability to express complex ideas simply**
- **Willingness to make concessions when justified – avoidance of dogmatism**
- **Straightforward manner – opposite of being evasive**

- **CPR Part 35**
- **Protocol for the Instruction of Experts to give Evidence in Civil Claims**

- **Who to instruct?**

- **Expert meetings**
- **CPR 35.12(5)**
- **CJC protocol, paragraph 18.12**
- **CPR 35 PD 9.3 and 9.4**
- **TCC Guide, paragraph 13.5.2**
- **Joint statements**

- **Reports**

- **Cross examination of experts**

When it all goes wrong

- *SPE International Ltd v PPC (UK) Ltd [2002]*
EWHC 881 (Ch)

- **The result – proof and causation**

- *Nulty v Milton Keynes* [2013] EWCA Civ 15;
[2013] BLR 134

The Judgment of Edwards-Stuart J:

- The burden of proof was and remained throughout on Milton Keynes
- Arson was “extremely unlikely” – rejected it as a possible cause
- It was “very unlikely” that the fire was caused by electrical arcing of the cable – no more than a “remote possibility”
- Identified a series of facts on the evidence which made a discarded un-extinguished cigarette not improbable

- However, none of the candidates for the causes of the fire, if “taken on its own”, was “inherently likely”
- Accepted that it might be regarded as unlikely that an electrical engineer who had been a part-time fireman would smoke and discard an un-extinguished cigarette
- *“But if the only other possible causes of this fire are very much less likely.....in law the discarded cigarette becomes the probable cause of the fire”*

The Court of Appeal's decision:

- Para 34 – case based on circumstantial evidence
- Para 35

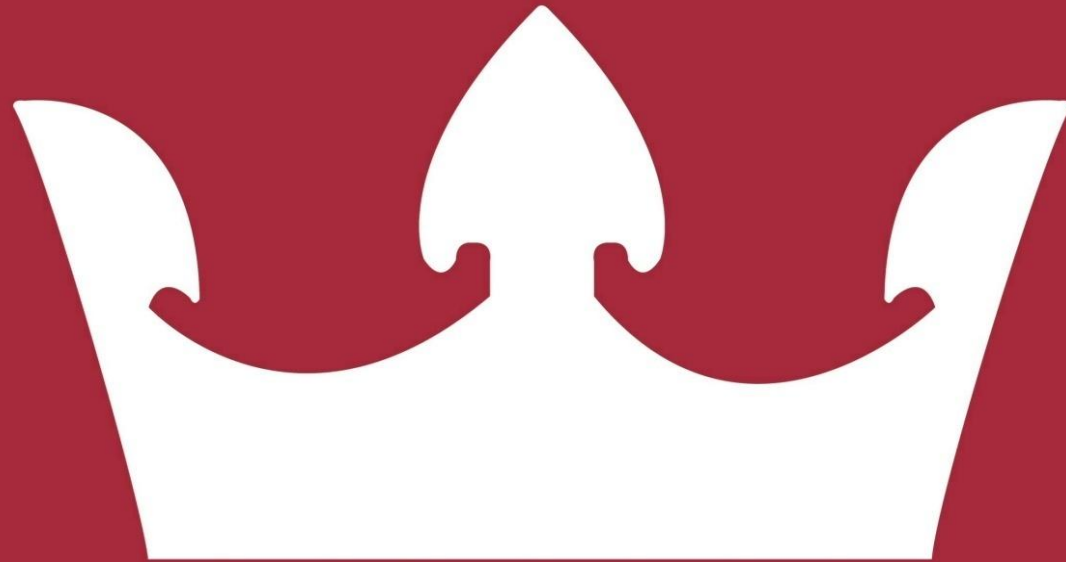
Balance of probabilities test:-

“....Court must be satisfied on rational and objective grounds that the case for believing that the suggested means of causation occurred is stronger than the case for not so believing...”

- Held: plain from Judge's reasoning that he was satisfied on all the evidence that case for believing Mr Nulty caused the fire than the case for not coming to that belief

Factors:

- adequacy of investigation – gaps in evidence/all facts known?
- other explanations?
- relative probabilities of potential causes – improbabilities of the one may serve to increase the probability of another



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