

# GETTING CLUED UP

## Stephanie Pelling offers some tips on instructing private investigators

There is something fascinatingly romantic about private investigators. Heralded from the golden age of detective fiction in the 1920s and 1930s, they operated in a political and social era typified by film noir, gangsters, crime, sex and moral ambiguity. It was an intoxicating epoch of intrigue and mystery that thrived in a paradoxical climate of post-war paranoia and new-found freedom. Many of the protagonists would transcend the literature in which they appeared, and become more famous than the stories they told.

Sherlock Holmes was already in the national conscience by this time, and his moniker is now synonymous with detective work. It has remained a profession that pedals great stories, and has been reinvented in subsequent decades with a new character, different setting and a thrilling compendium of new crimes to solve.

Holmes has been impressively followed by a new sleuth for every generation; Nancy Drew, Philip Marlowe, Hercule Poirot, Miss Marple, Magnum PI and Jessica Fletcher.

While modern day private investigators do not lurk in the shadows under a trilby, keep a revolver in their handbag or have the inside knowledge from one of the boys down the station, they really do participate in stake-outs, adopt different identities and wear disguises. Fact can indeed be stranger than fiction.

So what contribution can individuals in this esteemed profession make to personal injury practice in the 21st Century?



## PIs in PI

It is almost inconceivable to think that you can reconcile the worlds of the private investigator with personal injury claims, but the reality is that private investigators are playing an increasingly important role in personal injury litigation.

They are more regularly engaged at various stages of a case, by both claimant lawyers and insurers alike.

For the claimant lawyer, evidence has always been king - and those who embrace the more creative ways to obtain and test the evidence will be best-rewarded. That may be through earlier and more definitive assessment of prospects of succeeding (or a lack thereof); obtaining critical pieces of evidence; locating key witnesses; or even locating and identifying a potential defendant.

Claimant lawyers are taught to risk assess. Litigation is risk management after all, and it is essential to do what we can to increase the odds of a royal flush at the table. But the reality is that sometimes when you receive an enquiry or first instruction, there is very little to risk-assess; and for this reason, potentially meritorious cases may be prematurely dismissed.

It is important to consider what else could be accessible and beneficial outside of the more conventional investigative lines of requesting a police or Health & Safety Executive (HSE) report, and determining if there are any other witnesses that we can contact.

It is a difficult endeavour to ensure that all available evidence is reviewed to assess merit, while pushing for early decisions on prospects. It is not easy to strike the right balance between evidential due diligence and wider commercial realities of mounting WIP without hope of recovery.

Drawing upon the expertise of a private investigator may still seem a little alien to us. We may commonly associate private investigators with obtaining surreptitious photographs of a cheating spouse in flagrante, or investigating a company theft, inside trading, or finding a missing person. But across the pond, private investigators have long been allied

to the personal injury industry, principally by insurance companies - and it is easy to see why.

It is a mammoth business in America, and the costs and damages at play dwarf those in our own legal system. There is much at stake, and private investigators are habitually engaged as 'pre-trial detectives' to investigate a claim for personal injury.

Insurance companies use private investigators or their own SIU branch (Special Investigations Units) to investigate the validity of claims. It follows that where there is much at stake, there is much motivation to commit fraud.

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Using personal investigators in personal injury claims still feels relatively innovative, but they have been used by insurers for some time - and the prolificacy of surveillance is just one example of that. Solicitors in other areas of law such as criminal litigation or matrimonial law may use them more frequently. But for personal injury claimant lawyers, the benefits of engaging the services of a private investigator are still being explored.

As someone who has regularly sought assistance from personal investigators in cases of historic sexual abuse and serious injury claim, I consider them an invaluable asset in a variety of ways.

Investigators can be used to identify, locate and contact witnesses; locate and identify defendants; undertake financial due diligence on defendants to assess their means to pay costs and damages; identify and obtain archival or other historical documentation, footage or record; facilitate contact with recalcitrant witnesses for the purposes of securing a signed statement; and to serve pleadings direct upon a specific party.

## Private investigators

Surprisingly, private investigative work in the UK is an unlicensed profession, and anyone can assume the title and start peddling their wares. It is imperative that an instructing solicitor engages the services of a PI who is a member of a professional body or trade association to ensure that the individual has been screened, and - by virtue of their membership - is under an obligation to adhere to a strict code of conduct in much the same way that solicitors are. Accredited investigators will need to have professional indemnity insurance, which is a must when the parameters of their work can often be an invitation to blur the boundaries of legal with more illicit investigative practices.

### **Sarah Martin Investigations**

Sarah Martin has been working as a private investigator for over 20 years, and working for Irwin Mitchell for more than 16 years. She was formerly Chair of Education and Training on the governing council for the Association of British Investigators (ABI), and recently stepped down as Chair of the Membership and Selection Committee of the ABI overseeing membership and accreditation through interviews with investigators and newcomers entering the industry. Interviewees would include former police officers and members of the armed forces who were looking to get into investigative work. Such panel interviews, led by Martin, remain critical in maintaining high standards in the ABI.

Martin explains: 'Investigators can be full or provisional ABI members and solicitors can check the level of accreditation and areas of experience. Membership is vital in ensuring quality, indemnity and integrity. To put this into context, there are an estimated 10,000 private investigators operating in the UK, and only approximately 500-600 are members of the ABI.'

### **Instructing the right private investigator**

According to Martin, 'an investigator should ideally have a minimum BTEC Level 3 qualification (or the equivalent) as a professional

investigator, and be familiar with General Data Protection Regulations.

'Similarly, an investigator should pass a Disclosure and Barring Service (DBS) check (formerly a Criminal Records Bureau or CRB check) and evidence a clear criminal convictions certificate.

'Investigators can and do give evidence at trial in both civil and criminal matters, and every effort must be made to ensure that their credibility will not be in issue in cross examination.'

She also recommends that when approaching a potential investigative candidate, solicitors should ask about their current workload and relevant skill set, and ensure that they are data protection registered. It may also be helpful to ask about the balance of their receiving instructions from solicitors and insurers; in the same way you would with a medical expert.

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In the context of personal injury lawyers, it is imperative that any investigator understands the civil legal process. While you may only be instructing an investigator to address a discrete part of a claim, it is critical that that individual understands the wider role that their evidence could potentially play at trial, the prospects of giving evidence in court, and the importance of data integrity and the spectre of strict time frames etc. That is before addressing more specific issues such as the technicalities of serving witness statements, pleadings or bills.

**Data protection**

Solicitors will be all too familiar with the prominence given to the upholding of information rights in the public interest, promoting openness by public bodies and data privacy for individuals in the wake of the Data Protection Act 2018 (DPA).



This legislation controls how an individual's personal information is used by organisations, businesses or the government; everyone responsible for using personal data has to follow data protection principles to ensure that the information is used fairly, lawfully and transparently, used for specified and explicit purposes only, and in a manner adequate, relevant and limited to only what is necessary.

'The industry is information gathering and fact-finding' says Martin. 'It is focussed and specific investigation into data within specific parameters in the context of a personal injury claim, within the confines of what is legal.'

Simply put, a private investigator should know their way around basic data protection law. They need to know who is a data controller (the solicitor) and who is the data processor (the investigator); and on occasion, who may be both. It is important that an investigator is registered with the Information Commissioners Office (ICO). Providing data that has been obtained illicitly and in contravention of the DPA will have catastrophic ramifications for a solicitor reliant on it.

According to Martin, performing a 'data protection impact' (DPI) assessment ought to be the first thing that an investigator undertakes

on receipt of new instructions. This preliminary due diligence will enable the investigator to advise on (i) case requirements (ii) investigative objectives (iii) identify individuals with legitimate interest in relation to any prospective investigation and (iv) assess proportionality.

Investigators must also be familiar with what information is held publicly and without constraint.

An investigator ought to be conversant with public registers, databases and records offices to ascertain what information is readily available, provided you know where to look for it. Birth, Marriage and Death certificates are a matter of public record, and wills can be accessed via the Probate Registry, for example.

**Instructing a private investigator**

A private investigator becomes part of the legal team when instructed, and solicitors should provide them with as much information upon instruction as possible.

A competent investigator will have a natural aptitude for lateral thinking – the more information that you can provide in an instructing letter, the better the chance they can put that talent to good use. A competent investigator will merge creative strategy with legal knowledge and application.

It is also true that private investigators will have particular

areas of strength, experience and talent, and it is important to select the right investigator for the right job, whether that is surveillance, tracing individuals, financial status reports or serving witness documents. A prudent solicitor must consider not only the merits and tenacity of an investigator in finding a witness or tracing a document, but their wider role in the civil process.

A good private investigator will develop a rapport not only with the instructing solicitor, but also with a subject of enquiry. Witnesses will often be hostile when approached out of the blue, and the investigator must project an air of neutrality to secure engagement and compliance. It is the investigator who will be the first point of contact, and will be uniquely placed to promote positive relations with the solicitor.

Martin has these practical tips for instructing a private investigator:

- (i) Provide clear instructions – what does the solicitor require and in what time frame. Budget constraints ought to be flagged, and it may be appropriate to agree a set fee for preliminary investigations at the outset, before further instructions are confirmed.

Solicitors who are approaching the issue of proceedings, or who have already issued, will need to include investigative steps in a prospective budget – and may need to seek revision of one already approved by the court;

- (ii) Letters of instruction ought to contain as much information as can be practically provided – if instructions are restricted to perfunctory information, a solicitor may be overlooking an opportunity for an investigator to develop a lead and extract something potentially critical from a document;

- (ii) If an instruction relates to a financial status report, an investigator will need to know the level of potential damages (in so far as this can be estimated at that stage), in order to gauge the level of investigation that is appropriate to ensure that costs incurred remain proportionate.

The investigator will also need to know the level of any claim in order to review whether their level of professional indemnity insurance is sufficient or would need to be increased before accepting the instruction.

Similarly, in response, a private investigator ought to provide a copy of their terms of business, and address any issues raised by the instructing solicitor which may include memberships, accreditations, experience and instruction divide etc.

Progress, updating and final reports from an investigator, together with any appended photographs or footage, should be encrypted when sent to the instructing solicitor. On receipt of instructions an investigator ought to outline the initial investigations they intend to undertake and provide a costs estimate – an early indication will enable a solicitor to seek to amend their budget, if needed.

If that estimate should change, the solicitor ought to be informed before further work is undertaken.

### Conclusion

A final tip from Sarah Martin is that any solicitor would benefit from good relations with the investigator they instruct.

An investigator must feel comfortable enough to make recommendations in relation to further investigations that may assist, and this will be more likely where there is a good rapport and open communication – which could lead to further lines of enquiry for an investigator to pursue.

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