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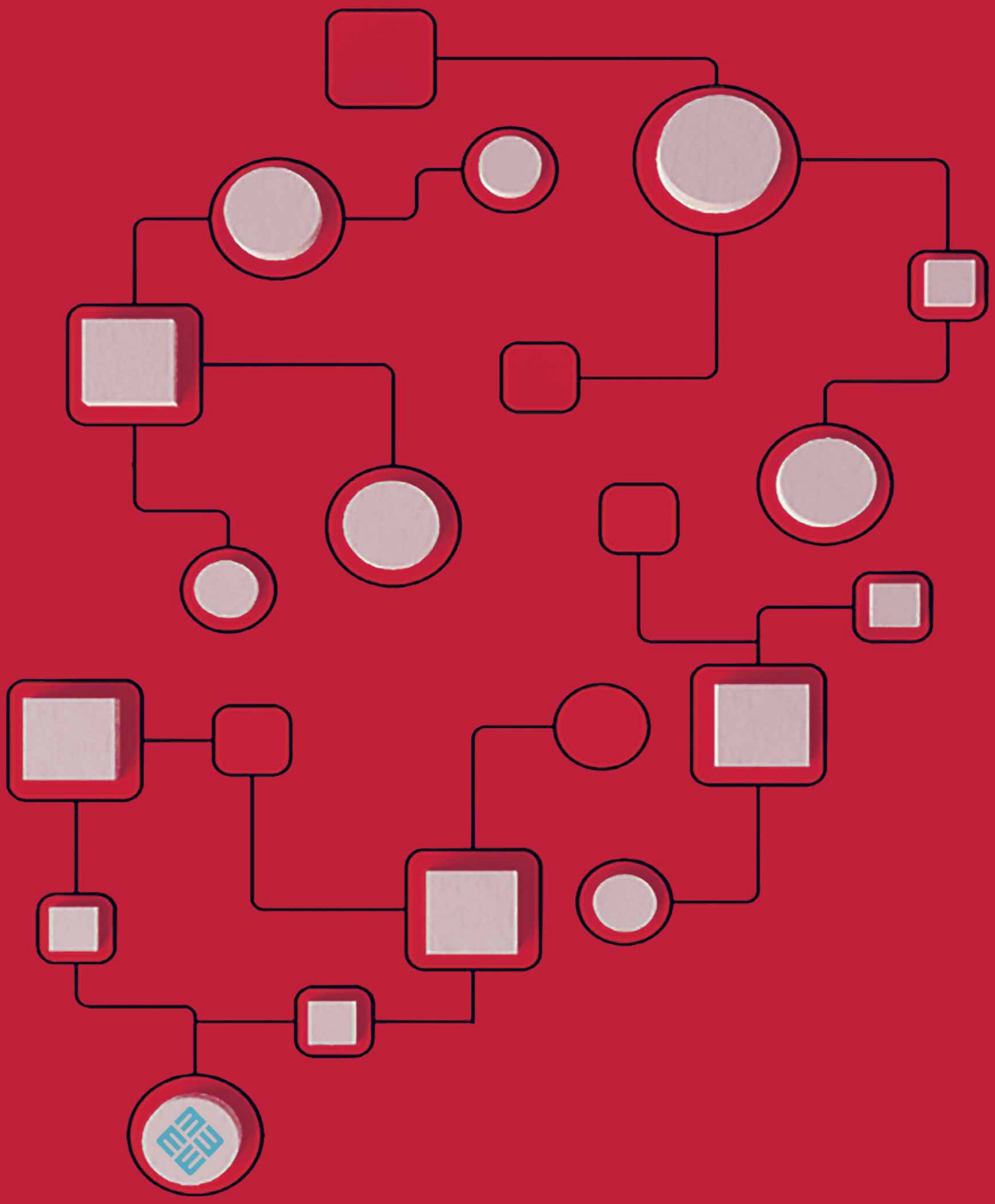

PERSONAL INJURY

Issue 61 June 2025 - £5.00 €6.00

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Welcome to the Expert Witness Journal

Hello and welcome to our June /July issue, the main focus of this issue is personal injury.

Personal injury is probably the most visible area for expert witnesss. A PI claim is a legal action taken when someone is injured due to the fault or negligence of another. This can include physical or psychological harm caused by accidents, medical negligence, or exposure to hazardous substances.

In this issue we feature articles covering a range of personal injury areas including, Medical Tattooing in Personal Injury Cases: A Crucial Contribution to Recovery and Compensation. In this article Rae Denman-Tanne explains how medical tattooing is increasingly being recognised as a valuable option in personal injury cases, particularly when it comes to scarring and pigmentation issues resulting from traumatic accidents.

Wrist Fractures in Medicolegal Practice: Why the Outcome is Rarely Perfect, fractures, particularly distal radius fractures, represent one of the most common injuries encountered in trauma and orthopaedic practice. An excellent article by Mr Ross Fawdington.

Scars – Combination Strategies for Prevention and Treatment, Mr. Raj Ragoowansi describes the choice of scar management. Wisdom Tooth Surgery Trigeminal Nerve Complications, by Dr R Kumar part one of a two part article.

Testing the Boundary: Tort Claims and Wrongful Acts by Alistair Kinley from Clyde & Co. *Bratt v Jones* [2025] EWCA Civ 562 this judgement provides clarification as to what the test for breach of duty is in a valuers' negligence case. Also featured is 'The Shadow of Gestmin - Analysing Lay Witness Evidence in Historic Industrial Disease Cases' by Samuel Shelton.

Understanding SIRVA Injuries: Causes, Symptoms and Treatment, in recent years, SIRVA - which stands for 'shoulder injury related to vaccine administration' by Rosie Nelson

Our next issue will be published in August 2025, it will have a non-medical focus, if you have a submission please email us.

Chris Connelly
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TUPE: Does Vicarious Liability Towards a Third Party for the Pre-transfer Actions of a Transferring Employee Transfer?

by Emma Ahmed, Legal Director, Professional Support Lawyer - www.hilldickinson.com

Employees benefit from various special protections when their employment transfers to a new employer because of a TUPE transfer. In particular, under the automatic transfer principle, most of the employee's employment terms are preserved on transfer and all the transferor's rights, powers, duties and liabilities under or in connection with the employee's employment contract transfer to the transferee. The High Court has recently considered the legal position when a claim for negligence is brought against an employer by a third party, in relation to the pre-transfer negligent actions of an employee whose employment has since been TUPE transferred to it.

ABC claims that she had suffered personal injuries whilst she was an in-patient at a hospital. She asserts that her injuries were caused by the acts/omissions of two doctors employed by the hospital and brought a claim seeking damages. At the relevant time, the hospital in question was owned/operated by H Ltd, but this had since been sold via a TUPE transfer to A Ltd and the employment of the two doctors had TUPE transferred across to A Ltd. A preliminary issue arose about whether the TUPE transfer meant that ABC could bring her claim against A Ltd, which would establish whether it was the insurer of H Ltd or A Ltd which was liable if ABC's claim was successful.

The High Court held that any vicarious liability of H Ltd for the alleged act/omissions of the doctors who had treated ABC did not transfer to A Ltd under TUPE. For liability to transfer under TUPE, there must be a direct connection between the liability and the transferred employment contract. The primary purpose of the TUPE legislation is to safeguard the rights of employees after their employment transfers and it is not generally concerned with preserving the rights of third parties.

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Some of the highlights of this issue

Events

Bond Solon

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Excellence in Report Writing
One day, virtual classroom 1 day
18 June 2025
9 July 2025

Courtroom Skills
One day, virtual classroom
19 June 2025 (sold out)
10 July 2025 1 day

Courtroom Skills* **
One day, In-person
16 September 2025

Civil Law and Procedure (Virtual)* England and Wales - 2 days
Starts: 15/05/2025,Virtual Classroom

Cross-Examination Day
One day, virtual classroom
20 June 2025 (sold out)
11 July 2025

Criminal Law and Procedure - England & Wales
Two days, virtual classroom
1-2 July 2025 (sold out)
11-12 December 2025

Family Law and Procedure - England and Wales
Two days, virtual classroom
23-24 October 2025

Discussions between Experts
Joint meetings and discussions between experts are requested by the courts in an attempt to save court time, reduce legal costs and bring about a settlement between the parties.
Discussions Between Experts (Virtual, 1:30pm - 5:00pm)
6 May 2025 (sold out)
21 May 2025 (sold out)
23 June 2025
15 July 2025

Law and Procedure - Scotland
One day, virtual classroom
23 June 2025

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MJF V University Hospitals Birmingham [2024] – The "Holmesian Fallacy" And The Limits Of A Put To Proof Defence

by Alex Stutt, Lawyer Injury & Medical Claims, Anthony Gold

I previously wrote about the risks of falling prey to the "Holmesian fallacy" in litigation. To recap, the fallacy arises from the following statement by Sherlock Holmes to Dr Watson in the 1890 story The Sign of the Four:

> *"How often have I said to you that when you have eliminated the impossible, whatever remains, however improbable, must be the truth?".*

The fallacy arises from the fact that it is very often impossible to eliminate all possible explanations for an occurrence. Therefore, it is usually a logical leap to say that any given explanation for something is true, just because you have eliminated all impossible explanations.

There is an important lesson to be taken from this in clinical negligence litigation. In any claim, the claimant must prove on the balance of probability that any injury for which compensation is sought was caused by negligence. What the "Holmesian fallacy" tells us, is that it may be insufficient for the claimant merely to rule out non-negligent explanations for the injury complained of. If the claimant cannot establish a positive proof of negligence, the claimant's case will remain vulnerable to the defence that they cannot realistically rule out all possible non-negligent explanations for the injury sustained and therefore the claim should fail.

However, is it really enough for the defendant simply to throw its hands up and adopt a put to proof defence in every case? A recent decision indicates otherwise.

MJF v. University hospitals Birmingham NHS foundation trust [2024] EWHC 3156 (KB)

In the recent case of MJF, the claimant was a 24-year-old with cerebral palsy. On 22 March 2016, the claimant underwent a PEG (percutaneous endoscopic gastrostomy) feeding tube insertion procedure. On 24 March 2016, the claimant was found unresponsive on the floor by one of her carers. She was rushed to hospital and underwent emergency surgery. The surgeons noted *"Necrosis around gastrostomy site"*. As a result of the breakdown around the feeding tube, the claimant suffered acute respiratory distress syndrome, sepsis, and multi-organ failure requiring ventilation. It was agreed by both parties that, subsequent to these events, the claimant's level of functioning deteriorated significantly, and her care needs greatly increased.

The claimant alleged that there was negligence in the performance of her PEG procedure and that this was the cause of the feeding tube breakdown in March 2016. Specifically, the experts instructed on behalf of the claimant were of the opinion that the feeding tube had been placed with excessive tension and that this was the cause of its subsequent breakdown.

The defendant denied liability in full. In its Defence (as amended), the defendant did not provide any alternative explanations for the feeding tube breakdown.[1] The defendant's position was that the breakdown had occurred because of a *"rare but recognised complication"* and that the claimant had not proved her case.

At trial, HHJ Emma Kelly was careful to balance the principle that the claimant must prove her case, against the failure by the defendant to offer plausible non-negligent explanations for the feeding tube breakdown. In that regard, she considered the case of *O'Connor v. The Pennine Acute Hospitals NHS Trust* [2015] EWCA 1244 which states:

> *"The fact that the defendant had not proffered any plausible explanation for the claimant's injury consistent with the exercise of due care did not convert the case into one of res ipsa loquitor. Nor did it reverse the burden of proof. Nevertheless, this was a material factor, which the judge was entitled to take into account"*

The judge found for the claimant on liability. The judge was careful not to assume that the claimant's case was correct just because the defendant had not provided a more plausible explanation (and the judge thereby avoided committing the Holmesian fallacy). However, the defendant's failure to offer any alternative plausible explanations encouraged the judge to look more favourably upon the claimant's evidence. As the judge noted towards the end of the judgement:

> *"The absence of any alternative plausible explanation…is a factor that adds weight to the claimant's experts' opinion."*

Comment

This judgment is a warning to defendants that a mere put to proof defence may often be insufficient to mount a defence to a claim. Whilst the burden of proof ultimately rests with the claimant, this case indicates that the court may look more favourably on a claimant's case when a defendant has not identified plausible non-negligent explanations for a claimant's injury.

Reference

[1] The defendant did offer alternative explanations for the breakdown in its first Defence, but these were removed by a later amendment. The defendant's experts also attempted to raise alternative explanations for the breakdown at trial in cross-examination, but these alternative explanations were rejected as inadmissible by the judge, and in obiter dicta were all found to be *"implausible"*

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Private Hospital Liability Post Bartolomucci

By Jonathan Bonser & Louise Kane - www.dacbeachcroft.com

Overview
DAC Beachcroft have successfully defended Circle Health Group Limited in the Part 8 claim of *James Donald Bartolomucci (a protected party suing by his Litigation Friend James M Bartolomucci) -v- Circle Health Group Limited [2025] EWHC 529(KB) (Bartolomucci* for short).

The Judgment has implications on how patient terms and conditions should be drafted, to ensure clarity regarding the lines of liability between treating consultants and the hospital.

Background
Bartolomucci belongs to a line of cases where a Claimant in the tort of negligence is presented with a potential defendant who cannot meet the compensation claimed. This usually occurs where the potential defendant has no effective insurance or indemnity cover. The Claimant is then forced to find ways of pursuing other parties for compensation through claims based, for example, in vicarious liability or non-delegable duty of care. Bartolomucci represents a variation on this theme and was pleaded in straight contract. The claim is specific to medical negligence in private hospital settings.

A common way of organising private hospital care is for treating consultants (surgeons, anaesthetists and others) to act as independent contractors under practising privileges within the hospital. Under this arrangement, the consultants will have their own indemnity arrangements and it is expected that they will be liable for any mistakes they make in performing their services. The hospital, on the other hand, will be responsible for nursing and other care they provide. What the Claimant in *Bartolomucci* was arguing was that there was a contractual obligation on the private hospital defendant, Circle Health Group (Circle, also referred to as BMI in the Judgment and this article), that rendered them responsible for the treatment provided by the surgeon and the anaesthetist. Circle successfully rebutted the claim, but the Judgment highlights the need for clarity in contractual documentation with patients.

Facts
On 12 May 2015, the Claimant underwent a hip resurfacing procedure. Surgery was performed by a consultant orthopaedic surgeon with anaesthesia being administered by a consultant anaesthetist (the Consultants). The Claimant suffered a catastrophic brain injury during the surgery. He has significant care needs. In the Judgment, it is noted that the Claimant alleges that the surgery and/or the anaesthesia were not carried out with reasonable care. He intends to seek damages as a result.

The surgery was performed following agreement to contractual documentation sent to the Claimant by BMI under cover of a letter dated 23 April 2015, offering a self-paying fixed price package (the Contract). The extent of the contractual obligations set out in those documents formed the basis of the claim.

Although the anaesthetist had indemnity cover through a medical defence organisation (MDO), that MDO indicated that they were not representing the anaesthetist and had no interest in the claim intimated against him. The anaesthetist was, therefore, unindemnified in a claim for very significant damages.

The claim
Virtually all, if not all, medical negligence claims are pursued through what are known as Part 7 proceedings which plead a full claim potentially allowing for extensive written and oral evidence from lay witnesses and experts. The Claimant in this case issued Part 8 proceedings against Circle. Such Part 8 proceedings allow for only limited, if any, oral evidence. The Court's findings are to be based largely on an interpretation and analysis of limited documentation.

These Part 8 proceedings sought various declarations from the Court in contract, which, if successful, would then be applied in conventional Part 7 medical negligence proceedings. The Claimant sought declarations that the services provided pursuant to the Contract with BMI included all in-patient medical and surgical (to include anaesthetic) treatment and healthcare required as part of the hip resurfacing procedure. The Claimant also sought a declaration that Circle were liable in contract to him for the acts and omissions of the consultants.

In their Defence, Circle argued that they were only responsible for the hospital care provided by its nurses and other such items as listed in the contractual documentation that was provided to the Claimant, but not the care provided by the Consultants.

Contractual documentation
Although other issues were aired within the Judgment, in essence, the argument revolved around the following documents and issues.

The covering letter sent by BMI to the Claimant's father in April 2015 stated "*Following your consultation with [the surgeon], please find enclosed details of our self-pay fixed price package for your surgery. This offer is made subject to the Terms and Conditions set out in the enclosed ....*"

There was a Quotation attached to the covering letter in the sum of £14,220.00 for the procedure. The items

listed as included in the fixed price package were "*Consultants' operating fees*". Listed among the items not included in the package were "*the Consultant's fee for the initial out-patient consultation*".

The attached Terms and Conditions referred to in the covering letter ran to 25 clauses. Although the Judgment refers to other clauses, Clauses 18 to 20 are key to the Judgment as handed down by the Court. They read as follows:

18. *All consultants are self-employed and provide their services direct to the patient.*

19. *Your quote will state whether the Consultant's fees for the procedure and the follow up (but not the initial consultation fee) are included in the quoted price. If the fees are included, the hospital will usually collect the consultant's fees as agent, but occasionally you will receive a separate invoice from the consultant for his portion of the procedure cost...*

20. *The initial consultation fee with the Consultant is a separate fee (outside the package price) which will be invoiced to you directly by the Consultant.*

Method to be adopted in the interpretation of the Contract – Summary of arguments

Both the Defendant and the Claimant agreed that the appropriate way of interpreting the contractual documentation was by reference to the Judgments in *Lamesa Investments Limited -v- Cynergy Bank Limited* and *Network Rail Infrastructure Limited -v- ABC Electrification Limited*.

The Judge considered his role was to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood the language used in the Contract to mean. The departure point for the interpretation of the language is the natural and ordinary meaning of the contractual terms used.

The Claimant laid great weight on the wording in the covering letter from BMI which offered the fixed price package for "*your surgery*". This, they argued, indicated that the Contract covered all aspects of the procedure including the surgery and anaesthesia.

In contrast, BMI relied heavily on Clauses 18 to 20 of the Terms and Conditions attached. The hospital argued that the Consultants' services were not included within the Contract as between BMI and the Claimant.

The judgment

The Judge acknowledged that the covering letter stated that the fixed price package was for "*your surgery*". However, this covering letter made mention to the Terms and Conditions and the attached Quotation. The Quotation described the procedure as "*The Birmingham Hip resurfacing procedure*". This description describes the subject of the Contract as being the procedure, but the inclusion in the Quotation of a text box listing what is and what is not included within "*your package*" makes clear that not all matters are covered. The initial consultation with the Consultant was not included. The Consultant's operating fees were included in the total sum charged by BMI.

The reference in Clause 18 of the Terms and Conditions to the Consultants being self-employed does not give any indication whether the services of surgeons or anaesthetists should be excluded from the scope of the obligation. After all, terms can be included within any contract for services to be performed by a third party. However, the second half of Clause 18 stipulates that the Consultants provide their services direct to the patient. A reasonable person would consider that Clause 18 stipulates that the Consultant rather than BMI would provide their services to the patient. Furthermore, these words are preceded by "*all Consultants are self-employed*". This allows the reader to understand that the Consultants do not work for BMI.

Clause 19 stipulates that the fees of the Consultants in this case were collected by BMI acting as agent for the Consultants. This is consistent with the Contract not including the provision of the Consultants' services.

Accordingly, the Court concluded that the ordinary and natural meaning of the words in Clauses 18 and 19 would have conveyed to the reasonable reader that the surgical services of the Consultants were to be provided by them rather than BMI. Reading the Contract as a whole, the purpose of the Contract was to provide a fixed price package for the Claimant's hip resurfacing procedure that included within the fixed price fees charged by the Consultants.

The Court, therefore, accepted the Defendant's arguments and dismissed the Claimant's request for declaratory relief.

Other matters in the judgment

Amongst other matters dealt with in the Judgment, the Court considered the following:

- It was not much argued by the parties, but commercial common sense is an important factor in the interpretation of contracts. The Judge concluded that the Defendant's interpretation of the Contract was consistent with commercial common sense.
- Documents that post-date contract formation or are not shared with the patient cannot form part of the factual matrix relevant to interpretation of a contract. For example, the practising privileges as between BMI and the Consultants would not lie within the knowledge of the Claimant and were, therefore, disregarded. The Registration Form that was signed by the Claimant after the formation of the Contract was also disregarded.
- There were no formal written contracts as such between the Claimant and the Consultants and the Claimant had specifically pleaded that no contracts were formed. In its Defence, the Defendant made no admissions as to the existence of such contracts. On the evidence available, the Court concluded that there were contracts between the Claimant and the Consultants. It should be noted that the Court accepted that the consent process in private medical healthcare

formed a part of the contractual process as between consultant and patient.

● The Part 8 proceedings made no claim for damages in personal injury. Accordingly, Qualified One way Cost Shifting (QOCS) does not apply. Circle is, therefore, as successful party in the claim, entitled to claim and enforce its costs as against the Claimant.

Summary and next steps

This claim required careful consideration of the specific contractual terms and the detail of the judgment provides guidelines for private hospital operators to consider when drafting their patient terms and conditions, and wider suite of documents for patients.

Given the profile of this case, and the issues raised, we recommend that private hospital operators re-visit their patient terms and conditions to ensure they clearly demarcate the lines of liability as between the private hospital operator and the patient, as well as the consultant and the patient.

Should you require support in reviewing and updating your patient terms and conditions in light of this judgment, please contact Jonathan Bonser, Legal Director or Louise Kane, Senior Associate. Jonathan led the successful defence in this case and Louise Kane is a commercial lawyer who has supported on reviewing patient terms and conditions for private hospitals.

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Testing the Boundary: Tort Claims and Wrongful Acts

by Alistair Kinley, Clyde & Co

The recent decision in *Dormer v Wilson and others* [2025] EWHC 523 (KB) is the latest judicial application, in road traffic cases, of what now seems to be known as the illegality defence, having previously been widely referred to as the ex turpi causa rule. At its core is the relatively uncontroversial proposition that a civil claim arising from the claimant's own wrongful act should be barred so as to ensure the integrity of the legal system between the criminal and civil fields.

In recent years, the Supreme Court has had to consider the basis and extent of the defence on several occasions and in very different factual settings. We will not rehearse that case law in this article but instead focus on how the defence was applied in Dormer.

Background

The facts were that the clamant and a relative, both teenagers without driving licences, were riding a stolen motorcycle when it collided with another vehicle at a junction in Birmingham city centre. Neither was wearing a helmet. The rider's negligence was the sole cause of the accident, but there was some dispute as to which of them was at the handlebars. However, the judge found that evidence at the time of the accident given by police, ambulance staff and lay witnesses established that the claimant was the passenger on the bike.

As a passenger, three wrongful acts might have been laid at the claimant in order to establish the illegality defence. If any of them stuck, the defence would bite and bar his claim: its force is that it is a complete defence and not a partial one. The potential wrongful acts were: (i) allowing himself to be carried in a vehicle known to be stolen or unlawfully taken (s12 Theft Act 1968), (ii) dangerous driving (s2 Road Traffic Act 1988), and (iii) causing or permitting a vehicle to be used without insurance (s143 RTA).

Examination of witness evidence

After careful examination of the witness evidence – that of the claimant in particular – the judge held that none of these had been established.

First, he found on the evidence that the claimant did not know or suspect the motorbike had been stolen. The related questions of whether he knew or had reason to suspect it was not insured and what effect that might have on the liability of the insurer or that of the Motor Insurer's Bureau were also examined but are not addressed in this article.

Second, the facts as found did not amount to a joint enterprise of dangerous driving, unlike the decision in *McCracken v Smith, MIB and Bell* 2015] EWCA Civ 380, which also involved two teenagers on a motorcycle colliding with another vehicle.

As regards the third potential offence, although the journey in which the claimant was injured was to some degree at his instigation because he wanted to be taken to hospital for medical treatment, he had nevertheless not "*'caused' the defendant to 'use' the motorbike without insurance contrary to s.143(1)(b) RTA by… requiring to be taken to hospital on [it]*".

Contributory negligence

In *Wallett v Vickers* [2018] EWHC 3088 (QB) Males J observed that "*careless driving is a criminal offence but nobody would suggest that careless driving by the claimant prevents the recovery of damages (reduced as appropriate on account of contributory negligence)*". In the present case, and by analogy, the judge adopted Males J's reasoning to the causing use without insurance offence, stating that:

"[the] *recovery of damages when a subsequently-injured passenger has (even knowingly) caused a driver to drive without insurance contrary to s.143 RTA is not harmful to the integrity of the legal system in the same way as dangerous driving. Again, a claimant is not compensated for the consequence of his own criminal act in encouraging driving without insurance, but for the consequences of the driver's negligence in injuring him and his foolishness can (and here in my view, does) sound in contributory negligence.*"

This conclusion would seem to be entirely obiter, given that the judge did not find that the claimant had caused the s143(1) offence.

For all these reasons, the illegality defence failed. But, as suggested immediately above, the issue of contributory negligence was highly relevant. Reviewing the well-known authorities, the judge noted that in *McCracken* (above), failure to wear a helmet was one of several elements of contributory negligence – assessed in the aggregate at 65% by the Court of Appeal – that had been "agreed at 15% because it would have reduced injuries".

The judge said he would have adopted this level if failure to wear a helmet was the only contributory feature. It was not, and a modest increase to 20% was appropriate on the facts. The claimant and defendant "*may not have had a joint enterprise of joyriding, but they had a joint enterprise of bad-decision-making… [however] bearing in mind the claimant's young age and inexperience, his trust in the older first defendant who is clearly mainly responsible for the injuries and this being a case of poor decision-making by the claimant rather than reckless 'fun', the*

appropriate overall reduction (including for the absence of a helmet) is 20%."

Future developments

It is suggested that the outcome in Dormer does not amount to a further circumscription of the illegality (formerly ex turpi) defence, but instead an appropriate disapplication of it in light of the lack of criminality or turpitude on the claimant's part. This recognises that the defence is grounded in protecting the integrity of the law by barring recovery if the harm arises out of the claimant's wrongful act, not his or her merely foolish act. The truly new element in Dormer may prove to be the obiter analysis that even had the s143 offence been made out, it would not have triggered the illegality defence.

There may be yet further development of the defence. The judge in Dormer noted that *"the Supreme Court's work on illegality is not yet done: they granted permission to appeal Lewis-Ranwell v G4S & others [2024] EWCA Civ 138 where the Court of Appeal in yet another 'mental health unlawful killing' case held the illegality defence does not apply where the individual is unaware of their own criminality."*

The facts of that case read like an exam question. After the claimant had been negligently discharged from mental health care, he killed three elderly men in their own homes. He was charged with murder but was found not guilty by reason of insanity. He brought civil claims for the failure to provide adequate treatment and care.

In February 2024, the Court of Appeal held "*by a majority of 2 to 1, that a person who deliberately and unlawfully kills whilst insane is not barred by the defence of illegality from suing mental health services for allegedly failing to treat him properly[1].*" In May 2024, the Supreme Court granted the defendants' request for permission to appeal, although a hearing date has yet to be listed. It has been described as *"a truly shocking case on the facts [raising] ethical as well as legal issues and the Court of Appeal's decision is likely to divide opinion sharply. However, there is currently no ruling on this precise situation from the highest court in the land[2]".*

References

[1] This passage is taken from a summary by Deka Chambers: Judgment handed down in Lewis-Ranwell v G4S Health Services & Others (2024) - Deka Chambers - Barristers Chambers

[2] In a case note published by NHS Resolution: Case of note: Lewis-Ranwell v. G4S Health Services (UK) Ltd., Devon Partnership NHS Trust and Devon County Council (Court of Appeal 16 February 2024) - NHS Resolution

New APIL President Calls for Pride in PI

Personal injury lawyers need to be ready to shout loudly about the difference they make to people's lives, APIL's incoming president has said.

Matthew Tuff addressed his fellow APIL members following the association's annual general meeting today (Thursday 15 May).

"Let's remember why we chose this job - to fight for those who find themselves at the lowest point in their lives and to help them to rebuild those lives," said Mr Tuff, who specialises in catastrophic injury claims.

"In their need for redress to help them turn their lives around, they risk standing alone against big, corporate insurance companies. And, it is you who make sure that these vulnerable, injured people, and their families, are not in that fight alone," he said.

"More than ever, we need a strong, united voice... APIL is proud to be that voice and proud to be the champion of the claimant PI sector," he went on.

Matthew is committed to APIL's flagship Rebuilding Shattered Lives campaign, which aims to rebuild trust in personal injury lawyers and put injured people at the heart of policymaking. Another key issue on his agenda is the "increasing abuse of fundamental dishonesty rules".

"It is awful that a claimant who may have experienced catastrophic injuries and psychological trauma is, on top of everything else, wrongly accused of dishonesty," he said.

Mr Tuff also lauded the Serious Injury Guide, a collaborative project with FOIL which marks its 10th anniversary this year and is a tool he uses himself.

"As a mature, modern, pragmatic organisation, APIL is open to collaborating with defendant organisations if this can help to achieve positive outcomes for victims of negligence," he said.

New postholders on APIL's executive committee were also announced at the annual general meeting today. Sabrina Lawlor, from Thompsons Solicitors, is the association's representative for Northern Ireland and James Byrne of Deka Chambers takes the dedicated barrister seat. Jonathan Scarsbrook from Irwin Mitchell and Erin Darling-Finan from Amicus Law have been elected as additional officers

Bratt v Jones [2025] EWCA Civ 562

The Court of Appeal, on 2 May, handed down its decision in the case of Bratt v Jones, in respect of which DAC Beachcroft acted on behalf of the successful Defendant/Respondent valuer, Mr Jones. The judgement provides clarification as to what the test for breach of duty is in a valuers' negligence case, as well as outlining some obiter dicta thoughts about how the test might be addressed further by the Supreme Court in a suitable case.

Although the law had seemed fairly settled, the Claimant in this case was contending that there was more to be read in those authorities than had previously been detected, and that no specific findings as to what a valuer had done wrong – beyond reach the 'wrong' valuation figure – was necessary to establish liability. Neither the trial Judge nor the Court of Appeal had any doubt that this was wrong. The parties had – rightly – proceeded on the basis that there was a precondition to liability that the valuation had to fall outside a reasonable bracket. The Court of Appeal found that this was correct by reference to existing Court of Appeal authority, but did take the opportunity to set out some thoughts as to whether this was an approach which ought to withstand scrutiny from the Supreme Court.

Background

Mr Bratt, the Claimant, owned a site in Oxfordshire which had planning consent for 82 houses across around 10 acres. In June 2013, a developer who had the option to purchase the site exercised its option, the parties could not agree a price, and the Defendant was instructed to value the site in an independent expert determination.

The Defendant, Mr Jones, carried out a valuation and assessed the market value of the site at £4.075million. The resulting purchase price was £3,529,500 which reflected 90% of the market value, less various deductibles. Mr Jones' exercise included residual and comparable valuations. In undertaking the comparable assessment, he identified a site which he considered so similar that he placed exclusive reliance on it. The Defendant elected to rely on this method as the basis of his valuation of the site as being £4.075million. He determined that the residual valuation (of £3.634m) supported this calculation (albeit unbeknown to Mr Jones at that time, the residual valuation contained an error which would have otherwise valued the site at around £4.6million).

Mr Bratt commenced a claim on the basis that Mr Jones had negligently undervalued the site, alleging that the site was worth around £8million. This claim was supported by expert evidence although, unusually, that expert evidence did not include an opinion as to the reasonable range of opinions which could have existed.

The expert evidence obtained on behalf of the Defendant expressed the view that a reasonably competent assessment would have resulted in a market value within a +/- 15% range of £4.2million.

The Law

One of the points in dispute was how the Court should find breach of duty on behalf of a valuer.

The Claimant argued that, if a valuation is found to fall outside of what the Court considers to be a reasonable margin of error, then that is prima facie evidence of negligence and a claimant does not have to take any further steps and does not have to plead or demonstrate the methodological reasons why the valuation was not reasonably competent. The Claimant contended that at this stage the 'evidential burden' then falls to the defendant valuer who must demonstrate they were not negligent.

The Claimant relied in particular on the cases of *Merivale Moore*[1] and *Legal & General*[2], as authority that the focus of the enquiry should be exclusively on the end result, rather than the process followed by the valuer. While the Claimant accepted that there may be cases where the valuer escapes a finding of negligence even where its valuation falls outside a reasonable margin – if a defendant can satisfy the evidential burden upon it to demonstrate that it had not acted negligently in the circumstances of the case – the Claimant argued that this would be a rare case and that the onus was on the Defendant to show that it fell within this exceptional category.

The Defendant however submitted that, while the cases showed that a *precondition* to liability was that the valuation fell outside a reasonable margin, the underlying requirement for liability must always be the *Bolam* principle, namely a finding that the Defendant acted in an identifiable manner in a way which no reasonably competent valuer could have done. In this way, the Defendant submitted, valuers cases are no different to any other professional negligence case, and a claimant must always plead and prove that the professional has failed to act in accordance with the practices of a reasonably competent professional of the same profession.

At trial the Defendant was at pains to emphasise that, in anything other than the most straightforward cases, the Court will - in order to arrive at its own 'true' valuation of the property - need to carry out a detailed consideration of the approach and steps taken by the valuer, which will by necessity include an assessment of whether such approach and each of the steps were reasonably competent. The assessment of what is considered to be reasonably competent will often reflect a range of approaches, on the basis that valuation is an art not a science and bearing in mind that not every

competent valuer will adopt the same approach as well as the fact that not every error will amount to a breach of duty. As such, a non-negligent range will encompass every result that could be arrived at by a reasonably competent valuer.

In essence, the Defendant's position was that a valuer cannot be found liable unless the Court finds that (i) some aspect of the valuation was carried out in a manner which was not reasonably competent and (ii) the valuation falls outside a reasonable bracket, looking at all the evidence available.

Finding at trial
The first instance Judge dismissed the claim.

He essentially agreed with the Defendant's analysis of the law and, having reviewed the various authorities, distilled two main principles:

- A finding of negligence can only be made if the valuer failed the Bolam test, namely to reach the standards of a reasonably competent professional in that field;
- But it is a precondition of liability that the valuation falls outside an acceptable bracket.

The Judge found that the Court's task was to form its own view as to the correct value and then identify an appropriate margin of error. Should the original valuation fall within the margin, there is no negligence. Should it fall outside the margin then the Court must examine whether the valuer has failed the Bolam test.

The Judge made it clear that, ultimately, the question of negligence could not be decided solely by whether the valuation fell outside a reasonable margin of error but by reference to whether the valuer acted "*in accordance with practices which are regarded as acceptable by a respectable body of opinion in his profession*."

The Court emphasised that, in complex valuations, an assessment of the 'true' value will often require considering what a reasonably competent approach would be to each step of the calculation. If the valuer is able to show that the steps they took would be considered acceptable by their professional peers, negligence cannot be established.

There will often be some differences between how different valuers approach a valuation and there can often be more than one single accepted practice in respect of the issues that arise. Where there are a range of approaches that the profession would generally accept as being reasonably competent, this should be reflected in the Court's assessment of the reasonably competent range.

In the present case, the Judge found the Defendant to have acted competently in his reliance upon one comparable site and in assessing the comparable evidence by reference to how a hypothetical purchaser would have approached its valuation of the land, market value being a question of what the market would pay for it. The Judge found that the Defendant's approach in this case reflected the exercise which was likely to have be taken by the hypothetical purchaser and therefore was likely to lead to an accurate assessment ("*or thereabouts*") of the true market value of the site.

The Judge considered each stage of the valuation process and concluded that the most likely market value of the site was £4,746,860, which placed the Defendant's valuation within an acceptable margin, of up to 15%. As such, there was no need for the Judge to go on to assess the Defendant's practices as compared to a respectable body of his peers any further, and the claim was dismissed.

The Claimant appealed on the basis of 4 grounds including 2 relating to the Judge's approach in law.

The appeal
The appeal was dismissed in full by the Court of Appeal.

In respect of the 2 grounds of the law, the Claimant argued that:

- The Judge applied the wrong legal test to determine liability, the correct approach being that if the valuation falls outside the margin, it is determinative of liability unless the valuer can prove they were not negligent.
- The Judge was wrong to approach the assessment of the margin as a matter of fact to be determined by reference to expert evidence; it was a question of law for the Court to assess and should have been 10%.

The Court rejected both of these arguments, making it clear that: "*whilst a valuation outside the acceptable bracket is an indication that something may have gone wrong, a claim in negligence or breach of contract against a valuer cannot succeed unless the court is satisfied that the valuer has failed to exercise due and proper professional skill, care and diligence in undertaking the valuation*"[3].

The Court did not disagree with or disapprove of the trial Judge's approach in any respect.

The Court confirmed that the first question, in accordance with *Merivale Moore*, is whether the valuation falls outside a reasonable margin of error and if so, the second question is that of the valuer's competence (ie the *Bolam t*est). In respect of this second question, the Court made it clear that the legal burden of proving negligence was not, as the Claimant had argued, reversed (it being unhelpful to refer to an 'evidential' burden in respect of this issue) and that the burden of proving negligence rests at all times on a claimant.

On this basis, in circumstances where the Defendant's valuation was found to have fallen within an appropriate margin of error, the trial Judge was correct in finding that there was therefore no requirement to consider the *Bolam* test. But if there had been a finding that the valuation was outside of a reasonable margin of error, there would have had to have been a clear finding as to what the valuer had done negligently wrong. The Court did not disagree with the trial Judge's finding that only pleaded allegations of negligence could be considered in this respect.

The Court further noted, obiter, the apparent 'logical fallacy' whereby a valuer could be found to have breached the *Bolam* test but not be liable so long as their valuation falls within an appropriate bracket. (This was not the 'logical fallacy' which had been the subject of submissions at the hearing – that related to the proposition that a valuation could be outside the reasonable margin of error even if every stage of the valuation had been carried out competently). The Court looked at the cases of *SAAMCO*[4] and *Lion Nathan*[5] in which Lord Hoffman placed the focus of any assessment of liability on whether reasonable care had been taken by the valuer, rather than the end result. The Court noted that Lord Hoffmann appeared to depart from the notion that a non-negligent range or bracket is at all relevant to the question of whether the valuer took reasonable care and skill, and questioned whether these passages were consistent with a pre-condition that a valuation be outside of a reasonable margin of error overall before any finding of liability can be made against a valuer.

In respect of how the margin of error is to be calculated, the Court also agreed with the Defendant that this was clearly a question of fact to be determined by the Court on the basis of the evidence before it.

In circumstances where (i) the Claimant did not adduce any evidence at trial from his expert in respect of the margin, (ii) the Defendant's expert opined that the margin could have been up to 20% but given the availability of the comparable considered it to be 15% and (iii) all the other evidence as to reasonableness of a margin was considered, the Judge was correct in his evaluation and was entitled to reach the conclusion he did as to a reasonable margin of error.

In terms of the remaining grounds, the Court gave them short shrift, finding that the Judge had a clear evidential basis on which to make his findings of fact.

Commentary

The appeal judgement is an affirmation of what had been perceived within the profession as the orthodoxy within this area of law, albeit with an obiter sting in the tail, which provides cause for speculation as to whether the law may change in due course should a suitable case find its way to the Supreme Court.

The good news for valuers (and their insurers) is that the case emphasises the need for a claimant to both plead and prove the specific respects in which it is alleged that a valuer has conducted a valuation in a manner which no reasonably competent valuer could have done. It also reaffirms that a claimant's evidence must address the reasonable margin for error which exists in respect of the particular valuation, as the margin of error is a question of fact in each case.

The primacy of the *Bolam* principle has been emphasised, and defendant valuers can rest easy in the knowledge that they will only be found to have acted negligently where the Court has found that something specific they did in respect of their approach to the valuation in question was outside the bounds of reasonable professional competence. There will not be any findings that a valuer was negligent simply because a Judge comes to a different view about the 'true' overall valuation figure. And, for now at least, there remains the additional protection for valuers that even if a methodological mistake has been made which has distorted the overall valuation number provided, they will not be found liable for damages unless the overall valuation number provided falls outside of a reasonably competent range for that valuation number.

It was in respect of this latter point that the Court of Appeal in *Bratt v Jones* indicated some difficulty with the law. As set out above, the Court pointed out that the precondition to liability which has been established in valuers' favour - i.e. that the overall valuation has to be outside of a reasonably competent overall valuation number before any liability can be found- appeared inconsistent with the dicta of Lord Hoffmann in a number of cases, and a fairly clear indication was given that the Court did not see any compelling reason in the higher authorities as to why this precondition should be imposed.

This point was not however fully argued, and should this point ever find its way to the Supreme Court, we would suggest that its determination would depend upon what view the Supreme Court took about the scope of the valuer's duty, and whether the duty was to provide a reasonably competent overall valuation, or was to exercise reasonable care and skill to avoid error in the valuation report. There are potentially strong arguments both ways on that (and indeed that question might be viewed as one that is fact-specific to the individual valuation; perhaps valuers will have an eye on this when setting out the scope of their duty in retainer letters going forward), but it is all for another day; for now, the law remains that there is a pre-condition to liability in valuers' cases that the overall valuation must be outside of a reasonably competent range.

It appears that consideration of this issue by the Supreme Court will require an appropriate case in which (i) the claimant has pleaded out a case that, on the specific facts, there was a duty the scope of which makes an overall bracket for error inappropriate; (ii) the defendant has pleaded a response to the claimant's case on the scope of the duty; (iii) there is a proper investigation of the matter at trial and findings made by the trial judge as to the scope of duty arising on the specific facts. In Bratt v Jones, for example, the Defendant was retained to provide a valuation number to be inserted into the payment formula of an option agreement– not an account of how the number had been calculated. This would, we suggest, be a paradigmatic case where the bracket precondition approach to liability is appropriate. This will all be teased out in future cases. For now, the law remains relatively straightforward: there is a pre-condition to liability in valuers' cases that the overall valuation must be outside of a reasonably competent range.

Whilst the Court's *obiter dictum* on the bracket approach might be seen as something of a surprise, there was, we suggest, no real surprise in the Court of Appeal dismissing without hesitation the proposition that the burden of proof is in any way on the

defendant valuer when it comes to the question of breach of duty – the affirmation that the burden of proof on this issue remains at all times and in all ways upon the claimant is a welcome one. The dicta in the existing cases which could be read as suggesting otherwise were unhelpful and will no longer cause any confusion on this point.

Nor were there any surprises in respect of how to fix the margin of error. The Claimant's arguments on this point appeared to stem from the fact that he had failed to plead any position or adduce any evidence in respect of it. It was however always clear on the authorities that the margin of error was a question of fact for the Court in each individual case.

In conclusion, the Court of Appeal has reaffirmed and clarified the orthodox position in respect of the law of valuer's negligence, but has also handed out a tantalising suggestion as to where any future debate about this area of law may be focused.

DAC Beachcroft LLP acted for Mr Jones, with counsel Scott Allen of 4 New Square Chambers. Scott was led by Graham Chapman KC in the appeal.

This article was jointly written by Polly McBride (DAC Beachcroft) and Scott Allen (4 New Square Chambers).

References

[1] [2000] PNLR 35
[2] [1997] PNLR 567
[3] Para 5
[4] [1996] 1 WLR 1438
[5] [1996] 1 WLR 1438

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What's Changing in Expert Witness and Advisory Recruitment (and Why It Matters)

by Gordon Roy
Head of Business Advisory & Consulting - /www.spencer-riley.com

Here's a look at how AI, regulation and shifting client expectations are shaping the future of talent in consulting.

Consulting and expert witness services sit at the heart of complex legal and commercial disputes. From International Arbitration to IP, Antitrust, and Forensic Accounting, these are the specialisms clients rely on when the stakes are high.

Demand for expert input is growing; in fact, Gartner predicts the global legal consulting market to exceed $50 billion by 2027, driven by rising litigation, tighter regulation, and the need for credible, defensible analysis.

In the past year, I've noticed a shift where firms are no longer just hiring for technical knowledge; they're also looking for senior leaders who can bring in work, nurture law firm relationships, and hit the ground running. Revenue-generating MDs and Partners with a transferable book of business are in high demand, especially across the US and Europe.

I go into that and more in this blog. But first, what exactly is changing in expert advisory recruitment, and why now?

The Impact of Experience, Networks and Commercial Credibility
Ask any senior hiring manager what they're looking for in an expert witness or advisory Partner, and you'll hear one thing loud and clear: commercial value. Technical ability is expected, but what sets candidates apart is their client following and their ability to win work.

Transferable books of business are now front and centre in lateral hiring conversations. It's not just about strengthening the technical bench; firms want individuals who can walk through the door with long-standing law firm relationships, introduce new revenue streams, and deepen client trust.

In recent conversations, I've even heard it compared to the hiring boom of 2021, only now, the bar's higher. There's more scrutiny, more demand for self-sufficiency, and far less appetite for passengers.

Generative AI Isn't Replacing Experts But It Is Changing Their Work
Many of the clients I speak with are already exploring how Generative AI (GenAI) might reshape their profession. While it's not replacing experts any time soon, it is changing how they operate; those aiming to stay competitive are becoming early adopters.

Here's what I'm seeing:

- **Efficiency without substitution**: GenAI is being used to support data review, research, and modelling, but it still requires expert oversight to ensure accuracy and context.
- **Credibility at risk:** Courts are pushing back on AI-generated inputs that lack transparency. Over-reliance without validation can undermine expert testimony.
- **Opportunity for differentiation:** Experts who understand how to use AI responsibly and explain it clearly will stand out in a space where trust and clarity matter most.

AI may be here to stay, but so is human judgment.

The Role of Regulation and Policy
As the legal and advisory landscape becomes more complex, regulatory changes are having a direct impact on the work and expectations of expert consultants.

In the US, recent amendments to Federal Rule of Evidence 702 have tightened the standards for admissibility of expert testimony. Across the EU, data protection regulations continue to evolve, with growing focus on digital forensics, cross-border data transfers, and evidence integrity.

For firms and clients alike, this adds another layer to hiring decisions. The most valuable experts are those who can combine technical excellence with a deep understanding of the shifting policy environment.

What Firms Need to Compete in 2025
Across the US and Europe, what's driving these hires says a lot about where the market is heading.

Here's what I've been seeing with several live Partner-level roles:

- **Succession Planning**

There's increasing urgency to secure senior talent who can lead now and mentor the next generation. Firms want MDs and Partners who bring both long-term value and short-term delivery.

- **Niche Expertise**

Fields like digital forensics, cross-border disputes, and economic damages are becoming more central.

Specialist knowledge combined with commercial acumen sets candidates apart.

● Hiring Philosophy
Many firms are moving away from slotting Partners into pre-existing teams. Instead, they're building new service lines or regions around standout individuals with proven client networks.

With AI reshaping workflows, regulation tightening, and the bar for commercial impact rising, how firms approach Partner-level hiring can make all the difference.

Seeking support for your business?
Are you planning to grow your expert witness or advisory team, or considering your next career move? Get in touch with Gordon on LinkedIn, www.linkedin.com/in/goroy/
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- Post-concussion clinics and mild traumatic brain injury clinics
- PTSD
- Stroke

We are instructed by claimant and defendant solicitors, as well as directly by various insurers and reinsurers seeking to mitigate long term, high value, neurological related claims.

Determining the Scope of an Inquest: Latest on Speculative Causes

By Gill Weatherill, Partner, Will Pickles, Senior Associate and Claire Anderson, Senior Associate - www.dacbeachcroft.com

Coroners have a wide discretion to decide whether or not events preceding a death fall within the scope of an inquest, but how should they go about making that decision?

The recently published case of Sharon O'Brien v HM Assistant Coroner for Sefton, Knowsley and St Helens helps shed light on this by focusing on the distinction between 'possible' and 'speculative' links between the event in question and the death.

What was the inquest about?
The deceased, Linda O'Brien, died after falling from the fourth floor window of her flat.

Approximately 7 months prior to this, a man Linda had previously been in a relationship with, Alan McMahon, had been sentenced to 22 weeks' imprisonment for assaulting Linda. He was also made subject to a restraining order, preventing him from approaching, contacting or communicating with her for 5 years.

However, about a month before Linda's window fall death, the police had received an anonymous report of a domestic violence incident at her flat. When they attended, Mr McMahon was at the flat with Linda, but she was calm and said she did not know why the police had been called. None of the police officers who attended were aware that Mr McMahon was the subject of a restraining order, despite checking on relevant police databases. Their evidence was that, had they known he was in the flat in breach of the restraining order, they would have arrested him. Although the existence of the restraining order subsequently came to light and steps were being taken towards prosecuting him for breaching this, Linda's death intervened.

Emergency services were alerted to Linda's fall from the window by Mr McMahon, who was the only other person in the flat with her at the time. Post mortem showed evidence of assault injuries sustained prior to her exiting the window. Mr McMahon was later sentenced to 20 months' imprisonment for multiple breaches of the restraining order and for theft. An accusation of murder was not proceeded with.

What was the Coroner's decision on scope?
It is important to flag first that Article 2 was found not to be engaged in this case, meaning there was no requirement here for an enhanced investigation looking at the wider circumstances of the death, as would be the case for an Article 2 inquest.

It was nevertheless argued on behalf of the deceased's family that the police's conduct in failing to identify the existence of the restraining order at the time of the reported domestic violence incident should be included within the scope of the inquest because, had Mr McMahon been arrested and prosecuted for breaching the restraining order, it is possible that he would not have been in Linda's flat on the day she died and the death would not have occurred.
The Coroner decided, however, that there was no 'coronial causation' linking the police's conduct with events resulting in the death because, to meet the causation test, the event or conduct in question needs, on the balance of probabilities, to have more than minimally, negligibly or trivially contributed to the death (i.e. it needs to have made an actual or material contribution to the death). In this case, the Coroner found, it simply could not be known - and was therefore pure speculation - whether arresting Mr McMahon at the time of the reported domestic violence incident would have prevented him being present at Linda's flat over a month later when she died (or indeed whether his presence there was causative of the death). As such, the Coroner concluded that events surrounding the reported domestic violence incident and the attending police being unaware of the restraining order would not require extensive investigation at the inquest and mention of those would be just for background purposes and information.

The deceased's family challenged this decision by way of judicial review, arguing that the Coroner had unlawfully limited the scope of the inquest by finding there was no causal link between the death and the acts or omissions of the police.

What did the High Court decide?
In summary, the High Court found in favour of the Coroner by ruling that, whilst is it is possible that, if Mr McMahon had been arrested for breach of the restraining order before Linda's death, he might have been in prison on the date of her death and it is possible that her death would not have occurred, whether he would have been in custody on that date is "*entirely speculative*". It was not enough to show that a particular event, or particular conduct, deprived the deceased of an increased chance of life (following the explanation in *Tainton*).

The judge did not believe it would be possible to obtain reliable evidence that would enable the Coroner to be satisfied on the balance of probabilities that Mr McMahon would have been in custody on the date of Linda's death had he been arrested earlier. It followed that any failure to arrest him prior to that date could not be proved to have contributed more than minimally, negligibly or trivially to the death. In the absence of this causative link, the proposed investigation into the actions or omissions of the police was found by the Court to be irrelevant, because it could not be proved on the balance of probabilities that anything done or not done by police officers at the time of the reported domestic violence incident or subsequently more than minimally, negligibly or trivially contributed to Linda's death.

The High Court also took the opportunity to highlight what the Court of Appeal said in the case of *Morahan* about inquests being an "*inquisitorial and relatively summary process*" and "*not a surrogate public inquiry*", concluding that a decision to limit the scope of the enquiry to avoid an expensive and time-consuming investigation into the acts or omissions of the police was consistent with the purpose of an inquest and could not be said to be irrational.

Practical impact and what next?

The reality is that Coroners have a wide discretion to decide on the scope of an inquest and delving into the intricacies of the law on coronial causation may not always be enough to persuade a Coroner that a particular event/conduct which is of concern to the deceased's family is outside the scope of an inquest. However, where the link between a particular event/incident and the death is felt to be merely 'speculative', this may be a useful case to draw to the attention of the Coroner when making submissions about what should or should not fall within scope.

The High Court's decision in this case may, however, not be the final word here because we understand that an application has been made for permission to appeal to the Court of Appeal. There is accordingly an element of 'watch this space' on this and we will continue to keep you updated.

How we can help

Our large national team of inquest lawyers have a wealth of experience in supporting providers and individuals across the health and social care sector through the inquest process - from relatively straightforward hospital deaths to very complex Article 2/jury inquest cases involving multiple parties and deaths in state detention, including providing representation at pre-inquest review hearings when matters such as inquest scope are decided.

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Medical Tattooing in Personal Injury Cases: A Crucial Contribution to Recovery and Compensation

by Rae Denman-Tanner, BA(Hons), CT Dip, CC Dip, FdA

Medical tattooing is increasingly being recognised as a valuable option in personal injury cases, particularly when it comes to scarring and pigmentation issues resulting from traumatic accidents. As an expert in the field, I've seen how medical tattooing can significantly improve a claimant's quality of life and even the legal outcome of a personal injury claim.

Types of Injuries Addressed by Medical Tattooing
Personal injury cases frequently result in significant and visible scarring. In such instances, medical tattooing can play a valuable role in helping individuals restore aspects of their pre-injury appearance. Whether resulting from car accidents, workplace incidents such as burns from scalding water, or machinery-related injuries, medical tattooing can effectively minimise the appearance of scars and pigmentation irregularities, supporting both aesthetic outcomes and emotional recovery.

The most common injuries treated with medical tattooing include:

- Excessive scarring: Often resulting from burns, surgery, or accidents, these scars are permanent but can be camouflaged with medical tattooing to reduce their prominence.
- Hypopigmentation: Loss of pigment in the skin after injury can leave noticeable areas of lighter skin, which can be treated with medical tattooing to create a more even appearance.
- Textural issues: Scars with irregular textures can benefit from microneedling combined with tattooing, improving both the colour and texture of the scar tissue.

Common Challenges in Personal Injury Cases
Personal injury cases involving medical tattooing are usually straightforward in terms of identifying the injury, but the key challenge lies in determining the appropriate compensation for the treatment and ongoing care. A lot of these cases focus on how much the claimant should receive for medical tattooing and how it can be factored into their recovery.

As a practitioner, my role is to assess the severity of the scarring or pigmentation issue and provide a detailed prognosis report. I outline the potential benefits of medical tattooing, estimate the number of treatments required, the costs involved, and how long it would take for the claimant to see results. There are generally no unrealistic expectations from the clients or solicitors, as they often understand that medical tattooing cannot completely erase scars but can significantly improve their visibility.

Cost and Treatment Planning for Personal Injury Cases
Cost estimations play a crucial role in personal injury claims. When medical tattooing is part of the treatment plan, the solicitor needs to know the specifics about how much it will cost in the short and long term.

During my consultations, I work out a treatment schedule that includes the number of initial sessions required, the expected duration of healing, and the costs associated with each treatment. I also consider long-term maintenance costs for regular colour boosts, which will be required every 1 to 5 years depending on the claimant's age, skin type, exposure to UV rays, and any underlying health conditions.

Addressing the Psychological Impact of Scarring
Scarring and pigmentation loss can significantly affect a person's mental and emotional wellbeing. It's not just about the physical appearance; it's about how the injury impacts their daily life, social interactions, and sense of self-worth. In my assessments, I consider how the scarring affects the claimant's ability to engage in activities like work, relationships, or socialising.

Medical tattooing doesn't completely eliminate scars, but it can reduce their visibility, which in turn often improves the claimant's mental state. Knowing they have a choice and an option to improve their appearance can be empowering and provide a sense of control over their recovery. This aspect of medical tattooing is vital in personal injury cases, as it can contribute to emotional healing alongside physical recovery.

What Personal Injury Solicitors Should Be Aware Of
One of the most important things for personal injury solicitors to understand is that medical tattooing is not a one-time solution. While it is effective in reducing the visibility of scars, it's not a permanent fix. The claimant will need regular colour boosts to maintain the results, and these costs should be factored into the claim.

Another crucial point is the impact of medical tattooing on long-term care and recovery. While it can reduce the appearance of scars, it does not eliminate

the need for other treatments like surgeries, laser treatments, or scar revision procedures. It is typically considered the final step in the recovery process, following more invasive treatments.

Final Thoughts

Incorporating medical tattooing into a personal injury claim can be a crucial part of the claimant's physical and emotional recovery. As an expert witness, I assess the extent of the injury, the potential benefits of tattooing, and provide a detailed prognosis that helps solicitors and claimants make informed decisions. Understanding the costs, the treatment timeline, and the ongoing maintenance requirements are essential to ensuring that the claimant's recovery is as complete as possible.

By considering medical tattooing as part of a personal injury case, solicitors can offer their clients a realistic option that not only addresses the physical damage caused by the injury but also contributes to their emotional and psychological wellbeing.

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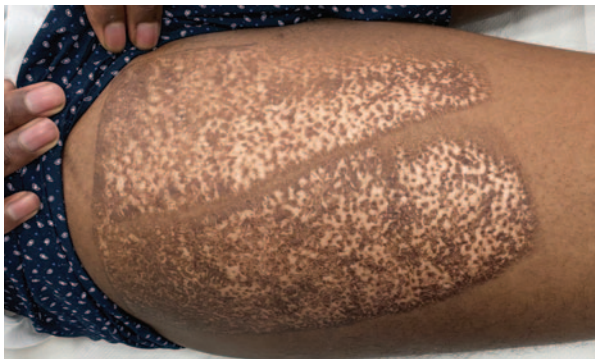

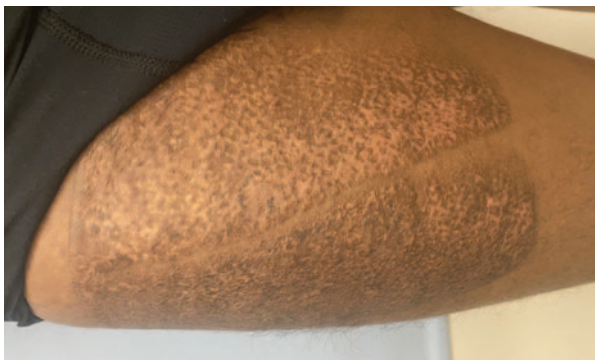

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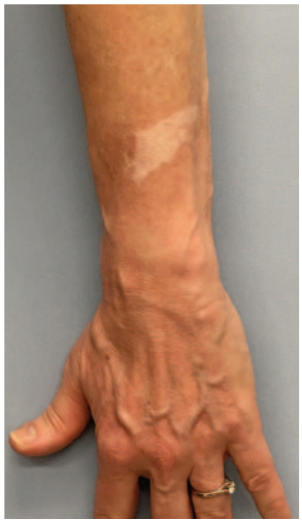

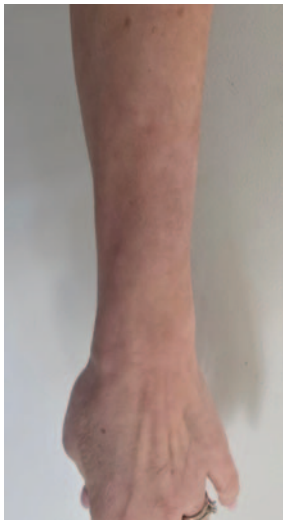

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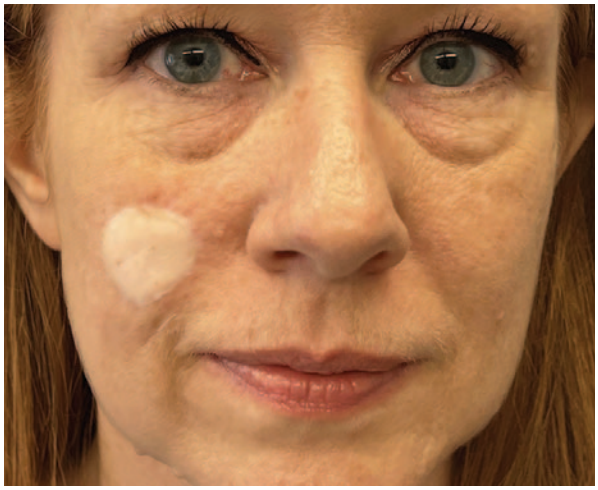
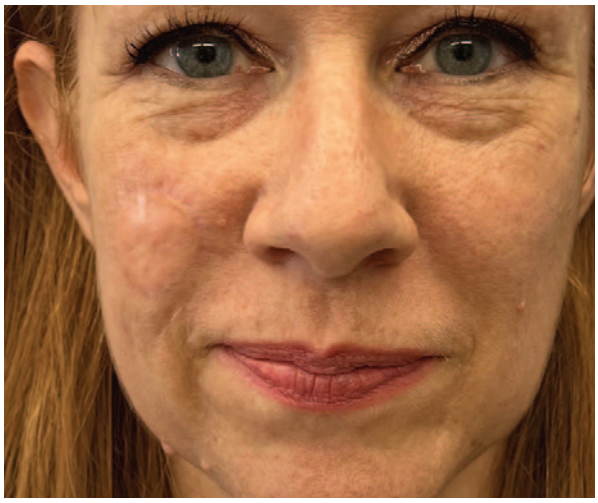




Fake Nurse Crackdown to Boost Public Safety

New measures to make it a criminal offence for people who are not qualified as a nurse to use the title and mislead the public.

Anyone misleading the public and describing themselves as a nurse without the relevant qualifications and registration will be committing a crime under new measures announced by the government to protect the title 'nurse' in law.

The move will help to boost protections and safety for both patients and staff, driving up standards and improving patient experience across the NHS through the government's Plan for Change.

Currently, anyone - including those struck off by the Nursing and Midwifery Council (NMC) for serious misconduct or criminal convictions - can call themselves a nurse. This can result in the public thinking they're getting advice and care from an expert professional like a nurse when they are not.

Previous reported examples of the job title being misused include someone calling herself a nurse at a large public event after being struck off and another reportedly masquerading as an aesthetic nurse.

There will be exemptions for relevant professions like veterinary nurse, dental nurse and nursery nurse, where the title 'nurse' is legitimately used.

The government is listening to nurses and recognises they are the backbone of the NHS, and today's announcement follows campaigning by unions for the government to act on the issue, as well as by Dawn Butler MP who introduced a ten minute rule bill earlier this year to protect the title 'nurse'.

Through the Plan for Change, the government is driving forward vital reform to get the NHS back on its feet and fit for the future. This year, a refreshed workforce plan will also be published to ensure the health service has the right workforce in the right place at the right time.

Health and Social Care Secretary Wes Streeting said: *Nurses carry out lifesaving work every day, and I am determined we do everything we can to support them and safeguard trust in the profession.*

I've been appalled to read reports of so-called nurses spreading dangerous misinformation and harming the public.

This new legislation will help crack down on bogus beauticians and conspiracy theorists masquerading as nurses, and those attempting to mislead patients.

The British people hold nurses in the highest regard, and we trust them in our most vulnerable moments, so patients need to know they are genuinely being seen by a nurse. Now they will.

This is part of our Plan for Change to fix the NHS and gets the right staff working in the right place at the right time.

Only the title 'registered nurse' is currently protected in law. The new legislation will change that - ensuring that only those individuals registered with the NMC can legally use the title. Anyone violating this will be committing a criminal offence and could face a hefty fine running into thousands of pounds.

There have been previous reports of bogus nurses misleadingly using the title. One ran a cosmetic clinic offering Botox and dermal filler treatments for several years despite not being registered with the NMC.

Another gave a speech at a COVID-19 conspiracy rally that likened NHS nurses and doctors to war criminals - spreading misinformation about vaccines and bringing her former colleagues into disrepute. She continued to call herself a nurse despite being struck off by the NMC.

A previous freedom of information request showed that across 93% of all NHS trusts, there were more than 8,000 people with the term 'nurse' in their job title who had no registered nursing qualifications. Although these people are supervised and providing important care, their job titles can cause confusion. Some, including nursery nurses, will be exempt under this new legislation.

Duncan Burton, Chief Nursing Officer for England, said: *The trust that people place in registered nurses is based on the rigorous training and education required to be registered as a nurse, which gives us the skills and knowledge to deliver high quality, safe and personalised care.*

Nurses value this trust and protecting the title of nurse can give added confidence and clarity to patients and the public on who is delivering their care and the skills and knowledge they have.

There are already various safeguards in place to deter people from pretending to be a nurse. The most serious cases would be captured by fraud offences and depending on the case they can also be prosecuted for other more serious offences like causing grievous bodily harm, assault or manslaughter.

The new legislation - expected to be laid this Parliament - will help to strengthen those existing safeguards.

Registered nurses go through high-quality undergraduate and postgraduate degree programmes and complete a process called revalidation every 3 years -

ensuring they can continually update their skill set. The new measures reflect that.

Professor Nicola Ranger, Royal College of Nursing General Secretary and Chief Executive, said: *This is an important moment for our safety-critical profession, after years of campaigning.*

A change in the law will recognise the knowledge, professionalism and clinical expertise that comes with being a registered nurse. It will provide better legal protections for nursing professionals and reassurance to patients.

Crucially, this is an opportunity to begin the journey to properly valuing nursing as a profession, where respect, reward and investment match the crucial nature of our work.

Dr Crystal Oldman CBE, Chief Executive at the Queen's Institute of Community Nursing, said: *Nurses and the millions of people they care for will benefit by this proposed change in legislation.*

This is a patient safety issue that the QICN has been campaigning on for some time.

People need confidence that when the person caring for them is described as a nurse, that person really is a qualified and registered nurse.

Paul Rees MBE, Interim Chief Executive and Registrar at the Nursing and Midwifery Council, said: *The public should always feel confident that anyone using the title 'nurse' is a registered professional with all the safeguards that brings.*

We look forward to working with the government and our stakeholders to deliver on it. In the meantime, it is already an offence for somebody to hold themselves out as a registered nurse when they are not.

Helga Pile, UNISON Head of Health, said: *Nurses and other NHS workers rightly enjoy a high level of trust because of the brilliant and important work they do.*

Charlatans and conspiracy theorists mustn't be allowed to harm patients or damage nurses' reputation and good standing with the public.

It's only right that anyone that tries to will now feel the full force of the law.

Rachel Power, Chief Executive of The Patients Association, said: *We welcome this commitment to ensuring patients know who is treating them and offering healthcare advice, and that those professionals are properly qualified. With health misinformation increasingly common, it's more important than ever that patients can trust the expertise of those caring for them.*

Alison Morton, CEO, Institute of Health Visiting, said: *The Institute of Health Visiting fully supports the campaign to protect the title 'nurse' in legislation. This is urgently needed to protect the public and provide assurance that the person providing their care has the qualifications, knowledge, skills, expertise and professionalism to deliver safe and effective care. Nursing is a safety-critical workforce. And, in our view, there is only one clear path forward - the current gap in legislation needs to be closed as a matter of urgency.*

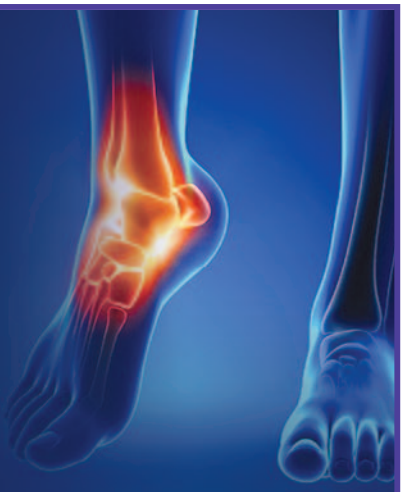
Professor Greta Westwood CBE PhD RN, CEO of the Florence Nightingale Foundation, said: *We welcome this recognition of the importance of the nursing role. Nurses are skilled and highly trained professionals, playing a key leadership role in the health and social care sectors, particularly around speaking out on patient safety and workforce challenges.*

This International Nurses Day, we are coming together to celebrate the incredible work that nurses do across the UK and globally, and we support the government taking this next step, working with the UK regulator, to protect our nurses and those we serve.

Mr Raj Kumar

Trauma & Orthopaedic Surgeon
Specialist Foot & Ankle

D.Orth MS (Orth) FRCS (Tr&Orth)



Mr Raj Kumar is a Consultant Orthopaedic Surgeon with a special interest in foot and ankle surgery, and general trauma. Mr Kumar is based at Lancashire Teaching Hospitals which is a major trauma centre dealing with serious injuries that are life changing and could result in serious disability, including head injuries, severe wounds and multiple fractures. He is part of the trauma service with a special interest in lower limb reconstruction surgery. Mr Kumar gained experience in lower limb reconstruction working at the trauma unit in Belfast.

Mr Kumar undertook his foot and ankle fellowship at Wrightington Hospital. He was granted a Fellowship of the British Orthopaedic Foot and Ankle Society, which he used to gain experience in ankle arthroscopic surgery under the internationally renowned Professor Van Dyke at Amsterdam.

Mr Kumar is involved in teaching and training nurses, physiotherapists, medical students and Orthopaedic Registrars. He has students from the University of Manchester who undertake various clinical attachments with him. He is an Honorary Senior Lecturer and examiner for the University of Manchester Medical School.

Mr Kumar provides a high quality, patient-centred foot and ankle service. His experience covers the entire spectrum of orthopaedic foot and ankle disorders. Besides the more common foot and ankle procedures, he performs ankle replacements, ankle arthroscopy, complex hind foot fusions, deformity corrections, and ligament and tendon reconstructions about the foot and ankle.

Mr Kumar has expertise in assessing personal injury, soft tissue and sports injury, complex polytrauma and low velocity injuries.

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New NHS Programme to Reduce Brain Injury in Childbirth

Government to roll out the Avoiding Brain Injury in Childbirth (ABC) programme nationally.

Expectant mothers will receive safer maternity care as a new NHS programme to help prevent brain injury during childbirth is rolled out across the country.

The Avoiding Brain Injury in Childbirth (ABC) programme will help maternity staff to better identify signs that the baby is in distress during labour so they can act quickly.

It will also help staff respond more effectively to obstetric emergencies, such as where the baby's head becomes lodged deep in the mother's pelvis during a caesarean birth.

The government programme, which will begin from September and follows an extensive development phase and pilot scheme, will reduce the number of avoidable brain injuries during childbirth - helping to prevent lifelong conditions like cerebral palsy.

The national rollout is only one step the government is taking to improve maternity services under its Plan for Change to fix the health service, as it reforms the NHS to ensure all women receive safe, personalised and compassionate care.

Health and Social Care Secretary Wes Streeting said:
All expectant mothers giving birth in an NHS hospital should have peace of mind that they are in safe hands.

This vital programme will give staff across the country the right tools and training to deliver better care to women and their babies, reducing the devastating impact of avoidable brain injury.

Under our Plan for Change, we are supporting trusts to make rapid improvements and training thousands more midwives - but I know more needs to be done. We will put women's voices right at the heart of our reforms as we work to improve care.

The national rollout follows a pilot in 12 maternity units that was launched in October 2024 and delivered by the Royal College of Obstetricians and Gynaecologists (RCOG), Royal College of Midwives (RCM) and The Healthcare Improvement Studies (THIS) Institute.

The pilot has shown the programme will fill an important gap in current training by bringing multidisciplinary teams together to work more collaboratively than ever before, to improve outcomes. The programme will give clinicians more confidence to take swift action managing an emergency during labour.

It is expected to reduce unacceptable inequalities in maternity outcomes across England - so that most maternity units achieve outcomes comparable to the highest-performing 20% of trusts.

This government is dedicated to improving maternity services more widely and is committed to training thousands more midwives, as well as setting an explicit target to close the Black and Asian maternal mortality gap.

In addition, we have allocated an extra £57 million for Start for Life services, helping expectant and new mothers with their infants by providing expert, trusted advice and guidance around pregnancy, birth and motherhood.

Ranee Thakar, President of RCOG, said:
The ABC programme supports multidisciplinary maternity teams to deliver safer, more personalised care. Hundreds of maternity staff, including obstetricians, midwives and anaesthetists, have been involved in developing and testing this quality improvement programme.

We have heard what a difference it makes, supporting teams to work effectively together in time-sensitive and high-pressure situations. RCOG is extremely proud to have been part of this fantastic collaboration.

Gill Walton, RCM Chief Executive, said:
Every midwife, maternity support worker, obstetrician, anaesthetist and sonographer wants to provide good, safe care - and the best way to do that is by working and training together. The ABC programme has brought together all those involved in maternity care, offering practical solutions to some of the most acute clinical challenges.

Crucially the ABC programme tools and training have been developed based on the voices of women, families and maternity staff. This has been the key to the success of the pilot programme.

Equally the will and drive of midwives and the wider multidisciplinary team to improve safety and outcomes for women and their families has been evident across the course of the training at the pilot sites.

The ABC programme has the potential to reduce the devastating impact of brain injuries during childbirth and RCM is proud to have been part of this innovative programme and we hope to see this adopted and implemented across maternity services.

Professor Mary Dixon-Woods, Director of THIS Institute, said:
The ABC programme design is based on the principle that evidence-based, co-designed patient-focused standardisation of clinical practice can reduce unwarranted variation and improve care and outcomes.

Crucially, this needs to be supported by comprehensive improvement resources, including training, tools and assets to enable good clinical practice and teamwork and respectful and inclusion communication and decision-making with women and birth partners.

The pilot has shown that it's possible to train people effectively and efficiently. A national commitment to implement the programme at scale will be important in ensuring that the benefits are seen.

Trusts that took part in the pilot scheme

The following sites participated in the pilot scheme:

- Countess of Chester Hospital NHS Foundation Trust
- East Lancashire Hospitals NHS Trust
- Lancashire Teaching Hospitals NHS Trust
- Liverpool Women's NHS Foundation Trust
- Warrington and Halton Teaching Hospitals NHS Foundation Trust
- Wirral University Teaching Hospital NHS Foundation Trust
- Croydon Health Services NHS Trust
- Epsom and St Helier University Hospitals NHS Trust
- St George's University Hospitals NHS Foundation Trust
- Barnsley Hospital NHS Foundation Trust
- Leeds Teaching Hospitals NHS Trust
- Hull University Teaching Hospitals NHS Trust

Wisdom Tooth Surgery Trigeminal Nerve Complications part 1

by Dr R Kumar BDS LDS RCS MSc ImpDent MAGDS RCSEd PGCert Orthodontics PGCert Facial Aesthetics, Examiner for the Royal College of Surgeons Edinburgh

Part one of a two part article

Terminology
M3M terminal mandibular molar
LN Lingual nerve
IAN Inferior Alveolar nerve
IAC Inferior Alveolar canal

Introduction
Wisdom teeth are also known as terminal molars, 3rd molars or 8s. They usually erupt between the ages of 17 and 24 years of age but in about 25% of worldwide cases the teeth become impacted against the second molars or the 7s (WHO).

Impacted mandibular molars (M3M) tend to suffer future problems such as decay, soft tissue infection and inflammation and commonly cause secondary decay against the 7s.

The instance of decay on the 7s can range from 24 to 80% depending on the age of the patient (Fisher), which can lead to gross destruction of the 7s, the need for root canal treatment or even the removal of the tooth.

Wisdom tooth impaction occurs as the wisdom tooth is developing (and the roots are growing) but the angulation prevents a full eruption.

Impaction generally means that the wisdom tooth is stuck either horizontally, vertically or at an angle against the 7 or the body of the mandible behind the wisdom tooth.

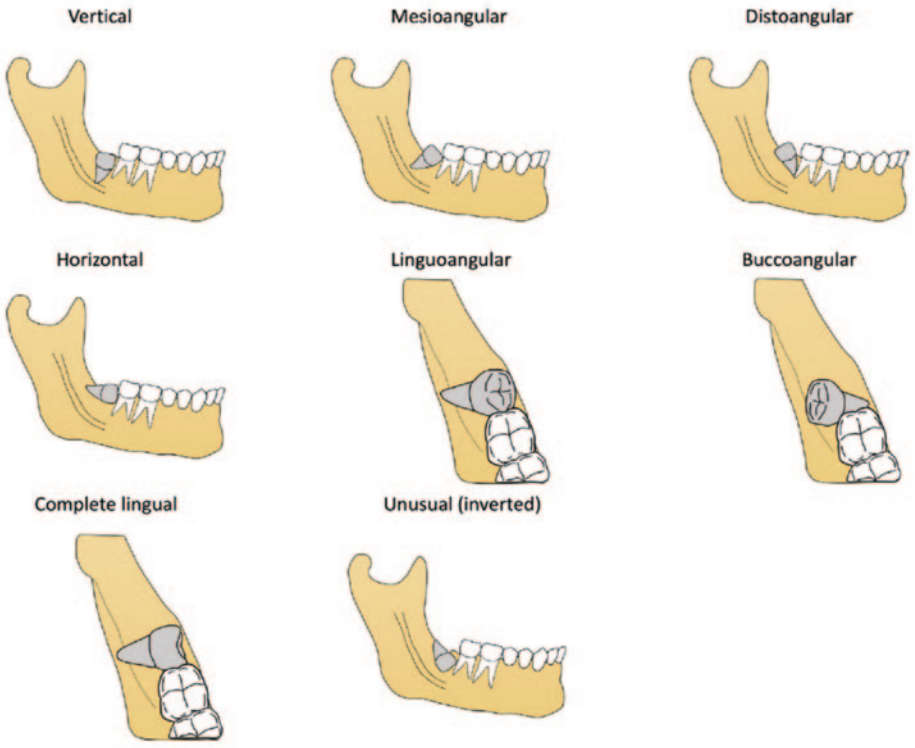
Prophylactic removal
Prophylactic removal of 8s is uncommon but can occur in patients that are planned to undergo:
- Bisphosphonates, antiangiogenic's, chemotherapy
- radiotherapy of the head and neck
- immunosuppressive therapy
- reduction of mandibular fractures
- orthognathic surgery around the angle of the mandible
- resection of benign and malignant lesions
- military personnel about to be deployed (Pepper)

Primary dental treatment
On initial presentation with soft tissue inflammation, the patient may complain of pain, swelling, reduced opening, halitosis and or food impaction.

The general term for wisdom tooth soft tissue infection/inflammation is pericoronitis.

The dentist may try to clean the periodontal soft tissue area around the 8 and advise either a saltwater rinse or antibiotics are prescribed.

Below,Winter's classification of impaction (Iwanaga)



Third molar surgery
Due to the impaction, the wisdom tooth generally flares up on a regular basis at least once or twice a year and eventually the soft tissue infection is so severe that the patient requests the removal of the impacted tooth.

A study carried out had reported follow up data on Finnish students confirming that by the age of 38 years most impacted mandibular molars required removal (Venta).

However, there is increasing evidence that mandibular 8s should be removed before permanent symptoms or additional damage to the 7s occurs (Huang) 3rd molar surgery is one of the most common surgical procedures performed in secondary care in the National Health Service (McCardle).

M3M surgery is usually carried out in a surgical setting such as a dental practice or an Oral Surgery Hospital setting. The surgeon is usually a dentist with experience in oral surgery tooth extractions or an Oral Surgeon.

M3M general post-surgery risks
During the surgical removal of the 8, a surgical flap is usually raised, cortical bone is removed and the tooth is then elevated completely.

The flap is then closed and sutured and the patient is usually given analgesics and on occasion antibiotics.

Patients at risk of postoperative infection can include:
- smokers
- patients with poor oral hygiene
- diabetics
- patients on immunosuppressants
- patients on bisphosphonate drugs

There is little evidence that patients who are prescribed antibiotics after surgery have a reduced risk of complications (Renton).

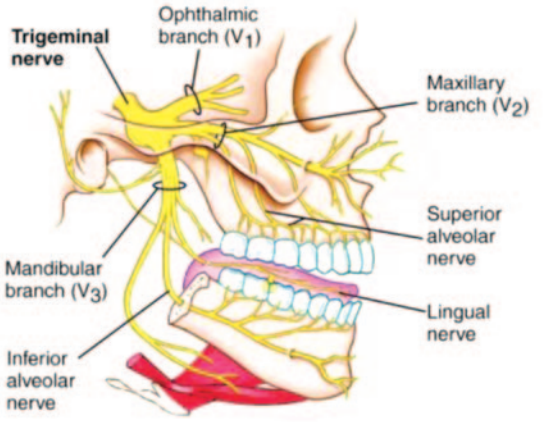
The more serious risk is damage to the mandibular nerve branches during surgery.

Nerve damage could result in :
- Paraesthesia (the sensation of tingling, burning, pricking or prickling, skincrawling, itching, "pins and needles" or numbness on or just underneath your skin)
- Anaesthesia
- Dysesthesia (unusual touch-based symptoms)
- Hyperesthesia
- Ageusia (loss of taste)
- Dysgeusia (altered taste)

Nerve injury may be temporary and or subside after 6 months, however if longer the injury was considered permanent (Iwanaga).

It is good practice that patients are warned of these risks if they apply; see later.

Mandibular nerve anatomy



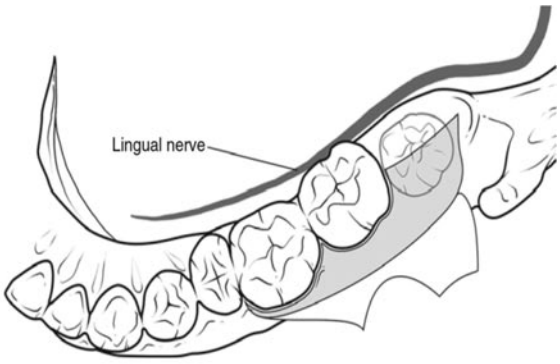
The Trigeminal nerve constitutes the largest sensory cortex representation in the brain compared with other sensory nerves, this is because the Trigeminal nerve provides sensory innovation to sight, smell, taste, hearing and speech.

Damage to the branches of the Trigeminal nerve during molar surgery can cause significant psychological morbidity (Caissie).

The Trigeminal nerve (V) branches into the Ophthalmic, Maxillary and Mandibular nerves.

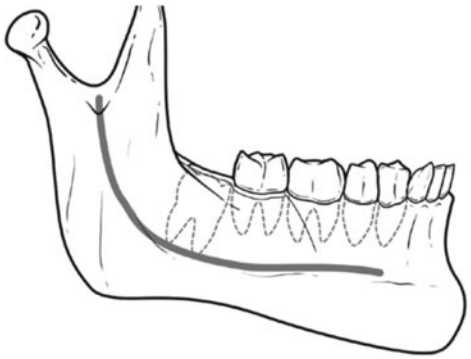
The **Mandibular nerve** is the only branch that contains motor fibres and innervates:
Anterior Division
Motor Innervation - Muscles of mastication
Sensory innervation - Buccal nerve (buccal mucosa)
Posterior Division
Auriculotemporal - sensory nerve to skin and area around the TMJ and ear.

Lingual nerve (LN) - sensory nerve runs in the mucosa below and behind the M3M and the tongue side mucosa



- supplying the anterior 2/3rds of the tongue
- floor of the mouth
- lingual mucosa and gingivae
- submandibular and sublingual glands
- carries the Chorda Tympani nerve carrying taste sensation to the anterior 2/3rds of the tongue

Inferior Alveolar nerve enters the mandible body at the ramus and sits within the inferior alveolar canal along with the Inferior Alveolar artery (IAA)



Association of Oral and Maxillofacial Surgeons of India

Motor - Mylohyoid and Anterior belly of the Digastric muscle
Sensory –
- sensation to all the teeth
- sensation to the skin and mucosa of the lower lip

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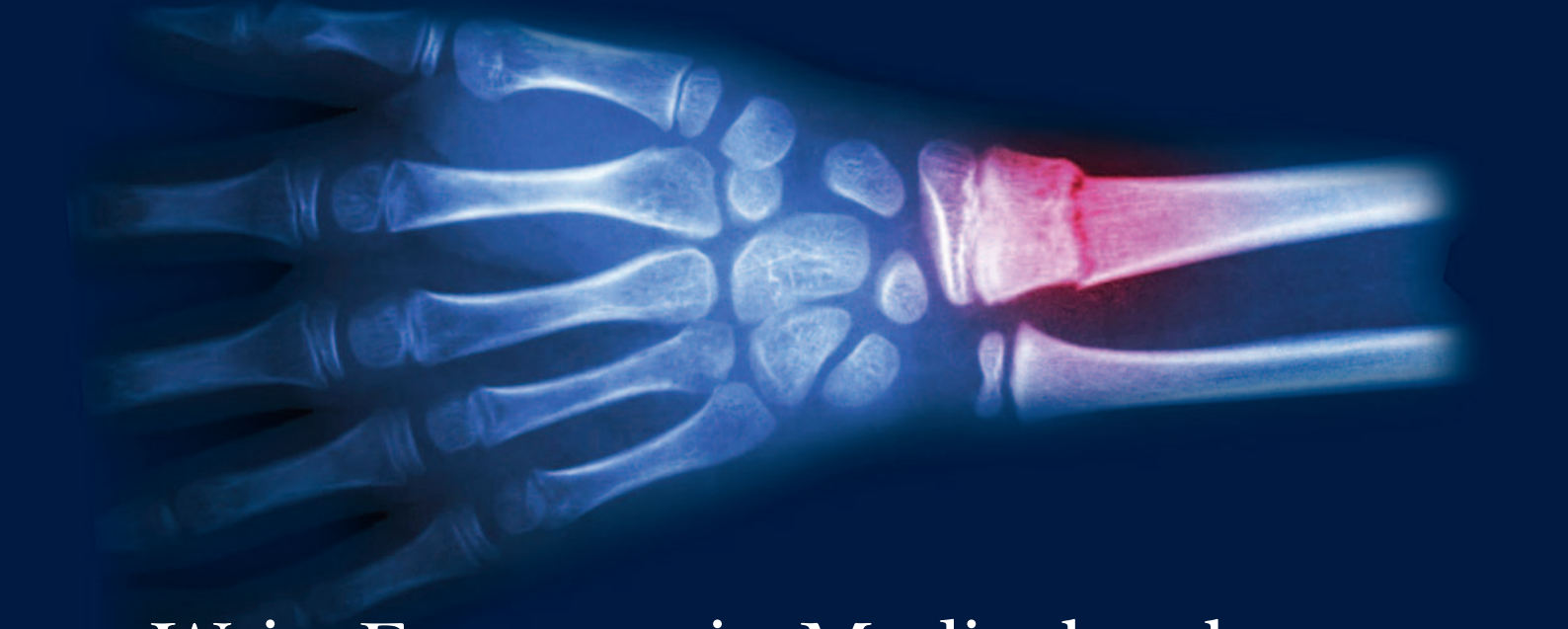
Part two of this article will be published in our August issue



Wrist Fractures in Medicolegal Practice: Why the Outcome is Rarely Perfect

Wrist fractures, particularly distal radius fractures, represent one of the most common injuries encountered in trauma and orthopaedic practice. Their frequency, functional significance, and the challenges they pose in management mean that wrist fractures feature prominently in medicolegal work, especially where long-term symptoms or suboptimal outcomes arise.

In the medicolegal context, wrist fractures often become the focus of litigation when recovery is incomplete, complications occur, or expectations exceed the likely outcome of the injury. This article explores the clinical aspects of wrist fractures most relevant to medicolegal practice, including classification, management, complications, and factors influencing prognosis. It highlights why wrist fractures rarely result in a truly 'perfect' recovery and provides expert insight into the evaluation of such injuries from a medicolegal perspective.

Epidemiology and Mechanisms of Injury

Frequency of Wrist Fractures

Wrist fractures, especially distal radius fractures, are among the most common skeletal injuries, accounting for approximately 15% of all fractures seen in emergency departments. There is a bimodal distribution:

- Young adults: high-energy trauma (e.g. sports injuries, road traffic accidents)
- Older adults (especially postmenopausal women): low-energy trauma (e.g. falls from standing height), often linked to osteoporosis.

The incidence of distal radius fractures increases markedly in women over the age of 50 due to reduced bone mineral density i.e. osteoporosis ("brittle bones").

Mechanisms of Injury

The typical mechanism involves a Fall Onto an Out-Stretched Hand (FOOSH injury), leading to axial loading across the wrist. The specific pattern of injury depends on factors such as:

- Position of the hand and wrist at impact
- Bone quality (normal vs osteoporotic)
- Energy of the trauma

High-energy injuries (such as motorbike accidents or falls from significant height) can result in complex, comminuted (multi-fragmentary) intra-articular fractures, whereas low-energy injuries in the elderly often produce extra-articular, metaphyseal fractures (i.e. the junction between the shaft of the bone and where it flares to form the articular joint).

Classification of Wrist Fractures

Several classification systems exist, but each has its strengths and limitations in the context of medicolegal work. However, classifications are rarely used in clinical practice beyond calling them intra-articular (i.e. the fracture line(s) extend into the joint) or extra-articular; or using the eponymous names.

Descriptive Terminology

First it is important to understand the medical terminology. The bone has a diaphysis (shaft), a metaphysis (the flared junction between the shaft and the epiphysis), and an epiphysis (the end of the bone with the cartilage on). The epiphysis fuses with the metaphysis when the patient reaches skeletal maturity and stops growing at the end of puberty i.e. mid-teenage years.

The diaphysis/shaft is good at withstanding axial compressive forces (or tension forces) but is slightly

weaker at resisting transverse forces (e.g. direct blows) or torsional forces (twisting mechanisms). The metaphysis is better at resisting transverse and torsional forces, but it has less thick cortical bone, so is susceptible to fractures at this junctional area.

Other common medical words are proximal and distal; and volar and dorsal. Proximal means closer to the centre of the body or origin, and distal means further away from the centre of the body or origin. For example a distal radius fracture is further away from the body, so is closer to the wrist than the elbow. A proximal radius fracture would be closer to the elbow. Volar means the palm side of the hand/forearm and dorsal refers to the upper side or back (e.g. back of the hand/forearm).

Finally we talk about fractures in terms of their mode of displacement. Fractures can be described as:

1. Shortening or lengthening (i.e. distraction)
2. Angulation
3. Rotation
4. Transverse displacement

So for a simple Colles type fracture (see below), this refers to a distal radius fracture that is likely to have some shortening with dorsal angulation and possibly some dorsal translation. Usually there isn't a rotation component, unless it is significantly displaced and the volar periosteum is disrupted (periosteum is the thick fibrous / tough layer on the bone that you encounter when eating barbeque ribs for example).

The simplest method for classification therefore classifies fractures based on:

- Anatomical location (proximal / mid-shaft / distal - radius)
- Fracture pattern i.e. involving the joint or not (intra-articular / extra-articular)
- Displacement (angulation, shortening, rotation)

This approach is often adequate for clinical and medicolegal reporting.

Eponymous Fractures

Some fracture types are referred to by eponymous names:

Fracture Name	Description
Colles' fracture	Fracture of the distal radius with dorsal angulation
Smith's fracture	Fracture of the distal radius with volar angulation
Barton's fracture	Intra-articular fracture with an intact volar/dorsal cortex
Chauffeur's fracture	Fracture of radial styloid process

These terms remain common in clinical practice but have limited prognostic value.

Classification Systems

There are many classifications systems including:

Frykman categorises distal radius fractures based on involvement of the radiocarpal and distal radioulnar joints, and the presence of an ulnar styloid fracture (8 types in total). It is rarely used in isolation in modern practice due to poor correlation with outcome but is often quoted by trainees for the exams as it's easier to remember and articulate.

AO (Arbeitsgemeinschaft für Osteosynthesefragen) / OTA classification is the most detailed:

- Type A: Extra-articular
- Type B: Partial articular
- Type C: Complete articular
    - o With further subgroups describing complexity and comminution.

While comprehensive, its complexity limits use in routine medicolegal reporting unless fracture details are specifically documented.

Fernandez classification is based on the mechanism of injury and assesses the fracture stability and associated soft tissue injury. It can be applied to both adults and children. It is credited as more practical to apply but it is more complex and time-consuming, and studies suggest it performs similarly to other existing systems.

Melone divides the radius into four fragments; shaft, radial styloid, dorsal lunate fossa, volar lunate fossa. This is easy to apply and practically useful as it allows the surgeon to identify the fracture fragments that require capturing as part of the fixation to enable the fracture to be stabilised. Its use is however limited to intra-articular fractures only.

Three Column Theory (radial/scaphoid column, intermediate/lunate column, ulna column) classifies fractures based on their involvement of the respective columns and aides in the selection of the appropriate treatment strategy.

There are more classification systems and all have their strengths and weaknesses.

Importance of Classification in Medicolegal Reports

In the medicolegal setting, classification systems provide useful information about:

- Severity of injury
- Likely treatment (operative vs non-operative)
- Prognostic implications

However, the specific classification used is less important than a clear, accurate description of the fracture morphology and displacement, and the rationale for the selected treatment strategy.

The Role of Surgery in Wrist Fractures

Surgical fixation of wrist fractures has become increasingly common, particularly with the advent of volar locking plates which allow stable fixation even in osteoporotic bone. However, the decision to operate is nuanced and must balance the benefits of anatomical reduction against surgical risks.

In medicolegal cases, scrutiny often focuses on whether surgical intervention was appropriate or whether non-operative treatment would have sufficed. Conversely, delays in surgery or missed indications can be grounds for criticism.

Surgical techniques for wrist fractures include:
• Closed reduction with application of a moulded cast (POP = Plaster of Paris)

• Percutaneous K-wires (like stainless steel cocktail sticks) to "pin" the fracture fragments

• Open reduction internal fixation (ORIF) with plates and screws

• External fixation

Volar plating (i.e. ORIF) is the most frequently utilised technique due to its biomechanical advantages and low-profile internal plate positioning.

Potential surgical complications include scarring, bleeding, infection, nerve injury, vessel injury, tendon irritation or rupture, pain, stiffness, swelling, CRPS, malunion*, nonunion, metalwork failure or hardware irritation, revision surgery or issues related to the anaesthetic e.g. allergy, adverse reaction, deep vein thrombosis or pulmonary embolism (i.e. blood clots in the legs or the lungs).

*Malunion can still occur, particularly if fracture fragments are inadequately reduced or if hardware loosens / fails.

From a medicolegal perspective, not all poor outcomes following surgery imply negligence. For example, tendon ruptures may occur even with correct plate/screw positioning, particularly in comminuted fractures.

Complications Following Wrist Fractures

Despite appropriate initial management, complications following wrist fractures are common and can significantly affect the clinical outcome. From a medicolegal perspective, understanding these complications is critical in evaluating causation, prognosis, and long-term disability.

Complications may arise due to the nature of the fracture, patient-specific factors, the initial management strategy, or a combination of these elements. Some complications are unavoidable despite best practice, while others may suggest suboptimal treatment or delays in diagnosis.

One of the most common complications is post-traumatic stiffness. This typically results from prolonged immobilisation, intra-articular involvement, or capsular scarring. Patients often experience reduced wrist range of motion, which commonly impacts wrist extension or the ability to turn the hand palm-up (supination) and palm-down (pronation).

Another frequent complication is persistent pain. This can stem from malunion, nonunion, or post-traumatic arthritis but may also be neuropathic in nature or result from complex regional pain syndrome (CRPS). In medicolegal practice, it is essential to differentiate between pain that arises due to structural problems and that which is disproportionate or poorly explained.

Malunion (i.e. healed but not in the correct position) remains a significant source of long-term symptoms. Distal radius fractures that heal with dorsal angulation, radial shortening, or loss of congruity at the distal radioulnar joint (DRUJ – the joint between the two forearm bones – radius & ulna), can lead to functional impairment, reduced grip strength, and cosmetic deformity.

Less frequently, tendon complications occur. Extensor pollicis longus (EPL) rupture is a well-recognised delayed complication, particularly following dorsally displaced fractures or those treated with dorsal plating. Flexor tendon injury is less common but may result from volar plate fixation or hardware irritation of the tendon. With EPL ruptures, these can occur spontaneously in both closed injuries that are treated with casts, and those treated with surgery e.g. K-wire fixation or fixation with plates and screws. There are 2 main theories, and these are either that at the time of the original injury the wrist went into maximum extension and "crimped" the tendon between the bones in the wrist and the distal radius, thus injuring it. Or that the blood supply to the tendon in this area is a watershed zone and it fails due to a lack of nourishment. In cases that are treated surgically, it therefore requires an expert witness to help determine whether it was negligent surgery or whether it was the sequelae of the natural history of the wrist injury.

Common Complications of Wrist Fractures

Complication	Typical Causes	Medicolegal Significance
Stiffness	Normal injury course, or from prolonged immobilisation, intra-articular fractures	May limit function, very difficult to to reverse
Malunion	Inadequate reduction, loss of position in cast or failure of fixation	Functional and cosmetic impact, potential for future surgery
Nonunion	Open fractures (e.g. infection), poor vascularity, smoking	Delayed recovery, may require further surgery
CRPS	Multifactorial, often idiopathic i.e. unknown cause	Long-term disability, high variability in outcome
Tendon rupture	Hardware irritation, fracture displacement	May require tendon transfer or grafting
Nerve injury	Swelling, malunion, compartment syndrome	Sensory or motor deficits, may be permanent
Arthritis	Intra-articular step-off, malalignment	Progressive symptoms, often irreversible

be made aware of not only common risks but also rare and serious complications, such as complex regional pain syndrome (CRPS), nerve damage, or tendon rupture. CRPS is a challenging condition to explain in layman's language and perhaps describing the ongoing symptoms e.g. pain, swelling, stiffness, loss of function is more appropriate?

Technical Surgical Errors
Unfortunately technical mistakes during surgery happen - for example, injuring the palmar cutaneous branch of the median nerve during Open Reduction Internal Fixation (ORIF) of distal radius fractures, or selecting screws that are too long and cause tendon ruptures, are a common source of claims and may lead to avoidable complications.

Inadequate Postoperative Instructions
Failure to advise on immobilisation, rehabilitation protocols, or warning signs of complications (such as increasing pain or swelling) may lead to criticism.

Delay in Diagnosis or Referral
In cases of trauma, failing to detect compartment syndrome or late tendon ruptures may lead to significant functional impairment and successful claims.

Common Complication	Key Medicolegal Issue
Nerve injury	Consent and surgical technique
Tendon injury	Intra-operative error, missed diagnosis, natural history
Infection	Documentation of risk and postoperative care
CRPS	Consent and early recognition
Nonunion of fracture	Delay in diagnosis or inappropriate treatment

Meticulous record-keeping, clear communication with patients, and adherence to national guidelines are essential strategies for mitigating these risks.

Complex Regional Pain Syndrome (CRPS)

Among the most feared complications following a wrist fracture is Complex Regional Pain Syndrome (CRPS). Although its precise cause remains poorly understood, it is thought to relate to an exaggerated inflammatory or autonomic response following injury. For the medicolegal expert, awareness of CRPS is crucial, not least because its diagnosis is sometimes contested, and its prognosis is highly variable.

CRPS is characterised by disproportionate pain, hypersensitivity, swelling, altered skin colour or temperature, and often significant functional impairment. The Budapest Criteria provide a validated framework for diagnosis (Harden et al., 2010), although application in practice is often nuanced and reliant on clinical judgement.

Importantly, the incidence of CRPS following distal radius fracture is relatively low - in the region of 1-2% (Dilek et al., 2012) - but its impact on outcome and disability can be profound. Most cases improve with early recognition, physiotherapy, and sometimes pharmacological or nerve-targeted treatments, but a small subset of patients are left with chronic symptoms that prove resistant to intervention.

From a medicolegal perspective, expert opinion may be required to comment upon causation, prognosis, and the appropriateness of treatment provided. Allegations of delayed diagnosis or failure to treat appropriately may arise, although in many cases the development of CRPS reflects an unfortunate biological response rather than any demonstrable negligence.

The Challenge of Persistent Pain and Disability

Even in the absence of CRPS, a proportion of patients report ongoing pain, stiffness, weakness or reduced function following a wrist fracture. The medicolegal question often posed is whether such symptoms are attributable to the index injury, or whether they reflect degenerative change, pre-existing pathology, or non-structural factors.

Studies suggest that up to 30% of patients may report some degree of pain or functional limitation a year after distal radius fracture, particularly in older patients or those with more complex injuries (MacDermid et al., 2003). Factors contributing to prolonged symptoms include intra-articular involvement, residual deformity, joint stiffness, and psychosocial factors.

Importantly, some claimants describe disproportionate pain behaviours, widespread symptoms, or non-anatomical patterns of limitation. Here, the experienced medicolegal expert must tread carefully, balancing respect for the patient's experience with objective clinical assessment and a clear evidence base.
Commenting upon prognosis requires a blend of scientific knowledge, clinical expertise, and realistic appraisal of functional recovery. It is essential to avoid assuming that structural healing alone guarantees symptom resolution.

Long-Term Disability and Impairment

While many wrist fractures heal with excellent functional results, a significant proportion of patients experience ongoing symptoms or limitations. For the medicolegal expert, assessing long-term impairment requires a careful balance of clinical knowledge, patient history, and realistic expectations.

Persistent stiffness is one of the most frequently reported problems, particularly affecting pronation-supination (turning the hand palm-down / palm-up) and wrist extension. Loss of grip strength is also common, especially in those with malunion or tendon adhesions. Even where radiographic healing appears satisfactory, patients may describe discomfort or functional restriction that impacts their ability to work or perform domestic tasks.

The distinction between impairment and disability is worth reiterating; impairment refers to the loss of physiological function, while disability reflects the impact on day-to-day life. Some individuals with minor radiological deformity may be profoundly affected

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due to their occupation or pre-injury level of activity, while others may adapt remarkably well to more significant objective deficits.

Assessment tools such as the Disabilities of the Arm, Shoulder and Hand (DASH) questionnaire, or the Patient-Rated Wrist Evaluation (PRWE), can help quantify functional limitation, though their interpretation requires caution, particularly in cases involving potential secondary gain.

From a medicolegal standpoint, the expert must address whether the level of disability is consistent with the injury, whether recovery has plateaued, and if future treatment may offer any realistic improvement. These are critical determinants in calculating general damages and future loss claims.

Prognostic Indicators and Predicting Outcomes

From a medicolegal perspective, predicting outcome is both a science and an art. A clear understanding of prognostic indicators allows for informed, balanced expert opinion. Some of the most significant predictors of long-term outcome include:

- **Fracture pattern and complexity:** Intra-articular fractures, comminution, and metaphyseal bone loss can be associated with poorer outcomes.
- **Age and bone quality:** Older patients or those with osteoporotic bone often have more complicated recoveries, with greater risk of displacement, stiffness, or CRPS.
- **Initial reduction quality:** Anatomical or near-anatomical alignment correlates strongly with better functional results.
- **Postoperative complications:** Any event that delays mobilisation - such as infection, hardware failure, or secondary surgery - typically results in increased stiffness and diminished grip strength.
- **Adherence to rehabilitation:** Patient motivation, access to physiotherapy, and early active range-of-motion exercises all influence final function.

The medicolegal expert should resist attributing poor outcome to a single factor without considering the broader clinical picture. This includes the often-underappreciated psychosocial determinants of recovery, such as patient expectations, anxiety, depression, and secondary gain. For example, two patients with identical radiographs may have markedly different outcomes depending on pain thresholds, comorbidities, and psychosocial influences.

Moreover, the **presence of pre-existing conditions** - such as rheumatoid arthritis, diabetes, or prior wrist injuries - can heavily influence prognosis and must be accounted for when assessing causation and attributing levels of disability. It's crucial in medicolegal reports to comment explicitly on how these variables interact with the index injury.

Imaging and functional assessments can aid in supporting opinions about prognosis. Late-stage imaging may show arthritis, hardware migration, or persistent malunion, helping to explain ongoing symptoms. Objective measures such as grip strength, range of motion, and validated questionnaires (e.g. DASH score) are valuable for quantifying functional limitation and guiding appropriate compensation estimates.

In summary, outcome prediction is multifactorial and requires a holistic approach that combines radiological, clinical, and psychosocial insights.

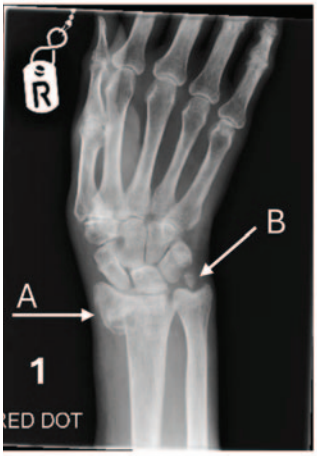

Image 1: *This is a Postero-Anterior (PA) radiograph of a right wrist. It shows an extra-articular distal radius fracture (marked A) with shortening and loss of radial inclination/angulation (i.e. the hand doesn't align with the forearm). There is also a fracture at the base of the ulna styloid (marked B) which is displaced.*

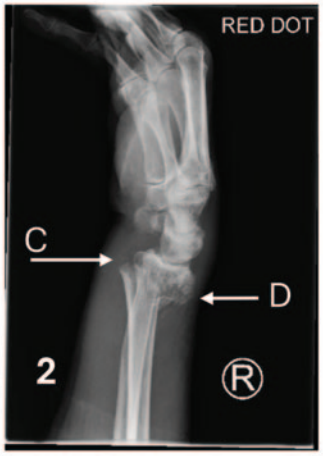

Image 2: *This is a Lateral (Lat) radiograph of the same wrist. It shows an extra-articular distal radius fracture which is dorsally displaced toward the back of the forearm/hand i.e. away from the arrow (marked C). There is some dorsal comminution i.e. fragmentation (marked D). The shape of the wrist is the classical Colles type wrist fracture and would have the appearance of a dinner fork.*

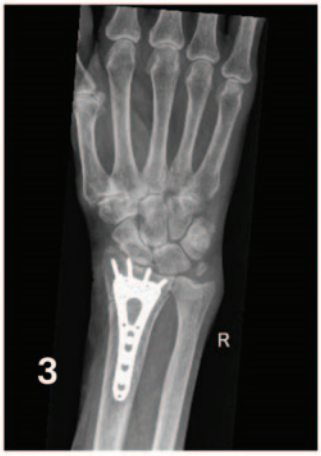

Image 3: *This is a postoperative PA radiograph demonstrating that the patient has undergone Open Reduction Internal Fixation (ORIF). The distal radius fracture has been reduced well i.e. all cortices (edges of the bone) are lined up and the correct joint angles have been restored.*

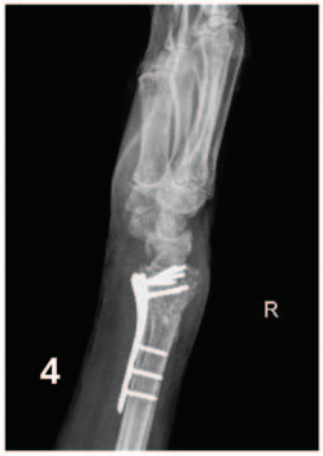

Image 4: *This is a postoperative Lateral radiograph demonstrating a volar locking plate (i.e. the plate is on the thumb/palm side of the bone). All the screws are the correct length and don't protrude excessively through the dorsal cortex thus won't irritate the tendons precipitating a tendon rupture.*

Medicolegal Reporting: Key Principles

Medicolegal reporting of wrist fractures demands clarity, consistency, and a structured approach. The stakes are high: the report may determine compensation, inform settlement discussions, or serve as a central piece of evidence in court.

Best practice elements of a medicolegal wrist fracture report include:

1. Thorough documentation of the history: Including mechanism of injury, immediate symptoms, and treatment timeline.

2. Detailed analysis of imaging: Initial, intra-treatment, and final radiographs should be reviewed to assess alignment, healing, and any complications.

3. Clear description of the injury and management: Including whether the injury was intra-articular, the surgical technique used, and any perioperative complications.

4. Objective clinical examination findings: Documenting deformity, range of motion, tenderness, sensory or motor deficits, and signs of CRPS.

5. Analysis of causation: Distinguishing between symptoms attributable to the index event and those likely due to unrelated or degenerative causes.

6. Prognosis and residual disability: Based on evidence and clinical reasoning, with reference to outcome studies where appropriate.

7. Consideration of the relevant legal test: For example, the "but for" test in tort law or balance of probabilities when discussing causation.

Common pitfalls in reporting include:

- Overstating the severity of findings based on radiographs alone.
- Failing to consider non-accident-related contributors to ongoing symptoms.
- Neglecting to address variability in patient outcomes or psychological comorbidities.
- Using overly technical language without explanation - clarity is critical.

Ultimately, a high-quality report is balanced, independent, and clearly reasoned. It should assist the court or instructing parties in understanding the injury's relevance, consequences, and long-term implications - while staying strictly within the expert's scope of expertise.

Conclusion and Medicolegal Reflections

Wrist fractures are common injuries, but their medicolegal analysis is rarely straightforward. While many patients make excellent recoveries, a significant minority experience ongoing symptoms, complications, or dissatisfaction with their outcome. The challenge for the expert lies in differentiating expected consequences of the injury from avoidable harm or substandard care.

From a medicolegal standpoint, these injuries are rarely "perfect" in terms of their recovery. The notion of "perfect" must be understood in context - not every patient will regain pre-injury function, and many will experience residual stiffness, pain, altered wrist mechanics, or complications even with ideal management.

The complexities of fracture pattern, treatment choice, biological healing, patient compliance, and psychosocial overlay all interact to influence recovery. Furthermore, the natural history of wrist fractures, particularly in older patients, may involve incomplete restoration of pre-injury status despite appropriate management.

The medicolegal expert must provide nuanced, fair, and evidence-based reports that clearly identify foreseeable complications, recognise the limits of predictability, and distinguish between complications that fall within the natural history of injury versus those that may reflect suboptimal care. Understanding the variability in outcome is not only critical for assessing damages but also for managing expectations - for patients, clinicians, and the courts.

A well-structured, transparent, and clearly referenced medicolegal report remains the cornerstone of effective expert evidence in this field. Expert analysis that is clinically grounded, logically argued, and clearly explained plays a crucial role in securing justice for claimants and defending professionals alike.

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HANDLING A DENTAL NEGLIGENCE CASE?

Dental consultant Toby Talbot, an independent expert witness with British and American training, has spent 25 years providing a fast track service for the legal community in cases of clinical negligence.

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What's Causing the ACL Injury Epidemic in Women's Football?

by Eleanor Green and Allana Edwards - https://www.brabners.com

ACL (anterior cruciate ligament) injuries are one of the most common and serious in football. It's estimated that there have been over 500 ACL injuries among elite footballers since 2022. Concerningly, female players are up to six times more at risk than males, with almost 30 missing the FIFA Women's World Cup 2023 due to ACL injuries.

From the design of football boots and hormonal fluctuations to disparities in training facilities, here Allana Edwards and Eleanor Green investigate the potential factors behind the prominence of female ACL injuries and ask — can anything be done to halt this epidemic?

Why are ACL injuries more common in female players?

ACL tears most commonly occur as a result of changing pace or direction or due to repetitive landing and pivoting manoeuvres, rather than contact between two players.

Various studies have been conducted to look into why females are more prone to non-contact ACL injuries, including consultant orthopaedic surgeon Nev Davies' study, which showed that female players are four-to-six times more at risk of sustaining non-contact ACL injuries than males. Female players are also 25% less likely to make a full recovery and return to the pitch than their male counterparts.

Yet following these findings, we haven't seen a decrease in the prevalence of ACL injuries in women.

Let's dig into some potential factors.

Training and recovery facilities

It's commonly thought that the genetic makeup of the female body plays a key role in injury risk, with females having wider pelvises and completely different biomechanics and hormones.

However, female health specialist Dr Emma Ross — a prominent speaker on this topic — believes there is "no good evidence" for the roles of "body shape, hip width and the menstrual cycle" as contributing factors to injuries, despite being used as arbitrary excuses for why "women aren't designed to play football."

Fox et al. (2020) also suggested that confining this to biological causes misrepresents the root causes of ACL injuries, which are likely to be strongly influenced by "gendered environmental disparities" — essentially, different experiences in sport and less access to training facilities.

According to Dr Joanne L Parsons' paper *'Anterior cruciate ligament injury: towards a gendered environmental approach'*, we need to look at gendered discrepancies in pre-sport activities, training, competition, research and rehabilitation environments.

Women already face plenty of barriers to participation in sport. They don't need the added challenge of unnecessary injuries holding them back. So far, not enough has been done to tackle this issue by those who have the power and influence to make a difference.

Nearly 30 female footballers — enough players for an entire squad — missed the 2023 FIFA Women's World Cup due to ACL injuries and at least 13 WSL (Women's Super League) players are currently undergoing ACL rehabilitation including England captain Leah Williamson.

This has forced prominent players to speak out, including Beth Mead and Vivianne Miedema in their Netflix documentary 'Step By Step'. This saw Arsenal players talk about their personal experiences of suffering from ACL injuries in the hope of helping the next generation of female footballers.

We spoke with former Canadian international and Champions League player Kylla Sjoman, who shared: *"It has taken so long for attention to be brought to the indisputable cases of ACL injuries in female athletes. My career was cut short due to an ACL injury which I know could have been prevented or at least rehabilitated if I had been afforded access to the appropriate facilities, resources and coaches".*

Football boots

While the majority of WSL players now have boot deals, there are still a number of professional players who don't. For them, choosing a new pair of boots means browsing the shelves in a high street store.

Until recently, the vast majority of football boots have been designed specifically for men. Given that women's feet have completely different bone structures to those of their male counterparts, it comes as no surprise that up to 82% of female players in Europe experience discomfort when wearing football boots.

Could boots be the Achilles heel to ACL injuries in females? Dr Emma Ross explores the impact that football boots have on ACL injuries in her book 'The Female Body Bible':

"You make studs and you make the sole to withstand the capacity of the average man and then you put an average women in them and as fast and as quick as they are, they're not as strong or as powerful as men. So those boots are now designed to grip a heavy, strong man into the ground but you've

got a lighter woman in them and they're getting anchored to the ground by them".

Some brands have finally got the message and started to design football boots for women. Nike is leading the way with the Phantom Luna Elite, claiming that this is the most innovative and evidence-driven female boot design to date. The boot has three key aims: eliminate preventable pain points, improve on-pitch performance and reduce the risk of major injuries.

While there is currently no evidence to suggest that the level of support provided by these boots will make a difference when mitigating ACL injuries, new models can certainly measure ACL loads at different points in time.

Scheduling and fixtures

Others point to the explosion in the popularity of women's football and the consequential growth in the fixture schedule as the cause of so many ACL injuries by increasing the demands on players' bodies.

The gruelling run of major tournaments in recent years has included a pandemic-delayed Olympics in 2021, a European Championship shifted back by 12 months for the same reason in 2022, the Women's World Cup in 2023 and the Paris Olympics in 2024 — all on top of the WSL and Champions League fixtures. It seems that players aren't going to be able to rest any time soon with the 2025 European Championships kicking off in July 2025.

With the likes of Sam Kerr racking up an astonishing 3,411 minutes of action during the 22/23 season across all competitions, it's unsurprising that players are suffering injuries.

Terms of employment

Injuries like ACL tears can be career ending — and access to the best facilities and care is essential for players to make a return to the physical demands of football at the highest levels.

With ACL injuries usually resulting in at least nine months off the pitch, players have often been prevented from accessing the state-of-the-art medical treatment and rehabilitation services provided by clubs due to their terms of employment.

Female footballers have historically been employed by clubs on far less favourable contractual terms than their male counterparts. Many of the first WSL contracts contained a clause that allowed clubs to terminate players' employment if they were unable to train or play games for over three months.

Below is an extract taken from a 2018 standard form contract:

"TERMINATION FOR LONG TERM INJURY

38 If a Player is unable through injury or illness to train or play for the Club for a consecutive period of 3 months in the written opinion of an appropriately qualified medical consultant instructed by the Club (the "Medical Consultant"), the Player shall be deemed to have suffered a "Long Term Injury". Each provision set out below shall apply unless the parties agree a more beneficial provision in substitution for the original provision.

39 Where a Player is deemed to have suffered a Long Term Injury, the Club shall be entitled to terminate this Contract by giving 3 months written notice to the Player (the "Notice Period"). The Club may serve notice at any time after the date on which the Player is declared to be suffering a Long Term Injury by the Medical Consultant."

Thankfully, this has recently changed. The FA and PFA have agreed new benefits pertaining to injury, illness and long-term sickness which came into effect from the start of the 2022 season to mirror those in the men's game.

Significantly, the period relating to contract termination has increased from three to 12 months. There are also new uplifts to maternity leave and pay.

Pitch quality

WSL teams are often allocated artificial pitches or academy pitches to both train and play fixtures on. This has been identified as an area of concern for many, including by Braun, Waterlain and Dragoo (2013), who suggest that friction increases when playing on synthetic surfaces, resulting in an increased rate of injury for the lower extremities (like legs, knees, ankles and feet).

In 2019, FIFA announced that both women's and men's football are to be played using the same surfaces and field parameters. Natural grass fields were a requirement for the first time at the 2023 Women's World Cup.

Nevertheless, there is still a disparity between the facilities accessible by men and women. In January 2023, we were still seeing WSL games being called off due to frozen pitches — a problem that is almost non-existent in the Premier League given that it's compulsory for clubs to have undersoil heating.

Manchester United and Manchester City have recognised this void in facilities and committed significant funds to combat the disparity. Manchester United Women recently moved into a new £7m training facility while Manchester City Women have submitted plans for a £10m purpose-built training facility.

The Government has also recently announced a £30m investment to build approximately 30 new state-of-the-art pitches and accompanying facilities, designed to prioritise women's teams across England.

Hormonal fluctuations

Hormonal fluctuations during the menstrual cycle have been identified as another potential factor contributing to the high incidence of ACL injuries in women's football.

Existing research suggests that variations in oestrogen and progesterone levels can potentially increase the risk of injury. In particular, oestrogen — which peaks during the ovulatory phase — has been associated with increased ligament laxity, making the ACL more susceptible to tears. Further, progesterone — which rises during the luteal phase — can impact neuromuscular response times, potentially leading to compromised joint stability. These hormonal changes may

therefore influence the biomechanics of movements such as landing from jumps or sudden directional changes — common scenarios for ACL injuries

In May 2024, research from University College London, University of Bath and St Mary's University suggested that players are more likely to get injured at certain points during their menstrual cycle. The peer-reviewed study found that 26 of the players monitored were six times more likely to pick up a muscle injury in the days leading up to their period, compared to when they were on their period.

It seems that football's governing bodies are also taking notice of the potential link between hormonal fluctuations and ACL injuries, with FIFA recently announcing its plans to fund a groundbreaking year-long study at Kingston University London. This will involve tracking hormone levels in blood samples from both elite and grassroots players throughout their menstrual cycles. The study aims correlate these hormonal phases with physical performance data and typical ACL injury scenarios, such as rapid directional changes and landing after heading the ball.

Simon Augustus, a senior lecturer in sport biomechanics at Kingston University, commented on the potential impact that this research could have to women's football: "We know some injuries are unavoidable, but we're attempting to help those individuals who injure their ACL outside of impact actions. Those are the ones where we might have more chance to intervene and prevent them from taking place by utilising strength training or tweaking technique".

Who has a duty of care?

The players have spoken and medical experts are clear — football is depriving female players of fair and equal treatment. Our infrastructure — originally designed and built to support men — is failing the women's game. This problem has been exacerbated by the accelerated growth of women's football.

Sports medicine specialist and former Chelsea club doctor Eva Carneiro is one of few females to have held a senior medical position at a Premier League club. She believes that the lack of funding and gaps in female-specific research and knowledge is negatively impacting female athletes.

She told Sky Sports: *"Gender is still an issue in football. You've got limited funding in the women's game and you don't have very experienced medical teams."*

Clubs and governing bodies owe a duty of care to all their athletes. At the very least, this includes employing physiotherapists and medical professionals with specific training and experience with the female anatomy. However, the talent pool for such professionals is limited, with coaches and physiotherapists working predominantly with men. This must change to ensure that our female players receive adequate care and support. From a legal perspective, female footballers are employees and have the right to receive the same standard of care as males.

What is being done to halt the ACL epidemic?
Training programmes
FIFA has already developed training programmes (such as the 11+) that are designed to prevent ACL injuries and have been implemented by clubs and national teams around the world. Yet there's still a drastic need for female-specific programmes to be developed.

UEFA Expert Panel
In December 2023, UEFA made an announcement that could well be considered a watershed moment for women's football — the introduction of an expert panel dedicated exclusively to understanding and improving the health and wellbeing of female athletes.

The central focus of this panel is to gain a deeper understanding of ACL injuries among female players.

It has been reported that the long-term aim is to publish a UEFA consensus on ACL injury prevention and management, plus an up-to-date ACL injury prevention programme. This research is currently ongoing.

However, the panel recently launched 'Unstoppable' — a new six-year strategy which, according to UEFA president Aleksander Čeferin, is UEFA's "road map to lay the groundwork for a sustainable future, unlocking the full potential of women's football."

As part of this strategy, UEFA has shown its commitment to addressing challenges such as those posed by a women's menstrual cycle by funding research into the impact of menstruation in football and setting up workshops to increase awareness of the menstrual cycle and its impact on players.

Research
Grace Vella — Founder and CEO of Miss Kick — told us that "the most important thing that needs to be done right now is the research. In the past, sport science and its findings has predominantly been based around the male anatomy and physiology.

It's only more recently, as the women's game has grown, that we have started to consider whether women and girls need specific equipment.

Ultimately, the goal should be to ensure the player on the pitch is as comfortable as possible and to minimise her risk of injury. It'll be interesting to see what findings come out of the data over the coming years…"

In light of this, FIFA's commitment to funding pioneering research into how hormonal fluctuations could lead to an increase in ACL injuries marks a huge step forward for women's football and (most importantly) the wellbeing of players. In particular, the findings that are obtained from this study could lead to groundbreaking tailored training programs and interventions that'll act to reduce injury risks based on individual hormonal profiles. This would be particularly helpful at non-elite levels, where clubs often operate without the financial resources of top-level clubs. Other well-known organisations within the football world are coming together with the aim to accelerating research into reducing ACL injuries in women's football. FIFPRO, the Professional Footballers Association and Leeds Beckett University, for example, have joined forces to conduct an advanced research initiative which focuses on increasing player availability and developing strategies to mitigate the risk of ACL injuries.

New treatment plans and technologies
Recent breakthroughs in treatment plans and technologies also provide promising and innovative solutions for both preventing and managing ACL injuries in women's football.

One notable innovation is the Bridge-Enhanced ACL Restoration (BEAR) procedure. Unlike traditional ACL reconstruction, which involves grafting tissue from another part of the body, the BEAR procedure uses a collagen implant combined with the patient's own blood to promote natural healing of the torn ligament. This approach preserves the native ACL's nerve and blood vessel structures, potentially leading to better functional outcomes once healed and reduced recovery times.

Another significant development is the use of 3D wearable sensor technology such as ViPerform AMI. This enables real-time monitoring of athletes' movements, providing detailed data on functional deficiencies that may predispose them to ACL injuries. By integrating this data into training programs, coaches and medical staff can design personalised interventions for each player in order to improve strength, coordination, balance and flexibility, thereby reducing the risk of injury.

Virtual reality technology and robot-assisted rehabilitation have also enhanced the precision and effectiveness of rehabilitation exercises. These technologies make rehabilitation more engaging for patients, improving adherence to protocols and ultimately leading to better recovery outcome.

These advancements in treatment and prevention strategies represent a significant step forward in addressing the prevalence of ACL injuries in women's football, offering hope for safer and more effective management of this all too prevalent issue.

Hopefully, 2025 will be a year of further positive change for women's football as we continue to see strides forward in parity with the men's game.

Talk to us
We work closely with elite sports clubs, national governing bodies, international federations and large sports agencies both throughout the UK and around the world.

If you need advice on the above or want to talk about how the changing landscape of women's football could affect your club or playing career, our specialist sports sector team is here to help.

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The Ergonomist's Role in Manual Handling Injury Claims

By Dr Ian Randle BSc, MSc, PhD, MErgS, C.ErgHF
Hu-Tech Experts

Manual handling injuries remain one of the most common causes of work-related musculoskeletal disorders in the UK, with thousands of claims brought each year under personal injury law. At the heart of many of these cases lies a central question: was the task designed and managed in a way that made injury foreseeable and preventable? Answering this requires more than an understanding of training, equipment or processes—it requires an understanding of how humans interact with their work environment. This is precisely where the ergonomist's expertise comes into play.

A Human-Centred Perspective

An ergonomist, also known as a human factors specialist, brings a distinct, human-centred perspective to evaluating manual handling injury claims. While engineers may focus on the mechanical properties of lifting equipment or the structural integrity of storage systems, ergonomists are uniquely trained to assess the interface between the task and the human body. This includes evaluating posture, lifting technique, the physical demands of the task, and the capacity of the individual worker.

Unlike purely technical assessments, ergonomic analysis recognises that injury risk cannot be fully understood by examining load weights or equipment specifications alone. For example, a load may fall within basic weight guidelines, yet still exceed what is safe for a particular individual to lift repeatedly without undue strain. Conversely, an ergonomist's analysis may also demonstrate that a task superficially perceived as hazardous is, in fact, reasonably safe when human factors and task design are appropriately considered. This holistic approach makes ergonomists well-placed to provide expert evidence on whether the risk of injury was foreseeable from a human biomechanics perspective.

Methods of Assessment

In investigating manual handling injuries, ergonomists employ a range of evidence-based techniques to provide objective analysis. These may include:

- Task Analysis: Structured observation and documentation of the task, identifying factors such as awkward postures, repetitive movements, twisting, or reaching.
- Biomechanical Assessment: Calculating the forces exerted on joints and the spine during lifting or carrying, using validated models to assess whether physical demands exceed safe guidelines.
- Environmental Evaluation: Examining factors such as space constraints, floor surfaces, lighting, and temperature, all of which can influence injury risk.
- Worker Capability Assessment: Considering individual differences in strength, stature, and health that may affect safe performance of the task as well as their state of training.

Through these methods, ergonomists provide detailed, scientifically grounded opinions on whether a task was designed and managed with due regard for the worker's capabilities and limitations. This analysis

goes beyond what an engineer or safety professional might offer, focusing not only on systems and equipment but on the human as an integral part of the work system.

Supporting the Legal Process

For lawyers involved in manual handling claims, ergonomist evidence is instrumental in addressing key legal issues. Ergonomists can assist in answering questions such as:

- Was the manual handling task reasonably safe for the exposed workforce?
- Were appropriate control measures implemented to reduce foreseeable risk?
- Was the employer's approach consistent with statutory obligations and industry standards?

Their testimony can clarify complex technical matters for the Court by linking task demands directly to the mechanism of injury, grounding opinions in both scientific principles and practical workplace realities. Crucially, ergonomists can provide objective evidence in both Claimant or Defendant cases—whether showing that injury risks were inadequately controlled, or that the task was reasonably safe and managed in line with regulatory requirements. This human-focused insight complements, rather than duplicates, the expertise provided by engineers or occupational health specialists.

Looking Ahead

As workplaces continue to evolve—with growing use of automation, hybrid working, and ageing workforces—the role of ergonomists in litigation is likely to become even more significant. Their ability to interpret work design through the lens of human capability will remain critical in ensuring that legal decisions are informed by a nuanced understanding of how people interact with their work environment. Whether instructed by Claimant or Defendant legal teams, engaging an ergonomist offers access to a specialist dimension of expertise—one that ensures the human element is not overlooked when evaluating manual handling injury claims.

Women's Health Series: Hysterectomy Claims

A lack of awareness and understanding appears to exist when it comes to women's reproductive health conditions, and the diagnosis and treatment of hysterectomies is no exception to this.

In this article we discuss where negligence can occur in relation to the treatment of hysterectomies, from initial misdiagnoses to surgical errors.

What is a Hysterectomy?

A hysterectomy is a surgical procedure to remove the womb (uterus) and is carried out to treat health problems that affect the female reproductive system.[1] Women will typically undergo a hysterectomy to treat problems such as heavy periods, fibroids, or chronic period pains. Roughly 55,000 hysterectomies are performed in the UK every year on women mainly in their 40s and 50s.[2]

Barriers to Treatment

Women undergoing hysterectomies can face numerous issues when trying to access treatment. These may include gender bias which leads to women's reproductive pains being normalised or dismissed, NHS delays due to chronic underfunding, and the rising costs of private procedures by 19% from 2021 to 2024.[3] For more information on this topic, please see Rebecca Linnell's recent blog on the Kingsley Napley website discussing the current crisis in accessing gynaecology care.

Hysterectomy Negligence

If problems arise in the care associated with a hysterectomy, there may be a legal claim for negligence which should be investigated.

Below, are some examples of potential negligence involving hysterectomies that may give rise to a legal claim for compensation.

Surgical Errors

During hysterectomy procedures it is possible for surgical errors to occur. While some issues that may arise are known risks of the surgery (for which the patient should have been appropriately consented for), other complications may be as a result of negligent care. For example, a patient's bladder may become damaged as the abdomen is being opened, particularly if prior procedures, such as a c-section, have left a thin layer of scar tissue.

In a recently reported settled case, a Claimant received compensation following injuries to her bladder which she negligently sustained during a hysterectomy procedure.[4] This resulted in her developing a fistula and experiencing incontinence. Following two surgeries which failed to repair the fistula, she was discharged home with a catheter. Approximately five months later a final repair surgery took place which was successful in resolving her incontinence. Her case included claims for sexual dysfunction, psychiatric injury, and loss of earnings as a result of her injuries. In this case the Claimant also made allegations against the Defendant that she was inadequately consented regarding the option of a total or sub-total hysterectomy. Liability was admitted by the Defendant in relation to the inter-operative injury sustained to her bladder, but they denied allegations that the Claimant was inadequately consented. We discuss the wider issues surrounding informed consent for hysterectomy procedures later in this article.

It is also important to note that negligent care can arise not just from damage caused during a hysterectomy, but also extends to when non-negligent damage has not been identified and repaired when it reasonably should have been. For example, damage to the ureter is a known risk of a hysterectomy, but it is usually recognised and repaired during the surgery.[5] A Claimant may therefore be successful in bringing a legal claim following a hysterectomy, despite any damage caused being a known complication, if it is found that the Defendant was negligent in not identifying and repairing such damage during the hysterectomy procedure.

If damage caused during surgery is left untreated, it can result in additional pain, complications and often requires a further corrective surgery once the damage has eventually been identified.

Early recognition of damage is therefore key, as operating staff can defer to the relevant disciplined doctor, for example a Urologist, to deal with immediate repairs, thereby minimising any long-term problems. Where there is a failure to recognise and rectify the damage, there may be grounds for a clinical negligence claim.

Delayed Diagnosis

The lack of awareness of women's reproductive health conditions can lead to a delay in the diagnosis of symptoms. This is a common reason for potential negligence claims, due to the fact that delays can lead to a deterioration of symptoms. As a result, a report by the Women and Equalities Committee has called on the NHS to 'urgently implement a training programme to improve the experience' of accessing treatment and diagnosis for women with reproductive ill health.[6]

Improving early diagnosis, such as through the provision of follow up appointments, and second opinions where warranted must be a priority to pre-

vent a deterioration of symptoms. The NHS must take steps to ensure practitioners keep up to date with the full range of diagnostics available to them to allow patients to be diagnosed at the earliest opportunity, hopefully resulting in less invasive treatment being required, and thus avoiding the subsequent risks associated with undergoing a hysterectomy.

As covered earlier in our article, delayed diagnosis and repair of non-negligent complications that occur during hysterectomy procedures may give rise to a legal claim. It is also possible for negligent delayed diagnosis of inter-operative injuries during other surgeries to have the disastrous outcome of an emergency hysterectomy being carried out. In the reported settled case of *MD v University Hospitals of Morecambe Bay NHS Foundation Trust*, the Claimant attended her 12-week ultrasound scan which showed the foetus to have severe abnormalities to the skull and brain with hydrocephalus.[7] She was therefore consented to have a termination of pregnancy that afternoon. Multiple negligent complications arose both in the lead up to her surgery, and the surgery itself, including perforation of the Claimant's uterus. She was given a laparotomy but after several attempts to stop the internal bleeding, the Defendant made the decision to carry out a hysterectomy. There were numerous allegations of negligence made by the Claimant, one of which was the Defendants delay in identifying the perforations. Liability was admitted by the Defendant.

The Misdiagnosis or Mistreatment of Symptoms

Whilst some gynaecological conditions do warrant a hysterectomy, this is not always the case. Patients may therefore find themselves having been negligently advised to undergo a hysterectomy when in fact, there were alternative, more suitable treatment options which should have been considered in the first instance. If a woman undergoes a hysterectomy when this was not necessary, there may be a legal claim.

Failures to Obtain Informed Consent

Increasing numbers of women have reported having inadequate time to consider the hysterectomy procedure and its possible consequences.[8] For example, in April 2025 it was reported that the Public Service Ombudsman for Wales found that a patient, Ms A, had a hysterectomy without giving her informed consent.[9] According to Ms A, it was not until the morning of her surgery that she was made aware that a hysterectomy may be performed as part of her procedure, and this was described by the ombudsman as being a 'serious failing'.

The Government response to the Women and Equalities Committee's first report states that moving forward, a risk assessment that allows a patient to make an informed choice on the recommended procedure should be undertaken as standard, taking account of any previous history of undergoing related procedures.[10] This should also include consideration of the patient's mental and physical preparedness for the procedure.

If consent was not properly obtained and the hysterectomy treatment caused an injury, a claim for medical negligence may be possible. However, it is worth noting that such claims can be challenging to prove. More information can be found on the Kingsley Napley Claims for a lack of informed consent webpage.[11]

Legal claims

The **Kingsley Napley** team specialise in gynaecology cases with a wealth of experience in this area. If, following a hysterectomy you are concerned about any of the issues raised in this article, please do not hesitate to contact their supportive and friendly team for a no obligation discussion.

The rest of the Kingsley Napley Women's Health Blog Series can be found on their website - ***https://www.kingsleynapley.co.uk/insights/blogs/medical-negligence-and-personal-injury-blog***.

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The Continuing Issues Relating to the Assessment of Expert's Fees in Composite Invoices - and the Distinction Between Detailed Assessments of Experts Fees in Fixed Costs Regimes

by David Taylor - Barrister at St John's Buildings

Whilst it is likely seen as trite that the costs of "obtaining a medical report" includes the costs of the agency fees (in place of Solicitor's profit costs) and not simply the charge made by the expert to produce the report, the extent of such agency costs that are recoverable, contained within a composite invoice, remains a challenge for the Court on assessment. A review of some recent cases and the distinction drawn between detailed assessment and the assessment of expert fees in fixed costs casesc

Background

For many years it has been commonplace that litigants use medical agencies to procure medical reports in PI and clinical negligence cases and that the costs of so doing are prima facie recoverable. Such costs are in place of the costs historically allowed on assessment for Solicitors' profit costs if they were to instruct an expert directly.

In *Stringer v Copley* (2002) unreported – HHJ Cooke – it was held that there is no principle which precludes the fees of a medical agency being recoverable, provided that those fees do not exceed the reasonable and proportionate cost of the Solicitors doing the work.

Judge Cooke went on to say, *"It is important that their invoices or fee notes should distinguish between the medical fee and their own charges, the latter being sufficiently particularised to enable the costs officer to be satisfied that they do not exceed the reasonable and proportionate cost of the Solicitors doing the work."*

The issue arose in an appeal before HHJ Bird in Manchester in the case of *Northampton General Hospital NHS Trust v Luke Hoskin* (1st tier appeal) 22nd May 2023. The main issue before the Court was whether a breakdown of the medical agency fee was required to be served by the receiving party (in the detailed assessment). Deputy District Judge Harris, sitting as a regional costs judge, had refused the Defendant's application for such a breakdown at the initial assessment. Premex who had produced the invoice had refused to provide a breakdown and simply asserted that the amounts were reasonable and proportionate.

Allowing the Appeal by the Defendant, HHJ Bird found that pursuant to PD47 5.2 (c) 'On commencement of detailed assessment proceedings, the receiving party must serve on the paying party the following documents, 'Copies of the fee notes of Counsel and of any expert in respect of fees claimed in the bill.'

HHJ Bird found that the wording of this was "very clear and admits of no doubt". He concluded "I am satisfied that it is clear that PD 47 imposes a duty on the receiving party to provide the fee note of any expert instructed and, where such costs are claimed details of the costs of any MRO. Premex is not an expert. Its invoice cannot be described in any sensible way as a fee note and is in any event not the fee note of the expert."

Having allowed the appeal, he required the receiving party to provide a breakdown between the Premex costs and the expert costs and to provide copies of the experts' fee notes. "I propose to order in addition, given what in my view is a clear failure to comply with PD 47, that in default of compliance with the order that items 53 and 58 each be assessed at zero."

The receiving party did not provide the breakdown but instead lodged an appeal to the Court of Appeal, that was eventually abandoned without being determined.

Do the obligations differ in the case of an assessment of an expert's fee in a fixed costs case and in a detailed assessment?

In *CXR v Dome Holdings Limited* (unreported) 14th August 2023, Senior Costs Judge Gordon- Saker (SCCO) considered competing persuasive but not binding authorities as to the extent of disclosure required in order for the Court to perform its assessment function. This was a detailed assessment case.

The issue he was to determine seems to have mirrored that in *Northampton v Hoskins*, and he followed the decision of HHJ Bird. He concluded that the PD requires the fee notes of the expert and in the absence of a breakdown of the fees of the expert and the agency, it is impossible to perform the exercise in *Stringer v Copley*, being the task of deciding whether those fees are more or less than the Solicitor would have charged for doing the same work.

In hearing argument however, he went on to add to the jurisprudence of the alternative approach (assessing a reasonable and proportionate fee without a breakdown) adopted by District Judge Jenkinson in the case of *Sephton v Anchor Hanover Group* (unreported) 20th April 2023.

In *Sephton*, the issue arose, but in the context of the case being a fixed costs case under the EL/PL protocol and was in fact an application for non-party disclosure against the medical agency for a breakdown of the agency invoice. This related to expert's fees and also the cost of an MRI scan. The fact of the application being brought as a non-party disclosure application does not seem to have affected the rulings made

as to the entitlement to disclosure of such a breakdown.

Judge Jenkinson followed a decision in *Beardmore v Lancashire County Council* (HHJ Wood KC) Feb 2019 in finding that the agency fees were recoverable as a disbursement under the fixed costs regime, but went on to find that the breakdown was not required as the Court was only required to ensure that the total cost of obtaining the report (or scan) is reasonable and proportionate and the apportionment between the provider and the agency is of limited relevance.

This seems to have been a common approach (sometimes referred to as not being proportionate to order the breakdown) in fixed costs cases.

Senior Costs Judge Gordon-Saker adds one comment to this jurisprudence in CXR, that the invoices do not contain an hourly rate as to the cost of obtaining the report or the amount of time spent, and that this information would be of great assistance in deciding whether the fees are reasonable and proportionate. Absent this, the Court simply has the product of the work done (the report) etc... to go on. It seemed therefore that there are good reasons as to why, although not required by the practice direction, experts fee notes should set out the work that was done with sufficient clarity, including the amount of time spent, to enable the Court to form a view as to the reasonableness of the fee.

Whilst he ultimately (in CXR) decided that a breakdown of the fees between the agency and the expert are required to comply with PD 47 (as it was a detailed assessment) he comments as to the assistance that would be gleaned by time spent and hourly rate charged, which might assist in those cases where the PD does not compel the breakdown (non-detailed assessment cases). It would allow the Court to be best able to perform the function of assessing a reasonable and proportionate fee if it had such additional information, although slightly differing perhaps to the full breakdown. It seems that this will be taken rather more as an obiter comment but perhaps illustrates the SCCO's view of the evidence required to assess the level of a reasonable and proportionate fee.

In *Ena Amina-Edu v Esure Insurance Company Limited* 8th March 2024 (unreported), HHJ Saggerson took a different approach to DJ Jenkinson, whilst determining an application for Part 18 responses to a request for information as to the breakdown of the medical agency invoice, and the assessment of costs in a case settled by part 36, and under the fixed costs regime.

He concluded amongst other things, that
- agency fees are recoverable within the fixed costs regime,
- if amounts are not agreed it is necessary to make a Part 23 application,
- on such a determination, proportionality is engaged,
- in considering proportionality the Court is entitled to consider what fees are attributable to the medical referral agency,
- that the Court is unlikely to be able to (or it is more difficult to) adjudicate on proportionality without being able to determine whether the relevant fee is in proportion to that which would have been charged by a solicitor carrying out the same work
- the court is entitled to transparency from those whose fees form part of claimed and potentially recoverable costs
- providers (despite commercial sensitivity) should be able to able to provide at least sufficient information as to the proportion of the medical invoice that reflects the true value of their commission
- commercial sensitivity does not override these considerations
- transparency is no more likely to impede the brisk application of fixed costs than obfuscation.

In short, he encouraged parties to use agencies that are prepared to be transparent, Part 18 can be used as a last resort if necessary, an unless order could be used to compel disclosure, or the fee would be assessed at NIL or as a percentage of the invoice, as something is likely to be recoverable, (as opposed to NIL), in default of disclosure.

In this case, as HHJ Saggerson did not have a breakdown, and did not find that the fee £2916 was prima facie reasonable, despite a £40,000 settlement pre allocation, and so found that in default of the breakdown, £750+VAT would be allowed. I tis understood that the breakdown was never provided and nor was the case appealed.

This is in contrast to the findings of DJ Jenkinson, albeit HHJ Saggerson did conclude that there may be cases where the fee claimed is prima facie reasonable. In Sephton, the paying party seemed not to persist with the breakdown of the experts' invoices, but rather only in respect of the MRI scan, which may have made the case more likely to be able to be assessed as the total invoice was prima facie reasonable.

Finally, and more recently, the case of *Susan Smith v Portsmouth Hospital NHS Foundation Trust* (2nd October 2024) (unreported) DJ Morris Wrexham, shows there is good reason for the Court to have a breakdown of the composite invoice. The Court had made a decision on a provisional assessment (paper) with only a summary of how the agency fee is calculated. Upon review with the full breakdown, it was apparent that the method of calculating the agency fee as summarised, (including referral commission, finance fee, waive fee, fixed operational fee and profit costs) did not reflect the cumulative total on the composite invoice when added to the fee charged by the Doctor. The Court had already disallowed the referral commission, the finance fee and the waive fee, but went on to disallow all elements of the agencies profit costs for lack of clarity or certainty.

So, in conclusion, whilst there is no binding authority, in detailed assessment proceedings, there is persuasive case law at DCJ level and Senior Costs Judge level to say that PD 47 is likely to compel a breakdown.

That hourly rates and time spent would be of significant use to the assessing Judge (albeit not compelled by a PD) and this might assist in terms of those cases that are not subject to PD 47, where the Judge is seeking to perform an assessment of that which is reasonable and proportionate.

That in the views of HHJ Saggerson, despite being an assessment out with the Detailed Assessment procedure (part 44.6 makes it clear that the detailed assessment procedure does not apply to the fixed costs regime under CPR 45), therefore not being subject to PD 47, that as proportionality is for the receiving party to show, that orders can be made for disclosure of the breakdown of the composite agency invoices, failing which, percentage deductions would be made (largely likely in favour of the paying party), if not awards of NIL.

Please feel free to get in touch if I can assist with matters arising from this article. Cases of course turn on their own facts and there is an abundance of opinion as to the most appropriate way for the Court to deal with these matters. It seems the advent of the fixed costs regime and its limitations as to costs assessment procedure have led to issues in this area that are more prevalent. To quote DJ Jenkinson in *Sephton*, "this is an argument that is vogue at the moment", although there seems to be little signs of it settling any time soon!

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Long-Term Impact of Childhood Traumatic Brain Injury: Some Medicolegal Considerations

by Girish Vaidya
Consultant Child and Adolescent Psychiatrist, Medicolegal Expert Witness, Healthcare Analytics.

Recent research on childhood traumatic brain injury (TBI) has revealed significant implications for medicolegal practice, particularly for cases involving road traffic accidents. This evolving understanding offers critical insights for legal professionals who instruct psychiatric experts in TBI assessments.

The Chronic Nature of Childhood TBI
Traumatic brain injuries are a leading cause of morbidity and mortality in children. While most children with mild TBI (mTBI) appear to recover from initial symptoms, emerging research demonstrates that TBI effects can persist throughout childhood and span into adulthood. Even mild TBI can have significant long-term consequences for a substantial subgroup of children, representing a major public health issue that deserves attention in a medicolegal context.

The traditional view of TBI as a discrete event with a predictable recovery trajectory is increasingly being replaced by a more nuanced understanding. Current evidence supports approaching childhood TBI as a chronic health condition requiring ongoing monitoring and proactive intervention.

Key Research Findings with Medicolegal Relevance
Longitudinal studies provide compelling evidence that challenges conventional assumptions about childhood TBI recovery:

- Comparison of adults who experienced childhood TBI with unaffected siblings demonstrated lower educational attainment, **more psychiatric conditions,** and increased disability - even for individuals who experienced mild TBI
- Research from a birth cohort found that children hospitalized for mTBI showed **increased inattention/hyperactivity and conduct problems** through ages 7-13
- Even after controlling for confounding factors, **children with mTBI demonstrated increased rates of psychiatric disorders between ages 14-16, including symptoms consistent with ADHD, Conduct Disorder, and Substance Abuse**
- By early adulthood (ages 21-25), these individuals showed **higher likelihood of being arrested** and involved in property and violent offenses compared to non-injured peers

These findings are particularly relevant for road traffic accident cases, as RTAs contribute to approximately 20,000 traumatic brain injury cases annually in the UK, with around 5,000 being moderate to severe. The relationship between brain injury and mental health is especially complex, as both are linked to dysfunctions in the neurological pathways of the brain.

Critical Developmental Considerations
What makes childhood TBI uniquely challenging is its interaction with ongoing brain development. The paediatric brain continues to develop past late adolescence, with sensory systems and the frontal lobes still maturing into early adulthood. This developmental context creates a scenario where:

- Some children may not present with immediate effects but experience challenges later as academic and social demands increase
- Injuries occurring during critical developmental windows (before age 5 or during adolescence) can result in long-standing changes in neuroplasticity and potential loss of developmental potential
- The full sequelae of paediatric TBI can emerge and/or persist well into adulthood, supporting the perspective that TBI in children is a chronic disease process rather than a one-time event

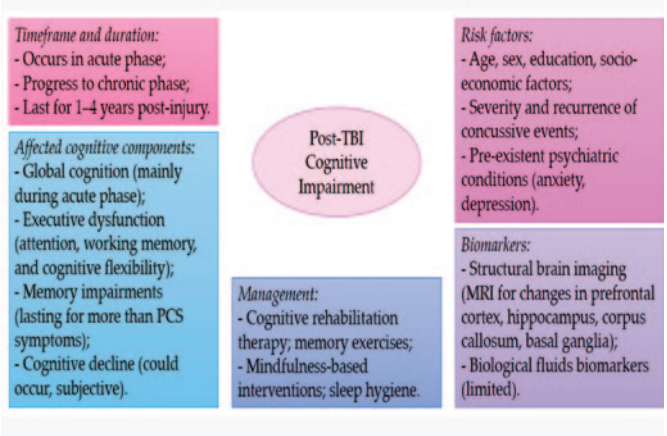

Figure 1. (above) A summary of key points discussed in the current narrative review.

Medicolegal Implications for Legal Practitioners
1. Causation and Attribution Challenges
The temporal gap between injury and symptom emergence creates significant challenges in establishing causation. Effects that appear years after an injury may be incorrectly attributed to other factors when they actually represent delayed consequences of the

original TBI. This is particularly relevant in mild TBI cases, where initial medical documentation may not fully capture potential long-term impacts.

2. Capacity and Decision-Making
Brain injuries may impair an individual's ability to make decisions, raising questions of capacity and guardianship. For children with TBI, these issues may become particularly apparent during transitions to adulthood, when executive function demands increase significantly. Legal professionals should be attuned to how injury-related cognitive changes might affect a client's capacity as they mature.

3. Assessment Complexities
The role of the child and adolescent psychiatrist as a medicolegal expert in TBI cases is challenging and complex. Any assessment must integrate:

- Pre-injury functioning and developmental history
- Acute injury characteristics
- Post-injury development and change, if any
- Behavioural observations as reported across settings (it is often imperative to ask for information from school and, if required, other settings that the child has been attending

The Imperative for Long-Term Monitoring
Given the evidence that childhood TBI effects can emerge or worsen over time, long-term monitoring becomes essential to both clinical care and medicolegal considerations. A proactive monitoring approach should include **regular developmental assessments,** particularly during key transition periods (starting school, entering adolescence, transitioning to secondary education, entering adulthood).

Where the entire family has been affected due to the road traffic accident, I have argued that there needs to be a better understanding of the bi-directional impact of the trauma on the parenting by the parent were the parent and the subject child to be involved together in the accident.

Conclusion: An Optimistic Approach to Complex Cases
While this evolving understanding presents challenges, it also creates opportunities for improved outcomes. By recognizing the potential long-term implications of childhood TBI and implementing appropriate monitoring protocols, we can ***significantly*** enhance trajectories for affected children.

Legal professionals play a crucial role in ensuring these children receive comprehensive support throughout their development. With proper assessment, monitoring, and timely intervention, many children with TBI can achieve favorable outcomes despite initial challenges.

Based on professional experience, treatment of ADHD like presentation is relatively straightforward and can be rewarding for all concerned.

[*reference for the graphic - https://www.mdpi.com/1648-9144/60/3/380 (open access)]*

A Health Condition Contributing to Misconduct is not Necessarily a Bar to a Fair Dismissal

By Verity Buckingham and Sarah Beeby

An employment tribunal has ruled that an apprentice's dismissal was fair after he threatened a colleague who he suspected of tampering with his lunch at work. The apprentice unsuccessfully argued that his impulsive reaction was caused by his ADHD and therefore his dismissal was unfair. This decision provides insight into the tribunal's approach when an employee is dismissed because of conduct arising from a disability.

Background

A garage apprentice, Mr Hayes, sent abusive messages to colleagues and threatened them with personal injury and damage to their possessions after finding his lunch vandalised. Pranks were commonplace at this workplace, but Mr Hayes had already received a final warning in 2021 after his intense reactions to pranks.

The garage suspended the apprentice pending an investigation. Mr Hayes told the investigating manager that he had ADHD. The garage obtained an occupational health report before holding a disciplinary hearing. The occupational health report advised the garage to consider the possibility of Mr Hayes having interpersonal communication deficits as a contributing or mitigating factor in the disciplinary process, but confirmed that the condition did not impair his ability to know right from wrong. The disciplinary manager took into account the fact that Mr Hayes had ADHD, but still considered that the repeated threats amounted to gross misconduct and that his ADHD was not sufficient mitigation to avoid dismissal.

Employment tribunal decision

Mr Hayes argued that his impulsive reaction was caused by his ADHD and brought various claims against the garage, including for unfair dismissal and disability discrimination.

Whilst the tribunal judge was prepared to accept that Mr Hayes' ADHD had something to do with him sending the abusive messages and making the threats, he found that it was not an inevitable consequence of him having ADHD. The judge also found that the link between Mr Hayes' ADHD and him sending the messages did not mean he bore no responsibility for his actions. Mr Hayes did not seek to argue otherwise.

The tribunal also considered that the messages were sent over a period of time (10-15 minutes) and there was a large number of messages. This weakened Mr Hayes' argument that the messages were an impulsive, "heat of the moment" reaction caused by his ADHD.

As a result, the tribunal found it was within the range of reasonable responses for the garage to dismiss Mr Hayes and the dismissal was therefore fair. Mr Hayes' claims of disability discrimination also failed. The tribunal was satisfied that dismissal was a proportionate means of achieving the legitimate aim of protecting staff from aggressive and threatening behaviour.

Key takeaways

In similar situations, it is sensible to ensure you have medical or occupational health advice on the impact of the health condition on the individual's behaviour. You should then weigh up any mitigation the health condition might provide, with all the other factors. It is helpful to see from this case that a tribunal will apply a common-sense approach and that the existence of a health condition which may have contributed to misconduct is not necessarily a bar to a fair dismissal in appropriate circumstances.

Authors

About Verity Buckingham

Verity is experienced in all aspects of employment law. She deals mostly with corporate clients advising on contentious and non-contentious employment matters. Verity's contentious practice includes defending claims in the Employment Tribunal and experience of Employment Appeal Tribunal litigation in relation to claims of unfair dismissal, discrimination, equal pay and whistleblowing.

About Sarah Beeby

Sarah is a partner and head of the Firm's tier one ranked People, Reward and Mobility practice in Milton Keynes. A very experienced employment lawyer, she undertakes a full range of employment work for a wide variety of clients in the private and public sectors, including many leading companies and household names. Sarah's work includes advising on large-scale redundancy and restructuring exercises, TUPE transfers and complex outsourcing arrangements, as well as advising on the employment aspects of large corporate transactions, having worked on numerous multi-million pound transactions for an impressive portfolio of

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Police Errors of Judgment and Negligence - Is there a Distinction? W v Chief Constable of Nottinghamshire Police - A Closer Look

by Catherine Dent - Barrister at St John's Buildings

Last month, I represented the Claimant in an appeal to the High Court before Mr Justice Bourne. The issues, or rather "issue" could not have been more straightforward - did the failure of a police officer to put his vehicle in neutral amount to negligence or was it simply an error of Judgment - which having regard to the factual circumstances at the time, did not amount to negligence?

A precis of the decision was reported on our website. This article explores the issues in greater depth.

The facts

The Claimant was injured on 15th April 2020, when attempted to evade the police. He was part of a group of men who were being observed by a serious organised crime police unit. The Claimant was part of a group of young men who were observed passing items between them. The group, upon seeing a police vehicle, dispersed in various directions. The Claimant left the scene on his bicycle and proceeded to cycle on the pavement, alongside a row of terraced houses.

The police officer drove alongside the Claimant and repeatedly asked him to stop, but he did not. The police officer pulled ahead of the Claimant in front of an end terrace house which had a concreted over front garden area with a low brick wall. In the heat of the moment, the police officer forgot to put his automatic vehicle into park or neutral and as he attempted to exit the car, it rolled into the brick wall striking the Claimant obliquely.

The Claimant, although knocked over by the impact, managed to make good his escape by a nearby street. The Claimant returned to the scene of the accident and admitted to the police officer that he had in his possession at the time a small quantity of cannabis.

First instance decision

In the first instance the trial judge found that the police officer owed the Claimant a duty of care however, he considered that the failure to place the vehicle in park or neutral did not constitute negligence. From the police officer's perspective the prevailing set of circumstances were *"not trivial"*.

Case law

The relevant case law that fell to be considered was *Robinson v Chief Constable of West Yorkshire* [2018] UKSC4.

The circumstances in Robinson involved a suspect who was dealing drugs outside a shopping centre. Police officers made a plan to apprehend him whilst two or more other officers would wait outside. As the first two officers took hold of the suspect, the suspect resisted arrest and there was a tussle. They collided with Mrs Robinson causing her injury. The lead officer accepted that it was necessary to consider the risk to bystanders and, that if he had walked past someone who was in harm's way, he would not have attempted the arrest. He simply failed to see Mrs Robinson.

Lord Reed considered that this was not a situation where the suspect had to be detained at that moment. It was therefore held that the trial judge was entitled to find negligence. The following paragraphs of the Judgment were particularly relevant:-

75. The Court of Appeal was correct to emphasise the importance of not imposing unrealistically demanding standards of care on police officers acting in the course of their operational duties. That is most obviously the case where critical decisions have to be made in stressful circumstances with little or no time for considered thought. This point has long been recognised. For example, in Marshall v Osmond, concerned with a police driver engaged in the pursuit of a suspect, Sir John Donaldson MR stated, as noted at para 47 above, that the officer's duty was to exercise "such care and skill as is reasonable in all the circumstances". He went on to state that those "were no doubt stressful circumstances", and that although there was no doubt that the officer made an error of judgment, he was far from satisfied that the officer had been negligent (p 1038). The same point was made, in a context closer to that of the present case, by May LJ in Costello v Chief Constable of Northumbria [1999] ICR 752, 767, where he remarked that "liability should not turn on ... shades of personal judgment and courage in the heat of the potentially dangerous moment".

76. It is also necessary to remember that a duty to take reasonable care can in some circumstances be consistent with exposing individuals to a significant degree of risk. That is most obviously the case in relation to the police themselves. There are many circumstances in which police officers are exposed to a risk of injury, but in which such exposure is consistent with the taking of reasonable care for their safety. Equally, there may be circumstances which justify the taking of risks to the safety of members of the public which would not otherwise be justified. A duty of care is always a duty to take such care as is reasonable in the circumstances.

A case going the other way was *Marshall v Osmond* CA 1983. The Claimant was driving a stolen car. The

suspect vehicle pulled up and the occupants fled on foot. The police car skidded and collided with the Claimant. The Judge found that the police did not owe the same duty of care. The Court of Appeal would disagree, however it dismissed the appeal on the facts as summarised by Lord Robertson MR. On the facts, the police officer had made an error of judgment, but the evidence did not show that he had been negligent.

Discussion

The key principle that can be summarised is, that a police car driver owes the same duty, such as to take such care as is reasonable. However, the nature of police work is such that circumstances may be significantly different. For that reason, unrealistically demanding standards of care should not be imposed on officers with little or no time for considered thought.

The cases show that although there is no presumption in favour of either party, if the police driver makes an error of Judgment, for which any other driver is liable, it is necessary to determine what caused the error to be made, and only in those circumstances can the Court decide.

At the appeal, Mr Justice Bourne considered that the relevant act or omission of failing to place the vehicle into park/neutral was not an error of judgment. The officer's error did not involve anything in the nature of decision making, it was a pure omission that any driver would be bound to make. If the same accident happened in ordinary circumstances. i.e taking a phone call and rolling into a pedestrian, this would plainly be negligent.

Whilst the first instance Judge was right to describe the circumstances as "non trivial", they were far from extreme. Whilst the Judge's reference to "difficult circumstances" and the "heat of the moment" were a factually correct explanation as to how the very basic error came about, it was not a significant legal reason to deny liability. If it were, it would suggest that officers attempting an arrest in relatively mundane circumstances could be excused from taking precaution.

In the writer's view, whether an act or omission constitutes negligence or is simply an "error of judgment" is entirely dependant on the prevailing circumstances of the time. The more mundane the circumstances, the greater the likelihood of negligence. Conversely, as in Marshall, the circumstances may be such that what would otherwise be considered a negligent act, can be excused as an error of judgment.

These types of cases are highly fact sensitive and careful consideration should be given to all the circumstances. What is negligent in one set of circumstances might be considered to simply be an "error of Judgment" in another.

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Judge Orders Moped Rider to Pay £25,000 Following Fraudulent Personal Injury Claim

A moped driver has been ordered to pay £25,000 by Croydon County Court after dashcam footage revealed that a personal injury claim made following a road traffic accident was false and fundamentally dishonest.

Mohamed Riouj, 44, brought a claim against a driver who was insured by AXA, alleging that a road traffic collision in London in May 2018 left him unconscious, with multiple injuries including two lost teeth. The claim was valued at £17,000.

However, video footage from a nearby bus used obtained during investigations by Clyde & Co on behalf of AXA showed the insured's vehicle was stationary when Riouj collided with it and that, contradictory to the claimant's version of events, he did not hit his head.

The case, heard at Croydon County Court before District Judge Bishop, concluded with the court finding the claim to be fundamentally dishonest. The judge noted "conflicting accounts" and labelled parts of Riouj's evidence as "downright lie[s]," particularly his claim of dental injuries, which medical records showed had occurred weeks earlier in Morocco.

Under cross-examination, the claimant admitted he had not been knocked unconscious, despite maintaining otherwise in his witness statement, medical evidence and replies to Part 18 questions.

Edward Frost, Head of Claims Fraud Strategy and Intelligence at AXA UK said: "Insurance fraud is a serious crime which has significant consequences for fraudsters but sadly also results in higher insurance premiums for honest customers as insurers are faced with increased costs. For this reason, AXA UK is committed to pursuing fraudulent cases to ensure we can prioritise protecting our customers.

"In this case it was concerning that the claimant's legal representative persisted with the claim despite long-standing notice of the issues, including incontrovertible evidence showing that no head injury could have been sustained. We hope that the finding of fundamental dishonesty against Mr Riouj shows the importance of investigation and expertise in fighting against fraud and serves as a warning to others."

Damian Rourke, Partner at Clyde & Co, who represented AXA, commented:
"This case is a textbook example of why objective evidence like dashcam footage is vital in exposing exaggerated and dishonest claims. Despite presenting a convincing narrative on paper, the facts told a very different story. The court rightly took a strong stance to protect both the integrity of the legal system and the interests of honest policyholders."

The court awarded AXA their full counterclaim, with Mr Riouj ordered to pay defendant damages, plus interest, along with the costs of defending the claim summarily assessed in the sum of £25,000.

Clyde & Co are specialists in dealing with Fraud claims, and we closely monitor developments around this topic. To read our latest insights please visit https://www.clydeco.com/en/insights.

If you have any questions about this topic you can contact Damian Rourke at Damian.Rourke@clydeco.com

Limitation Period for Child Sexual Abuse to be Lifted

by James Ellis - Barrister at St John's Buildings

On 20 October 2022 the Independent Inquiry into Child Sexual Abuse (IICSA) published its final report. Among the many recommendations, the 15th recommendation was that the 3-year limitation period for bringing a personal injury claim be removed for historic sexual abuse claims. This was with the caveat that if there is a concern over whether there can be a fair trial due to the passage of time, the burden is on defendants to show that a fair trial is not possible.

The government published its response on 5 February 2025 announcing that recommendation 15 is to be acted on. A date for implementation is not yet set, however this is likely to have wide reaching effects for the victims of historic sexual abuse.

Personal injury claims for historic sexual abuse, and abuse more generally, are brought in a number of ways. Some of the more common are given a brief overview below.

Local Authorities: Failure to Act & the Assumption of Responsibility

Much of the recent authority involving local authorities allegedly failing in their common law duty of care towards children, centres on whether there has been an assumption of responsibility.

The textbook Tofaris and Steel in "Negligence Liability for Omissions and the Police" 2016 CLJ 128 has been cited in a number of authorities (including *K v Birmingham* [2024] EWHC 431 (KB) and *DFX & others v Coventry City Council* [2021] EWHC 1382 (QB)) when expressing the four ways that public authorities, in the same way as private individuals, may come under a duty of care to prevent the occurrence of harm.

These are:

- When there has been an assumption of responsibility by the public body to protect someone from that harm;
- Where the public body has done something which prevents another from protecting someone from that danger;
- Where the public body has a special level of control over the source of the danger; and
- The public body's status creates an obligation to protect someone from danger.

It is the first of those 4 options that is frequently raised in historic abuse claims. *Poole BC v GN* [2019] UKSC 25 concerned a family that was targeted by neighbours, with the children being on the receiving end of harassment and physical abuse for several years. The steps taken by the local authority included investigating the issue and putting the children under a child protection plan before eventually moving them to other accommodation.

A claim was brought by the children on the basis that the defendant had failed in its obligations under s. 17 & s. 47 Children Act 1989 to protect them from harm and had assumed responsibility due to the level of investigation and involvement.

The Supreme court, as had been the case in previous claims against the police, found that public authorities did not owe a duty at common law merely because they had statutory powers or duties. This included where they could prevent someone suffering harm. Or, in other words, public bodies did not generally owe a duty to confer a benefit, including the protection of harm [28]. The investigation and monitoring of the claimants did not involve the provision of a service which the claimants could rely on to create an assumption of responsibility, nor had the local authority taken the children into care and so assumed responsibility for their welfare [81] & [82]. They were merely statutory functions, and so the claim failed.

The assumption of responsibility was considered further in *HXA v Surrey CC* and *YXA v Wolverhampton CC* [2023] UKSC 52.

In *HXA*, the claimant claimed to have suffered physical and emotional abuse by her mother and sexual abuse by her mother's partner and his father. Allegations of sexual abuse were made whilst in her mother's care, but she was not removed from the family home until 5 years later. The steps the local authority took included the initial stages of preparing an application for a care order and carrying out a keep safe workshop. This was found to be insufficient for the local authority to have assumed responsibility.

In *YXA*, the claimant was put into partial s. 20 accommodation under the Children Act 1989. YXA spent 1 night per week and 1 weekend per month in local authority accommodation. When not in local authority accommodation, YXA continued to live with family where hewas over medicated and neglected. However, as this occurred when not in the local authorities' care, there was found to be no assumption of responsibility at the time the harm occurred.

The difficulty with pleading an assumption of responsibility was highlighted in *K v Birmingham City Council* [2024] EWHC 431 (KB). This claim concerned the defendant's application to strike out various parts of a Particulars of Claim. The underlying claim concerned a child who was accommodated by the defendant with her mother's consent under s.20 Children Act 1989. When in local authority accommodation she was sexually abused by third parties over a 2.5-year period.

As part of her judgment, HHJ Kelly considered much of the relevant case law in reaching her decision to strike out certain paragraphs that lacked specificity and allowing amendments to others. In particular, simply referencing s.20 without specifically including what the assumed responsibilities were was insufficient

as this was merely pleading the statutory duty. However, permission was given to amend the particulars to include what specific responsibilities the defendant was said to have assumed over the claimant.

In matters involving local authorities and a failure to remove or protect children from harm, whilst each case turns on its own facts, claims which are more likely to have some success are ones in which the Claimant was accommodated by a local authority when the abuse took place or was otherwise in their care.

Human Rights Act 1998 (HRA) claims

Claims under the Human Rights Act 1998 are frequently brought alongside claims for breach of duty against local authorities. These are normally for a breach of Article 3 ECHR (freedom from inhuman and degrading treatment). Section 6 HRA includes that it is unlawful for a public authority to act in a way which is incompatible with a convention right, and that "an act" includes a failure to act.

Unfortunately, the updates on limitation only apply to the Limitation Act 1980. As it stands, s. 7(5) HRA limitation is for a period of 1 year from the date in which the act complained of took place or such longer period as the court or tribunal considers equitable having regard to all the circumstances. It is expected that the lift on the limitation for common law claims will have an impact on the circumstances the court takes into account when consider the HRA limitation period.

Claims against organisations

For a claim against an organisation or institution, a claimant will have to prove on balance, that the abuse occurred, that the defendant is vicariously liable for the actions of the tortfeasor, and what injury was caused.

For a claim against an organisation or institution, a claimant will have to prove on balance, that the abuse occurred, that the defendant is vicariously liable for the actions of the tortfeasor, and what injury was caused.

Lord Burrows gives a very helpful overview of vicarious liability in *BXB v Trustees of the Barry Congregation of Jehovah's Witnesses* [2023] UKSC 15 at [58] and goes through the modern law on vicarious liability at [30] to [57]. BXB, and in particular those paragraphs, are recommended reading.

In essence, and as set out in *BXB*, the test for vicarious liability comes in two stages:

1. Whether the relationship between the defendant and the tortfeasor was one of employment or akin to employment.

2. Whether the wrongful conduct was so closely connected with acts that the tortfeasor was authorised to do, that it can fairly and properly be regarded as done by the tortfeasor while acting in the defendant's employment or quasi-employment.

These cases are highly fact sensitive, and some examples are considered below.

In *Armes v Nottinghamshire CC* [2017] UKSC 60, the defendant was found vicariously liable for the physical and sexual abuse committed by foster parents. It was accepted that the local authority had not been negligent in their selection process or supervision. However, the relationship between the defendant and the foster parents was akin to employment. The reasons given included the foster parents were not undertaking an independent business of their own, the service provided by the foster parents was an integral part of the defendant's childcare services for the benefit of the local authority, and the placement of a child in care created the inherent risk of abuse as close control cannot be exercised by the local authority. The 2nd stage was not contested by the defendant on appeal.

This was later followed in *DJ v Barnsley MBC* [2024] EWCA Civ 841, where the local authority had placed a child in an informal arrangement with his aunt and uncle for 7 months before taking the child into care with the aunt and uncle acting as foster parents. The child suffered sexual abuse for several years, with the local authority not found vicariously liable for the first 7 months as the child was not in care, but liable thereafter when he was in care and the aunt and uncle recognised as foster parents. The court was quick to note that this was not a general rule regarding foster parents and each case was fact specific, especially as some historic cases, as it was on those facts, were based on the previous legislation at the time of the abuse, not the Children Act 1989 [69].

In *MXX v A Secondary School* [2023] EWCA Civ 996 a school was found not to be vicariously liable for the

sexual abuse of a child. The abuser had one week of work experience at the school, which was sufficient to satisfy the 1st stage. However, the grooming had started after the week had finished, he had no caring or pastoral responsibilities for the pupils and had no position of authority over the pupils. At [88] Lady Justice Davies found that these facts did not satisfy the 2nd stage of the wrongful act being closely connected to what the tortfeasor was authorised to do.

From the above, claims in vicarious liability can be clearer cut, such as abuse by foster parents or by teachers with clear pastoral responsibilities, but the courts have been understandably reluctant to lay down general rules.

Tortfeasor

If a claim cannot be brought via vicarious liability or a local authority generally in those circumstances, a civil claim can be brought directly against the tortfeasor such as in *BRS v Gadd* [2024] EWHC 1403 (KB).

However, this is often the least desirable approach due to the tortfeasor's lack of assets, and with many cases being historic, the abuser may be deceased at the point a claim is brought.

Criminal Injuries Compensation Authority (CICA)

For many, an application with the CICA may be the most likely option to receive an award in damages.

The CICA is an agency of the Ministry of Justice responsible for compensating victims of violent crime within the tariffs set out in the Criminal Injuries Compensation Scheme (CICS). It is important to note that a conviction for the crime is not necessary for an award to be made and decisions on injuries, including whether the injuries were directly caused by the violent crime, are made to the civil standard.

The limitation period of two years may at first may seem unfair when compared to the current 3- year limitation period, however for historical sexual abuse cases it is 2 years from the date the matter is first reported to the police. This can be at any time after the child turns 18, so if a victim reported their historic sexual abuse to the police on their 36th birthday, they would have until the day prior to their 38th birthday to make an application. If the incident is reported to the police when the victim is still a child, they would have until the day before their 20th birthday to make an application.

The main drawback of the CICA, particularly in cases of historical sexual abuse, is the tariffs within the CICS are significantly less than the comparable brackets in the 17th edition of the JC Guidelines.

For example, where the victim of a sexual offence is a child the maximum total for injuries for a permanent disabling mental illness along with serious internal injuries is £44,000 with the possibility of an additional amount in cases of pregnancy and/or sexually transmitted infections. Compared to the current JC Guidelines, the most severe cases can be up to £183,050.

Whilst this remains a less desirable option due to the lower tariff amounts, it often has less litigation risk than proving breach of duty or vicarious liability and often has a greater chance of receiving an award than pursuing the abuser directly.

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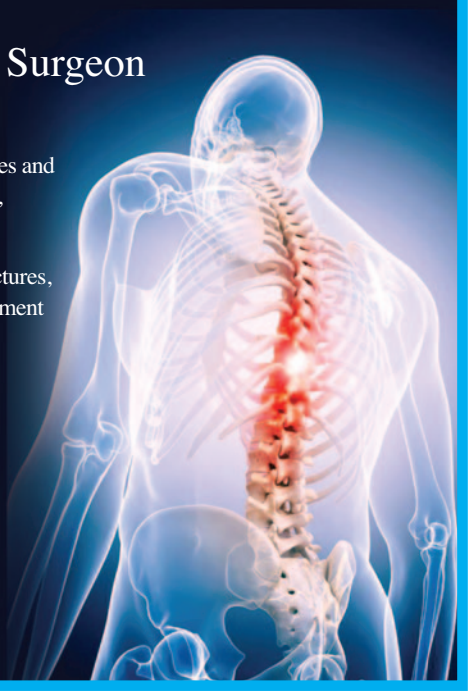
James was called to the Bar in 2017 and, after a period as a court advocate with an international law firm specialising in personal injury, property and credit hire, completed his pupillage under personal injury specialist barrister Gareth Thompson.



Personal Injury Claims Drop, but Public Liability Cases Surge

by Josie Geistfeld - Claims Media

Figures show that personal injury claims continued to decline in 2024, while public liability and clinical negligence saw sharp rises.

The latest figures from the Compensation Recovery Unit (CRU) reveal a continued decline in personal injury claims, with total registrations falling to 467,783 in 2024 from 476,702 in 2023. However, public liability cases have seen a sharp increase.

A shift in the motor injury claims ecosystem since 2023

The data shows a significant drop in motor injury claims, which remain the largest category but have fallen from 352,230 in 2023 to 328,637 in 2024. According to the Association of Consumer Support Organisations (ACSO), which obtained the latest data through a Freedom of Information request, the decline in motor injury claims is ongoing with no signs of slowing.

2024 saw the lowest number of road-traffic accident (RTA) injury claims ever recorded. Since 2018, claims have fallen by more than 50%, despite there being more cars on the road and similar annual mileage.

Maxwell Scott remarked: "People are still suffering injuries from RTAs, but they are not claiming, even though they have every right to do so.

"The government and insurers have worked hard, through a mix of public policy and public relations, to make it increasingly difficult for injured people to get redress, despite continuing historic highs for the cost of motor insurance."

He also urged the government's Motor Insurance Taskforce to investigate why promised savings for consumers have not materialised. "We look forward to the FCA publishing its data on whiplash savings and asking insurers to fulfil the promises made in 2018, at the time the whiplash reforms became law."

Employer liability claims stable, but public liability and clinical negligence claims rise

Employer liability claims have remained relatively steady, rising slightly from 44,296 in 2023 to 45,497 in 2024. In contrast, public liability claims have surged by 15% between 2023 and 2024, possibly due to increasing safety concerns in public spaces.

Clinical negligence claims have also seen a sharp rise, jumping from 14,918 in 2023 to 16,540 in 2024, possibly reflecting challenges in the NHS.

"All claims, with the exception of clinical negligence, are down since 2018, reflecting a society where injured people increasingly cannot expect to be supported after they have an accident," Maxwell Scott concluded. While the overall trend in personal injury claims is downward, the rise in public liability and clinical negligence cases suggests a changing landscape in compensation claims.

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Josie Geistfeld Josie is an editor for Claims Media. She welcomes feedback, comments, and opinion at josie.geistfeld@barkerbrooks.co.uk

Scars – Combination Strategies for Prevention and Treatment

Mr. Raj Ragoowansi is a highly experienced medico-legal expert with over 20 years of experience in preparing comprehensive, evidence-based reports for personal injury and clinical negligence cases.

Mr. Ragoowansi provides 120-150 medico-legal reports annually covering a broad range of fields but mainly specialising in scars.

Pathophysiology of scars
Wound healing occurs as a response to disruption of the epidermis and dermis. It is an intricate and well-orchestrated response with the goal to restore skin integrity and function.

However, skin wound healing may result in abnormal scarring, including keloid lesions or hypertrophic scars. The underlying mechanisms of hypertrophic scars and keloid lesions have been extensively researched, including Mr Ragoowansi's own scientific and clinical research, which suggests that the changes in the extracellular matrix are perpetuated by ongoing inflammation in susceptible individuals, resulting in fibrotic/lumpy/pigmented scars.

The lesions then become established, with ongoing deposition of excess disordered collagen.

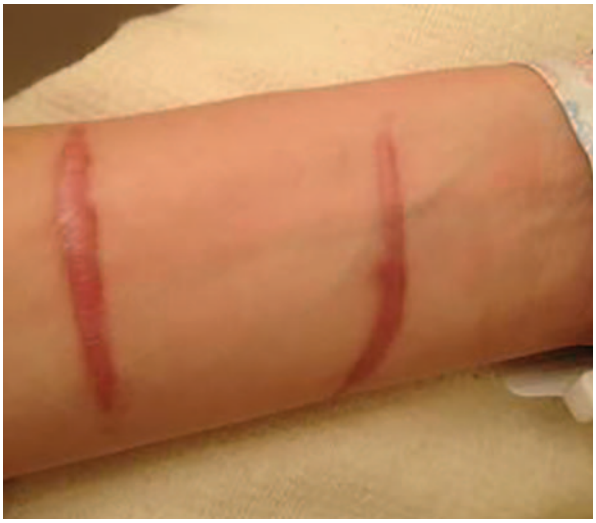
Types of scars
Hypertrophic Scar:
Growth: Remains confined to the original wound's borders.

Appearance: Typically thick, raised, and red or brown in colour.

Histology: Collagen fibres are generally arranged in a wavy, regular pattern.

Progression: May initially thicken or rise for a few months, then gradually fades and flattens over 1-2 years.

Symptoms: Can be itchy or painful.



Above, Hypertrophic Scar

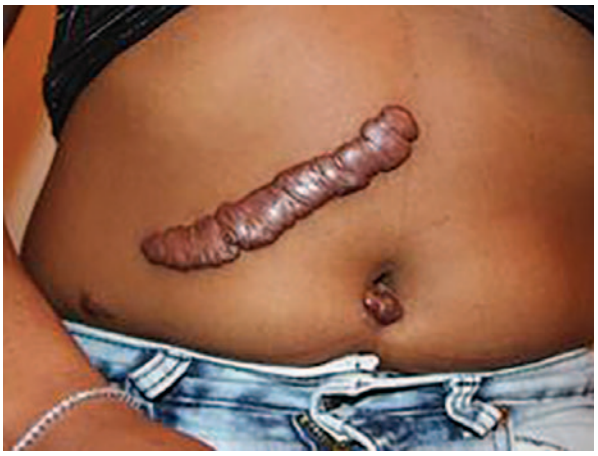
Keloid:
Growth: Extends beyond the original wound's boundaries and can grow aggressively.

Appearance: Raised, hard, smooth, and shiny, can be skin-coloured or darker than surrounding skin.

Histology: Collagen fibres are often disorganized and may contain hyalinized collagen bundles.

Progression: Generally does not regress spontaneously and can persist for a long time.

Symptoms: Can be itchy, painful, or even cause hyperesthesia.



Above, Keloid scar

Key Differences between hypertrophic and keloid scars:
Growth Boundaries: Hypertrophic scars stay within the wound, while keloids spread.

Regression: Hypertrophic scars can regress, keloids do not.

Histology: Hypertrophic scars have a more organized collagen structure, keloids are more disorganized.

Progression: Hypertrophic scars have a more defined growth and maturation phase, keloids are often more persistent.

In summary, the main difference lies in the growth pattern and the ability to regress. Hypertrophic scars are contained and may fade, while keloids extend and do not typically regress.

Other sub-types include :
Atrophic (sunken or thinned), Pigmented or depigmented, Adherent or contractile, especially over joints or in mobile areas
Prevention and treatment
An initial set of strategies to minimize the risk of scar formation is applicable to all types of scars and is indicated before, during and immediately after surgery. These include optimal surgical management, this includes measures to reduce skin tension, and to provide taping, hydration and ultraviolet (UV) protection of the early scar tissue. Silicone sheeting or gel is universally considered as the first-line prophylactic and treatment option for hypertrophic scars and keloids. Other (more specialized) scar treatment options are available for high-risk patients and/or scars. Pressure garments may be indicated for more widespread scarring, especially after burns. At a later stage, more invasive or surgical procedures may be necessary for the correction of permanent unsightly scars and can be combined with adjuvant measures to achieve optimal outcomes.

The choice of scar management measures for a particular patient should be evidence-based taking individual patient and wound characteristics into consideration.

The location of the injury is crucial. A small scar on the face, neck or hands may be more significant than a larger scar on the back or thigh, particularly in cosmetic and functional terms.

Medicolegal reports
As Consultant Plastic and Hand Surgeon, Mr Ragoowansi has been instructed in a wide range of medico-legal cases involving scars, burns, and soft tissue injuries — from road traffic collisions to workplace and public liability incidents. These types of injuries, although sometimes underestimated in the legal context, can result in life-changing consequences that are not only functional and physical but also psychological and social.

Contact details and appointments
Senior Secretary, Jacquie Taylor -
Tel: 0203 752 1565
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Area of work: Greater London and Nationwide

- Appointments within 3-4 weeks of instruction, including out-of-hours availability.
- Reports delivered within 3-4 weeks after consultation.
- Court dates and hearings efficiently scheduled by the administration team.

Consultation locations:
101 Harley Street, London, W1G 6AH (Adults & minors)

Hospital of St John & St Elizabeth, NW8 (Adults & minors)

Spire East London Hospital, IG4 (Adults only)

Facilities: Disabled access and interpreter services available upon request.

Accreditation & Expert Witness Training

Mr. Ragoowansi is fully certified in medico-legal report writing and expert witness training, holding qualifications from Bond Solon and Cardiff University, including:

- Excellence in Report Writing – Bond Solon
- Courtroom Skills & Cross-Examination – Bond Solon
- Civil, Criminal & Family Law Procedure – Bond Solon
- Cardiff University Report Writing – Certified

Remediation Costs - Can you have "a Rolls Royce Solution to a Ford Escort Problem"?

by Claire Kilpatrick and Jake Wright - www.stevens-bolton.com

Southern Electricity Power Distribution PLC v OCU Modus Ltd [2025] EWHC 723 (TCC) (27 March 2025)

Construction works carry inherent risks of imperfections, yet when defects arise, what are parties reasonably expected to do? The court was asked to assess the reasonableness of the remedial works in the recent case of *Southern Electricity Power Distribution PLC v OCU Modus Ltd [2025] EWHC 723* (TCC) (27 March 2025) where the adopted remedial works were described as the "Rolls Royce" option.

Background

Southern Electric Power Distribution PLC (SEPD), owns and operates electricity distribution infrastructure across the UK. One of its customers, a photovoltaic solar farm at Wroughton Airfield, entered into a connection agreement which required the installation of two 7km 33kV ducted underground cable circuits including 6 cables in total.

SEPD engaged OCU Modus Limited (Modus), for the design, supply, installation, commissioning and adoption of the electricity and distribution equipment (the Works) by a contract dated 13 February 2016 (the Agreement). The Agreement required the Works to meet certain minimum standards. The works were completed and following some pre-completion testing, SEPD energised the circuit and signed a completion certificate on 4 April 2016.

Discovery of the defects

A short time after the cables had been energised, one of the circuits failed. SEPD's investigations discovered undocumented amendments and repairs which were visible to all of the cables, although it was not clear who had carried out the repairs or when. One of these issues appeared to be the cause of the failure. Modus denied responsibility for the alleged defects and claimed the defective work and subsequent repairs were due to a third party and had been carried out without their authorisation or knowledge.

SEPD performed emergency repairs and re-ran the tests, but the Works failed to meet the minimum standards required under the Agreement. Further investigation suggested that there were multiple issues with the circuit and a number of other unrecorded repairs and other issues. Following these further investigations, the minimum required standard was dropped to a lower standard. However, even at the lower thresholds, subsequent testing showed five of the six cables were still defective.

Remedial works

Following further investigation and testing, SEPD assessed what remedial works would be best placed to fix the situation and narrowed down its options to:

1. full replacement of both circuits and all the joints; or

2. replacement of all joints and up to 10% partial replacement of the circuit; or

3. replacement of all joints that had not already been replaced.

Having assessed these options, SEPD opted for full replacement of the Works (the Adopted Solution). SEPD's remedial works focused on replacing the existing circuit by installing new cable along a different route, not alongside the existing route (the overlay method). This Adopted Solution was to avoid any outages caused by any disconnection and reliance upon any additional items of Modus' Works which were defective (including the ductwork, reinstatement materials and backfill of topsoil which also did not meet the contractual specification). SEPD's total claim value for the repairs was £2,642,237.71.

Modus denied liability for the defects and/or denied that it was reasonable for SEPD to have chosen a remedial solution which required full replacement works and recovery of the costs of doing so from Modus – counsel for Modus was quoted within the judgement as describing the issue as "whether SEPD should be compensated for implementing a Rolls Royce solution to a Ford Escort problem".

The decision

Ultimately the court held that Modus was responsible for the defective works. The judge then distilled the arguments regarding the reasonableness of the Adopted Solution and associated costs into three central questions, as follows:

1. was it reasonable for SEPD to replace the circuits by the Adopted Solution?

2. if it was reasonable, are the actual costs of doing so properly attributable to the defendant's wrong rather than a consequence of the claimant's choice?

3. if so, are the actual costs of doing so themselves reasonable?

The judge, Justice Constable, gave the answer to all three questions as "yes" and noted that "it was

objectively reasonable to assume, when determining the appropriate remedial scheme, that the defects were widespread and that they would lead to progressive degradation of the integrity of the circuits. As such, it was reasonable to adopt a scheme which addressed the avoidance of future, premature failure of the circuits." As for which remedial scheme was to be considered most appropriate, Justice Constable agreed that just replacing the faulty joints was a "materially inferior" solution as SEPD would be left with a circuit worse than the one they were entitled to under the Agreement. Therefore, the judge agreed that only replacing the circuits would put SEPD back in the position it would have been but for the breach and was to be "reasonably justified" because it minimised to the greatest extent possible future intervention by way of further fault finding, remedial work or indeed later replacement.

In assessing the reasonableness of SEPD's remedial works and whether the costs for doing these works were properly attributable to Modus' defective work rather than SEPD's choice, the judge decided SEPD's Adopted Solution was "both reasonable, and caused in law by the underlying breaches and defective circuits". The judge awarded SEPD its total claim value for the repairs of £2,642,237.71

Key takeaways

While the details of the court's reasoning in this case are fact specific, the case is a useful reminder for parties on how courts assess claims for remedial works and what questions need to be answered to pursue a successful claim.

For anyone seeking to claim costs for defective works, parties should meticulously document their processes for deciding which option they are electing to use in order to justify the 'reasonableness' of the decision, including reliance upon expert evidence in relation to technical matters and commercial meetings considering costs as well as quotes for different schemes of works.

Conversely, those parties who may seek to challenge remedial schemes proposed by others equally need to be able to provide evidence of the reasoning behind their challenges to the proposed scope, methodology, cost, etc. of the proposed remedial works.

Ultimately, whether the "Rolls Royce" solution is appropriate and/or reasonable will be a matter of fact in each case, but a clear demonstration as to why the scheme and costs are each reasonable and clearly linked to the breach or default (rather than a matter of claimant choice) will be key arguments in any attempt to recover the costs for remedial works.

Understanding SIRVA Injuries: Causes, Symptoms and Treatment

by Rosie Nelson - www.penningtonslaw.com

In recent years, SIRVA - which stands for 'shoulder injury related to vaccine administration' - is a term that has been gaining attention in the medical community. This type of injury occurs when a person experiences shoulder pain or injury after receiving a vaccine. While vaccines are a crucial part of maintaining public health, the occurrence of SIRVA has raised concerns, especially regarding the technique of vaccine administration.

Our team has been receiving a high number of enquiries from patients who have received a diagnosis of SIRVA and wish to know whether they can make a clinical negligence claim. We are currently in the process of investigating some of these claims to determine whether the legal tests for negligence can be demonstrated. This article will explore SIRVA, its causes, symptoms and treatment, as well as making a claim.

What is SIRVA?
SIRVA appears to occur when the needle is inserted incorrectly or inappropriately into the shoulder joint area, resulting in an inflammatory response and damage to the muscles, nerves or tendons surrounding the shoulder. The injury typically manifests itself within a few days or weeks of being vaccinated and can lead to significant pain, discomfort and, sometimes, long-term disability.

The SIRVA injuries are most commonly associated with vaccines administered in the upper arm, such as the flu or Covid-19 vaccine, but they can occur with any injection given in the shoulder region.

Causes of SIRVA
SIRVA injuries typically appear to result from inappropriate injection techniques. Intramuscular vaccinations administered into the upper arm should be delivered with the needle at a 90-degree angle into the middle of the deltoid muscle. This tends to be around 2.5cm below the acromion process, which is a bony prominence at the top of the shoulder joint. The acromion process should be located and used as a landmark in order to administer the injection correctly into the deltoid muscle.

SIRVA can occur in the following instances:
Incorrect needle placement: When the vaccine is injected too high or too deep into the shoulder, it can damage the muscles or tendons in the rotator cuff or the bursa.

Injection into the shoulder joint: If the needle enters the shoulder joint itself, it can cause direct injury to the structures inside the joint, including the cartilage, ligaments and tendons.

Where there has been a negligent failure to correctly identify the appropriate injection site and the injection has been inappropriately administered into the bursa or the shoulder joint, it may be possible to bring a clinical negligence claim.

Symptoms of SIRVA
Common signs and symptoms include:
Pain: The most common symptom, typically starting as a sharp, localised pain in the shoulder. Over time, this pain may radiate down the arm or increase in intensity. This will typically significantly affect a patient's ability to perform daily activities and will often affect the patient's sleep.

Swelling: Inflammation around the shoulder joint and upper arm can occur, making the shoulder appear swollen.

Stiffness: Many people with SIRVA experience a limited range of motion, making it difficult to raise the arm or perform overhead activities.

Tingling or numbness: Damage to the nerves in the area may cause sensations of tingling, numbness or weakness in the arm.

Weakness: As the muscles in the shoulder are affected, there may be noticeable weakness, making tasks like lifting, carrying or reaching more difficult to do.

Diagnosis of SIRVA
A healthcare provider will typically diagnose SIRVA based on the patient's history and symptoms. Since the injury occurs soon after vaccination, the healthcare provider will often inquire about the timing of the vaccine and the nature of the pain.

To confirm the diagnosis, an ultrasound or MRI may be used to assess the damage to the shoulder joint, muscles, tendons, or ligaments.

SIRVA can often manifest as subacromial bursitis (ie inflammation of the bursa, a fluid-filled sac that cushions the shoulder joint), and this is the diagnosis many of our clients have been given.

Treatment for SIRVA

Treatment for SIRVA varies depending on the severity of the injury. The goal is to reduce pain, improve mobility, and allow the shoulder to heal properly. Five common treatment methods include:

1. Rest and ice: The first step in treating SIRVA is to rest the shoulder and apply ice to reduce swelling and inflammation.

2. Physiotherapy: In mild to moderate cases, physiotherapy may be recommended to restore the range of motion and strength in the shoulder. A physiotherapist will guide the patient through exercises designed to promote healing and prevent further injury.

3. Anti-inflammatory medications: Over-the-counter pain relievers like ibuprofen can help reduce pain and inflammation. In some cases, stronger prescription medications may be necessary.

4. Corticosteroid injections: For more severe cases, corticosteroid injections may be used to reduce inflammation and provide temporary pain relief. However, these are not long-term solutions.

5. Surgery: In rare cases, surgery may be necessary to repair damage to the shoulder muscles, tendons or joint structures. This is usually only considered if conservative treatments fail.

Claims for SIRVA

To succeed in bringing a clinical negligence claim for SIRVA, it is necessary to prove two things:

1. First, we have to establish that there has been a 'breach of duty' – in other words, that no reasonable and responsible body of clinicians would have provided the treatment that was given.

2. Secondly, if we can establish any breaches of duty we must go on to prove what injuries have been caused as a result and that this would not have happened but for the breaches of duty – this is known as 'causation'.

Both breach of duty and causation need to be established for a claim to succeed.

Compensation

In a successful claim, compensation may be awarded for the following:

- pain, suffering and loss of amenity;
- care and assistance required as a result of the injury;
- loss of earnings where applicable;
- cost of employing a gardener, decorator or handyman;
- cost of private treatment and medication;
- aids and equipment;
- travel expenses.

Time limits

It is important to be aware of the time limits involved in bringing a claim. In most cases, a claim for damages as a result of injuries must be issued (ie, court proceedings commenced) within three years of the date of the negligent act or omission. On occasion, it may be the case that the limitation period starts on a later date if you first became aware of a significant injury that may have been caused by a negligent act or omission.

How we can help

Our team of experts have had success in securing damages for clients who have suffered from SIRVA.

Rosie Nelson, senior associate at Penningtons Manches Cooper, comments: "The number of enquiries we are receiving relating to SIRVA is concerning. Clients are reporting very similar experiences of a vaccination being administered unusually high up in their arm, with immediate pain and loss of function in the shoulder which persists, and with no prior history of shoulder injury.

"Although vaccinations are crucial in preventing illness, it is vitally important that those administering them are adequately trained and are injecting their patients with due care and attention, adopting appropriate intramuscular vaccination techniques. I would urge anyone who has been affected by SIRVA to come forward so that they have the opportunity to obtain legal advice as to whether or not they may have a claim".

If you have suffered an injury following a vaccination and you would like to investigate a potential claim, our specialist orthopaedic injury team is here to offer an informal discussion to explain your options, please call 0800 328 9545, email clinnegspecialist@penningtonslaw.com or complete our online assessment form.

The Shadow of Gestmin - Analysing Lay Witness Evidence in Historic Industrial Disease Cases

by Samuel Shelton - www.ropewalk.co.uk

It is a common feature of most industrial disease litigation that the relevant events often took place a long time ago. A trial judge determining such cases is frequently faced with limited documentary evidence and with evidence from lay witnesses (some of whom may have died before trial) who have limited recall of the historic events in question. It is necessary, in those circumstances, to analyse the evidence of lay witnesses with particular care. This blog outlines the way in which the court has done so to date, with a particular consideration of two recent decisions.

The judicial analysis of lay witness evidence in the context of historic claims began most notably with the decision of Mr Justice Leggatt in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm). That was a commercial case in which there was, as is so often the case, a large volume of contemporaneous documentary evidence to consider alongside the oral evidence of witnesses. In analysing the lay witness evidence, Leggatt J set out at [15-22] a detailed summary of the difficulties with evidence based upon recollection. He noted the *"unreliability of human memory"* and considered that *"While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony"*. His analysis should be read in full but, in summary, he highlighted that recall inevitably involves revision, that human memory is vulnerable to interference – particularly from the process of civil litigation and the procedure of preparing for trial – and that confidence in recollection should not be conflated with accuracy.

The analysis of Leggatt J has since been applied outside the commercial arena and, in particular, in industrial disease litigation. Most reported judgments have arisen in the context of mesothelioma claims, given the particularly long incubation period of the disease and given the fact that, taking place in the High Court, there are simply more reported judgments. The first notable judgment was in *Sloper v Lloyds Bank plc* [2016] EWHC 483 (QB). There was then a particularly helpful trio of judgments in 2020: *Bannister v Freemans Public Ltd Co* [2020] EWHC 1256 (QB), *Smith v Secretary of State for Transport* [2020] EWHC 1954 (QB) and *Pinnegar v Kellogg International Corp & ICI Chemicals & Polymers Ltd* [2020] EWHC 3431 (QB). These are, of course, all first instance decisions and each case will turn on its own facts. As HHJ Platts noted in Pinnegar at [5], *"These judgments contain helpful reminders of the factors which might affect the reliability of a witness' recollection and which a fact finding tribunal should bear in mind when considering that witness' evidence, but … they are not statements of legal principle"*.

A full analysis of all the above decisions is beyond the scope of this article, but they provide useful reading. This blog looks at how the analysis to lay witness evidence has since been applied in two relatively recent cases: one in which the lay witness evidence was accepted (*Dean v Armstrong Oiler Company Ltd* [2023] EWHC 3445 (KB)) and one in which it was not (*Evans v Secretary of State for Health and Social Care* [2024] EWHC 496 (KB)).

Dean v Armstrong Oiler Company Ltd

This was a decision of HHJ Coe KC, sitting as a Deputy High Court Judge.

The case was brought by Mrs Rosemary Dean, the widow of Mr Philip Dean who died on 9 June 2020 after contracting mesothelioma. Mr Dean had been employed by the Defendant between 1959 and 1972. It was alleged that he had been exposed to asbestos between about 1964/65 through to 1972 when he was required to inspect and work on an air compressor located outside the factory building. It was alleged that the compressor was located near to a boiler which was insulated with lagging containing asbestos and that, as a result inter alia of Mr Dean brushing past the lagging in order to get to the compressor, he was exposed to respirable dust containing asbestos. A statement from Mr Dean had been obtained before he passed away.

As to the issue of the reliability of Mr Dean's evidence, the Defendant raised two key points. Firstly, they relied upon various entries in Mr Dean's medical records which suggested that he did not have a reliable recollection of any asbestos exposure. A GP entry in January 2019 recorded *"no asbestos exposure"* and there then followed references to *"Never knowingly been exposed to asbestos"*, *"Ex engineering, no asbestos"* and *"He has no known exposure to asbestos"* and there then followed a CT scan report which stated that *"there is no evidence of previous asbestos exposure"*. By August 2019 when Mr Dean had been diagnosed with mesothelioma, it was reported that he had said that he did not recollect any asbestos exposure, but that he had worked in places where there could potentially have been asbestos. There was then an oncology manuscript note which read *"Boiler in the first role probably had asbestos"* and stated that the Claimant had various roles *"Through the 50s, 60s and 70s with potential*

exposure to asbestos, although nothing he can clearly identify". Secondly, the Defendant relied upon the unlikelihood of the insulation on the boiler being unprotected and containing asbestos while being exposed to the elements; the Defendant suggested that it was more likely that the insulation was encapsulated in a plaster coating such that any dustiness came simply from that and/or general ambient dust.

The judge analysed the reliability of Mr Dean's recollection in the context of the medical records at [51-61]. As to the law, she noted that "*while I was referred to the case of Gestmin v Credit Suisse [2013] EWHC 3560, I do not find that it is helpful in terms of any general principle in this case, which is not a commercial case with a large volume of documents going to liability*". She analysed the facts as follows:

- She considered it important that the medical records be viewed in their context: they are *"clinical notes and do not constitute the sort of detailed exploration of work history that would be taken by a solicitor"* and *"Mr Dean's diagnosis would obviously have come as something of a shock and he may not therefore have been concentrating on his employment history";*
- She noted that the medico-legal evidence from Dr Beckles outlined that *"Patients often do not recall exposure when asked, particularly if the question is whether or not they worked with asbestos";*
- She noted that it was not known what precisely Mr Dean was asked when he first went to his GP in January 2019 and any questions would not have been *"particularly probing at that stage";*
- She considered that the records which followed the first in January 2019 were likely a case of repetition from the first, rather than a statement from Mr Dean on each occasion;
- She found that there were some errors in the records, where Mr Dean had been noted as working in the Navy when he had not;
- She considered that once Mr Dean had been diagnosed with mesothelioma, and was aware that it is almost always caused by exposure to asbestos, he was able to consider and identify the boiler as a possible cause; and
- She accordingly concluded that, in the circumstances and context of the records, Mr Dean's evidence and recollection followed an *"unremarkable pattern"* such that she found his account *"reliable"* and *"convincing"*.

The issue in respect of the insulation on the boiler being unprotected and containing asbestos was also found in the Claimant's favour – the judge, again, accepted Mr Dean's evidence. She provided a detailed analysis of all the evidence in the case at [62-84] and it was most notable in her determination on this issue that Mr Dean's account was supported by the expert evidence (which the judge evaluated in some detail and with the benefit of cross-examination).

The Claimant ultimately went on to succeed in her claim overall.

Evans v Secretary of State for Health and Social Care
This was a decision of Andrew Kinnier KC, sitting as a Deputy High Court Judge.

The case was brought by Mrs Teresa Evans, the daughter of Mrs Maria Drinkwater who died on 1 May 2019 after contracting mesothelioma. Mrs Drinkwater had been employed by the Defendant's predecessor as a carer at Bradwell Grove Hospital in Burford between 1974/75 and 1986. It was alleged that she had been exposed to asbestos during the course of several months in 1975/76 when works were being carried out on the hospital building. It was alleged that she had been exposed to *"visible clouds of dust floating around in the corridor along which I had to walk every day for months whilst the building was demolished"* and that such dust contained asbestos from the works. A statement from Mrs Drinkwater had been obtained before she passed away.

As to the issue of the reliability of Mrs Drinkwater's evidence, the Defendant raised four key points. Firstly, in Mrs Drinkwater's application for compensation under the Pneumoconiosis etc (Workers' Compensation) Act 1979 on 19 March 2018 she denied any occupational asbestos exposure. Secondly, Mrs Drinkwater had accepted unrelated secondary asbestos exposure when laundering her husband's work overalls such that the Defendant asserted that that exposure was the more likely explanation for the development of mesothelioma. Thirdly, the Defendant's case was that it was inherently implausible that the presence of *"clouds of dust"* as described by Mrs Drinkwater would have been tolerated in a hospital for several months. Fourthly, some of Mrs Drinkwater's evidence about the presence of asbestos in the hospital was considered by the experts to have been incorrect.

Before turning to an analysis of the facts, the judge outlined seven helpful factors in assessing lay witness evidence in historic cases [37]:

"(a) The burden rests at all times on the Claimant to prove that there was exposure to asbestos dust and that such exposure was caused by the Defendant's breach of duty: Brett v. Reading University [2007] EWCA Civ 88, para. 19 (per Sedley LJ) and para. 26 (per Maurice Kay LJ).

(b) The usual standard of proof applies with the same rigour in mesothelioma claims as in any other. In that regard, it is important that judges should bear in mind that the Fairchild exception itself represents what the House of Lords considered to be the proper balance between the interests of claimants and defendants in mesothelioma cases. Having regard to the harrowing nature of the illness, judges must resist any temptation to give the claimant's case an additional boost by taking a lax approach to the proof of the essential elements. That could only result in the balance struck by the Fairchild exception being distorted: Sienkiewicz [2011] 2 AC 229 at 288E-F, para. 166 (per Lord Rodger).

(c) It is not the duty of fact-finders to reach conclusions of fact, one way or the other, in every case. There are cases where, as a matter of justice and policy, a court should say that the evidence adduced (whatever its type) is too weak to prove

anything to an appropriate standard, so that the claim should fail: Sienkiewicz [2011] 2 AC 229 at 296C-D, para. 193 (per Lord Mance).

(d) The process of attempting to remember events in the distant past is an inherently fallible one and it is a process that is highly susceptible to error and inaccuracy. Efforts to think back many years to recollect the details of past events are liable to be affected by numerous external influences and involvement in civil litigation can itself operate as a significant influence: Jackman v. Harold Firth & Son Ltd [2021] EWHC 1461, para. 13; Bannister v. Freemans [2020] EWHC 1256 (QB), paras. 73-77; Sloper v. Lloyds Bank [2016] EWHC 483 (QB), para. 62.

(e) When a witness recalls events from the past, he or she is in fact unconsciously reconstructing those events. The description the witness provides of the relevant event or events is in fact a description of the reconstruction undertaken at that point: Jackman [2021] EWHC 1461, para. 13(iii); Sloper [2016] EWHC 483 (QB), para. 62; Prescott v. The University of St Andrews [2016] SCOH 3, para. 42; Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm), paras. 15-23.

(f) Testing recollection against contemporaneous documents is a useful and important exercise because it gives the court an opportunity to compare a near contemporaneous version of events (subject to no or little reconstruction) with a re-constructed version of events: Jackman [2021] EWHC 1461, para. 13; Bannister [2020] EWHC 1256 (QB), para. 77; Sloper [2016] EWHC 483 (QB), para. 60.

(g) The judge should be careful not to allow the defence to convert one of the inherent difficulties in asbestos litigation – the inevitably long latency periods of mesothelioma – into its first line of defence: Bannister [2020] EWHC 1256 (QB), para. 82."

The judge went on the analyse the facts as follows:

- He did not accept Mrs Drinkwater's evidence of encountering large clouds of dust bearing in mind the inherent implausibility of it and the absence of corroboration: "*Maintenance of cleanliness and hygiene in a hospital is obviously important and in that very particular context it is unlikely that generation of visible clouds of dust into occupied parts of an operational hospital on a consistent and daily basis would have been tolerated for a prolonged period of time, let alone for months.*" [44];

- He considered that Mrs Drinkwater had *"thought carefully about when she might have been exposed to asbestos"* after her diagnosis and her records exclusively suggested exposure from her husband's clothes [45];

- Mrs Drinkwater had thought that the building was being *"demolished"* when the works, although substantial, *"could not be reasonably confused with demolition"* such that he considered that *"the basis for her firm, but mistaken, belief that the building was demolished is not obvious"* [46];

- He was concerned by the fact that, on the expert evidence, Mrs Drinkwater's recollection of the locations in the building where asbestos may have been present was mistaken [47];

- He highlighted the limits (and total absence in many respects) of Mrs Drinkwater's evidence about the actual work which was being undertaken while she alleged that she was present, how far away she was from the work and the extent to which that work and any resultant dust cloud contained asbestos [55-71]; and

- His conclusion was that, having rejected the main tenant of Mrs Drinkwater's evidence and in the absence of any detail in relation to other relevant matters, *"The short point is that it is not now possible reliably to estimate, measure or quantify any exposure because of limitations of the evidence"* [81-84].

The Claimant's case accordingly failed.

Comment

Whilst the decisions in *Dean* and *Evans* are fact specific, they provide very helpful examples of current judicial analysis of lay witness evidence in historic claims.

The decisions highlight that whilst the general propositions from *Gestmin* about human memory are important for a trial judge to bear in mind in an industrial disease case, one must also consider the commercial context in which some of Leggatt J's comments were made. Indeed, as exemplified by *Dean*, documents such as medical records in industrial disease cases may be less useful than contemporaneous commercial documents when one considers the purpose for which medical records are prepared, the nature of the questions asked / matters discussed and the emotions of the subject patient. On the other hand, documents such as an application for compensation or even later medical records may be persuasive evidence (as in *Evans*) where one has had time to reflect. The important point is that each record must be viewed in its context.

Further, the seven factors highlighted in *Evans* are particularly helpful for future cases. It is notable that the judge there drew upon the inherent unlikelihood of the Defendant in fact exposing Mrs Drinkwater to what would be significant levels of dust; this is an argument which progressively carries more force in modern cases where the court is concerned with asbestos exposure periods which are increasingly substantially post-watershed. What was particularly difficult for the Claimant in *Evans* was that there was limited evidence on the actual asbestos work and Mrs Drinkwater's proximity to it. It is not known whether Mrs Drinkwater simply could not give any detail on those points or whether they simply weren't explored with her when her statement was taken, but the absence of such detail is stark bearing in mind the comments in *Dean* of *"the sort of detailed exploration of work history that would be taken by a solicitor"*. What is key in these cases is that if a statement can be taken, it should be taken as soon as possible and as thoroughly as possible.

Whilst *Dean* and *Evans* concern mesothelioma cases, the principles discussed above are equally applicable to claims involving, for example, historic vibration exposure resulting in hand-arm vibration syndrome or noise exposure resulting in hearing loss. In the au-

thor's experience, experts dealing with exposure in such cases frequently emphasise caution when evaluating statements of lay witnesses and frequently apply a broad reduction (sometimes as much as 50%) to stated 'anger times' in accepting that many individuals overestimate such times (albeit innocently in most cases).

What is clear from *Gestmin* and its subsequent application in industrial disease cases is that lay witness recollection evidence of historic matters should always be viewed with particular care.

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Gourlay v West Dunbartonshire Council - A Tribunal's Decision to Reduce a Claimant's Compensation was Based on "Perverse Conclusions and Material Errors of Law"

by Chris Cuckney, Senior Associate - www.devonshires.com

In a recent judgment in the case of *Gourlay v West Dunbartonshire Council*, the Employment Appeal Tribunal has provided useful guidance setting out how tribunals should critically assess financial loss in discrimination claims. The case also reiterates the importance of preparing for remedy hearings, particularly where the employer is running an argument that the employee's compensation should be reduced for some reason.

Background
Mr Gourlay started working for West Dunbartonshire Council (the Council) in April 2008 as a Corporate Health and Safety Officer, and he was later dismissed in September 2015 for gross misconduct. Mr Gourlay brought a number of Employment Tribunal claims against his former employer, including unfair dismissal, failure to make reasonable adjustments, and victimisation.

The failure to make reasonable adjustments arose out of the Council's failure to provide Mr Gourlay with appropriate office equipment that would have helped him manage his multiple sclerosis at work. The victimisation claim arose out of the Council's decision to suspend and dismiss Mr Gourlay, and their decision to refuse his appeal. As a result of these events, Mr Gourlay experienced a severe depressive episode which rendered him permanently unfit for work.

Employment Tribunal
The Employment Tribunal ruled in Mr Gourlay's favour in his unfair dismissal, reasonable adjustments and victimisation claims.

At the remedy hearing, Mr Gourlay was found to be permanently unable to work and his total financial loss until retirement was assessed to be almost £625,000 (which included past, future, and pension losses). The Employment Tribunal has the power to reduce a claimant's compensation where it considers that they would have been dismissed in any event. In this case, the Tribunal applied an 80% reduction on the basis that:

1. Mr Gourlay's employment would have ended by 31 March 2017, through either mutual agreement due to a breakdown in the working relationship, or through mutual agreement on agreed terms; or

2. Mr Gourlay may have taken early ill-health retirement anyway because of his pre-existing type 2 diabetes and multiple sclerosis.

Having applied the 80% reduction, the Employment Tribunal awarded him just under £125,000. Mr Gourlay appealed this decision to reduce his compensation by 80% to the Employment Appeal Tribunal.

Employment Appeal Tribunal (EAT)
The EAT agreed with Mr Gourlay and overturned the Employment Tribunal's decision.

The EAT went as far as saying that the Employment Tribunal had got itself *"muddled"* and trying to decipher what they had decided and why was *"challenging."* The EAT ultimately held that the decision to reduce the compensation by 80% was based on *"perverse conclusions and material errors of law"*.

The EAT went back to basic principles and highlighted that the purpose of compensation in discrimination claims is to put the claimant back in the position they would have been had the discrimination never taken place. Having already found that the Council's discriminative actions had caused an ongoing psychiatric illness which rendered Mr Gourlay permanently incapable of working, the Employment Tribunal had failed to consider the key question: Would a lawful non-discriminatory dismissal have left Mr Gourlay permanently unable to work because of psychiatric injury? If not, meaning that the Council's discriminatory acts caused the psychiatric injury, then compensation should not have been reduced.

The EAT also held that the Tribunal's conclusion that Mr Gourlay's employment might have ended by mutual agreement by 31 March 2017 was hypothetical and without evidence. The Tribunal had again failed to consider the key question set out in the above paragraph – whether a lawful non-discriminatory dismissal would have resulted in the same psychiatric injury.

The EAT also ruled that the Employment Tribunal's conclusion that Mr Gourlay's diabetes and multiple sclerosis might have forced him to take ill health retirement anyway was pure speculation, and wasn't based on any medical or factual evidence.

Accordingly, the EAT determined that the Employment Tribunal had taken the wrong approach when calculating Mr Gourlay's compensation and should not have reduced his compensation by 80%.

Comment
Compensation in discrimination claims is uncapped, meaning there is no legal maximum amount that can be awarded against a respondent. In discrimination

claims, claimants seem to be increasingly seeking career long losses up to the point of retirement. In practice, career long losses are a high bar and are very rarely awarded by tribunals, and only ever in the most extreme cases where the discrimination has left the claimant permanently unable to work, which was the situation in this case.

Whilst the Employment Tribunal went too far in its role, the Council equally didn't go far enough. Respondents are often criticised for failing to properly prepare and engage in remedy hearings, perhaps because they don't see themselves losing so they don't think they need to or that it would be a waste of legal costs. However, this case is a useful reminder of the importance of prior preparation for remedy hearings because things will not go your way if you are underprepared. If a respondent wants to argue that a claimant's compensation should be reduced, it needs to provide evidence for its argument. Hypothetical arguments, like the one here that Mr Gourlay might have been forced into ill health retirement anyway, are highly unlikely to succeed without expert evidence. As the EAT made clear, the key remedy question was whether a lawful non-discriminatory dismissal would have left Mr Gourlay permanently unable to work because of psychiatric injury, and the Council provided no evidence on this point meaning there was no basis to reduce Mr Gourlay's compensation.

If you require any further guidance in relation to discrimination or remedy hearings, please contact a member of the Employment Team.
www.devonshires.com/strengths/employment-human-resources-pensions/

The Complex Relationship Between Neurodevelopmental Disorders and Paediatric Brain Injury

by Associate Solicitor, Oliver Shaw

Brain injuries in children, even subtle ones, can profoundly affect cognitive, emotional and social functioning. These areas of function are also often impacted by neurodevelopmental disorders (NDD) such as Attention-Deficit/Hyperactivity Disorder (ADHD) and Autism Spectrum Disorder (ASD). A diagnosis of an NDD or brain injury can have a profound effect on a child's future.

Challenges arise when a child suffers a head injury, initial medical investigations do not identify obvious damage to the brain, but the child's behaviour significantly changes. Untangling which symptoms may stem from a subtle brain injury, a psychological injury or a potentially undiagnosed pre-existing condition, such as a neurodevelopmental disorder is complex.

In personal injury claims, parents and carers, as well as the solicitors who support them, must prove it likely that the accident caused at least some of the problems suffered by the child before compensation can be awarded.

Brain injuries, particularly frontal lobe injuries, and the relationship with ADHD and ASD is a complicating factor. However, there are common themes that affect those seeking compensation for such injuries in England and Wales, which are explored below.

Understanding frontal lobe brain injury in children

The frontal lobes are referred to as the brain's "executive centre". This is because they play a dominant role in behaviour, personality and decision making. Located behind the forehead – the frontal lobes are where the brain conducts problem-solving, planning, impulse control, judgement and attention. The frontal lobes also contribute to emotional regulation and motivation, which when combined with the other functions creates behaviour. In a developing child the frontal lobe, and therefore that child's behaviour and comprehension, are still maturing. Meaning that damage to this area can disrupt development, and significantly alter a child's trajectory in life.

When a child suffers a frontal lobe injury, such as in a fall or road accident, parents and carers, or teachers, might notice changes in behaviour and abilities, but these changes may not always appear immediately. Difficulties can emerge later. Whilst damage will still be present from an injury, problems might only become evident as the child faces increasingly complex cognitive and social demands, typically as they get older and advance in school.

Common difficulties experienced by children who have suffered brain injuries, such as those already outlined (difficulty paying attention, memory problems, impulsivity and poor emotional control) might then manifest in the child's behaviour. The child might become disinhibited, displaying behaviour inappropriate for the circumstances or have angry outbursts. They might struggle with planning or switching between activities, and instead get "stuck" on one idea or action. This type of injury can also make it harder for a child to empathise and understand others' feelings, leading to awkward or challenging interactions. Each brain injury is different, because each child is different and the effects of a brain injury are unique.

Because many of these issues mirror the characteristics seen in ADHD and, to some extent, ASD, this is where challenges can arise when bringing a personal injury claim.

The overlap between brain injury and neurodevelopmental disorders

There is a striking similarity between the effects of a frontal brain injury and the symptoms of certain neurodevelopmental disorders. The nature of ADHD is that it involves impaired attention, hyperactivity, and impulsivity which, as noted, are also common problems after child brain injury. Research supports this overlap: one American based study found that diagnoses of "secondary ADHD" (attention-deficit type symptoms arising after a brain injury) are three times more common in children with head trauma than in their uninjured peers (Study, The effect of pediatric traumatic brain injury on behavioral outcomes: a systematic review - LI - 2013 - Developmental Medicine & Child Neurology - Wiley Online Library).

Autism Spectrum Disorder (ASD) also shares some similarities with brain injury (Headway – Brain Injury & Autism, https://www.headway.org.uk/news-and-campaigns/news/2024/brain-injury-and-autism/). By definition, autism affects social communication, behaviour, and sensory processing. However, it is important to distinguish that a traumatic brain injury cannot itself "cause" a child to become autistic; autism is a lifelong developmental condition rooted in genetic and early brain development. The complexity arises in a personal injury claim because a brain injury might cause a child to present with traits similar to those with ASD.

Given the overlap in symptoms, distinguishing between a neurodevelopmental disorder and the effects of a brain injury is challenging for those responsible for a child's medical treatment. For example, a child with undiagnosed ADHD might only be identified after a head injury brings attention to their concentration problems. In the same way, an autistic child's need for support might intensify after a brain injury, or even due to how they experience a psychological injury, such as Post-Traumatic Stress Disorder (PTSD).

Legal Considerations in Child Brain Injury Claims

A personal injury claim for a child who may have suffered a brain injury involves careful consideration that is unique to these types of case, particularly when there might be uncertainty around whether a child might also have a neurodevelopmental disorder.

For a claim to be successful, it is vital to prove 'causation' – that is, whether it is likely some or all of the child's difficulties stem from an accident-related brain injury, rather than being entirely due to a pre-existing neurodevelopmental disorder. Understanding and proving a claim, is further complicated by the fact that children who have been injured in an accident will also frequently suffer from a psychological injury (such as PTSD or anxiety) that can intensify the behaviours of a child with a neurodevelopmental disorder. While a psychological injury cannot cause ADHD or ASD, it may lead to a worsening or a heightened expression of symptoms, making it appear as though the accident itself caused an underlying neurodevelopmental disorder.

The "Eggshell Skull" Rule is a fundamental principle of law in England and Wales that requires that the defendant, the person responsible for causing the accident, to take their victim as they find them. This principle means a person bringing a claim can recover compensation for the full extent of the harm caused to them, even if the harm they have suffered is greater because a pre-existing issue, such as a neurodevelopmental disorder, is made worse.

High quality, robust expert evidence is key in these cases to identify what has been caused by an accident, and so it is vital that parents and carers choose solicitors with extensive experience supporting families of children who have suffered brain injuries. Those solicitors will typically understand the unique complexities of such claims and be adept at marshalling multiple medico-legal experts to help build a clear picture of what a child is going through, what difficulties can be attributed to the accident and what that might mean for the child in the long term. Experts are often instructed from the following disciplines:

- Paediatric Neurologist/Neurosurgeon
- Paediatric Neuropsychologist
- Paediatric Neuropsychiatrist
- Educational Psychologists

In terms of legal procedure, court action must usually be started within the three-year time limit for personal injury claims, however this does not apply in the same way for children. A child or their parent can initiate a claim any time before their 21st birthday, but taking early action is always advisable because it may be possible to secure early rehabilitation which can help identify the cause of difficulties and in doing so, help to offset the long term consequences of injury.

In one such claim we've handled we took a comprehensive approach to proving causation by obtaining neurology, neuropsychology and neurodevelopmental assessments as part of the child's rehabilitation, which helped us to understand whether pre-existing factors might have played a role in their difficulties and to tailor their rehabilitation. We also conducted a forensic exploration of the child's medical, educational and social care history, identifying any prior concerns that could be relevant to the case.

Armed with this evidence we then proceeded to instruct a paediatric neurologist to prepare a medico-legal opinion, asking them to consider if there was clear evidence of organic brain injury, and a paediatric neuropsychologist to assess the child for subtle neurological markers that could indicate a more subtle brain injury.

This structured, multi-expert approach ensured that all potential causes were examined, allowing us to build a strong case that accurately reflected the child's condition and the extent of the impact of the accident.

The Emotional and Practical Impact on Families and the Importance of Support

When a child suffers a suspected brain injury, the impact on the family is significant. Parents often feel their lives are on hold, under scrutiny from medical and legal professionals, while they must also manage the daily challenges of life and financial strain of caring for a child that is injured. Those problems are only made worse, if they themselves were injured in the same accident, if they must pause their careers to care for their injured child, or if they have other children who also need caring for.

Caring for a brain-injured child is emotionally and financially draining. Parents face stress and uncertainty about their child's future, and they simply do not receive the same access to medical care, therapy, and educational support if they are purely reliant on statutory services. Private rehabilitation and specialist interventions are expensive, therefore compensation claims, where possible, can ensure a route to securing proper support both for now and the future.

Support for Families

Supporting families goes beyond the ins and outs of the legal claim. Being readily available, understanding their childs struggles, and advocating for interim payments, Education, Health and Care Plan (funding and financial advice as well as neurodevelopmental and other assessments can ease the burden they face.

Defendants will often claim a child's issues were pre-existing and unaffected by the accident, or that the child is not far from where life would have taken them had the accident never occurred. It is important

that parents feel they can trust their solicitor, so they can be confident that the evidence they give of cognitive, emotional, and behavioural changes both before and after the accident is heard and that they see it being used effectively to support their child.

Thankfully, many children who are investigated for brain injury will have not suffered one. However, where they have a neurodevelopmental disorder, they may still show worsening symptoms because of the effects of a psychological injury, such as PTSD. While not directly linked to the accident, diagnosis of a neurodevelopmental disorder can help a parent secure appropriate educational support, therapy, and long-term care, outside of the claim, giving families clarity and enabling a better future for their child.

In claims we have handled previously we been able to help families secure vital support, including funding for psychological treatment for family members, to help them cope with the emotional burden of caring for their injured child. We have also secured interim payments which have been used for a variety of purposes, including:

- funding an Education, Health and Care Plan (EHCP) to provide tailored educational supported suited to the child's evolving needs.
- respite weekends, allowing families a much-needed break.
- tutoring, to help the child recover lost ground in their education due to the accident.
- funding cover transport costs to medical appointments.
- to replace parent's lost earnings, were they have been compelled to take time off work due their child's injuries.

Conclusion

Navigating a child's brain injury claim where there is a suspicion of a brain injury, particularly where the damage may be subtle and there are potentially co-occurring neurodevelopmental disorders requires careful consideration even by experts in the field. These cases are undeniably complex and can take a long time to finalise because of the evolving effects that these conditions may have on a growing child. However, with the right approach, it is possible to achieve positive outcomes whatever the cause of a child's difficulties.

Compensation cannot undo the impact an accident may have on a child's life, or that of their parents, but a successful claim can provide the financial means for a better life. With expert support and determined representation, families can be guided on this difficult journey and secure both the justice and resources their child deserves.

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Audit of 50 Solicitors	N/A	Excellent	Good	Fair	Below	Poor	No comment
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Understanding of all relevant procedures	0	46	4	0	0	0	0
Report Writing Skills	0	46	4	0	0	0	0
Answering Questions Part 35	32	10	4	0	0	0	4
Professional Knowledge	0	50	0	0	0	0	0
Ability to extract relevant information	0	46	4	0	0	0	0
Communication Skills	0	44	6	0	0	0	0
Presentation Skills	10	32	4	0	0	0	4
Would you instruct Mr Miller again		100%	-	- -	-		-
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Personal Injury in Aesthetic Medicine: Navigating the Risks of Non-Surgical Cosmetic Procedures

By Julie Brackenbury, Independent Aesthetic Nurse and Medico-Legal Expert

Non-surgical cosmetic treatments such as botulinum toxin injections, dermal fillers, and chemical peels have become increasingly mainstream in the UK. These procedures are often promoted as convenient, low-risk alternatives to surgery. However, their rising popularity has been accompanied by a growing number of personal injury claims, many of which stem from complications that could have been avoided through proper training, consent, and clinical governance.

In this article, I draw on my experience as an aesthetic nurse and expert witness to explore the medico-legal implications of personal injury in non-surgical aesthetic practice. I highlight key areas of risk, discuss the importance of robust consent and documentation, and consider the evolving regulatory landscape.

The Expanding Landscape of Aesthetic Medicine:
The UK's aesthetic sector has experienced exponential growth in recent years. According to the Department of Health and Social Care (2022), the industry was worth approximately £3.6 billion in 2021, with non-surgical procedures accounting for over 80% of that total. Yet despite its rapid expansion, the sector remains largely under-regulated, with no mandatory training requirements or national licensing system in place for practitioners administering high-risk treatments.

This lack of regulation has left patients vulnerable to harm, and legal practitioners are increasingly being instructed to pursue claims against individuals or clinics following adverse outcomes. In the absence of statutory safeguards, expert witnesses play a critical role in helping courts understand whether an injury was foreseeable, avoidable, and attributable to negligence.

Common Types of Injury and Clinical Failings:
In my work reviewing aesthetic injury claims, several recurring themes emerge;

- Vascular occlusion and tissue necrosis following filler injections, particularly in the perioral and perinasal regions
- Infections, including cellulitis and abscess formation, linked to inadequate aseptic technique or poor aftercare advice
- Burns and pigmentation changes associated with lasers or chemical peels
- Psychological injury due to botched outcomes, deformity, or a breach of patient expectations

Duty of Care:
In aesthetic practice the duty of care is no different from that in mainstream healthcare. Where standards fall below that of a reasonably competent practitioner, and a patient suffers harm as a result, legal liability may arise. Many such cases involve non-medically trained individuals performing advanced procedures without sufficient anatomical knowledge or clinical experience.

The Centrality of Informed Consent:
A consistent shortcoming in aesthetic injury cases is the failure to obtain informed, voluntary, and specific consent. Informed consent is not a signature on a form but a process and is two-way discussion that allows the patient to make a reasoned decision about whether to proceed.

Best practice:
Best practice dictates that patients should be provided with written and verbal information outlining;

- The proposed treatment and how it works
- Likely outcomes, including limitations
- Common and rare risks (e.g., bruising, infection, vascular occlusion)
- Alternatives, including no treatment
- The practitioner's qualifications

Principles:
In *Montgomery v. Lanarkshire Health Board* [2015] UKSC 11, the Supreme Court held:
"*The doctor is under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment.*"

This principle extends to non-surgical cosmetic procedures, where practitioners must disclose all material risks to patients. A patient undergoing a dermal filler injection must, therefore, be informed of the risk of vascular compromise, even if such complications are rare, because the consequences can be catastrophic. Moreover, cooling-off periods are crucial in elective procedures. Consent obtained minutes before treatment is not only poor practice but may be legally indefensible if complications arise.

Psychological Vulnerability and Practitioner Responsibility:
Another layer of complexity in aesthetic medicine lies in the psychological motivation of patients. Aesthetic interventions often intersect with self-esteem and mental health. Patients presenting with unrealistic

expectations, body dysmorphic disorder (BDD), or seeking to 'fix' deeper emotional issues may not be suitable candidates for cosmetic procedures. Thus, Aesthetic Practitioners have a duty to identify red flags and refer on when appropriate. Administering treatment to a psychologically vulnerable individual without assessing their suitability may amount to a breach of duty if harm ensues.

The Joint Council for Cosmetic Practitioners (JCCP) and General Medical Council (GMC) both advise that practitioners should be trained to screen for mental health conditions and know when to decline treatment (JCCP, 2021; GMC, 2016).

Medico-Legal Case Examples:
Case One: Lip Filler Vascular Occlusion
A 32-year-old woman attended a high-street clinic for lip augmentation. Within hours, she developed greyish discolouration and intense pain around the injection site. She contacted the clinic but was advised to monitor the area at home. By the time she was reviewed, necrosis had set in, requiring urgent hospital referral.

Expert opinion concluded that the practitioner failed to recognise a vascular occlusion and delayed appropriate treatment with hyaluronidase. The case settled in favour of the claimant.

Case Two: Laser Burn and Pigmentation
A client of South Asian heritage (Fitzpatrick Skin type IV) underwent laser hair removal at a beauty salon. No patch test was carried out, and incorrect wavelength settings were used. The Claimant sustained superficial burns and developed post-inflammatory hyperpigmentation. The clinic had no medical oversight, and the practitioner lacked formal training.

A claim for personal injury was successful on the grounds of inadequate assessment, lack of informed consent, and breach of duty.

Judicial Commentary and Legal Precedents:
Several landmark cases continue to inform how courts approach personal injury in cosmetic practice:

In *Montgomery v Lanarkshire Health Board* [2015] UKSC 11, the Court held:
"The doctor is under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment."

In *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582, the principle was established:
"*A man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view.*"

In *Chester v Afshar* [2004] UKHL 41, the House of Lords stated:
"*The law imposes a duty on a medical practitioner to warn a patient of a small but well-established risk of serious injury inherent in the proposed treatment.*"

These principles provide the legal framework within which aesthetic claims are assessed and reinforce the importance of detailed consent and professional standards.

The Role of the Expert Witness:
In aesthetic litigation, the expert witness has a crucial role in assessing whether the standard of care met legal and clinical expectations.
This includes:
- Evaluating the consent process and treatment rationale
- Reviewing treatment records, photographs, and training evidence
- Offering impartial, experience-based opinion on causation and breach
- Assisting the court in understanding technical clinical issues

Expert opinion must be independent, based on current guidance, and within the individual's area of expertise. For instance, an aesthetic nurse with years of hands-on experience in administering dermal fillers would be well-placed to assess a filler-related injury claim.

A Call for Reform The UK Government has recognised the need for tighter regulation. The Health and Care Act 2022 included provisions for a licensing regime for aesthetic practitioners and premises in England. Although this is a step forward, implementation has been slow, and there is an ongoing need for:
- Clear definitions of high-risk procedures
- National training and accreditation standards
- A public register of approved practitioners
- Consistent enforcement mechanisms

Until such reforms are enacted, personal injury claims will continue to highlight the dangers of a fragmented system. In the meantime, robust training, consent, and documentation remain the most effective risk mitigation tools for practitioners.

Conclusion:
Personal injury in aesthetic medicine is a growing area of concern, particularly within non-surgical practice. These procedures, though widely perceived as minor, carry real risks. Where harm results from inadequate care, the legal consequences can be severe—for both patient and practitioner.

Practitioners must adhere to best practice standards, respect the principles of informed consent, and exercise sound clinical judgement. For legal professionals handling aesthetic injury claims, expert witnesses remain a vital asset in helping courts understand whether a duty was breached, and if so, whether that breach led to avoidable harm.

Only through greater professional accountability, regulatory reform, and patient-centred care can the aesthetic sector truly balance innovation with safety.

Author Biography:
Julie Brackenbury is an Independent Aesthetic Nurse and Medico-Legal Expert with over 16 years' experience in the field of cosmetic medicine and has authored more than 45 articles on aesthetic practice. Julie regularly provides expert witness reports in civil litigation and coronial matters, with a particular focus on dermal fillers, botulinum toxin, chemical peels, and laser injuries.

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More Evidence Needed Before Restricting Judicial Review Appeals

The Law Society of England and Wales has called for more evidence to be gathered before restrictions are placed on judicial review appeals involving nationally significant infrastructure projects (NSIPs).

The Planning and Infrastructure Bill – which would restrict appeals relating to NSIP judicial reviews – had its second reading in the House of Commons on Monday (24 March).

"We appreciate the need for critical infrastructure projects to deliver growth. However, we are concerned that this restriction on judicial review appeals could prevent legitimate cases from being heard," said Law Society president Richard Atkinson.

"Judicial review in the context of NSIPs does not consider the merits of the proposed infrastructure project, only whether the development consent order has been made lawfully. While pursuing certainty through ensuring swift administration of justice is worthwhile, any reforms must balance efficiency with maintaining access to justice.

"Stopping people from seeking permission to appeal to the Court of Appeal where an NSIP appeal has initially been deemed 'totally without merit' may seem superficially attractive, but we do not currently know how many such NSIP claims were later successful.

"If there are claims where this is the case, then this measure could exclude valid cases and deny access to justice by preventing the decision being reconsidered."

The bill also proposes removing the paper permission for NSIP judicial reviews.

"The experience of our members is that making permission decisions on the papers saves costs and resources for both parties and the courts," added Richard Atkinson.

"In contrast, the preparation required for an oral hearing can be extensive, and there are additional costs to attending a hearing which would be borne by both parties.

"Streamlining judicial review on permission decisions should be evidence led, particularly when considering the importance and impact of NSIPs. The government should therefore analyse and publish further evidence on the number of cases initially deemed totally without merit which were then later successful.

"Officials should also look at the cost implications of removing the paper permission stage to allow assessment of the impact on access to justice."

LSE Law School launches Personal Injury Clinic with Hodge Jones & Allen

The partnership with LSE Legal Advice Clinic, which launched in February 2025, will aim to improve access to justice by providing free, confidential legal advice to members of the public on a range of issues, including personal injury law.

The new clinic will also offer students the opportunity to gain practical, hands-on experience designed to enhance their employability. The new Personal Injury Law Clinic will benefit from the expertise of Daniel Denton, Personal Injury Partner at Hodge Jones & Allen, and will provide free legal advice and assistance to members of the public who are otherwise unable to access justice, whilst giving students key development opportunities. Clients can receive free advice via Zoom, Teams, telephone or speak directly to the Clinic.

Daniel Denton has over two decades of experience in representing clients with significant and often life-changing injuries. Daniel will lead and support LSE students in gaining experience in the area of personal injury law. The initiative will enhance the employability of students, exposing them to real-life cases whilst having a significant positive impact on the local community by supporting individuals in need.

LSE Law School represents one of the largest academic communities within one of the most well-regarded universities in the world. In the UK, LSE was ranked as the top university and named the School as its 'University of the Year 2025' by the Times, and third by The Complete University Guide in 2025. In the QS World University rankings for 2024, the Law School was ranked seventh out of 200 worldwide.

This innovative partnership between LSE and Hodge Jones & Allen underscores their combined commitment to social justice and education, and represents a significant step forward in bridging the gap between legal education and practical application, preparing students to enter the legal field as competent, experienced professionals while fulfilling a crucial community service.

Diana Kirsch, Legal Clinic Director, at LSE, commented on the collaboration: 'We are delighted to be launching our new Legal Advice Clinic this year and we are incredibly grateful to Daniel Denton and HJA for their generous support in enabling us to offer free personal injury advice. The Clinic offers our students

invaluable hands-on experience, allowing them to work closely with practising lawyers. We are confident that Daniel's expertise will greatly benefit our students and enhance their learning.'

Nitika Bagaria, a student currently studying the LLM Master of Laws programme at the university, commented on the new partnership: 'Working with Mr. Denton on a pro bono personal injury case was an invaluable experience. He was incredibly knowledgeable and took the time to provide me with extensive background information on the law. He not only guided me through the case but also shared career insights and best practices in personal injury law, from his years of experience. He fostered a welcoming environment, encouraging curiosity and independent thinking. I truly appreciate his expertise in the field and his dedication to the cause.'

Daniel commented, 'The new Personal Injury Law Clinic with the London School of Economics will provide significant support to the local community and will provide greater access to free personal injury law information for more people in the area. I'm also delighted to help develop learning outcomes for students at LSE who will have an invaluable opportunity to practice their skills, gain experience and develop their knowledge in the area of Personal Injury Law.'

For more information or to request assistance from the Personal Injury Law Clinic, please visit the LSE Law School Legal Clinic.
https://www.lse.ac.uk/law/legal-advice

What's it Like Giving Expert Medical Evidence in Court?

The prospect of giving evidence at trial can be unnerving for both new and seasoned experts.

***Amy Heath** and **Nadia Krueger-Young**, partners in the Medical Negligence team at Stewarts, asked **Laura Bochkoltz**, physiotherapist and **Chris Danbury**, consultant intensivist, about their experiences of giving evidence in court.*

How long have you been an expert witness for?

Laura: "Twenty-six years. In 1999, after over a decade in clinical practice, I felt I had accumulated the expertise to become an expert witness. At the time, my boss at the National Spinal Injuries Centre offered me the possibility of being mentored by her and I accepted. Although I had not originally planned to go down this route, I have learned to love the responsibility which comes with this line of work. I now manage a team of experts who have covered over 300 cases in spinal cord injuries and neurological conditions. What is interesting is that being an expert has also enabled me to be a better clinician, as it has made me have to think about the long term needs of my patients."

Chris: "Twelve and a half years. My first instruction was in the Court of Protection in *NHS Trust v L* [2012] EWHC 2741. Initially, I considered myself to be a medicolegal academic, having been awarded an MPhil in Medical Law by Glasgow University in 2005. Shortly afterwards, I took on the role of Visiting Research Fellow in Health Law at the School of Law in the University of Reading. I was then cajoled into accepting instructions by a number of people, both medical and legal."

How many times have you given evidence at trial?

Chris: "Roughly 18 times in the Court of Protection, 14 times as an expert in the Coroner's Court and once in the High Court."

Laura: "I have given evidence in court once last year in *W v Ministry of Justice* [2024] EWHC 2389 at the Royal Court of Justice in London."

What issues were you giving evidence about?

Laura: "I was instructed by the claimant solicitor to act as an expert physiotherapist for their client who had sustained an incomplete spinal cord injury. All the experts assessed the claimant, joint discussions took place and statements were produced and disclosed. After the joint discussions, the defendant solicitors disclosed some surveillance video footage. Most of the experts instructed by the defendants then changed their opinion and recommendation without real evidence to support their change of view. The case therefore went to court.

The judges asked what I had found in my assessment and to compare my findings with the surveillance video. I was asked to give my expert opinion from a physiotherapy point of view on how the spinal cord injury had impacted the claimant's mobility, how their mobility was likely to deteriorate as they aged and what they needed to maximise their function long term."

Chris: "In the Court of Protection, my evidence was regarding serious medical treatment decisions, helping explain the rationale for and against initiating, continuing or stopping serious medical treatment. When stopping treatment, I was helping the court and family to understand that this would probably result in the patient's death.

In the Coroner's Court, my role is helping that court come to a better understanding of the circumstances of the patient's death. In the High Court, I was helping the court understand how decision making in an intensive care unit is different from the general ward, with a different assessment of risks and benefits of a given treatment."

How did you prepare, and what, if anything, would you now do differently?

Laura: "I spent a lot of time reading all the documentation related to the case. With a trial you never know exactly what you will be asked, so I felt I had to know the case very well. I cross referenced my evidence to the defendant's to see if there were discrepancies and to check I had not made any errors. I also spent time looking at the surveillance videos. The case was all-consuming for a while to the run up to the trial.

At the end of each day of the trial, I made a list of what had been discussed that was relevant and what wasn't. I made sure I was fully focused on the pertinent issues and what I could contribute to those issues.

The only thing I would now do differently is to manage my time better during the preparation. The first day of the trial I did not attend court as I felt I did not know the case well enough and wanted that extra day to carry on preparing and reading. In hindsight, I should have gone to court even if I knew I was not going to give evidence, as this would have given me the opportunity to hear the claimant's evidence and have an overall picture of how the issues were being presented."

Chris: "I reread my report at least daily for a week or so before a court appearance. I try to critique it. I ask

myself whether my opinion has changed. I'll go back to what I consider to be the key pages in the medical records and make sure they are in the trial bundle.
I always check the Civil Procedure Rules (CPR)/Court of Protection Rules and the practice directions. I can't quote them, but I'm alert to an easy question from any of the barristers: 'When was the last time you read Part 35 of the CPR?'"

Did you receive any useful advice in advance of the trial that you would like to pass on?
Laura: "It was another expert who said the day before I gave evidence, "Laura, you don't need to know the other expert's evidence by heart!". It seems obvious but when you are in the thick of it you lose perspective. Although you don't need to know everyone else's, it is essential to know your own evidence inside and out.

The objective of the trial is for you to give information to the judge in your area of expertise so the judge can make their findings. It is not a race, you are allowed time to look at your bundles, think about the question and explain your position.

Take your time and check your facts. If you have any doubts, I would strongly recommend you reassess the claimant before the trial."

Chris: "Use simple language, be honest, don't argue, admit ignorance, if your opinion has changed (based on other evidence), admit as much and say why. Most of all, no BS!"

How did you find the experience of giving evidence?
Chris: "Very stressful, and it doesn't get easier. But it's a hugely important role."

Laura: "It was very satisfying! I saw it as a collaborative exercise, where the solicitors and barristers were trying to do the best for their clients, and the experts were trying to stay focussed and impartial to provide the judge with the relevant information so they could form their opinion and make their findings. Because of this, I was able to stay very focused and relatively relaxed."

What do you think is key to being able to give evidence successfully?
Chris: "Being a good clinician first and foremost; secondly, being able to function under pressure, and finally, being a good communicator."

Laura: "Firstly, undertake training on how to give evidence. Throughout my career I have attended different courses and workshops to understand the process and what is expected of the experts in court. As an example, during the training they tell you that it is important that you talk to the judge. My worst fear was forgetting to talk to the judge and respond to the barrister who was asking me the question. When I was in the box, it wasn't as difficult as I thought it would be, and talking to the judge felt obvious.

Secondly, at the point you take the instruction, be sure that you are the right expert for the case. When you do your assessment make sure it is thorough and keep in the back of your mind that you may need to go to court! When you start hearing that the case may go to trial, look at when your assessment was undertaken and think of whether things could have changed. Worst case scenario, you can always re-assess the claimant, which is a much better option than being in the witness box and not being sure of your findings.

Thirdly, talk to your solicitor beforehand. Don't be concerned for example that they will think of you differently if you don't have experience of giving evidence at trial and need some guidance. It doesn't make you a bad expert witness to say you need help for something you haven't done before; in fact, it is quite the opposite!

Bear in mind that in the courtroom, you are probably the only one who knows your field as well as you do. You are talking to very intelligent people but that doesn't mean they know your field of expertise and the jargon! I found that giving examples to illustrate my thinking made it easier for the judge to understand what I was talking about.

Finally, and most importantly, it is essential to remember just how crucial it is to stay in your field of expertise and to acknowledge when you are at the limits of that expertise. Your reasoning is based upon your expertise and if you start to offer opinions in other areas, these will not stand up to scrutiny."

What advice would you give to an expert about to embark on giving evidence at trial?
Laura: "Make sure you set aside the time needed to prepare and consider if you need to be there throughout the trial. It is your reputation at stake, so even if your solicitor doesn't think it necessary for you to hear other experts giving evidence and while you may not be paid for the extra days, go and listen.

On a practical level, eat, drink and sleep – you don't know how long it will take. When you are giving your evidence, take your time and remember to breathe and pause. It is not a race."

Chris: "Listen to the question, speak up to the judge, then finish. Less is usually more and never, never argue with a barrister."

What tips would you give to a solicitor guiding their experts through the process of giving evidence at trial?
Laura: "Give your expert support in the lead up. A good expert may still be apprehensive about going to trial.

Tell or remind your expert what their job is and remind them that even if the barristers are being assertive or even combative, not to take it personally. The expert's job is assisting the judge to make their findings. Keeping that in mind helped me to diffuse the heated debates.

Don't wait for the expert to say they need to reassess the claimant. The expert might be so nervous about the prospect of an intense legal process that they might not think about a reassessment or might not realise it is an option.

Lastly, remember to ask your expert whether they have given evidence beforehand. It is easier for them if the question comes from the solicitor and if they are new, you can help explain the process and address any concerns they may have."

Chris: "Tell your expert to remember their oral exams they sat for their postgraduate qualifications. Tell the expert that they should prepare for the trial as though it were a 'long case' for their final post-graduate exam and that the barristers and judge take the role of the examiners."

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Insurance Implications Following "Landmark" E-bike Collision Case

by Lisa Mansfield, Partner - www.rdj.ie

A recent Dublin District Court decision, reported by the Irish time on 16 April 2025, has sparked considerable discussion regarding the liability of e-bike users involved in collisions. While the judgment has been described in some reports as "landmark," it's important to bear in mind that its authority is confined to the facts of the case since District Court rulings do not set binding precedent for higher courts.

Case Overview
On 4 August 2024, the plaintiff suffered a broken leg after being struck by an e-bike while jogging near Howth in Co. Dublin. It's reported that he was dissatisfied with the police investigation, which he believed was inadequate because it did not include forwarding a file to the Director of Public Prosecutions (DPP). As a result, the plaintiff initiated a private prosecution and lodged a complaint with Fiosrú, the new Garda complaints channel.

During the proceedings, the defendant e-bike rider pleaded guilty to careless driving under the Road Traffic Act 1961 and was fined €250. A pivotal issue in the case was whether the e-bike, equipped with a 750W motor and capable of speeds between 20 and 25 km/h, should be classified as a mechanically propelled vehicle (MPV). The court accepted that it did meet the MPV criteria, thereby requiring the rider to have insurance, a condition typically applied to motorised vehicles rather than ordinary bicycles.

E-bike Classification and Insurance Implications
This decision to treat the e-bike as an MPV marks a departure from the conventional treatment of bicycles. Under existing Irish law, an MPV is any vehicle intended or adapted for propulsion by mechanical means, including bicycles that incorporate an auxiliary electric motor exceeding 0.25 kilowatts. With the court's acceptance of the 750W motor in the defendant's e-bike placing it within this category, e-bike users are now potentially faced with the legal obligation to secure motor insurance.

The new classification also prompts insurers to reassess the risk profile associated with e-bike usage. Unlike traditional bicycle insurance, which generally covers theft or minor accidental damage, insurance for an MPV must address the broader liabilities linked to motor vehicle incidents. Underwriters may need to develop new products that better reflect the higher-powered elements of e-bikes and their associated accident risks.

As e-bike ownership becomes more common, there is potential for a niche insurance market to develop. For insurers, there is an opportunity to innovate by offering hybrid products that combine the protections of both traditional bicycle and motor vehicle coverage. Such products would serve current needs and prepare the industry for potential regulatory changes prompted by the growing popularity of e-bikes.

Claims Process and Recovery
In incidents where the e-bike operator is uninsured, entities such as the Motor Insurers Bureau of Ireland (MIBI) may become involved in facilitating recovery for injured parties. In this case, the plaintiff has already paved the way to include the MIBI in his personal injury claim. This move hints at possible future enforcement actions against uninsured e-bike riders.
Legislative and Regulatory Ramifications

Although the Irish Times report described the decision as a "landmark" case, it is important to note that District Court outcomes do not have binding legal authority. Nevertheless, the ruling highlights a pressing need for clarity in Irish law regarding modern

transport innovations like e-bikes. Legislators may consider revising the Road Traffic Act to clearly specify which classes of e-bikes require insurance and which might be exempt. Such clarity would help ensure that lower-risk users are not penalised unnecessarily while maintaining public safety.

Conclusion

In summary, this decision raises important questions about the regulation and insurance of e-bikes in Ireland and it is an area that will inevitably grow as more and more e-bikes take to the road. It will be interesting to see how the personal injury case against the MIBI proceeds in due course and whether this decision will lead to the DPP pursuing careless driving prosecutions against e-bike drivers as a result.

Author

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Judge Criticises Expert for "Contaminat[ing] the Professionals Meeting" – the Importance of Following Best Practice During Discussions

In a recent care order case, a medical expert's conduct was criticised by the judge who stated that her approach was "a cause for serious concern".

Not only did her report lack "due diligence" leading her to draw erroneous conclusions that the parents in the case were at fault in causing harm to their children, but the impact of her "errors and closed mind…went beyond her own individual evidence" in tainting what was discussed in the experts' meeting as well.

Read on to find out the facts of the case and how essential it is that all participants understand the legal requirements and implications of the joint meetings between experts.

Background

In *LB Croydon v D (Critical Scrutiny of the Paedeatric Overview)* [2024] EWFC 438 HHJ, the family court heard that the London Borough of Croydon was seeking a care order for three children on the belief that they had been harmed in the care of their parents.

A medical expert was instructed to provide the paediatric overview for the court as a key expert witness. The expert's duties included:

1. Providing a concise medical chronology taken from the volume of available clinical medical data.

2. Clearly signposting the court to the relevant data.

3. Properly evaluating the evidence as to whether an injury was inflicted or not.

4. Not being speculative.

5. Correcting errors in their own work and identify errors in the work of others.

6. Limiting opinion evidence to their individual specialty.

7. Revisiting past conclusion in the light of fresh evidence.

8. Not removing evidence of relevance from the judge's determination.

What conclusions did the medical expert reach?

The medical expert set out in her report her professional opinion that the medical evidence pointed to the children having suffered 'inflicted non-accidental injuries'.

This was disputed by the parents.

3. What were the fundamental errors in the medical expert's report?

The medical expert was subject to a detailed and forensic cross examination by the mother's counsel, which was "nothing short of a demolition" of her evidence. In fact, the medical expert even concluded herself that her evidence was partially "appalling".

The fundamental errors that ran through the whole of her evidence and beyond are:

- Her misidentification and confusion of the twins, when reading the primary medical disclosure. This was of seminal importance because different birth and post birth experiences led to one of the twins being weaker and more vulnerable. In addition, even at the time of giving evidence in court, she still had not tracked back to see how that error had impacted her opinion in relation to each child, despite correcting it in addendum.

- Her misinterpretation of the primary medical evidence - stating that the twins had "bruising" when in fact there was no primary medical evidence from the treating clinicians that the twins had any bruises on their bodies.

4. What impact did the medical expert's conduct have on the experts' meeting?

The role of an expert is to provide objective, unbiased opinions to help a court, tribunal or jury understand or resolve issues relating to a case that requires specialist knowledge. The evidence and conduct of an expert witness can determine the outcome of a case, with potentially far-reaching consequences for the parties involved.

As Deputy High Court Judge, Kathryn Major correctly stated in this care order case, the medical expert's "approach…is a cause for serious concern. There are real world consequences for children where the professional medical advice is flawed, factually inaccurate and lacking in enquiry and analysis."

If the medical expert's evidence had not been discredited by the mother's counsel during cross-

examination, the judge might have reached an entirely different conclusion – removing the children from a "perfectly safe home".

5. Conclusion

This case serves as a useful reminder of how an expert can negatively impact a case – not only in drawing erroneous conclusions in their report but also in undermining the discussions between experts that are specifically requested by the courts to save court time, narrow the issues in scope and reduce legal costs.

If you would like a reminder of what is considered best practice by the courts for discussions between experts, the next available date for our half-day, virtual Discussions between Experts course is the 23 June, commencing at 9.30am. During this course, experts will gain a thorough understanding of the court procedure rules governing discussions between experts and the court's intention behind these discussions. We will also provide experts with a comprehensive overview of what these discussions entail, possible pitfalls and the implications if best practice is not followed.

For more information about this course or to book your place, please contact a member of the **Bond Solon** team on 020 7549 2549 or expertwitness@bondsolon.com.

Firearms Examination: Precision in Forensic Science and Legal Applications

Firearm-related forensic evidence plays a pivotal role in criminal investigations and legal proceedings. From identifying weapons to determining ballistic matches, forensic firearm examiners provide crucial insights that contribute to case resolution and justice.

This article draws from a recent **Forensic Access** webinar, "Aiming for Precision in Forensic Science", which explored the complexities of firearm examinations and classification in the UK legal system. The session provided an in-depth look at the types of firearms and ammunition commonly encountered in forensic investigations, the legal classifications that determine whether a weapon is prohibited, and the forensic techniques used to analyse firearms-related evidence.

With a growing number of cases involving modified weapons, imitation firearms, and even 3D-printed gun components, forensic expertise in this area is more critical than ever.

The Role of Firearm Examination in Criminal Cases
Forensic firearm examination is a highly specialised discipline that involves analysing weapons, ammunition, and related evidence to determine their role in criminal activity. The work of forensic firearm experts spans a variety of cases, from serious offences including murder and manslaughter to armed robberies, illegal possession, and firearms trafficking.

Key aspects of firearm examinations can include:

- Identifying and classifying firearms, including modified, imitation, and antique weapons.
- Assessing whether a weapon meets the legal definition of a firearm under UK legislation.
- Determining whether a firearm has been discharged and linking it to ballistic evidence.
- Examining cartridge cases and bullets to identify unique tool marks that indicate the specific weapon used.
- Evaluating 3D-printed components and their functionality.

Forensic Access experts have examined thousands of cases involving firearm-related evidence, supporting criminal investigations and providing expert testimony in court.

Understanding Firearm types and their functions
One of the most important aspects of firearm examination is understanding the different types of

weapons and how they function. Although all firearms share the same basic purpose—firing a projectile toward a target—there are numerous designs and mechanisms that influence how they operate.

Some of the key firearm types encountered in forensic investigations can include:

1. Handguns

• **Semi-automatic pistols:** Fire one round per trigger pull and reload automatically from a magazine.

• **Revolvers:** Use a rotating cylinder to hold ammunition; each chamber aligns with the barrel when fired.

2. Rifles

• **Bolt-action rifles:** Require manual operation of the bolt to chamber the next round.

• **Lever-action rifles:** Use a lever mechanism to chamber rounds.

• **Semi-automatic rifles:** Fire one round per trigger pull and reload using gas or recoil-operated cycling mechanisms.

3. Shotguns

• **Pump-action shotguns:** Require manual operation of the fore-end to load a new shell.

• **Semi-automatic shotguns:** Use gas or recoil-operated mechanisms to reload automatically.

• **Sawn-off shotguns:** Modified to have a shorter barrel for concealability, often making them prohibited under UK law.

Understanding these firearm types helps forensic experts determine how a weapon was used in a crime, whether it has been modified, and whether it meets legal classification as a prohibited firearm.

The Legal Classification of Firearms in the UK

Firearm legislation in the UK is among the strictest in the world. Firearms examiners provide critical expertise in determining whether a weapon is legal, restricted, or prohibited under UK law.

Key legal considerations include:

Lethality: A 'firearm' must discharge a projectile with a muzzle energy above one joule to be legally classified as a "lethal barrelled weapon."

• **Classification:** Firearms fall into categories such as shotguns, air weapons, antique firearms, and prohibited weapons.

• **Modification: Alterations,** such as sawing off a shotgun barrel or converting a blank-firing weapon to fire live rounds, can change a weapon's legal status.

• **Imitation Firearms:** Some replicas, including blank-firing guns and airsoft weapons, can be mistaken for real firearms, making classification crucial in legal cases.

• **Ammunition Restrictions:** Certain types of ammunition, such as armour-piercing or incendiary rounds, are prohibited.

Expert forensic classification ensures that courts receive accurate assessments of firearm status, helping to guide appropriate legal outcomes.

The role of Air Weapons and their classification

Air weapons, commonly used for sport and pest control, have strict classification guidelines. Forensic analysis helps determine their legality based on:

• **Muzzle energy:** Air pistols exceeding 6 foot-pounds and air rifles over 12 foot-pounds require certification.

• **Modifications:** Some air weapons are unlawfully altered to increase power, making them classified as firearms.

• **Test firing:** Chronograph testing measures velocity to assess compliance with UK law.

The importance of Ammunition Examination

Ammunition is crucial in forensic investigations, with experts analysing:

• **Calibre and manufacturer** to match bullets to weapons.

• **Live or inert status** to determine whether seized ammunition is viable.

• **Prohibited ammunition types,** such as armour-piercing or incendiary rounds.

The Concept of 'Readily Convertible' Firearms

Some blank-firing or deactivated weapons can be modified to fire live ammunition. Forensic experts assess:

• **Ease of modification**

• **Required tools**

• **Previous alterations**

These assessments are increasingly relevant with the rise of 3D-printed gun components.

Case Studies: The Importance of Firearm Examination

Anonymised case studies from the webinar highlighted how forensic firearm examination supports fair legal outcomes by challenging assumptions and ensuring evidence is interpreted accurately.

1. Modified Firearm Assessment

In one case, a shotgun had been seized during a police operation. Initially, it was classified as a standard shotgun requiring a certificate. However, upon forensic examination, it was found to have been sawn-off, reducing its barrel length to below 24 inches, making it a prohibited weapon under UK law. This reclassification had significant implications for the charges brought against the suspect.

2. Cartridge Case Examination and Ballistics Matching

A shooting incident left several fired cartridge cases at the scene. Forensic experts conducted microscopic comparisons of the recovered casings with test-fired samples from a suspect's firearm. The analysis identified distinctive firing pin and extractor marks, confirming that the casings had been fired from that specific weapon. This evidence was pivotal in securing a conviction.

3. Imitation Firearms and Legal Classification

A suspect was arrested in possession of what appeared to be a real handgun. However, forensic examination revealed it was an imitation firearm incapable of

firing live ammunition. The findings were crucial in determining the appropriate charges, preventing an unnecessary firearms offence conviction.

These cases illustrate the critical role forensic firearm examiners play in ensuring that firearms-related evidence is accurately assessed and legally classified.

Advancements in Firearm Examination: 3D-Printed Firearms

The emergence of 3D-printed firearms presents new challenges for law enforcement and forensic investigators. While 3D printing has been used to manufacture firearm components for years, recent advancements have made it possible to create fully functional firearms with minimal machining.

Key issues related to 3D-printed firearms include:

- **Ease of Manufacturing:** Files for printing gun components are easily accessible online.
- **Legal Implications:** Simply possessing 3D-printed firearm components, or the digital files used to create them, may constitute an offence.
- **Forensic Challenges:** Identifying and tracing 3D-printed weapons requires specialised forensic techniques, as they may lack traditional tool marks found on factory-manufactured firearms.

Forensic Access experts are at the forefront of addressing these emerging threats, ensuring that forensic methods evolve alongside technological advancements.

Conclusion: The Essential Role of Firearm Examiners

Forensic firearm examination is a specialised and evolving field that plays a crucial role in the criminal justice system. From identifying and classifying weapons to matching ballistic evidence, forensic experts provide the courts with objective, evidence-based insights that influence case outcomes.

With ongoing advancements in firearm technology, including 3D printing and firearm modifications, forensic expertise is more important than ever. Ensuring accurate classifications, reliable evidence assessments, and clear expert testimony is key to maintaining the integrity of firearm-related investigations and legal proceedings.

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FORENSIC ACCESS

Telephone Evidence in Criminal Proceedings; Tactics & Strategy

by Jonathan Lennon KC, Barrister

The ubiquitous mobile phone has transformed criminal investigations and prosecutions over the last 15-20 years. Mobile phone evidence is a key tool in the fight against crime. But the phone in your pocket can also become a confession of a crime never committed. Evidence of presence at a scene, of messages received or comments made can sometimes give a false impression. How does an un-witting suspect on the wrong end of phone evidence begin to tackle what may seem like formidable evidence against him or her?

The problem for those facing serious charges is that the calls/texts etc may be quite innocent and the accused simply cannot remember why he made or received them. He or she may be asked about a series of one minute calls made many months earlier. The other problem is the danger of guilty association; in other words the Defendant has been up to no good, but of a completely different type, and much less serious than the detective at the interview seems to be suggesting. A police theory then appears to be backed up the phone evidence.

So what are the issues in a phone evidence case that Defendants and their advisors should be considering? Can phone evidence be challenged in Court?

Phone Attribution; Linking Devices to Defendants

In order for the police to suggest that a suspect has been in phone contact with another suspect the police need to know the phone numbers of the two concerned. Many mobile phone accounts are of the pay as you go sort –this means the network provider, Vodafone, EE etc will probably have no record of the name and address of the subscriber. This is not a problem for the police when the phone is seized directly from a suspect on arrest. It is a problem when a series of incriminating text messages, or calls patterning, are then found on the phone from another number that cannot be traced through the network provider.

In that situation the police will hope that the call/text message is to or from someone logged into the mobile's memory/SIM card address book. For instance, there may be a series of calls just after a suspect's arrest from someone 'John' – 'John' may also have sent an incriminating text message. The police may suspect that 'John' is 'in on it' and believe their man may be John Smith – someone known to the police. The police now, ideally, need John Smith's phone to be on him when he is arrested so that the number they have for 'John' – is proved to be John Smith's. This is one way of making an attribution.

There is no rule of law that provides that phone numbers being attributed to certain suspects have to reach a certain gold evidential standard. No phone may be discovered at all. The police might secure the call records for John's phone and discover that that phone is used to call John's Mum, John's work-place etc etc, creating a stronger attribution of that phone number to their suspect. But other people than just John might have use of the same handset. Sometimes attribution evidence can be very weak.

In one case the author was involved in an email sent via a handset attached a video clip that the Crown asserted was created on a certain date – a date that my client accepted that he had the phone. The video clip was important evidence. The expert who claimed the date of creation was cross-examined and it transpired that the date of creation was in fact the date the clip was sent to the phone – not the date the clip was made. On that date my client could not have had the phone. That was a critical issue for the defence.

If attribution is an issue it is critical to make that clear in the Defence Statement so that the prosecution are obliged to disclose other parts of the phone evidence (including from other seized devices) which might detract from the Crown's theory.

Hearsay

The law on hearsay in criminal proceedings was codified in the *Criminal Justice Act 2003*. This can be important in phone cases as the critical piece of evidence might be a social media message from A to B but implicating C – this could be hearsay.

The default position is that a "matter stated" in hearsay material is inadmissible unless it qualifies for admission under s114(1) of the 2003 Act. That gateway is quite wide. If a text/email etc is hearsay that does not necessarily mean it cannot be admitted in evidence. There is not the space in this article to give a full account of the CJA hearsay provisions and the significant amount of case law it has generated. However, in the context of mobile phone evidence one case in particular is instructive; *R Twist [2011] EWCA Crim 1143*.

In Twist the Court of Appeal considered messages received by the Defendants (four conjoined appeals). The Court focussed on the s114(1) test of 'matter stated'. Specifically the Act involved asking what it was that the party was seeking to prove – i.e. what did the prosecution say the hearsay message actually demonstrated? Most communications would contain one or more 'matters stated', but it did not always follow that

any would be the matter that prosecution was setting out to try to prove. However, where a party sought to prove that a matter stated in the communication was fact, as opposed to opinion or comment, then the rule against hearsay would be engaged.

As a guide the Court indicated that it would be helpful to approach the question on whether the hearsay rules applied in this way:

(i) identify what relevant fact (matter) it is sought to prove;

(ii) ask whether there is a statement of **that matter** in the communication.

If not, then no question of hearsay arises (whatever other matters may be contained in the communication);

(iii) If yes, ask whether it was one of the purposes (not necessarily the only or dominant purpose) of the maker of the communication that the recipient, or any other person, should believe that matter or act upon it as true? If yes, it is hearsay. If not, it is not.

The Court emphasised that in deciding whether a communication was hearsay or not, might not be the end of the issue of admissibility. The fact sought to be proved had to be a relevant fact – not just something the prosecution wanted the jury to hear against the Defendant. In that case, even if the material passed the Twist tests the evidence would be inadmissible anyway.

In *R v Doyle [2018] EWCA Crim 2198*, the Court of Appeal considered a drugs case where a phone had been discovered in a drugs raid. Text messages were discovered that had been sent to D, one of which accused D of opening up packages of 'weed' – something which D denied in reply. The Judge found the messages were not hearsay and admitted them as evidence. In fact, as the Court of Appeal found, the text allegation was hearsay as it was tendered to prove the truth of D's involvement with the cannabis. However, though the trial Judge had erred the Court of Appeal applying the s114(1) test of whether the hearsay should be admitted in the interest of justice (a very wide test) found that it would have been admissible hearsay in any event and upheld the conviction.

Proving Conspiracies

The essential element of the offence of conspiracy is evidence of an agreement with others to commit an offence. The 'agreement', of course, is never a signed document expressing a contract to commit a crime. The Crown will simply invite the jury to infer the agreement from the surrounding circumstances. This will often mean heavy reliance on the phone contacts between suspects and also the timing and frequency of those contacts.

For example, the Crown might invite a jury to infer that one series of calls by a Defendant to others is the 'arrangement stage', and the next series of calls, happening just after the arrest of those others, is the Defendant desperately trying to find out what has happened to his drugs, guns or whatever. Indeed the police have sometimes use the tactic of making arrests of suspects lower down the command chain first, just to see later what the digital reaction is of those higher up.

In conspiracy cases there will often be significant areas of evidence which, on the face of it, appears damming, but which in fact are not admissible against a particular Defendant.

A basic rule of evidence is that, ordinarily, acts done or words uttered by 'A' cannot be evidence against 'B'. But in conspiracy cases there is the so-called 'acts and declarations' rule. This provides that the acts or declarations of any conspirator or co-accused made in furtherance of the alleged common design may be admitted as part of the evidence against any other conspirator. *The Criminal Justice Act 2003* preserves this rule – i.e. as an exception against the common-law exclusion of such hearsay evidence; s118(1).

To be admissible against a co-Defendant the declaration in question must be in furtherance of the common design; it must; *"be demonstrated to be one forming an integral part of the machinery designed to give effect to the joint enterprise" – R v Reeves, unrep. Dec 4, 1998*. Descriptions of past events etc are not made in furtherance of the common design and are therefore not admissible against anyone other than the maker. For example, an undercover officer covertly records suspect X discussing the preparations for an offence and person Y is mentioned. This could be admissible evidence against both X and Y in a conspiracy case.

But the acts and declarations rule can, and very often should, be tested by the defence. In *R v Gray and Liggins [1995] 2 Cr. App. R 100* the Appeal Court went back to basic principals by recalling that; *"the basic reason for admitting the evidence of the acts or words of one against the other is that the combination or pre-concert to commit the crime is considered as implying an authority to act to or speak in furtherance of the common purpose on behalf of the others. From the nature of the case it can seldom happen that anything said by one which is no more than a narrative statement or account of some event that has already taken place…..can become admissible under this principal against his companions in the common enterprise."*

Thus, it maybe that X's comments can in truth be shown to be no more than grandstanding or describing past events – and even if that is not clear there remains a discretion for the Judge to direct the jury not to hold X's words against Y.

Cell-Site Analysis

Mobile phones can of course be powerful evidence of where a particular individual was at a certain time. The evidence comes usually from a police officer, but sometimes an expert briefed by the Crown will consider information from the network provider about which of their 'cell-sites' were used in certain calls; i.e. which cell picked up or received the radio wave transmissions carrying the call.

If the police want to show the movement of an individual from one place to another then the expert can show how the phone signal passed from one cell site

to another as the handset moved, or simply show that some time after one call was made another was made that used a different cell. It has to be bourne in mind that in rural areas the use of a particular cell may not mean the user is very close to that site, whereas in places like central London the logging of a call on a particular site invariably means the handset is very close by – perhaps within metres. Such evidence, coupled with evidence of calls made around certain key events, may provide the prosecution with compelling material that needs very thorough analysis by anyone defending in such a case.

Such evidence may, at first blush seem difficult to challenge. But cell-siting of a mobile phone can have an impact greater than its actual worth. The author was recently involved in a case where the prosecution cell site expert confirmed that a call made by my client was and picked on a certain cell mast, but the detail of the data showed it was picked up on a particular section of the mast – a particular azimuth. This meant that my client was likely to be one side of a busy west London Square when he made the call – and not the other, where his co-defendant was. That small detail was critical in putting the cell-site evidence in its proper perspective and ultimately led to the acquittal of my client who was facing very serious charges.

Conclusion

Telephone evidence can make or break a case. Mobile phones provide a very personal picture of a Defendant because they are such a large part of modern life for all of us. The challenges outlined here e.g. attribution, hearsay etc are not easy topics. There is often a dense amount of material to consider – more often in the unused material as opposed to the used evidence. As ever early preparation is the key if there is to be any hope of mounting any kind of challenge to this sort of evidence.

About the author

Jonathan Lennon KC is a Barrister specialising in serious/ complex criminal defence cases at Doughty Street Chambers, London. He has extensive experience in all aspects of financial and serious crime and the Proceeds of Crime Act 2002. He is ranked by the Legal 500 and Chambers & Ptnrs.

L500 2025; "Jonathan works tirelessly for clients and is completely on top of every matter he deals with. He has that rare quality of being able to being able to translate the most complex of issues to make sure that both the jury and the client are fully engaged in the proceedings."

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Landlords and Developers Must Act: Demands for Urgent Cladding Remediation in the Wake of the Second Grenfell Inquiry Report

Author, ***Bhavina Vasishta,*** *Associate Director – Architect*
Rimkus Consulting Group

In September 2024, the Grenfell Tower Inquiry published its highly anticipated Phase 2 report[1], marking an important moment in the ongoing quest for justice, and safety reforms, following the tragic fire in 2017. This report, and subsequent government recommendations, highlight the urgent need for landlords, and developers, to take immediate action to remediate unsafe cladding, and other fire safety defects, across their UK portfolios.

Key Findings and Recommendations

The Phase 2 report delves into the systemic failures that contributed to the Grenfell Tower disaster, highlighting the lapses in building regulations, fire safety protocols, and the responsibilities of various stakeholders. In response to this report, the government has accepted the majority of the inquiry's recommendations[2], and reiterated its commitment, to enforcing measures to accelerate the remediation process.

One of the most significant outcomes of the Phase 2 report is the clear message for landlords, and developers: they must take action. The government has made it clear that the remediation of unsafe cladding, and other fire safety defects, is a top priority, and building owners must act swiftly to ensure the safety of residents.

Government's Stance and Legislative Measures

The Building Safety Act 2022[3], along with subsequent legislative updates, provides a framework to hold developers accountable. This includes the introduction of the Responsible Actors Scheme (RAS)[4], which empowers the Secretary of State to block developers who fail to sign contracts to fix unsafe buildings.

The Remediation Acceleration Plan (RAP), published in December 2024, outlines the government's strategy to expedite the remediation of unsafe buildings. This plan addresses key barriers such as landlord reluctance, regulatory capacity constraints, and developer inconsistency.[5]

The government aims to ensure that all high-rise buildings with unsafe cladding are identified, and remediated, by the end of 2029. Furthermore, by the end of 2029, every building over 11 metres with unsafe cladding will either have been remediated, have a date for completion, or the landlords will be liable for severe penalties.[6] This is an ambitious target, in part due to the lengthy legal processes involved in identifying, and remediating, the necessary buildings. There may also be subsequent claims that landlords, and developers, wish to pursue in order to recover costs, further increasing the overall project duration.

Implications for Landlords and Developers

For landlords, and developers, the message is clear: action is required. The Phase 2 report, and government measures, leave no room for delay or complacency. Landlords, and developers, must conduct thorough assessments of their portfolios, prioritise the remediation of unsafe buildings, and ensure compliance with the latest safety standards.

Failure to act not only jeopardises the safety of residents, but also exposes landlords, and developers to significant legal, and financial, repercussions. The government has made it clear that it will not hesitate to take enforcement action against those who fail to meet their obligations.

Conclusion

The publication of the Grenfell Tower Inquiry Phase 2 report serves as a reminder of the consequences of neglecting fire safety. Landlords and developers should heed the calls to action, and take immediate steps, to remediate unsafe buildings across their UK portfolios. The safety of residents depends on it, and the time for action is now.

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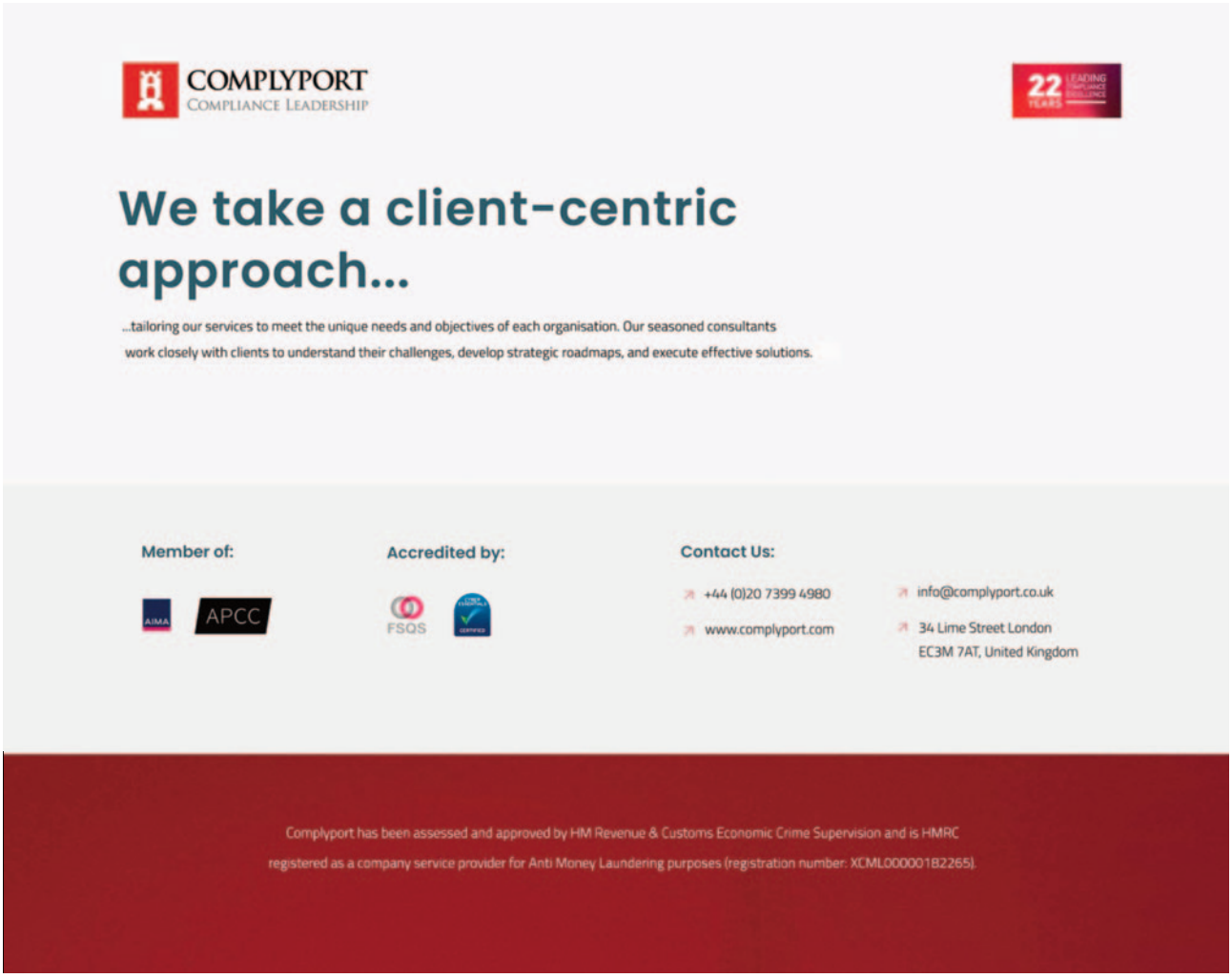

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High Court Rejects Split Trial in Superyacht Negligence Case

In a significant ruling for professional negligence litigators, earlier this year the High Court refused an application for a split trial in Tatiana Soroka v Payne Hicks Beach, a professional negligence claim arising from one of the UK's most high-profile divorce settlements.

Ms Soroka, who was awarded £453 million following the breakdown of her marriage to oligarch Farkhad Akhmedov, alleged that her former solicitors, Payne Hicks Beach, acted negligently in failing to advise her to pursue enforcement against the £150 million superyacht Luna. She contended that had she been advised correctly she would have enhanced her recovery under the financial remedy order.

Payne Hicks Beach denied the allegations, arguing there was:

i. no breach of duty;
ii. no duty of care was owed in the manner claimed; and
iii. no causative loss.

Request for a Split Trial Refused
Ms Soroka sought to divide the proceedings into two phases: first, to resolve issues of breach of duty; and second, to address causation and loss. Her legal team argued that a staged approach would streamline litigation and reduce costs. Master Kaye, sitting as a Deputy High Court Judge, refused the application.

The following issues were a factor in the judge's decision to refuse the application:

i. Fuzzy lines
Split trials carry "*dangers and unintended consequences*" due to the risk of an apparently bright line between issues being "*not so bright or perhaps a little bit fuzzy*". If the issues are not cleanly separated, there is a danger that some issues might end up falling down a gap between the two trials.

The starting point is assessing whether there is a "*sufficiently clear bright line between the issues*" to justify a split. Even if possible in principle, the judge must adopt a common-sense, pragmatic approach to decide whether a split trial is just and efficient.

ii. The dangers of overlap between the trial on liability and the trial on causation
The judge further asserted that overlap can lead to unintended consequences, satellite disputes and difficulties. Attempts to narrowly define trial one risked *"either leaving a gap or creating an overlap*" across breach, duty, and causation. There was no obvious means of avoiding such an overlap; all relevant material is needed at once to properly assess key issues. The judge expressed "*a real nagging doubt that the clear bright line was not clear or bright*", and was not persuaded by the proposed split in this matter.

iii. Timing and delay
Master Kaye noted that because the full trial could be heard by late 2026, and splitting would delay resolution until sometime in 2028, it was not in the interests of justice.

iv. ADR and settlement
In this case, the judgment confirmed that a split trial was highly unlikely to enhance the prospects of an early settlement and more likely to delay the time parties can consider settlement.

v. Issues with witness evidence
Master Kaye also held that witnesses already have limited recollection of the events in 2017. A split trial would require many witnesses to testify twice, which is unfair and would lead to "*risks inherent in witnesses giving evidence covering the same ground twice*". Repeating evidence after 10 years had the potential to affect reliability.

Furthermore, revisiting the same matters could offer witnesses "*a trial run*", giving rise to unfairness and inefficiency. The need for the same experts to attend trial twice and give overlapping evidence also weighed against a split.

vi. Costs
Splitting trials means additional time, and consequently costs. In this case, a cost-saving existed only if the Claimant lost at trial one, but "*no obvious substantial saving*" could be guaranteed. The judge held that this was not a claim where a resolution of breach and duty would lead to an obvious immediate window of opportunity to settle.

vii. Prejudice
Concern was raised that delays from a split trial would prejudice other court users, as two trials consume more resources and delay other cases. If different judges preside over each trial, any fuzziness in the first trial would cause inevitable complications in the second.

The judge also considered that *"it also seems to me to represent the right balance in terms of costs and benefit. It seems to me the reasonable and proportionate approach consistent with the overriding objective"*.

Shortly after judgment was given, Ms Soroka withdrew her claim.

Practical Implications
This decision is an interesting example of judicial reasoning around split trials in professional

negligence cases. It reaffirms that split trials will remain the exception. Courts will have to consider whether proposed divisions are workable, and whether the savings or efficiencies are real. Where breach, duty, causation and loss are heavily interlinked, a split trial is unlikely to be ordered.

The decision reinforces judicial reluctance to grant split trials without a compelling case management reason, serving as an important reminder that courts prioritise efficiency, fairness, and the overriding objective.

Further Information
If you have any questions regarding this blog, please contact Jemma Brimblecombe or Úna Campbell in our Dispute Resolution team.

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Whose Risk is it?

by Claire Kilpatrick - Managing Associate

Whose risk is it?
Construction contracts invariably include a number of technical and commercial contract documents in addition to the legal contract terms and conditions. But what happens when a potential conflict arises? This was considered in the recent case of *John Sisk and Son Limited v Capital & Centric (Rose) Limited* [2025] EWHC 594 (TCC) where the terms of an amended JCT D&B contract and two appended "clarifications" documents did not align. A dispute arose as to whether the risk of the existing structures (and their unsuitability) rested with the employer or the contractor.

Background
● On 20 May 2022 Capital & Centric (Rose) Limited (C&C) entered into a JCT D&B 2016 contract with John Sisk and Son Limited (Sisk) for the design and construction of substantial works at Weir Mill, Chestergate. The contract contained substantial amendments and included various other 'contract documents' appended to the JCT form.

● During the works, issues arose in connection with the suitability of the existing structure for which Sisk claimed extensions of time and additional costs. The parties disagreed over who was responsible for the risks associated with the existing structures on the site, including their ability to support and/or facilitate the proposed works.

● The dispute was referred to an adjudicator who found that "…the responsibility for ground conditions including the identification of the basements, structures, voids, compressed structural elements and obstructions under the existing West Mill was solely Sisk's risk". The upshot of this decision was that Sisk was unable to claim an extension of time and/or any additional costs it incurred as a result of this risk.

● Sisk subsequently brought proceedings in the TCC by way of a Part 8 claim for declaratory relief as to the proper construction of a clarification regarding the risk of the potential unsuitability of the existing structures at the site.

The contract
The contract included bespoke amendments at clauses 2.42.1 to 2.42.4, of a type which are commonly made to JCT D&B contracts. In summary, clauses 2.42.1 to 2.42.3 set out that:

● C&C gave no representation as to the condition of the site or existing structures, or the accuracy of any data or information it provided to Sisk;

● Sisk had the opportunity of inspecting the physical conditions of the site (including existing structures) and was deemed to have inspected and examined the site and satisfied itself as to risks or other circumstances affecting the works; and

● Sisk would not be entitled to any extension of time and/or additional payment for risks it did not or could not have foreseen which affected the works.

Therefore, according to these clauses, it seemed that Sisk would be responsible for all risks in relation to the site, including risks in the existing structures and any information provided by C&C being wrong. However, clause 2.42.4 stated that "this Clause 2.42 shall be subject to item 2 of the Clarifications".

The Clarifications were defined in the contract as the document titled "contract clarifications" and included in the Employer's Requirements. In a hard copy of the contract there was one such document included in the contract documents. However, the electronic version of the contract (which included a number of additional documents which were considered too large to be printed and included in the hard copy contract) included an additional document titled 'tender submission clarifications".

Item 2 of the clarifications document set out a clarification request from Sisk for "existing structures risk including ability to support/facilitate proposed works" to which the response was "The Employer is to insure the existing buildings/works. Employer also to obtain a warranty from Arup with regard to the suitability of the proposed works. Employer Risk."

The tender submissions clarifications document included a clarification request from Sisk as follows: "Existing Structures Risk sits with the Employer including insurance"; Sisk's additional comments reads: "Employer to warrant that the structural condition of the existing fabric is suitable to facilitate the new works"; Sisk's pricing confirmation is ticked "Unable to price". C&C's comments under F, concealed unless opened as explained above, reads: "Not accepted. PCSA[5] period has been for Sisk to satisfy themselves on exactly these issues. We will categorically not accept a blanket exclusion on existing structures". The entry under "Position Agreed/Discussed in Meeting on 22.03.2022" reads: "Confirmed in the meeting that this is to clarify the employer is to insure the buildings in line with JCT option C".

The arguments
In summary, Sisk argued that:
● The meaning of the clarifications document was that C&C took the risk of any unsuitability of the existing structures and Sisk was entitled to claim extensions of time and/or additional costs which arose as a result of that risk; and

● The tender submissions clarifications "merely records the initial qualification and some history of negotiations" but did not set out the final contract position which was included in the clarifications document.

C&C argued that the tender submissions clarifications was a contract document and the position recorded in the tender submissions clarification was agreed, did not change and was consistent with the terms of clause 2.42. C&C also provided evidence of the pre-contractual negotiations to support its position that it was agreed that Sisk was to take the risk of the existing structures.

What did the court decide?
The court decided that on a proper interpretation of the contract, the risk in the unsuitability of the existing structures rested solely with C&C, as the employer.

Reasons for the court's decision included the following:

- The contract was clear that clause 2.42, while expressly making Sisk liable for risk in the existing buildings, was subject to item 2 of the clarifications document. The clarifications document stated that the "existing structures risk" was an "Employer Risk".
- In the absence of contractual definitions, "Employer Risk" and "existing structures risk" were to have their ordinary meanings, and in particular, the court found that the inclusion of the words "Employer Risk" in the relevant answer to the clarification query from Sisk meant that C&C was expressly agreeing to take the risk associated with the suitability of the existing structures.
- The pre-contract negotiations were inadmissible and did not fall within any exception to the rule against admitting such evidence. The court also noted that the contract included an "entire agreement" clause.
- The tender submissions clarifications document was a valid contract document. But it only recorded that specific agreement had been reached in relation to insurance (which was consistent with the rest of the contract). It did not record that Sisk had accepted the existing structures risk.

Key takeaways
This case is a stark reminder to parties to check that they are happy with all of the contract documents, not just the legal terms and conditions. It is also a warning to resist the temptation to append to the contract all documents and correspondence that may have passed between the parties, particularly at an early stage of the negotiations.

- Parties should check for any inconsistencies between contract documents, including between the contract terms and any other technical or commercial documents to be appended to the contract.
- Be wary of including tender submission documents or minutes of meetings as part of the contract documents, particularly where contract negotiations have continued after that date.
- Pre-contract negotiations are unlikely to be admissible in interpreting the contract and/or as evidence of the parties' intentions, except in very limited circumstances.

In short, parties should make sure that the final contract accurately reflects what has been agreed, not just in the terms and conditions, but across all contract documents. And don't be tempted to append other ancillary documents "just in case"…

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