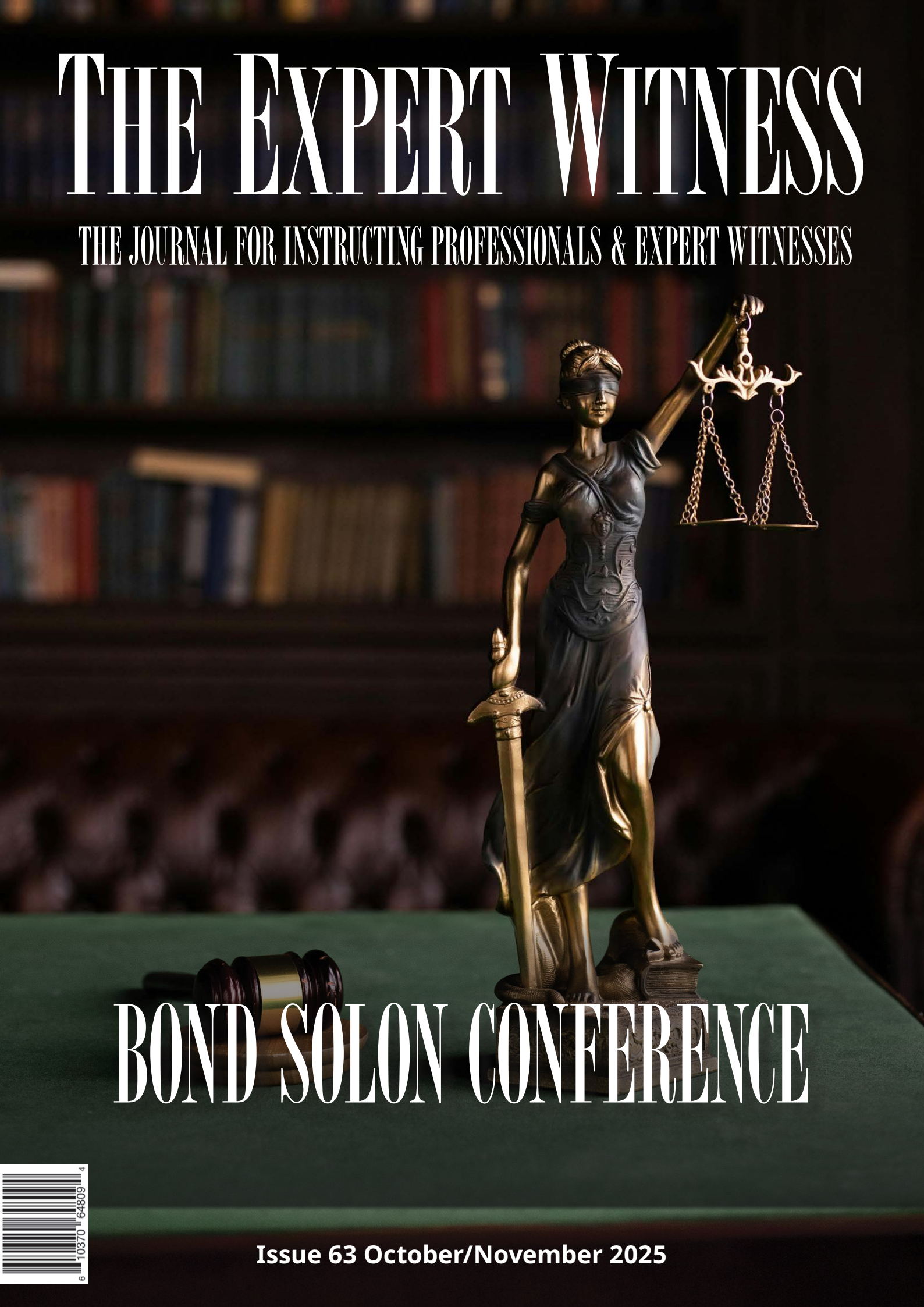
The Expert Witness

THE JOURNAL FOR INSTRUCTING PROFESSIONALS & EXPERT WITNESSES



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Issue 63 October/November 2025

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Welcome to the Expert Witness Journal

Hello and welcome to the 63rd edition of the Expert Witness Journal.

Expert Witness are proud to have been the lead sponsor of the Bond Solon Expert Witness Conference for over 13 years, this year taking place on Friday 7th November at Church House, Westminster. We always look forward to meeting experts face to face, representing over 80 areas of expertise. We appreciate all feedback and gather a valuable insight into the thoughts and developments of experts. Please pop by our stand and say hello.

It is also valuable to attend some of the specialist sessions for Family, Criminal, Commercial or Medico-Legal expert witnesses which offers updates, practical guidance and a chance to discuss the topics that specifically relate to your area.

In this issue, we feature many articles that are relevant to most experts including; Instructing an Expert to Produce a Report? by Bond Solon, Finding the ideal Dental Expert for your next Case by Prof. Paul Tipton, Unseen Danger: How Forensic Collision analysis helped demonstrate the limits of driver awareness in a motorway collision case and Crisis in Custody: The Unfolding Human Rights Emergency in UK Prisons.

Topics also include: Personal Injury, Capacity assessments, Sensory Integration, AI and Crypto Fraud.

Our next issue will be published in December 2025, focussing on all issues surrounding medico-legal reporting. If you would be interested in submitting an article, please feel free to get in touch.

Nigel Hector
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Dr Sam Bonner

MBChB, MRCOG, FRCOG, DFSRH
Consultant Obstetrician, Clinical Governance Lead, Maternity Clinical Advisor, Maternity & Newborn Safety Investigations (MNSI) led by Care Quality Commission (CQC)

Dr Samantha Bonner is a Consultant Obstetrician who has a specialist interest in high risk antenatal, intrapartum and postnatal care, maternal medicine and clinical governance.

Dr Bonner qualified in 2007 from the University of Sheffield and trained in the North West completing specialist training in Advanced Labour Ward practice, maternal medicine and labour ward lead. Dr Bonner was appointed as a full time Consultant Obstetrician in 2016

Dr Bonner has formal expert witness accreditation through Cardiff University Bond Solon Expert Witness certification in Civil law (Excellence in report writing, Courtroom skills, cross examination and civil law theory). She is instructed by Claimants, Defendants and in Coronial investigations. She currently prepares approximately 50 court compliant medical legal reports per year (clinical negligence, breach of duty and personal injury) with a Claimant – Defendant ratio of 60-40.

Dr Bonner has experience in cases relating to:

- High risk antenatal care including missed or delayed diagnosis and management
- High risk Intrapartum care
- Postnatal care
- Hypoxic Ischemic Encephalopathy
- Early neonatal deaths
- Maternal medicine (congenital and acquired heart disease in pregnancy)
- Abnormal Cardiotocography (CTG) assessment and management
- Delay in diagnosis of acute intrapartum events (placental abruption, uterine rupture)
- Failure to expedite birth following abnormal CTG, abnormal FBS and malpresentation (breech)
- Delay in delivery
- Failure to discuss risks (Large for gestational age contributing to fetal and maternal trauma, mode of birth, malpresentation, high maternal BMI)
- Maternal birth injury (Obstetric anal sphincter injury, post-partum haemorrhage, traumatic births)
- Fetal trauma relating to delivery
- Mismanagement of DVT / PE / Varicose veins (antenatal / intrapartum/ postnatal)

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Miss Kenga Sivarajah
Expert Obstetrician

MBBS BSc (Hons) MRCOG MRCP (UK) PGCert (MedEd)

Ms Kenga Sivarajah is an Expert Obstetrician based in London.

Currently a Consultant Obstetrician at King's College Hospital (KCH) and gained by completion of training in 2018. Ms Sivarajah is the Labour ward lead at KCH, lead for Perinatal Mental health and runs the Cardiology, Respiratory and Liver pregnancy service.

Ms Sivarajah has an excellent knowledge of Obstetrics, with special interest in women with pregnant women with medical complications and the complex journey that they often face before, during and after their pregnancy.

With a wealth of experience in caring for these women at both tertiary and district general hospital level. In her experience, thorough counselling and planning prior to pregnancy remains an essential component of maternal medicine care. Ms Sivarajah is on the PSIRF panel for risk incidents in maternity at KCH She has extensive experience of root cause analysis of patient safety incident in the maternity unit as well as preparing serious untoward incident reports. Ms Sivarajah has worked with TMELP since September 2021. She assists in obstetric legal cases by providing by expert Obstetric opinion and has provided her expertise on over 250 cases.She has completed the Capsticks diploma in risk and claims management with distinction.

Ms Sivarajah is very familiar with the legal framework applicable for women who lack capacity to make decisions regarding their antenatal, intrapartum and postnatal care. She has led and assisted on 10 such cases; one of which was extremely complex and a landmark case in the Court of Protection. Subsequently awarded a King's Star award for her work. She is an expert in co-ordinating care of these women via an extensive MDT, making best interest decisions and submitting detailed care plans to the Court of Protection. In her current role, she works closely with the safeguarding team ensuring that care for the unborn child and existing children is also maintained. She is currently part of a working group to formulate a framework for assessing mental capacity in patients.

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Dr Gillian Stephen
Consultant Obstetrician

BSc, MBChB, MRCOG

Dr Gillian Stephen is a Consultant Obstetrician who has a special interest in multiple pregnancies, perinatal mental health and fetal medicine.

Dr Stephen qualified from the University of Manchester Medical School in 2003 after completing a BSc in Medical Science at the University of St Andrews. She trained in the North West and commenced Maternal and Fetal Medicine subspecialty training at Saint Mary's Hospital in 2011.

She is instructed by Claimants and Defendants in clinical negligence and personal injury cases. Dr Stephen is happy to opine on causation, condition and prognosis, breach of duty and liability.

Dr Stephen has experience in cases relating to:

- Intrapartum care
- Delay in diagnosis
- Fetal medicine
- Multiple pregnancy management
- Maternal mental health
- High risk antenatal care
- Early neonatal deaths
- Hypoxic ischaemic encephalopathy (HIE)
- Abnormal CTG assessment
- Mismanagement of DVT/P
- Failure to discuss risks (foetal macrosomia (large baby))
- Trauma relating to delivery (mother and baby)
- Traumatic births
- Failure to expedite delivery following abnormal red flags:
  - Abnormal CTG
  - Abnormal FBS
  - Breech/footing deliveries

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Area of Work: North West and Nationwide

Ms Emily Brace
Registered Midwife

MSc, BSc RM, Dip RN

Ms. Emily Brace works nationally across England supporting NHS Organisations from a maternity safety perspective.

She graduated as an Adult Registered Nurse in 2005, before furthering her professional qualifications in 2009 as a Registered Midwife.

Ms Brace has held a variety of Consultant & Specialist Midwifery Roles across busy Tertiary units in both England & Wales, this has included a variety of clinical positions as well as national improvement work, and national system wide change with a perinatal safety lens.

Ms Braces' expertise includes senior expert leadership and clinical advice for trusts across England that have been entered onto a safety support programme or have required upstream diagnostic support.

Her expertise also includes, but not limited to:

- Diagnostic reviews of maternity services
- Thematic reviews of clinical incidents and SMART action development
- Gap analysis of clinical pathways against national best practice
- Support for Trusts re: management of clinical incidents
- Governance Training & Audit deep dives
- Quality Improvement initiatives against best practice
- Strategic advice & support
- Leadership capacity and capability reviews
- Cultural service reviews
- System wide learning

Ms Brace has undertaken the Bond Solon Cardiff University Assessment – Civil Expert Certificate (CUBS Assessment) in 2023. She is widely published and has been recognised for her excellence.

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Contents

Some of the highlights of this issue

Mr Andrew Morrell
Consultant Ophthalmologist

BSc FRCS FRCSed FRCophth

Mr Andrew Morrell is a Consultant Ophthalmologist. He was appointed as a consultant in Leeds in 1992. With a particular interest in anterior segment surgery including corneal and cataract surgery with premium monofocal, toric, extended depth of focus and multifocal lens implants.

Following his appointment as an NHS consultant with a subspecialty interest in corneal and refractive surgery Mr Morrell set up a regional excimer laser service at St James's University Hospital in 1993.

Special interests include corneal surgery and treatment for keratoconus with keraring and cross linking. Undertaking laser phototherapeutic keratectomy for recurrent corneal erosion syndrome. Since 1993 he has specialised in refractive surgery including refractive lens surgery as well as excimer and femtosecond laser correction of spectacle error with SMILE, LASIK, LASEK and wavefront guided treatments.

Areas covered include:
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Laser eye treatment (yag laser capsulotomy)
Refractive lens exchange surgery
Corneal and external eye disease Lacrimal disorders

Mr Morrell has provided medical reports on request since 1996. On average he prepares 100 written reports per annum covering a broad range of ophthalmic cases. The case split over the last year was 75% Defendant, 25% Claimant. He has undertook specialist Expert Witness training passing the Cardiff University Bond Solon Civil Expert in June 2006.

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Dr Nav Khaira

Registered Specialist in Periodontics & Oral Surgery (General Dental Council, U.K.)

FDS RCSEd, LLM(U.Card), MSc. (Hons), MClinDent(U.Lond), BDS(U.Lond), MRDRCS(Eng.), MFDSRCPS (Glasg.), MSurgDent RCS (Eng.) LDSRCS (Eng.)

Dr. Nav Khaira is a specialist in Periodontics and Oral Surgery and Expert Witness based in Guernsey. He received specialist training at Guys, King's and St. Thomas' Dental Institute and was one of the first in the U.K. to complete his Certificate of Specialist Training. He is a Fellow of the Royal College of Surgeons, Edinburgh and clinical panel member of the Dental Complaints Service, GDC. In addition to active clinical commitments, he takes instruction for dento-legal work. He has a LLM in Legal Aspects of Medical Practice from Cardiff Law School complete in 2006.

Dr Khaira is experienced in all aspects of general dentistry, restorative dentistry, implantology and cosmetic dentistry. In his role as an expert witness, he is often instructed for cases concerning Negligence related to breach of duty and causation within his fields of speciality but will accept cases in both Personal Injury and Negligence in general dentistry.

Dr Khaira has undertaken specific expert witness training through Bond Solon and is familiar with the Civil Procedure Rules pt 35 and his duty to the Court.

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Rae Denman

Medical Tattoo Expert Witness
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Rae Denman is a highly experienced Medical Tattooist with over 13 years of expertise in scar camouflage and facial feature redefinition. Her advanced scar re-pigmentation techniques restore natural skin tones on the face, torso, and limbs after trauma or surgery. She specialises in realistic hair-stroke techniques for eyebrow restoration, subtle shading for eye definition, and lip symmetry correction following scarring or skin grafts. Rae's expertise attracts international patients seeking specialist care in the UK.

Rae has completed Inspire MediLaw's Expert Witness Training, accredited by the Royal College of Surgeons, and Bond Solon Report Writing Training, ensuring excellence in medico-legal reporting. She accepts instructions for clinical negligence cases as well as condition and prognosis reports.

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London
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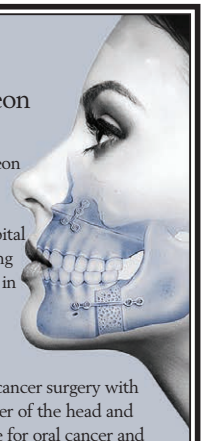
London, W1G 7LH

Mr Ajay Wilson
Consultant Oral and Maxillofacial Surgeon

BDS MFDS MBChB MRCS FRCS



Mr Ajay Wilson is a Consultant Oral and Maxillofacial Surgeon at Sunderland Royal Hospital. He completed medical and dental degrees, in addition to dental and surgical fellowships. Qualifying in dentistry in 2003 and spent three years in hospital practice in Manchester. Then completed basic surgical training in medicine and surgery and took up higher surgical training in OMFS in the Northwest of England. He is a Core Member Head and Neck cancer MDT and Extended Member Skin cancer MDT.

Mr Wilsons' specialist practice is oral cancer, head and neck cancer surgery with micro vascular free tissue reconstruction. He is a core member of the head and neck MDT and also offer sentinel lymph node biopsy service for oral cancer and head and neck melanoma.

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Mr Wilson provides high-quality screening, advisory and full CPR Part 35 compliant reports. He currently accepts more than 50 Oral & Maxillofacial instructions per year. Mr Wilson can act on behalf of either Claimant or Defendant or as a Single Joint Expert with his current split being Claimant 60% - Defence 30% - Single Joint Expert 10%.

Mr Wilson is pleased to consider medical reports across the full spectrum of Oral and Maxillofacial Surgery. Terms & conditions, including costs, and time frames are available from my secretary.

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Nuffield Health Hospital, Clayton Rd, Jesmond, Newcastle upon Tyne, NE2 1JP

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11th December 2025 to 12th December 2025

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One day, virtual classroom

4th December 2025

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One day, virtual classroom

27th November 2025

Discussions Between Experts
One day, virtual classroom

21st November 2025

Personal Injury Essentials
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11th November 2025

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Qualification: Can count towards the University of Aberdeen Bond Solon Expert Witness Certificate – please call for details on **020 7549 2549** or email **expertwitness@bondsolon.com**

Instructing An Expert To Produce A Report? This Recent High Court Case Highlights The Importance Of Giving Them All The Relevant Information

High Court judge renders expert's report "unreliable" because it had been produced without sight of all the relevant evidence - a cautionary tale for both instructing solicitors and expert witnesses.

1. Introduction
In Rebecca Hepworth v Dr Amanda Coates [2025] EWHC 1907 (KB), the claimant brought an action in clinical negligence against her GP (the defendant).

She alleged that the defendant failed to diagnose red flag symptoms of cauda equina syndrome at a face-to-face consultation on 5 November 2018.

The case failed on the issue of liability, with the claimant's expert evidence being a particular cause of concern.

2. What were the main issues with the expert's report?
The main issue with the expert's report was that he had prepared it without having consulted several pieces of evidence in the case, which were key to the issues he addressed in his report. This included not only the reports of other experts in the case but also the claimant's witness statement.

The claimant's expert also attended a meeting with the defendant's expert without having seen all the evidence in the case.

3. How did this issue affect the claimant expert's overall evidence?
This issue led to serious discrepancies between the expert's evidence on the claimant's health and the claimant's own evidence in both of her witness statements.

Judge Charman concluded that the claimant's expert "did not take, or did not record, an accurate history of [the claimant's] condition". As his findings were based on inaccurate history of the claimant's condition, his report was "likely to be unreliable".

4. What was the issue with the expert's oral evidence?
In addition to the issues with his report, the judgment also highlighted issues with the expert's oral evidence.

"During his cross examination, [the expert] referred to having seen in the medical notes which he had looked at recently, a note of [the claimant] falling down the stairs and attending hospital where a head scan was carried out. A break was taken to give the expert time to find the relevant note. After the break, he referred to a note of another fall which was very clearly not the one he referred to as it did not have the features he had previously described. He was given a further opportunity to find the note overnight. Next morning, he identified a note which referred to an MRI head scan. However, the scan related to reported sinus issues and not a fall."

- Judge Charman

Whilst Judge Charman was satisfied that the expert did not deliberately set out to mislead the court, his conduct did "cast serious doubt on the reliability of his oral evidence generally". Instead of acknowledging or admitting he had made a mistake,

"in order to try to save face, [he] sought to justify it" by repeatedly trying to find evidence.

5. What can instructing solicitors and expert witnesses learn from this case?

There is an onus on experts to ensure they have the complete picture before finalising their report. As Judge Charman stated, "it was not [the expert's] fault if he was not provided with the witness statements and other reports, but that he did not ask to see them before finalising his report is, in my judgment, a serious omission."

However, as this case highlights, the main responsibility lies with instructing solicitors to ensure that their expert access to all relevant information before producing their report, and that the final report is based on that information. Instructing solicitors should pay particular attention to this given the consequences of an "unreliable" report – that it has the potential to materially impact the outcome of a client's case.

Article provided by Bond Solon
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From Frustration to Efficiency: An improved roadmap for Expert Witness Reports

by Bindweep Kaur, Medical Expert Witness Alliance (MEWA) LLP
www.mewa.org.uk

The legal proceedings within the UK rely heavily on expert witness reports. The experts play a pivotal role in providing their specialist opinion on complex matters to aid the Judge and the Jury with their decision making process. They also provide valuable insights to barristers and solicitors regarding their cases.

However, the experts are often faced with challenges whilst providing their expert witness reports. There are various factors that play a role in frustrating the experts and some simple measures can effectively allay these concerns and help in an efficient delivery of expert witness reports.

1. Documents Submission
The documents provided to an expert form the basis of their opinion and their expert witness report. Hence, getting across the correct documents, in correct formats and in a timely manner lay the foundations of an effective engagement process between experts and instructing parties.

Depending on the complexity of the case, various different type of documents may be required to be reviewed in order to answer the questions laid out in the Letter of Instructions (LOI). Hence, it's pertinent that the documents provided are relevant and all of them need to be reviewed by the expert. Sometimes, the experts come across scenarios where the relevant documents are missing or there are duplicate documents in the bundle. Both of these scenarios can lead to difficulties. Missing documents leads to confusion, time spent in ensuring that the documents are actually missing, time spent in liaising with the instructing party to obtain those documents, undue pressure on the experts to still submit their report in the timeframes previously agreed and in some cases, it can lead to delays in report submission. Similarly, duplicate documents leads to increased number of documents for the expert to review which can lead to funding concerns being raised by the experts, wasted time in identifying the relevant documents from a heap of duplicate documents as well as mistrust in the instructing party's efficiency in managing the expert witness process.

A very common source of confusion for the experts is how the documents are named. Different organisations and instructing parties name their documents in different ways. And these nomenclatures can mean different things to the experts. Therefore, when experts receive the documents, they expect and assume the documents to provide them a certain kind of information but sometimes, the nomenclature is misleading and therefore those documents do not provide them the information they thought would be available in those documents. This leads to wasted time for the expert to review these documents and then to obtain the correct documents from the instructing parties.

In some situations, the process of delivery of documents can be streamlined to ensure that the experts have everything with them in an organised manner. Receiving documents in a piecemeal manner means that the experts have to review the documents several times which lead to extra time being spent on cases and can eventually lead to funding concerns being raised. Depending on the speciality of the case, sometimes documents are sent via links from NHS organisations or other healthcare providers. However, the experts are not granted access to these links till the experts tries and fails to open these links. This leads to frustration and wasted time for the experts.

Furthermore, some specialities require imaging to be reviewed and these need to be sent to the expert in a specified format. Sometimes, despite repeated efforts, it takes a huge amount of time for the instructing parties to understand what's required, how to obtain those documents/ imaging and how to provide these to the experts in the correct formats. Despite the time taken in arranging these documents/ imaging, there is an expectation on the expert to complete the report in the previously agreed timeframes, which seems unreasonable and adds to the disappointment of experts with the expert witness process.

It is common practice for the experts to base their fees on the number of documents that need to be reviewed, in addition to the complexities of the

case. The funding is agreed on the parameters presented at the outset of the case. However, as the case progresses, the experts receive documents in a piecemeal manner which amount to the number of documents to be a lot higher than previously quoted for. The expert's extra time taken in reviewing the duplicate documents, requesting missing documents, trying to obtain access to the links provided is not considered. And any requests from the experts for extra funding due to the circumstances of the case are frowned upon. This leaves the expert frustrated, disappointed and not willing to partake in the process of providing expert witness reports.

2.Letter of Instruction (LOI)
The LOI is one of the most important document as it needs to provide clear instructions to the expert regarding the questions that need to be answered. The experts base their report on the questions asked within the LOI. However, it is not uncommon that there are ambiguities found in the LOI, assumptions made by the instructing parties which are not mentioned in the LOI and assumptions made by the expert based on the LOI.

On some occasions, the instructing parties do not include all the questions within the LOI and criticise the report for being incomplete. If the experts ask for more funding to answer the new questions asked, it's not appreciated by the instructing party.

These situations lead to confusion, complaints and mistrust in the whole process of providing and obtaining expert witness reports. The instructing parties challenge the opinion provided and the experts defend the reports based on their understanding of the LOI.

3.In-person assessment and court attendances
On a number of occasions, based on the particular circumstances of a case, the experts are required to assess the clients. And similarly, court attendances are needed based on the requirements of the case. Since the last few years, the frequency of remote assessments and remote court attendances has increased manifold. However, some instructing parties insist on an in-person assessment as well as in-person court attendance. Experts are best placed to determine whether a remote assessment is possible for any case or an in-person assessment is required. However, the instructing parties insist on in -person assessment despite an expert's decision that a remote assessment will suffice. An in-person assessment incurs more cost and more time spent on travelling for the expert or the client, when it is not necessary.

Similarly, court attendances can now be arranged remotely. A number of courts have now moved from in-person court attendances to remote attendances because these tend to cost less, utilise less time for the expert as the experts don't need to travel which means they don't need to drop their full day from their day-to-day jobs and are more efficient. Despite this, some instructing parties insist on an in-person court attendance which some experts don't want to undertake.

4.Communication
Efficient and timely communication is a key aspect of the relationship between the expert and the instructing party. After receiving the CV and quotes, the instructing parties sometimes takes months in coming back to the experts to let them know whether they would like to instruct them or not. This means that the expert's diaries are clogged up, they can't accept or decline other instructions and quite often find themselves in an awkward situation.
During the course of preparing an expert witness report, the experts may have questions that they need to ask the instructing party. Sometimes, a response to these questions takes weeks and the expert can't progress with their report. However, the expert is still expected to complete the report as per the original agreed deadline.

Conclusion
Experts are a valuable asset and the English justice system rely heavily on them to provide their expert opinions. Some simple measures can help reduce the inefficiencies and frustrations and improve the experience of obtaining expert witness reports. An efficient document submission process where all the relevant documents are sent to the experts altogether in a timely manner, with correct nomenclature, in correct format as well as with correct links and passwords will make the process efficient for the experts. An effective timely engagement between solicitors and experts will help experts progress cases efficiently.

In addition, detailed and clear instructions in an LOI will help reduce risks of assumptions which will massively help to obtain comprehensive expert witness reports.

The above changes can help to streamline the process and thereby increase the confidence of all parties involved in obtaining and providing expert witness reports.

RONALD A MILLER

MBBS MRCS LRCP ECFMG MS FRCS FRGS

CONSULTANT UROLOGICAL SURGEON/UROLOGIST

I have more than 30 years of consultant urological experience having been Head of Department at The Whittington Hospital, Honorary Senior Lecturer at the Institute of Urology, University College and Royal Free Hospitals. I now work privately.

I am a recognised expert in endoscopic renal, bladder and prostate surgery with more than 250 publications. I have specialist experience in gynaecological injuries, cauda equina cases, and urological cancer management (previously Chair of NLCN (urology) responsible for cancer standards). I regularly report on vasectomies, circumcision, torsion, and general urology cases.

I undertake 100 cases per year; 10% single expert, 20% defendant, and 70% claimant work. I am fully trained in medico-legal work, and was voted Urology Expert Witness of the Year 2022 and 2023. Terms and conditions and my CV can be viewed on my website www.ronaldmiller.com I receive instructions from most of the major medico-legal litigators in the United Kingdom and Southern Ireland both claimant and defendant.

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Mr Stephen Keoghane

Consultant Urological Surgeon MBBS MS FRCS (Urol)

- I am an NHS consultant with over 22 years experience in urology.
- Having qualified from the Middlesex Hospital Medical School in 1989, my first job as a junior doctor was in the urology department at the Middlesex Hospital - at the time one of the premier units in the world. My training in surgery was broad, with 2 years spent in clinical research in Oxford and 2 years in radiology. The latter allows me to offer what I believe to be a unique insight into the radiological aspects of medico-legal cases.
- I completed a formal endo-urology fellowship, which included time in the US training in complex surgery and have published widely in the international scientific literature, and continue to write feature articles for the urology press.
- I served as a medical officer in the Army Reserve (AR) for 22 years. I was promoted to lieutenant colonel at a young age and have experience as an adviser to the MOD on urological conditions. Having been selected for higher training at the Army Staff College, I passed out in the top third of all AR officers. My clinical experience includes the treatment of blast injury and ballistic trauma in Afghanistan. Assessing the impact of illness on occupation was an inherent part of my time in the British Army Reserve.
- My surgical and medico-legal practice covers both core and sub-specialist endo-urology, acting for both claimant and defendant in the UK and Ireland.
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‘Think Kidneys’ in all your clinical negligence cases

by Adnan Sharif

Kidney problems are central in many medical negligence cases because they are both common and highly preventable. The kidneys are vulnerable to harm from dehydration, infection, surgery, and medications, yet their function can be easily tracked with standard blood tests and urine measurements. This combination makes kidney-related complications a clear marker of whether proper care was delivered.

Why Kidney Problems Are So Important to Pick Up in Negligence Cases

1. They Are Common in Healthcare Settings
Acute kidney injury (AKI) occurs in up to one in five hospitalised patients, and chronic kidney disease (CKD) affects millions of people in the United Kingdom. Their frequency means they often arise in negligence claims, particularly after hospital admissions, surgeries, or critical illness – either in isolation or in combination with other medical illness or surgery.

2. They Are Often Preventable
Many kidney complications can be avoided with basic steps: checking creatinine levels, monitoring urine output, adjusting drug doses, and ensuring proper hydration. There are many national and international guidelines, including NICE recommendations, for measures to prevent AKI. Despite these recommendations, AKI rates are high. When these preventative steps are missed, the resulting harm may reflect a breach of duty.

3. They Have Clear Diagnostic Markers
Unlike some conditions, kidney function is measurable and objective. Rising creatinine and/or falling eGFR values provide a timeline that can be analysed to see if clinicians acted promptly or negligently. These are routine blood tests and will be available for patients in primary care or hospital settings.

4. They Lead to Serious Consequences
Failure to detect kidney problems can cause permanent renal failure, dialysis dependence and/or death. Advanced kidney disease or kidney failure has a major negative impact on quality of life and survival. These poor outcomes carry significant damages, making them high-stakes issues in litigation.

5. They Are Easily Linked to Standards of Care
As highlighted above, national and international guidelines (such as NICE or KDIGO respectively) set clear expectations for monitoring and managing at-risk patients. This makes it easier to establish whether care fell below an acceptable standard.

The Importance of Kidney-Related Complications in Medical Negligence Cases
Kidney-related complications are increasingly prominent in medical negligence litigation because kidneys have an important role to play in wellbeing and they can suffer from both acute illness and/or chronic health issues. The kidneys play a vital role in filtering toxins, regulating blood pressure, and maintaining fluid balance. This makes them highly vulnerable to harm from delayed diagnoses, medication errors, and inadequate monitoring. Because kidney function is measurable with objective markers such as serum creatinine, eGFR, and urine output, these cases are particularly well suited to legal scrutiny. Below are the most common kidney problems encountered in negligence claims.

1. Acute Kidney Injury (AKI)
- **Description:** A sudden decline in kidney function, usually over hours to days.
- **Causes in negligence cases:**
  - Sepsis, poor hydration, inapprorpiate medication, major surgery etc.
  - Failure to recognize reduced urine output.
  - Delayed action on rising creatinine levels.
  - Inappropriate or continued use of nephrotoxic drugs (e.g., NSAIDs, aminoglycosides, IV contrast) without monitoring.
  - Poor fluid management (either underhydration or fluid overload).
- **Why it matters legally:**
  - AKI is often preventable with proper monitoring and early intervention.
  - Courts can evaluate whether standard guidelines (e.g., KDIGO, NICE) were followed.
  - Missed AKI can progress to chronic kidney disease or dialysis dependence, leading to high compensation claims.

2. Chronic Kidney Disease (CKD) and Its Progression

- **Description:** Gradual, long-term decline in kidney function that can lead to end-stage renal disease.
- **Causes in negligence cases:**
  - Delayed diagnosis of hypertension or diabetes, the leading causes of CKD.
  - Failure to monitor kidney function in patients with known risk factors.
  - Inadequate follow-up or specialist referral when early signs of CKD appear.
- **Why it matters legally:**
  - Missed opportunities to slow CKD progression through medication, blood pressure control, or lifestyle interventions can be grounds for negligence.
  - Failure to diagnose CKD early can result in avoidable dialysis, transplantation, or premature death.

3. Drug-Induced Nephrotoxicity

- **Description:** Kidney damage caused by medications or substances.
- **Common culprits:** NSAIDs, aminoglycosides, chemotherapy agents, lithium, and IV contrast dye.
- **Causes in negligence cases:**
  - Prescribing nephrotoxic drugs without monitoring kidney function.
  - Continuing such drugs despite clear warning signs of renal impairment.
  - Failure to adjust dosages in patients with impaired renal function.
- **Why it matters legally:**
  - There are well-established monitoring standards (e.g., baseline renal testing before contrast scans, dose adjustment in renal impairment).
  - Negligence claims often hinge on whether clinicians failed to adhere to these standards.

4. Obstructive Uropathy (Blocked Kidneys)

- **Description:** Blockage of urine flow, which can cause kidney damage if untreated.
- **Causes in negligence cases:**
  - Failure to promptly investigate symptoms such as flank pain, hematuria, or anuria.
  - Delayed imaging (e.g., ultrasound, CT scan) to detect stones, tumors, or enlarged prostate.
  - Delayed urological intervention to relieve obstruction.
- **Why it matters legally:**
  - Kidney damage from obstruction is usually preventable with timely intervention.
  - Courts assess whether delays in diagnosis or intervention were unreasonable.

5. End-Stage Renal Disease (ESRD) and Dialysis Complications

- **Description:** Complete or near-complete kidney failure requiring dialysis or transplant.
- **Causes in negligence cases:**
  - Failure to manage earlier stages of CKD or AKI.
  - Poor management of dialysis access (e.g., infections, clotted fistulas due to negligence).
  - Inadequate monitoring during dialysis sessions, leading to electrolyte imbalances or hypotension.
- **Why it matters legally:**
  - ESRD represents a catastrophic, life-altering outcome for patients.
  - Negligence claims often involve high compensation for ongoing care, disability, and loss of quality of life.

6. Renal Transplant Complications

- **Description:** Kidney transplant failure due to rejection, infection, or surgical complications.
- **Causes in negligence cases:**
  - Failure to recognize early signs of rejection.
  - Medication errors involving immunosuppressive drugs.
  - Surgical or post-operative mismanagement.
- **Why it matters legally:**
  - A failed transplant is devastating and usually avoidable with proper care.
  - Negligence cases often focus on whether standard protocols for immunosuppression and monitoring were followed.

7. Hypertensive and Diabetic Nephropathy Mismanagement

- **Description:** Progressive kidney damage caused by uncontrolled high blood pressure or diabetes.
- **Causes in negligence cases:**
  - Failure to diagnose or adequately control blood pressure or blood glucose.
  - Inadequate monitoring of kidney function in long-term diabetic or hypertensive patients.
- **Why it matters legally:**
  - These are among the most preventable causes of kidney failure.
  - Negligence claims may argue that earlier interventions could have slowed or prevented progression to CKD or ESRD.

Conclusion

Kidney-related negligence claims often revolve around missed opportunities: opportunities to monitor, diagnose, intervene, or refer in time. The kidneys provide measurable markers (creatinine, eGFR, urine output), and there are well-established clinical guidelines for their protection. When these are ignored, preventable harm can occur—making kidney problems central to medical negligence litigation.

For legal practitioners, the most common issues include acute kidney injury, progression of chronic kidney disease, drug-induced nephrotoxicity, obstructive uropathy, dialysis errors, transplant failures, and mismanagement of diabetes or hypertension. Each carries serious, often life-altering consequences, and each offers a clear pathway for establishing whether negligence occurred.

Kidney-related complications stand out in medical negligence cases because they are common, measurable, and often preventable. Their consequences are profound, and expert nephrology input is indispensable in assessing liability and damages. For both plaintiffs and defence teams, careful evaluation of kidney function and related care is a critical step in achieving just outcomes.

Mark Lawless v Adrian Keatley: A "common sense" approach to employer's liability

By Sorcha Ward - www.dacbeachcroft.com

Overview
The High Court (Twomey J) delivered judgment in the case of *Lawless v Keatley* on the 26th June 2025. The case concerns an alleged incident on an employer's premises on the 9th March 2016 wherein the Plaintiff suffered an injury to his back while emptying a wheelbarrow on a upward incline.

Twomey J considered whether incidents such as that which befell the Plaintiff should lead to compensation simply because they occurred '*on the premises of a third party with insurance*.' Mr Justice Twomey stated that, in his view, the plaintiff's accident, '*if it happened in a domestic setting would be regarded as an unfortunate everyday mishap or accident*'.

Furthermore, the judgment considers the usefulness, to the courts, of expert evidence from engineers in relation to these "*unfortunate everyday mishaps, or whether the courts are capable of assessing those everyday mishaps by applying "common sense*".

Decision
In dismissing the claim of Mr Lawless, Twomey J referred to and cited the recent decisions of the Court of Appeal in *Nemeth v Topaz Energy Group Limited [2021]*[1], the *Supreme Court in Rosberg Partners v L.K Shields [2018]*[2] and the *Court of Appeal in Morgan v ESB [2021]*[3] and stated that:

1. An employer is not an insurer of an employee
Twomey J found, as was the case in *Nemeth*, that the plaintiff was undertaking an action that, if it had taken place in the plaintiff's home or garden, would be considered an unfortunate everyday mishap.

Twomey J opined that '*an employer is not liable for an injury resulting from an employee doing an everyday task, simply because he/she happened to do that task at work*'. In very plain language, Twomey J found that '*just because an employer has an insurance policy for accidents at work does not mean he/she ….should be regarded as being liable for unfortunate everyday mishaps*'. The test is: **has the employer failed to exercise reasonable care?**

Twomey J found the task the Plaintiff was carrying out at the time of his alleged accident - emptying a wheelbarrow – was an everyday task, which required no specific training. There was no defect in the wheelbarrow. As such it seemed to the Court that '*there could be no liability on the part of the employer, for not providing a safe system of work*.'

2. Courts should apply 'common sense' and 'scepticism' to personal injury claims
The Court cited O'Donnell J (as he then was) in *Rosberg*, who stated that '*courts should approach claims ….not simply on the basis of the genuineness or plausibility of witnesses, but by applying common sense and some degree of scepticism*'.

Twomey J referred to Nemeth, where the Court of Appeal found that '*when a court is dealing with expert evidence from engineers on "ordinary everyday matters with which most people would be expected to be familiar' the court can bring 'its own common sense to bear*".'

The judgment considered that while expert evidence might be required in a "*highly specialised area of ….. medical or scientific expertise*", a '*court does not require an engineer to tell it that one should empty a wheelbarrow on an upward incline, since this is basic common sense*'.

Implications
The decision by the High Court in ***Lawless*** reaffirms the principle that employers are not insurers for every workplace incident, especially where the tasks at hand align with "everyday" domestic activities. The case calls for the application of common sense in cases involving everyday tasks, criticises the over reliance on expert evidence and marks a call for realism in personal injury litigation.

References
[1] [2021] IECA 252.
[2] [2018] 2 I.R 811.
[3] [2021] IECA 29.

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Unseen Danger: How Forensic Collision Analysis Helped Demonstrate the Limits of Driver Awareness in a Motorway Collision Case

This case study is drawn from a recent webinar delivered by Chris Goddard, Forensic Collision Consultant at Forensic Access, exploring how forensic collision investigation can uncover vital evidence in complex road traffic cases.

Forensic collision investigation is the scientific process of reconstructing road traffic incidents to establish how and why they occurred. By applying principles of physics, mathematics, engineering, and human factors, collision investigators provide the courts with clear, impartial analysis that helps inform decision-making.

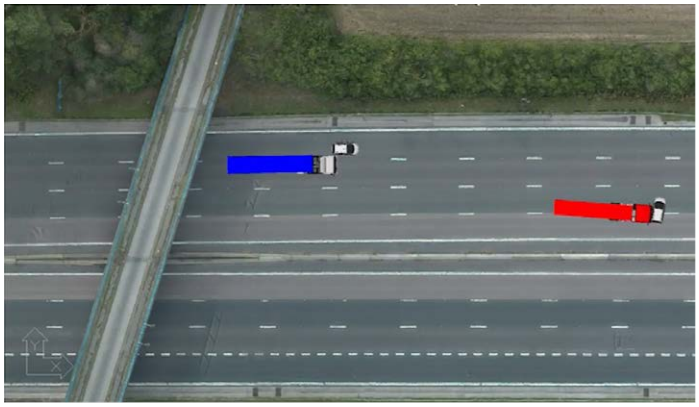
In cases involving commercial vehicles, such as Heavy Goods Vehicles (HGVs), the stakes can be particularly high. These vehicles present unique challenges, including limited visibility, large blind spots, and complex vehicle dynamics. Witness accounts alone are often unreliable, especially when incidents unfold quickly on busy roads. Forensic collision investigators play a vital role in these situations by providing accurate, objective insights that help courts understand the true sequence of events.

This case involved a motorway collision between an HGV and a car, leading to the HGV being prosecuted for driving without due care and attention. The expert investigation helped the court assess the circumstances fairly and ultimately played a key role in the outcome.

Background:
The incident took place on a motorway when a car, having joined from a slip road, merged into the main carriageway alongside an HGV. The slip road formed a new lane, and under normal circumstances, the car would have remained safely in this lane as both vehicles continued travelling at motorway speeds. However, impact marks later revealed that both the car and the HGV had deviated slightly from their original positions. The car made contact with the side of the HGV, causing the car to spin across the motorway into the path of a second HGV, resulting in a significant secondary collision.

The initial contact between the car and the first HGV was so minor that the prosecution and defence agreed the HGV driver would not have been aware of it. The prosecution nonetheless argued that the HGV driver had failed to exercise due care and attention.

To address this, forensic analysis was required to establish exactly what had happened, whether the HGV driver could have reasonably been expected to notice the impact, and whether the actions of the car contributed to the incident.



Above, visual representation of the motorway road layout and vehicle positions at the time of the HGV 1 and HGV 2 collision with the car

The Challenge:
The central question to this case was whether the HGV driver had failed in their duty of care by not noticing the presence of the car and causing the initial contact. The risks were significant, as the case could have led to a criminal conviction for careless driving.

Expert analysis was essential because the investigation needed to:

- Determine the precise movements and positioning of both vehicles leading up to the collision.
- Establish whether the HGV driver could have seen the car prior to the collision using the vehicle's mirrors.
- Interpret tachograph data to understand vehicle speed and positioning.
- Conduct a mirror survey to accurately map the driver's field of vision and identify any blind spots.
- Present the findings in a clear and objective way that would assist the court in understanding the technical evidence.

The Findings:
To answer the key questions raised in this case, a detailed forensic investigation was conducted. By combining physical evidence, digital modelling, vehicle data, and scientific research, the court were provided with a clear and objective reconstruction of the incident.

The investigation involved several essential steps:

- **Analysis of Vehicle Positions and Movements:**
  Through examination of impact marks on both the car and the HGV, the investigation established that both vehicles had moved slightly from their original paths before the collision occurred. This was a crucial finding as it demonstrated that neither vehicle was entirely maintaining its lane, which helped explain how the initial contact occurred. Also, this data suggested that the car was not maintaining a steady position and was also partially responsible for the circumstances that led to contact.

- **Tachograph Data Review:**
  The digital tachograph installed in the HGV was examined to assess speed and driving patterns and behaviour in the lead-up to the incident. Although the tachograph is not specifically designed as a collision investigation tool, it can provide valuable information that greatly assists the investigative process.

  Tachographs are designed to monitor driving hours and rest periods; they also record speed and distance data at regular intervals. The tachograph in this case confirmed that the HGV was travelling at a steady cruising speed, within legal limits, and not engaging in any erratic behaviour or unsafe manoeuvres.

This data helped to reinforce that the driver was operating the vehicle appropriately.

Above, Tachograph data from the HGV, assessing speed and driver behaviour

- **Mirror Survey and Blind Spot Mapping:**
  A comprehensive mirror survey was undertaken to establish what the HGV driver could and could not see at the time of the collision.

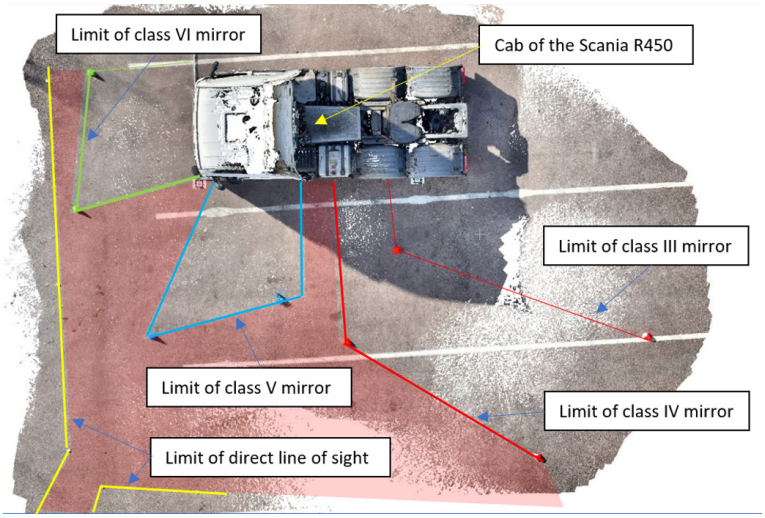
Using a combination of photographs and measurements, the fields of view provided by each mirror, including Class III, IV, V, and VI mirrors. Each mirror provided different fields of view, but the analysis identified the presence of unavoidable blind spots, particularly on the near side of the vehicle.

Above, 3D digital model to show the position of the vehicles at the time of the collision

- **3D Digital Modelling:**
  A detailed computer-generated model of the incident was created to show the positioning of the car alongside the HGV at the point of impact.

  This model was overlaid with the results of the mirror survey, visually demonstrating that most of the car was outside the driver's field of vision at the critical moment. This visual reconstruction clearly demonstrated that, at the moment of contact, most of the car was located within a blind spot and was not visible to the driver.

  The blind spot effectively concealed the car from view, making it reasonable to conclude that the driver would not have been aware of its presence.



Above, Computer-generated model to show car positioning to the HGV, as well as the mirror survey to establish blind spots.

- **Presentation of Evidence to the Court:**
  The findings were presented in a clear and accessible way, using both the 3D model and supporting images to help the court understand the technical evidence. The visual presentation helped explain the practical realities of HGV driving, including the challenges posed by blind spots and limited visibility.

The combined results of this investigation led to several important conclusions:

- The initial contact between the car and the HGV was minimal, causing very slight damage that the driver could not have been expected to notice.
- The HGV was travelling at a consistent and lawful speed with no evidence of dangerous or careless driving behaviour.
- The car was positioned within a blind spot at the time of the collision, making it invisible to the HGV driver despite the presence of multiple mirrors.
- Both vehicles had deviated slightly from their expected positions, suggesting that the incident was not solely attributable to the actions of the HGV driver.

Above, Comparison of damage between HGV 1 and the car involved in the incident.

These findings were accepted by the court, which found that the case against the HGV driver was unproven. Therefore, the HGV driver was acquitted.

This case highlights the importance of thorough forensic investigation in complex road traffic incidents. By applying a scientific approach to the available evidence, critical insights were revealed and clear answers provided to the court to ensure that the driver was not charged for circumstances beyond their control.

Partner with Forensic Access:
At Forensic Access, we provide expert analysis and support in collision investigation, as well as a wide range of forensic disciplines. Our experienced specialists deliver clear, impartial evidence that assists courts and legal teams in understanding complex incidents.

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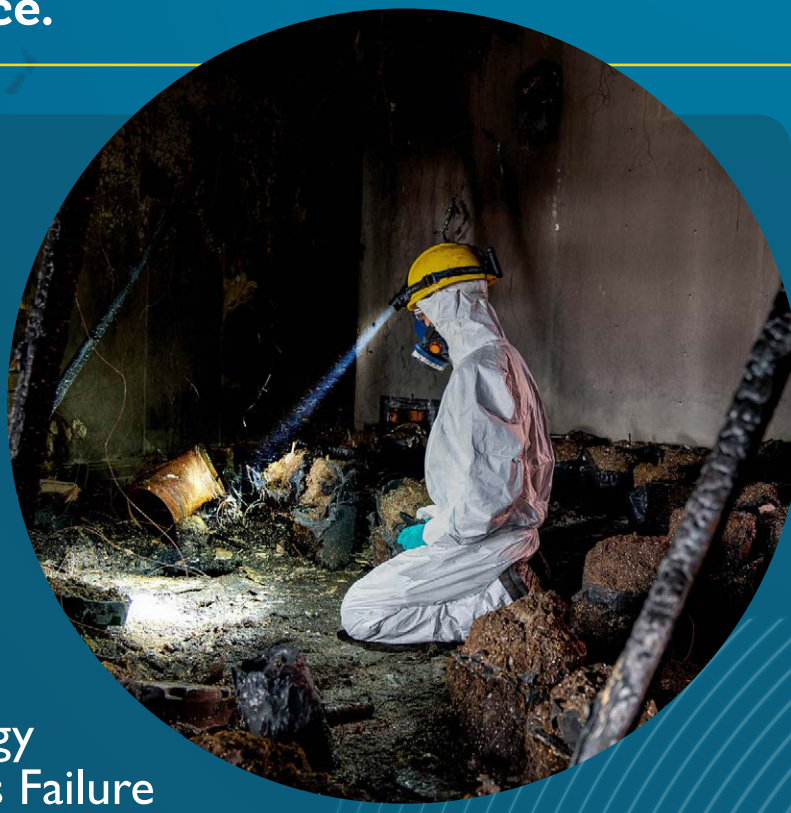

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Contributory Negligence and the Vulnerable Road User

by Kate Longson

Preface

Personal injury lawyers will be well familiar with the concept of contributory negligence. This article is intended to give guidance to practitioners in more unusual cases where assessment of contributory negligence may be more complex than it first appears, focussing particularly on road traffic claims brought by vulnerable road users.

General Principles

Pursuant to s1(1) of the Law Reform (Contributory Negligence) Act 1945:

Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

In road traffic claims brought by vulnerable road users, the same general principles relating to the contributory negligence doctrine apply as with any other claim. Accordingly, in determining whether to make a reduction for contributory negligence and to what extent, the court will consider:

- The "moral blameworthiness" of the respective parties; and
- The causative potency of the parties' actions.

The assessment of moral blameworthiness will be highly fact specific, taking account of factors such as speed, intoxication, general behaviour and awareness and, perhaps, the use of reflective/protective gear, particularly by cyclists/motorcyclists.

As to causative potency, in claims involving vulnerable road users the courts have readily accepted that the damage likely to be caused by a motor vehicle to a pedestrian/cyclist is highly relevant when assessing contributory negligence: *Sinclair v Joyner [2015] EWHC 1800 (QB)* at §73.

It should be borne in mind that the doctrine does not apply to claims in trespass to the person: *Pritchard v Co-operative Group Limited [2011] EWCA Civ 329*. It will not, therefore, be open to a defendant to raise contributory negligence if, for instance, he has used a car to intentionally run down a pedestrian, even if that pedestrian was obstructively standing in front of the car.

In a road traffic context, therefore, it is likely only to be claims in negligence which give rise to the partial defence of contributory negligence. Such a defence must be pleaded and proven by the defendant and it is not open to the court to make a finding in the absence of such a pleading.

Below are some case examples, from various contexts, which may assist readers in the assessment of contributory negligence in their own cases:

Pedestrians

McDermott v Pettit [2011] EWHC 3074 (QB) – 10% reduction – the Claimant was struck by the Defendant's car when crossing the road in the early hours of the morning. He was 10 metres away from the nearest pedestrian crossing. The Defendant driver was driving at in excess of the speed limit with an excessive blood alcohol level.

Carpenter v Lunnon [2004] EWHC 3079 (QB) – 20% reduction – the Deceased pedestrian was walking at the edge of the carriageway of a country lane (there was no pavement) when he was hit from behind by the Defendant's vehicle. He had been walking in the direction of the flow of traffic. He was wearing dark clothing and it was a dark night, such that the Defendant's opportunity to see the Deceased before the collision was reduced.

Sedge v Prime [2011] EWHC 820 (QB) – 25% reduction – the Claimant, who had been drinking, stepped out into a bollarded road used by both pedestrians and vehicles, and into the path of the Defendant's car, without looking. The Defendant had been driving far too quickly for the road conditions and had not been paying sufficient attention to the road conditions and the presence of the Claimant.

Hickman v London Central Bus Co Ltd [2013] EWHC 1703 (QB) – 40% reduction – the Claimant was hit by a bus which pulled away from a stationary position at traffic lights when they turned from red to green. The Claimant had crossed directly in front of the bus, ahead of the traffic lights and pedestrian crossing, expecting that the lights would remain on red. The bus driver did not see him prior to the collision.

Hill v Master Concrete Northern Limited [2010] EWHC 3613 (QB) – 50% reduction – the Claimant was hit by a lorry driving at slow speed which turned into a side road which she was attempting to cross. The Claimant did not see the lorry despite its size and the noise it created. She had accordingly not looked properly. The lorry driver also did not see the Claimant, but this was due to a failure to look in the exact right spot at the correct moment. The balance of the moral blameworthiness lay against the Claimant but the causative potency of the lorry was such that, overall, it was appropriate to split liability evenly.

Ehari v Curry [2006] EWHC. 1319 (QB) – 70% reduction – the Claimant, who was a child, stepped out in front of the Defendant's vehicle from behind a car which had completely concealed her presence until one second before the collision. The court accepted that the Defendant could not have braked to avoid the collision but found that he could and should have swerved to avoid the Claimant.

Watson v Skuse [2001] EWCA Civ 1158 – 80% reduction – the Claimant attempted to cross a pelican crossing when the lights were in favour of the flow of traffic. He stepped into the road directly in front of the Defendant's lorry, out of view of the driver.

Cyclists

Smith v Finch [2009] EWHC 53 (QB) – no reduction – the Claimant cyclist was hit at speed by a motorcyclist and knocked from his bike. He was not wearing a helmet, although he did own one. Although the court held that wearing a helmet was a sensible practice, although not mandated by law, the Defendant called no evidence to establish that the injuries would have been less severe/ avoided had the Claimant been wearing a helmet. Accordingly no reduction was made.

Rickson v Bhaker [2017] EWHC 264 (QB) – 20% reduction – the Claimant cyclist was knocked from his bicycle when the Defendant van driver, who had been travelling in the opposite direction, turned right across his path. The van driver was convicted of driving without due care and attention and accepted that the accident had primarily been caused by his negligence but alleged contributory negligence on the part of the Claimant. The court concluded that the Claimant could and should have taken evasive action in response to the movement of the van.

Sinclair v Joyner [2015] EWHC 1800 (QB) – 25% reduction – the Defendant car driver attempted to overtake the Claimant cyclist on a narrow country lane. The Claimant was riding in the middle of the road and lost control of her bicycle momentarily. The Defendant's decision to overtake when there was insufficient room to do so safely deprived the Claimant of the opportunity to regain control of her bicycle and was thus primarily causative of the accident. The Claimant also bore some responsibility for riding in the middle of the road when she should not have been.

Reynolds v Stutt & Parker LLP [2011] EWHC 2263 (ch) – 66% reduction – the Claimant had deliberately caused a collision with a work colleague during a cycling event at a country park organised by his employer. He had declined to wear a helmet despite the fact that one was available. Whilst the employer had been negligent in the manner in which it organised the event, the Claimant bore the greater degree of responsibility for riding in such a dangerous manner.

Motorcyclists

Davis v Schrogin [2006] EWCA Civ 974 – no reduction – the Claimant motorcyclist was filtering past a queue of traffic when the Defendant car driver executed a U-turn, out of the queue of traffic, directly into the Claimant's path. The Claimant had been so close to the Defendant's vehicle before he executed the turn that he was unable to take any action to avoid the accident. The court accordingly declined to make any reduction for contributory negligence.

O'Connell v Jackson [1972] 1 QB 270 – 15% reduction – the Claimant motorcyclist was knocked from his bike when the Defendant emerged from a minor road into his path. The Claimant did not contribute to the accident itself but was not wearing a helmet. Medical evidence suggested that, had he worn a helmet, his injuries would have been lessened. A reduction was accordingly made to reflect this.

Jones v Lawton [2013] EWHC 4108 (QB) – 33% reduction – the Claimant motorcyclist was filtering past a lane of stationary traffic when the Defendant emerged from a side road, though the line of stationary traffic and into the path of the Claimant. The Defendant was primarily liable for failing to account for the possibility of a proceeding cyclist/ motorcyclist and for failing to hear the motorcycle

as it approached. A significant reduction was nevertheless appropriate since the Claimant was riding too quickly for the road conditions and had not noticed the gap in the line of traffic from which the Defendant emerged.

Ringe v Eden Springs (UK) Limited [2012] EWHC 14 (QB) – 80% reduction – the Claimant motorcyclist was significantly exceeding the speed limit and was overtaking an articulated lorry when he collided with the side of the Defendant's van, which was emerging from a junction. Whilst the Defendant was negligent for failing to wait until he had a clear view of the road before pulling out, the Claimant bore the greater degree of responsibility for riding in such a dangerous manner.

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Cross-border claims: English Courts apply Spanish law in serious injury case

by Yasmina Villar-Lopez, Associate at law firm Weightmans

Summary of the facts

The case relates to a personal injury claim arising out of a road traffic accident in Spain and brought against the MIB in England. On 21 July 2017, the claimant who was a young British man, attended a wedding in Mallorca with his girlfriend. In the early hours of the morning, the claimant left on his own to find a taxi back to the hotel. When he was close to the centre of a nearby road, a white minivan (which it transpired was uninsured), collided with him and dragged him under its axle along the road surface for nearly 200 feet. The claimant sustained severe brain injuries as a result.

Jurisdiction and applicable law

The claimant opted to issue court proceedings in England rather than in Spain, and not against the driver, but against the United Kingdom's Motor Insurers' Bureau ("MIB") who stands in for the Spanish compensation fund. Despite the claim being pursued in England, Spanish law and its principles of compensation were applicable to the claim.

Liability and quantum

Although primary liability of the uninsured Spanish driver, and therefore liability of the MIB, had been admitted prior to the commencement of the 14-day trial (which took place in the High Court) in November 2024, contributory fault and quantum remained in dispute. The claim was pleaded at over £3,000,000.

Trial and conclusions

A general judgment[1] and a separate short judgment[2] (on the issue of the application of Spanish penalty interest alone)were finally handed down on 31 July 2025.

It is worth mentioning the following interesting points arising from the judgments:

1. Particularly notable is the high level of contributory negligence found, (assessed at 65%) which resulted in an award for damages of approximately £213,000.
2. The Spanish system of compensation is based on a strict Baremo of fixed tariff damages for different types of injuries. The court was presented with an argument that Recital 33 of the Rome II Regulation could undermine the effects of the Baremo. The court [EB1] provided for the first time formal guidance as to the applicability and effect of Recital 33, and concluded that the same cannot have any effects on the application of the Baremo rules. This is a helpful point for defendant practitioners as this judgment will serve as precedent to prevent claimants from "escaping" strict foreign law rules on quantum on cases where Rome II is applicable.
3. The importance of choosing the right foreign experts. In England, foreign law is treated as a question of fact which each party must prove with their own expert evidence from a qualified lawyer in the relevant jurisdiction. However, any foreign lawyer must be an independent expert with obligations to the court and not to the instructing party. Unfortunately for the claimant in this case, the court found that the claimant's Spanish law expert failed in her duty to the court resulting in harsh criticism of her evidence, which ultimately had a detrimental impact on the claim.

4. The High Court ruled that Spanish substantive law applied to the claimant's injury claim given that the accident had occurred in Spain, and that the payment of interest under Spanish law was also a question of substantive law. The judge determined that the relevant statutory provision for the calculation of penalty interest in claims against insurers in Spain is Article 20 of the 50/1980 Insurance Contract Act of 8 October 1980 ("Article 20"). Article 20(9) provides for a specific regime that applies to insurers in the position of a guarantee fund.

In addition, Article 20(8) provides that no penalty interest may be imposed when the delay in the payment of a minimum amount is justified or not attributable to the insurer.

Unfortunately, the MIB on this case failed to make any "minimum" interim payments to the Claimant within the three months from the date of notification of the claim. This was due to a number of issues (ie. liability was denied at the time, inability to quantify the claim at that stage, etc).

The court considered that none of the two exceptions applied on the current case and imposed that penalty interest must be awarded to the Claimant.

It is therefore extremely important for insurance companies and/or the MIB to make a prompt payment to avoid the potentially detrimental effects of the imposition of penalty interest.

Conclusions

Overall, save as for the imposition of penalty interest issue, which was already an issue almost impossible to reverse given the long history of unfavourable decisions in the matter, this case represents, generally, a positive outcome for the MIB and a clear example of the importance of choosing the right experts and ensuring that they understand the requirements of English procedure and their duty to the court.

Article first published by law firm, **Weightmans.**

Reference

[1] [2025] EWHC 2002 (KB)

[2] [2025] EWHC 2038 (KB)

Heads up! Liability for injuries caused to spectators at sporting events

by Jasmine Murphy, Gatehouse Chambers

In May 2025, Golfweek reported that the Spanish player Jon Rahm struck a fan with a golf ball during the PGA Championship 2025. It turns out that was the third time this player had accidentally potted a spectator with a golf ball. The time before, in 2022, the injured spectator (a news anchor) was reported to have suffered facial injuries.

Although there is a wide body of case law establishing the duty of care owed by participants in sports to each other, what is the legal situation where a spectator, or an employee with duties at a match, is injured by a golf ball, football, ice hockey puck, vehicle, horse or even a player accidentally leaving the area of play? Although it may seem fair that they should be able to claim damages from the organiser of the game, or even the player, is that the correct legal analysis?

This situation has been considered several times by the courts over many decades. Unfortunately for claimants, these cases are very hard to win. The reported cases mostly come down on the side of the defendant club or arena, although it seems that golfers remain most at risk from being successfully sued.

Early Authorities

The history of claims by spectators probably starts almost 100 years ago with **Hall v Brooklands Auto Racing Club**. Two spectators standing at the railings of a car racetrack were killed by a car that was thrown into the air after a minor collision. Although this case predated the Occupiers' Liability Act 1957, the common law recognised the duty of an occupier to take reasonable care to see that visitors were reasonably safe. The defendant's appeal against a finding of liability was successful. Although there was a duty on the racetrack owners to see that the course was as free from danger as reasonable care and skill could make it, they were not insurers and did not warrant absolute safety. Here, the incident was quite extraordinary and there was no history of such events happening in the past. Additionally, it was found that there was no obligation to protect against a danger incident to the entertainment which any reasonable spectator foresaw and of which he took the risk.

Lord Justice Scrutton said: What is reasonable care would depend on the perils which might be reasonably expected to occur, and the extent to which the ordinary spectator might be expected to appreciate and take the risk of such perils. Illustrations are the risk of being hit by a cricket ball at Lord's or the Oval, where any ordinary spectator in my view expects and takes the risk of a ball being hit with considerable force amongst the spectators, and does not expect any structure which will prevent any ball from reaching the spectators. An even more common case is one which may be seen all over the country every Saturday afternoon, spectators admitted for payment to a field to witness a football or hockey match, and standing along a line near the touchline. No one expects the persons receiving payment to erect such structures or nets that no spectator can be bit by a ball kicked or hit violently from the field of play towards the spectators. The field is safe to stand on, and the spectators take the risk of the game.

Hall was applied by the Court of Appeal in **Murray and another v Harringay Arena LD** where a child spectator was hit in the eye by an ice hockey puck during an ice hockey game. Although there was evidence that pucks were hit out of the arena from time to time, there was no evidence to show that a serious injury such as this had happened before. Considering the position in contract, the Court

of Appeal held that there was an implied term to take reasonable care but the duty arising under it did not involve an obligation to protect against a danger incidental to the entertainment which any reasonable spectator foresaw and of which he took the risk.

A more recent ice hockey case in Northern Ireland followed similar reasoning to **Murray**. In **Browning v Odyssey Trust Co Ltd and Belfast Giants 2008 Ltd** Gillen J found that although **Murray** was decided a long time ago, the principles were still applicable. In particular, a defendant organiser, as occupier, generally had no duty to prevent exposure to risks which were inherent in activities which were freely undertaken or inherent in the sport itself, such as balls which were regularly hit with force into the spectators.

When A Player Is Sued

These cases involved the consideration of the situation where the claimant was a paying spectator and the defendant was the organiser of the event. However, what if the defendant is the sporting competitor or player? In **Woolridge v Sumner** and another a photographer who was at the edge of an arena at a horse show to take photographs sued the owner of a horse that ran him down. Although he won at first instance against the owner, as vicariously liable for the rider, he lost against the promoters of the show. On appeal however, the Court of Appeal came to a different conclusion. In assessing actionable blame there was a difference between an injury – for example – caused by a tennis ball hit or a racket accidentally thrown in the course of play into spectators at Wimbledon and a ball hit or a racket thrown into the stands in temper or annoyance when play was not in progress. Lord Justice Sellers said that provided the competition or game is being performed within the rules and the requirement of the sport and by a person of adequate skill and competence the spectator does not expect his safety to be regarded by the participant. Lord Justice Diplock summarised his view as: A person attending a game or competition takes the risk of any damage caused to him by any act of a participant done in the course of and for the purposes of the game or competition notwithstanding that such act may involve an error of judgment or a lapse of skill, unless the participant's conduct is such as to evince a reckless disregard of the spectator's safety.

Liability For Those Other Than Paying Spectators

What about the situation where the injured claimant is not a paying spectator but working at a game when they are injured? In **Woolridge** above, the photographer was not an equine fan but present in his working capacity. This did not make any difference to the outcome. In the Scottish case of **Gillon v Chief Constable of Strathclyde Police** the Outer House considered a claim brought by an employee injured at a football match against her employer and a football club. The claimant, a police officer, was on duty at a football match. She was standing on the track next to the pitch with her back to the game, looking up at the crowd when a player accidentally collided with her. The Court found that the risk of injury was foreseeable but due to the absence of previous incidents and the unusual combination of circumstances, the risk was so small so as to not warrant any precautions being taken by either defendant. She failed against both defendants.

In **Lewis v Wandsworth County Council** the claimant was walking along a footpath in Battersea Park, next to where a game of cricket was being played, when she was hit by a cricket ball and injured. Although she succeeded at first instance, she lost on appeal. Both the lower and appeal court were referred to **Bolton v Stone**, the seminal case about foreseeability. **Bolton** involved a cricket ball being hit out of a cricket ground and going on to hit a pedestrian on a nearby road. The evidence was that balls being hit as far as this to go into the road were very unusual. The House of Lords said that reasonable foreseeability of an event was not enough to found liability, the further result that injury is likely to follow would also be such that a reasonable person would contemplate. Instead, the court had to consider the chances of an accident happening, the potential seriousness of an accident and the measures that could be taken to minimise the risk. The remote possibility was not enough and the existence of some risk was an ordinary incident of life, even when all due care had been taken. In **Lewis** Mr Justice Stewart said that the case was very different to **Bolton** because the risk of balls being hit towards the path was so evident that no warning was needed. Statistics were important as they showed an absence of previous accidents. In the circumstances allowing pedestrians to walk along the path when a cricket match was taking place was reasonably safe, the prospects of an accident (albeit nasty if it occurred) being remote. The remoteness is reinforced by Mr Birtles' evidence as to statistics. Further and in any event the alleged breach by failure to warn the Claimant in the terms suggested does not withstand proper analysis.

Golfing claims

Returning to golfing injuries, this is one area where claimants have been more successful, although most of such cases are where other players have been injured instead of spectators. In **Horton v Jackson** one golfer was liable to another golfer for an eye injury. The liable golfer unsuccessfully tried to appeal the finding that the golf club was not liable as well. The golf club was not liable on the basis that in 800,000 rounds of golf there had only been two accidents and screens and extra signs would have made no difference.

Golfing injuries have more recently been considered in the Scottish courts, probably due to Scotland being the golfer's paradise. In **Phee v Gordon** both a golfer and the golf club were found liable for another player's injuries when walking from a green to a tee. On appeal of the apportionment finding, the club was found 80% liable and the golfer 20% liable. However in the later case of **McMahon v Dear** it was noted that, somewhat surprisingly, the Outer House in **Phee** did not cite any of the English authorities such as **Murray** or **Hall**. In that case an official who was blinded by a golf ball lost his claim against the player. The shot was played in the normal course of play, there was no error of judgment, and the danger of being hit was a risk incidental to the competition which the claimant accepted.

Conclusion

Although there may be circumstances where the organisers of a sporting event do not take reasonable care in respect of spectators, these cases are rare, especially as safety at sports grounds is highly regulated. Liability of a player for an injury caused to a spectator requires something extra to take it out of normal play into a negligent action. Unfortunately, injured spectators, and even unwilling spectators such as the claimant in **Lewis**, must take the risk of the game.

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Gillick is not a universal test – an important clarification from the Court of Appeal

For years, lawyers and clinicians have thrown around the term 'Gillick competence' as if it were a universal test to apply to analyse the decision-making abilities of children. More recently, they have largely limited themselves to throwing the term around in relation to the decision-making abilities of children under 16, looking instead (in England & Wales) to the Mental Capacity Act 2005 for those aged 16 and over.

Both of these are incorrect.

The MCA 2005 only applies to those aged 16 and over where statute provides that it does (hence why the Law Commission in its disabled children's social care consultation paper proposed expressly making it apply to decision-making by children in the context of the assessment and support planning of social care needs).

In *Re S (Wardship: Removal to Ghana)* [2025] EWCA Civ 1011, the Court of Appeal has reminded us that the Gillick test in fact strictly only applies to the determination of whether a child (under 16[1]) has the capacity to give or withhold valid consent to medical treatment. The case arose in another context altogether, namely whether the High Court had been wrong to refuse a wardship application – brought by the child themselves – seeking to bring about their return from Ghana. In the course of reasons for explaining why Hayden J had gone about matters in the wrong way, Sir Andrew McFarlane made some important observations about the *Gillick* test:

40. Although the impact of the decision in Gillick v West Norfolk and Wisbech AHA [1986] AC 115 (HL) featured prominently in the submissions of the two interveners [The International Centre for Family Law, Policy and Practice and the Association of Lawyers for Children], the points made there were not developed by the parties to the appeal during the oral hearing. There was, however, some discussion on the direct relevance of a child being said to be 'Gillick competent' in proceedings which do not relate to medical treatment. It may therefore be helpful to offer some short observations in that regard.

41. In the present case, Hayden J recorded that

'nobody has disputed that S is a 'Gillick competent' young person and that, accordingly, resolution of his application requires his own views to be factored into a best interests decision relating to his welfare.'

42. In their skeleton argument for S, counsel had put forward five 'key propositions', the fifth of which was:

'To override the wishes and feelings of a Gillick competent young person, there must be clear and compelling reasons for so doing. Parental responsibility does not trump that obligation on the Court, once the Court is seised of a welfare decision in respect of the young person.'

43. In their skeleton argument on behalf of the father, Ms Foulkes and Ms Charlotte Baker submitted:

'It is wrong in law to assert that achieving Gillick-competence serves to narrow parental responsibility in relation to all and/or significant areas relating to a young person's welfare, and in addition, that there must be clear and compelling reasons to override the wishes and feelings of a Gillick-competent young person (see the "fifth proposition" in S's skeleton argument). As is explored further below, the ratio in Gillick v West Norfolk and Wisbech Area Health Authority & Anr is limited to medical treatment and, although it is often referred to in family proceedings as a shorthand to describe (a) the rationality and strength of a young person's feelings; and/or (b) their capacity to participate in litigation and competence to instruct their own solicitors, it is not of wider application as a principle of law.'

44. In her oral submissions, Ms Fottrell asserted that Gillick was of fundamental importance in this case. She challenged Ms Foulkes' submission that it was not relevant, as CA 1989, s 1, the welfare checklist and case law were all informed by Gillickand stressed the need to give due weight to 'wishes and feelings'. Ms Foulkes maintained the position that Gillickapplied directly to medical cases and that it was difficult to see how it might apply to non-medical decisions. Following further research over the short adjournment, Ms Fottrell drew attention to a Re S (Parent as Child: Adoption: Consent) [2017] EWHC 2729 (Fam), in which Cobb J (as he then was) considered the ability of a parent, who was still herself a child, to give valid consent to the adoption of her own child. Cobb J clearly considered that Gillick competence was a relevant factor in that situation, albeit that the decision in focus did not relate to medical treatment. He summarised the approach to be taken as follows:

'… it is agreed by all parties that in order to be satisfied that a child is able to make a Gillick-competent decision (ie has 'sufficient understanding and intelligence to enable him or her to understand fully what is proposed': see Lord Scarman in Gillick, above), the child should be of sufficient intelligence and maturity to:

(i) Understand the nature and implications of the decision and the process of implementing that decision.

(ii) Understand the implications of not pursuing the decision.

(iii) Retain the information long enough for the decision making process to take place.

(iv) Weigh up the information and arrive at a decision.

(v) Communicate that decision.'

45. Having considered the issue during the hearing and since, I am clear that Ms Foulkes is correct that, in terms of its legal impact, the decision in Gillick is limited to the ability of a young person to give autonomous valid consent to medical treatment. The purpose of the decision is to offer clarity for the benefit of medical practitioners who require valid consent for a proposed procedure. Lord Scarman was plain in limiting the context of the principle:

'I would hold that as a matter of law the parental right to determine whether or not their minor child below the age of 16 will have medical treatment terminates if and when the child achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed. It will be a question of fact whether a child seeking advice has sufficient understanding of what is involved to give a consent valid in law.'

46. It is also right that, over time, the phrase 'Gillick competent' has been used more loosely to describe the age and maturity of young people who are seen as being capable of making informed decisions as to their future in a range of situations wholly unconnected with medical treatment. An example of this is the use of the phrase by Cobb J in Re S, but, it must be stressed, that Re S, whilst not concerning consent to medical treatment, was specifically focused upon the capacity of a the 'child' in that case to give valid consent to adoption. Cobb J was not referring to, or deploying, the concept of Gillick competence in the course of making a CA 1989, s 1 determination as to the child's welfare – which is the situation in the present case.

47. By the close of submissions, Ms Fottrell did not seek to go beyond the position described in the previous paragraph. In the circumstances, it is right to proceed in the present case on the basis that the characterisation of S as being Gillick competent has no direct legal impact in a case which does not concern the evaluation of his ability to give or to withhold valid consent to medical treatment. In the context of this case, 'Gillick competent' is no more, nor no less, than a convenient label to indicate that S has sufficient maturity and understanding to form his own view as to where he may live. His 'wishes and feelings' are matters that the court is specifically required to take into account by CA 1989, s 1(3)(a). They are to be considered 'in the light of his age and understanding'. The fact that all parties before the judge accepted that S was Gillick competent was a factor that should have been given appropriate weight by the court in its overall welfare evaluation. The wishes and feelings of a young person who is so regarded are likely to attract more weight, and, depending on the issue in question and the circumstances of the case, in some cases significantly more weight, than that attaching to the wishes and feelings of a younger or less mature child. But, as a matter of law, it is wrong to assert, as the appellant's 'fifth proposition' asserted, that the wishes and feelings of a Gillick competent young person can only be overridden if the court finds clear and compelling reasons for doing so. As with each of the other elements in any holistic welfare balance, all will turn on the weight that is attributed to each of the relevant factors.

Comment

Sir Andrew McFarlane is undoubtedly correct that the term 'Gillick competence' has crept in in very many places over the years. There are situations which are closely analogous to the medical treatment context (for instance, consenting to confinement so as to take the circumstances out of the scope of the definition of deprivation of liberty for purposes of Article 5 ECHR). There are also situations which are much less closely analogous (for instance, making decisions about a change of name). This decision will hopefully prompt judges to ask more carefully as to precisely how they are using the term and the test in cases that come before them – and, in turn, whether the labelling of the child's maturity and understanding is apt to answer the question about the child they have to decide.

More immediately, the *Gillick* test featured significantly in the context of the Mental Health Bill debates, for instance, with the Government resisting amendments to put the test for decision-making in relation to matters under the MHA 1983 (which extend beyond decisions about treatment to, for instance, appointment of a nominated person) on a statutory footing. The Government expressed concern that to introduce a test specifically for use in the mental health setting would create confusion and uncertainty elsewhere given the broader applicability of the *Gillick* test. Proceeding on the basis that *Gillick* does not, in fact, have 'direct legal impact' in relation to many of the decisions being taken in the mental health setting might be thought to shed rather a different light on matters.

Sir Andrew's observations about the decision in *Re S* are also interesting. It is clear that he endorsed the approach of Cobb J (as he then was), in circumstances where Cobb J reframed *Gillick* to look very much like the functional limb of the MCA 2005 test. Again in the context of the Mental Health Bill debates, there have been arguments as to whether and how Gillick differs from the MCA 2005. Sir Andrew, for one, [2] would appear to take the view that applying the test is applying the functional aspect of the test in the MCA 2005 (and, as in *Re S*, it does not then require any analysis of whether any inability to make the decision is down to an impairment / disturbance of the mind / brain).

More broadly, the decision is also helpful for reminding us that not only will the courts override the decision of a Gillick competent child in the medical treatment context where there is appropriate cause to do so, there will also be statutory contexts (most obviously under the Children Act, but also in relation to 1980 Hague Convention cases) where the child's view can never, itself, be determinative as a matter of law. That does not mean that their views should not be taken seriously, but it means that Parliament (and the courts) have determined that, as children, they are different legal creatures to adults.

[1] As Sir James Munby made clear in *NHS Trust v X (In the matter of X (A Child) (No 2))* [2021] EWHC 65 (Fam), at paragraph 77, Gillick competence ceases to be relevant in the context of medical treatment decisions governed by s.8 Family Law Reform Act 1969 when a child turns 16.

[2] It is also interesting to note that the (statutory) MHA Code of Practice uses essentially the same approach as that of Cobb J to interrogate a child's ability to make relevant decisions – see the (English) Code at paragraph 19.36.

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Producing robust capacity assessments and the approaches to assessing capacity

by Lynette Wallace, www.brownejacobson.com

The case of *Calderdale MBC v LS* [2025] EWCOP 10 (T3) considered capacity in various areas (litigation, residence, care, contact, internet and social media, and sex) for a vulnerable 31-year-old woman, referred to as 'Stitch' at her request, in reference to her favourite Disney character. Stich has mild intellectual disability, ADHD, and dysfunctional attachment style.

Court proceedings initially started in 2019, at the end of which Stitch was declared to have decision-making capacity in most areas of her life. However, the case was revisited shortly after due to a deterioration in Stitch's presentation and concerns from the local authority about her capacity in various areas.

Further capacity assessments and expert evidence were gathered, and following a hearing in January 2025, Mr Justice Cobb declared Stitch to lack capacity to conduct proceedings and to make decisions about residence, care, contact with others, internet and social media use and engaging in sexual relations.

Mr Justice Cobb found neither the capacity assessments undertaken by the independent expert or the local authority to be satisfactory and the importance of rigorous capacity assessments was emphasised. The Judge also determined that decision-making capacity cannot be contingent on there being compulsory care plans or support in place. Finally, the complex areas of fluctuating and longitudinal capacity were explored. We take a more detailed look at the Judge's findings in this article.

Formal capacity assessments and the need to tell P that they are being assessed

Following the declaration in June 2023 that Stitch had decision-making capacity in various areas of her life, she was given more autonomy and allowed unrestricted use of her mobile phone and social media. However, she found this overwhelming and began to engage in risk taking and harmful behaviour. Ms A, a social worker, re-assessed Stitch's capacity over approximately eight visits during a five-week period and reported in August 2023 that Stitch no longer had capacity in these areas.

Mr Justice Cobb however questioned Ms A's assessment process, describing it as "*unorthodox*" and lacking the necessary rigour:

"I find that Ms A failed to spell out clearly the purpose of the questions for Stitch during the eight or so visits in the summer of 2023, and did not specifically advise Stitch that her capacity in several areas was being assessed. I wish to emphasise that this does not fatally undermine the integrity of Ms A's assessment altogether which contains some useful insights, but I am bound to treat the evidence which emerged from these discussions with more caution than if this had been a more formal capacity assessment…"

The Judge took the view that for capacity assessments to be reliable, they must be rigorous and formal, and practitioners should inform individuals that their capacity is being assessed.

A formal capacity assessment was considered necessary for Stitch's case, but it is worth bearing in mind that there could be circumstances where undertaking a less formal capacity assessment, where P is not informed that the assessment is taking place, could be justified e.g. where P refuses to engage in an assessment of their capacity or where knowledge of such assessment is likely to cause P significant harm.

Can a finding of capacity be made be if it is contingent on there being a compulsory support plan in place?

The Official Solicitor suggested that the court could make "contingent orders" that Stitch had capacity to make decisions about residence and care, provided that a compulsory support plan was always in place. Similarly, regarding decisions about contact with her mother, Stitch could be found to have capacity provided she had a compulsory support plan and the support and presence of carers. The Official Solicitor asserted that this approach aligned with a core principle of the Mental Capacity Act (MCA), namely, to support individuals in making decisions for themselves.

However, Mr Justice Cobb said that decision-making that could be called capacitous only when P was 'contained' by a continuous and compulsory framework of protections, supports and restrictions, lacked autonomy or self-determination, which were essential characteristics of capacitous decision-making. Adopting the Official Solicitor's approach would lead to the conclusion that Stitch had capacity only when she was compulsorily contained or supported and lost capacity whenever she made her own unsupported decisions. That did not suggest that she had capacity or even that her capacity fluctuated; rather, it suggested that she was unable to make her own decisions.

The Judge's view was that decision-making capacity cannot be contingent on continuous compulsory care plans or support.

Fluctuating vs longitudinal capacity

In the judgment, there is a lot of discussion about fluctuating and longitudinal capacity. Mr Justice Cobb recognised that this was not a typical 'fluctuating' capacity case, as Stitch did not have periodic psychotic and/or dysregulated episodes. The parties disagreed as to whether Stitch's capacity to decide on care and residence fluctuated and on what approach should be taken:

- **Approach 1: Anticipatory declarations** catering for fluctuating capacity where there are temporary periods of dysregulation (anticipatory declarations were considered in Wakefield MDC v DN & MN [2019] EWHC 2306 (Fam)); or
- **Approach 2: Take a 'longitudinal' approach** catering for those decisions taken regularly or repeatedly (sometimes at short notice) as opposed to isolated decisions (the longitudinal approach was considered in *Cheshire West v PWK* [2019] EWCOP 57). E.g. the management of a health condition. Repeated decisions may make it appropriate to take a broad view as to the 'material time' during which the person should be able to make the decisions in question.

Mr Justice Cobb found that there were times when Stitch could articulate a level of understanding and reasoning that suggested she had capacity, however at other times she showed such a clear and marked lack of understanding or reasoning about her residence and care needs that she could not be view under any circumstances as having capacity. Taking a longitudinal perspective on her capacity, he declared her uncapacious in these areas. The same longitudinal approach was adopted in relation to contact.

Factors relevant to the approaches to assessing capacity

Assessing capacity requires a multifaceted approach. There are number of factors we have observed to be relevant when determining the best approach for an assessment of capacity:

- Diagnosis.
- How loss of capacity arises or manifests.
- Predictability e.g. specific periods or changeable depending on the situation.
- Current presentation.
- Relevant information to be considered under each domain e.g. care, residence, contact.
- Regularity of decisions e.g. how often.
- Workability of solution: is a long and arduous process required to consider whether the person lacks capacity in the given moment dependent on place, time, duration etc? If so, it may be better to make a declaration that the person lacks capacity.
- Protection of the person's autonomy (interference to the minimum degree necessary to ensure safety).

Tips for producing a robust capacity assessment

1. Decision specific: Identify the specific decision to be assessed.

2. Timing: Assessments should be conducted at the time the decision is to be made. However, the timing of the assessment itself is important and should, if possible, be conducted when best suited to the service user.

3. Formality: The documentation should be formal and there is a need to tell people that their capacity is being assessed but the style or approach may need to be less formal or at least flexible and tailored to the person whose capacity is being assessed.

4. Engagement: Take all practicable steps to ensure that every effort is made to assist the person to engage with the assessment e.g. simple words, support from a carer to ask questions, Makaton, time of day, location, visual aids, story boards.

5. Non-engagement: Is the person unwilling or unable to undergo a capacity assessment? What can be changed to aid engagement? It is not possible to force someone to undergo an assessment and, in such cases, it may be appropriate to rely on triangulating evidence to come to a reasonable belief as to whether person lacks capacity. In such situations an application to the court may well be necessary to make the ultimate decision. If this situation arises, please do get in touch with our Court of Protection lawyers who are experienced in advising on capacity assessments and Court applications.

6. Recovery: consider whether there is any prospect of the person regaining capacity and whether the decision could be safely postponed until the person can make it themselves.

7. Relevant information: The information to be discussed with the person varies depending on the nature of the decision to be made. Please get in touch with us for specific guidance on the relevant information for each capacity domain.

8. Ask open ended questions.

9. Tangible options: Ensure concrete details can be given of any options available (e.g. living in a care home vs living at home with a package of care).

10. Executive function: Consider real-world evidence of their ability to plan, organise and initiate actions.

11. Evidence base: Gather information from people who know the person well to gain an insight into the person's decision-making patterns and abilities. Consider the broader context of the decision making.

12. Identify the salient factors where there is an assessment that the person lacks capacity. The best assessments will identify specifically what aspect the person could not understand, comprehend, weigh up, retain or communicate in relation to the particular decision.

13. Conclusion: state your conclusion as to whether P has capacity to make specific decisions, and the reasons.

14. Document: the assessment (including the questions asked and the person's responses) on the appropriate form. E.g. capacity assessments are to be documented on a COP3 form for the Court of Protection.

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Taught Anatomy at the University of Cambridge.
Authored over 130 peer reviewed articles and co-authored 3 medical text books.

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Varicose veins	Thread veins
DVT/ Venous insufficiency	Lymphoedema / leg swelling
Leg ulceration	Hernias
Aortic conditions	Carotid conditions
Peripheral vascular disease	Hand Arm Vibration Syndrome
Raynaud's Syndrome	Non-Freezing Cold Injury

Mr Gaunt has over 21 years' experience of preparing medicolegal reports, advising solicitors and barristers and giving evidence in court on a wide range of vascular conditions. Member of the Faculty of Expert Witnesses.

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Clinical negligence is my main area of work outside of my busy cardiology practice. The specialist areas which I cover are listed below. My main interests are congenital heart disease and electrophysiology (the study of abnormal heart rhythms). I have been involved with many civil and criminal cases with respect to these areas. I have a firm commitment to delivering high quality reports within 4-6 weeks of instruction.

I work in an adult and paediatric hospital. My paediatric practice is based in Our Lady's Hospital, and my adult practice is based at the Mater Hospital in Dublin. My medicolegal practice is primarily UK based, however I have undertaken international cases on occasions if deemed to be appropriate. I am able to travel to see clients if required.

Area of expertise:

- Heart Rhythm disorders (adult and paediatric)
- Pacemakers (adult and paediatric)
- Paediatric cardiology
- Paediatric cardiac surgery
- Adult congenital cardiology
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Judge rejects anonymity plea from discredited family expert

A judge has recommended an expert witness repay her fee to the local authority after all parties in a recent family court hearing agreed that the registered clinical psychologist's report was "fundamentally flawed".

Introduction
In the recent case of *Liverpool City Council v Ms A & Ors 2025]* EWHC 1474 (Fam), a registered clinical psychologist was appointed to conduct a psychological assessment of the father of a seven-year-old boy, as part of its assessment of whether, after three years in foster care, the child should be returned to his father's care in Italy. The child was of dual Romanian and Italian heritage.

The expert was appointed due to her being dual qualified in Italy and the UK. However, on receiving the report, all parties unanimously agreed that she had "wholly misunderstood and failed to comply with her instructions as an expert". An alternative psychologist had to be instructed.

What conclusions did the expert witness reach?
One of the key issues addressed in the expert's report was whether the child's father posed a risk of domestic abuse, given that he had physically assaulted the child's mother several years earlier.

The expert concluded there was no risk - but the way in which she came to this conclusion was what challenged the integrity of her report. Rather than drawing her conclusion based on her interview with the subject of her report, she based it on her theory that the domestic abuse finding itself was wrong.

"*I disagree with the finding about his violent nature in reference to the hospital record brought as evidence by [Mrs. A] as the record do not specify the name of the partner involved in that incident and [Mrs. A] was in a relationship with Mr. U as well as Mr. O at the time of the incident," the expert's report stated.*

"Since Mr. O has not been charge[d] by the Italian local authority for this incident, this evidence is not an acceptable for me; especially considering that there is no further evidence that Mr. O has been violent before or after this incident or in any other romantic relationship.

"In my professional opinion, this evidence is also not acceptable as the court demonstrated that [Mrs. A] has res[orted] to lying and manipulate facts according to her benefit and the partner she chose in such circumstances […]. Ultimately, it is clear that the competitions and animosity between the fathers fueled by the ambiguous and enmeshed behaviors of [Mrs. A] towards the fathers, has often led to conflictual relationship between these parties."

What were the issues with the expert witness' report?
In her ruling, Ms Justice Harris stated that the expert witness' "conclusions and recommendations were fundamentally flawed by reason of her failure to proceed on the basis of the factual findings made by [the judge in the domestic abuse case]".

Harris continued: "The fundamental difficulty is that contrary to the duties of an expert, [the expert in this case] did not consider the Court's findings within that broader framework of assessment but challenged the validity of the findings themselves. It is not a case of different professionals utilising different assessment tools, but a court appointed expert failing to proceed on the basis of the facts as determined by the Court in carrying out the risk assessment as instructed."

Responding to the expert's complaint that she was not given an opportunity to respond to concerns before a new psychologist was appointed, the judge said, "given the fundamental and pervasive nature of this failing, the Court is satisfied it was not susceptible to remedy through the raising of questions or points of clarification."

She added, "The Court also has to note that [the expert's] detailed response, continues to conflate the factual findings of the Court (which are not subject to question or challenge), with the process of assessing current risk."

Why did the expert witness' request for anonymity in the judgment fail?
The expert requested anonymity in the judgment but was refused on the basis that her request did not meet the criteria, for example, to ensure the anonymisation of the child/family or to prevent a credible threat to an expert's safety. Harris said there was a clear public interest in publishing the names of expert's that have not met their duty to the court.

"The Court observes that experts have clear and important duties to the Court as set out within Part 25 of the Family Procedure Rules 2010. It is vital instructed experts understand those rules and comply with them. If they fail in those duties, it not only causes harmful delay and significant cost to the public purse, but undermines fair, sound and just decision-making by the courts," she said.

"Whilst no doubt publication may be uncomfortable for [the expert] and may impact on her professional standing, she has not been able to point to any matters that would engage her Article 8 rights in any significant way."

Commenting on the fact that the expert had already been paid by the local authority and legal aid agency, the judge also said, "I am satisfied the fees of [the expert] should not in principle be met from the public purse […]. I would invite her to consider whether she should out of good will return her fee to those public bodies."

What can expert witnesses learn from this case?

While the expert's evidence may not have materially altered the outcome of this case, which was to return the boy to his father's care, it is a clear example of how important it is for experts to fully understand their duty to the court and to follow legal process.

This case has been heard against a changing landscape of increased scrutiny of family court experts. The government has recently closed a consultation on the standards required for psychologists as expert witnesses in family courts, after concerns were raised about the reliability of unregulated expert evidence, particularly in the context of accusations of "parental alienation".

To stay up to date with the procedural framework in the family courts, consider enrolling on our two-day Family Law and Procedure – England and Wales course – the next date is the 23-24 October 2025. Delegates will understand how law is made and enforced; the court structure; the stages through which a case in court must pass and the different types of proceedings heard within the family courts. In response to recent criticism of expert witnesses operating in the family courts, the course will also cover family experts' duties to the court and compliance with Part 25 of the Family Procedure Rules 2010.

https://www.bondsolon.com/courses/family-law-and-procedure-england-and-wales/

To discuss this course or to place a booking, please contact expertwitness@bondsolon.com or +44 (0) 20 7549 2549.

Mitigation In Personal Injury Claims

by Laura Wilson & John Caddies

In personal injury claims, claimants have a duty to take reasonable steps to minimise their losses stemming from an accident/illness. This is known as "mitigation". Examples of mitigation steps that a claimant is expected to take include: seeking timely medical treatment and following treatment recommendations; exploring alternative employment or retraining options available to them if they are unable to return to their pre-accident employment; and avoiding incurring disproportionate or unreasonable expenses.

If a defendant can successfully persuade a court that a claimant has failed to take reasonable steps to mitigate their losses, that claimant can be penalised by way of reduction to their recoverable damages for the part of the loss that could have been avoided. The key issue for determination is the "reasonableness" of the claimant's conduct.

Seeking timely medical treatment and following treatment recommendations

An interesting recent defence case that I was instructed on involved a claimant who sustained a significant shoulder injury in a workplace accident. The expert evidence was that the shoulder injury would resolve to a nuisance level within a set timeframe if the claimant underwent shoulder replacement surgery. The claimant, however, was obese and therefore was not eligible for the shoulder surgery unless he lost a significant amount of weight, which he had not done. The issue which, therefore, arose was whether the claimant was being unreasonable in not losing weight, as arguably if the claimant underwent the surgery, his shoulder symptoms would vastly improve, which would significantly improve his quality of life and reduce his future losses.

The claim settled on a commercial basis without further consideration of this issue by a judge. However, if the claim had proceeded to a trial, it is questionable whether the defendant's mitigation argument would have succeeded in this instance as a judge may well have been sympathetic to potential arguments from the claimant that it would have been very difficult for him to lose weight and/or he had tried but had been unsuccessful. In order to persuade a judge in this scenario that the claimant had failed to mitigate his losses, the defendant would have most likely have had to offer to pay for the claimant to undergo a weight loss programme or instruct a personal trainer, or some other form of weight loss assistance, in the first instance. If the claimant had then refused the defendant's offer, the defendant's chances of obtaining a finding from a judge that the claimant had failed to mitigate his losses would have likely increased. This is because a judge may in that scenario have reached the conclusion that the claimant had unreasonably refused assistance from the defendant to lose weight.

NHS v private medical treatment

Another common mitigation issue touches upon the debate between NHS v private treatment in personal injury litigation. Claimants have a duty to seek prompt medical treatment for their injuries to avoid being accused of failing to mitigate their losses, and if prompt medical treatment is unavailable on the NHS, they often turn to private medical treatment and thereafter seek to recover those private medical expenses from the defendant.

Each case will be determined on a case-by-case basis, but the general rule is that a claimant has the right to choose to have their treatment on a private basis, especially if it will mean a more expedient resolution of their symptoms, despite the availability of NHS services. The question inevitably comes down to "reasonableness" and whether it is reasonable for the claimant to have incurred medical expenses on a private basis. Generally, the courts' view is that if a medical expense is reasonable and recommended by an expert, the injured person is not restricted to NHS treatment, and the claimant's duty to mitigate their loss does not mean that they have to seek NHS treatment to reduce the amount of private treatment expenses they incur.

Exploring alternative employment or retraining options

In addition, and as referenced above, claimants have a duty to explore alternative employment or retraining options if they cannot return to their pre-accident employment. If a claimant fails to

demonstrate that they have taken proactive steps to explore alternative employment options, a court is likely to determine that there has been a failure to mitigate and reduce the claimant's loss of earnings' award accordingly. For example, if a court finds that a Claimant failed to mitigate their losses by not returning to work post-injury when the medical evidence opined that they were fit to return, the court would likely calculate the claimant's loss of earnings as the difference between the claimant's pre-accident earnings and the earnings the claimant would have earned if they had returned to work. Defendants should therefore request disclosure of specific documentary evidence from the claimant at the appropriate stage to demonstrate that they have searched for and applied for roles/training programmes that fit their post-accident capabilities and/or seek regular updates as to whether the claimant's employment status and the steps that they are taking to return to the workplace.

Avoiding incurring disproportionate or unreasonable expenses

Finally, claimants are under a duty to avoid incurring disproportionate or unreasonable expenses. For example, if a claimant breaks his reading glasses in an accident and then purchases much more expensive, designer glasses as a replacement, it is unlikely that a judge would allow recovery of anything more than the cost of the original glasses. In this scenario, a judge would likely say that the Claimant has failed to mitigate his losses by failing to seek a reasonably priced pair of replacement glasses.

Mitigation cases will be decided on a case-by-case basis. The burden of proving that a claimant has failed to mitigate their losses is on the defendant and any defendant proposing to run this argument should put the claimant on notice as early as possible (via statements of case, open correspondence etc.) of their intention to challenge recoverability of damages associated with their failure to mitigate.

For any more information on advancing mitigation defences in personal injury claims, please contact the author.

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Mismanagement of disciplinary process leaves employer liable for psychiatric injury

by Sarah Gilzean, Partner - www.mfmac.com

When we think about the risks that arise from a failure to properly manage a disciplinary procedure involving an employee with a history of mental ill health, disability discrimination and unfair dismissal immediately come to mind. However, in *Woodhead v WTTV Ltd & Anor* the High Court has upheld a claim for negligence against an employer, based on the manner in which disciplinary proceedings were conducted.

Background

The claimant was Managing Director of WTTV Limited. In November 2019 he was given 6 months' notice of termination of employment by reason of redundancy. On 28 November 2019 he was invited to a meeting and told that complaints of sexual harassment had been made against him. In what turned into a lengthy meeting, the claimant was required to immediately respond to the allegations, which related to events in 2017/18. He was then suspended while further investigations took place. On 2 December the employer decided not to pursue a number of the allegations but failed to convey this to the claimant - indeed they continued to actively pursue responses from him to these allegations. They also continued to pursue the disciplinary proceedings while the claimant was off sick, despite there being no urgency. They also attempted to require him to undergo what was described by the Court as an "entirely pointless" occupational health appointment.

The claimant had a history of mental ill health and had been a recovering alcoholic since 1991. He was signed off work on 3 December 2019 suffering from an adjustment disorder that "severely affected his ability to function". On 4 December a letter from the claimant's psychologist confirmed to the employer that the meeting on 28 November had precipitated a relapse of his depressive illness. The claimant was admitted to hospital on 13 December and remained there until January 2020. On discharge he continued to be treated as an outpatient for a further 7 weeks. He did not return to work prior to the redundancy taking effect in May 2020.

High Court action

The claimant brought three claims seeking damages for psychiatric injury. The first was based on the misuse of private information and was unsuccessful. The second was based on negligence and the last based on breach of the implied duty of trust and confidence (breach of contract). The court found it unnecessary to consider the breach of contract claim as it added nothing to the negligence claim. The claim in negligence succeeded in part.

The duty upon which the claimant's case relied was that an employer will not, in the course of an individual's employment, expose them to an unreasonable risk of psychiatric injury arising from employment. In this case, the court concluded that the psychologist's letter of 4 December put the employer on notice that the claimant was at risk of psychiatric injury. This then meant that claims related to events that predated that letter failed. However, the court held that the failure to inform the claimant that some of the allegations were not being pursued, the attempts to continue the disciplinary procedure while the claimant was on sick leave and the requirement to attend the OH appointment were a breach of duty. Expert evidence during the court hearing evidenced psychiatric harm caused by these breaches.

What can be learnt from this?

Throughout this judgment the court refers to the need for the employer to take "reasonable care". In this context that is reasonable care to prevent or reduce foreseeable harm to the claimant's health.

Employers must find the right balance between the need of their business to progress a disciplinary process and the needs of the employee, with particular care being taken where there is known mental ill health. In many cases employers will be within their rights to seek independent OH advice on whether an employee is able to participate in a disciplinary procedure, but it should not be done automatically. Taking some time to assess the circumstances, considering the risks to the business (including other employees) of not progressing a matter versus the risk of harm to the employee being disciplined, will be important. The question of whether an employee could be disabled, and the need for reasonable adjustments, should also always be considered.

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What does the Health and Safety Executive's 2025 annual report reveal?

The Health and Safety Executive (HSE) published its annual report on 2 July 2025, detailing work-related fatalities from 2024/25. The release of the report marks a significant milestone, as Britain's national workplace safety regulator celebrates its 50th anniversary this year. While Great Britain proudly claims its position as one of the safest places to work in the world, the report reveals that significant challenges remain.

In this article, we review the HSE's 2025/26 Business Plan, which outlines its strategy to combat fatalities in the years ahead.

A summary of the report findings

The report presents an ambivalent picture of workplace safety in Britain. Between March 2024 and 2025, 124 workers lost their lives in work-related accidents, with male workers accounting for the vast majority (95%) of fatal injuries. Falls from height continue to be the leading cause of workplace fatalities, while the construction and agricultural sectors together account for nearly half (47%) of all fatal injuries by sector.

Particularly concerning is that around 40% of fatal injuries occurred among self-employed workers, highlighting vulnerabilities in this growing segment of the workforce. The report also notes 2,218 mesothelioma deaths in 2023, resulting from historical asbestos exposure. This demonstrates the long-term consequences of chemical workplace hazards, even since the banning of asbestos in 1985.

Fifty years of HSE

Despite these tragic losses, the data shows continuous progress since the Health and Safety at Work Act came into force in 1974. The number of fatally injured employees has fallen by approximately 85% over this period. However, this improvement may be partly attributed to changes in the types of work people now undertake, improved technology and other factors.

As HSE Chief Executive Sarah Albon recently commented: "Great Britain is one of the safest places in the world to work, but we must remember each of these deaths represents a tragedy for families, friends and communities."

The broader implications

The human cost of workplace hazards extends far beyond workplace accidents. Each year, work-related conditions affect hundreds of thousands of employees and employers. For example, annually, approximately 600,000 people suffer non-fatal injuries in the workplace, 12,000 lung disease deaths are estimated as being linked to past exposures at work and over 500,000 people experience work-related muscle and joint problems. Mental health also plays a significant role, with workplace stress resulting in 16.4 million lost working days annually.

The financial implications are shocking. New cases of work-related health problems cost Great Britain £14.5bn in 2022/2023 alone, encompassing medical treatment, sick pay and lost productivity that affects the entire economy.

The role of HSE

The Health and Safety Executive serves as Britain's national regulator for workplace health and safety, with the responsibility of ensuring that risks to people's health and safety from work activities are controlled and regulated. Its comprehensive approach involves setting and enforcing safety standards across various industries, conducting workplace inspections and providing guidance to employers and workers on accident and occupational disease prevention.

When workplace accidents occur, HSE investigators work to determine the causes and identify whether safety regulations have been breached. The organisation has the authority to take enforcement action, including issuing improvement notices, prohibition notices or pursuing criminal prosecutions against employers who fail to meet their legal duties. It also works to identify emerging risks and develop new safety regulations to protect workers across all economic sectors.

The HSE focuses on the biggest risks, including noise damage, muscle injuries, asbestos exposure, proper use of machinery and equipment and falls from height. Despite fewer cases going to court today, the HSE still wins 94% of prosecutions, demonstrating that proper investigation leads to real consequences for employers who fail to protect their workers.

Legal support for workplace accident clients

If you sustain a workplace injury, specialist legal support is crucial to help secure the rehabilitation and treatment you may need both now and in the future. We specialise in supporting people who have sustained injuries in workplace accidents, which can include cognitive and spinal cord injuries or catastrophic polytrauma, such as neurological conditions, amputations and serious burns. We work with the best

experts and case managers in the industry to ensure the optimal outcome for each individual.

We understand that workplace accidents can be life-changing, and we help clients navigate the often-daunting process of making compensation claims against their employers. Our experienced solicitors have secured compensation totalling more than £200m for clients over the past 20 years, including high-level spinal cord injury cases and brain injury cases.

Recent settlements secured for clients involved in an accident at work include a seven-figure settlement for Charlie, a busy and active gentleman. Charlie sustained a spinal injury at work, and the settlement sum has allowed him to regain some of his pre-injury independence. Another recent client, Gerald, sustained a traumatic brain injury while delivering pallets as an HGV driver. With Stewarts' support, he achieved a seven-figure settlement, enabling him to purchase a bungalow and contribute to his ongoing rehabilitation and treatment. You can read Gerald's story here.
https://www.stewartslaw.com/news/hgv-driver-injured-at-work-secures-settlement/

If you want to know more about bringing an accident in the workplace claim, read the article on our website written by Warren Maxwell.
https://www.stewartslaw.com

The future of HSE
As the HSE marks its 50th anniversary, the 2025 annual report clearly shows the progress made, but also outlines the work still to be done.

Partner Nichola Fosler comments: *"Each of the 124 fatalities represents a family devastated and a preventable tragedy. Despite the improvements with workplace safety the HSE notes that the challenge ahead lies in maintaining the level of workplace safety while addressing emerging risks and protecting an evolving workforce, particularly in light of advances in technology and the growing number of self-employed workers who face unique vulnerabilities."*

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Court provides clarity on the recoverability of rehabilitation payments in contribution claims

On appeal from the Cambridge County Court, the High Court has recently handed down its judgment in R&B Plastering Limited v UK Insurance Limited, which provides legal clarification in relation to the recoverability of rehabilitation payments in contribution claims.

Kennedys acted on behalf of R&B Plastering Ltd (R&B).

Background
Mr Eckford, a tacker, was engaged by R&B as a labour only subcontractor. R&B was engaged by the main contractor, Robert Norman Construction Ltd (RNC), to carry out various works on a house renovation including plasterboard tacking.

Mr Eckford fell through a hole between the first and second floor, which had been made on the instructions of RNC in order to move material between the floors. R&B settled Mr Eckford's personal injury claim pre-litigation and sought a partial contribution from RNC's insurer.

RNC's insurer denied liability and R&B therefore commenced contribution proceedings for a part-recovery of damages and costs paid to Mr Eckford, NHS charges, and rehabilitation payments.

The case proceeded to a two day trial before HHJ Patrick Moloney KC sitting at Cambridge County Court on 15 May 2023 with judgment handed down on the 12 July 2023. The judge found that RNC was 50% liable, because it participated in the joint decision to cut a hole between floors for moving materials but, following delivery of such materials, failed to reinstate the floor or to prevent workers including Mr Eckford from accessing the room. The contribution claim therefore succeeded.

The appeal
RNC's insurer failed in its appeal against the judge's findings in relation to liability.

It also appealed in relation to the recoverability of certain rehabilitation payments made by R&B's insurer to Mr Eckford under the Rehabilitation Code 2015. It argued that technically speaking they were not "damages" within the meaning of the Civil Liability Contribution Act 1978.

The judgment of the lower court was that the 1978 Act is not limited to recovery of damages but, by operation of section 2, additionally extends to any amount "such as may be found to be just and equitable having regard to the extent of that person's responsibility for the damage in question" including for example costs.

HHJ Moloney KC drew comparison with rehabilitation expenditure funded directly by claimants from interim payments outside of the 2015 Code, which is a familiar head of loss in personal injury damages. He also made the important point that rehabilitation payments by insurers should be recoverable as a matter of public policy, otherwise they might be discouraged from participating in the "valuable scheme" of the 2015 Code.

Mrs Justice Foster accepted R&B's submissions, and agreed with HHJ Moloney KC that a contribution under the 1978 Act is not required to be a proportion of "damages" and includes other items such as costs and rehabilitation payments.

He also referenced the recent Court of Appeal judgment in *Hadley v Przybylo* [2024] EWCA Civ 250 which confirmed that the costs of a claimant's solicitor managing rehabilitation were recoverable in the litigation.

Comment
The judgment provides another factual example of a sub-contractor sharing liability with a main contractor following a construction site accident, where the main contractor had overall responsibilities for site safety and supervising sub-contractors.

It also provides important legal confirmation of the recoverability of rehabilitation payments in contribution claims which, as the High Court highlighted, supports the valuable aims of the Rehabilitation Code 2015 by removing a potential technical barrier to funding.

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Dr Max Mifsud
Consultant Paediatric Orthopaedic Surgeon

MD MScRes FRCS(Tr&Orth) FEBOT

Dr Max Mifsud is a fully certified Consultant Trauma and Orthopaedic Surgeon based at the Oxford University Hospitals NHS Trust, a major tertiary referral centre and designated NHSE Sarcoma Centre. He is listed on the specialist registers of both the UK General Medical Council (GMC) and the Malta Medical Council (MMC).

Max has experience as a Medical Expert, with a particular focus on medicolegal matters in paediatric orthopaedics. His specialist knowledge includes cerebral palsy and other neuromuscular conditions, post-injury/post-traumatic bone and joint deformities, hip dysplasia (including DDH), bone infections, and sarcoma. He currently undertakes personal injury cases, and, in cases where breach of duty has already been established, Max offers Condition and Prognosis reports based on his highly specialist training. He does not currently do any Causation or Breach of Duty work. Max has been undertaking work as a Medical Expert since 2023 and has been instructed approximately equally between defendants and claimants.

In his clinical practice, Max has performed over 4,000 procedures on both adults and children, with outcomes and patient feedback consistently ranked in the top 25% nationally. In addition to his clinical practice, Max is the Clinical Governance Lead for his department and has led numerous local and regional service improvement projects, with a focus on digital transformation, productivity, patient safety, and equitable access to care through integrated pathways.

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Dr Mark Hayden
Paediatric Intensivist

MD, MB ChB, MRCP(UK), FRACP (Australia), FCICM (Australia)

Mark is an experienced paediatric intensivist with sub-specialist skills in paediatric cardiac intensive care. He has been a consultant for the last 24 years in Australia and the UK. He has worked in public and private practice. He has been a consultant in paediatric cardiac intensive care at Great Ormond St Hospital for Children since 2015

Areas of expertise:

- Paediatric Intensive Care
- Paediatric Cardiac Intensive Care
- Extracorporeal Support (ECMO/VAD)
- Transplantation (Heart and Lung)
- Tracheal Surgery
- Electronic Medical Records
- The Health Impacts of Air Pollution

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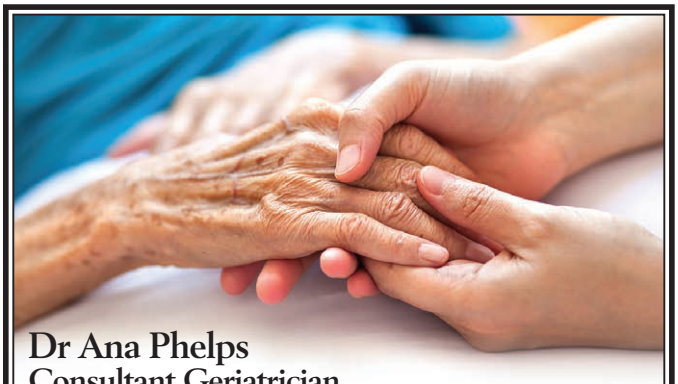

Dr Ana Phelps
Consultant Geriatrician

MD, MSc, PhD, FRCP, RCPathME

Dr. Ana Phelps is a Consultant Geriatrician at The Buckinghamshire Healthcare NHS Foundation Trust. Her interests are general and acute Geriatrics, Orthogeriatrics, Peri-operative Medicine, Aging, Geriatric Care, Medical Gerontology, Dementia, Elderly, and Gerontological.

Dr Phelps has specialist interest in Orthogeriatrics and Peri-operative Medicine. She is also particularly interested in Frailty in the acute and interface settings. Throughout her career she has been heavily involved with research, teaching and medical education and more recently with Leadership, Management and Service Development.

Dr. Ana Phelps is a certified Medical Examiner, Consultant representative to the Clinical Ethics Committee at Buckinghamshire Healthcare NHS Trust and is deeply involved in Clinical Governance to ensure delivery of best care for my patients.

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Dr Kailash Krishnan
Consultant in Stroke Medicine and Hon Asst Professor

MBBS, FRCP, FESO, PhD (Stroke Medicine)

Dr Krishnan is triple accredited in General Internal Medicine, Geriatrics and Stroke Medicine with expertise in Geriatrics and Stroke Medicine. He completed by PhD in Stroke at the University of Nottingham and has been a full-time Consultant since 2016.

He is involved in the management of patients in stroke and transient ischaemic attack (TIA) across the whole patient pathway including diagnosis, investigation, acute treatment, rehabilitation, secondary prevention and long-term complications.

Dr Krishnan is co-lead of the Mechanical Thrombectomy service at Queen's Medical Centre Nottingham University Hospitals NHS Trust and now involved in roll-out and implementation of AI regionally. Dr Krishnan is also co-lead the PFO closure for cryptogenic stroke at Nottingham which is now a regional service.

Dr Krishnan is a group chair for developing national guidelines for stroke and part of an international consortium which developed guidelines for HRT in stroke, thrombolysis and mechanical thrombectomy for pregnancy and peuperium for the European Stroke Organisation.

Dr Krishnan is now a chief investigator of a multicentre, randomised controlled trial in acute intracerebral haemorrhage (awarded by the NIHR RfPB) and principal/site investigator for eight other clinical trials. He has published widely in national and international journals (including the Lancet) and regularly peer-review publications submitted to various journals. He is an invited and elected member of various national and international committees.

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Re:Cognition Health
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At Re:Cognition Health, we provide a wide range of services to claimant and defendant lawyers, independent case managers, and insurers who offer income replacement and other indemnity products where claims are related to neurological and cognitive function.

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Reporting and Expert-Opinion Services

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Our imaging often reveals abnormalities not present on the scans performed at the time of the accident. Our full suite of advanced neuro-diagnostics includes:

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- DTI
- MEG

Rehabilitation Assessment and Therapy

We provide a full range of neuro-rehabilitation services including detailed assessments of the potential for rehabilitation, which types of therapy are likely to be most effective, and in what sequence.

Our rehabilitation services include:

- Traumatic brain injury
- Cognitive function impairment caused by medical treatment
- Chronic Fatigue Syndrome
- Return to work programmes, including stress and depression
- 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.

Crisis in Custody: The Unfolding Human Rights Emergency in UK Prisons

by Shivani Mehta and Maria O'Connell - www.hja.net

The prison system in England and Wales is no doubt facing an unprecedented crisis. The number of prisoners is still at a six-month high and there are approximately 87,500 people in custody. The Public Accounts Committee (PAC) has produced a critical report urging the Gov-ernment to take rapid action to address this crisis.

The PAC report addresses the UK prison system crisis highlighting escalating violence, severe overcrowding and inadequate rehabilitation services.

Overcrowding, understaffing and inadequate resources have led to a strained system where they have been unable to meet the needs of both detainees and staff. There has been a growing issue of prisoners being held temporarily in police cells, rather than being transferred to prisons or detention facilities. This raises many human rights concerns.

Operation Safeguard and the Use of Police Cells

In an attempt to address the lack of capacity in prisons, Justice Secretary Shabana Mahmood has implemented Operation Safeguard, an emergency measure allowing for the use of police cells to hold prisoners when prisons have run out of capacity.

Police cells are designed for the short-term detention of individuals awaiting processing or court appearances. They are not designed to accommodate prisoners serving long sentences. Such an approach will no doubt have an impact on the prisoner's rights and welfare.

Criticisms from the PAC

In its report, the PAC has set out recommendations for the Ministry of Justice (MOJ) and HM Prison and Probation Services (HMPPS) so that they can take steps to address the prison crisis. The main criticisms and concerns raised by the PAC report are summarised as follows:

1. Unrealistic and delayed prison expansion plans
2. Inhumane living conditions
3. Ineffective rehabilitation efforts and a failure to reduce re-offending
4. Increased violence and safety risks due to over-stretched facilities.
5. A lack of strategic planning

The PAC reports has included several recommendations for the MOJ and HMMPS which should be addressed in their Treasury of Minute Response:

1. Apply lessons learned from their current projects to improve future major estate projects
2. Explain how they will ensure plans are realistic, especially regarding risk management and planning permission
3. Create a business case to address the prison estate maintenance backlog
4. Evaluate the impact of prison capacity pressures (the PAC have highlighted key areas on what this should focus on)
5. Develop a plan to improve rehabilitation efforts.
6. Outline how changes to probation and sentencing will affect reoffending rates.

Government Response on 16th May 2025

The Government provided a response to the prison overcrowding, noting the following key points:

- It will apply lessons learned from past-building projects to improve future delivery.
- It will improve planning for prison places, with better risk and planning permission strategies.
- The creation of a separate business case for the prison maintenance backlog was rejected, with the Government stating that the funding depends on the Spending Review
- It will update Parliament after the spring 2025 Sentencing Review covering maintenance, capacity and probation impact.
- It acknowledged emergency measures are costly and is now using investments to push for long -term funding.
- It disagreed with recommendation of extra evaluation of risk assessments for new prisoners, instead stating that existing safety processes are in place.
- It will assess the impact of overcrowding on self-harm and violence and is already monitoring prison safety data.
- It agreed to improve access to education, work and time outside the cells and holding prisoners accountable for delivery.
- Noted plans to improve rehabilitation and reduce reoffending will be shared after the Sentencing Review and this will include funding and targets.

Potential consequences of overcrowding

The response outlined above indicates a lack of urgency in addressing these concerns. Notably the following consequences are likely to be experienced by those living in overcrowded and unsuitable conditions, which may have long-lasting consequences.

- Overcrowding and poor living conditions may result in breaches of Article 3 (which prohibits inhuman or degrading treatment) and/or Article 8 of the European Convention on Human Rights (a right to private and family life).
- The ability to deliver programmes aimed at supporting rehabilitation may be compromised insofar as there are insufficient resources to meet demand, which in turn is likely to impact the reoffending rates (further compounding the existing difficultly of overcrowding). In addition, a lack of educational and therapeutic programmes will inevitably decrease the chance of a person successfully integrating back into society.
- A lack of therapeutic support, as well as treatment and assistance in addressing drug and alcohol use, may result in individuals needing that help being unable to access it (again increasing the risk of reoffending on release, and further continuing the problem of overcrowding)
- The increased risk of self-harm and suicide; a lack of adequate mental health resources due the overcrowding would likely result in a higher rate of self-harm and higher risk of suicide. The fact of overcrowding and the conditions in which prisoners are expected to live as a result of this, would understandably result their mental health being adversely impacted. Overcrowding will also inevitably impact vulnerable prisoners as well as the effectiveness of preventing prisoner on prisoner assaults as it will be harder to monitor those risks and intervene.

Whilst overcrowding within the prison system needs to urgently be addressed, a more appropriate solution is needed to address overcrowding without reliance on police cells. This approach is entirely unsuitable, and will no doubt have a detrimental effect on the emotional and physical welfare of prisoners; it appears to be a short-term, short-sighted attempt at a solution and is effectively one that kicks the can down the road without properly and effectively addressing any of the problems raised by the PAC. As a consequence, it is anticipated that those within the prison system will inevitably be more vulnerable to harm, and to experiencing a breach of their Convention rights.

We believe that every individual – including those in custody, deserves to be treated with dignity and fairness. Our Civil Liberties & Human Rights team has a long history of holding the state to account when people's rights are violated in prison or detention settings. If you or a loved one has been affected by poor prison conditions, inadequate healthcare, or potential breaches of your human rights, we're here to help. Contact our legal experts on **0330 029 1587** today to discuss your concerns in confidence.

www.hja.net

Can AI be trusted for legal research?

by James Tumbridge, Robert Peake, Ryan Abbott

In the first of a two-part series, Technology partners James Tumbridge and Robert Peake, and consultant solicitor Ryan Abbott consider the use of Artificial Intelligence (AI) in legal research, comparing the approach in the UK with that in the US and Canada.

AI has been thought of as the solution to everything for the past couple of years. The use of AI in legal disputes presents positive opportunity, but issues have been spotted, resulting in various guidelines and rules being published. The concerns are now growing in the UK following embarrassment of lawyers and trade mark attorneys in using AI that produced inaccurate outputs.

Not everything is Generative AI (genAI), meaning you ask it for something, and it generates an outcome. The generative product of AI is what has caused most concern in legal proceedings. The first reported case of lawyers relying on the use of genAI occurred in the US in May 2023. This involved two New York lawyers who used an AI tool, ChatGPT, for legal research, which produced results that included made-up cases. These results were submitted in federal court filings without being reviewed or validated by attorneys, resulting in Judge Castel demanding the legal team explain itself. Despite the widespread attention this case garnered, American attorneys still continue to submit ChatGPT output without review or validation. There are also similar examples from Canada, including the April 2025 case of Hussein v. Canada, where the lawyer apparently relied on a tailored legal genAI tool called Visto.ai designed for Canadian immigration cases, but still ended up using fake cases in the submissions, as well as citing real cases but making the wrong points. Canada requires disclosure of the use of AI but that did not stop these mistakes.

The judge commented:

"[39] *I do not accept that this is permissible. The use of generative artificial intelligence ... must be declared and as a matter of both practice, good sense and professionalism, its output must be verified by a human...*"

Use of AI in English courts

The English courts do not ban the use of AI but both judges and lawyers have been told they are responsible for the material which is produced in their name. In England & Wales, AI can be used but the human user is responsible for its accuracy, and responsible for any errors. In November 2023, the Solicitors Regulation Authority issued guidance on AI use and The Bar Council published guidance in January 2024. More recently in 2025, the Chartered Institute of Arbitrators also issued guidance.

England has been looking to technology and, potentially, AI helping with cases for some time. In March 2004, algorithm-based digital decision making was working behind the scenes in the justice system. Lord Justice Birss explained then that algorithm-based decision making was already solving a problem at the online money claims service, with a formula applied where defendants accept a debt but ask for time to pay. Birss LJ went on to say that looking to the future: "AI used properly has the potential to enhance the work of lawyers and judges enormously." In October 2024, the Lord Chancellor and Secretary of State for Justice, Shabana Mahmood MP and the Lady Chief Justice, The Right Honourable the Baroness Carr of Walton-on-the-Hill, also echoed the potential of technology for the future of the courts and justice system.

However, alongside accuracy, there is concern about the ethics in the use of AI. On ethical AI and international standards, the UK promotes the Ethical AI Initiative, and the international standard – specifically ISO 42001, the AI management system. This may be adopted as a standard in English procedure at some point. In April 2025 the judiciary updated its guidance to judicial office holders on the use of AI. Yet all this guidance seems to be unheeded: There is a clear need for better understanding of the rules and policing of lawyers.

Use of AI in American courts

As discussed above, the first case to involve a lawyer caught submitting inaccurate ChatGPT-generated content was *Mata v. Aviance, Inc. No. 1:2022cv01461 (S.D.N.Y. 2023)* involving attorneys Steven Schwartz and Peter LoDuca and their firm Levidow, Levidow & Oberman. The judge sanctioned both attorneys and their firm, levying a $5,000 fine for misleading the court. The judge found that the lawyers acted in bad faith and made *"acts of conscious avoidance and false and misleading statements to the court"* in order to obfuscate their conduct. The judge found Schwartz did not understand ChatGPT's limitations, did not self-verify the AI-generated results, and relied on ChatGPT's self-verification.

In any American court, there is an obligation for attorneys submitting legal citations to verify the citations are accurate. Lawyers signing legal filings are responsible for this verification, whether underlying work was done by junior attorneys or genAI systems.

Federal Rule of Civil Procedure 11(b)(2) requires that when an attorney or unrepresented party submits legal documents to the court, they certify that the legal claims or arguments are supported by existing law or by a reasonable, nonfrivolous argument to change the law.

Some courts have created bespoke rules dealing with the use of genAI by litigants. For instance, in 2023, U.S. District Judge Brantley Starr of the Northern District of Texas required attorneys to file a certificate to indicate either that no portion of any filed document was AI-generated, or that a human being validated any AI-generated text.

Law360 maintains a tracker of U.S. district and magistrate judge standing orders on AI. About 2% of judges have such orders. Some judges ban the use of AI outright, others require disclosure of the use of AI and attestations related to accuracy. Some courts have simply reminded counsel that they are responsible for ensuring any information submitted to a court is accurate.

In *Lacey v. State Farm Gen. Ins. Co., No. cv-24-05205 FMO (MAAx) (C.D. Cal. May 6, 2025)*, attorneys from K&L Gates and Ellis George were fined $31,100 for submitting briefs with non-existent or incorrect citations. Similarly, in *P.R. Soccer League NFP Corp. v. Federación Puertorriqueña de Futbol, No. 3:23-cv-01203-RAM-MDM (D.P.R. Apr. 10, 2025)*, more than $50,000 in attorney's fees was awarded to Paul Weiss after opposing counsel filed motions with made up content.

Most recently, lawyers for MyPillow CEO Mike Lindell were fined after submitting a legal brief filled with AI-generated errors. U.S. District Judge Nina Wang of the District of Colorado found that attorneys from McSweeney Cynkar and Kachouroff *"were not reasonable in certifying that the claims, defenses and other legal contentions... were warranted by existing law."* The Court fined Kachouroff and the attroneys $3,000 each.

If you have questions or concerns about the use of AI in legal research, please contact:

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Finding The Ideal Dental Expert For Your Next Case

By Professor Paul Tipton

Introduction
One of the biggest problems facing the legal profession currently is the inability to find suitable experts for a case.

According to research conducted for the British Dental Health Foundation, consumer confidence in Dentists is at 88%, far higher than that of doctors and twice as many people value their relationship with their dentist over their doctor (19.7% to 9.9%), yet dental litigation figures are going through the roof.

Dentists are now twice as likely to be sued than they were 10 years ago according to figures from Dental Protection. This is despite reports from the Care Quality Commission that dental patients are at lower risk than those being seen by any of the health provider.

The current clinical negligence landscape has arisen due to the current NHS system of payment and a de-skilling of new dental graduates.

Dentists face an ethical imperative to promote what is best to the patients and this beneficial approach to care is balanced with a desire to avoid harm if possible.

NHS Payment System
One of the factors that drive dental decisions is the payment system. In the UK, the NHS payment system primarily revolves around activity payments (either fee per item or units of dental activity – UDA's). The current remuneration scheme (UDA's) in Health Service Practice in England & Wales impacts the daily decisions that dentists make. Quite simply, if your payment mechanism encourages prevention, then prevention will be provided. On the other hand, if your payment approach encourages restorations or extractions, then restorations or extractions will take place. To give an example, a dentist receives the same payment for an extraction as he/she does for a root filling. Whilst an extraction may take 5-10 minutes, a molar root filling may take one hour.

Consent
There is a professional and ethical obligation to find out what our patients want to know as well as what you think they need to know. Following on from the Supreme Court judgment in the Montgomery case, there is now legal obligation to do the same. Consent is not a matter of bombarding the patient with technical information or a smorgasbord of choices that are either specifically related to the patient or tossed into the conversation simply to fulfill the ethics of giving all the options or appropriate for the clinical situation.

The best known definition of 'consent' comes from the Department of Health which says it is "the voluntary continuing permission to the patient to receive particular treatments, it must be based upon the patient's adequate knowledge of the purpose, nature, likely effects and risks of that treatment including the likelihood of its success and a discussion of any alternative to it including no treatment." Montgomery replies that clinicians translate their professional knowledge into something meaningful for the average patient. The dentist is required to inform their patient about risks, which the individual sitting in the chair would be likely to attain significance to. Unless the patient is informed of the comparative risk of different procedures, they would not be in the position to give their fully informed consent to one procedure rather than another. However, dentists are not paid for treatment planning and giving alternatives, but only for treatment.

The consent checklist involves:

- Is the patient old enough and capable of making decisions?
- Have I given the patient sufficient information about the treatment?
- Does the patient understand what treatment they have agreed to?
- Does the patient know their risk susceptibility status?
- Does the patient know what his or her own involvement is?
- Does the patient understand the risks and benefits of the treatment?
- Has the patient been given alternatives?
- Does the patient understand all the costs involved?
- Have I provided any written information about the treatment and preventive procedures?

Breach of Care
A patient must prove there was a breach of duty of care in failing to reach the standard of care expected

and they suffered harm/losses as a result (causation) and that harm was foreseeable and not to remote.

The key issue is what the standard care pertaining to the time for that particular clinical situation was and whether the dentist did something a reasonable dentist would not have done alternatively did not do something a reasonable dentist would have done in that particular situation. This is the 'Bolam Test' and still a relevant standard that applies some 60 years after the judgment was handed down.

The Bolam test is applied in law to assess whether or not the defendant in question has committed a breach of duty, and is guilty of negligence. It clearly states that a dentist is not deemed to have been negligent if he/she has acted in accordance with a practice accepted as proper by a responsible body at the time the event occurred.

The law does not expect the dentist to be aware of every recent development in medical science but they would however expect that the procedure or technique has become well proven and well accepted before it is adopted.

The GDC however expect clinicians to provide good quality care based on current evidence.

Causation
Proving negligence is only half the battle though. Once negligence has been identified, the claimant then has to prove causation. This is why the experts report is required.

Identifying causation is the most important factor in a case and is often overlooked by some experts. Each expert must understand that it is not enough to simply just to deal with liability, for the case to have merit. The claimant must prove that the patient would have had a much better prognosis but for the defendant's negligence.

The but-for test is used to identify causation. I.e. but for the negligence, the resulting outcome would have been far better/ the injury would not have occurred. Thus the negligence in question made a material contribution to the severity of the injury.
If a defendant is deemed to have been negligent, but the resulting damage would still be the same, then there is no case as causation has been disproved.

Periodontal Disease
Negligence cases take the most amount of time, are often highly complex and can involve multiple dentists over a period of time during which the patient was treated. This is especially in the area of periodontal disease where lack of care, treatments and diagnoses may have been going on for a decade or more; the patient has seen multiple dentists who have continued to misdiagnose the disease process. This becomes difficult to apportion the negligence percentage to each of the dentists involved in the case.

The periodontal disease types of negligence cases that we see in Dentistry are due to a lack of diagnosis and lack of treatments which has in turn led to tooth loss. These teeth then need to be replaced, usually with dental implants. Dental implants are a very costly treatment and usually not available in the health service and often, should the negligence have led to loss of many teeth, then treatment cost can be in the region of £50,000 in order to replace these missing teeth with implants.

Tooth Extractions
The second most common cause of negligence is due to tooth extraction where it has not been explained to the patient that there are other options which could lead to the tooth being saved. If they had been fully informed they would have taken another route which would have led to their tooth being treated. This is often the result of the extraction being an easier but not always better option to complex restorative treatments to save the tooth. Again, once the tooth has been removed the usual replacement is with the dental implant and a single tooth replacement is often in the region of £3,000 to £4,000.

Cosmetic Dentistry
More recently, we are seeing complex cosmetic treatments for which the dental practitioner is either inadequately trained for or does not provide the patient with a reasonable estimate of the costs and outcome, alongside the pros and cons of such treatment. Here, the more expensive treatments include dental implants, cosmetic dentistry with veneers, etc., and also short-term orthodontics.

Patients are very often disappointed when having veneers or crowns placed, as the end result does not match their expectations which can again lead to a claim. Most dentists often do not complete enough diagnostic work in advance of treatment, so that the end result can be easily previewed by patients and amended as required.

Dental implants have a failure rate and this is often overlooked. The expected failure rate has always been in the region of 5% in the lower jaw and 10% in the upper jaw. More recently, however, there is peri-implantitis disease which has led to an increase in these rates. Again this is often overlooked during the treatment planning stage. The patients have the assumption that their implants will last them a lifetime.

Prosthodontics
My specialty of Prosthodontics deals with the replacement of teeth and this can be via crowns, veneers, bridges and implants. Prosthodontics would

also include treatment of the temporomandibular joints and bite. This treatment is often wholly performed by dentists who have inadequate training in the field of occlusion (bite). Being a Specialist in Prosthodontics and a Professor of Restorative and Cosmetic Dentistry gives me an overall view of all the fields involved in Restorative, Cosmetic and General Dentistry which is essential when writing reports and coming to opinions as to plans and treatments.

Dental Education

Dental education has also impacted upon the current climate. Dental education has changed massively over the years and I have been involved in it very closely with my company Tipton Training. We have trained dentists over the last 20 years both in the UK and abroad in some of the complex issues of the newer techniques in Dentistry. Due to government cutbacks and lack of funding, often some of the newer graduates are graduating from dental school without basic knowledge and without having performed some of the basic dental tasks. This then leads to a lack of confidence on the dentist's part which can be reflected in the quality of treatment that is provided. In general, many of the newer graduates from home and overseas may be de-skilled in many practical dental procedures that the experienced dental practitioner takes for granted.

Dental Experts

Expert witnesses, however, now operate in a regulatory and legal environment. It is much more onerous than it was 10 years ago. Not only can any participant in the court case or indeed an outside observer refer an expert witness to the relevant professional regulator but litigators themselves can also sue their own expert for damages if they think the expert is being negligent. So there is a serious professional risk. In the latest British Dental Journal, there was an article on "The GDC – a law unto itself", which is well worth reading by the legal profession and describes exactly why today's dentist are worried about being reported to their own regulator (the GDC).

This is why many experts have now closed their books or do not take on this type of work anymore especially the complex negligence work.

Choosing a Dental Expert

The increase in dental litigation combined with the paucity of dental experts means that finding the right expert for each particular case is incredibly difficult.

This has obviously resulted in a lack of quality experts for litigants to choose from.

The choice of dental expert should be based on the understanding and knowledge of their field and someone who has over 10 years of general dental practice. Alternatively, dentists who have gone on to have further education in a particular field, such as Master's degrees or Specialists in Periodontics, Endodontics, Orthodontics, Prosthodontics, General Dentistry and Implantology, and finally to Professors or Consultants when required for more complex cases.

The term involves the word 'expert' for a reason, they should have expertise in their particular field and not just be practicing in it, that shouldn't qualify. There is definitely a positive correlation between who the best experts are and their knowledge and expertise within their particular field. Their CV, qualifications, professional standing, reputation and experience bears witness to their level of expertise.

An expert witness is called upon when the facts and issues of the case cannot be easily identified and requires the expertise of a specialist in a particular area to explain and draw conclusions on the case. The aim of an expert is to provide clarity and reasoned judgement on the complex issues and facts within the case.

Duties and Responsibilities
It's a necessary trait that an expert has familiarity and demonstrates a clear understanding of all the procedural requirements for giving evidence in a court of law. They must conform with the requirements set out in Part 35 of the Civil Procedure Rules.

An experts duty and responsibility is to the court only, it is their duty to help the court on matters within their expertise. Experts must remain impartial to the case as their goal is to present an independent view that is objective of the case in question. The eventual outcome of the case should have no bearing on the experts decision making. As their primary duty is to the court, they must present an honest, impartial and rational opinion based on the relevant case facts, even if that means acting against the best wishes of the party by whom they have been instructed.

Impartiality starts before instruction. Before accepting any instruction, the expert must ensure that there will be no conflict of interest in the case in question, i.e. that the eventual opinion formed by the expert will be free from emotional attachment, bias and prejudice. This will obviously not occur should the expert have a prior relationship, on any level, with the defendant in question for instance.

Emotion can manifest itself not just as a result of a prior relationship, but also due to ones own past experiences. Previous experiences may result in a positive/negative relationship with one viewpoint and for example, perhaps a feeling of sympathy towards the defendant. Bias has thus been created and neutrality towards the case lost.

Expert Witness Training
It is also important to have continuity when choosing an expert and knowing that they have been through adequate training in the expert witness field and have enough experience in that field to write reports which are legible, easy to read and precise. It is essential to understand a basic knowledge of the legal system so as to help the court reach its opinion if required. It appears that accreditation from a recognised body is increasingly becoming a prerequiste of many instructing litigants.

Understanding of the Literature
Although there are very few cases in which an expert will physically end up in court, it is still paramount that they have the ability to communicate and present information well. A dentist may be correct in their opinion but unless they can fully explain and justify their opinion by reference to the relevant facts and dental/medical literature, then their opinion will be less convincing and thus will carry less weight. Therefore the ability to explain the relevant anatomy and physiology in layman's terms to the court is crucial.

Experts should always communicate in a non-technical language that can be easily understood by the judge and tribunal. This goes for the experts report as well. A good expert report should always be structured in a clear and concise manner, easily understood by all, as well as citing all the relevant facts, the investigation, the references, the analysis, the reasoning and the conclusion.

The final key quality a good expert presents is decisiveness. The expert must draw on their knowledge to form a decisive opinion based on the relevant facts presented in the case. When fact-based opinions aren't possible, an expert needs to be decisive and provide, to the best of their ability, an objective and accurate opinion based on the balance of probability. It is imperative the expert is able to understand the difference between what a dentist might to and what a dentist ought to do in any given situation.

Selecting the Right Expert
Thorough attention is required when reviewing a case. An expert must give careful attention to his or her instructions, ensuring that they scrutinize all relevant medical and dental records and witness statements from which to draw their conclusions.

Paying attention to detail helps to present a balanced but clear view of the case at hand, particularly the standards and accepted body of opinion that was used at the time the supposed negligence occurred. A good expert must always pay attention to the accepted body of opinion at the time of the event to adjudicate whether negligence has occurred by comparing the treatment facts with the then accepted treatment guidelines. In these time-lapse instances, it can be very important to choose an expert who was in practice during a similar timeframe. Likewise it is key that when selecting an expert witness for cases of the not too distant past, the expert in question must still be practicing and be up to speed with the now accepted body of opinion.

Privilege in UK tax disputes: Five questions answered

by Sarah Osprey, Zoe Andrews, Tanja Velling

HMRC cannot demand disclosure of documents that are subject to legal professional privilege. However, it is not uncommon for HMRC to ask for them. Careful thought is required when assessing if a document really is privileged (and so can be withheld) and, if so, whether the benefits of sharing it with HMRC might outweigh the risks. In this post, we address five common questions on privilege, which follows on from the more general tips on information requests that we previously shared[1] part of a series on tax disputes in the UK.[2]

First things first. Legal professional privilege (**LPP**) protects a client's confidential communications with their lawyer made for the purpose of obtaining legal advice. It can also protect confidential communications with third parties (such as expert witnesses) made for the purpose of preparing litigation. LPP is a fundamental right that belongs to the client; it prevents the protected communications from being disclosed without the client's consent. It is also a notoriously difficult area of law. Recent trends have shown increasing scepticism from HMRC and regulatory authorities regarding LPP.

Can HMRC ask for privileged documents?

HMRC can (and do from time to time) ask to see documents that are privileged, but it is up to you whether to provide those documents or not – you are not obliged to do so. Sharing advice may be helpful in resolving a dispute, but the consequences and potential downsides need to be considered. If you provide a piece of advice, privilege could be lost not just in respect of that document, but also for related documents (which may or may not be so "helpful" for your position). "Cherry-picking" which privileged documents you share is generally not allowed. And, in a cross-border context, the implications for other jurisdictions of sharing advice with HMRC would need to be considered.

What if privileged documents are leaked or inadvertently provided?

It depends on the circumstances of the leak. Privilege is inherently linked to (and dependant on) confidentiality. If confidentiality is lost, privilege is lost and cannot be regained. If the advice has been posted on a public website and viewed by thousands of people (think Panama Papers), there is no coming back. But, if privileged advice was inadvertently included among documents provided to HMRC in bulk following an information request, or if an HMRC officer was accidentally copied into an email with privileged advice, it should be possible to salvage the situation. It is crucial to act quickly, inform the recipient that LPP applies, and ask them to delete (and not pass on) the material sent in error. Of course, it would be better to prevent inadvertent or accidental disclosures in the first place. Where HMRC ask for all emails from a particular inbox, it is advisable to review the emails first so any privileged material (and material that should be withheld for other reasons) can be removed.

When does LPP apply? Does copying a lawyer make an email privileged?

No, copying a lawyer does not automatically make an email privileged. The application of LPP depends on the purpose and substance of the communication. Merely copying a lawyer into emails about a company directors' travel arrangements would not make those emails privileged. But the conclusion would be different, if the lawyer was copied to advise on how many days the director would be regarded as having spent in the UK for tax purposes because of those travel arrangements. Where a confidential communication is for the purpose of getting legal advice, it can attract LPP, whether it asks a specific legal question or sets out the factual background for the advice.

The same principles apply if you have a company director who is a lawyer. Whether confidential communications (including emails) with the lawyer/company director are privileged will depend on the purpose and substance of those communications. Are you seeking legal advice? Or are you discussing commercial issues in respect of the running of the company?

Who is the "client" for LPP purposes?

Very broadly, only communications between a lawyer and their "client" can be privileged during an HMRC enquiry (there are exceptions to this if litigation is reasonably in prospect, but that often will not be the case until quite late in the enquiry process, or until a closure notice has been issued).

Identifying the "client" can be one of the most problematic elements of the test for LPP. The "client" is restricted to those employees of a corporate who

are given responsibility for obtaining legal advice. Documents produced by other employees may not be protected by LPP, even if the documents were prepared for the purpose of enabling legal advice to be given. As a practical matter, it is important to define the "client" group at the outset and maintain and update a record of that group through the enquiry. Note that too wide a "client" group may be deemed artificial and could risk a waiver of privilege, while too narrow may give rise to practical issues for the purposes of providing lawyers with instructions.

Are the rules on privilege the same across different jurisdictions?

No. The rules can vary between different jurisdictions. One difference between English and EU law is, for instance, that, under English law, privilege covers advice by inhouse lawyers and lawyers qualified abroad. In contrast, EU law recognises privilege only in respect of advice by external counsel qualified in an EEA country. There are also differences between privilege in the UK and the US. Under English law, it is possible to share selected documents for a limited purpose without losing privilege. This is referred to as "limited waiver". As that concept is not recognised in the US, the IRS would likely consider any applicable US privilege to have been lost where a document is shared with HMRC (even if on a limited waiver basis).

Bonus: how we can help!

Please get in touch with any of us or another member of Slaughter and May's market-leading tax disputes team[3] if you have any questions on the topics discussed in this blog or another tax disputes query.

We have extensive experience in advising at every stage of a wide range of disputes from questions of UK corporation tax, partnership taxation and VAT grouping to treaty interpretation and transfer pricing. Whether you are looking for strategic advice in respect of an ongoing issue or proactive risk management through the creation of defence files or an audit of existing processes, we can help.

References

[1] **Previously shared blog**
https://www.europeantax.blog/post/102145f/how-to-respond-to-information-requests-from-hmrc

[2] **Tax disputes in UK series**
https://www.europeantax.blog/tag/tax%20disputes%20series%202025

[3] **Slaughter and May's market-leading tax disputes team**
https://www.slaughterandmay.com/services/practices/tax/tax-disputes

Hypothetical Valuations, Real Insights: A Forensic Approach To Business Worth

by Neil Rudd: Associate Director in the Forensic Services Team at Crowe U.K. LLP

Introduction
Haven't you ever wanted to play a game of matching hypothetical businesses to the most appropriate valuation methods? No, me neither, but who knows, it might catch on.

Forensic accountants are regularly instructed to opine on the hypothetical market value of a business, when an actual sale of the business may not be practical or needed. This can occur both in a contentious legal setting, for example, in divorce proceedings, shareholder / partnership disputes or unfair prejudice matters, or in a non-contentious setting, say, when a valuation is needed at a particular point in time for tax purposes.

A common question that arises in these situations is, "Which valuation method is the most accurate?" Unfortunately, the answer is often "it depends." Thankfully, forensic accountants have a variety of tools at their disposal to address different scenarios.

Below I explore various scenarios, all framed in the hypothetical shareholder dispute between hypothetical business partners, Ellen, Esme and Deanna and their hypothetical pharmaceutical conglomerate, Ell Ess Dee Limited.

See if you can work out which subsidiary might lend itself to each valuation approach, before the likely candidate is revealed at the end of each section, with your options being.

(a) Ell Ess Deesign Limited, the R&D division, responsible for deigning new drugs.
(b) Ell Ess Deelivey Limited, its wholesale arm, manufacturing and supplying drugs to pharmacies.
(c) Ell Ess DeeLandLord Limited, a remnant from when they used to operate a chain of pharmacies, but now just hold the premises as investment properties to rent out.
(d) Ell Ess Deeveloper Limited, a recently acquired mobile phone app developer, known for its addictive pharmaceutical sim game, Side Effect City.

Earnings based approach
This method first seeks to establish the level of maintainable earnings that a business can sustain for the foreseeable future. Often the measure of earnings used is EBITDA profit, being earnings before interest, taxation, depreciation and amortisation, as this can be a fairly comparable profit measure when evaluating different businesses. A combination of historical, current and forecasted financial performance may be used in arriving at this estimate of maintainable earnings.

The estimated maintainable earnings are then multiplied by a factor, referred to as 'the multiple' representing the number of future years' earnings for which a purchaser might be prepared to pay to give an enterprise value for a business. Comparable real-world transactions, listed company multiples or published valuation indices are some of the common resources used in deciding what is an appropriate multiple.

This enterprise value is the value of a business' underlying trading operations, which must then be adjusted to reflect its working capital and debt structure, to arrive at the market value of the business.

With the profitability of the business being fundamental to this approach, it lends itself to being used to value profitable trading (rather than investment) businesses, that have reasonably predictable future financial performance.

Ell Ess Deelivery Limited, the pharmaceutical wholesale arm, could potentially be valued using an earnings based approach, given it is a well-established profitable business that has traded consistently for many years.

Turnover multiple approach
A turnover multiple approach is a specific type of earnings-based approach, but as the name suggests, it uses turnover rather than profit as the measure of earnings.

Again, this applies to trading businesses and can be appropriate in situations where stable recurring turnover is a key metric of the success of a business. Examples where this might be appropriate are.

- An independent financial advisory business, whose turnover is derived from a percentage of the assets it manages on behalf of its clients.
- A mobile phone game developer, whose turnover is reliant on advertising revenues earned through users playing the game, rather than the initial purchase of the game.

Probably slightly too well signposted, Ell Ess Deeveloper Limited, the mobile phone app company, is a potential candidate for this valuation method, particularly given the amount of recurring advertising revenue Side Effect City generates.

Asset based approach
An approach that does exactly what is says on the tin, in that it values a business based upon the market value of its assets (and liabilities). This is usually achieved by

reviewing a business' balance sheet and adjusting any assets and liabilities that are not held at a market value, to market value. A typical example of an adjustment might be land which is sometimes valued in the balance sheet at the original cost it was purchased for, rather than its current market value.

This approach might be used in situations where a business is more reliant on the value of the assets it owns rather than the revenues and profits it can generate from these assets. Property investment companies, (such as Ell Ess DeeLandLord Limited), or farming businesses often fit these criteria.

Asset-based valuations might also be appropriate where a trading business is loss-making, or marginally profitable and there may be more value in selling the assets, settling the liabilities and withdrawing the residual cash, than there is in continuing the trading operations.

Discounted cash flow (DCF) approach

The DCF method is based on the assumption that the value of a business, is equal to the net present value of its expected future cash flows. This means it reflects what someone would be willing to pay now for the opportunity to receive future cash flows.

This approach requires the production of detailed and reliable medium to long-term forecasts of operating cash flows and capital expenditure of the business. The total value of these forecasted cashflows is discounted to reflect both the risk and uncertainty in achieving these cash flows as well as recognising that cash in the future is not worth as much as if it was received today.

This approach can useful where historical and current financial performance is not necessarily indicative of future performance, which can be the case for.

- Start-ups or relatively new businesses that are expected to undergo a period of significant growth.
- Businesses that are expecting a step change in performance, owing to, for example, entering a new market, releasing new products or adopting a different strategy.
- Businesses that are planning on buying new or selling existing trading divisions/subsidiaries, materially altering their overall trading capacity and performance.

With any DCF valuation, it is important to remember that the valuation is only as good as the forecasts it uses, with forecasting always having an element of uncertainty and crystal ball gazing.

By process of elimination, the only remaining subsidiary to be valued is Ell Ess Deesign Limited. Given the impending release of its new cure for the common cold, its profitability is anticipated to skyrocket, which can be reasonably accurately forecasted, given that the licensing and distribution agreements for the next ten years have already been negotiated. A DCF valuation may well be a valid approach in this situation.

A recent actual transaction

Say, a couple of months prior, an arms-length third party had bought an interest in the business to be valued. It might be possible that the consideration paid for this interest could be used as a proxy for the current market value of the business, if the assumption that the market value is unlikely to have materially changed in such a short timeframe holds true. Using this proxy is, in a nutshell, the recent actual transaction approach.

While we have already mentioned Ell Ess Deevelopment, the app developer, in the context of a turnover multiple approach, given that it has only recently been acquired by Ell Ess Dee Limited, this recent actual transaction approach might also be an option.

It is worth remembering that using more than one valuation method as a cross-check to each other, can make a hypothetical valuation more robust, providing the circumstances for using each valuation approach are appropriate.

Final thoughts

This has only been a whistle stop tour of a few of the valuation methods employed by forensic accountants, but hopefully it has given you some insight into aspects of a forensic accountant's thought process, when approaching hypothetical business valuations.

I must stress that there are no hard and fast rules about when any particular approach should be employed, with the availability, quality and reliability of information as well as the specific nuances of each situation being factors that can impact which valuation methods can and should be used.

The Royal College of Psychiatrists has launched 'Delivering for Disability'

- a new campaign and guidance calling on mental health employers in England, to adopt 15 actions to help combat the disability discrimination of NHS staff.

Providing Reasonable Adjustments - Essential Guidance for Mental Health Employers, is a co-produced framework designed to empower NHS services to implement effective and practical support for staff with disabilities and long-term health conditions. The guidance bridges the gap between policy and lived experience, to enable all staff, regardless of ability, to thrive.

NHS England data shows that mental health staff with disabilities are twice as likely to report experiencing personal discrimination from a colleague or manager compared to their non-disabled peers (12.2 per cent vs. 5.8 per cent).

RCPsych President Dr Lade Smith CBE said:

"Disability discrimination comes at an immense cost to individuals, teams and ultimately impacts our ability to retain experienced professionals and thereby look after patients. Our Providing Reasonable Adjustments guidance equips employers with clear, evidence-based actions, informed by the voices of those with lived experience. By embedding these practices, services will benefit because staff will be better supported, more likely to remain and thrive at work, all of which will be much better for patient care."

'Dr B' suffered with Long Covid and reasonable adjustments enabled him to remain at work:

'Dr B' had Long Covid for over three years, with long-term physical and cognitive issues and deterioration over that period. Accommodations included working four days instead of five and no on-calls due to the extent of cognitive fatigue beyond 5pm. One day a week they worked from home to reduce the effect of travel, and an FFP3 mask was worn in all clinical areas to reduce further acute Covid risk.

As a result, Dr B was able to continue work and their talent was retained within the NHS. Their employer reviewed working arrangements and hours on an ongoing basis and adapted reasonable adjustments.

Dr Lade Smith CBE, President of the Royal College of Psychiatrists, said:

"Tackling the barriers that interfere with people with disabilities being able to give their best at work is imperative to improving productivity. It will also make the NHS a more compassionate, inclusive and attractive place to work. Reasonable adjustments help staff feel valued and respected, reduce sickness absence, improve retention and foster better teamworking."

"I'd encourage leaders at all levels, from board executives to clinical supervisors, to embed this guidance into their workforce strategies. The aim of the guidance is not only to help you meet your legal duty as an employer but to create productive and healthy environments that benefit all staff, ultimately supporting them to improve patient care."

Filippo Di Franco MD FRCS

Upper GI & Laparoscopic Surgeon

Mr Filippo Di Franco is a Consultant Upper Gastrointestinal and Laparoscopic Surgeon at the North West Anglia NHS Foundation Trust and also Director for the Division of Surgery at North West Anglia NHS Foundation Trust.

Mr Di Franco specialises in General Surgery and all aspects of benign upper gastrointestinal surgery and emergency general surgery, including laparoscopic/open surgery for gallstones (cholecystectomy), groin hernias, abdominal wall hernias, hiatus hernia, acid reflux (gastro-oesophageal reflux disease) and acute intra-abdominal conditions such as peptic ulcer disease, bowel obstruction and perforation, appendicitis, cholecystitis, pancreatitis, peritonitis and trauma. He is also a JAG accredited upper gastrointestinal endoscopist.

As an expert witness, Mr Di Franco can be instructed to provide an honest and reliable expert witness report on issues within a General Surgery context and in relation to trauma, personal injury and clinical negligence including breach of duty, causation, condition and prognosis. In addition to desktop reports and/or remote consultation, Mr Di Franco is prepared to undertake medical examination where it is necessary.

Mr Di Franco has undertaken specialist expert witness training and holds the Cardiff University Bond Solon (CUBS) Expert Witness Civil Certificate (2021). To complete the CUBS (Civil) he has undertaken the following Bond Solon Expert Witness training courses:
- Excellence in Report Writing (2019)
- Courtroom Skills (2020)
- Cross-Examination Day (2020)
- Civil Law and Procedure (2020)

Mr Di Franco has been awarded three Clinical Excellence Awards and has been a member of the "Q" (quality) initiative of Health Foundation since 2018 and Fellow of the Royal College of Surgeons since 2001. As Divisional Director for Surgery at North West Anglia NHS Foundation Trust, he is responsible for the overall performance of the Division of Surgery which includes 15 Departments. He has published some 22 papers in peer-reviewed journals on topics in general surgery. The majority of these papers relate to laparoscopic surgery and emergency surgery.

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Dr Andrew Breen

Consultant in Anaesthesia and Intensive Care Medicine

MBCHB FRCA FFICM MBA

Dr Andrew Breen is a Consultant in Intensive Care Medicine and Anaesthesia based at Leeds Teaching Hospitals NHS trust, West Yorkshire, a position he has held since 2005.

Intensive care medicine: Dr Breen's clinical expertise is in the comprehensive delivery of support to patients requiring general intensive care and cardiac intensive care. His clinical workload comprises the breadth of general intensive care medicine, as well as the specialist areas of liver failure and transplantation, upper GI and bariatric surgery, cardiothoracic surgery, haematology and oncology. This includes the treatment of sepsis, shock/cardiovascular support, respiratory failure and multiple organ failure.
His academic and educational interests include
- point-of-care ultrasound
- the ethics of care escalation
- intravenous fluid therapy and electrolyte management
- delayed treatment of the deteriorating patient
- prognostication and decision-making

Anaesthesia: Dr Breen's clinical expertise in anaesthesia comprises all areas of general surgery, as well as the specialist areas of thoracic surgery, hepatobiliary surgery, upper GI and bariatric surgery.
This includes
- cardiovascular management
- intravenous fluid therapy
- vascular access
- preoperative assessment
- postoperative management & complications
- airway management

Sepsis: As a consultant in Intensive Care Medicine and Anaesthesia, Dr Breen has been managing sepsis for over 20 years. His interests in sepsis range across the intensive care environment, the hospital ward environment and the operating theatre, and include early resuscitation, system-wide quality management and the education of all frontline healthcare providers in optimal management.

Intravenous fluid therapy: Dr Breen is an experienced educator and quality improver in the administration of intravenous fluids.

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Mr Robert Sutcliffe

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Consultant Hepatobiliary & Pancreatic Surgeon

MA MB BChir FRCS(Gen) MD

Mr Robert Sutcliffe is a Consultant in Hepatobiliary and Pancreatic Surgery based at Queen Elizabeth Hospital, Birmingham.

Robert graduated in medicine at Cambridge University in 1995. After basic surgical training, he was awarded an M.D. after completing research into hepatocellular carcinoma at Kings College Hospital, London.

Robert has played a major role in developing the laparoscopic HPB programme in Birmingham and also has experience in robotic HPB surgery. Robert is experienced in treating patients with gallbladder, liver and pancreatic conditions, and offers the full range of HPB surgical procedures, including Whipple procedure, laparoscopic distal pancreatectomy, open and laparoscopic liver resection and laparoscopic adrenalectomy.

Robert has undertaken medicolegal work since 2013 (negligence work since 2014). He has attended both the Standard Medicolegal Course and Medico-legal expert witness course on clinical negligence in 2012. He is instructed on approximately 30-35 cases per year (negligence only), equally divided between claimant and defendant.

Areas of medicolegal expertise include;
- All aspects of hepatobiliary and pancreatic surgery, including bile duct injury, pancreatitis
- Adrenal surgery

Robert has an interest in clinical research and has published over 200 peer-reviewed articles. His research interests include surgical oncology, perioperative care and minimally invasive HPB surgery, and he has introduced enhanced recovery pathways after liver and pancreatic resection in Birmingham. Robert is a committee member for the European Registry of Minimally Invasive Liver Surgery (E-MILS) and an Associate Editor of the HPB Journal.

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Professor Jonathan Pinkney BSc, MB BS, MD, FRCP.

Professor of Diabetes, Endocrinology and Obesity

Jonathan Pinkney is Professor of Endocrinology and Diabetes at the Peninsula Schools of Medicine and Dentistry and Honorary Consultant Physician in Endocrinology and Diabetes at University Hospitals Plymouth NHS Trust. He qualified from London University in 1985 and has held senior clinical and academic appointments in Bristol, Liverpool and Plymouth.

Professor Pinkney has completed the Bond Solon Expert Witness training and he holds the Cardiff University Bond Solon (CUBS) certificate. Professor Pinkney undertakes the preparation of medicolegal reports relating to medical problems associated with diabetes, obesity, endocrinology (hormones and metabolism), and acute general medicine, in which fields he has many years of clinical experience and a wealth of expertise on all aspects of clinical management and the long term consequences of diseases.

Specific areas of expertise and medicolegal interest within the field of diabetes include the drug and other medical treatment of diabetes, the occurrence and long term treatment and risks associated with complications of diabetes (vascular disease, retinopathy, nephropathy, neuropathy and diabetic foot problems), and the risk factors for, and occurrence and management of hypoglycaemia, hypoglycaemia and driving, and forensic aspects of hypoglycaemia.

Specific areas of interest and expertise in the field of obesity include causes of weight gain, medical effects of weight gain, weight loss treatments including bariatric surgery, medical side effects and complications of bariatric surgery, and the impact of obesity and its treatment on long term health and mortality.

Specific areas of interest in endocrinology include diseases of the thyroid, adrenal and pituitary glands, calcium and vitamin-D metabolism and reproductive endocrinology.

General areas of medicolegal interest and previous experience within these specific disease areas include the correct application of evidence-based clinical practice to patient management, long term risks of complications, the risk of treatment side effects, and life expectancy.

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Security For Costs In Civil Litigation: Principles, Recent Developments, and Strategic Considerations

by Giles Tagg & Gus Palmann

The basics

Security for costs is a valuable procedural tool that ensures that defendants are not unfairly burdened by the costs of defending speculative or weak claims. If utilised correctly, it can also provide a strategic advantage. This article gives a general overview of the mechanisms, principles and developments concerning security for costs applications, as well as their strategic use.

What is "security for costs"?

An application for a security for costs order is a procedural device in civil litigation designed to protect defendants from the risk of incurring irrecoverable legal costs. It allows a defendant to request that a claimant provide financial security (typically a payment into court or a guarantee, or increasingly an after the event (ATE) insurance policy) ensuring that if the defendant successfully defends the claim, it can recover its legal costs. This tool is particularly relevant when there are concerns about the claimant's financial standing or its ability to satisfy a costs order.

How will the court decide the application?

The court will exercise its discretion, considering factors such as the claimant's financial position, residence, conduct, and potentially the merits of the case. If granted, the proceedings may be stayed until the security is provided.

Why does security for costs exist?

The rationale behind security for costs is rooted in fairness and risk mitigation. Defendants, unlike claimants, do not choose to be involved in litigation. If they are forced to defend a claim, they should not be left exposed to the possibility of winning but being unable to recover their costs. It is designed to protect defendants from the risk of non-payment of costs, especially where the claimant is impecunious, resides outside the jurisdiction, or has taken (or would otherwise be likely to take) steps to frustrate enforcement.

Key principles established by case law

Several landmark cases have shaped the principles governing security for costs:

1. The courts must avoid using security for costs oppressively and should consider whether the claimant's financial difficulties were caused by the defendant. Although prospects of success are relevant, a court should not, however, consider the merits of the case in any detail when deciding whether to grant security for costs, unless either party can demonstrate a strong probability of success. *(Keary Developments Ltd v Tarmac Construction Ltd (1995)).*
2. Residence outside the jurisdiction alone is insufficient to justify a security for costs order; there must be a real risk of enforcement difficulties. Proportionality and access to justice must be balanced against protection of defendants. *(Nasser v United Bank of Kuwait (2001)).*
3. An ATE insurance policy may provide adequate security. The Court of Appeal has held that ATE policies can satisfy security requirements particularly if they contain anti-avoidance provisions and offer sufficient protection. This is very much a developing area of law, with an increasing maturation of the ATE policy market. *(Premier Motorauctions Ltd v PwC LLP (2017)).*
4. If there is a reasonable possibility of indemnity costs being awarded, the amount of security should reflect that. The courts have also reinforced the importance of full and frank disclosure by claimants opposing security applications. *(Danilina v Chernukhin (2018)).*

Recent developments

ATE insurance and litigation funding Courts have become more critical of ATE policies, scrutinizing their terms, exclusions, and enforceability. Recent cases emphasize the need for anti-avoidance clauses

and direct rights of enforcement. This will be discussed at greater length in a future article as the topic is detailed and complex.

Recent cases

Craft Development SCI v Actis LLP & Ors

The defendants, Actis, sought security for costs against the claimant, Craft Development SCI, a Cameroonian company suing over a failed joint venture to develop the Douala Mall. The claimant, represented by its provisional administrator, alleged breach of contract, conspiracy, and fraud after Actis partnered with a different entity to complete the project.

Actis argued that Craft was impecunious and unlikely to pay costs if unsuccessful. Craft countered that a security order would stifle the claim, as its minority shareholder, had exhausted personal resources funding litigation.

Mrs Justice Stacey found that while Craft had disclosed substantial financial hardship, gaps remained in its evidence, particularly regarding future litigation funding and potential support from associates. The judge concluded it was just to order security, but reduced the amount from the £1.6 million sought to £300,000, highlighting the balancing act the courts will perform when evaluating the risk of stifling the claim against the defendant's potential exposure.

Agrofirma Oniks LLC & Ors v ABH Ukraine Limited & Ors

This case involved a dispute over loan participation notes issued by EMIS Finance BV to fund loans to ABH Ukraine Ltd (ABHU). The claimants sought an extension of time to provide security for costs, citing difficulties transferring funds from Ukraine due to sanctions affecting ABHU and perceived links to EMIS.

Previously, the court had ordered the claimants to pay £500,000 in security by 25 July 2025 or face restrictions on submitting evidence in jurisdictional challenges. Despite initial agreement on holding funds via Fieldfisher LLP, the claimants requested a five-week extension, citing their bank's refusal to transfer funds potentially benefiting sanctioned entities.

Mr Justice Bright acknowledged the genuine difficulty, but criticized the claimants' delay and lack of detailed evidence. He granted a limited extension to 14 August 2025, increasing the security amount to £580,000 to cover additional costs. The court emphasized that funds held by Fieldfisher would not be released without judicial approval, ensuring compliance with sanctions.

The judgment highlights the intersection of procedural fairness, international sanctions, and litigation strategy, reinforcing the importance of timely compliance and robust evidence in security for costs related applications.

Summary and strategic considerations

Security for costs is a vital tool in civil litigation, balancing the interests of justice with financial prudence. The principles established in case law underscore the importance of strategic litigation planning.

Practitioners must be vigilant in assessing the financial and jurisdictional risks posed by claimants including both political / judicial realities in foreign nations, but also potentially wider geopolitical realities as demonstrated in Agrofirma *Oniks LLC & Ors v ABH Ukraine Limited & Ors.*

Applications for security for costs should be made promptly, supported by robust evidence, and tailored to the specific circumstances of the case. Conversely, claimants opposing such applications must provide clear, credible evidence to demonstrate that their claim would be stifled or that adequate security already exists. *Craft Development SCI v Actis LLP & Ors* in particular emphasises the need for full and frank disclosure by the claimant on this point.

Applications for security for costs are also a valid strategic consideration. While courts are keen to ensure that such applications do not have a stifling effect on legitimate cases, they are an effective means of forcing the claimant to confront the realities of its situation. In particular, applications for security for costs (or at least the threat thereof) can be applied at various 'pressure points' during litigation. For instance, if the claimant is likely to soon begin the process of a costly exercise such as instructing expert witnesses and counsel for trial, a well-timed security for costs application may well be able to enhance financial pressure to a point where a claimant is prepared to re-consider its views on settling the matter.

In an era of increasing cross-border litigation, decreasing global stability and third-party funding, understanding the nuances of security for costs is essential. Parties must remain attuned to not only legal developments but also geopolitical realities, ensuring that their litigation strategies are not only legally sound but are pragmatically grounded and commercially viable.

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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.

Toby assists courts, counsel and judges in making accurate and well-informed decisions in cases relating to restorative dentistry and all aspects of prosthodontics, periodontics, endodontics and implantology.

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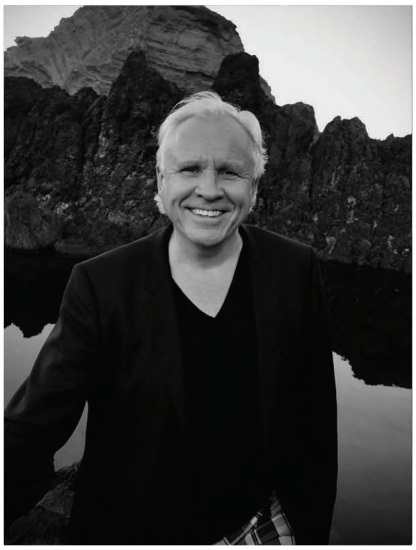
Whether acting for the claimant or defendant, please call.



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Rayner My Parade! The Importance Of Specialist Advice.

by Jemma Brimblecombe - jbrimblecombe@kingsleynapley.co.uk
Elliot Grosvenor-Taylor - EGrosvenor-Taylor@kingsleynapley.co.uk

In her resignation letter, Ms Rayner said that she *"deeply regrets"* her decision not to seek *"additional specialist tax advice"* over her purchase of her Hove property.

However, given stamp duty land tax is a complex area, what if the advice she had received had been wrong? For anyone buying or selling a property it is important to be aware of the general principles and the necessary next steps if they suspect that they have been poorly or negligently advised by a professional. IFAs may also sometimes be the ones to spot a potential problem.

The elements of a professional negligence claim
In the first instance, it is necessary to consider the various elements of a professional negligence claim and whether these are satisfied. The relevant test is set out below:

Duty of Care
As a starting point, to bring a claim the client must prove that they were owed a duty of care by the professional involved. The duty is usually evidenced by the written retainer/engagement letter between the professional and client but in the absence of a written retainer it may be implied by the parties' conduct. In the case of a solicitor, it is well established that a solicitor owes their clients a duty of care.

Breach of Duty
Once a duty of care is established, it must then be shown that the professional breached their duty of care, by demonstrating that the services provided fell below the standards of a reasonably competent professional specialising in their area of expertise. Sometimes this requires expert evidence, for example if a valuer has allegedly misstated the value of a property, then a valuation expert would be required to assist with this. At other times, the alleged negligence may be more obvious. Using the example of Ms Rayner, if her advisers had not properly taken account of stamp duty provisions relating to a conveyancing transaction, then there may have been a breach of duty. The standard is what a reasonably competent professional specialising in their area of expertise would advise in that situation considering the instructions they received.

Causation
Once it has been established that there was a breach of duty, it must also be proven that the loss suffered was caused by the negligent act or advice. This is commonly referred to as "causation".

The relevant test is whether "but for" the professional's negligence, the loss would still have occurred. A claim will not succeed if the claimant would have acted in exactly the same way had the professional not been negligent. For example, if a claimant purchased a house but subsequently discovered there was a defect with the property (which the solicitors should have picked up on) but there is evidence to suggest this was the Claimant's dream home and they were always going to buy it because it had sentimental value, then they will struggle to pursue a negligence claim.

Loss
If you are able to establish the above, you will be entitled to damages. Damages are generally assessed from the date of the breach. The usual principle is that claimant is put back in the position they would have been in had the professional not been negligent. The loss must have been caused as a direct result of the negligence and it must have been reasonably foreseeable.

It may be obvious that a loss has been suffered in some cases for example a clear amount can be calculated if a tax penalty is levied, but in other cases it may be more complicated, and could, for example, involve valuing a loss of opportunity (i.e. had I not received bad financial advice I would have invested my money elsewhere) or a loss of chance or even the loss of a job or reputation which is harder to evaluate.

Steps to take if negligence suspected
With the above general negligence framework in mind, there are various steps to take if adviser negligence is suspected. This applies whether you are the claimant or if you are an IFA advising a new client and from a review of their files/instructions it becomes clear a problem may have arisen with previous advice.

1. You should collate the relevant documentation relating to the instruction. Key documents include engagement letters or any letters confirming the nature of the instruction and the advice/services the professional agreed to provide, any documents in which you/your client is providing instructions and any letters or emails of advice (including any attendance notes of conversations). Collating key documents and reviewing the underlying file is a crucial first step.

2. Check the time period as a priority. Did the issue or potential negligence arise more than 6 years ago? If so, you may be potentially be out of time to bring a claim. The applicable limitation period in most professional negligence cases is six years from the date of the negligence. However, this may be extended where the negligence only becomes apparent at a later stage. In those cases, the relevant limitation period is three years from the date of knowledge of the facts which might give rise to a claim. There is a long stop date of fifteen years within which claims must be brought.

3. Be aware that not all mistakes are capable of amounting to negligence. However, if you are an advisor to a client (such as a solicitor) it will often be within your experience, using the test referred to above of the standard of a reasonably competent professional to gauge whether potential negligence has arisen. If the advice is such that no competent professional would have advised in the manner you have seen on a file then very likely are good grounds for asserting negligence.

4. Consider also whether you or your client has mitigated their loss. For example, could they easily take steps to minimise or extinguish their potential losses (or prevent their losses from increasing, i.e. by selling a property). If so, then they should act to mitigate their losses. If a potential claimant fails to do so, it may be unable to recover damages for losses which could have been avoided by taking such reasonable steps.

5. Has the claimant/your client contributed to the losses suffered? If the professional is able to show contributory negligence, the losses claimed may be reduced having regard to the claimant's share of the responsibility. For example, if a solicitor was accused of negligence but the client failed to inform them of key information, this could give rise to a defence of contributory negligence.

6. Carefully consider what the potential losses may be and collate relevant and detailed information to ascertain what the potential loss may be. As noted above this is not always straightforward but it is very useful at the outset of every claim for a solicitor to have a general idea of what a claim is considered to be worth. This also feeds into proportionality and commerciality and whether it is worth the time and investment in pursuing the claim.

Is Home Office Diversity Promotion Racist?

Diversity Maths is useful in reviewing diversity targets and achievements for any group of staff. The Home Office publishes achievement and targets for various characteristics – let's look at Ethnic minority targets, and recruitment into the Senior Civil Service (SCS) – the most senior, well paid and prestigious roles...

Progress against diversity targets

Characteristic	Grade	Target to achieve by 2025	2018	2021	2022	2023	2024
Ethnic minority[1]							
	All staff	24%	24%	24%	24%	24%	24%
	SCS	15%	6%	7%	8%	10%	9%

From https://www.gov.uk/government/statistics/home-office-workforce-diversity-statistics-2023-to-2024/home-office-workforce-diversity-statistics-2023-to-2024

The goal is to increase SCS BAMEs from 6% in 2018 to 15% in 2025.

That's by 9% (15% - 6%) over 7 years, or 9%/7 = 1.29% each year.

Our simplified model assumes:

- 100 staff in the SCS workforce at each age 40 to 60 (evidence suggests an average SCS recruitment age of about 40). So, 2,000 staff in total.
- Assume everyone retires at 60. Ignore deaths and exits other than retirements.

So what recruitment is needed? (Note, we also need to compensate for the six (100x6%) that retire each year at 60).

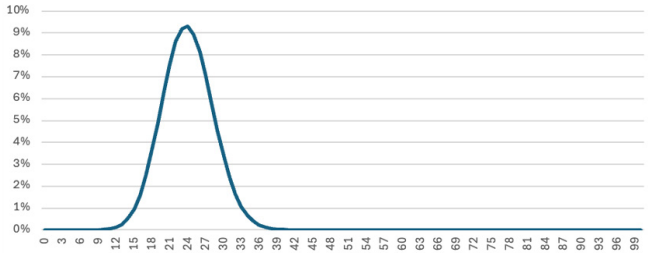
Our 2018 starting BAME population is 2,000 x 6% = 120 people.

2025 end target = 2,000 x 15% = 300. Increase of 300-120 = 180 over seven years.

So that's 180/7 = 25.7 say 26, plus the six retirement replacements. 26 + 6 = 32.

The chances of fairly getting 32 or more BAME recruits in one year are 4.27%. (Based on a 24% BAME population – whether recruiting from All Staff or even top graduates, 24% is appropriate.)

Probability of each year's selection from a 24% BAME Population



So less than one chance in 20.

BUT THE HOME OFFICE WILL HAVE DONE THAT, (OR PLANS TO DO THAT), FOR SEVEN YEARS IN A ROW!

Chances of that are (.0427)7 or .0427^7 ... which equals 0.0000000002589,
or **ONE CHANCE IN 3.9 BILLION!**

To me, that looks **VERY** racist!?

Now, it might be that we can assume that all current BAMEs are under age 54. In that case, we can assume a 26 target. That looks more reasonable.

The chances of getting 26 or more from a population of 24% BAMEs is 53.8%. So, to get that over 7 years has a probability of .538^7 = 1.31%, or 1 in 53. This looks a lot more justifiable, but still pretty unlikely.

Now, let's look at what the Home Office has **actually achieved** in BAME recruitment to the SCS up to 2024.

Over the six years to 2024, they achieved 9%, or an increase of 3%, which is ½% per year (9%-6%)/6, which amounts to 2,000 x .005 = 10. Add our six retirement replacements to get 16 each year.

The odds on getting 16 or more are just over 98%, or 88.9% chance over the six years. Hardly a challenging result, but one that perhaps reflects the supply of suitable candidates.

Is it worth looking at the 10 if we exclude retirements? Chances are over 99.9% for both one and six years. Not worth worrying about?

Therefore if this simple simple test is used as a starting point, the indications for the Home Office are:

a) 2025 target? Scrap it and replace with something sensible. Look at own experience.
b) Result to 2024 – perhaps disappointing, but suggests the need for a review of talent available and developing, experience and opportunities. It also provides confirmation the assumption that the Home Office has been promoting based on merit, as required by law.

Now, this model should definitely NOT be used in an Employment Tribunal claim. But it may indicate where a full report is advisable. A full report would take account of:

i) Actual BAME age distribution of the SCS group (and supplying "All staff")
ii) Recruitment and exit rates by ethnicity and age.

This would provide sound evidence if targets or results need to be justified.

Justification for the graph shown can be found in my past EWJ articles, or on diversitymaths.com, or by emailing me on peter@windsorac.com.

Author, Peter Crowley

The price is right Or is it? Drafting lessons from the Court of Appeal

Flexibility is often essential in commercial contracts, but so is certainty. The recent Court of Appeal decision in ***KSY Juice Blends UK Ltd v Citrosuco GMBH*** *[2025] EWCA Civ 730 offers a timely reminder of how courts interpret flexible pricing clauses.*

What happened

The contract in question included a clause stating that part of the price was flexible and was to be fixed between the parties by a certain time, namely December of each year. The High Court initially ruled this clause unenforceable, as a result of its open-ended nature and the absence of defined parameters to determine how this was to be interpreted by the parties. However, the Court of Appeal reversed that decision, holding the clause enforceable and instead, that in the absence of an agreed price, a reasonable market rate could be implied.

KSY Juice Blends Ltd had entered into a three-year supply contract with Citrosuco GMBH for 1,200 metric tonnes of orange juice pulp wash per year. The contract split the annual volume into two parts: 400 metric tonnes at a fixed price, and a further 800 metric tonnes at an open price to be fixed. No agreement was ever reached on the open price portion of the contract. Citrosuco refused to accept delivery of a cargo of pulp from KSY, prompting KSY to claim repudiatory breach, terminate the contract, and seek damages for lost profits. The court had to consider whether the open pricing clause was enforceable.

What matters

There is a tension between the Court's desire to uphold the parties' contractual bargain and the uncertainty of clauses that leave matters to be agreed upon at a later date.

It is not unusual for parties to leave some aspects of a contract open to be agreed at a later date. However, this carries the risk that the clause (or the contract) will be an unenforceable 'agreement to agree'.

KSY reinforces that the Court will strive to enforce the parties' agreement where the drafting and surrounding circumstances allow.

Zacaroli LJ (with whom Baker LJ and Popplewell LJ agreed) placed considerable emphasis on the availability of objective pricing benchmarks - specifically, market data for frozen orange juice - which offered a credible foundation for assessing price. Although such benchmarks are unlikely to be available in all cases. Other relevant factors included the contract's provisions on delivery schedules, minimum purchase volumes, and an initial fixed price. Taken together, these elements led the Court to imply a term that in the absence of reaching agreement the price would be a reasonable or market price.

However, the Court also acknowledged that with different wording or without reference points, the outcome may have differed. Particular care needs to be taken when leaving a matter to be agreed at a later date.

What now

Given how context-dependent the enforceability of open pricing clauses is, clear drafting is essential. The more certain the original drafting is, the less likely it is that a dispute about enforceability will arise. If flexibility is needed particular care should be taken and the parties could consider quantifiable mechanisms - such as indexation clauses tied to published benchmarks or formula-based pricing that adjusts automatically.

It is often sensible to build in dispute resolution mechanisms, such as expert determination or arbitration. When doing so, it is wise to consider carefully the question the decision-maker is expected to resolve, the criteria to be applied, and the scope of their authority. KSY indicates that a solid resolution process (while not necessary) can go a long way in giving the court comfort about the certainty of the agreement to maintain enforceability.

The Court of Appeal preserved the bargain this time - but that won't always be the case. The line between commercial flexibility and legal uncertainty is thin and context dependent. **Ultimately, the KSY decision underscores that while flexibility in pricing can be commercially valuable, clarity in drafting is what ensures enforceability - so make sure your contracts speak as clearly as your intentions. Ensuring clarity also helps avoid a dispute arising in the first instance. While the contract was upheld in KSY, it was a long (and no doubt costly) road to get there.**

Permission to appeal to the Supreme Court was refused by the Court of Appeal.

This information is for general information purposes only and does not constitute legal advice. It is recommended that specific professional advice is sought before acting on any of the information given. Please contact us for specific advice on your circumstances.

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HART v LARGE – a negligent residential surveyor.

This article refers to a court case in 2020 where a surveyor, Richard Large, was found to give negligent advice in his survey report to a house purchaser (Mr & Mrs Large). It discusses the background to the case and how it currently affects surveyors carrying out surveys and writing a report for a pre-purchase buyer.

Background

Richard Large, an experienced surveyor who was soon to retire, was asked by Mr & Mrs Hart to carry out a survey on a cliff top property in South Devon that they wished to purchase. There had been considerable work carried out on the property to such an extent that the new property was barely recognisable compared to the original (see photos). The survey was carried out on 2 November 2021 and it was decided by the surveyor to carry out a Homebuyers survey and report. This is currently called a level 2 survey and is midway between a level 1 (condition report) and a level 3 survey (more detailed than a level 2 and used in more complex buildings). It is important to note the two facts of its exposed situation on top of a cliff in Devon and that the house had been substantially reconstructed as these are important parts in determining liability and also in treating this case as relatively unique.

Richard Large sent his report to the Harts the same day as the survey and he effectively gave it a clean bill of health save for concern over lack of information over the septic tank and concerns with pipes/gutters. The house was marketed at a value of £1.4M, Richard Large valued it at £1.2M and this was the price that was agreed. Completion was made on 23 November 2011 and when Mr & Mrs Hart arrived on that day, they found workmen carrying out repair work to the front door. Doubts about the quality of the construction were therefore immediately raised by Mr & Mrs Hart. Over the next few months (and critically going into the first winter that the property had encountered since the rebuilding) water was found to be still entering through the front door, through large glazed elevations and through the balcony area.

Mr & Mrs Hart took independent advice from another surveyor who found that significant errors and omissions had been made by the building contractor who carried out the rebuilding work and this entailed that the building was not water tight against the significant amount of rain and sea water that it should have been able to cope with being on the edge of a cliff in Devon. The cost of the remedial works was estimated as being in excess of £500,000. Mr & Mrs Hart decided to take legal action against Richard Large and also their conveyancing solicitor and the architect involved in the rebuilding (although there was no direct contractual link between Mr & Mrs Hart). No claim was made against the builder. The claims against the solicitor and the architect were mainly due to a lack of a Professional Completion Certificate (PCC) being supplied by the architect to the house vendor which would in turn have been made available to the any prospective purchaser.

Above, cliff top property in South Devon before

Above, cliff top property in South Devon after

In June 2012 Mr & Mrs Hart asked Richard Large to inspect the property and the problems that they have been enduring with water ingress. No admission of liability is made by Richard Large. Remedial works to cure the leaks are carried out between 2014 and 2018. Claims of professional negligence are made by Mrs & Mrs Hart against the architect, the conveyancing solicitor and Richard Large sometime in 2019. The solicitor and architect make out of court settlements amounting to £376,000 between them. Richard Large does not make any out of court settlement and following a court case in February 2020, the judge makes judgement of professional negligence against Richard Large. Following expert witness reports by Quantity surveyors as to the amount of repair work involved, the cost was judged to be £750,000 for repair and rebuilding. The judge also awarded Mr & Mrs Hart £15,000 for inconvenience and distress. Subtracting the amount already paid by the architect and solicitor, Richard Large was therefore liable for £389,000.

Details of claim made by Mr & Mrs Hart
Mr & Mrs Hart claimed that Richard Large was negligent by recommending a Homebuyers report instead of a Full Building Survey, failing to identify the significant damp problems at the property and failing to recommend, in his report, that a Professional Consultant's Certificate (PCC) should have been obtained.

Richard Large was not found negligent in advising and producing a Home Buyers Report, but negligent in not alerting the Harts to the possibility of damp penetration and not recommending a PCC. The judgement was delivered in May 2020 and a link to the judgement is at the end of this article. I would urge all building surveyors and lawyers involved in this work to read it as although it is long at over 100 pages, it is very readable and well subdivided. There are many judgements that are equally long are have no sub headings and consequently are very hard to follow.

I must confess that when I first heard about this case I felt it vey harsh on Richard Large when I heard the summaries of the case. As you can see from the photograph of the 'after', the building appears to be built well and an architect was involved in the design and supervising the construction. In his measurements for damp internally, Richard Large found no signs of damp ingress and therefore concluded that the building was free of any possibility of damp ingress. And, essentially, here starts his first step to negligence.

I made reference at the beginning to the fact that this was a very exposed property on a cliff top in South Devon and that the building had been practically rebuilt. These two items should have made Richard Large very wary about pronouncing that the building was watertight. He made reference in his report that although he could no view damp proof elements to the walls, windows terraces, he basically assumed that they were intact and performing adequately.

Details of the court case
This was heavily criticised by the judge and he made reference to the fact that Richard Large should at least have said in his report that the damp roofing element (see paragraphs 189-199 in the court judgement) could not be seen. The judge said that Richard Large should have referred to these elements as 'not inspected'. Furthermore, Richard Large's surveying 'antennae' should have been on alert when he found a number of cases of poor workmanship that put some doubt as to the quality of the build and this was pointed out to Richard Large (see paragraph 211 of the judgement) during questioning between Richard Large and the judge.

The issue of whether the level of survey carried out by Richard Large was correct was discussed by the judge and he gave a very interesting argument in the tautology of Richard Large effectively trying to use the fact that he only carried out a Homebuyer's Report and not a Full Building Survey. The argument by the judge is given at paragraph 136 and effectively says that Richard Large should have been continually assessing whether the level of survey was correct for the type and location of building being inspected. Richard Large could not use the argument that he was instructed to carry out a Homebuyer's report and not a Full Building Survey and that if he was instructed to do a Full Building Survey then he would have been able to spot the defects.

There is a link to the podcast at the end of the article and in this podcast between experienced surveyors there is agreement that although the actual report for a Full Building survey is lengthier than that for a Homebuyer's Report, many agreed that the level of inspection for both reports are essentially the same.

The last point is whether Richard Large was negligent for failing, in his report, to state that a Professional Consultant's Certificate (PCC) must be provided. The judge held that because of the unusual nature of the building being newly rebuilt and the inability of Richard Large to determine conclusively whether the damp proofing elements were present then Richard Large should have made it very clear that a PCC should be demanded and basically advising the Harts not to proceed without one. If Richard Large had stated that a PCC should be produced then the sale would not have gone through and Richard Large would not have been found liable of £389,000! The architect had realised that they were liable and

negligent as they had not carried out sufficient on site supervision during construction in order to produce a PCC and therefore could not say whether the damp proofing elements of the doors, windows and terrace were constructed as the drawings demanded.

Expert witness testimony
The evidence given by the two experts did not play a very big part in the case outcome. The judge did say that because Richard Large's expert was involved only later on when a lot of the repair work had been carried out as opposed to the claimant's expert then he was at a certain disadvantage. There was however criticism by the judge for Large's expert in that he lacked analytical detail, did not take a realistic view on the need for demolition and rebuilding, and used inappropriate comparables. The judge did comment, however, that "in respect of the existence of defects in the building and the appropriate approach to be taken by a surveyor carrying out a Homebuyer's Report inspection or a building surveyor, I found the evidence of both of great use." Overall, the judge preferred the evidence that was produced by Mr & Mrs Hart's expert.

Immediate reaction to the judgement
Following the issue of the judgement there were many ripples through both the legal and surveying world. It also concerned me as a structural engineer who carries out occasional general surveys on houses and comment on dampness. But the judge was quite insistent to point out that this was a very unique case and should not be read as to how all surveys should be carried out. As I have said already, how can you be held liable for dampness that was later found in the property when no dampness was found during the survey. But what this ignores is that Richard Large did not look at the whole context of the building and what his survey could or could not reveal. He made no mention of the exposed nature of the site, nor did he make proper comment on the fact that he was unable to inspect all the damp proofing elements, yet said that he assumed that they must be present.

The other factor is the omission of mentioning in the report the requirement to have a Professional Consultant's Certificate (PCC). This created a knee-jerk reaction where lots of surveyors suddenly felt that they had to ask for a PCC for any conversion or extension work carried out. But on this particular house, it was the only way of establishing that all the damp proofing elements had been installed. There was no way that this could be established by a purely visual examination.

Reactions by Richard Large
There is a very illuminating article/interview by Allan Millstein that is the third reference at the end of this article. What you do have to remember is however much you look at a court case and decide whether the judgement is fair or not, is that there are real people involved in this and Richard Large did not have sufficient indemnity insurance to cover the eventual claim made against him. This may well be the reason that Richard Large (and his legal team) not only fought the court case but also appealed against the method of apportioning damages and lost that appeal with consequential increased court costs. What should have been an uneventful retirement has now meant a complete change in his life and home circumstances as he needed to raise money himself to cover the costs.

In reading the article it appears that Richard Large still believes that he was not to blame and others were. As I referred to earlier this was my feeling when I heard the summary of the case, but I changed my opinion completely when I read the full judgement from the first course. Phrases from this article that stick out from Richard Large are "my failings were trivial", "seeing the plans would not prove anything about what was actually built", "the judge said .... a visible DPC was essential", and "I didn't miss anything". It is quite sad that here appears to be a surveyor who has not come to terms with the failings in the survey and report that he carried out for Mr & Mrs Hart.

The comment about 'seeing the plans would not have changed anything' is very revealing in Richard Large's inability to view the problems of a house that has been comprehensively rebuilt using elements of construction that require high standards of construction to ensure watertightness (ie level threshold openings) but appear to be beyond the experience of the builder as we know that they were constantly repairing the front door but it still leaked rain water, that the building was in a very exposed location for rain and sea water and that the building had not been tested by a winter of rain and weather. I feel that the least that Richard Large could have done is to look at the drawings to see what damp proofing had been specified and where.

My personal opinion, that I have never heard anyone bring up (and there are countless articles on the web by lawyers and surveyors) is that a visual survey was mostly a complete waste of time to ensure that the building was free of defects. As it was a pre-purchase survey then it would have been very unlikely that the owner of the house, before the Harts bought it, would have allowed any opening up to ensure that all the required damp proofing was present.

Lessons to be learnt by surveyors today
Surveyors should be clear in their report about the limitations of an advice. In this case Richard Large commented that he could no see any damp proof course or membrane but assumed that they would or should be there. So if it can't be very verified then its presence can neither be verified nor denied.

Be alert to signs of inadequate design or construction. There were at least three areas of poor construction that was not mentioned implicitly by Richard Large and had he brought them together and cast doubt on the level of construction then there could have been a very different outcome to this case.

Draw the client's attention to the need for terms of protection (eg NHBC or PCC certificate and guarantees on specific items). If there was one thing that this case hinged upon and that was the lack of the PCC. The architect was unable to provide one even had they been asked because they did not carry out the required site supervision, the solicitor failed to ask for the PCC and made other errors in the conveyancing and Richard Large failed to point out to Mr & Mrs Hart that the only way to ensure that the damp proofing was installed correctly was to have a PCC.

It should be emphasised that the comments above only really apply to this case and not to all other conversions and extensions. For instance, a loft conversion may be carried out to a house without a PCC but the level of risk to a purchaser is low compared to the Hart house. And it is pointless asking for one where the loft conversion was carried out 10 years and no one knows who the architect or builder was!

And finally, this case was unique due to the exposed location and that the house was practically rebuilt and had not gone through a winter of harsh weather. Mind you, there may well be other cases that have unique factors in them that are totally different but which the surveyor should have ben 'alive to', and will result in a court case due to the negligence of the surveyor. The watch word is therefore to always ensure that you have considered all relevant aspects in your survey and report, and not just the ones you cover day to day.

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Preserve it and save: how conditional exemption can protect your heritage... and your wallet

by Charles Richardson - crichardson@kingsleynapley.co.uk

With significant changes to Inheritance Tax (IHT) reliefs for agricultural and business property due to take effect in approximately seven months, affected individuals are exploring every available planning strategy to mitigate the impact. For those who are asset-rich but cash-poor, the prospect of a 20% IHT charge on death is deeply concerning and threatens the continuity of long-held family assets.

The uncomfortable reality is that there is no universally applicable solution. However, the UK's Conditional Exemption regime offers a compelling—albeit limited—opportunity to defer both IHT and Capital Gains Tax (CGT) in specific circumstances.

What is conditional exemption?

Conditional exemption is a relief mechanism under the Inheritance Tax Act 1984, allowing owners of qualifying heritage assets to defer IHT and CGT liabilities upon transfer, provided they agree to specific undertakings. These typically include:

- Maintaining the asset in good condition.
- Providing public access for a minimum number of days annually.
- Retaining the asset within the UK and notifying HMRC of any changes.

The relief is conditional - the tax is deferred, not eliminated. If the undertakings are breached, the deferred tax becomes immediately payable.

What qualifies?

The scope of qualifying assets is broad, but the eligibility threshold is high. The legislation outlines three principal categories:

- Works of art and other objects of national scientific, historic, or artistic interest that are considered pre-eminent.
- Land of outstanding scenic, historic, or scientific interest, encompassing botanical, horticultural, silvicultural, arboricultural, agricultural, archaeological, physiographic, and ecological features, as well as man-made landscapes.
- Buildings of outstanding historic or architectural interest, including essential amenity land and historically associated objects.

Eligibility is determined by advisory bodies such as Historic England, Arts Council England, and Natural England. Crucially, it is not sufficient for an asset to be merely "heritage" or "unique" - it must be among the most exceptional of its kind.

Applications must be submitted within two years of the relevant transfer, and successful applicants must enter into formal undertakings with HMRC.

Examples of qualifying assets

Works of art and objects

- A Turner painting in private ownership, recognised for its artistic and historical importance.
- 17th-century naval maps, valued for their contribution to national history and scientific understanding.
- Rare geological specimens, deemed of national scientific interest by expert bodies.

Land of outstanding interest

- Capability Brown-designed gardens on a private estate, representing landscape architecture of national significance.
- Ancient woodland hosting rare species, with ecological and botanical value.
- Historic battlefield sites, notable for their archaeological and historic relevance.

Buildings and associated land

- A Grade I listed Jacobean manor house, preserved for its architectural and historic merit.

- A medieval church retaining original features, reflecting religious and cultural heritage.
- An estate with historically associated objects, such as antique furniture or archival materials linked to the property.

Why consider conditional exemption?

- Tax deferral: IHT and CGT liabilities are postponed, often indefinitely, provided the undertakings are upheld. Successive owners may renew the undertakings, preserving the exemption across generations.
- Legacy preservation: Families can retain culturally significant assets without being forced to sell them to meet tax obligations.
- Public engagement: The scheme promotes public access, enhancing the asset's visibility and societal value.
- Estate planning flexibility: Once exempted, assets may be used more freely without triggering IHT anti-avoidance provisions (e.g. gift with reservation of benefit). Owners may also establish a Maintenance Fund, which is itself IHT-exempt, to support the long-term preservation of the asset—offering further favourable tax treatment.

What to watch out for

1. Compliance is essential

Failure to meet the undertakings—such as inadequate maintenance or insufficient public access—can result in:

- Immediate liability for deferred IHT/CGT.
- Interest and penalties.
- Loss of future eligibility.

HMRC conducts periodic reviews to ensure compliance.

2. Restricted flexibility

Once an asset is within the regime, its sale or transfer (except to an approved body) may trigger the deferred tax, potentially limiting future planning options.

3. Public access requirements

Owners must provide public access for at least 28 days per year, with specified hours and days. This can affect privacy and may necessitate investment in visitor infrastructure, insurance, and health and safety compliance—particularly where access is granted to stately homes or extensive grounds.

Assets held in museums or galleries often meet access requirements more easily, mitigating some of the practical challenges for private owners.

4. Administrative burden

HMRC may require a Heritage Management Plan, detailing how the asset will be preserved and accessed. This adds complexity and typically requires professional advice. Ongoing reporting obligations also apply, with HMRC monitoring compliance over time.

Conclusion

Conditional exemption is a powerful tool for those seeking to align the preservation of culturally significant assets with prudent tax planning. However, it is not a passive relief - it demands active stewardship, careful structuring, and ongoing compliance.

In a climate of increasing uncertainty around IHT and broader tax reform, Conditional Exemption may offer a valuable buffer - provided the undertakings are acceptable and sustainable.

For owners of heritage assets, the message is clear: preserve it and save. With the right advice and commitment, conditional exemption can help safeguard both your legacy and your financial future.

A Veiled Threat Is Still a Threat: High Court Clarifies Limits of Without Prejudice Privilege

by Christian Carlyle

The High Court's recent decision in QPQ Limited v Schute[1] offers important guidance on the admissibility of settlement correspondence and the boundaries of the "without prejudice" rule, especially where implicit threats are used to exert pressure in commercial litigation.

Background

The dispute centred on allegations by the Plaintiff of breach of a shareholders' agreement, employee poaching, and misappropriation of blockchain technology ("1DLT"), with claimed losses exceeding €106 million. The Defendant denied all wrongdoing.

As the litigation progressed, a sequence of seven letters between the parties' solicitors became the focus of an application to admit them into evidence, despite being headed "without prejudice save as to costs" (WPSATC).

The Controversial Correspondence

The first WPSATC letter, sent by the Plaintiff's solicitors, referenced ongoing Swiss criminal proceedings against former employees and suggested that the defendant's reputation could suffer if the matter was not resolved. The letter urged the Defendant to consider compensating the plaintiff, linking the resolution of both the Irish proceedings and the Swiss criminal complaints.

The Defendant argued that this amounted to an implicit threat: settle or risk reputational and criminal consequences. Expert evidence on Swiss law confirmed that complainants could influence the scope and continuation of criminal proceedings, adding weight to the Defendant's concerns.

Legal Principles

Mr Justice Sanfey reviewed the rationale for the "without prejudice" rule, noting its public policy purpose of encouraging settlement. However, he emphasised that privilege is not absolute and may be set aside in cases of "unambiguous impropriety" - a test drawn from Ferster v Ferster [2016] EWCA Civ 717 and Boreh v Republic of Djibouti [2015] EWHC 769 (Comm).

The judgment makes clear:

- The WPSATC heading was technically inappropriate in the absence of a settlement offer, but this did not deprive the letter of privilege.
- An "opening shot" in negotiations can be protected, even without a formal offer.
- The key issue is whether the correspondence was "unambiguously improper."

The Court's Findings

Sanfey J. found that, while the letter did not contain an express threat, its references to Swiss criminal proceedings and reputational harm amounted to improper pressure. He stated:

"I do not think it can be the case that improper pressure can only be exerted expressly or overtly. A veiled threat is still a threat."

The Court concluded that the Plaintiff's conduct exceeded what is permissible in settlement negotiations. The pressure exerted was unambiguous and improper, justifying the admission of the correspondence as open evidence.

Practical Takeaways

- **Drafting Settlement Letters:** Solicitors must avoid any suggestion - explicit or implicit - of coercion or improper pressure, especially where criminal proceedings are referenced.
- Privilege Is Not Absolute: The "without prejudice" rule will not protect communications that cross the line into impropriety, even if the threat is veiled.
- Objective Assessment: The court will assess impropriety from the recipient's perspective, not based on subjective explanations or post facto rationalisations.

Conclusion

This decision is a timely reminder that the privilege attached to settlement negotiations is robust but not unbreakable. Where correspondence is used to exert improper pressure - whether overtly or by implication - the courts will not hesitate to lift the veil of privilege.

Reference

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Sensory Processing Difficulties and Special Educational Needs

by Amanda Hunter BSc, MSc, RCOT - amanda@smartot.co.uk
Occupational Therapist and Advanced Practitioner in Sensory Integration, Children and Young People

What is Sensory Integration?

Sensory integration refers to how the brain receives and processes sensory information from the environment and the body through the senses, e.g. eyes, ears, skin. The brain interprets the information and compares it to information coming in and stored in the memory. Sensory processing occurs automatically, every day, and is important for all daily activities, e.g. dressing, eating, socialising, learning. Awareness of sensory input increases when a person needs to move or act, i.e. if they are uncomfortable, if demands increase in a situation, or if they are in danger.

Sensory integration was initially developed in the late 1960s and 1970s by Dr. Jean Ayres, an occupational therapist and psychologist from the United States of America. She explored how difficulties receiving and processing sensory information related to difficulties on a daily basis. Dr. Ayres developed a theory about what happens when sensory integration does not develop well, a method of assessing difficulties, and of treating them. She carried out research to further develop and understand sensory integration and treated many children with sensory integration difficulties. Her work has continued and is an integral part of occupational therapy provision.

The Sensory Systems

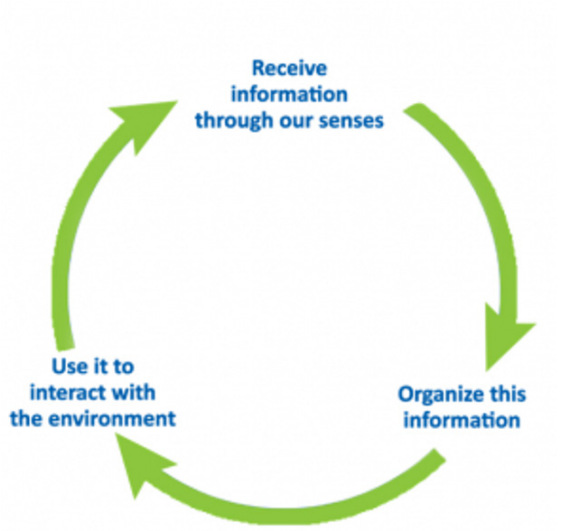
There are eight sensory systems.

Visual (sight) – what is seen, e.g. colour, shape, orientation and movement.

Auditory (hearing) – information that is heard, e.g. volume, pitch, rhythm, breadth and frequency of sound, how sounds blend together.

Olfactory (smell) – detects smells, filters out background smells, and notices differences between smells. Identifies smells that are safe or harmful.

Oral Sensory (taste) – different tastes, e.g. sweet, bitter, salt, sour. Identifies whether food is safe or harmful.



from www.pathways.org

Tactile (touch) – information on touch from the skin, e.g. touch, pressure, temperature and pain.

Vestibular (sense of movement in space) – information about movement, head position, and position in space. It helps with balance, posture, and keeping the head and body steady during movement. It is needed for movement and balance and consists of two systems, the otoliths and the semi-circular canals, which are in the inner ear.

- Otoliths detect linear movement, i.e. forward and backwards, up and down.
- Semi-circular canals detect rotation, i.e. vertical axis (e.g. spinning in standing), forwards and backwards (e.g. nodding the head), and the frontal plane (e.g. cartwheels). Together the canals detect movement in all directions.

Proprioceptive (sensations from the muscles and joints of the body) – information used to plan and coordinate movements, i.e. position, location, orientation, and movement of the body. The proprioceptive system uses information from the inner ear (detecting motion and position), and sensors in the muscles and ligaments (tissue that connects bones together).

Interoception – information on the condition of the body and how it is 'feeling'. Information is received from nerve endings in the organs, muscles, and skin. The brain uses this to help a person understand the state of the body, e.g. hunger, thirst, feeling full, thirst, nausea, pain, body temperature, need for the bathroom, feeling tired. Interoception helps a person experience emotion. Without being able to 'feel' and make sense of body sensations, it is harder to identify emotions, e.g. fear, stress, excitement.

The Development of Sensory Processing

Sensory systems develop before birth. Children use them to learn about their body and the world around them. Sensory processing provides a foundation for higher level skills, e.g. cognition, motor skills. If it does not develop or function effectively, it affects learning and overall development. Difficulties can affect posture, balance, muscle tone, eye movements, body awareness, coordination, and praxis (motor planning). They can affect speech, self-esteem, confidence, learning and concentration, and daily living skills.

A person with sensory issues may feel sensory input more or less intensely than others. It can affect their ability to cope in different environments, perform daily tasks, and their feelings of safety. Difficulties can cause problems with regulation, motor skills, learning, play skills and interaction with others.

Signs of a Sensory Processing Difficulty

- Heightened reaction to sound or touch.
- Under responds to certain sensations, e.g. doesn't notice someone calling their name, doesn't notice someone tapping their shoulder, high pain threshold.
- Difficulty controlling behaviour and emotions, e.g. tantrums, reacts emotionally, need for control, impulsive, easily frustrated, challenging behaviour, overly compliant.
- Easily distracted. Poor attention and concentration.
- Poor motor skills, e.g. coordination, balance, ball skills, fine motor skills, handwriting.
- Difficulties with sleep.
- Limited diet, e.g. textures, tastes, smells, doesn't know when hungry, thirsty or full.
- Distressed during self-care tasks, e.g. brushing hair, washing hair, cutting nails, cleaning teeth, dressing, feeding, haircut, shower/bath.
- Seeks movement., e.g. fidgety, moves constantly, difficulty sitting still, spinning, moves quickly, takes risks.
- Seeks intense pressure, e.g. squashes or squeezes objects, leans into people, looks for tight/small spaces, crashes into objects or people, uses too much force.
- Avoids or fears movement activities, e.g. swings, slides, being upside down, spinning.
- Problems with communication and social skills, e.g. eye contact, turn taking, social interaction, friendships, playing with other children, reading social cues and social situations. Difficulty expressing ideas, thoughts and emotions.
- Difficulty with transitions or change.
- Problems following instructions.
- Poor planning, sequencing, working memory and organisational skills.
- Low self-esteem and confidence.
- Difficulty controlling emotions.
- Problems learning.
- Impulsiveness or risky behaviour.

Sensory processing difficulties are associated with a number of needs, such as:

- Autistic Spectrum Disorder.
- Attention Deficit Hyperactivity Disorder.
- Specific Learning Difficulties.
- Developmental Disabilities.
- Developmental Co-ordination Disorder or dyspraxia.
- Emotional and behavioural difficulties.
- Issues with attachment and early childhood trauma.

Patterns of Sensory Processing Difficulties

Sensory issues can affect one sensory system or more than one. There are different patterns:

Sensory modulation problems – occur when the brain over responds to, or under responds, to sensory information. For example, if someone over responds to touch they may be very aware of how their clothes feel. If someone is under responsive to touch they may not notice contact from others. A person can become distressed, feel unsafe, or become anxious, fearful, angry and frustrated. They may compensate for their problems, e.g. remove their clothes, avoid washing themselves, or withdraw from social contact. A person can be over responsive in one sensory system and under responsive in another, or over and under responsive within the same sensory system. Their response can depend on the situation and how they feel.

Sensory discrimination and perceptual problems – occur when the brain has difficulty identifying differences in sensory input, e.g. feeling two different points of touch that are close together when fastening buttons. A person can be clumsy or use too much or too little force. A person with visual perceptual problems may struggle with lots of information or finding something specific, e.g. objects in cluttered environments, lose their place when reading.

Vestibular and bilateral integration problems – occur as a result of problems with vestibular input. They can cause problems with posture, balance, bilateral coordination (coordination of both sides of the body), reading, ball skills, or fine motor skills, e.g. using scissors, handwriting.

Praxis problems – praxis is how the brain plans and carries out new movements, e.g. learning to jump, hop, drive or use cutlery. There are two types of difficulty. **Somatodyspraxia** is a problem with praxis and the processing of touch and proprioceptive input. **Visuodyspraxia** is a problem with praxis and visual processing. Some people have both of these problems, while others have one or the other. They can have difficulty learning new skills and with coordination, timing, complex movements, fine motor skills, handwriting and play.

Occupational Therapy with Children and Young People

Occupational therapy (OT) helps a child or young person manage or cope with a difficulty or disability. The aim is to improve function, increase independence, and help a person learn new skills. An occupational therapist can identify how a child processes and responds to sensory information. Once the areas of difficulty are known, strategies are recommended to manage them.

Assessment

Sensory processing assessments are individual. They require assessment from an occupational therapist who has completed training at an advanced level, i.e. advanced practitioner in sensory integration. An occupational therapist will help others understand the nature of any difficulties and why they occur. An assessment may include:

- Discussion and written feedback from parents or carers, school staff and professionals.
- Discussion with the child about daily activities and sensory issues.
- Classroom observations.
- Non-standardized assessments to assess gross motor skills, fine motor skills, handwriting, sensory processing and behaviour.
- Standardized assessments, e.g. The Beery-Buktenica Developmental Test of Visual Motor Skills, Test of Visual Perceptual Skills, Motor-Free Visual Perception Test, Movement Assessment Battery for Children, The Bruininks-Oseretsky Test of Motor Proficiency, Detailed Assessment of Speed of Handwriting. Using a standardised assessment depends on the ability of the child and whether they will cope with it.
- Sensory profile, e.g. Sensory Profile, Sensory Processing Measure.

Intervention

Intervention may include:

- Helping the child, family/carers, school staff and professionals understand their needs.
- Occupational therapy programme for school and home to develop skills, e.g. balance, coordination, muscle tone, body awareness, fine motor skills, handwriting skills, visual motor skills and visual perceptual skills.
- Sensory diet – an individual programme of activities that is embedded into routine. The aim is to provide the right amount of sensory input to increase regulation and help a child move into the 'right zone' or level of arousal, i.e. feel calm and focused so that they are ready to learn, take part in activities, and tolerate change in their routine and environment.
- Sensory integration therapy – a specialist therapy, provided by an approved practitioner in sensory integration. Sensory integration therapy uses activities that provide proprioceptive input (pressure), tactile input (touch, textures) and vestibular input (movement). Sensory integration therapy aims to improve sensory processing so a child or young person can adapt and respond appropriately. Activities are challenging but set at the right level, i.e. not too difficult, not too easy. The number of sessions varies depending on the child's needs.
- Teaching different ways of approaching activities and situations.
- Changing or adapting the environment or routine.
- Reducing or changing demands.
- Equipment, e.g. exercise ball, ear defenders, fidgets, pencil grips, sensory cushion, writing slope, Theraputty.
- Recommendations for tests and exams.
- Regulation tools, e.g. Sensory Circuits, The Zones of Regulation, Therapressure Programme (reduces sensory/tactile defensiveness, formerly known as brushing programme).
- Social stories – to help a child understand how to respond in certain situations.
- Group activities.
- Supporting transitions from one area and/or activity to another, e.g. home to school.
- Managing challenging behaviours.

Evidence

Evidence on sensory processing difficulties and interventions vary. It is essential that assessments are individual to the child or young person and are completed by an occupational therapist who has advanced training. The following studies are

a selection of the evidence. They have explored a number of different issues, including the effects on learning, how children with specific needs compare to typically developing children, and the impact of sensory integration therapy.

Sanz-Carvera et al (2017) compared children with different neurodevelopmental disorders and typically developing children. They indicated that children with conditions such as Autism (ASD) and attention deficit hyperactivity disorder (ADHD) process sensory information differently. Their study demonstrated how different contexts and demands affect children. Those with neurodevelopmental disorders had higher levels of dysfunction compared to typically developing children, both at home and school. At home, the most affected group included those with ASD and ADHD. They had high levels of sensory processing dysfunction. At school, children with autism had a higher percentage of dysfunction, particularly in relation to sound, touch and social relationships. Difficulties with proprioception were more characteristic of ADHD. The study explored the valuable role of occupational therapy. It recommended early intervention to identify difficulties, support for parents and teachers to understand a child's difficulties, and intervention programmes, i.e. sensory activities and sensory integration therapy.

Jones et al (2020) explored the effects of sensory processing on learning and school for autistic pupils. The study concluded that negative sensory experiences affected learning. Difficulties included distraction, anxiety and limited participation. The study highlighted the importance of addressing sensory needs, access to resources, and staff knowledge to minimize the impact of sensory processing difficulties.

Watling and Hauer (2015) carried out a systematic review of the effectiveness of Ayres Sensory Integration® (ASI) and sensory-based interventions (SBIs) for children with ASD. SBIs are approaches and strategies that address sensory issues. The authors found moderate evidence for ASI and mixed results for SBIs. Some studies noted significant improvement from ASI for individualized goals and sleep, but there was no clear evidence from others in terms of task engagement or behaviours. SBI in the home and clinic settings led to improvements in behaviours and cognitive function. Clinic based SBI that included vestibular, proprioceptive, and tactile input was associated with improved motor proficiency and sensory functioning. The authors noted caution as the evidence was varied and limited. They highlighted the factors affecting systematic reviews, i.e. sensory approaches differ in how they are implemented, the terms used to label sensory processing difficulties have been interchangeable over the years.

A later systematic review (Schaaf et al 2018) identified positive outcomes for function, participation, and the level of assistance needed for self-care activities. The study noted the increase in evidence regarding play, sensory-motor skills, and language skills is emerging.

A recent review of evidence (Acuña et al 2025) applied fidelity criteria for ASI, which measures adherence to the structure and processes used during therapy. It concluded that ASI significantly improved autistic children's individualized goals linked to occupational performance, function, and participation, i.e. sensory processing and regulation, sitting, daily routines, meal preparation, community participation, communication, behaviours, emotional regulation, gross motor skills, fine motor skills, safety, sleep, self-care skills (dressing, bathing, feeding), school participation, communication and interaction, and play.

Ongoing research is needed to provide further evidence on how sensory processing difficulties impact on the education and function of children. Studies that focus on individual targets and single cases have demonstrated evidence that supports intervention to increase regulation to sensory input. Every child and young person is an individual and the factors that affect their development are different. They change with age, in different situations, and during every stage of their education. It is imperative that assessments and intervention are individual.

Occupational therapy has a key role in an Education, Health and Care plan

An occupational therapy assessment provides valuable information on a child or young person's special educational needs and how they affect their function. An accurate description of needs will inform the content of sections B, E and F. An occupational therapist is often instructed to comment on the provision, specifically occupational therapy provision, and to comment on the education placement.

What are the challenges as an expert?

It is necessary to build a rapport with a child/young person within a very short period time to complete

the assessment. It is important to understand how the child or young person has coped, what support they have had, the needs of the family/carers, and how this has impacted their education. Assessments are very individual. Some need additional support to understand and manage a child/young person, particularly if their needs are complex.

Challenging an EHC plan is a long process so emotions can be high. Children and young people can be dysregulated for a number of reasons, e.g. the assessment is a new experience, they have struggled without adequate support. Some are wary, anxious and reluctant to communicate or engage in the assessment. It is important to build a rapport with them, adapt the assessment if needed, and reduce demands as much as possible.

The occupational therapist must explain how the report informs the EHC plan and tribunal process. Reports should be impartial, comprehensive and adhere to the facts, use little jargon, and comply with practice directions. Therapists must recognise the limitations of their assessment and when skills are outside their area of expertise.

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Amanda trained with Bond Solon and has an expert witness certificate from Cardiff University. She has extensive experience of issues related to special educational needs and Education, Health and Care Plans, i.e. refusal to issue, description of need, inadequate support, inappropriate provision or placement.

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Clarity in motion: shaping the future of self-driving language

The government has launched a public consultation to determine which words, phrases, and symbols should be legally prohibited from use in relation to automated vehicles. In this article we outline what this means for businesses in the mobility sector – and why it's important that they have their say.

Introduction
The Automated Vehicles Act 2024 (the "2024 Act"), which received Royal Assent in May 2024, marks a pivotal moment in the UK's journey towards a safe and regulated future for self-driving technology. Among its key provisions is a new power granted to the Secretary of State for Transport to protect specific marketing terms, ensuring that only vehicles officially authorised as self-driving can be marketed as such.

This legislative step is not semantics. It's about safeguarding public trust, preventing confusion, and ensuring that innovation in the automated vehicle sector proceeds responsibly.

Protected marketing terms: drawing the line between assistance and autonomy
At its core, the 2024 Act introduces a formal authorisation process to determine whether a vehicle can truly operate without human control or oversight. Only vehicles that pass this process can be legally described as "self-driving" or "driverless".

To enforce this, the Act introduces two new offences:

- **Protected Terms Offence**: this offence prohibits the use of specific marketing terms unless the vehicle has been authorised as automated. The exact list of protected terms will be set out in secondary legislation (a draft of which is provided alongside the consultation)
- **Confusion Offence**: this broader offence applies to any commercial communication likely to mislead consumers into thinking a vehicle can drive itself when it cannot

Together, these provisions aim to draw a clear legal line between **driver assistance** and **true automation** – a distinction that is often blurred in marketing materials.

The consultation: shaping the language of automation
On 10 June 2025, the government launched a public consultation to determine which words, phrases, and symbols should be legally prohibited from use unless a vehicle has been authorised. The current proposed list of protected terms includes:

- automated (when referring to a vehicle as a whole)
- automated driving
- automated vehicle
- autonomous (when referring to a vehicle as a whole)
- autonomous driving / driving autonomously
- drive autonomously
- drives itself
- driverless
- self-driving / driving itself
- travel autonomously

If adopted, these terms will be legally reserved for vehicles that have only passed the authorisation process, helping to prevent misleading marketing and protect consumers from overestimating what a vehicle can do.

What this means for businesses
For businesses currently using these terms – or planning to – this is a clear call to action: now is the time to review your marketing strategies and materials. Using protected terms without proper authorisation could expose your organisation to enforcement action, reputational harm, and potential legal liability.

Take proactive steps:

- brief your engineering, product and marketing teams now so they are aware of the proposed prohibitions
- introduce sign off processes and involve legal at an early stage of the product and marketing journey
- ensure your messaging aligns with the evolving regulatory landscape to avoid wasting time and cost adopting inappropriate terminology and communications strategies

Staying ahead of these changes isn't just about compliance – it's about maintaining trust and credibility and avoiding (potentially criminal) sanctions.

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Horses for different courses: not just personal injury.

by Mrs Peta Roberts, F.B.H.S

I have worked as an equestrian expert witness for many years, and have written reports for an amazing variety of cases. Whilst many cases are valuations or personal injury, other interesting cases include:

A report written for a local council's planning department, where a planning applicant had built 'stables' that local parties had complained were unsuitable for horses, but could easily be adapted for human habitation. I inspected the stables, and wrote a report for the planning council, stating why they were actually unusable as stables. Amongst other problems there was a beautiful brick step into the stables, that the horses would have had difficulty negotiating. Despite a foreign witness saying that in their country horses go up flights of stairs to sleep on the upper floor of their houses, the planning council won their case.

I have undertaken several cases involving tack and equipment failures, resulting in injury, as well as one involving a person in possession of a large quantity of tack and trailers possibly from dubious sources. I had to tell the court how people buy tack second hand, and often pay cash for it, with no receipt, which was made easier as some of the tack had been legitimately bought from an acquaintance of mine.

Another case involved a horse being transported back from treatment at a vet clinic, and it had died in transit as a result of being tied up incorrectly. The owner claimed against the vet as the vet nurse had loaded it, but the staff were absolved as it transpired it had been travelled to the vets and home again in an unsuitable headcollar, supplied by there owner, that did not break when the horse got caught up.

I quite often get business management type cases, predicting how a business would have grown had the proprietor not been injured, or predicting what horses would have been worth had the owner been able to train them as planned before their accident. I have also had to comment on what extra equipment a top class horse rider needed after being seriously injured in a car accident, to enable the rider to continue competing at top level.

Another interesting case involved a ridden horse that jumped over a fence onto a car. The rider had been following the local hunt, but claimed he was walking back to his lorry. On investigation it transpired he was actually going away from his lorry, having a little jolly over the hedges.

I get enquiries about health and safety, and often have to comment on risk assessments, and safe practices at work. I have written reports for council health and safety departments, on topics such as ring ropes at shows, health and safety procedures, risk assessments, lorry parking, and routes to be taken in competition. I have also written reports for trading standards, when purchasers have bought unsuitable, misdescribed horses.

Welfare of horses is now becoming a hot topic, and I authored a report where horses were not being kept or worked as agreed by the owner, and their care had become a welfare issue.

Valuations of horses is always a difficult subject, as there is no published guide, as there is with cars. Realistically a horse is worth whatever someone is prepared to pay for it, and some of them are actually a negative asset!

Nearly every case involving horses needs some sort of input from an equestrian expert, as equestrians talk a slightly different language, and non equestrians often get the wrong end of the stick. In one case I said that the pony had never been driven in company, but was told that it had, the drivers friend in the carriage on the way to the shop! The phrase 'driven in company' means in the company of other driven horses!

Whilst some of the cases are sad, and often make unpleasant reading, it is satisfying when the case concludes with the right outcome, and I learn something from every case.

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Crypto Fraud, Custody and the Courts

by Conor O'leary - coleary@mhc.ie

A recent UK High Court decision in Jones v Persons Unknown underscores the complex questions crypto fraud cases raise around ownership, custody and third-party rights. The Court declined to overturn a previous fraud judgment, despite a non-party exchange claiming its customers' Bitcoin had been wrongly taken to satisfy it. Our Dispute Resolution team examines the background to the case and explores how courts approach custody arrangements, mixed funds and third-party claims in fraud disputes.

What you need to know

- An investor previously in 2022 succeeded in its claim for fraud against two unknown fraudsters and Huobi Global Ltd, a cryptocurrency exchange.
- Huobi owned the wallet that stored the stolen Bitcoin.
- The Court made an order for the return of the Bitcoin against Huobi.
- Huobi transferred the Bitcoin from an unconnected wallet and then deducted the Bitcoin from the account belonging to Kyrrex Ltd, another cryptocurrency exchange.
- Kyrrex sought to have the judgment annulled on the basis that it was directly affected by it through the loss of the Bitcoin from its account.
- The Court refused the application and stated that Kyrrex's claim lay against Huobi which held its Bitcoin, under its terms of business.

Background

Mr Jones, a Bitcoin investor was persuaded by two unknown fraudsters to transfer 90 Bitcoin to a fake investor platform. Expert evidence produced by Mr Jones identified an exchange wallet, referred to throughout the case as the 'Targeted Wallet', owned by Huobi, into which Mr Jones' Bitcoin was transferred and stored. Mr Jones brought a claim against the fraudsters and Huobi on the basis that it owned and controlled the Targeted Wallet.

Neither the fraudsters nor Huobi participated in the proceedings. The Court granted freezing injunctions against the fraudsters. The Court also made an order against Huobi for the return of the 90 stolen Bitcoin and a further 8 Bitcoin to cover interest and costs on the basis that the exchange had duties towards Mr Jones.

Huobi transferred the Bitcoin from an unconnected wallet and then deducted the equivalent amount from an account held by Kyrrex in the Targeted Wallet.

Application to annul the judgment

Two years later, Kyrrex, sought to have the judgement set aside on the basis that although it was not a party to the proceedings, it was directly affected by the ultimate judgment.

Kyrrex argued that it had been directly affected by the judgment through the loss of the Bitcoin in its account in the Targeted Wallet. Kyrrex claimed that the expert evidence produced by Mr Jones in the proceedings which traced the stolen Bitcoin to the Targeted Wallet was incorrect. Expert evidence obtained by Kyrrex showed that Huobi transferred Bitcoin from an unconnected wallet which did not contain Mr Jones' stolen Bitcoin but mixed funds belonging to Kyrrex and its customers.

What is crucial to note is that under Huobi's terms and conditions, the Targeted Wallet was defined as a custodial wallet. As a result, the cryptocurrencies contained in the wallet, as a matter of law, belonged to its customers. However, in practice, Huobi treated the Targeted Wallet as a source of funds from which it could add and deduct cryptocurrencies at will, provided that it kept an account record of what cryptocurrencies it owed to each account holder.

The decision

The Court refused the Kyrrex' application to set aside the judgment on the basis that Kyrrex failed to show that it had been directly affected by the judgment. The Court held that while the judgment was based on the assumption that Mr Jones' Bitcoin was stored in the Targeted Wallet, the order for the return of the Bitcoin did not specify the wallet from

which the Bitcoin was to be repaid. It was the choice of Huobi to draw Bitcoin from an unconnected wallet address and reimburse itself from the Targeted Wallet, rather than a direct consequence of the order. The Court found that Kyrrex was only indirectly affected by the judgment, and that any claim it had lay against Huobi under its terms of business.

The Court also noted that Kyrrex had delayed in making its application and Huobi had since been deregistered. Accordingly, prejudice would be caused to Mr Jones should the judgment be set aside and the proceedings reopened.

Conclusion

This case illustrates that cryptocurrencies differ widely, and exchanges operate under varied models. The ownership rights of participants can vary significantly depending on each exchange's terms of business. Therefore, participants in cryptocurrency markets must pay attention to both an exchange's terms of business and how it operates in practice. As with any cryptocurrency fraud, acting quickly is crucial to protecting and enforcing your rights over the assets you hold.

For more information, please contact a member of our Dispute Resolution team at:

www.mhc.ie/practice-areas/dispute-resolution

Digital Evidence in the Dock: Admissibility, Reliability and Forensic Practice for Lawyers and the Public

This paper provides a practical guide to how digital evidence is identified, captured, analysed and presented in criminal and civil proceedings in England and Wales, with comparative nods to international technical standards. It explains the legal and scientific foundations that underpin admissibility and weight—covering the Forensic Science Regulator's statutory Code of Practice (the 'FSR Code'), the Criminal Procedure Rules and Criminal Practice Directions on expert evidence, the Criminal Procedure and Investigations Act (CPIA) disclosure regime, and good-practice standards such as ISO/IEC 27037 and BS 10008.

The paper is written for a general audience with an interest in justice, but assumes the reader has a basic legal grounding. It sets out the end-to-end digital forensics lifecycle, common pitfalls (from weak chain of custody to tool validation gaps), options to remediate non-compliance, and a roadmap for practitioners who must work across the legal–technical boundary.

1. Introduction

Digital traces now feature in almost every investigation: mobile phone content, cloud backups, messages, location histories, CCTV, vehicle telemetry, and data captured by internet platforms. For courts, the promise is better fact-finding; the risk is unreliable science or unfair intrusion into privacy. For lawyers, the challenge is to interrogate methods, not only conclusions. For the public, trust hinges on clear standards, transparency about uncertainty, and rigorous disclosure.

Three questions structure this guide:

(1) **When is digital evidence admissible?**

(2) **What makes it reliable?**

(3) **How should professionals collect, analyse and disclose it so that courts - and the public - can have confidence in the outcome?**

We highlight the post-2023 statutory footing for the Forensic Science Regulator, the refreshed Criminal Practice Directions 2023, the Attorney General's 2024 Disclosure Guidelines, and established international standards that shape day-to-day practice.

2. Legal, Regulatory and Standards Landscape

Key legal instruments (England & Wales). The Forensic Science Regulator Act 2021 establishes the Regulator in statute and requires a Code of Practice. A statutory FSR Code came into force in October 2023; compliance is increasingly expected across policing and providers, with UKAS managing accreditation to ISO standards for laboratory and scene activities. Criminal courts govern expert evidence primarily through the Criminal Procedure Rules (CrimPR) Part 19 and the Criminal Practice Directions (CPD) 2023 (as amended), which set duties of independence, report content, declarations of compliance, and case-management expectations. Disclosure duties are set by the CPIA 1996 (and Code of Practice) and the Attorney General's Guidelines on Disclosure (most recently updated to May 2024), with specific guidance for the digital context.

Technical and management standards. ISO/IEC 27037 provides foundational guidance on identification, collection, acquisition and preservation of digital evidence; BS 10008:2020 addresses evidential weight and legal admissibility of electronically stored information by specifying controls that demonstrate authenticity and integrity; NIST Special Publications (e.g., SP 800-101r1 for mobile device forensics) and testing programs help practitioners understand method limitations and validation requirements.

3. Background and Current State

Police and private practitioners operate in a hybrid landscape of statutory requirements and professional practice. The College of Policing's Authorised Professional Practice (APP) on extracting material from digital devices seeks consistent, lawful and proportionate seizure and extraction, complemented by the Home Office code under the Police, Crime, Sentencing and Courts Act 2022 on voluntary device access. Operationally, forces are moving towards greater accreditation and standardisation, while grappling with data volumes, encryption, and cloud-sourced evidence.

Against that backdrop, four themes recur in court: chain of custody and continuity; validation and competence; scope and proportionality (especially for victims' and witnesses' devices); and disclosure management for vast datasets.

4. Methodology and Lifecycle

This guide synthesises statute, procedural rules, regulator guidance and international standards, alongside practical experience from digital forensics. We, at Computer Forensics Lab adopt the lifecycle model - **identify, preserve, acquire, examine, analyse, report, present, and archive** - mapping each stage to

Table: Core Instruments and Standards (At-a-Glance)

Instrument/Standard	Scope	Relevance to Digital Evidence
Forensic Science Regulator Act 2021 & FSR Code (2023–)	Statutory regulator & quality code for forensic activities	Sets quality/validation/ accreditation expectations; declarations of compliance
Criminal Procedure Rules Part 19 & Criminal Practice Directions 2023	Procedure for expert evidence	Expert duties, report content, declarations, case management
CPIA 1996 & Code of Practice; AG's Disclosure Guidelines (2024)	Disclosure of unused material	Digital disclosure strategy, schedules, reasonable lines of enquiry
ISO/IEC 27037	Guidelines for identification, collection, acquisition and preservation	Foundational handling principles across device types
BS 10008:2020	Evidential weight and legal admissibility of ESI	Controls for authenticity and integrity of electronic records
NIST SP 800-101r1; CFTT	Mobile device forensics & tool testing	Acquisition/examination guidance; limitations; validation inputs

legal tests and documentary outputs (e.g., continuity logs, decision records, expert reports, schedules of unused material).

5. Findings and Analysis

Admissibility is rarely the hurdle; reliability and weight are. UK law generally adopts a permissive stance on admissibility, provided evidence is relevant and not unfairly prejudicial. For expert opinion and scientific evidence, CrimPR 19 and the CPD 2023 require explicit statements of methodology, data relied upon, uncertainties, limitations, and compliance with applicable codes. The FSR Code adds a quality-system lens: accreditation where required, documented validation, competence, impartiality, and explicit declaration of compliance or reasoned departures.

Chain of custody is a process, not a form. Continuity is demonstrated through contemporaneous records: **who did what, when, why,** and **with what effect on the item or data.** Good practice includes *unique identifiers, tamper-evident packaging or logical seals (cryptographic hashes), auditable access controls, and versioned case notes.*

Tool and method validation is central to reliability. Whether imaging a smartphone or parsing an application database, validation must show the method is fit for its intended use, with known error rates and limitations. That includes updates when tools change; open-source and commercial tools alike require local validation against ground-truth datasets, not just vendor claims.

Scope and proportionality require defensible decisions. Especially for third-party and victim data, investigators and lawyers must document why a device is examined, what is examined on it, and why narrower, less intrusive avenues were not sufficient.

Disclosure in the digital age depends on early strategy. Prosecutors and investigators should agree digital strategies at the outset: device attribution, triage criteria, search terms, technology aids, and schedules that capture relevant but unused material. Defence should be invited to particularise reasonable lines of enquiry.

6. Options and Evaluation

Where non-compliance arises (e.g., a laboratory process lacks accreditation or a report departs from the Code), courts may still admit the evidence but adjust weight and require additional safeguards: disclosure of validation data; agreement of a single joint expert; or limiting the scope of opinion. Prosecutors should assess reliability case-by-case rather than reflexively rejecting non-compliant evidence, while ensuring transparency about risks and mitigations.

Case Studies & Scenarios

The following short, anonymised scenarios are designed to help general readers understand how the legal and scientific rules in Sections 2–6 apply in practice. The situations map closely to real-world issues encountered in England and Wales. Each scenario flags the relevant rules and standards and ends with plain-language takeaways.

Case Study 1 — Mobile extraction challenged for lack of validation

Facts: A burglary suspect's Android handset is imaged using a commercial tool. The resulting report includes parsed chat threads and a timeline. Defence argues the chat parser is a new version not validated by the unit.

Issues: Reliability of the method (tool/version validation), expert's duty to state uncertainties, and weight of evidence.

What the court considered: The expert's declaration under CrimPR Part 19/CPD 2023 and whether the provider complied with the **FSR Code** (validation and competence). The prosecutor disclosed available validation data and version-change logs and invited defence questions.

Outcome: Evidence admitted; judge treated message timestamps with caution until the expert produced spot-checks against handset artefacts (SQLite) and server exports. Weight ultimately reduced on marginal items.

Why this matters: Tools evolve quickly. Providers must validate methods locally and explain any limits. Courts rarely exclude wholesale; they adjust how much trust to place in particular findings.

Case Study 2 — Chain of custody gap with cloud export

Facts: Investigators export a victim's cloud chat history (provider self-service download). A hash is recorded for the ZIP file, but not for the unzipped JSON evidence before analysis. Defence questions continuity after a later re-zip.

Issues: Continuity and integrity of electronic files once unpacked; whether initial handling met good practice.

What the court considered: Handling against **ISO/IEC 27037** principles (identification, collection, acquisition, preservation) and use of cryptographic hashing (e.g., SHA-256) across each handover, not just at first download.

Outcome: Court accepted the explanation and re-established the chain by hashing the original provider download (still retained) and the processed working set; minor weight discount for the gap.

Lessons learned: Hash as early and as often as is proportionate—at acquisition, at extraction, and before analysis. Keep the original container read-only and record tool versions used to unpack and parse.

Case Study 3 — Proportionality and a victim's device

Facts: In a sexual-offence investigation, police request the complainant's phone for full download. The complainant is anxious about historic unrelated content.

Issues: Necessity and proportionality; obtaining informed agreement; minimising intrusion while pursuing reasonable lines of enquiry.

What the court considered: Whether investigators followed the **Home Office extraction code** and **College of Policing APP** (clear explanation, consent, scope limitation), and whether the digital strategy complied with the **AG's Disclosure Guidelines (2024)** on reasonable lines of enquiry.

Outcome: A targeted extraction (date/app keywords) satisfied the enquiry without a full device image. Clear documentation reduced delay and distress.

Takeaway: Targeted, transparent extraction builds trust and often yields faster, higher-quality evidence than broad downloads.

Case Study 4 — Big data disclosure and early strategy

Facts: A fraud inquiry seizes 10 laptops and 8 phones from a small business. Disclosure falters months later because no digital plan exists and search terms were not agreed.

Issues: Managing volume; documenting reasonable lines of enquiry; creating Schedules of Unused Material; engaging defence early.

What the court considered: Duties under **CPIA Code of Practice** and the **AG's Guidelines (2024)**; CPS guidance on experts and digital material (including the Investigation Management Document (IMD) and use of technology aids).

Outcome: Court imposed a revised timetable, directed service of an IMD with prioritised terms, and encouraged a meeting to narrow issues. Case recovered; adjournment avoided.

Tip: Treat digital disclosure as a project: who, what, when, with what tools—and write it down on day one and stick to the terms agreed.

Case Study 5 — Non-accredited activity: admissible but reduced weight

Facts: A provider conducts a niche audio enhancement not yet in the accredited scope when the FSR Code comes into force. The expert declares the limitation and supplies validation summaries.

Issues: Effect of non-compliance with the FSR Code on admissibility vs weight; transparency in expert declarations.

What the court considered: **CPD 2023 (Oct amendment)** aligning expert declarations with the FSR Code; CPS guidance that non-compliance is not an automatic bar but requires closer scrutiny.

Outcome: The opinion was admitted with cautionary directions; court preferred features corroborated by independent checks.

Lesson: Declare non-compliance precisely, describe mitigations, and provide validation data: courts can calibrate weight accordingly.

Case Study 6 — Hashing algorithms in practice

Facts: Legacy workflow records MD5 hashes at acquisition. During review, SHA-256 is added. Defence raises the topic of MD5/SHA-1 collisions.

Issues: Whether legacy hashes undermine integrity; best-practice algorithm choices.

What the court considered: NIST guidance on approved hash functions (**FIPS 180-4** / Hash Functions project) and sector positions (e.g., SWGDE) emphasising preference for SHA-2/3 for integrity, with MD5 allowed for deduplication where appropriate.

Outcome: Integrity supported by SHA-256 computed on original images; MD5 retained for cross-tool matching only.

Practical note: Use SHA-256/512 as the primary integrity seal; document why any legacy MD5 remains in the workflow.

Case Study 7 — Experts' discussion and narrowing the issues

Facts: Prosecution and defence mobile experts disagree on whether a chat was user-deleted or app-expired.

Issues: Clarifying the technical basis of opinions; reducing disputes for the jury.

What the court considered: Direction for a pre-hearing discussion and joint statement under **CrimPR 19.6** to isolate agreed facts (e.g., database flags) and genuinely disputed interpretations.

Outcome: Experts agreed the artefact indicated auto-expiry; dispute narrowed to timing assumptions. Jury received a clear, short issue list.

Why it helps: Joint statements prevent technical debates from overwhelming the trial and surface uncertainty transparently.

Case Study 8 — Validating a chat parser with ground-truth data

Facts: A DFU (Digital Forensics Unit of a UK Police Force) validates a new parser for an instant-messaging app using a ground-truth dataset (devices populated with known messages, edits, deletes). Initial tests reveal mis-interpreted edited-message flags. Vendor patch issued.

Issues: Method validation, error detection, version control and change management in live casework.

What the court considered: The unit's validation records (**FSR-G-218**) and reliance on independent testing (e.g., NIST CFTT mobile test specs). The expert updated the report to correct earlier drafts and disclosed the limitations.
Outcome: Court satisfied the final results were reliable; disclosure of the earlier limitation preserved trust and avoided ambush.
Takeaway: Validation is not a checkbox—expect to learn about tool edges and record them for court.

Plain-language tips for readers and witnesses

- If your device is seized, you can ask what will be examined and why; targeted extractions are common where appropriate.
- Ask how your data will be protected and when your device will be returned.
- In court, experts should explain methods, error rates and uncertainties in simple terms—this is a duty, not a favour.
- Hash values are like digital seals: if data change, the seal won't match. Prefer SHA-256/512 for integrity checks.

10. Budget & Resourcing
Costs split into quality management (documentation, audits), accreditation fees, validation time, tooling and training. Savings often follow from standardised workflows (reduced rework), better disclosure planning (fewer late adjournments), and targeted extractions (less data to process and store).

11. KPIs & Success Metrics
Suggested indicators: percentage of casework within accredited scope; time from seizure to triage report; percentage of methods with current validation; disclosure timeliness; frequency of judicial criticism relating to digital evidence.

12. Compliance, Security and Ethics
Compliance requires mapping each forensic activity to the FSR Code and CrimPR duties, ensuring data protection compliance (lawful basis, necessity, minimisation) and security controls proportionate to sensitivity. Ethically, intrusiveness should be minimised—especially for victims and witnesses—and culturally aware practices adopted when dealing with communications data.

13. Conclusion
Digital evidence can illuminate truth or mislead. Courts will continue to admit relevant evidence, but confidence depends on transparent, validated methods and rigorous disclosure. The statutory FSR Code and the refreshed procedural framework provide scaffolding; practitioners must embed them in daily habits—documented decisions, controlled methods, candid reports—to serve justice and maintain public trust.

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Cyber insurance and email fraud: Implications of the Siam Aero decision

by Hans Allnutt & Lara Maslowska

Overview

Logix Aero Ireland Ltd v Siam Aero Repair Company Ltd [2025] EWHC 1283 (KB)

This case concerns the purchase of 2 aircraft engines by Logix Aero ("Logix"), a company based in Ireland, from Siam Aero Repair Company ("Siam"), based in Thailand. The sale was introduced to the defendant by Corentin Espitalier, the CEO of Sky Aeroservices SARL ("Sky Aero"), the French company providing the tear down services for the aircraft from which the engines were obtained. Representatives of Sky Aero were copied in to the parties' email correspondence.

The majority of the negotiations were carried out via email. As the terms of the sale & purchase agreement were being discussed, a fraudulent third party inserted themselves into the conversation using similar, but incorrect email addresses for the buyer and purchaser allowing the fraudster to act as an unseen middleman, controlling the conversation and stopping the parties to the transaction communicating with each other. The upshot was that the buyer, Logix, paid the purchase money to the fraudster on the basis of doctored invoices and this was only discovered when Siam complained it had not received payment.

The first access by the fraudster to the negotiation conversation was following a genuine email from Siam, but it was confirmed in forensic reports from Secretariat (instructed by Siam) and Kroll (instructed by Logix) that there was no evidence of either party's IT systems having been hacked or otherwise compromised, or that anyone connected to either party sent the email to the fraudster.

Kroll was not able to review Sky Aero's email system, having been informed by Sky Aero that the logs for the relevant months were missing. Although the judgment does not explicitly note this observation, an unanswered question sits over Sky Aero's emails as to whether they were hacked.

Initially Logix sought an interim seizure order of the engines in France after accusing Siam of fraudulently pocketing the money. Siam applied to strike out the claim and provided forensic evidence from Secretariat debunking Logix's allegations of fraud. Logix then filed amended particulars of claim which altered the crux of the claim from one alleging fraud to one in which Siam was accused of:

- Disclosing confidential information to the fraudster in breach of a confidentiality clause
- Providing apparent authority to the fraudster to act on its behalf when it reached the binding sale and purchase agreement. The apparent authority was said to arise from the principal (i.e. Siam) putting the agent (i.e. the fraudster) in a specific position carrying with it "usual authority".

The court struck out the claim, finding that no apparent authority could have been given by Siam to the fraudster to act as its agent and the concept has no application to circumstances where the parties believe they are dealing with each other. Further, even if there had been a breach of the confidentiality clause, this was not causative of the loss of purchase monies. The loss was caused by the communications from both sides and, primarily, the actions of the fraudster.

The court proceeded to award the Siam's costs on the indemnity basis thanks to Logix's initial unjustified allegations of fraud.

Relevance for victims of email fraud and cyber insurers

The circumstances of email interception leading to financial fraud will be very familiar to cyber insurers who frequently deal with "business email compromise" incidents, where by hackers obtain access to an insured's mailbox. While financial fraud does not always follow, business email compromised incidents do frequently appear to have this intention due to the targeting of accounting mailboxes and payment emails.

In circumstances where payment fraud does occur, a question often arises as to whether liability for the loss rests with the party whose emails were hacked, or whether it rests with the payor who ought to carry out due diligence checks on the recipient banking details.

The factual pattern, and legal liability, could also have implications as to whether a loss is covered by cyber insurance. If legal liability were to rest with the party whose emails were hacked, it is possible that a policy might insure the loss as under the third party liability cover. Otherwise, there may be no cover unless the paying party holds cyber insurance cover with explicit coverage/endorsement for financial losses arising out of email fraud.

Turning to the question of legal liability, this case is useful in that the courts recognised that Siam was not culpable in the fraud and had no liability. Key to this finding was the forensic evidence from Siam's forensic expert which confirmed that there was no evidence of its emails being compromised.

Similarly, Kroll confirmed that there was no evidence of compromise in respect of Logix's email environment. The elephant in the room appears to be the lack of logs to carry out an investigation into Sky Aero's email system. It is notable that Sky Aero was not named as a defendant, perhaps reflecting that the claimant felt that there was no viable cause of action for Sky Aero's legal responsibility for any compromise of its emails (if proven) or for the fraud.

In the absence of evidence to prove a security failure by the defendant, the argument raised by Logix that the fraudster was acting with the "apparent authority" of the defendant was ambitious and the court determined that it had no reasonable prospect of success.

The case highlights how important it is to carry out early forensic investigations following financial fraud related business email compromise incidents in order to identify which party, if any, was responsible for the email compromise (and indeed that a party was not responsible). Particularly where forensic logs have a limited lifespan. In the absence of compelling evidence that the payee suffered the security breach, a payor will continue to struggle absolve itself of responsibility for protecting itself against the fraud (for example by carrying out bank account verification checks). The financial losses, as this case shows, can be significant.

Trading Blows: Supreme Court draws the line on fraud and third-party liability

by Natalie Kearney - www.st-philips.com

The Supreme Court's judgment in *Bilta (UK) Ltd (in liquidation) v Tradition Financial Services Ltd* is important for insolvency practitioners, lawyers, and those involved in fraud litigation. It clarifies the extent to which third parties can be held liable for fraudulent trading under section 213 of the Insolvency Act 1986. Specifically, it has confirmed that:

- a defendant does not need to have participated in the management or control of the fraudulently trading company to attract liability; and
- any knowing involvement of anyone who dishonestly assists or contributes to the carrying on by the company of any business intended to defraud creditors will be sufficient.

Bilta (UK) Ltd (in liquidation) and others v Tradition Financial Services Ltd [2025] UKSC 18

The fraudulent scheme

Bilta was amongst several companies which were vehicles in an "MTIC fraud". The scheme involved spot trading in carbon credits under the EU Emissions Trading Scheme. The five companies entered into liquidation owing significant VAT liabilities to HMRC.

Legal issues

The liquidators of the companies, together with the companies, brought claims under section 213 against Tradition Financial Services Ltd ['Tradition']. Section 213 imposes liability on *"any persons who were knowingly parties to the carrying on of the business"* with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose. The claimants also alleged Tradition had dishonestly assisted the directors of the companies in their breaches of fiduciary duties in relation to acts between May and July 2009.

A partial settlement was reached, leaving two legal issues to be determined:

1. whether Tradition was within the scope of section 213; and
2. whether the claims in dishonest assistance were statute-barred.

In relation to section 213, Tradition submitted that the phrase *"any persons who were knowingly parties to the carrying on of the business"* was restricted to persons exercising management or control over the company in question.

Supreme Court Judgment

Section 213

The Court concluded that the language of section 213 was not ambiguous and there was nothing therein to restrict its scope to directors or others involved in the management or control of the company. The wording is broad enough to include third parties if they were knowingly parties to the fraudulent business being carried on. It considered that where Parliament intended to limit the scope of provisions of the Insolvency Act 1986 to directors or other officers, it did so expressly, as is contained in sections 212 (which refers to a person who *"is or has been concerned, or has taken part, in the promotion, formation or management of the company"*) or 214 (which refers to *"a person who is or has been a director of the company"*).

The Supreme Court endorsed, at [36], a helpful example given in the Court of Appeal ([2023] EWCA Civ 112) by Lewison LJ at paragraph 93:

"Suppose that a manufacturer regularly supplies counterfeit designer clothes to a retailing company, knowing that the retailer will pass them off as genuine. It is, in my judgment, no misuse of language to describe the manufacturer as 'party to the carrying on' of a fraudulent business, even though he exercises no managerial or controlling role within the retailing company; and the manufacturer may have other business activities that are not fraudulent. The manufacturer knows about the retailer's fraudulent business and is actively participating in it in the sense of furthering and facilitating it."

Limitation

As to the question of whether the dishonest assistance claims were statute-barred; the acts complained of took place between May and July 2009 and the claim was issued in November 2017. The claimants sought to rely on section 32 of the Limitation Act 1980, postponing the start of the limitation period until such time as the claimants had discovered the fraud, or could with reasonable diligence have discovered it.

The Supreme Court confirmed that the latter is perhaps best framed as the claimant being required to show it could not with reasonable diligence have discovered the fraud.

As such, the key date was 8 November 2011; however, the relevant parties (Nathanael Eurl Ltd (in liquidation) and Inline Trading ltd (in liquidation)) did not exist at that date, as they had been struck off the

register of companies and dissolved. They had subsequently been restored and then wound up and thus section 1032 of the Companies Act 2006 applied. Accordingly, the companies were deemed to have continued in existence and although they did not, in fact, exist when limitation expired on 8 November 2011, the law deemed they did exist at that time.

The claimants submitted:

- they could not have discovered the fraud any earlier than they did because they did not have officers capable of discovering the fraud until liquidators were appointed; and
- section 1032 should be read so as to deem the companies only had a 'bare' existence during the period of dissolution, with no officers in post who could have discovered the fraud.

The Supreme Court dismissed the appeal finding nothing in section 1032 to support the claimants' interpretation. The question as to whether a company is assumed to have had officers, and therefore whether such officers could with reasonable diligence have discovered the fraud, is a question of fact based on the balance of probabilities with reference to the available evidence. Neither of the claimant companies had adduced evidence on the point and therefore, given the burden was theirs, they had failed to discharge the burden of proof and the claims were statute-barred.

Implications for practice

Whilst the decision in relation to section 213 is perhaps unsurprising, it is a welcome confirmation of the position when pursuing third parties that actively assisted in fraudulent trading. It will be wise for parties involved in transactions with companies at risk of insolvency to be advised of the potential liability for fraudulent trading.

The interpretation of section 213 is in line with the creditor-friendly interpretation of section 423 in the decision in El-Husseiny v Invest Bank PSC [2025] UKSC 4 earlier this year, which confirmed that section 423 can be used where a debtor procures the transfer of assets they do not personally own.

The decision in relation to section 32, and its interplay with section 1032, is particularly interesting in that it raises the question as to what evidence could be adduced to show that a company that was dissolved and subsequently restored could not with reasonable diligence have discovered a fraud. At first blush it seems likely to be a difficult evidential hurdle for a claimant and certainly something to keep an eye on for future developments.

Anyone interested in hearing more about the implications of this case, or the section 423 developments, is welcome to attend the St Philips Chambers Insolvency Conference on 18 June 2025. Register here

Whilst every effort has been taken to ensure that the law in this article is correct, it is intended to give a general overview of the law for educational and/or informational purposes. It is not intended to be a substitute for specific legal advice and should not be relied upon for this purpose.

This article represents the opinion of the author and does not necessarily reflect the view of any other member of St Philips Chambers.

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Shocked & Horrified of Tunbridge Wells (Norwich, actually, but you get the point)

by Robert Dale, Senior Partner, Daniel Connal Partnership

Just occasionally something pops into your email inbox which stops you in your tracks!

It happened to me back in April. Amongst the usual inbox fodder – updates on projects, requests for information, job enquiries, etc – was a **Practice Alert** issued by the Royal Institution for Chartered Surveyors (RICS), entitled **'Acting as an expert witness in housing disrepair and other high-volume cases'.**

Issued in response to a number of reported concerns about the quality of expert witness functions, the professional body for Chartered Surveyors had felt it necessary to remind its members of their 'legal, professional and regulatory obligations' when providing evidence-based opinion in expert witness cases.

I was shocked. In fact, I'd go as far as saying, I was horrified, after all the key tenet of the expert witness is their impartiality. A duty to the court, not the appointing party, to provide unbiased opinion. The delivery of a report by an expert in the relevant field – thorough, evidence-based, well researched – which will stand up to the closest scrutiny, and offer clear, practical advice, based on comprehensive understanding and experience.

It is a **crucial** element in ensuring credibility and confidence in the outcome of any case, and something that I thought any RICS member would understand and adhere to.

Red Flags! Where are the problems arising?

However, issues seem to be occurring specifically in housing disrepair and other high-volume work –the Practice Alert cites cavity wall insulation for example - which affect significant numbers of people, who may be entitled to compensation. The likely impact of major claims against companies leading to behaviour from claims management organisations, which should present a furiously waving red flag to a RICS expert witness:

1. The offer of serial instruction of the same expert in multiple claims - a lot of work, very tempting, but with potential for conflict of interest corresponding with the risk of losing a revenue stream, should the expert reports fail to align with the expectations of the client.
2. The insistence that an expert uses pre-populated templates, standard schedules of charges, or copy/paste reports – convenient and easy certainly, but where is the proper investigation or verification.
3. Misrepresentation or inaccuracy in either qualifications or experience, whether resulting from template use, alteration of reports after submission, or incorrect use of the RICS logo.

Any RICS member ignoring these red flags is not complying with RICS standards for members and runs the risk of regulatory sanctions and legal consequences.

Gold Standard

The RICS Surveyors Acting as Expert Witnesses: Practice Statement and Guidance note provides the gold standard. It is currently in its 4th edition, which was published in 2014, with amendments in 2020 and 2023. In August, RICS launched its global public consultation for the 5th edition. Aiming to ensure that it meets industry needs effectively, RICS members and stakeholders have the opportunity to review and comment on the draft.

Key updates for this 5th edition include enhanced professional protection as well as risk mitigation for high-volume cases, template usage, and professional responsibilities. There are also clearer requirements for identifying and disclosing conflicts of interest, along with an explanation of legal consequences for non-compliance. It would appear that it cannot come soon enough.

In the meantime, the April Practice Alert provides a checklist and guidance on four sections of practice for RICs members acting as expert witnesses, as a timely reminder and which they must be able to "fully and unambiguously" discharge.

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- Building Defects
- Valuation of Building Work

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The changing landscape of determining quantum

Valuation by probabilistic rather than deterministic methods

Is the construction industry witnessing the end of deterministic methods in quantity surveying in favour of probabilistic approaches?

*by **Vincent Fogarty**, Managing Director of Diales Technical, Quantum and Technical Expert, London, UK*

In my experience working on large-scale projects such as airports, transport infrastructure, and data centres, it has become increasingly clear that cost estimation and procurement are evolving towards probabilistic models. With the advent of AI, these methods are likely to expand.

The Royal Institution of Chartered Surveyors (RICS) predicted these changes[1] in 2020, recognising that the "scale ruler" for measuring cost elements was nearing the end of its life cycle, particularly for large-scale complex infrastructure. This shift is particularly evident in target cost[2] procurement contracts designed to accommodate a more flexible and risk-aware approach to construction. As the industry adapts to a growing uncertainty, the role of probabilistic cost prediction is becoming beneficial and essential.

The limitations of deterministic methods

Traditionally, quantity surveying has relied on deterministic methods to predict construction costs. This approach involves measuring quantities, applying rates for materials and labour, determining indirect costs such as preliminaries, and calculating overhead and profit percentages. However, this method has one significant drawback: it assumes that all inputs and outputs are predictable and fixed, which is rarely the case in modern construction projects. In fixed sum contracts, the design must be mature and fully defined to provide a reliable cost point. But in practice, especially in Design & Build contracts, designs often remain fluid at contract formation, sometimes only reaching the Employer's Requirements stage and/or a Royal Institute of British Architects (RIBA) Stage 3[3]. As a result, the deterministic method cannot accurately address the inherent uncertainties in the design and delivery process.

Enter probabilistic methods

In contrast, probabilistic methods take uncertainty into account. Instead of relying on a single value cost estimate, these methods use historical data to create a range of possible outcomes. This range is then analysed through models such as Monte Carlo simulations which account for the risk and variability inherent in complex projects. Over the past few years, there has been a noticeable increase in the use of Monte Carlo simulations within the construction industry. This trend has been partly driven by the heightened awareness of risks highlighted by events such as the COVID-19 pandemic, but also by a broader shift in the industry toward data-driven, analytics-based decision-making. Monte Carlo simulations are particularly powerful tools for cost and programme/schedule forecasting. By running thousands of random simulations based on a range of input parameters—such as Expected Value, Best Case, and Worst Case —Monte Carlo analysis can produce a probability distribution of potential project outcomes. This allows stakeholders to assess the likelihood of various cost and programme/schedule scenarios and to make more informed decisions.

The role of Monte Carlo in today's construction industry

The technique has proven to be very useful in complex and high-stakes projects. As an example, in a recent expert appointment at Diales under joint instructions, we utilised Monte Carlo simulations to determine an "On Demand" bond value that provided surety in the event of default[4] concerning a Settlement Agreement. The diversity and complexity of the scope, coupled with strict time constraints, made the probabilistic approach not only useful but necessary. By incorporating a range of scenarios we established a reasonable and well-supported bond value that balanced all the relevant factors. The UK's Treasury and Cabinet Office[5] and the Infrastructure and Project Authority have recognised this shift and are actively promoting probabilistic techniques to ensure greater cost certainty in largescale infrastructure projects. This is not just about improving the accuracy of cost predictions but is also about providing the confidence necessary for stakeholders to make sound, data-driven decisions. The UK's Environment Agency mandates the use of Monte Carlo cost modelling.

The future of quantity surveying

The shift towards probabilistic methods does not spell the end of deterministic approaches, but it does signify a profound transformation in how quantity surveying and cost management are practised.

The rise in the use of Monte Carlo simulations and similar probabilistic techniques highlights a growing need for data literacy and an ability to handle complex risk modelling.

As the construction industry continues to innovate, the quantity surveyor's role will likely evolve into a more analytical and strategic one, blending traditional expertise with new methodologies that can better address the uncertainties of modern construction. For those in the profession, staying ahead of this shift means embracing the technologies and techniques that can provide deeper insights into project risks and cost implications. This evolving skill set will not only enhance the accuracy of cost predictions but also instil greater confidence among clients, investors, and the public, increasing the likelihood that construction projects can be delivered successfully on time and within budget. In the expert witness world, this will mean that those with practical experience in applying cost model techniques ought to flourish.

This article was originally written for issue 28 of the Diales Digest. You can view the publication here: www.diales.com/diales-digest-issue-28

Do not hesitate to get in touch with Vincent directly if you have any queries following-on from this article. You can view his expert profile and get in touch with him via this page: www.diales.com/en/expert/vincent-fogarty

References

1. RICS, Cost Prediction, 1st edition, dated November 2020, effective from 1 July 2021.

2. Such as NEC Option C forms and similar target cost contracts.

3. RIBA Stage 3: Spatial Coordination Formerly known as the 'Developed Design' stage; this is where the practical aspects of the concept are decided. For instance, at RIBA Stage 3, the design team should consider how the project will meet legal requirements, such as building regulations.

4. In the event where defects were not remediated within a time limitation period.

5. Infrastructure and Projects Authority; Cost Estimation Guidance, A best practice approach for infrastructure projects and programmes, Crown Office, 2021.

Procedural Unfairness in the removal of a Permitted Development Right: Singhal UK Limited v Secretary of State for Housing, Communities and Local Government & Another

by Anna Tranter - anna.tranter@irwinmitchell.com

The recent Planning Court judgment of Singhal UK Ltd v Secretary of State for Housing, Communities and Local Government and Anor Communities & Anor [2025] EWHC 1967 (Admin) found that the threshold for procedural unfairness can be met where a decision departs from an agreed matter between the parties, where the parties did not have the opportunity to make representations on that point.

This case centred around the statutory review under sections 288 and 289 of the Town and Country Planning Act 1990 of a Planning Inspectorate appeal decision dated 5 May 2023. That appeal was brought by the Claimant against an enforcement notice issued by the London Borough of Hounslow, alleging a breach of planning control at a property owned by the Claimant. The breach involved the construction of a residential outbuilding (sub-divided into three spaces), a single-storey rear extension and link extension.

The appeal had partially succeeded with permission granted for a single storey rear extension, subject to a condition that no building or enclosure could be erected or installed within the dwellinghouse's curtilage without prior written notice.

The Claimant argued that this condition would prevent the erection of an outbuilding "required for a purpose incidental to the enjoyment of the dwellinghouse" which would otherwise constitute permitted development ("PD") under the Town and Country Planning (General Permitted Development) (England) Order 2015.

The statutory review was brought on three grounds:

1. The Inspector acted unfairly in including the condition removing PD rights
2. The Inspector failed to take into account the NPPF
3. The Inspector failed to take into account material considerations in deciding that one of the three rooms in the outbuilding would not be required for a purpose incidental to the enjoyment of the dwellinghouse.

Ground 1: Procedural Unfairness

The claim succeeded on Ground 1 alone. That the Inspector did not think he had the power to remove PD rights in this case had been an agreed matter between the parties to the appeal. Departing from this position by imposing the condition deprived the parties of the chance to address this issue. Judge

Jarman KC considered that had the parties had been given the opportunity, it may have impacted the justification for the condition. The court found that the threshold for procedural unfairness (requiring substantial prejudice to the Claimant) had been met.

Ground 2: Failure to Consider the NPPF
The court held that although the NPPF was not explicitly cited, the Inspector had applied relevant principles from the Planning Practice Guidance (PPG), which interprets and clarifies the NPPF.

Ground 3: Failure to consider Material Facts
Judge Jarman KC found that the Inspector was entitled to conclude that the outbuilding, taken as a whole, was not required for any purpose incidental to the enjoyment of a dwellinghouse. The third space was not identified on the plan as being for a specific purpose which the Inspector found "suggested" that it was not required for that incidental use. The Inspector also had regard to authorities indicating that the size of the building is not itself determinative, which supported his reasoning.

This case highlights that parties to an appeal should be provided with a chance to respond and make representations in respect of the removal of a PD right, to ensure that any conditions imposed are procedurally sound and transparently reasoned.

The case supports existing authorities providing that the size of an outbuilding is not determinative when considering its incidental use, but rather this should be assessed as a matter of fact and degree. The case also highlights the importance of clearly defining the intended use of each space in planning applications and appeals.

A v X Y & Z and Secretariat Consulting v A

by Expert Evidence - www.expert-evidence.com

Expert Evidence have summarised the case below to highlight the issue of an experts duty to the Court. In the 'secretariat' case; the judge ruled that secretariat cannot be a consultant to both parties. This was however a contractual relationship issue, not the fact it was a single expert used by both parties.

These reported cases are two stages of the same case heard in the last 12 months. The first was in the Technology and Construction Court ('TCC'), the second, the Secretariat Consulting case, in the Court of Appeal. The case concerns the duty, fiduciary or otherwise, that an expert owes to his instructing client and the question of conflict of interest which can arise when engaging multi-disciplinary companies. The application was brought in connection with two ongoing arbitrations, so the hearing was heard in private and the parties granted anonymity in the judgement.

Case Description

The case concerned the developer of a large petrochemical plant which in 2012 and 2013 appointed a consultant to provide engineering, procurement and construction management ('**EPCM**') services in relation to that development project. The appointment was worth US$2 billion. A contractor was also appointed for the construction of certain facilities at the plant, the works totalling US$117 million. Disputes arose between the developer and the contractor who had incurred additional costs because of delays. Some of these delays were caused by the late release of issued-for-construction drawings by the EPCM contractor.

The contractor initiated an ICC arbitration against the developer in relation to those additional costs (the '**Contractor Arbitration**'). In March 2019 the developer instructed a delay expert from the Asian subsidiary of Secretariat, an international firm offering litigation support services, to advise and act for it in connection with the arbitration. The parties signed a formal letter of engagement which, amongst other things, confirmed that Secretariat had no conflict of interest and would maintain that position for the duration of the engagement.

A few months later the EPCM contractor started its own ICC arbitration in London against the developer for non-payment of fees (the '**EPCM Arbitration**'), and their solicitors also sought to engage an expert from Secretariat to provide quantum services to help with their arbitration. The developers counterclaimed against the EPCM consultant for delay and disruption to the project including any liability they might be found to have had in the Contractor Arbitration. Further they objected to the appointment of the expert on the grounds that they had already appointed an expert from Secretariat for the Contractor Arbitration, and that there would be a conflict of interest. Although the experts would come from different subsidiary companies of Secretariat, the issues being considered in the two arbitrations would overlap and concerned the same underlying dispute and that there would be a conflict of interest.

> *Confidentiality is a virtue of the loyal, as loyalty is the virtue of faithfulness."*
>
> Edwin Louis Cole

The EPCM consultant and Secretariat argued that the experts were employed by separate parts of the Secretariat group, that they were based in different geographical regions, in different disciplines and that there were information barriers (electronic and physical) within the group to prevent the seepage of confidential material. The developer proceeded to apply to the TCC for an interim injunction preventing Secretariat from providing its expert to the EPCM consultant. This was based on two grounds: breach of fiduciary duty and breach of confidence. The TCC granted the injunction, reasoning that Secretariat's original appointment on the Construction Arbitration carried with it a fiduciary duty of loyalty to the developer. The various parts and companies within the Secretariat group comprised a whole- they were marketed as one global group and the duty of loyalty was owed by all the corporate parts of Secretariat.

The Judgement

Secretariat took their case to the Court of Appeal which unanimously upheld the TCC's judgement, though not on the grounds that Secretariat owed a fiduciary duty of loyalty. Indeed the Court expressed reservations on the implications of doing so, noting that the term was *"freighted with a good deal of legal baggage"*. There was an express clause in the contract for the Contractor Arbitration which prohibited

conflicts of interest and Secretariat had *"confirmed you have no conflict of interest in acting for (the developer) in this engagement"* and that it would *"maintain this position for the duration of your engagement"*. The Court found that this clause was agreed on behalf of all the companies within the group even though it had been addressed to, and specifically signed by, only one company. Secretariat *"markets itself as one global firm, with numerous regional offices.... [not as] a variety of different companies who were free to act as if they were unconnected."* The EPCM Arbitration appointment would involve an overlap "of parties, role, project, and subject matter" and clearly there would be conflict of interest.

The Consequences

The decision has some important consequences for the way that expert services firms market and organize themselves internally. It is vital that expert firms consider any undertakings already made regarding conflicts of interest by subsidiary parts of a larger group, and also that potential overlaps are not ignored in previous and potential new instructions. In particular it is important that clients of firms providing expert witness services are aware that the expert does not need to owe any fiduciary duty of loyalty to them and this can be excluded in the terms and conditions of engagement.

Link: A v B [2020] EWHC 809 (TCC) (03 April 2020)
Link: Secretariat Consulting PTE Ltd & Ors v A Company [2021] EWCA Civ 6 (11 January 2021)

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The Ajax Programme: Lessons in Risk and the Value of Expert Assurance

The Ajax armoured vehicle programme was intended to be a transformative step for the British Army: a fleet of six advanced, fully digitised vehicles providing cutting-edge surveillance, reconnaissance, and support capabilities. However, as the National Audit Office (NAO) details in its 2022 report, the programme has instead become a cautionary tale of how complex defence procurement can falter when risk management, technical requirements, and supplier oversight are not robustly assured from the outset. The consequences include years of delay, spiralling costs, and critical safety issues, most notably, unresolved noise and vibration problems that have directly affected the health of Army personnel.

At the heart of Ajax's troubles lies the drive to deliver a bespoke solution bristling with new capabilities, but without sufficient maturity in the underlying technologies or a clear understanding of how they would integrate. The Ministry of Defence (MoD) specified around 1,200 capability requirements for each of the six Ajax variants. While innovation is vital in defence modernisation, the result was a system so complex that even the Department and General Dynamics Land Systems UK (GDLS-UK) struggled to fully understand how components would work together. For example, the cannon's design was not mature at contract award, yet its integration was pivotal for the vehicle's intended capability.

This lack of clarity led to a continual churn of design changes, 1,897 in total between 2015 and 2021, each adding delay, cost, and risk. The NAO noted that neither the Department nor GDLS-UK fully understood some components' specifications or how they would be integrated onto the Ajax vehicle. The programme quickly exhausted its schedule contingency and became mired in disputes over technical standards and acceptance criteria.

Perhaps the most damaging failing has been the inability to anticipate and control the noise and vibration hazards that have rendered the vehicles unsafe for crew. Despite early indications of excessive vibration and reports from crews as early as 2017, these issues were not prioritised until 2020. By September 2021, the MoD had imposed 27 limitations of use on Ajax vehicles, 22 of which were safety-related and 11 critical to achieving even initial operating capability. Testing was insufficiently rigorous and failed to reflect real-world conditions, ultimately forcing the MoD to halt progress until solutions could be agreed.

The programme also suffered from fragmented accountability. The contract intended to transfer financial risk to the contractor, but in practice led to

confusion over roles. While the MoD was responsible for specifying and accepting vehicles, GDLS-UK was accountable for design and manufacture. When problems arose, disputes emerged over who was responsible for remediation. The lack of clear, shared ownership of risk and safety assurance directly contributed to delays and hazards.

Another key issue was scheduling over-optimism. The NAO found that the original schedule was unrealistic, with the design and manufacturing phase extending to nearly eight years- far beyond the three years initially expected. Most of the programme's contingency was consumed early, leaving little room to respond to emergent problems.

These failures are not unique to Ajax, they are emblematic of the risks in any high-value, high-complexity defence procurement.

What is required is not simply more oversight, but the right kind of expertise that is embedded early and throughout the project lifecycle.

The Role of Expert Assurance in Defence Procurement

Finch Consulting brings deep experience in engineering risk management, safety assurance, and legal compliance across high-hazard sectors, including defence. Our consultants are Subject Matter Experts and former board-level executives from defence contractors, combining technical knowledge with practical, organisational insight. This enables Finch to bridge the gap between ambitious requirements and safe, deliverable outcomes.

One key lesson from the Ajax project is the risk of excessive requirements and unclear standards. It highlighted the importance of early and transparent user engagement, modular engineering, balancing ambition with realism, and enforcing stronger contractual oversight. Finch's experience in translating complex regulations into clear, actionable guidance and specifications has helped our clients streamline compliance while maintaining operational readiness.

Finch's expertise spans the entire system lifecycle, from concept to decommissioning. Our consultants ensure that risk and safety are considered from the outset, not added as afterthoughts. This includes support for HAZID and HAZOP studies, machinery and equipment compliance, and development of robust safety management systems.

The Ajax case also highlights the dangers of fragmented supply chains. Finch helps strengthen supply chain resilience through supplier assessments, integration of safety requirements into contracts, and support for dispute resolution. Our background as expert witnesses equip us to assist clients in both avoiding and navigating complex disagreements like those seen in Ajax.

The Ajax programme's difficulties are a reminder that in complex, high-stakes defence projects, success depends on more than technical innovation, it requires disciplined, expert risk management, defined outcomes, and a shared culture of accountability. By embedding specialist assurance from the outset, future programmes can deliver real value for the Armed Forces and the taxpayer.

*Please note all information for this article has been sourced from the public domain and mainly the National Audit Office (NAO) report The Ajax Programme, 11 March 2022, ISBN: 9781786044198. No other sources have been used.

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Associated People
The Ajax Programme: Lessons in Risk and the Value of Expert Assurance

Recent Case Laws Relating to the Defective Premises Act 1972: Its Impact on Contractors and Consultants

by Antony Davis, BA(Hons), DipArch, ARBUK, RIBA, PCGHE, MSc (Construction Law) & Joan Kennedy, BSc(Arch), MSc (Bldg Science), MSc (Construction Law), FCIArb, FPIArb, AMAE, UAP

Introduction

The Building Safety Act 2022[1] **(BSA 2022)** (which gained Royal Assent on 28 April 2022), has had a significant impact on liability around the design and construction process. One of the changes brought about by the BSA 2022 is the change in the limitation periods to bring a claim under the Defective Premises Act 1972 **(DPA)**. This legislative change has prompted claims under the DPA (which would have been time-barred pre-BSA 2022), where claims in contract and tort[2] are time-barred.

The recent UK Supreme Court and High Court decision on **URS v BDW** [2025] UKSC 21,[3] and High Court decisions on **Vainker v Marbank** [2024] EWHC 667 (TCC)[4] and **BDW v Ardmore** [2024][5] provide new guidance on DPA claim outcomes within the Courts and their potential impact on the UK construction industry.

Relevant Limitation Periods Overview

The Limitation Act 1980 **(LA 1980)** states the time limits for bringing actions. An action in tort has a limitation period of six years from the occurrence of damage[6] or three years from the date of knowledge if that period expires later than the normal six year limitation period.[7] A simple contract has a limitation period of six years from the date of breach.[8] A contract under seal has a limitation period of 12 years.[9]

The BSA 2022 section 135 (s.135 BSA) inserted section 4B into the LA 1980, and has retrospectively increased the limitation period for a claim under section 1(1) of the DPA **(s1(1) of the DPA)** from six years to 30 years from the date on which the right of action occurred prior to 28 June 2022 or 15 years where the right of action occurred after that date.[10] This legislative change has prompted new claims under the DPA when claims in contract or tort are time-barred. This is evident in the background of the claims brought to the Courts on URS v BDW [2025], Vainker v Marbank [2024] and BDW v Ardmore [2024].

Limitation Period and Time Bar Issues for Claims

Vainker v Marbank [2024]

In Vainker v Marbank, Mrs Vainker the homeowner, and SCd the architect, entered into contract in 2011 for Royal Institute of British Architects (RIBA) work stages E to L.[11] Even though the contract was not signed, Mrs Vainker paid SCd (around October 2011) for services with respect to Stage E works.[12] The view of Mrs. Justice Jefford DBE (the Judge) was that a signature is not a pre-requisite for a concluded contract and that the conduct of Mrs Vainker in asking and paying for SCd's services was sufficient to confirm acceptance of a contract.[13]

During the course of the works (between 2013 and practical completion on 15 May 2014) Mrs Vainker complained about the brickwork finish and water ingress at the property.[14] The Judge found that Mrs Vainker's claim against SCd, with respect to breach of contract based on SCd's design and / or inspection around these areas, was time-barred as all the relevant breaches occurred well before practical completion and therefore more than six years before the commencement of proceedings[15] in 2020.

The Judge also found that the claim in tort in respect to design and / or inspection was also time-barred as Mrs Vainker had knowledge of the damage that was attributable to SCd, in whole or in part, from late 2013.[16] This is more than three years from the date of knowledge where the period expires later than the normal six year limitation period.[17] The claimant therefore opted to claim against SCd for breach under the DPA,[18] as the claim in contract and tort were both time-barred.

BDW v Ardmore [2024]

BDW v Ardmore [2024] covered a summary judgement application by BDW (the Claimant), to enforce an adjudication decision, requiring Ardmore (the Defendant) to pay over £14M of damages plus adjudicator's costs and expenses after BDW obtained

practical completion on an apartment development between December 2003 and June 2004.[19] The key allegations that BDW raised were: *"the unsuitable nature of the Alumasc product and the omission of fire barriers."* [20]

Ardmore, the contractor, had a limitation defence under LA 1980 against any claims that might be brought by BDW under section 1(1) of the DPA. This became potentially ineffective when the provisions of the BSA 2022 came into force.[21] This legislative change prompted BDW to issue a Letter of Claim to Ardmore in July 2022, nearly 20 years after practical completion, regarding fire safety defects at the development.[22]

URS v BDW [2025]

In URS v BDW, BDW discovered structural design defects in two of its multiple high-rise residential building developments (Capital East and Freemens Meadow) during its investigations in late 2019.[23] BDW carried out remedial works between 2020 to 2021. At the time that repair costs were incurred, BDW no longer had proprietary interest in the developments and any action brought by third parties to BDW whether under the DPA or in contract would have been time barred under Limitation Act 1980.[24]

In March 2020, BDW brought a claim against URS (who provided structural design services to BDW) in tort.[25] In October 2021, in URS v BDW's preliminary issue trial, BDW v URS [2021] EHWC 2796 (TCC),[26] the Judge, Mr Justice Fraser, considered that the defects presented a health and safety risk.[27]

In June 2022, s.135 BSA came into force which retrospectively extended the limitation period under section 1 of the DPA. BDW applied to amend its case relying on s.135 of the BSA (2022). BDW succeeded in amending its claim and bringing new claims against URS under s.1 of the DPA and under the Civil Liability (Contribution) Act 1978.[28] The amendments were granted by the High Court in December 2022.[29]

The High Court decisions were appealed and heard by the Court of Appeals in April 2023.[30] The Court of Appeals dismissed the appeals.[31] The Supreme Court granted permission to appeal on four grounds, which included the effect of applying s135 of the BSA (2022) and additionally whether URS owed a duty to BDW under section 1(1)(a) of the DPA and if BDW's alleged losses were recoverable for breach of that duty.[32]

Consideration of Relevant Defects in the Decisions

In section 1(1)(b) of the DPA, the duties of the person(s) taking on work in connection with dwellings are described as being:

"done in a workmanlike or... professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed."

Based on a previous case,[33] the types of defects that the Court is likely to consider as falling under the remit of the DPA, are the defects that will render the dwelling unfit for habitation. This relates primarily to the safety of the users and / or make the condition of the dwelling deteriorate over time. The Court held that for defects based on aesthetics, it is unlikely that it would make a dwelling unfit for habitation.

Vainker v Marbank [2024]

In Vainker v Marbank, numerous defects were alleged, the most relevant of which are those that could render the house 'unfit for habitation,' namely the alleged brickwork finish and the glass balustrade defects. When considering which defects were relevant the Judge cited Rendlesham Estates plc & Ors v Barr Ltd [2014] EWHC 3968 (TCC), a case concerning defects in an apartment building that could lead to mould and damp. In Rendlesham v Barr, the judgement says that: [34]

"(iii) There may be a breach of the duty in respect of a defect which means that the ***condition of the dwelling is likely to deteriorate over time*** *and render the dwelling unfit for habitation when it does so...*

(iv) ***... it must be the case that minor or aesthetic defects which do not contribute, and are not capable of contributing to, unfitness for habitation cannot be relevant*** *in this consideration and damages cannot be recovered in respect of such a defect merely because other defects render the dwelling unfit for habitation."*

Mrs Vainker alleged that the brickwork was *"permanently damp"* and *"the stained brickwork forms part of the structural element of the building and that prolonged saturation of the mortar may well result in sulphate damage to the mortar joints."* [35] The alleged water ingress and structural risk formed part of the basis of Mrs Vainker's argument that the House was unfit for habitation at the time of completion.[36] Additionally it was alleged that these defects were due to SCd's failure to exercise reasonable skill and

care and a breach of section 1 of the DPA[37] relating to inadequate specifications and details, and failure to carry out appropriate site inspections.

The Judge considered the experts' evidence and held that there was no evidence of a causal connection between any design defect and the leaks that occurred or any risk of future leaks.[38] There was no evidence that the brickwork was permanently damp.[39]

The Judge noted that the experts agreed that there was no evidence of structural brickwork failure or falling bricks[40] and that Mrs Vainker's case must show *"the condition of the brickwork at the time of completion meant that it was susceptible to failure at a later date to an extent that would make the property unfit for habitation."* [41]

The Judge noted that there was broad agreement between the Experts on the risk of structural failure arising from sulphate attack due to the brickwork being permanently saturated.[42]

However, it was not clear whether there had been any erosion of the mortar that was consistent with sulphate attack.[43] The Court therefore was not satisfied that it was likely for further erosion or for structural risk to occur as a result of design or workmanship issues. The Court also decided that the staining was an aesthetic defect which would not make the house unfit for habitation at the time of completion[44] and that SCd was not in breach of their duties under section 1 of the DPA.

Regarding the glass balustrade which were installed at the first and second floor terrace, and to the main internal staircase of the house, it was alleged that toughened and laminated glass panels should have been installed, as per specification, rather than just toughened glass panels. The installation of just toughened glass panels was not in accordance with the Building Regulations K2 requirements. The installation of the incorrect and unspecified glass panels should have been identified by SCd (the architect) as part of their inspections, when exercising reasonable care and skill.

It was the Judge's view that the Contract (including specification and drawings) did call for bonded toughened and laminated glass panels in all the locations described and therefore Marbank Construction Limited ("**MCL**") were in breach as they had failed to carry out the works in line with the Contract.[45] Therefore, the claim against MCL on breach of contract was not time-barred.

The Judge stated that there had been little consideration at trial on the interpretation of the Building Regulations, and it should be noted that:

"... it seems more likely that they would require laminated glass or a handrail in such circumstances, since the failure of the glass would create the risk of fall to ground level." [46]

On SCd using reasonable skill and care during their inspections the Judge stated:

"... the weight of the agreed expert evidence is firmly in favour of the conclusion that it is visually obvious that the glass is not laminated... and that is something that SCd, exercising reasonable care and skill, ought to have observed at some point..." [47]

The Judge concluded that SCd's failure to notice that laminated glass had not been installed rendered the House unfit for habitation because of the inherent risk posed to health and safety, and therefore, was a breach of duty under section 1 of the DPA.[48]

As it was unclear whether SCd had the opportunity to inspect other aspects of the balustrade installation which may have proven to be defective (such as the stainless steel plate covers and packing pieces for the glass balustrades) the Judge found that the Claimants had not made their case and that SCd could not be found to be in breach of contract or duty of care in this respect.[49] This underlines the importance of making accurate records during site inspections.

BDW v Ardmore [2024]

In BDW v Ardmore [2024], the summary judgement focuses on the legal arguments challenging the adjudicator's decision and jurisdiction on deciding a claim under DPA. But at the centre of the case is the underlying allegations relating to fire safety defects. The allegations BDW raised were *"the unsuitable nature of the Alumasc product and the omission of fire barriers."* [50] These key allegations were subsequently advanced in the adjudication. BDW's Letter of Claim identified Ardmore's general obligations under both the Building Contract and the DPA.[51]

The Adjudicator held that Ardmore had breached its duties under contract and was liable under the DPA.[52] The Judge held the adjudicator's decision, and that the adjudicator had jurisdiction on deciding the claims.[53] While the summary judgement does not go into the details of the allegations, it sheds a light on what type of claims were brought under the DPA.

BDW v URS [2021]

In URS v BDW's Preliminary Issue trial, BDW v URS [2021] EHWC 2796 (TCC),[54] the Judge, Mr Justice Fraser, considered the defects that present a health and safety risk.[55] It was alleged that the existing structure of the buildings in Capital East and Freemens Meadows were not safe following BDW's investigations. The lack of safety was said to be a

result of the deficiencies in URS's structural design, which were not known prior to the inspections.[56] The defect allegations relate to the structural slabs being overstressed.[57] The parties accepted that for the purposes of the Preliminary Issues hearing, it was assumed that the defendant (URS) breached its duty of care.[58]

The Court Decides on Reasonableness of Historic Document Disclosure

In the case of the parties having difficulties finding relevant documents, the Court is likely to consider whether parties have taken *"proper"* [59] steps to gather the relevant information and documentation.

In BDW v Ardmore, the Judge considered two related questions: (i) what the reason for Ardmore's inability is to access relevant documents, and (ii) given Ardmore's lack of documents, were the broad requirements of natural justice satisfied during the adjudication process in relation to the provision of disclosure by BDW. On the first question, the Judge's view was that Ardmore's record keeping over the relevant period was deficient, and particular reference was made to the witness statements.

Ardmore's witness stated that Ardmore's record keeping on recent projects is robust, but this was not the case for projects completed around the time of the BDW development. The witness did refer to the fact that *"until recently, there has been no reason for those operating in the construction industry to retain documents for longer than required for usual limitation periods (i.e. 15 years)."* [60] The Judge stated that in essence the witness evidence is that Ardmore has been unable to find pertinent documents. The Judge inferred that Ardmore's lack of documentation was not due to document disposal after any relevant period had expired.

The Judge then considered where BDW's witness stated that there was every reason for Ardmore to retain documents in the circumstances because, by the time that this dispute was raised in July 2022, there had been two previous disputes about Ardmore's works. In 2007 when Ardmore carried out remedial works to address water leaks and in 2015 when BDW arbitrated against Ardmore regarding balcony defects, which settled in February 2017, and Ardmore carried out remedial works to the balconies. In 2019, BDW began asking Ardmore for documents relating to the cladding materials. These previous events should have alerted Ardmore to the importance of retaining its documents for a longer period.

Regarding the insufficient information going into the adjudication due to Ardmore's poor record keeping or Admore's decision not to carry out any detailed investigations, the Judge found that neither of these reasons would be due to the 20 year passage of time.[61]

On the second question, regarding the breach of natural justice in relation to the provision of documents to Ardmore, the Judge referred to the correspondence between the parties and found that it does not support this proposition. The Judge cited that in Ardmore's pre-adjudication correspondence, Ardmore had requested extensive disclosure from BDW. BDW had provided various documents and reports to Ardmore. During the adjudication, Ardmore identified categories of disclosure, which the Adjudicator directed BDW to comply with. When BDW provided the documents, Ardmore did not complain about any omissions in any of the disclosures. Ardmore requested additional documents in its Rebutter, and these were also provided by BDW.[62]

The Judge rejected the suggestion that because of the adjudication process, Ardmore had received only selected documents from BDW. Based on the evidence, the Judge found that BDW had carried out reasonable and proportionate searches and disclosed the relevant documents to Ardmore.[63]

Retrospective Effect of s.135 of the BSA 2022 Clarified in URS v BDW [2025] UKSC Decision

In URS v BDW (2025), the retrospective effect of the provisions in the BSA 2022 was clarified. It is not disputed that s.135 BSA applies to a claim brought under s.1 of the DPA. The issue is whether the retrospective effect of s.135 BSA also applies to other claims which are dependent on the time limit under the DPA but are not actually claims under the DPA.[64] In this case, an action is brought by BDW against URS claiming damages for repair costs in the tort of negligence and for contribution.

The Supreme Court held that s.135(3) of the BSA does apply to claims which are dependent on s.1 DPA. Section 135(3) of the BSA refers to *"an action by virtue of"* s.1 of the DPA and it is not limited to actions "under" s.1 of the DPA.

The Supreme Court held that the *"central purpose of the BSA in general, and section 135 in particular, was to hold those responsible for building safety defects accountable."* [65]

If s.135(3) of the BSA were restricted to actions under s.1 DPA then this purpose would be seriously undermined. The consequence would be that the 30-year limitation period would apply to claims brought by homeowners against a developer under the DPA. But it would limit any 'onward' claims brought by the developer against the contractor

(whether builder, architect or engineer) who was directly responsible for the building safety defect.[66] This might penalise responsible developers who are proactive in identifying and remedying building safety defects.[67]

The Supreme Court decision quoted the Secretary of State's explanation:

"Retrospectivity is central to achieving the aims and objectives of the BSA. Many of the building safety issues identified in the wake of the Grenfell Tower fire arise in relation to buildings constructed many years ago.... A retrospective approach provides for effective routes to redress against those responsible for historical building safety defects that have only recently come to light, whatever level of the supply chain they operated at." [68]

Conclusion

Based on the High Court's decision on BDW v Ardmore [2024], it appears that there is another route to bring claims under the DPA via adjudication for construction contracts (within the definition of the Housing Grants, Construction and Regenerations Act 1996). However, this is still being tested as Ardmore was allowed to appeal the High Court's decision, and the hearing is scheduled for October 2025.

Now that the BSA 2022 has extended the DPA limitation period to 30 years, the DPA would apply to recovery actions against consultants, designers and contractors. For consultants, designers and contractors, retaining the relevant critical documentation to stand behind what they have done on a project going back up to 30 years and going forward up to 15 years (based on the 28 June starting point that the initiated by the BSA 2022) is now crucial as they are less likely to have reliable witness evidence available to cover such long periods. Record keeping demonstrating the design process, decision making, and implementation will be essential.

This additional area of exposure to construction professionals has now been created, as developers can now pursue a direct statutory route to construction professionals rather than relying on a claim in negligence or breach of contract. This direct route is likely to impact the cost and availability of the professional indemnity cover market for construction professionals and introduce more claims into the construction industry. This may result in more costs where contractors, designers, and consultants will need to put more resources into responding to claims in an industry which the government has already identified as having low productivity rates.

These rulings will give building owners and developers the confidence to undertake remedial works and recover costs from their supply chains, even though they are not facing claims. An aim of the BSA 2022 is to hold those responsible for building safety defects liable by giving the broadest interpretation of the legislation possible, as the Courts encourage developers to carry out repairs to remove dangers to occupants.

Acknowledgements

We would like to thank our colleagues, Antony Davis and Joan Kennedy, for providing insight and expertise that greatly assisted this research.

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[1] https://www.gov.uk/guidance/the-building-safety-act

[2] Tort: an act or omission that gives rise to an injury (invasion of a legal right) or harm (a loss or detriment that an individual suffers) from another and amounts to a civil wrong for which the courts impose liability.

[3] URS Corporation Ltd (Appellant) v BDW Trading Ltd (Respondent) [2025] UKSC 21 (although this case involves BDW it is separate from BDW v Ardmore)

[4] [2024] EWHC 667 (TCC) (1) Brenda Vainker (2) Francois Vainker and (1) Marbank Construction Limited (2) Mercer & Miller (3) SCd Architects Limited.

[5] BDW Trading Limited v Ardmore Construction Limited [2024] EWHC 3235 (TCC). At the time of writing, the case is under appeal and is scheduled to be heard in October 2025.

[6] Limitation Act 1980, Section 2; LexisNexis Limitation – professional negligence claims

[7] Limitation Act 1980, Section 14A

[8] Limitation Act 1980, Section 5; LexisNexis Limitation – professional negligence claims

[9] Limitation Act 1980, Section 8

[10] BSA 2022, Section 135 (in force on 28 June 2022) https://www.legislation.gov.uk/ukpga/2022/30/section/135

[11] The Royal Institute of British Architects (RIBA) Plan of Work outlines key work stages for the design and construction of any building project. RIBA stages E to L (which is not the current RIBA terminology) involves E: Technical design, F: Production of Information, G: Tender documentation, H: Tender action, J: Mobilisation, K: Construction to Practical Completion, and L: Post-Completion (including Handover).

[12] Vainker v Marbank Construction Ltd & Ors [2024] EWHC 667 (TCC), paragraph 16.

[13] Vainker v Marbank Construction Ltd & Ors [2024] EWHC 667 (TCC), paragraph 22.

[14] Vainker v Marbank Construction Ltd & Ors [2024] EWHC 667 (TCC), paragraph 9.

[15] Vainker v Marbank Construction Ltd & Ors [2024] EWHC 667 (TCC), paragraphs 23, 182.

[16] Vainker v Marbank Construction Ltd & Ors [2024] EWHC 667 (TCC), paragraph 190.

[17] Limitation Act 1980, section 14A

[18] Vainker v Marbank Construction Ltd & Ors [2024] EWHC 667 (TCC), paragraph 191.

[19] BDW v Ardmore [2024] EHWC 3235 (TCC), paragraph 9

[20] BDW v Ardmore [2024] EHWC 3235 (TCC), paragraph 32a

[21] BDW v Ardmore [2024] EHWC 3235 (TCC), paragraph 9

[22] BDW v Ardmore [2024] EHWC 3235 (TCC), paragraph 11

[23] URS v BDW [2025], paragraph 5

[24] URS v BDW [2025], paragraphs 8 to 9

[25] URS v BDW [2025], paragraph 10

[26] BDW Trading Limited v (1) URS Corporation Limited (2) Cameron Taylor One Limited [2021] EWHC 2796 (TCC)

[27] BDW v URS [2021], paragraph 21

[28] [2022] EWHC 2966 (TCC) HT-2020-000084 (14 December 2022); URS v BDW [2025], paragraph 14

[29] [2022] EWHC 2966 (TCC) HT-2020-000084 (14 December 2022); URS v BDW [2025], paragraph 14

[30] [2023] EWCA Civ. 772; URS v BDW [2025], paragraph 15

[31] [2023] EWCA Civ. 772; URS v BDW [2025], paragraph 15

[32] URS v BDW [2025], paragraph 16

[33] Rendlesham Estates Plc v Barr Ltd [2014].

[34] Vainker v Marbank Construction Ltd & Ors [2024] EWHC 667 (TCC), paragraph 39

[35] Vainker v Marbank Construction Ltd & Ors [2024] EWHC 667 (TCC), paragraph 194

[36] Vainker v Marbank Construction Ltd & Ors [2024] EWHC 667 (TCC), paragraph 195

[37] Vainker v Marbank Construction Ltd & Ors [2024] EWHC 667 (TCC), paragraph 119

[38] Vainker v Marbank Construction Ltd & Ors [2024] EWHC 667 (TCC), paragraph 195

[39] Vainker v Marbank Construction Ltd & Ors [2024] EWHC 667 (TCC), paragraph 195

[40] Vainker v Marbank Construction Ltd & Ors [2024] EWHC 667 (TCC), paragraph 196

[41] Vainker v Marbank Construction Ltd & Ors [2024] EWHC 667 (TCC), paragraph 196

[42] Vainker v Marbank Construction Ltd & Ors [2024] EWHC 667 (TCC), paragraph 197

[43] Vainker v Marbank Construction Ltd & Ors [2024] EWHC 667 (TCC), paragraph 199

[44] Vainker v Marbank Construction Ltd & Ors [2024] EWHC 667 (TCC), paragraph 208

[45] Vainker v Marbank Construction Ltd & Ors [2024] EWHC 667 (TCC), paragraphs 280-281

[46] Vainker v Marbank Construction Ltd & Ors [2024] EWHC 667 (TCC), paragraph 279

[47] Vainker v Marbank Construction Ltd & Ors [2024] EWHC 667 (TCC), paragraph 282

[48] Vainker v Marbank Construction Ltd & Ors [2024] EWHC 667 (TCC), paragraph 308

[49] Vainker v Marbank Construction Ltd & Ors [2024] EWHC 667 (TCC), paragraph 292

[50] BDW v Ardmore [2024] EHWC 3235 (TCC), paragraph 32a

[51] BDW v Ardmore [2024] EHWC 3235 (TCC), paragraph 32a

[52] BDW v Ardmore [2024] EHWC 3235 (TCC), paragraph 32a

[53] BDW v Ardmore [2024] EHWC 3235 (TCC), paragraph 80

[54] BDW Trading Limited v (1) URS Corporation Limited (2) Cameron Taylor One Limited [2021] EWHC 2796 (TCC)

[55] BDW v URS [2021], paragraph 21

[56] BDW v URS [2021], paragraph 13

[57] BDW v URS [2021], paragraphs 21 to 22.

[58] BDW v URS [2021], paragraph 50

[59] BDW v Ardmore [2024] EHWC 3235 (TCC), paragraph 123

[60] BDW v Ardmore [2024] EHWC 3235 (TCC), Paragraph 121

[61] BDW v Ardmore [2024] EHWC 3235 (TCC), Paragraph 125

[62] BDW v Ardmore [2024] EHWC 3235 (TCC), Paragraphs 128 to 130

[63] BDW v Ardmore [2024] EHWC 3235 (TCC), Paragraph 132

[64] URS v BDW [2025], paragraph 96

[65] URS v BDW [2025], paragraphs 104-106

[66] URS v BDW [2025], paragraphs 107-108

[67] URS v BDW [2025], paragraphs 109-116

[68] URS v BDW [2025], paragraph 87

Employers, Trustees and Part 8 Claims – What You Need To Know

by Ian Gordon, Partner and Aaron Dunning-Foreman, Partner at Gowling WLG

What is a Part 8 claim?
A Part 8 claim is a court process for resolving doubts or uncertainties where the underlying facts are clear. It is more streamlined than Part 7 claims that can involve legal pleadings, the disclosure of documents, and factual and expert witnesses. It is so called because it is a claim under Part 8 of the Civil Procedure Rules.

When can you use Part 8?
In a pensions context, most cases brought to court are Part 8 claims. Usually this is because an uncertainty has been identified in the administration of the scheme which needs to be resolved by a court order.

Bringing a claim under Part 8 can be a useful way of resolving issues and uncertainties in the following contexts:

- Doubts about the validity of scheme documents such as:
  - whether a deed has been properly executed; or
  - whether the requirements of the scheme's power of amendment, section 67 of the Pensions Act 1995 or section 37 of the Pension Schemes Act 1993 have been met.
- Doubts about the meaning of provisions in scheme rules or legislation such as:
  - how pensions should increase in payment or be revalued in deferment;
  - how the employer contribution rule operates and the level of scheme funding trustees can seek from the employer;
  - whether members can rely on scheme booklets or announcements or otherwise prevent employers or trustees applying the scheme's strict rules in paying benefits.
- Doubts about whether scheme rules reflect what the employer and trustees originally intended or how the scheme has been administered. In appropriate cases, the court can rectify the wording of scheme rules so that it is consistent with what the parties to the rules intended.
- Doubts about whether the scheme has complied with statutory requirements on such matters as:
  - the equalisation of male and female normal pension ages;
  - the preservation of the value of members' benefits.
- Doubts about whether the trustee would be acting in accordance with its duties in administering the scheme in the way in which it is minded to do.
- Trustees might want court 'blessing' (via a 'Beddoe' application) before using scheme assets on other more adversarial litigation, such as claims against professional advisers or as to whether to settle such claims at a given level.

The structure of Part 8 proceedings
There is flexibility in the Part 8 procedure which enables the court to:

- give a judgment after a fully argued trial if it has not been possible to resolve the uncertainties by agreement between the parties to the Part 8 claim;
- give a judgment that resolves the underlying issues without a trial being necessary because there is no argument between the parties as to what the correct outcome should be;
- give directions as to how the trustees should administer the scheme, thereby protecting them from potential breach of trust claims;
- approve a compromise that the parties to the Part 8 claim have agreed;
- decide a case on paper without any attendance required before the court;
- approve a compromise agreed by the parties.

The parties to Part 8 claims
Parties to a Part 8 claim are often the employer(s), the trustees and a representative beneficiary who is appointed to look after members' interests. This ensures that everyone involved is bound by the court's judgment. In a case like that, the trustee will often be neutral, with the key issues being argued out by the legal teams for the employer and the representative beneficiary.

Sometimes, it is possible to streamline the Part 8 claim so that only the employer and trustees are parties, the trustees agreeing to act for affected members.

If you have any questions about the information above, or about Part 8 claims in general, please contact **Ian Gordon** or **Aaron Dunning-Foreman** from our **Pensions Disputes team**.

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Officers to Deploy Forensic Spray in Crackdown on E-Scooter and Bike-Related ASB

An innovative new tactic to combat rising incidents of anti-social behaviour (ASB) will soon be implemented in the Rhyl and Denbighshire Coastal district.

With a particular focus on the illegal use of e-scooters and push-bikes, the initiative will see officers equipped with the Smart Tag forensic spray—a tool designed to safely and discreetly mark offenders for later identification.

The Smart Tag solution has a unique forensic code relating to the pressurised cannister it was sprayed from, which can link a suspect and vehicle to the scene of an offence.

To achieve this, officers will use a UV light to scan the offender's clothing and bike, which will highlight the bright yellow solution to show that they have been tagged.

The initiative forms part of Operation Vroom, which is specifically targeting the illegal use of e-bikes and e-scooters across the force area.

These vehicles are frequently linked to drug supply, theft, and anti-social behaviour and pose serious risks to pedestrians, road users, and the riders themselves.

In recent months, the district has seen a surge in complaints from residents and local councils, including Abergele, Rhuddlan and Prestatyn, regarding youths causing disruption while illegally riding electric bikes and scooters at high speeds.

Individual riders often conceal their identities with hoods and face coverings to avoid detection.

These behaviours have made it increasingly difficult for officers to intervene or identify suspects during patrols.

Sergeant Iwan Hughes acknowledged the scale of the problem and the limitations officers face in pursuing offenders on bikes.

He said: *"Traditional methods of apprehension are simply not viable in these circumstances. We need a solution that allows us to act safely and effectively without escalating risk.*

"The Smart Tag forensic spray offers a promising alternative. When deployed, it coats the suspect in a traceable liquid that is invisible to the naked eye but detectable under UV light.

"A forensic marker can later be linked directly to the incident, providing robust evidential support for further action.

"This approach will be adopted imminently by officers across the district."

By using Smart Tag, officers can mark offenders in real time without the need for physical pursuit, which can endanger the public, officers and the individual riders.

This proactive step will help us tackle one of our most persistent ASB challenges on our streets and roads.

Sgt Hughes added: *"We hope that public awareness of the forensic spray's use will serve as a powerful deterrent, reducing the frequency of such incidents and restoring a sense of safety in our communities."*

North Wales Police remains committed to innovative, community-driven solutions and we will continue to adapt our approach to meet the evolving challenges of modern policing.

If you see electric bikes or scooters being ridden dangerously or illegally, please report it to us. Together we can keep our streets and public spaces safe for everyone.

New Remote Face Scanning Tech To Monitor Offenders and Cut Crime

Thousands of criminals could be kept under additional surveillance by new technology to enhance how the Probation Service monitors offenders and cuts crime.

- New monitoring software to use AI to heighten offender surveillance – preventing crimes before they happen
- Pilot to help cut crime in communities by cracking down on reoffending
- Part of £8 million tech drive to make our streets safer with our Plan for Change

The government has announced that as part of a new pilot, offenders will have to answer to remote check-in surveillance on their own mobile devices. This is in addition to their tough licence conditions, like GPS tags and in person appointments with their probation officer, to make our streets safer.

The tough new measure will also require offenders to record short videos of themselves and use artificial intelligence to confirm their identity. They will also have to answer questions about their behaviour and recent activities.

Any attempts to thwart the AI ID matching or concerning answers will result in an instant red alert being sent to the Probation Service for immediate intervention, helping prevent crimes before they happen.

Lord Timpson, Minister for Prisons, Probation and Reducing Reoffending, said:

This new pilot keeps the watchful eye of our probation officers on these offenders wherever they are, helping catapult our analogue justice system into a new digital age.

It's bold ideas like this that are helping us tackle the challenges we face. We are protecting the public, supporting our staff, and making our streets safer as part of our Plan for Change.

The pilot is being trialled in four Probation regions across England – the South West, North West, East of England and Kent Surrey and Sussex – before being considered for further rollout with additional tech add-ons, such as GPS location verification.

This technology is part of a new £8 million drive by the Lord Chancellor to enhance criminal surveillance and deliver safer streets for communities blighted by prolific reoffending.

It follows the launch of the department's AI Action Plan and recent meetings with top tech firms to explore the use of cutting-edge tools to toughen up punishment. Ideas pitched to Ministers included AI powered home monitoring and the use of synthetic brain cells to replicate the behaviour of a human nose to detect illegal drug use.

This announcement follows the introduction of the Sentencing Bill which set out plans to reform sentencing and end the prison crisis.

In the Spending Review, the government announced that the Probation Service will receive up to £700 million, an almost 45% increase in funding. This new funding will mean tens of thousands more offenders can be tagged and monitored in the community.

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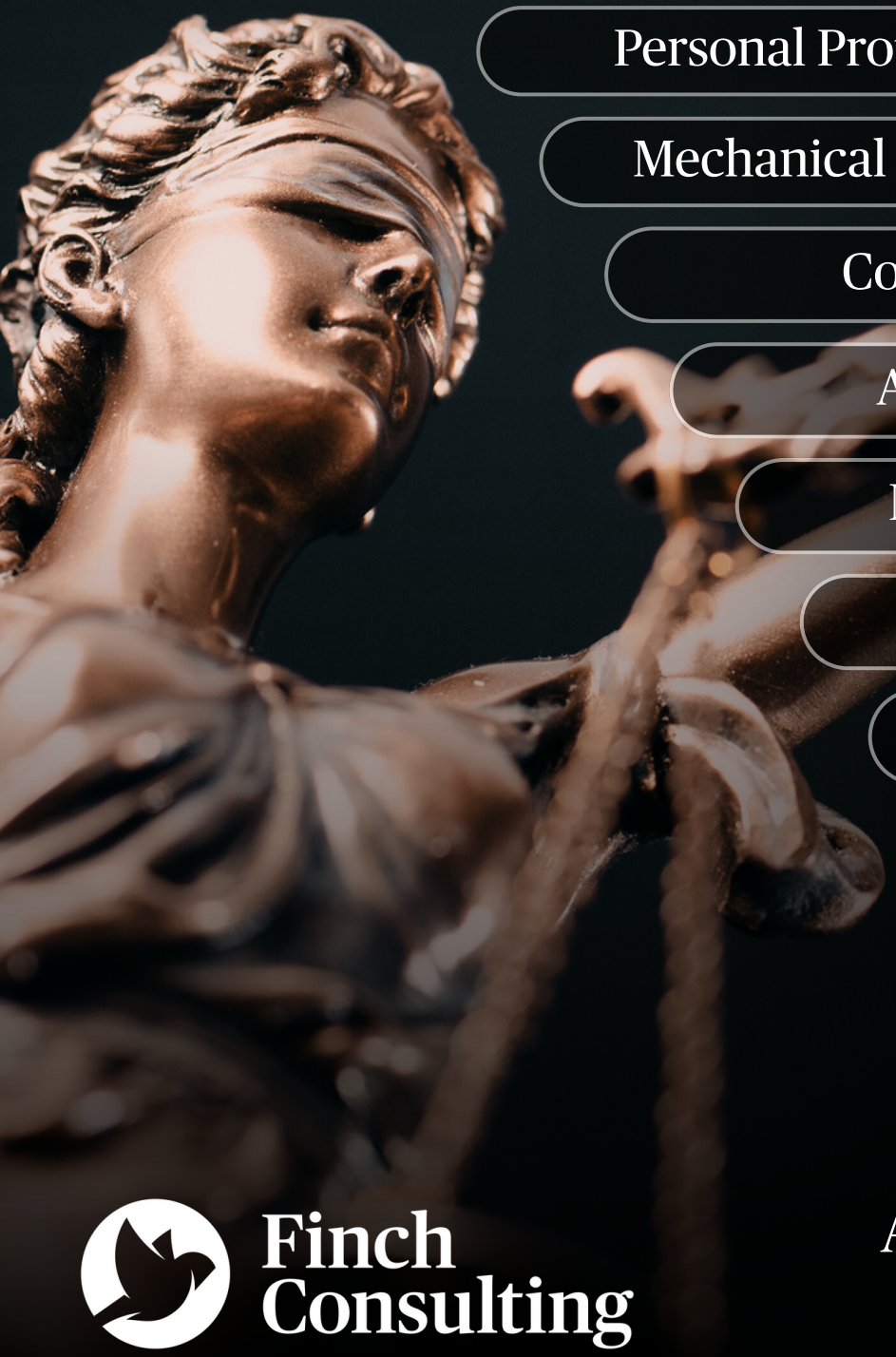

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