The Expert Witness

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MEDICO LEGAL
PSYCHIATRY • PSYCHOLOGY

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Dr. Nireeja Pradhan

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Expert Witness will be holding our first conference of 2026, to celebrate our 30th Anniversary of connecting Litigators to Experts.

Conference details:

Date: Thursday 12th February 2026
6pm - 8pm

Venue: Liverpool Athenaeum Club

Church Alley
Liverpool, L1 3DD

There are a small number of tickets still available, but the conference is nearly fully booked. Please contact us if you are interested in reserving a place at info@expertwitness.co.uk

Our chief aim is to promote personal and meaningful contact for our experts with leading lawyers. We have decided to hold a limited number of places to ensure all those attending can fully engage with the speaker and each other. We are beginning in the North West. This conference will be delivered by Richard Edwards, who is a Governor of the EWI. Richard was named as 'Catastrophic Injury Lawyer of the year in 2023. Those in attendance are experts in their respective fields who can assist in Personal Injury cases, who we publish and profile to law firms on www.expertwitness.co.uk and connect to law firms on our confidential Searchline service; Telephone: 0161 834 0017. After the Conference presentation in the library, there will be time allocated for Q & A, followed by drinks and canapes.

About Richard Edwards :

Richard is the Principal and Founding Solicitor of Richard Edwards & Co Solicitors and Advocates, based in Liverpool. He specialises in unusual, complicated and high value litigation for clients with brain, spinal and amputation injuries, often in cases where liability is contested.

A Fellow of the Association of Personal Injury Lawyers and a Solicitor-Advocate, Richard was admitted to the Roll of Solicitors in 2005, giving him 20 years litigation experience. He also sits as Deputy District Judge.

Richard has lectured and written extensively about matters of interest in the personal injury sector in a range of publications, and on matters that concern the duties of expert witnesses. Richard's practice routinely involves the instruction of expert witnesses in a range of specialisms in contested high value litigation.

Richard won 'Catastrophic Injury Lawyer of the Year' and was also shortlisted for 'Outstanding Case of the Year' at the Personal Injury Awards 2023. Richard is also ranked as a Leading Individual in the Legal 500 Directory, and he is also ranked in Chambers & Partners, marking him out as one of the leading personal injury lawyers in his field.

He was elected to the EWI Board in 2025.

Richard Edwards & Co.
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About the Venue: The Athenaeum, is a private members club in Liverpool, England.

The building contains a stunning late 18th Century library, where the conference will be held. As well housing a copy of the Magna Carta, the chief librarian at the Athenaeum is a legal librarian, familiar with the old Directories of Experts. The building has facilities such as cloakrooms, bar, dining room, open fire and comfortable chairs to relax in and read the papers, which will provide a relaxing environment for professional development. Experts will receive a certificate of attendance after the conference which can be used for 2 hours of CPD.

Welcome to the Expert Witness Journal

Hello and welcome to the 64th edition of the Expert Witness Journal.

Last month saw the Bond Solon Expert Witness Conference at Church House, London. It was great to meet so many experts old and new, representing over 80 areas of expertise. We always look forward to meeting experts 'face to face', to hear the diverse and interesting talks gaining a valuable insight into the thoughts and developments of experts.

The main focus of this issue is Medico-Legal, psychiatry and psychology with excellent articles on 'Behind Every Death: Lessons from a Transplant Surgeon and Medical Examiner in Clinical Negligence' by Mohammad Ayaz Hossain, 'Remote Robot-assisted Surgery Raises Liability Questions' by Jill Patterson and Philippa Wheeler at Leigh Day, 'The Inevitability of Greater Regulation: What Does the Future Hold for Experts?' by Tom Thurlow and Lara Tulip at Weightmans, 'Holding the Risk in Medical Treatment Cases' by Alex Ruck Keene and 'Beyond the Pill: The Medicolegal Significance of Deep TMS in Managing Treatment-Resistant Psychiatric Disorders' by Dr Behrouz Nabavi.

In this issue we also feature 'Indirect Optic Nerve Trauma Resulting in Visual Field Loss' by Nicholas Jacobs, '"Medical misadventure" Inquest Conclusion: What are the Implications for Plastic Surgeons and Clinics?' by Tracy Sell-Peters, 'What does a Nephrologist do?' by Dr Michael Robson and 'What Makes a Good Expert?' by Guy Jackson and Jason Sharp at Overford.

Our next issue will be published in February 2026; it will have a main Forensics feature, if you have a submission please email us. We would like to take this opportunity to wish all our readers a happy holidays and a peaceful new year.

Nigel Hector
Publisher
nigel@expertwitness.co.uk

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Contents

Some of the highlights of this issue

The Role of Emotion in Psychosis Onset

by King's College London

New research from the Institute of Psychiatry, Psychology & Neuroscience (IoPPN) at King's College London has highlighted the important role that emotions play in the onset and persistence of psychosis.

The research, published in Early Intervention in Psychiatry[1], advocates for the development of emotion-focused interventions that seek to prevent a person's relapse in their health as well as maintain their recovery.

Psychosis is a symptom of mental illness typified by hallucinations, delusional thoughts and disorganized thinking. While previous research has implicated emotion in the onset and continuation of psychosis, there has not yet been a universally acknowledged theory to account for the influence that emotions can have on it.

Researchers in this study conducted a systematic review of 78 studies comparing the experiences of healthy controls with individuals at Clinical High Risk (CHR), a diagnosis of schizophrenia (SZ), and those experiencing their First Episode of Psychosis (FEP). Researchers wanted to better understand both the role of emotions, as well as emotional coping strategies, in their experiences.

This systematic review found that SZ and CHR individuals demonstrated significant impairments in their emotional awareness, their understanding of self and others, and their ability to regulate their emotions when compared to healthy controls. They also demonstrated a heightened emotional reactivity.

The researchers found that individuals with schizophrenia reported high levels of "Negative Affect" - a reduction or absence of normal emotional expression – which was a strong predictor of paranoia.

> *"Experiencing emotions is a natural part of everyday life. However, our study highlights that people with psychosis experience emotions with more intensity, which can significantly contribute to the emergence and maintenance of their psychosis symptoms. Therefore, psychological interventions that explicitly target emotions and emotional coping in psychosis could help prevent relapse and maintain recovery."*
>
> **- Dr Anna Georgiades,**
> a Lecturer in Early Intervention in Psychosis
> at King's IoPPN and the study's senior author

The researchers also wanted to explore how individuals at CHR and those with schizophrenia employed coping mechanisms to manage emotional situations. They found that, while the healthy controls were more likely to adopt "Adaptive Coping Strategies", in which individuals seek to manage stress and difficult situations in healthy and constructive ways, people with psychosis were more likely to employ maladaptive techniques that were associated with an increase in their symptoms and increased depression.

Dr Anna Georgiades, a Lecturer in Early Intervention in Psychosis at King's IoPPN and the study's senior author said,

> *"There are two ways in which a person might manage an emotionally stressful situation; either by removing the stressor, or by seeking to manage the stress that is being caused.*
>
> *"From the studies we reviewed, we consistently found that people with psychosis used more unhelpful emotional coping such as avoidance and suppression rather than helpful emotional coping such as problem solving or changing the way they think about the situation.*
>
> *"By reducing unhelpful emotional coping and by increasing more helpful emotional coping (i.e. by increasing active problem solving and the skill in changing one's view of a situation), we could prevent relapse and maintain recovery. This therefore has important implications for the psychological treatment of psychosis."*

[1] The Role of Emotion in Psychosis Onset and Symptom Persistence: A Systematic Review (DOI.org/10.1111/eip.70096) (R. Gurnani, A. Georgiades) was published in Early Intervention in Psychiatry.

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Behind Every Death: Lessons from a Transplant Surgeon and Medical Examiner in Clinical Negligence

by Mohammad Ayaz Hossain, Consultant Renal Transplant Surgeon and Royal College of Pathologist Medical Examiner Royal Free Hospital NHS Trust

This article explores how the dual role of Consultant Kidney Transplant Surgeon and Medical Examiner enhances the quality and credibility of expert witness practice in clinical negligence cases. Drawing on over 15 years of surgical experience and leadership in the National Organ Retrieval Service, the author reflects on how Medical Examiner duties—particularly the structured review of deaths—sharpens medico-legal insight. Through regular scrutiny of clinical records, communication pathways, and systemic processes, the Medical Examiner role cultivates pattern recognition, ethical awareness, and objectivity. Recurring themes such as delays in recognising deterioration, documentation failures, and missed escalation opportunities are examined, with anonymised examples illustrating their relevance to breach of duty and causation analysis. The article highlights how these insights inform the structure, clarity, and impartiality of expert witness reports, and proposes that Medical Examiner experience be recognised as a valuable asset for clinicians engaged in medico-legal work.

Introduction

I have worked as a training and Consultant Kidney Transplant Surgeon for the past 15 years, performing over 350 kidney transplants across several leading UK transplant centres. My experience in transplantation has spanned multiple units, giving me a broad perspective on surgical practice and transplant logistics. My role includes assessing and listing patients for the national transplant waiting list and selecting suitable donor-recipient pairs for the live donor programme—tasks that demand clinical precision, ethical sensitivity, and multidisciplinary coordination. Outside the role as a transplant surgeon, I am also a lead surgeon for the National Organ Retrieval Service, which involves direct procurement of organs for other transplant centres around the country for the purpose of implantation.

My experience in transplant surgery has naturally led to a deeper engagement with clinical governance and patient safety, which I now apply in my role as a Medical Examiner (ME) for the last 5 years. The complexities of transplant care—from listing patients and coordinating live donor pairs to leading national organ retrieval—require meticulous attention to detail, ethical clarity, and robust decision-making. These same principles underpin the ME system, where I independently review deaths, identify potential concerns in care, and communicate sensitively with families. This dual perspective has not only broadened my understanding of systemic issues in healthcare but also enhanced my ability to scrutinise clinical events with objectivity and precision—skills that are invaluable in expert witness work.

The ME system was introduced in England and Wales to improve the scrutiny of deaths and enhance transparency in the certification process. This was done primarily as a response to Shipman enquiry. Medical Examiners are senior doctors, often consultants, who review deaths including those that are referred to His Majesty's Coroner. They are independent of the clinical teams involved in a patient's care. Their responsibilities include examining medical records, discussing cases with the attending clinical team, and speaking with bereaved families to identify any concerns about the care provided. The role is designed to ensure that deaths are accurately certified, that learning is extracted from adverse outcomes, and that potential systemic issues are flagged early. This additional benefit improves overall governance and accurate collection of mortality statistics for public health purposes.

Unlike coroners, Medical Examiners do not conduct legal investigations but serve as a vital bridge between clinical governance and patient safety. In my own practice as a Kidney transplant surgeon,

this role has provided a unique vantage point from which to observe recurring patterns in clinical care—insights that have proven invaluable when preparing expert witness reports for clinical negligence cases.

The dual role of a transplant surgeon and ME presents a unique ethical consideration, especially in cases where organ donation is being considered. In my clinical surgeon role involved in organ retrieval, there is a potential conflict when certifying a death that may lead to donation. The ME system is built on the principle of independent scrutiny, and guidance from NHS England and the Royal College of Pathologists explicitly states that Medical Examiners must not review deaths of patients they have treated or where they have a vested interest (1, 2). In organ donation scenarios, this means that an ME who is also part of the retrieval team must recuse themselves from certifying the death to preserve impartiality and public trust. The ethical framework for donation after circulatory death (DCD) also highlights the importance of separating clinical care from donation decisions to avoid any perception of undue influence (3). Maintaining this boundary is essential not only for legal compliance but also for ensuring that families feel confident in the integrity of the process. In practice, this requires clear local protocols and transparency about roles, particularly in time-sensitive donation pathways. Holding insight into both the clinical and logistical aspects of organ donation offers a valuable perspective on the ethical principles underpinning the process—particularly around consent, timing, and separation of roles. This dual understanding helps maintain objectivity and reinforces the importance of transparency and fairness in decision-making. These attributes—ethical awareness, impartiality, and clarity—are directly transferable to expert witness report writing, where the ability to assess complex clinical scenarios with balanced judgment is essential to validating credibility.

In addition to the ethical considerations, holding dual roles as a transplant clinician and Medical Examiner offers unique advantages in fostering a robust multidisciplinary team (MDT) approach. Transplant clinicians routinely collaborate with a wide array of specialists—intensivists, anaesthetists, radiologists, microbiologists, and theatre teams—creating a dynamic and highly integrated network that enhances patient care. This breadth of access often surpasses that of other specialties, enabling more comprehensive clinical insights and decision-making. However, this collaborative strength also highlights the risks of working in isolation. In cases where deaths are reviewed without input from relevant experts or an MDT framework, there is potential for missed nuances in clinical reasoning or oversight in complex cases. Ensuring consistent communication across specialties remains a challenge, and the dual role must be navigated carefully to maintain transparency, impartiality, and trust in the death certification process.

This article aims to explore how the role of ME enhances the quality and credibility of expert witness work in clinical negligence cases. Drawing on my experience as a Transplant Surgeon and Medical Examiner, I examine how the skills developed through case scrutiny—such as ethical awareness, pattern recognition, and objective analysis—translate into more robust, balanced, and legally sound expert reports.

The Medical Examiner Role in Practice

As an ME, I have reviewed numerous deaths across surgical and medical specialties, and several recurring themes consistently emerge—each with significant implications for clinical negligence analysis.

Delays in recognition of deterioration are among the most common.

In one anonymised case, a patient with sepsis showed early signs of organ dysfunction, but these were not escalated due to fragmented handovers and reliance on outdated observations. The delay in initiating critical care contributed to a poor outcome, highlighting the importance of timely clinical vigilance.

Documentation and communication failures also feature prominently.

In another case, a postoperative patient deteriorated overnight, but the escalation plan was not clearly documented, and nursing staff were unsure whom to contact. The lack of clarity in the notes and absence of a documented ceiling of care led to delayed intervention and ultimately death. These failures not only compromise patient safety but also complicate retrospective analysis and legal review.

Missed opportunities in care escalation often stem from unclear responsibilities or assumptions between teams.

In a case involving a complex renal patient, early signs of fluid overload were noted but not acted upon due to uncertainty over whether nephrology or general medicine was leading care. This ambiguity delayed appropriate management and contributed to the patient's decline.

These examples underscore the importance of systemic awareness and clinical scrutiny—skills honed through ME work and directly applicable to expert witness practice. Recognising these patterns allows for a more informed and balanced assessment of breach of duty and causation in medico-legal reports.

Ethical challenges in a dual role.

Navigating ethical challenges is an integral part of both transplant surgery and the Medical Examiner role, and these experiences have deepened my understanding of clinical decision-making and professional boundaries. For example, in a recent case I reviewed as a Medical Examiner, a patient had died following withdrawal of life-sustaining treatment, and organ donation was being considered. As I was also part of the transplant team involved in organ retrieval, I immediately recused myself from the ME review to avoid any conflict of interest. This decision aligned with national guidance and preserved the integrity of both the donation process and the scrutiny of care. The case raised important ethical questions around timing of withdrawal, communication with the family, and the separation of clinical and donation-related decisions. Such experiences reinforce the importance of impartiality, transparency, and ethical clarity—qualities that are essential when preparing expert witness reports. They allow me to approach complex medico-legal scenarios with a balanced perspective, ensuring that my testimony is not only clinically accurate but also ethically sound and legally defensible.

Translating Medical Examiner Experience into Expert Witness Practice

My role as a ME has significantly enhanced my approach to expert witness work by refining how I analyse breach of duty, assess causation, and structure medico-legal reports. Regular scrutiny of deaths has trained me to identify deviations from accepted standards of care with precision, particularly in cases involving delayed escalation, poor documentation, or fragmented communication. This forensic thinking—developed through systematic case reviews—enables me to assess whether clinical actions were reasonable and timely, forming the foundation of breach of duty analysis.

In causation assessment, ME experience helps me distinguish between contributing factors and direct causes of harm, especially in complex, multi-disciplinary cases. I apply a structured, evidence-based approach to determine whether substandard care materially affected the outcome.

When writing reports, I draw on the ME discipline of clear, impartial communication. I construct a coherent narrative, separate factual findings from opinion, and ensure that my conclusions are transparent and legally defensible. These transferable skills—forensic thinking, impartiality, and narrative construction—are essential to producing expert testimony that supports fair and informed legal decisions.

Breach of Duty Analysis: A Forensic Approach Informed by Clinical Scrutiny

The process of identifying breach of duty in clinical negligence cases requires a structured and impartial assessment of whether the care provided fell below the standard expected of a reasonably competent practitioner. My experience as an ME has been instrumental in refining this analysis. Regular scrutiny of deaths—often involving complex, multi-disciplinary care—has trained me to dissect clinical timelines, evaluate decision-making processes, and identify missed opportunities for intervention. For example, in reviewing cases where escalation of care was delayed or documentation was incomplete, I have learned to distinguish between system-level failures and individual clinical judgments.

As a transplant surgeon, I am acutely aware of the high-stakes nature of decision-making, particularly in listing patients, assessing donor suitability, and managing perioperative risks. This background enables me to contextualise clinical actions within the realities of surgical practice, avoiding hindsight bias while maintaining objectivity. When preparing expert witness reports, I apply this dual lens—clinical and forensic—to assess whether the actions taken were reasonable, timely, and aligned with accepted standards. This approach ensures that my breach of duty analysis is not only grounded in clinical reality but also robust enough to withstand legal scrutiny.

Navigating Boundaries Between Clinical and Legal Roles

Balancing the responsibilities of a clinician and expert witness requires careful navigation of professional boundaries. I am acutely aware of the need to separate clinical care from legal analysis. In my clinical role, decisions are made in real time, often under pressure, with the primary focus on patient outcomes. In contrast, expert witness work demands retrospective scrutiny, impartiality, and detachment from the emotional context of care delivery.

Confidentiality is paramount in both roles. The Medical Examiner routinely handles sensitive information about patients and families, and this reinforces the discipline required when preparing medico-legal reports. Ensuring that all documentation is anonymised, securely stored, and shared only with appropriate legal parties is essential to maintaining trust and professional standards.

The emotional burden of reviewing deaths—particularly those involving missed opportunities or preventable harm—can be significant. It requires resilience and a structured approach to avoid personal bias or emotional influence in legal

opinions. Recognising this burden has helped me develop strategies to maintain objectivity, such as relying on evidence-based frameworks and peer discussion.

Above all, transparency and integrity underpin both clinical and legal practice. Whether reviewing a death or writing an expert report, I strive to present findings clearly, acknowledge uncertainty, and avoid speculation. This commitment to honesty and impartiality ensures that my contributions support fair legal outcomes and uphold the standards of both medicine and law.

Conclusion: Bridging Clinical Scrutiny and Legal Insight

Being a Medical Examiner has profoundly enhanced my expert witness practice by cultivating a disciplined, impartial approach to case analysis. The routine scrutiny of deaths has sharpened my ability to identify systemic failures, assess clinical decision-making, and communicate findings with clarity and sensitivity. These skills—rooted in transparency, ethical awareness, and objectivity—are directly transferable to medico-legal reporting, where balanced judgment and robust reasoning are essential.

For clinicians involved in expert witness work, the ME role offers a unique opportunity to develop forensic insight while remaining grounded in clinical realities. It encourages reflection on care standards, fosters a deeper understanding of patient safety, and strengthens the ability to articulate complex scenarios in a legally relevant format. Given its emphasis on impartial review and systemic awareness, ME experience should be recognised as a valuable asset in clinical negligence cases, contributing to fairer outcomes and improved accountability across the healthcare system.

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"Medical misadventure" Inquest Conclusion: What are the Implications for Plastic Surgeons and Clinics?

by Tracy Sell-Peters

At a recent inquest into the death of patient AR who died following elective cosmetic surgery, a Coroner reached a relatively rare conclusion, that she died as a result of "medical misadventure".

Keystone Law's Healthcare Litigation Partner Tracy Sell-Peters represented the Consultant Plastic & Aesthetic Surgeon, and the clinic where he worked, at the inquest into this tragic death. In this article, Tracy explains the impact this decision has for plastic surgeons and clinics.

The Case Facts

The patient underwent abdominoplasty, bilateral breast reduction, and fat grafting. These are all procedures which are regularly carried out at private hospitals and clinics throughout England & Wales.

The inquest was heard at Westminster Coroners' Court at the end of August 2025. AR had died twelve days post-operatively. The post-mortem identified the medical cause of death as Ia) pulmonary thromboembolus (PE), Ib) deep venous thrombosis (DVT), and II) recent surgery. AR did receive preventative anti-thrombotic treatment with heparin, even though this is not required or universally used after plastic surgery procedures. She exhibited virtually no symptoms of DVT until the night before her death.

This is one of a number of fatal cases where death from DVT/PE has followed surgical procedures for which anti-coagulation is not mandated but where death has still ensued even when it is given. Clearly, the clinical judgement about whether to prescribe anti-coagulant medication is a very delicate balancing act for surgeons in these situations. These cases have rightly provoked widespread discussion.

Live evidence was heard from the consultant surgeon, two clinic nurses, and the anaesthetist, as well as the resident medical officer from the private hospital where the surgery took place. The Coroner agreed with the pathologist's findings and concluded that the care provided had been appropriate, including the advice and practices in relation to mitigation of risk of DVT/PE, the surgery itself, the post-operative period, and discharge. Follow-up care was also appropriate and, although the patient suffered post-operative pain, nausea, and constipation, these were in keeping with the surgery and there were no concerns about leg swelling or shortness of breath.

After examining all the evidence, the Coroner reached a short-form conclusion of "medical misadventure", the patient having developed a PE in her right leg veins. Here the conclusion was certainly appropriate, given that this was a case where there was an unforeseen or unintended injury or adverse outcome from elective medical treatment.

What is "medical misadventure"?

"Medical misadventure" is not a finding of fault or negligence: it is essentially a neutral finding. But it does acknowledge that a recognised complication of medical treatment has occurred with unintended, fatal consequences. The option of reaching this conclusion is highlighted at paragraph 47 of the Chief Coroner's Guidance Chapter 15 on Conclusions (dated 1.1.25). The guidance clarifies that

> *"'medical misadventure' might be the conclusion when a recognised complication of an elective surgical procedure has come about with fatal consequences."*

In light of this relatively recent clarification, "medical misadventure" may become more common as an inquest conclusion.

The significance for private-sector plastic surgeons, clinics, and medical indemnifiers

Firstly, this case highlights the importance of using specialist lawyers for advice and representation in inquests. The "medical misadventure" conclusion may be most relevant (or perhaps only relevant) to patient deaths that happen after private elective aesthetic and cosmetic surgery, given the wording of the Guidance. Using lawyers with extensive experience of representing plastic surgeons and clinics in inquests is essential to make sure the Coroner has the necessary evidence and submissions to reach the right conclusion. This in turn can be crucial for protecting the legal position and reputation of the plastic surgeon and clinic in tragic cases such as this, including by minimising the likelihood of a referral to the GMC, either by the Coroner or by the family.

A finding of "medical misadventure" will make it more difficult for the family of the deceased to then make a clinical negligence claim alleging shortcomings in the clinical care. While a clinical negligence claim alleging a failure in the consenting process may still be possible, an appropriate inquest finding can significantly reduce the chances of a clinical negligence claim. This can save or minimise the costs involved in a subsequent claim, and the time and stress associated with defending one. Appropriate findings can also minimise the risk of damaging publicity for the surgeon and clinic, which in a competitive market can be vital for protecting their practice.

If you are a medical professional, clinic, or hospital and require advice, please contact:

Tracy Sell-Peters -
tracy.sell-peters@keystonelaw.co.uk

Tracy has extensive experience representing healthcare professionals and providers in inquests and many other types of proceedings in England & Wales.

Remote Robot-assisted Surgery Raises Liability Questions

by Jill Paterson, Partner & Philippa Wheeler, Associate Solicitor at Leigh Day

In a world-first, surgeons in Dundee and Florida have successfully performed remote stroke surgery using robotic technology: a significant development that could redefine emergency care for millions.

Professor Iris Grunwald, consultant diagnostic and interventional neuroradiologist, performed a mechanical thrombectomy on a human body which had been donated to science. The procedure uses catheters and wires to remove blood clots on the brain after a stroke. Traditionally, a surgeon would be situated in the operating theatre with the patient, but in this procedure Professor Grunwald operated from Ninewells Hospital in Dundee on the cadaver located in a university facility across the city.

Hours later, neurosurgeon Dr Ricardo Hanel used the same technology to perform a similar procedure from his location over 4,000 miles away in Florida.

The procedures used robotics from Lithuanian firm, Sentante, to mimic the surgeons' movements, who were guided by live X-ray imaging and ultra-low latency connectivity supported by tech companies, Nvidia and Ericsson.

How robotic stroke surgery works

An ischaemic stroke occurs when a blood clot blocks an artery supplying the brain. A common treatment is a thrombectomy, where a specialist threads a catheter through an artery (often from the groin) up to the brain to physically remove the clot.

In the robotic setup:

- A patient is admitted to a local hospital for surgery.
- At the local hospital, a robotic arm is connected to the same catheters and wires a surgeon would normally use.
- A local medic attaches the wires to the patient.
- The hospital is connected to the remote surgeon at another location.
- The remote surgeon uses instruments in their hospital, and the robot replicates those movements precisely in real time on the patient at the other hospital.
- The procedure is monitored via live imaging, allowing the remote surgeon to guide the catheter and remove the clot as if they were physically present.

This innovation could greatly improve access to stroke care, especially in rural or under-served areas where there may be fewer specialists. Further, every minute counts in stroke treatment, and this technology could eliminate delays that can cost lives. It could also reduce the burden on overstretched healthcare systems.

Legal questions in a robotic world

Professor Grunwald described the procedure as "the first glimpse of the future". But it brings with it a series of legal and ethical questions.

As we move toward clinical trials and live patient procedures, key concerns will include:

1. If something goes wrong, who will be liable?

- Is it the remote surgeon, the local team, the hospital, or the robot manufacturer?
- What if harm results from a connectivity issue, software glitch or mechanical fault?

2. How do we prove causation?

- In traditional surgery, causation is linked to a surgeon's direct action or inaction.
- In robotic procedures, responsibility may be distributed across multiple actors, including hardware, software, and network providers.
- If a patient suffers harm, how do we trace the source of the error in a system involving real-time data transmission, robotics, and human oversight?

3. What regulatory and legal frameworks apply?

- With a patient in one country, a surgeon in another, the robot manufacturer and software provider elsewhere, which legal framework would apply?

A call for thoughtful regulation

Careful thought will need to be given to regulation. Policymakers, insurers, and medical bodies will need to work together to:

- Define clear liability protocols for robotic procedures.
- Ensure transparency in robotic system performance and decision-making.
- Develop cross-border standards for remote surgery and patient safety.

Conclusion

Whilst the Dundee experiment is a triumph of science, connectivity, and vision, it also raises considerable questions about patient safety, consent and liability. Patient safety must always be at the heart of technological advances, and clear liability protocols would help to resolve any questions arising from these internationally connected medical devices. It is important for innovators to work hand in hand with regulators to ensure that both patient safety and innovation are given the importance that is due.

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What does a Nephrologist do?

by Dr. Michael Robson

Nephrologists specialise in the diagnosis and treatment of conditions affecting the kidneys. There are many causes of acute and chronic kidney disease. Acute kidney injury is a term used to describe a recent decline in kidney function, which may or may not be reversible. Causes include infections, gastrointestinal bleeds, heart attacks, autoimmune diseases and medication. If the cause is not clear, a kidney biopsy may be needed. Chronic kidney disease refers to an established reduction in kidney function; and it is considered irreversible. Many patients with chronic kidney disease can be monitored in primary care. Indications to see a nephrologist include the possibility of a treatable condition and kidney disease approaching a stage when planning for dialysis and transplantation is needed. Nephrologists are expert at treating blood pressure and may see patients with difficult to treat hypertension. They also provide what is known as 'renal replacement therapy' for patients with end-stage kidney disease. This comprises haemodialysis, peritoneal dialysis, preparation for renal transplantation and post-transplant care.

Nephrologists work closely with urologists who are kidney surgeons. They also work closely with transplant surgeons and specialist nurses because the care of patients with end-stage kidney disease is multidisciplinary. Access to the circulation is needed for haemodialysis and that is usually achieved by surgically joining an artery and vein in the arm, known as an arteriovenous fistula. This operation can be performed by a transplant surgeon or vascular surgeon. Surgeons also insert tubes into the abdomen for peritoneal dialysis. Nephrologists and transplant surgeons usually jointly manage kidney transplant recipients, before and after the transplant.

Clinical negligence questions that need an opinion from a nephrologist

When a patient discovers their kidney function is reduced, they may ask if it could have been avoided. There may be several factors leading to acute kidney injury or chronic kidney disease, and that can be a difficult question to answer. However, the job of a nephrology expert is to determine whether it is more likely than not that the outcome would have been different, and to explain their reasoning. Breach of duty questions may relate to nephrology care but often the question of liability leading to the kidney problem relates to primary care, a physician who is not a nephrologist, or a surgeon. In these cases, an opinion on breach of duty may require a different expert, though a nephrologist could still opine on causation. An opinion on the care of patients receiving renal replacement therapy may also be requested from a nephrologist. For example, this might be regarding blood pressure control on dialysis because poor blood pressure control could lead to strokes or hypertensive eye disease. Other matters that a nephrologist may be instructed to consider are the diagnosis and treatment of complications in arteriovenous fistulae, preparation for renal transplantation or posttransplant care.

Nephrologists may provide condition and prognosis reports for people with kidney disease, or people who have sustained kidney damage due to trauma to a kidney or ureter. Irreversible kidney damage can occur if urine outflow is obstructed. That might be due to ureteric injury during pelvic surgery or other causes. Such cases may require an opinion on breach of duty from a gynaecologist or urologist and an opinion on condition and prognosis from a nephrologist. Patients with kidney disease have

a reduced life expectancy, primarily due to an increased risk of cardiovascular disease. They will also have a higher risk of end stage kidney disease, if they have not already reached this. These are important questions for a nephrology report on prognosis. Moderately reduced kidney function does not usually cause symptoms. However, patients on dialysis may be unable to work or perform other activities due to fatigue and the time needed for dialysis.

Conclusion

I hope this article has illustrated the varied nature of a nephrologist's job, and how they work with other specialists to care for patients with kidney disease. It may not always be clear to a solicitor if an opinion is needed from a nephrologist, a urologist, a transplant surgeon, a vascular surgeon or a specialist nurse. It is therefore important to recommend another expert at the initial approach, if this is appropriate.

Dr Prakash Raviraj

Consultant Forensic Psychiatrist MBBS, FRCPsych, LLM, CCT (Forensic)

Dr Raviraj is an independent Consultant Forensic Psychiatrist based in Manchester. He is a practicing clinician with inpatient responsibilities. He has authored reports to the Crown, Magistrates and Family Courts.

He has clinical experience of working in high, medium, low secure and community forensic psychiatric services. He has extensive experience of working in various prisons across the North of England. He is a member of the first tier mental health review tribunals and appointed by CQC as a second opinion appointed doctor (SOAD).

He was the medical Director at Cygnet Wyke until April 2021. He worked previously as a full time consultant at the Spinney in Atherton and as a NHS consultant at the Edenfield Centre.

He was awarded LLM in Mental Health Law from Northumbria University in May 2010; his dissertation was: 'Murder by mentally ill - A review of the Defences of Insanity and Diminished Responsibility'.

Dr Raviraj speaks Hindi, Urdu, Kannada, Telugu, Tamil languages.

He will endeavour to submit his report within three weeks of receipt of all paperwork and can provide reports much earlier if all the information is provided with the initial request.

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Email: prpsychiatry@gmail.com - **Alternate Email:** p.raviraj1@nhs.net
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Dr George Fieldman

Independent Consultant Chartered Psychologist
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BSc, PhD, CPsychol, CSci, AFBPsS, BABCP, UKCP, FRSA

Dr George Fieldman is a highly experienced Consultant Chartered Psychologist with specialist expertise in psychotherapy, executive coaching and medico-legal reporting. He provides clear, well-reasoned and authoritative expert witness reports for civil and employment law cases.

Dr Fieldman is a Consultant Psychologist at King Edward VII's Hospital, London.

With a strong research and clinical background in psychophysiology, his areas of medico-legal expertise include:

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A Tangled Web: The Admissibility of Previous Apparently False Complaints of Rape and Domestic Violence, and Their Effect on Conviction.

by Bianca Brasoveanu, Barrister at Mountford Chambers

Bianca Brasoveanu considers the Court of Appeal's decision in *R v Hurley* [2025] EWCA Crim 642.

Introduction

Mr Hurley was convicted of the rape of 'Y' and a related sexual offence in 2016, and sought the assistance of the Criminal Cases Review Commission ('CCRC).

The CCRC, having considered the fresh evidence Mr Hurley sought to adduce, referred the case back to the Court of Appeal under section 9(1) of the Criminal Appeal Act 1995 on the basis that there was a real possibility that the fresh evidence would be admissible, and would lead the Court of Appeal to conclude that Mr Hurley's convictions were unsafe.

The Fresh Evidence

The material Mr Hurley relied upon in his appeal was threefold:

- Evidence through police documents and medical records that Y had made previous allegations of rape on at least three occasions between the ages of 17 and 19 (2002-2004). None of these allegations had been pursued, as Y withdrew her support after making the initial complaint to the police. Two of the allegations were stranger rapes in public places, and one was an allegation relating to her then boyfriend and his friends.
- Police records where Y alleged being the victim of domestic violence by her partner and later husband 'H'. Various incidents were reported to the police, but again, Y was never supportive of H's prosecution.
- Two allegations of rape made by Y against her husband H in 2016 and 2018. Following the first report to the police, Y did not want to provide a statement in support of the investigation and in a retraction statement, she said that she could not be sure anything had happened. In terms of the latter allegation, H was interviewed, denied the offence, and Y rang the police a few weeks later saying this rape had never happened.

The Court of Appeal proceeded on the basis that this was all fresh material.

The Legal Submissions

It was submitted on behalf of Mr Hurley that the above three strands of evidence should be admitted, firstly under section 100 of the Criminal Justice Act 2003 (non-defendant's bad character) and secondly, where pertinent, under section 41 of the Youth Justice and Criminal Evidence Act 1999 (restriction on evidence or questions about complainant's sexual history). Should the evidence be deemed admissible, then it ought to be considered as fresh evidence in Mr Hurley's appeal under section 23 of the Criminal Appeal Act 2003.

As part of the judgment, the Court adopted a stepped guide as to how to approach the correlation between section 100 and section 41 in cases where the complainant's previous allegation of sexual offences is first said to be false:

1. Evidence of false complaints ought always to be considered as non-defendant bad character in accordance with s.100 because it is evidence of misconduct (s.112(1) of the 2003 Act);
2. The admissibility of this evidence is underpinned by the enhanced relevance test outlined in s.100(1)(b) of the Criminal Justice Act 2003 mandating the following:
    i. the evidence must have substantial (but not necessarily conclusive) probative value in relation to the complainant's credibility; and
    ii. credibility must be a matter in issue of substantial importance in the proceedings as a whole.

3. False complaints of previous sexual offending are not automatically covered by section 41 unless the evidence that is sought to be admitted, is of the sexual behaviour itself. If the issue is the complainant making an allegation said to be false, the admissibility test reverts to section 100.
4. In order to deem a statement false, there must be a proper evidential basis: *R v RD* [2009] EWCA Crim 2137 and *R v AM* [2009] EWCA Crim 618.
5. The "proper evidential basis" must meet the test under section 100, namely:
    i. It must have substantial probative value in relation to a matter in issue; and
    ii. It must be of substantial importance in the context of the case as a whole.
6. The admissibility of this evidence under section 41 is very fact specific.
7. Even when the admissibility threshold is met, the court retains the power to evaluate the quality of the evidence in question.

The Findings

In applying the stepped approach outlined above, the Court found that none of the allegations were encompassed by section 41 because they were not allegations relating to sexual behaviour. However, they found that there was no proper evidential basis to find the allegations to be false, and therefore they did not satisfy the test under section 100. This resulted in none of the domestic violence allegations nor the five previous rape allegations being admitted as fresh evidence to re-open the conviction of Mr Hurley.

Although there may not be any criticism to the approach taken by the Court of Appeal insofar as the legal test under section 41 is concerned, Mr Hurley's defence was significantly restricted as he was prevented from cross examining the complainant over the five previous allegations of rape she did not want to pursue. Significantly, some of those allegations were made at a time when she was described as drinking to excess and living a chaotic and promiscuous lifestyle, as commented upon by multiple witnesses questioned by the police in 2004.

It is plain that Y was a vulnerable individual, and had these previous allegations been allowed as evidence, her cross examination would need to have been carefully undertaken by defence counsel within the remits of the legal framework of section 100.

It is concerning that, in light of the information presented to the Court of Appeal, Mr Hurley's conviction was upheld. Many would question the safety of Mr Hurley's conviction when his jury were deprived of this evidence in their task of assessing Y's credibility in her complaint against Mr Hurley.

Commentary

Arguably, the most important clarification from previous case law that the Court made in Rex v Hurley, was step three when it established that the admissibility under section 41 of previous false allegations of sexual offences depends on the subject of the alleged falsity. It was only deemed admissible when the subject matter was indeed a sexual act as opposed to the making of the allegation in itself because in that case there would be no sexual behaviour which would trigger section 41.

Although the stepped approach to addressing the interrelation between section 100 and 41 was seemingly straightforward, the practical application of this approach does not in effect simplify the interpretation of the legislation in question which can fairly be described as 'labyrinthine'.

Particularly, the Court's application of step 5 did not develop the understanding of what is intended to be a 'proper evidential basis' from its accepted definition of *'some material from which it could properly be concluded that the complaint was false [...] [or is] capable of founding an inference that the complaint was untrue'* as per M [2009] EWCA Crim 618.

In Hurley, despite the large amount of conflicting evidence on the alleged falsity of the complainant's previous allegations, the Court found that they could not establish a basis of their falsity. This is arguably an unfair approach to objectively equivocal evidence whose balance is dangerously tipped towards the complainant: how can evidence of this kind not be allowed to be challenged? Particularly, evidence of witnesses describing Y's behaviours at the time, the content of the retraction statements she made to the police not simply withdrawing her support but actually saying that at least one of the rapes had not happened, and of another she said she could not be sure it occurred in the first place, were not put before the jury. It might be said that these aspects ought to have been considered as indicative of at least a layer of uncertainty in terms of the veracity of her past allegations thus establishing a basis for their falsity.

It is hard to understand how this information was not put before the jury when part of their duty was to assess the complainant's credibility. Isn't this a clear example of where previous allegations are truly relevant for the jury to consider when they weigh her evidence in the case at hand? Although it is understandable that vulnerable complainants should be protected by the Courts so that the process can be as fair and as least intrusive as possible, this should not interfere with a defendant's right to a fair trial and the defence's ability to challenge the credibility of a complaint.

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Dr. Ewa Wolska

Sexual Offence Examiner for adults, adolescents and children with special interest in the interpretation of physical signs of sexual assault, rape and child sexual abuse.

Forensic Physician specialising in interpretation of general body injuries, including non-fatal strangulation, physical assaults and domestic violence.

As a Forensic Physician and Sexual Offence Examiner of adults, adolescents and children, I have extensive experience in the management of immediate forensic and medical needs and interpretation of general body and ano-genital injuries in complainants and suspects of sexual and physical assaults, child sexual and physical abuse and non-fatal strangulation.

I regularly complete expert witness reports for Police Forces, Crown Prosecution Service, Defence and Family Courts, and give oral evidence in court.

I am one of the expert advisors for the National Crime Agency.

I regularly attend and facilitate peer review meetings and training events for other medical professionals.

I am an author and co-author of 10 chapters of the latest (2019) Polish Handbook of Forensic Medicine and Pathology.

I am one of the expert reviewers and chapter co-leads for the review of the current Royal College of Paediatrics and Child Health "The Physical Signs of Child Sexual Abuse" evidence-based review and guidance for best practice 2024.

Email: drewolska.ssarc@nhs.net
Alternate Email: e.wolska@yahoo.com
Telephone: 0785 197 2662

Area of work: International

Dr. Christopher Thom

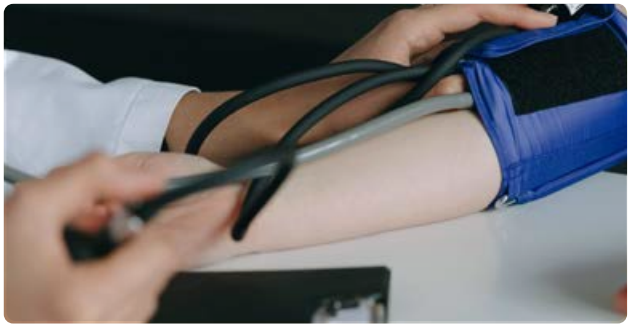
Consultant Physician

FRCP

Consultant Physician with special responsibility for Care of the Elderly and Stroke Medicine at Maidstone Hospital, Kent, since 1995.

Dr Christopher Thom has 30 years' experience as a consultant physician in a district general hospital. Until three years ago, he took a full part in the unselected medical take. He has wide experience in most areas of elderly medicine and was responsible for developing stroke medicine in Maidstone, where he continues to provide hyper-acute and acute stroke care. He also offers a specialist service for patients with movement disorders. Dr Thom undertakes consultations in both the NHS and private practice in general medicine, care of the elderly, stroke medicine, and movement disorders.

Email: chris.thom@nhs.net | **Alternate Email:** chris.thom@kims.org.uk
Mobile: 07796 694316



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Web: www.rapidaccessgynaecology.co.uk

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The Inevitability of Greater Regulation: What Does the Future Hold for Experts?

by Tom Thurlow, Partner & Lara Tulip, Trainee Solicitor at Weightmans

The Bond Solon's 2025 Expert Witness Survey

Bond Solon recently released the results of its '2025 Expert Witness Survey', which provides invaluable insight into the views of the profession.

Among the interesting findings, what was perhaps most headline grabbing was the fact that only 59% of those surveyed were in favour of greater regulation, meaning 41% were opposed.

For those of us who operate in the professional regulatory/disciplinary space this is not that surprising and we have seen similar reactions from other nascent professions who have been on a regulatory journey. Whilst no doubt the reasons for those on either side will be various, we would not be surprised if factors influencing those who are against greater regulation include:

- the question over what training and qualification requirements would mean in practice and would that limit the scope of experts' ability to act in certain fields / types of work
- the worry that formal regulation would impose onerous reporting obligations
- the potential for external auditing and procedural requirements which may be disproportionate to the size of operations
- the fear that regulation would make experts subject to disciplinary proceedings
- the concern that such requirements may operate to impinge on the independence of their methodology
- the possibility of higher insurance premiums.

Regulation would no doubt impose greater standards, procedural requirements or codes of practice which some see as limiting professional judgement which is particularly important for experts for whom this is the cornerstone of their profession.

We would also imagine that whilst the larger expert outfits would be less concerned with these changes (many will already have the necessary processes and procedures in place) the many experts who still operate as sole trader or small partnerships will see this as a much greater threat. That would not be unfounded, and indeed where in other professions we have seen the imposition of greater regulation, contraction of the market tends to follow.

The natural next step?

If greater regulation for experts does come however, it would not be a 'bolt out of the blue', but rather an unsurprising evolution of the profession.

In 2011, Jones v Kaney 2011 UKSC 13 abolished the long-standing immunity experts enjoyed against negligence actions for their preparatory work and evidence. The decision reinforced the professional obligations of expert witnesses and underscored that whilst an expert's paramount duty is to the court, this does not negate the professional duty of care owed to the instructing party. A watershed moment for the profession, this naturally led to experts needing to hold proper professional indemnity in place, and shifted the dial on their relationship with their client and instructing solicitors. For insurers, this also of course birthed a new market.

Whilst the position has since then largely — at least formally — not changed, in our experience there has been a 'professionalising' of the regulation and indeed certainly the way the larger outfits conduct themselves and run their businesses is some far way from what used to be the case.

Whilst not hugely reported, the dial recently shifted again when in JSC Commercial Bank PrivatBank v Kolomoisky and others [2025] EWHC 1987 (Ch) the court held that experts have a duty to disclose

previous criticisms of their evidence to the Court and that failing to do so can amount to a breach of an expert's duty. This breach does not mean that an expert's evidence should be disregarded completely, instead it should be subject to a higher level of scrutiny. Why is this so important?

Other than the obvious practical implications for experts who have been criticised, what this judgment means at a higher level is that an expert now has a status or standing that outlasts any particular instruction. Just like with lawyers, an expert's reputation therefore now not only impacts the ability to attract work, but the value of the contribution. Whilst perhaps always the case to some extent, this shift — we would suggest — very much paves the way for greater regulation. The role of regulators of course being very much to govern the standing and practice of individuals, groups of individuals and professions generally, and outside of any particular case.

Questions for professional indemnity insurers

There are — so far as we aware — no immediate plans, but this is something that professional indemnity insurers with 'skin in the game' in the expert field should keep a close eye on.

Greater regulation will necessarily mean greater scrutiny and experience would suggest that ultimately that reduces the risk for insurers as claims tend to reduce (albeit disciplinary actions increase). Initially thought, this is quite possibly a double-edged sword as whilst ultimately regulation can make the professional a less risky business to write (and in theory therefore increasing the commercial opportunity for insurers), getting to that point is always a journey, and those journeys can be the riskiest moments for a profession, and by implication insurers.

Insurers in this space will no doubt therefore want to reflect on their medium to long term appetite in this space, and we would imagine that those who want to get ahead will start considering whether for example:

- there are additional questions they might want to include in their prop forms going forwards about experts' practices and procedures / what steps they are taking to prepare should greater regulation come
- what premiums insurers might ultimately need to charge, and what the increase journey looks like over the coming years to get there
- what cover they want to provide for disciplinary investigation/action and whether — for example — they want to consider writing in point lawyers into policies to ensure that complaints are effectively managed
- whether there is scope to work with brokers and/or lawyers operating in this space to offer ways of working with insureds / potential insureds to help get them ready and therefore set themselves apart.

We will be watching these developments carefully, and would be delighted to discuss this further with any insurers looking to consider their position.

First published by Tom Thurlow, partner at law firm, **Weightmans.**

Rae Denman

MEDICAL TATTOOIST

Rae Denman

Medical Tattoo Expert Witness

BA(HONS) FDA CT DIP CC DIP

Tel: **07967 758 714**
Email: **rae@raedenman.co.uk**
Website: **www.raedenman.co.uk**

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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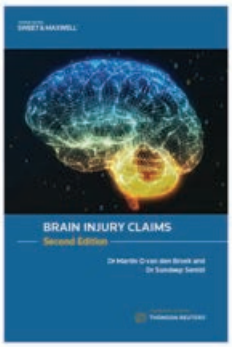

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Dr Sundeep Sembi
B.Sc. (Hons.), Clin.Psy.D., C. Psychol., AFBPsS.
Consultant Clinical Neuropsychologist
10 Harley Street London W1G 9PF
Telephone: 020 7467 8365
Mobile: 07813873578
info@psychologychambers.com

Chris Dawson BSc MBBS FRCS MS LLDip
Consultant Urologist

Mr Dawson is a Consultant Urologist with over 28 years' experience. He has formal training in personal injury and medical negligence reporting and completed the Bond Solon Expert Witness Course in 2006. In 2008 he completed a Diploma in Law at the College of Law in Birmingham.

Mr Dawson has over 21 years of medico legal report writing and expert witness work and has completed over 1950 reports, He has completed numerous Fitness to Practise reports for the General Medical Council.

He is the author of the ABC of Urology, now in its 3rd edition, and also co-edited the Evidence for Urology which won first prize in the urology section of the BMA Medical Book Competition in 2005.

Mr Dawson is happy to accept instructions for personal injury, clinical negligence and condition and prognosis reports.

M: 07711 584939
E: expertwitness@chrisdawson.org.uk

Fitzwilliam Hospital, Milton Way, South Bretton,
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What Makes a Good Expert?

by Guy Jackson and Jason Sharp at Overford

In construction and legal disputes, the role of the quantum expert can be significant. An expert does not just know their subject; they also understand how to apply their knowledge in a fair, independent, and methodical way. The credibility of their evidence might be the difference between success and failure in a dispute.

Independence, Objectivity, and Instructions

An expert's first duty is always to the tribunal or court, not the party paying their fees, even if that party is one of the parties to a dispute. This independence is what gives their opinion weight. A strong expert presents evidence without bias, resists client pressure, and avoids drawing conclusions that cannot be properly supported. Problems arise when experts are not seen as impartial. In Walsh Construction v. Toronto Transit Commission (2024), the Transit Commission questioned the independence of Walsh's expert due to their repeated involvement with the contractor. The tribunal concluded that this history created the appearance of bias, which undermined the expert's credibility. The case is one of many highlighting the importance of impartiality in expert roles. As any good expert will know, the definitive case on responsibilities of an expert is that of the Ikarian Reefer which set out the seven guiding principles of impartial expert evidence.

As the Ikarian Reefer made clear, impartiality requires not only independence in analysis but also clarity in the instructions provided. An expert's duty therefore begins with obtaining clear and comprehensive instructions. These should set out the expertise required, the purpose and scope of the report, the questions to be answered, the relevant background, and the parties involved. Where instructions are unclear, incomplete, or inconsistent with the expert's overriding duty to the court or tribunal, the expert should raise these concerns with the instructing party at the earliest opportunity. If clarification cannot be achieved, it may be necessary to seek directions from the court and, in some cases, to consider whether they can continue to act at all.

Evidence and Reasoning

At the heart of a quantum analyst's role is the ability to work carefully with evidence and present it through clear reasoning. This begins with understanding how costs are recorded, testing whether the figures are accurate, and questioning anomalies. Skilled analysts look beyond the surface of ledgers, examining provisions, miscoding's, discounts, and hidden rebates. By contrast, weaker analysts risk undermining their conclusions if they rely on incomplete or selective data.

Strong analysis does not stop at gathering evidence. The best analysts build their reports step by step, linking facts to the legal basis of the claim, examining causation, and ensuring that any losses claimed are not too remote. They explain their reasoning in plain language so that lawyers, clients, and tribunals can follow it with ease. Problems arise when experts take shortcuts or rely on "rules of thumb" – broad assumptions or simplified formulas, such as adding flat percentages for overheads or delay costs without testing their accuracy. Tribunals expect tailored reasoning supported by proper evidence, and they will discount analysis that lacks a clear chain of logic.

In Van Oord UK Ltd v Allseas UK Ltd (2015), the claimant's expert was heavily criticised for failing to check claims against the underlying documentation. By copying sections of the claimant's evidence directly into his report, and attaching documents he had not reviewed himself, he seriously weakened his credibility. The case shows why careful handling of evidence and logical, transparent reasoning are essential to persuasive expert testimony.

Identifying the Basis – Cause, Effect and Foreseeability

Every good analysis begins by identifying the correct basis of a claim, and whether the losses claimed are in principle recoverable. Without this foundation, even the most detailed calculations risk being irrelevant. A clear link between the legal

entitlement and the financial assessment ensures that the analysis is both reliable and persuasive. In the case of Esso Petroleum Co Ltd v Mardon (1976), damages were awarded for negligent misstatement and highlighted that the divide between a statement of opinion and of fact becomes more significant if a party holds themselves out as having expert knowledge.

A core part of quantum analysis is showing that the costs claimed were caused by the issue in dispute. It is not enough to demonstrate that money was spent; the analyst must prove that the expenditure arose because of the breach.

The law also places limits on the losses that can be recovered. Costs that are too remote, or that could not have been foreseen, will not be accepted. A good analyst presents a clear chain of cause and effect, ensuring that each item of loss is linked directly to the event in question. Including unrelated or exaggerated costs only undermines the credibility of the report.

In Hadley v Baxendale (1854), the court confirmed that only losses foreseeable at the time of contracting can be recovered. Similarly, in Quinn v Burch Bros (1966), the court held that a breach which merely provided the occasion for an accident, rather than causing it, did not give rise to damages. Together these cases illustrate why a quantum analyst must carefully connect the claimed costs to the actual breach.

Choosing the Right Measurement of Loss

Construction disputes often present more than one way to measure monetary loss. A defect, for example, might be valued either by the cost of rectification or by the reduction in the property's value. The task of the quantum analyst is to select the measure that most accurately reflects the circumstances of the case, rather than simply the one that produces the largest figure.

In Ruxley Electronics and Construction Ltd v Forsyth (1996), the House of Lords held that reinstatement costs were disproportionate where the actual loss in value was minimal. Instead, damages were awarded for loss of amenity. This case illustrates that the correct measure of loss is not always the most expensive one, and why analysts must exercise careful judgment in recommending an approach. The importance of careful judgement was also highlighted in the recent Notting Hill moth infestation case. The High Court judge criticised the expert's grasp of the issues and described his judgment as "flawed in many instances." He was also criticised for being unwilling to make sensible concessions, instead arguing with counsel, and often failing to answer questions directly. These criticisms underline the need for experts to exercise careful, balanced judgment and to communicate their reasoning clearly, particularly when addressing alternative measures of loss.

Balance and No Loss

A credible analysis looks at both sides of the picture. Losses must be assessed, but so must any gains or advantages that occur during a project. While breaches or delays often lead to extra costs, they can also result in savings or efficiencies if the work is carried out in more favourable conditions. If an expert only reports the losses and ignores the benefits, their evidence risks appearing biased. A balanced assessment, by contrast, shows fairness and objectivity.

The courts have also recognised that in some cases no real monetary loss is suffered. Sometimes the works leave the claimant in a better position than before, or savings offset the extra costs. This is often described as betterment. Where betterment or collateral advantages exist, tribunals expect experts to reflect these openly in their calculation.

In Walter Lilly & Co Ltd v Mackay & DMW Developments Ltd (2012), one expert was criticised for focusing heavily on additional costs while failing to account for efficiencies and overlapping causes of delay. Similarly, in cases involving betterment, courts have confirmed that a claimant who benefits from an improvement cannot recover the full cost as though no gain had been made. These examples highlight why recognising both losses and gains is essential to producing credible and reliable analysis.

Spare Capacity and Voluntary Costs

Not all costs claimed are recoverable. Some resources have spare capacity and would have been incurred regardless of the breach. Common examples include tools that are already owned, overheads that would have been paid in any event, or staff who were not fully occupied. Similarly, some expenditure may be undertaken voluntarily, such as excessive tendering or internal allocations that are not a direct result of the dispute.

In Alfred McAlpine Homes North Ltd v Property and Land Contractors Ltd (1995), Judge Lloyd QC examined whether certain overheads should be treated as fixed or variable. He concluded that not all overheads could be directly attributed to the delay, meaning they could not be claimed in full. This case highlights why analysts must scrutinise whether claimed costs genuinely flow from the breach, or whether they simply reflect resources that already existed.

Contract Price vs Actual Costs

A common issue in construction disputes is the difference between what was priced in the contract and what was spent. Some claims rely on allowances said to have been included in the contract price, while others are based on later recorded expenditure. A careful analyst does not simply accept these figures at face value but tests whether the sums were truly included, whether they are reasonable, and whether they represent genuine costs arising from the breach.

In London School Board v Northcroft, Son & Neighbour (1902), hidden discounts and allowances distorted the true value of accounts. Clear separation of contract price and actual costs avoids inflated or misleading claims. Such separation also ensures that damages reflect commercial reality rather than accounting devices.

Avoiding Duplication

Another risk is duplication, where the same cost is claimed under different headings such as prolongation, disruption, or variations. Overlapping claims can result in double counting, which tribunals will not accept.

In British Westinghouse Electric Co Ltd v Underground Electric Railways Co of London Ltd (1912), the House of Lords confirmed that losses must be balanced against gains and that awards cannot amount to a windfall. By extension, duplication between claims must be identified and removed. Analysts who demonstrate clearly how each figure has been derived, and who show that no item is counted more than once, provide evidence that is far more likely to withstand scrutiny.

Practical Judgment and Clarity

Finally, good experts exercise practical judgment. They consider alternative ways of assessing loss and reach conclusions that are realistic rather than speculative. Their purpose is to assist the tribunal, not to overwhelm it, which is why their reports are clear, structured, and accessible.

In CIB Properties Ltd v Birse Construction Ltd (2005), where the court was faced with competing expert evidence on construction defects and costs. The judge criticised one expert's lengthy, technical report for being "opaque and unhelpful" and placed greater weight on the opposing expert's more straightforward and accessible analysis. The case highlights that clarity and practical judgment often carry more weight than complexity or volume.
Professionalism and Credibility

Beyond technical skill, independence, and clarity, the most effective experts understand that their personal credibility is on the line. This means being honest about the limits of their expertise, transparent in their methods, and consistent in their professional conduct. Reputation matters: an expert known for balance and integrity is more likely to have their evidence accepted.

Conclusion

The qualities of a good expert go far beyond technical knowledge. Independence, thorough preparation, attention to evidence, clear reasoning, fairness, communication skills, and sound judgment all combine to create testimony that assists rather than confuses. When these qualities are missing, even highly qualified experts' risk having their evidence set aside. In construction disputes, where the stakes are often high, the best experts are those who not only understand the detail but also deliver it with clarity, balance, and professionalism.

Dr BENJAMIN SHAW

MBBS BSc(Hons) PGCert(Dist) MRCP(UK)

CONSULTANT AUDIOVESTIBULAR PHYSICIAN

Dr Shaw is a highly specialised Audiovestibular Consultant Physician with extensive clinical experience in assessing, diagnosing and treating patients with inner ear and vestibular disorders.

His practice is exclusively dedicated to patients with dizziness, imbalance, tinnitus and hearing disorders. Each year, he typically treats 1000 new patients and conducts a further 1000 follow-up consultations, through his NHS and private practices. He is recognised by senior consultant colleagues nationally for his expert knowledge and receives referrals for complex cases from across the country.

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Harley Street, London | TheDizzySpecialist.com

Professor Dae Kim

Consultant ENT & Head and Neck & Thyroid Surgeon

MBChB, BDS, MSc, FRCS (Orl-HNS), PhD

Professor Dae Kim is currently a Consultant ENT, Head & Neck and Thyroid Surgeon at The Royal Marsden Hospital (Chelsea) London. He has over 25-years' experience in treating a wide range of ear and hearing problems, as well as nasal and sinus problems. He has a special expertise in thyroid cancer and thyroid surgery, as well as complex head and neck problems including neck trauma, neck lumps, throat problems, including swallowing and voice change.

The unique combination of extensive clinical experience within major centres of excellence, involvement in national and international committees and a strong academic career ensures that he is able to be up-to-date with the latest medical literature and 'best-evidence' to support medical reports of the highest quality.

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- Thyroid Surgery
- Thyroid Cancer
- Parathyroid surgery
- Hyperparathyroidism

Head & Neck Surgery and Oncology
- Head & Neck Cancer (including salivary, larynx & pharynx cancers)
- Thyroid Cancer
- Voice disorders
- Swallowing disorder
- Breathing Disorders (of throat).

Professor Dae Kim has extensive medicolegal experience & training

Tel: 07769180017 - **Mobile:** 07769 180 017
Email: daekim72@yahoo.co.uk - **Alt Email**: daekim72@yahoo.co.uk
Website: www.entmedicolegalexpert.com - **Alt Website:** entsurgeon-daekim.com
Address: 10 Northcliffe Close, Worcester Park, Surrey, KT4 7DS

Mr Andrew Meredith

Consultant ENT Surgeon

MA, MBBS, FRCS, DLO

Mr Meredith is a Consultant ENT Surgeon previously based at Hastings and now working part-time at Queen Alexandra Portsmouth.

He has extensive experience in ear, nose and throat problems including:
Noise induced hearing loss
General ENT personal injury
Otology
Rhinology
Diving and ear, nose and throat disorders
Sleep disorders
Obstructive sleep apnoea
Special clinical interests in Audiology

Since 1990 Mr Meredith has examined approximately 1200 patients with possible noise induced hearing loss, and approximately 200 patients in personal injury cases. He has experience of conference with council in approximately 50 cases and has attended court as an as expert witness in 9 cases.

Consultations:
Sussex Premier Health
The Ridge, St Leonards on Sea, East Sussex, TN37 7RE

Contact Details
Tel: 01825 872162 - **Email:** peterdesterre@aol.com
Contact address: Candytuft, Stalkers Lane,
East Hoathly, Lewes, East Sussex, BN8 6QS

Mr Edward Saxby

Consultant ophthalmic and oculoplastic surgeontant Physician

FRCOphth AFHEA MBChB

Mr Edward Saxby qualified in 2012 from the University of Bristol. He completed his specialist ophthalmic training in the Southeast of Scotland at the Princess Alexandra Hospital in Edinburgh. Following this he went on to undertake the prestigious oculoplastic, lacrimal and orbital fellowship at Addenbrookes Hospital, Cambridge.

Edward Saxby is passionate about medical education. He is an associate fellow of the Higher Education Faculty and has run both national and international courses teaching eyelid and cataract surgery around the world.

Mr Saxby now works as a busy ophthalmic and oculoplastic consultant at Musgrove Park Hospital, Taunton and The Nuffield Hospital, Taunton. He specialises in both function and cosmetic eyelid surgery as well as cataract surgery.

Email: e_saxby@doctors.org.uk
Alternate Email: Edward.saxby@somersetft.nhs.uk
Website: https://www.edwardsaxbyeyelidsurgery.co.uk/

Area of work: Somerset

Clinical Negligence: Insights on Surgical Planning, Informed Consent and Complication Occurrence

by Lynn Livesey, Laura McMillan & Lauren Chisholm at Brodies LLP

The recent High Court decision in **HQA v Newcastle-upon-Tyne Hospitals NHS Foundation Trust [2025] EWHC 2121 (KB)** provides detailed guidance on the legal standards that govern high-risk surgical practice.

The judgment explores where the line is drawn between an unavoidable complication and a negligent failure in preparation and communication. While not binding in Scotland, the decision of the English & Welsh courts provides guidance on three areas that are central to many clinical negligence claims:

- pre-operative planning and risk management;
- the scope of informed consent; and
- the limits of liability where complications arise from recognised risks despite the exercise of reasonable skill and care.

Factual background

The claimant had complex congenital heart disease and had undergone several major procedures in childhood. By 2022, at the age of 25, her condition had deteriorated, and she required further surgery. She was to undergo pulmonary valve replacement and a PEARS procedure, with possible aortic valve intervention. This would be her third "redo" sternotomy - a procedure known to carry higher risks.

Two issues arose before surgery:

- The consent process: A registrar first quoted a 20% mortality risk, but the consultant later revised this to 5-10%. The main discussion with the consultant happened only on the day of the operation.
- No steps were taken to expose and prepare the femoral vessels before sternotomy, despite scans showing the aorta was only 3mm from the sternum.

On 3 May 2022, during the sternotomy, the oscillating saw transected the aorta. Severe bleeding followed, and establishing bypass was delayed because femoral access had not been prepared. The claimant suffered hypoxia, resulting in severe brain injury.

The claim was brought on three main grounds:

1. That the consent process was inadequate and took place too late.
2. That pre-operative planning was negligent, particularly in failing to prepare femoral vessels.
3. That the intraoperative use of the saw was negligent.

The court's findings

1. Pre-operative planning

The court found a clear breach of duty in how the operation was planned. Both experts agreed that the claimant's anatomy created a medium to high risk of aortic injury. The judge held that preparing the femoral vessels was the minimum standard of care in such circumstances.

It was concluded that this failure caused delay in establishing bypass and materially contributed to the brain injury, estimating that around 13 minutes of hypoxia could have been avoided.

2. Intraoperative skill

The claimant alleged negligence in how the saw was handled. Here, the court took a different view. Expert evidence confirmed that aortic injury is a recognised complication of redo sternotomies, even where the surgeon exercises reasonable skill and care. The judge agreed stating that:

> *"Such a misjudgement...falls squarely within the category of a risk of error which cannot be eliminated entirely..."*

No breach of duty was therefore established in relation to the saw injury itself.

3. Informed consent

The Court was critical of both the timing and content of the consent process.

- **Timing**: The claimant first met her consultant surgeon on the morning of surgery.
- **Content**: The claimant was not informed about the option of exposing the femoral vessels, nor about the risks created by her specific anatomy.

The judge stated that it is not for the surgeon to determine for the claimant, what the claimant's risk appetite should be and that it was a breach of the duty of care owed by the surgeon not to explain to the claimant that another option was available. During evidence it was heard that the claimant would have chosen the variant procedure involving femoral preparation, although she would not have delayed surgery.

Wider commentary

The court reiterated the principle from *Montgomery v Lanarkshire Health Board [2015] UKSC 11* that it is for the courts, not the medical profession, to define the scope of a patient's rights. The court emphasised that while doctors exercise professional judgment when deciding on treatment options, they cannot unilaterally determine what risks to disclose to the patient. Instead, patients must be given the information necessary to make their own decisions about the risks they are willing to accept.

The judgment also highlights that determining whether a risk is "material" is fact-specific and patient-specific, considering not just statistical likelihood but also the potential impact on the patient's life, the importance of the benefits sought, and the risks associated with alternative treatments. This approach reinforces the *Montgomery* principle that consent is not a routine process, and it is a patient-centred discussion that must reflect the individual's perspective and circumstances.

The court further criticised governance and documentation in this case. The operation note was not completed until 16 days after surgery, and no Datix or Serious Incident investigation was carried out. The absence of contemporaneous records made it more difficult for the Trust to defend its position and illustrates the importance of proper documentation in supporting compliance with both clinical and legal standards.

Key Takeaways

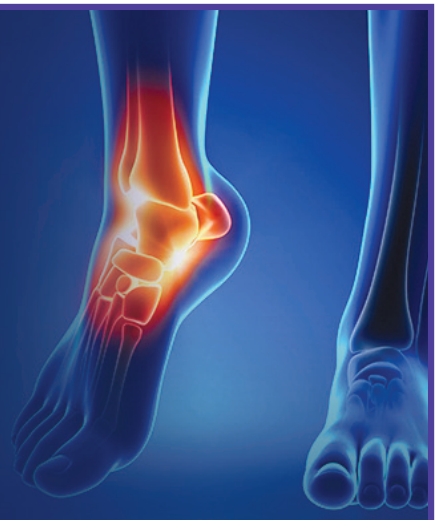
This case provides helpful commentary on the Court's application of the Supreme Court decision in *Montgomery*. Key takeaways from the judgement are:

- **Pre-operative planning**: Foreseeable catastrophic risks must be actively managed. Failure to take obvious steps, such as preparing femoral access, will be treated as a breach.
- **Informed consent**: *Montgomery* remains central. Surgeons must explain not just material risks, but also reasonable alternative techniques that may reduce those risks.
- **Recognised risks**: A poor outcome is not proof of negligence. If a complication arises that is well-recognised and the surgeon acted with reasonable care, no breach will be found.
- **Documentation**: Late or inadequate records undermine both patient safety and the ability to defend a claim.

Mr Raj Kumar

Trauma & Orthopaedic Surgeon
Specialist Foot & Ankle

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



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

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

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

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

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

Contact Details
Tel: 07881 802 084
Email: rajkumar@doctors.net.uk
Rajkumar Padmakumer Ltd
5 Mallowdale, Fulwood, Preston, Lancashire, PR2 7AG

Expert admits that his report amounted to "a piece of advocacy for the claimant" - how did this impact the outcome of the case?

by BondSolon

Introduction

In Tosh v Gupta [2025] EWHC 2025 deputy high court judge Sarah Clarke KC had to decide whether the defendant, a consultant general colorectal and laparoscopic surgeon, had been negligent in the way he graded the claimant's haemorrhoids, and in the subsequent advice he gave on the best way to treat them.

The expert witness for the claimant in this case was a retired general and colorectal surgeon with over 25 years' experience in a district general hospital. He admitted he had not done many haemorrhoidectomies and had never done a ligature haemorrhoidectomy, which was the procedure in issue in this case.

What was the judge's main issue with the evidence of the claimant's expert witness?

A key red flag for the judge in hearing the claimant's expert's evidence was that he overtly admitted that parts of his report amounted to "a piece of advocacy for the claimant". This was in direct contravention of CPR 35, which calls for experts to remain objective and unbiased, sticking to the facts of the case.

Under cross-examination, the expert was asked whether it would be reasonable to recommend surgery if the claimant had grade 3 or 4 haemorrhoids. He replied saying that it would be. However, when he was asked why this was not mentioned in either of his reports or in the joint statements, he agreed it should have been and that its omission was a failure to comply with his duty to the court. "I think that's a reasonable comment," he told the court.

Due to the poor standard of the expert's evidence and the fact that the defendant's expert, had more relevant experience, the judge said, "where there is a conflict between the evidence, I unhesitatingly prefer the evidence of [the defendant's expert]".

Were there any other issues with the evidence of the claimant's expert?

The claimant's expert also undermined the credibility of his evidence by not fully addressing the defendant's side of the case. His witness statement dated 21 July 2021 referred to him having read the claimant and defendant's witness evidence. However, these were only served in April 2024.

"He said that when the witness evidence was served, he did have regard to it, but his opinion had not changed since he wrote this 2021 report. This does not however explain how he was able to have regard to witness evidence in July 2021 when these statements did not even come into existence until 2024," the judge said. "It was also pointed out to him that neither this expert report, nor his subsequent report dated 4 February 2022 made any reference to the defendant's case and nor had he analysed the defendant's case."

The expert accepted that his evidence had not addressed the defendant's case and that he was under a duty to assess the arguments on both sides and weigh them up fairly. He argued, however, that he had done despite not referencing the defendant's arguments in his reports.

Elsewhere, the expert failed to admit he had changed his opinion and been wrong in his interpretation of some of the evidence on the claimant's condition. "Again, it is a matter of concern that [the expert] was unwilling to admit what is obvious to any reader – which is that he has completely changed his mind by the time of the joint statement... Instead, [the expert] gave a confusing and rather incoherent response," the judge pointed out in her ruling.

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Paul Tebbutt
Paul Tebbutt is a Chartered Surveyor with 25 years' post qualification experience and RICS Registered Valuer who serves as a panel valuer to numerous banks and other lending institutions.

Clive Morley
Clive started as a contractor's Quantity Surveyor moved onto Contracts Management. He progressed into management in the Design and Build sector.

James Hargreaves
Rights of Light Associate Director
James is a specialist in the area of practice known as Neighbourly Matters.

Hari Hirani
Hari has been a practicing surveyor since 1976 [over 42 years] having a wide range of experience in Capital & Rental Valuations.

Neil Maloney
aving started his career in property management, Neil has also worked as a building surveyor across the South-East.

Mandeep Jhita
Currently works within the valuation team in a general practice capacity and his experiences have seen him value a range of assets in various sectors.

Richard Kirby
Practising Arbitrator, Expert Determiner, Mediator, Chartered Surveyor and Expert

Telephone: +44 (0)20 7061 1100
E-mail: info@awh.co.uk
Website: www.awhexpertwitness.com
12 Dorrington Street, London, EC1N 7TB

The judge recalled the defendant's counsel asking the claimant's expert witness whether he had changed his opinion to which he replied, "I agree it is not clear."

"Therefore, despite being given three chances to concede that he had obviously changed his mind, he was unable to do so. This does not appear to comply with his duties under PD 35, which requires that 'if after producing a report, an expert's view changes on any material matter, such change of view should be communicated to all the parties without delay, and when appropriate to the court.'", the judge said.

How did these issues impact the judgment in the case?

Aside from lacking the appropriate level of expertise for this case, the expert appeared to have completely neglected his duty to the court throughout the case. He chose to place himself firmly on the side of the instructing party and to fight their corner, rather than comply with his duties under Part 35 of the CPR, particularly his overriding duty to the court.

It is impossible to say whether an alternative expert witness would have led to an alternative outcome for the claimant. However, this expert did not help the claimant's case and likely harmed his own reputation as a credible expert witness for future instructions.

The judge ruled that the claimant failed to prove her case on liability and causation, and the claim was dismissed.

What are the key learnings for expert witnesses?

The case offers lessons for experts in the importance of being aware of, understanding and complying with all their duties and responsibilities under Part 35 of the CPR. It also presents an example of what not to do if your evidence changes during the case or is found to be confusing or incoherent.

Bond Solon provides training[1] covering all the core skills and knowledge expert witnesses require to fulfil their role compliantly and effectively. We also offer university certified training programmes[2] that are widely regarded as the industry gold standard by instructing parties.

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References

[1] www.bondsolon.com/expert-witness/

[2] www.bondsolon.com/expert-witness/expert-witness-certificates/

Dr Jyothi Shenoy

Clinical Psychologist & Psychotherapist

PhD in Clinical Psychology, M.Phil, M.A in Psychology, P.G Diploma in CBT: Institute of Psychiatry

Dr Shenoy has clinical experience in;

- Psychological assessment and intervention, predominantly using CBT for clients with a wide range of problems; anxiety, depression, OCD, PTSD, Psychosis, Post natal depression, personality and adjustment disorders etc.
- Parenting assessments, CARE-Index assessments, family functioning assessments, personality assessments, assessment for Autism Spectrum disorders.
- Cognitive functions assessment including neuropsychological assessments.
- Assessment of and psychological effects of domestic violence and substance misuse.
- Assessment of children: cognitive functions, mental health and well-being and attachment.
- Anxiety management groups.
- Developed and ran the CBT for depression group.
- Experienced in Root Cause Analysis training and lead on Serious Incidents investigations within his Trust.
- Expertise in assessment of the psychological effects of severe and long term mental health conditions.
- Family interventions in the community and on inpatient wards.
- Consultation to the team.
- Supervision of staff in their psychological work.
- CBT Supervision of Primary Care Psychologists, 2004-2006.
- Coordinator and lead for the CBT peer supervision group for a group of senior clinical psychologists, 2008- present.
- Inpatient psychology groups.

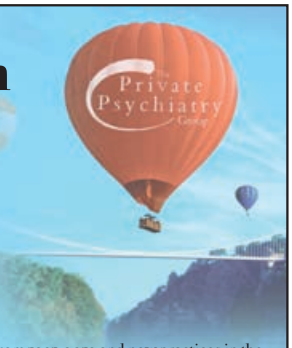
Has experience giving evidence in court, with court reports & professional meetings.

Tel: 07963 510 976 - Email: jyothishenoy@hotmail.com
Area of Work: Greater London and Nationwide

Dr Rebecca Slinn

Consultant Psychiatrist

MBBS MRCPsych



Dr Rebecca Slinn is a Consultant Psychiatrist based in South West England.

Dr Slinn has over 30 years' experience practicing in general adult and old age psychiatry; working as a consultant for over 24 years with a wide range of experience in hospital, the community and different jurisdictions in the UK. Dr Slinn worked in the NHS from 1991-2012 and now practices in the independent sector. She is fully accredited for Continuing Professional Development by the Royal College Psychiatrists.

Dr Slinn has expertise in all areas of general adult psychiatry, psychosis, mood disorder, trauma, personality disorder, anxiety disorders, eating disorder, addiction, older adult psychiatry including cognitive impairment, dementia, capacity assessments including testamentary capacity, presentations of psychiatric disorder on old age.

Medico- legal experience includes:
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Contact: Secretary, Amanda Haffner - Tel: 0117 4350070
Email: a.haffner@theprivatepsychiatrygroup.com - Website: theprivatepsychiatrygroup.com
Litfield House, 1 Litfield Place, Clifton Down, Bristol, BS8 3LS

Dr Andrés Herane-Vives

Consultant General Adult Psychiatrist I Expert in Medicolegal Psychiatry

BSc, M.D, MSc, MPhil, PostDip, Ph.D., PostDoc, Senior Fellow

Dr Andrés Herane-Vives is a highly experienced Consultant Forensic Psychiatrist with extensive clinical and medicolegal expertise in both the United Kingdom and Chile. His career spans over a decade, during which he has been involved in complex forensic cases, high-risk psychiatric assessments, and expert witness work across multiple legal jurisdictions.

Forensic Psychiatry Expertise
Dr Herane-Vives has worked in forensic psychiatry in both public and private healthcare systems, providing psychiatric assessments and expert opinions for criminal and civil cases. His UK-based work includes consultant roles in forensic psychiatric services, evaluating offenders within the criminal justice system, high-security hospitals, and community forensic services. His Chilean forensic experience encompasses psychiatric evaluations in legal proceedings, working with governmental agencies, and consulting on forensic psychiatric policy.

Medicolegal Experience
Dr Herane-Vives has a strong background in medicolegal work, having contributed expert psychiatric reports for a broad range of cases, including:
Criminal defense and prosecution cases (fitness to plead, diminished responsibility, insanity defense).
Mental capacity and competency assessments for civil litigation and testamentary capacity disputes.
Employment Tribunal cases, providing psychiatric evaluations on workplace mental health claims.
Personal injury claims, assessing psychological trauma and PTSD in civil lawsuits.
Medical negligence cases, offering psychiatric opinions on the impact of clinical malpractice.

His deep knowledge of the intersection between psychiatry and the law has made him a sought-after expert witness in court proceedings, where he has provided evidence in complex legal disputes. He has worked closely with solicitors, barristers, and judicial bodies to ensure comprehensive and unbiased psychiatric evaluations.

Commitment to Medicolegal Justice
With many years of experience dealing with complex cases, Dr. Herane-Vives remains dedicated to ensuring that psychiatric evaluations are conducted with rigor, objectivity, and fairness. His work continues to contribute to the advancement of forensic psychiatry in both clinical and legal settings.

Dr Andrés Herane-Vives can undetake reports in both English and Spanish.

Tel: +44 (0)1253 670 416
Email: andres.herane@tenharleystreet.co.uk - **Website**: www.tenharleystreet.co.uk
Address: 10 Harley Street, London, W1G 9PF - **Area of work:** London and Nationwide

O'Connell v MOD: an expert's approach to evidence and honesty

by Emma Hague, Clyde & Co LLP

The recent High Court decision in O'Connell v Ministry of Defence [2025] EWHC 2301 (KB) is one that deserves the attention of both personal injury lawyers and medico-legal experts alike.

Not only does it involve the Animals Act 1971, but it also delivers a clear reminder of how expert evidence can influence findings of fundamental dishonesty. The judgment - particularly paragraphs 118 to 130 - provides valuable insight into how the court assesses expert contributions when honesty is in question.

The background

The claimant, a gunner in the Royal Horse Artillery, brought claims in both negligence and under the Animals Act 1971 after being thrown from a horse during the course of her employment. She sustained a serious injury to her left shoulder, specifically a significantly displaced clavicle fracture, which required open reduction and internal fixation.

Despite surgical success, she continued to report severe pain, numbness, and restricted movement, ultimately claiming substantial damages for ongoing disability. Her case included assertions of being fit for part-time work only, a need for care and assistance, and even the cost of an automatic vehicle due to her alleged inability to use her left arm.

The defendant's case and surveillance evidence

The defence challenged the extent of the claimant's reported limitations.

Pain expert Dr McDowell observed that neither he nor the orthopaedic surgeons could identify a clinical explanation for her ongoing symptoms. Importantly, he noted an absence of muscle wasting, which would have been expected if the claimant truly avoided using her arm.

In light of these inconsistencies, the defendant obtained surveillance footage. The claimant was seen using her left arm freely and driving a manual car, contradicting her earlier claims. Further evidence revealed that she had attempted to mislead the court, including presenting false witness evidence and concealing the replacement of her car.

Expert evidence - speaking (or staying silent) matters

All medical experts were invited to comment on the surveillance footage.

- The defendant's orthopaedic expert, Mr Smith, concluded that the footage showed voluntary non-use of the arm and that the claimant had full, normal function.
- Both orthopaedic experts agreed that there was no orthopaedic explanation for her reported disability.

Dr McDowell maintained that the footage confirmed his earlier opinion – that her reported limitations were inconsistent with objective findings. While acknowledging that veracity is ultimately a matter for the court, he provided a clear, well-reasoned view to assist the judge.

By contrast, the claimant's pain expert, Professor Lalkhen, adjusted his diagnosis after viewing the footage but did not comment on the claimant's honesty. His second report notably lacked any discussion of "issues of veracity" or "malingering symptoms", something the court explicitly noted.

The finding

The court found the claimant to be fundamentally dishonest. In doing so, the judge observed that silence from an expert can itself be telling – an inference could be drawn from Professor Lalkhen's decision not to engage with the issue of veracity.

By contrast, Dr McDowell was praised for the clarity and balance of his assistance. As the court stated:

"It was put to Dr McDowell in cross-examination that

his comments that he would expect to have seen muscle-wasting if the claimant was as disabled as she said she was, involved him departing from his role as an expert and trespassing into the court's territory. I disagree with that. Both he and Professor Lalkhen assisted the court by sharing what they would expect to see in a patient with the claimant's history and presenting complaints. As I have made clear in the paragraphs above, I consider that, if anything, the court and the parties would have been assisted by more comment from Professor Lalkhen, not by less from Dr McDowell."

Key takeaways

This case serves as a strong reminder that while honesty is for the court to determine, expert opinion remains invaluable. Courts rely heavily on medical experts to interpret clinical findings and contextualise inconsistencies in the evidence.

An expert's measured but candid opinion can make a significant difference - and sometimes, as seen here, silence can speak volumes.

The judgment reinforces the principle that experts should not shy away from offering views on credibility when those views are rooted in objective medical evidence and expressed with respect for the court's role.

When Pain Persists: Why Chronic Pain Cases Demand Early Identification

by Philip Nicholas, Legal Director & Lee Cook, Partner at Weightmans

Early identification of chronic pain cases is often difficult. A case involving seemingly modest injuries at the outset can often end up evolving into a costly claim for Insurers.

The analysis of our data reveals why early identification (and subsequent settlement) of such cases is at times problematic. However, if defendants and their insurers can identify these claims at the earliest possible stage the potential financial benefits are significant.

We examined our database of settled large loss claims and found that alongside tetraplegic cases, chronic pain cases have the longest average period from the date of accident to date of settlement, at 1,331 days (approximately 3 and a half years).

Where our data most starkly demonstrates the potential difficulties identifying chronic pain cases is when looking at the period between the date of accident and the date when instructions are received from Insurers. The chronic pain injury type has far and away the longest period between date of accident and date of instruction, at an average of 823 days (approximately 2 ¼ years). For comparative purposes, the injury type with the second longest period has a period of 485 days (nearly 11 months less compared to chronic pain cases).

A natural question which follows is: do chronic pain cases also have the longest average period between receipt of instructions and settlement? In short – no, far from it. Our data demonstrates that the average period from the date of instruction to date of settlement for a chronic pain case is the third lowest of the injury types, at 508 days. For comparative purposes, the injury type with the longest average period from instruction to settlement is tetraplegic injury at 1,165 days, and the shortest average period is orthopaedic injury, at 427 days. The overall average period from date of instruction to date of settlement across all cases of all injury types is 630 days.

Early identification of a chronic pain case has the obvious and immediate benefit of enhanced insight as to the claim's potential value. Armed with this knowledge, claim strategies and early settlement offers are better informed. Similarly, early settlement coupled with swifter panel instruction can also have the additional advantage of reducing the ultimate monthly "burn rate" cost of the case. Our data shows the average chronic pain case has a monthly burn rate of £8,341.

It is important that insurers spot potential red flags early in what can be difficult circumstances when there may be little engagement from the claimant and their team in some cases. Insurers in these scenarios are too often left in the dark as to the claim's true potential value. This approach also makes it more difficult to alter the claim's trajectory once multi-disciplinary medical reports are obtained and treatment programmes are already in place.

So, how can Insurers spot potential red flags and other issues to identify sooner the potential of a chronic pain case developing? One or more of the triggers below may indicate a person is susceptible to develop or suffer a pain condition:

- Ongoing symptoms greater than 6 - 12 months.
- Pain and disability exhibiting without cause.
- Deteriorating symptoms.
- Pain and disability greater than can be explained by underlying physical cause.
- No anatomical or physiological explanation in some cases.
- 50% of neurology outpatients have a functional symptom.
- Are medical records being withheld without cause?
- Is there a 'diagnosis' or any reference to pain in medical records, comments made to experts by a claimant or by an expert generally?

- Look for possible motivational factors as to the benefits of being ill and/or disabled the need for reward for the disability.
- Is there any history of sexual, physical or emotional self-harm, eating disorders, IBS, marital and family problems or financial issues?
- Is the claimant still off work after a long period of time?
- Were there any repeated absences from work prior to the accident?
- Is there a referral to a pain specialist or care expert in terms of further treatment and assistance with recovery?
- Have the claimant's solicitors advised further medical evidence is being obtained or they cannot yet disclose medical evidence?
- Is there any evidence of psychological issues?

If one or more of these red flags are present, then it may be a key indicator in identifying a potential chronic pain case. Proactive steps can be taken following identification to ensure that these cases are carefully managed and claim life cycles reduced. See below for our very helpful chronic pain guide for further information on tactical approaches in these claims to achieve this.

Article published by law firm, **Weightmans**
www.weightmans.com

Determining Reliability in Clinical Negligence Litigation – Evidential and Expert Considerations

by Elizabeth Broadley, Partner & Elinor Colman, Associate at Clyde & Co LLP

Clyde & Co successfully represented a Consultant Upper GI and Bariatric Surgeon, an MDDUS member, at a trial which concerned a decision to undertake balloon dilatation following sleeve gastrectomy surgery.

This decision highlights the importance of the reliability of both factual and expert witnesses in clinical negligence proceedings. Clyde & Co instructed Anna Hughes of 2 Temple Gardens on this case.

Introduction

The Claimant (C) met with the Defendant (D) in 2019 to explore the possibility of weight loss surgery. C elected to undergo the procedure after she had been reviewed by D and his specialist bariatric team, including a dietitian, psychotherapist and bariatric nurse, who found C to be a suitable candidate. Surgery took place in September 2019.

At a review four weeks after surgery, C complained of even sloppy textured food getting stuck in her throat. D performed a barium swallow, which suggested a mild delay or hold up of contrast at the gastro oesophageal junction (GOJ). The Claimant continued to struggle with eating and four weeks later D undertook a diagnostic gastroscopy where he concluded that a possible narrowing may be causing her symptoms. Accordingly, the Claimant was consented for a balloon dilatation, which D undertook. Unfortunately, C suffered a recognised complication of this procedure, a leak of the gastric sleeve, requiring conversion of the sleeve to a gastric bypass. At the time of trial, C was sadly still suffering from ongoing symptoms of vomiting with poor oral intake, and malnutrition.

At the time of issue of proceedings, D was extensively criticised for failing to appropriately consent C for surgery, and for the performance of the sleeve gastrectomy itself. These formed over half of the allegations pleaded. However, just weeks before trial, C discontinued all of these allegations and the focus of the case remained only on the post operative care. This left the following issues to be determined at trial:

i. Whether there had been a breach of duty by D in failing to provide C with reasonable post-operative care following the sleeve gastrectomy;
ii. Whether there had been a breach of duty in proceeding with the balloon dilatation;
iii. Whether the breach(es) of duty caused injury or damage to C.

It was accepted by D in advance of the trial that should breach of duty be established in respect of the performance of the balloon dilatation, then causation would be established in full.

A 3 day trial took place before HHJ Simon at the Royal Courts of Justice beginning in June 2025.

Legal arguments

In support of the allegations of breach of duty, C argued that D and the bariatric nurse failed to document C's reports of difficulties with vomiting and food progression. D and the bariatric nurse gave evidence that such important information would have been recorded had it been reported by C, and indeed when these issues were reported, the bariatric nurse immediately requested D's input, which led to further investigations.

It was also argued by C that as there was no good evidence of stricture on the barium swallow, further conservative treatment measures should have been attempted before embarking on the dilatation. This was supported by the evidence of the Claimant's expert Upper GI/Bariatric Surgeon, who was strongly of the view that balloon dilatation was only to be conducted in the presence of confirmed stricture. However, as the trial progressed, this expert was unable to provide concrete definitions

of the terms "stricture", "stenosis" and "narrowing" which led to him lacking a coherent basis for the position he adopted. He sought to add that C's symptoms could be alternatively explained by dysmotility, but ultimately conceded that narrowing was top of the list of possibilities.

D argued that the barium swallow did evidence stenosis, as supported by the opinion of his expert Upper GI/Bariatric Surgeon. D's expert was praised by the Judge for his careful and intelligible explanation of what was encompassed by "stricture", "stenosis" and "narrowing", and made clear in his opinion that the evidence of stenosis made the performance of the balloon dilatation reasonable.

Judgment was reserved and handed down in October 2025.

Outcome

The Claimant's claim was dismissed. HHJ Simon acknowledged the extremely serious consequences that C suffered as a result of the sleeve leak, and expressed the Court's every sympathy for C's serious and continuing health challenges. However, he concluded that the claim against D was simply not made out, even on the more limited basis advanced at trial.

The Judge was not persuaded that the support offered by the team to C was anything other than a reasonable equivalent of what would be offered in the NHS. It was improbable that D or his team would not have documented communications from C concerning highly relevant and important information such as her difficulties with vomiting or food progression, and D's MDT working model was found to be a perfectly proper system for sharing expertise and being patient-focussed. The Defendant and his clinical team were found to be credible witnesses and their evidence was reliable.

HHJ Simon accepted D's evidence that the holistic picture was highly suggestive of narrowing in the area of the GOJ. Further, he found that the Defendant's expert had considered the relevant literature thoroughly, roundly undermining the explanations put forward by his counterpart. The Claimant's expert was criticised for not clearly having at least a basic understanding of the legal parameters within which he was asked to express his opinion, for his evidence being difficult to understand due to his inconsistent use of terminology, and for not responding adequately to cross-examination. This was contrasted with the evidence of the Defendant's expert, who was entirely coherent and supported his opinion by reference to the medical literature.

Learning points

1. A Claimant need not be found dishonest for their evidence not to be accepted. The Claimant's credibility was not criticised by the Judge (or indeed the Defendant) at trial, but the Judge acknowledged it would be surprising if the passage of time and traumatic nature of the events did not have a detrimental impact on her recollection. This goes to show that factual evidence can be challenged on reliability, without having to pursue any allegations of dishonesty.
2. It is important to evidence how a clinical team can work together, not just as individuals, to support a patient's journey. Having a robust MDT model in place, and calling other members of the MDT as witnesses, can help to prove the level of support provided to patients.
3. Finally, it is crucial that a party's expert is able to demonstrate an adequate understanding of the Bolam test and justify their evidence with clarity, being able to explain complex terminology as necessary.

Mr Simon Clarke

Consultant Paediatric Surgeon

BSc. MBBS. FRCS(Eng.) FRCS(Paed Surg)

Mr Simon Clarke is a Consultant Paediatric Surgeon, at the Portland and Cromwell hospitals.

Mr Clarke's training took place in London at the globally renowned Great Ormond Street Hospital (GOSH) as well as at Chelsea and St George's. He was also given the opportunity to train in Oxford and Hong Kong, giving him an even broader knowledge of surgical procedures such as minimal access surgery.

With over 35 years of experience with 21 as a consultant at Chelsea & Westminster Hospital, London. He provides first-class surgical expertise for a wide range of conditions, including hernias (umbilical and inguinal), undescended testicles, gastrointestinal disorders such as gastro-oesophegal reflux disease (GERD) and hydrocele.

He is highly skilled in surgical procedures such as minimal access surgery (keyhole surgery), circumcision, neonatal surgery, emergency children's surgery, appendicitis, laparoscopy and endoscopy. In fact, from 2018 to present, he has been the president of the British Association of Paediatric Endoscopic Surgeons (BAPES).

Mr Clarke undertakes cases mostly within the medico-legal report field. He has acted on behalf of numerous medicolegal clients on a wide range of cases across England and Northern Ireland.Undertaking between 1-3 cases per year with a 70:30 split ratio of Plaintiff : Defendant.

Mr Clarke has completed 16 medico-legal reports between 2017-2024. He has also assisted the General Medical Council in a fitness to practice review in 2020 and, has attended two meetings of Liability Expert prior to possible court proceedings.

He also participates in the training of future surgeons as an honorary senior lecturer at Imperial College London. He is widely published and undertakes research projects.

Contact: Mario Polo
Tel: 0203 006 5920 - Mobile: 07931 177 787
Email: contact@londonpaediatricsurgeon.com
Alternate Email: sclarke3005@me.com
Website: https://www.londonpaediatricsurgeon.com

Dr Theo Polychronakis

Consultant in Paediatrics and Paediatric Respiratory medicine

Medicinae Doctor (M.D.) Aristotle University of Thessaloniki, Greece, Master of Science in Allergy (Imperial College, London)

A highly experienced Consultant in Paediatrics and Paediatric Respiratory Medicine at Addenbrooke's Hospital.

Key clinical leadership roles include service lead for Paediatric Respiratory Medicine in Cambridge UK.

Expertise spans asthma and preschool wheeze, sleep-disordered breathing, long-term ventilation, cystic fibrosis, and complex airway management, underpinned by extensive specialist training at leading centres such as Great Ormond Street and the Royal Brompton Hospital.

Actively involved in clinical governance, service innovation, and research, with multiple publications and presentations at international conferences. Leads a regional sleep service and has pioneered integrated, multidisciplinary models of care and novel service pathways to improveoutcomes for children with chronic respiratory conditions.

Contact: Theo Polychronakis
Email: info@cpmla.co.uk
Website: https://www.drpolychronakis.co.uk
Alternate Website: https://www.cpmla.co.uk
Area of work: Cambridge and Nationwide

Dr Stephen Warriner

Consultant Paediatrician – Specialist Interest in Paediatric Neurology & Epilepsy

MBChB MRCPCH

Stephen is a Consultant General Paediatrician with nearly 30 years' experience in paediatric medicine, specialising in paediatric neurology and epilepsy. He provides independent expert witness reports in cases involving general paediatric conditions, paediatric neurological conditions, epilepsy management, diagnostic delay, and standards of care.

Areas of Medico-Legal Expertise

- Paediatric neurology and epilepsy (diagnosis, management, follow-up)
- Febrile seizures, status epilepticus, complex epilepsy syndromes
- Developmental delay and neuro-disability
- Neurological consequences of perinatal injury or hypoxia
- Standards of care in paediatric neurology
- Medication errors and seizure management protocols
- General paediatric conditions including acute and chronic illnesses, growth and development concerns, and common childhood illnesses

Medico-Legal Practice

I have acted as a medico-legal expert previously, instructed by both claimant and defendant solicitors.

- Experience giving oral evidence in paediatric safeguarding cases.
- Reports prepared in compliance with CPR Part 35 and Family Procedure Rules Part 25.
- Undertake condition and prognosis, breach of duty, and causation reports.

Turnaround time: 4 weeks from receipt of full papers.
Report types: Desktop reports, full assessments, joint reports.

Email: stephen.warriner@hampshirepaediatricians.co.uk
Alternate Email: stevewarriner@me.com
Telephone: 0770 305 3384 | **Area of work:** Portsmouth, UK

Mr. Tom Crompton

Children's Orthopaedic Consultant

Mr. Thomas Crompton is a children's orthopaedic consultant at The Royal Alexandra Children's hospital in Brighton. Thomas's interests span the range of children's orthopaedic conditions, including neuromuscular conditions such as cerebral palsy. He also has a special interest in children's trauma. He provides children's orthopaedic services across Brighton and London.

As an orthopaedic consultant, Mr. Crompton has experience with preparing clinical negligence and medical reports for a wide range of medico-legal cases.

He can write medico-legal reports for all children's orthopaedic conditions, including trauma. He can also produce expert witness reports for clinical negligence, breach of duty, liability, and causation for children's orthopaedics, whether elective or trauma.

Approximately 50 reports per annum.

Defendant: Claimant split approximately 20:80

Mr. Crompton's specialities include:

- Children's trauma and fractures: Mr. Crompton runs the children's trauma service in Brighton, which is one of the busiest children's trauma units in the UK.
- Opinions on all children's trauma including negligence work.
- Childhood hip conditions: Including DDH, SUFE and Perthes disease.

Email: admin@childrensorthopaedics.co.uk
Website: www.childrensorthopaedics.co.uk

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Toby Talbot
BDS MSD (Univ of Washington)
FDS RCS (Eng)

toby@tobytalbot.co.uk
tobytalbot.co.uk
+44 1225 426 222

Holding the Risk in Medical Treatment Cases

by Alex Ruck Keene

Re RS (Best Interests: Surgery and Intensive Care) [2025] EWCOP 38 (T3)[1] is a case which demonstrates the care and thought which – rightly – should go into ensuring that those with cognitive impairments are put forward for appropriate physical procedures, and also contains some very helpful wider observations about the role of the courts in such cases.

The person concerned was RS, a 18 year old man with a complex range of physical and cognitive impairments. The procedure envisaged was surgical correction to curvature of his spine. However, the choice was a stark one:

> *35. [...] There is no conservative treatment that will help RS's scoliosis. There is no safe way of offering him surgery without the elective post-operative intensive care under heavy sedation, intubation and mechanical ventilation. He either has the corrective surgery and post-operative mechanical ventilation or he has no treatment for his scoliosis at all.*

RS lacked capacity to consent or to refuse consent to the treatment, and, as Poole J noted at paragraph 2:

> *Notwithstanding a long and detailed medical decision-making process, concerns remain that the way forward in RS's case is finely balanced. In fact there is a broad measure of agreement between RS's mother, GH, the surgeon who would carry out the operation, independent expert witnesses, the providers of a second opinion to the treating clinicians, and the Official Solicitor, acting as RS's Litigation Friend. No party contends that the proposed treatment is contrary to RS's best interests. However, all involved agree that the decision is finely balanced and the healthcare professionals who would provide the post-operative treatment are particularly anxious for confirmation from the Court that it will be in RS's best interests.*

The reference to 'finely balanced' was a reference to the guidance contained in Applications Relating to Medical Treatment, [2020] EWCOP 2[2], which, in turn, drew on the decision of the Supreme Court in NHS Trust v Y. That guidance made clear that, where the decision is finely balanced, "it is highly probable that an application to the Court of Protection is appropriate. In such an event consideration must always be given as to whether an application to the Court of Protection is required;" if the decision related to life-sustaining treatment, the guidance went on to provide that an application to the Court of Protection must be made.

In RS's case, the treatment was not life-sustaining or life-giving (which may explain why the application was not brought by the treating bodies, as would be expected, but rather by RS's mother), but it would have implications for RS's life expectancy.

Poole J gave a very helpful explanation of his approach to the question of (in effect) the legitimacy of a judge making the decision as to whether the surgery should proceed:

> *36. Medical professionals are much more experienced than judges in making decisions about whether a particular treatment or operation is in a patient's best interests but in this case, as Dr Tremlett put it, after months of intense assessment and discussion, he and other professionals of enormous experience have oscillated. They regard this as a finely balanced decision. In accordance with the guidance referred to at the outset of this judgment, the decision has properly been brought to Court of Protection for resolution.*

> *37. Whilst NHS Trusts and clinicians have to take into account other matters such as the allocation of resources and the impact on others of providing or not providing the proposed treatment, the Judge in the Court of Protection is required by statue only to consider the subject individual's best interests. The Court cannot require resources to be allocated or force clinicians to provide treatment they are not willing to provide, but when there are choices to be made*

between available options, then the entire focus is on the individual's interests.

> *38. The assessment of best interests includes, but is not limited to, consideration of the risks and benefits of proceeding with the planned treatment, and of not doing so. Evidence about risks and benefits requires careful consideration. Unavoidably, the evidence before the Court tends to focus on numerical assessments of risk and benefit, such as a 40% chance of a risk occurring, or a 5 year extension of life expectancy. In many cases, including the present case, such evidence has to be treated with caution. Predictions cannot be made with precision when they are based on very limited data. There are no large studies of 18 year olds having elective heavy sedation and mechanical ventilation for two to three weeks after corrective surgery for scoliosis. If not unique, the plan for RS is extremely unusual. The Court relies on expert and professional opinion evidence but in this case much of that evidence is based on personal experience.*

> *39. Decision-makers have to look forward and so have to deal with uncertainty. It is a frequent mistake to believe that if something goes wrong after a decision then the decision must have been wrong. If a decision-maker choses option X over option Y because X has a 90% chance of success and Y has only a 50% chance of success, and X fails, it does not mean that they made the wrong choice. There is rarely a risk free option, and there certainly is not one for RS. Where there is risk, there is the possibility of a poor or even a fatal outcome, but risk is inevitable, in particular when the decision to be made is finely balanced.*

> *40. When choosing to take a course of action that carries risk over a course of inaction, a decision-maker may feel personally responsible for every risk that then occurs. That may be especially so for clinicians and family members closely connected to the individual concerned. But they would have been equally responsible for the consequences of not acting. A decision-maker may feel a greater sense of responsibility for the consequences of a decision to act as opposed to a decision to do nothing, but for the person who suffers the consequences there is little difference.*

> *41. Judges are not inherently better at assessing risks and benefits than those intimately concerned with a person's care and treatment, including parents and medical professionals, but there are differences:*
>
> > *41.1. Judges have some distance from the person whose treatment is under consideration. Unlike those intimately involved with the individual's care, judges will not have responsibility for carrying out the treatment, dealing with complications, or living with the direct consequences of the decision.*
>
> > *42.2. Judges can hear evidence from key witnesses, including independent experts, scrutinised by experienced Counsel, in a formal court setting to assist them to assess risks and benefits and to assess best interests.*
>
> > *42.3. Judges can take a neutral overview having taken into account the family's perspective and the clinicians' perspective.*

> *43. It might be argued that some of these differences place judges at a disadvantage. Some would say that fundamental decisions about a person's medical treatment should be made by those who know them best and who will be living with the consequences. However, the law requires that when disputed or finely balanced decisions regarding medical treatment of this kind are brought before the Court, it is the Judge who makes the decision as to what is in the person's best interests, applying the principles and provisions of MCA 2005. Court procedures are designed to ensure fairness to all the parties involved. The process requires the judge to be objective. Responsibility for the decision is taken away from the family and the clinicians who may find objectivity difficult to achieve and is placed in the hands of the Judge. Precisely because the Judge is one step removed from the day to day care of the individual, they may find it easier to take a balanced overview than those with a particular, personal perspective.*

In RS's case, Poole J found that the benefits of proceeding outweighed the (significant) risks to RS, and that, taking into account all the circumstances, including the views of GH and others concerned with his welfare, it was in his best interests for the surgery to proceed. As he made a point of doing (for different reasons) in the recent case of KP[3], Poole J emphasised that the buck stopped with him:

> *51. The responsibility for this decision is now the Court's. I was told that GH did not want to bear the weight of responsibility herself. She wanted all the clinicians to agree. That has not quite been achieved but she should know that whilst her evidence is of considerable assistance, the decision is not hers and the responsibility for the decision lies with the Court. Likewise, the treating clinicians, including those with doubts about the merits of the decision, can focus on giving RS the best possible care without worrying that they made the wrong call.*

Conclusion

Reading this judgment was in some ways mildly surreal, as I did so under 24 hours after having recorded a conversation with Professor John Coggon[4] about whether mental capacity law is law, in which we got quite deep into what judges are doing and why. Poole J's observations almost read like he had been privy to that conversation. They

also resonate with a longer-standing debate about whether there is 'overreach' by the law into medical decision-making, as well as a more recent one about whether and when it is sensible to approach the court to assist with clinical unease.[5]

For my part, and whether or not it is conceived as a conventional role for a court, I have always found it to be hugely important, and helpful, for judges to be able to hold risks that – for whatever reasons – are ones that cannot be held by those involved in the person's care. Such can be necessary in a case like RS's, where the desire was to act, but in a situation where there were inherent risks in acting. It can also be necessary in a case such as that Re RC[6], where those involved considered that not acting was the ethically right thing to do, but were legitimately concerned at the risk to them of the consequences of doing so. Poole J's judgment provides a clear measure of reassurance that he, at least, is someone who is willing and able to bear the weight of risks on his shoulders.

References

1 [2025] EWCOP 38 (T3)

2 [2020] 3 All ER 873, [2020] 1 WLR 641, [2020] WLR(D) 30, [2020] Med LR 55, [2020] WLR 641, [2020] EWCOP 2, [2020] COPLR 205

3 [2025] EWCOP 35 (T3)

4 mentalcapacitylawandpolicy.org.uk/is-mental-capacity-law-law-in-conversation-with-professor-john-coggon/

5 Wren B, Ruck Keene A. Can the courts be viewed as an appropriate vehicle to settle clinical unease?. Journal of Medical Ethics 2024;50:452-459.

6 [2014] EWCOP 1317

If You Change Your Mind: A closer look at CPR 36.10

by Charlotte Wilk, Barrister at Gatehouse Chambers

In *Chinda v Cardiff & Vale University Health Board* [2025] EWHC 2692 (KB) the court found that there must be some significant alteration in the circumstances of a case which would justify an offeror withdrawing or changing the terms of an offer, and the Claimant's vulnerability (when viewed in tandem with other factors) did not meet this test; the Claimant was held to his Part 36 offer, with the court declining permission to withdraw it.

The Background

An application by the Claimant dated 29 July 2025, seeking permission to withdraw his part 36 Offer made on 2 July 2025, came before Master Cook. The background to the Claim is that the Claimant alleged a delay in diagnosis of spinal tuberculosis relating to neurological injury. It is admitted that the Defendant, in breach of duty, failed to arrange MRI scanning when the Claimant attended A&E in August 2020.

The Claimant is now 35, and by reason of his injuries, is essentially paraplegic. He suffers from neuropathic pain, paraesthesia and burning sensations in his back and lower limbs as well as bladder, bowel and sexual dysfunction. The Claimant has had a syrinx which according to the Claimant's neurosurgery expert, gives rise to a small but material risk of future deterioration of the neurological function in his upper limbs, as well as a small risk that he may suffer further deterioration to his bladder, bowels and sexual dysfunction.

The Defendant admitted several breaches of duty in the Defence dated 6 June 2023, and judgment was entered for the Claimant with quantum to be assessed. A trial on quantum was scheduled for 2 October 2025.

The settlement negotiations

An RTM was arranged for 1 July 2025, prior to which all directions had been complied with, except for experts' discussions and joint reports. On the day of the RTM, offers were exchanged but settlement could not be reached because the Claimant wished to settle on a provisional damages basis, and the Defendant did not have authority to settle on that basis. As the RTM drew to a close, it was agreed that the Claimant would propose new terms (including as to provisional damages) on which he was prepared to settle.

The next day (2 July 2025), the Claimant's solicitors made a Part 36 offer which included a retained lump sum, a variable periodical payments order and an order for provisional damages. This offer was made on the basis of instructions given by the Claimant at the RTM on 1 July 2025.

On 8 July 2025 the Claimant's solicitor wrote to the Defendant to put them on notice that the Claimant wished to withdraw the Part 36 offer made on 2 July. However, that offer was accepted by the Defendant on 22 July 2025.

The Claimant wished to settle his Claim on the basis of a lump sum damages award and an order for provisional damages calculated on the basis that the lump sum award would be equal in value to the lump sum and variable periodical payments contained in the Defendant's Part 36 offer. The offer was made in writing on 29 July 2025. The quantum trial was vacated hence the matter fell to be considered by Master Cook.

The CPR

The following rule, CPR 36.10, fell to be considered:

(1) Subject to rule 36.9(1), this rule applies where the offeror serves notice before expiry of the relevant period of withdrawal of the offer or change of its terms to be less advantageous to the offeree.

(2) Where this rule applies–

(a) if the offeree has not served notice of acceptance of the original offer by the expiry of the relevant period, the offeror's notice has effect on the expiry of that period; and

(b) if the offeree serves notice of acceptance of the original offer before the expiry of the relevant period, that acceptance has effect unless the offeror applies to the court for permission to withdraw the offer or to change its terms–

(i) within 7 days of the offeree's notice of acceptance; or

(ii) if earlier, before the first day of trial.

(3) On an application under paragraph (2)(b), the court may give permission for the original offer to be withdrawn or its terms changed if satisfied that there has been a change of circumstances since the making of the original offer and that it is in the interests of justice to give permission.

It was not in dispute that, as the Defendant had accepted the Claimant's Part 36 offer before the expiry date of the relevant period, that the Claimant required the court's permission under r.36.10(2)(b) to withdraw the Part 36 offer. The court therefore needed to consider whether there had been "a change of circumstances" and whether it "[was] in the interest of justice to give permission" for that offer to be withdrawn.

A Wholly Different complexion?

The White Book commentary at 36.10.1 was considered, including its reference to *Wolverhampton Hospitals NHS Foundation Trust* [2015] 1 WLR 4659, and Leggatt J's remarks at [52]:

> *"The test to be applied when the court is considering whether to give a party permission to withdraw a Part 36 offer is whether there has been a sufficient change of circumstances to make it just to permit the party to withdraw its offer. That test was set out by the Court of Appeal in relation to payments into court in Camper v Pothecary [1941] 2 KB 58 at 70. The Court of Appeal gave as examples of such circumstances "the discovery of further evidence which puts a wholly different complexion on the case ... or a change in the legal outlook brought about by a new judicial decision..." This test was adopted in relation to Part 36 payments by the Court of Appeal in Flynn v Scougall [2004] 1 WLR 3069, 3079 at para 39. I see no reason why the test should be different in relation to a Part 36 offer and, as mentioned earlier, the defendant's application to withdraw its Part 36 offer was made on the basis that this is the applicable test."*

The case of *Retailers v Visa* [2017] EWHC 3606 (Comm) was also considered. At paragraphs [37]-[38] of the *Retailers* case it was noted that:

> *"37 . It is accepted that there must be more than a change in the parties' evaluation of known or existing facts or evidence. There must be new evidence which puts a wholly different complexion on the case or a change in judicial outlook by a judicial decision, such as that of the House of Lords in Benham v Gambling, which changed the whole approach of the courts to the measure of damages for loss of expectation of life without actually changing the law. That was the position in Cumper v Pothecary.*
>
> *The tenor of the examples given suggest that what is envisaged is some radical alteration in circumstances which would justify an offeror departing from the valuation it had placed on the case when making the offer it did."*

Counsel for the Claimant drew the court's attention, inter alia, to the amended text of the overriding objective (in particular, PD 1A) which focusses on vulnerability. He also focussed on several other factors, including excerpts from the Claimant's witness statement in which the Claimant described his struggles with processing the settlement negotiations due to fatigue.

Counsel for the Claimant submitted that there was no injustice in permitting a seriously injured claimant to change his mind about the form of award he wished to accept (lump sum / PP) in circumstances where alternative offers had previously been made by the defendant. He suggested that there were multifarious factors which, when placed alongside the Claimant's medical vulnerability, would meet the *"change of circumstances"* test. He submitted that a person could be considered vulnerable by reason of a factor (personal, situational / permanent or temporary), which might affect their ability to participate in proceedings, and that this vulnerable condition could amount to part of the relevant circumstances. He also argued, amongst other things, that the lump sum offer of £7,350,500 was identical to the lump sum offer made by the Defendant at the RTM, and that in respect of provisional damages – the offer dated 29 July 2025 was actually more generous to the Defendant than the terms of the offer dated 2 July 2025.

In essence, he submitted that in reality – there was no difference between the Claimant's original and revised Part 36 offer.

Counsel for the Defendant submitted that the reports of the neurosurgical, care, and physiotherapy experts supported the proposition that the Claimant is known to suffer from fatigue and pain, with good and bad days. She submitted that this was not new and could not constitute a radical change of circumstances: a change of mind could was not a change of circumstances. Counsel for the Defendant also placed emphasis on two key factors:

- During the RTM, the Claimant only made offers on the basis of a retained lump sum and indexed periodical payments; no offers were made on a lump sum only basis. The Part 36 offer made the following day was consistent with this.
- The Claimant's Part 36 offer was not made at or immediately after the RTM on 1 July, which finished at around 4:25pm. The offer was made the following day at 3:42 by which time the Claimant had ample time to rest and reflect

upon the exchange of offers at the RTM, as well as time to reflect on advice he had received on those offers and to instruct his solicitors to delay making any offers until he had discussed the case with his family.

The self-contained code strikes again: avoiding an "unacceptable degree of uncertainty"

Master Cook noted that it was not suggested to him that the Claimant might be vulnerable in the sense that his ability to instruct his representatives might be adversely affected. In fact, at all times the Claimant was represented by a specialist personal injury firm who were presumably aware of his difficulties, particularly given such difficulties were referred to within the expert medical reports obtained by the firm. Master Cook remarked that [at 35]:

> *"In the circumstances, if there had been any such real concern on their part I would have expected the solicitors to raise the issue or at least ensure that their client had sufficient space in which to give his instructions to them. In my judgment this situation is far removed from that in which directions under paragraph 8 or special measures under paragraph 10 of the PD are required."*

As had been repeatedly recognised in the case law, CPR Part 36 is a self-contained procedural code: it is highly structured and prescriptive with restricted discretion [36]. As such, Master Cook accepted Counsel for the Defendant's submissions that a change of mind cannot amount to a change of circumstances for the purpose of CPR r.36.10(3). To find otherwise would introduce "*an unacceptable degree of uncertainty*" [38] into a code designed to ensure predictability and certainty. As such, a significant alteration in the circumstances surrounding a case must be identified in order for an offeror to justify the withdrawal of an offer. The Claimant would therefore be held to his Part 36 offer.

As identified by the Master himself, the case law is couched in references to the self-contained nature of the Part 36 regime. When practitioners are faced with knotty problems arising out of Part 36 such as these, it is always important to go back to basics, and to consider the tenor and purpose of the regime – after all, procedural self-containment is expressly enshrined in CPR 36.1(1).

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The Circle Case Management Expert Witness Panel: Raising Standards in Independent Expert Evidence

by Yvonne Spijkerman, Clinical Director

In an era where the credibility and timeliness of expert evidence can shape the outcome of legal proceedings, the role of a reliable, transparent, and skilled expert witness provider has never been more vital. The legal profession depends on independent expertise to bring clarity, impartiality, and authority to complex matters.

Circle Case Management has emerged as a leading name in this field, offering a new standard of excellence through its **Expert Witness Panel**. The panel combines the independence and professionalism of seasoned experts with the structure and support of a dedicated management team, ensuring quality, efficiency, and transparency for every instruction.

This article explores what makes **Circle Case Management's Expert Witness Panel** different, and why solicitors, insurers, case managers, and medico-legal professionals across the UK and Ireland are turning to Circle Case Management as their preferred source for expert witness services.

Independence and Integrity at the Core

One of the key distinguishing features of Circle Case Management is its **independent status**. Unlike larger medico-legal agencies or firms driven by volume-based contracts, Circle Case Management is not affiliated with any single organisation or corporate interest.

This independence allows Circle Case Management's panel to remain **wholly impartial** - a vital principle for expert witnesses whose duty is to the court rather than to any party instructing them. Independence ensures that each expert's opinion is guided solely by their professional knowledge, evidence, and expertise, free from commercial or organisational pressures.

For legal professionals, this provides confidence that every report produced through Circle Case Management is grounded in genuine objectivity and ethical integrity - qualities that are fundamental to the expert witness role and central to the credibility of any court report.

A Select Panel of Highly Skilled Experts

Circle Case Management does not operate an open marketplace model. Instead, it offers a **carefully curated panel** of experts who have been **hand-selected** based on their qualifications, professional standing, and proven ability to produce high-quality court-compliant reports.

The panel includes specialists across a wide range of disciplines, such as:

- **Vocational rehabilitation**
- **Care**
- **Tissue Viability**
- **Occupational therapy**
- **Physiotherapy**
- **Speech and language therapy**
- **Nursing and care assessments**
- **Psychology and neuropsychology**
- **Social work and independent living assessments**

Each expert is vetted not only for their professional expertise but also for their experience in **medico-legal reporting** - including courtroom experience, report writing skills, and understanding of the Civil Procedure Rules (CPR Part 35) and equivalent standards in Ireland.

The result is a panel that combines deep practical expertise with the forensic rigour required of expert witnesses.

A UK-Wide and Cross-Border Reach

Circle Case Management's Expert Witness Panel is available for instruction **across the United Kingdom** and has rapidly expanded its reach to provide reports in **Ireland**, supporting both plaintiff and defence solicitors, insurers, and rehabilitation providers.

This broad coverage ensures that clients can access the right expert - no matter where they are located - without compromising on quality, consistency, or efficiency.

By maintaining a UK-wide panel, Circle Case Management is also able to provide local expertise when required, which can be particularly beneficial in cases where **regional context**, such as access to care, costings, or local service provision, is relevant to the assessment.

Deferred Payment Options: Supporting Access to Justice

A key feature that sets Circle Case Management apart is its ability to offer **deferred payment arrangements** in suitable cases, subject to approval.

This flexible approach recognises that many legal cases - particularly in personal injury and clinical negligence - are conducted under Conditional Fee Agreements (CFAs) or may have funding tied up until settlement.

By offering deferred payment, Circle Case Management ensures that access to expert evidence is **not delayed or restricted by immediate financial barriers**. Solicitors can proceed confidently, knowing that the expert report will be produced promptly and that payment will follow at an agreed stage in the litigation process.

This financial flexibility reflects Circle Case Management's commitment to supporting both clients and the legal profession in achieving fair and timely outcomes.

Desktop Reports: Efficiency Without Compromise

In addition to full assessments and in-person evaluations, Circle Case Management's panel offers desktop reports where appropriate.

A desktop report is based on a review of records, medical documentation, and other evidence, without the need for a physical assessment. These reports are particularly valuable in cases where:

- The claimant's condition is well-documented;
- Liability or causation issues can be addressed from existing evidence; or
- A rapid turnaround is required.

Circle Case Management ensures that desktop reports uphold the same professional and evidential standards as full reports, offering an efficient, cost-effective option without compromising on quality or independence.

A Transparent, Streamlined Process

From the moment an enquiry is received, Circle Case Management's process is characterised by clarity, responsiveness, and transparency.

At the point of enquiry, the team provides a clear, bespoke quotation tailored to the specifics of the case. This quote outlines not only the expert's fees but also the anticipated timeline and scope of the instruction.

Circle Case Management's support ensures that every stage of the process - from initial instruction to report delivery - is handled efficiently, with regular communication and updates provided throughout.

For legal professionals, this means no hidden costs, no uncertainty, and no unnecessary delays - just a professional, accountable service designed to make the expert instruction process as seamless as possible.

Commitment to Quality and Timeliness

Every member of Circle Case Management's Expert Witness Panel shares a commitment to producing high-standard, court-compliant reports that meet the expectations of both the instructing party and the judiciary.

Each report undergoes internal quality assurance checks to ensure it meets Circle Case Management's standards of clarity, accuracy, and compliance with CPR and court requirements.

Equally important is timeliness. Circle Case Management recognises the pressures facing the modern legal system, where delays can have serious implications for claimants and defendants alike. The panel works diligently to ensure that deadlines are met, and that reports are produced within agreed timescales - without compromising on detail or quality.

Collaborative, Yet Independent

While Circle Case Management provides strong administrative and case management support to both experts and instructing parties, it is careful to maintain each expert's professional independence.

Experts are encouraged to reach conclusions based solely on their expertise and the evidence before them. Circle Case Management's role is to facilitate and support that process - never to influence it.

This balance of support and independence is one of the company's defining strengths. It allows experts to focus on the substance of their work while clients benefit from professional coordination, communication, and accountability at every stage.

Continuous Development and Professional Standards

Expert witness work demands not only technical skill but also ongoing professional development. Circle Case Management invests in its panel members through access to training, peer review, and continuous professional development (CPD) opportunities.

This ensures that experts remain at the forefront of their respective fields, both clinically and legally. Whether through updates on procedural requirements, report-writing standards, or courtroom skills, Circle Case Management promotes a culture of excellence and lifelong learning within its expert network.

Transparency, Trust, and Professional Relationships

At its heart, Circle Case Management's approach is built on trust - trust between the expert and the legal professional, and trust between the panel and the courts.

By maintaining transparency at every stage - through clear quoting, communication, and ethical integrity - Circle Case Management has built long-standing relationships with law firms, insurers, and rehabilitation specialists across the UK and Ireland.

This commitment to openness reinforces Circle' Case Managements reputation as a reliable and principled partner in the delivery of expert evidence.

Why Instruct from the Circle Case Management Expert Witness Panel?

Choosing the right expert can be decisive in any legal case. Instructing through Circle Case Management offers a number of distinct advantages:

- Independence and impartiality – ensuring every report reflects objective, evidence-based opinion.
- A carefully selected expert panel – each member chosen for their expertise, credibility, and professionalism.
- Deferred payment options – supporting cases where funding may not yet be released.
- Desktop reporting – a cost-effective and timely solution where full assessments are not required.
- UK-wide and Irish coverage – providing national reach with local insight.
- Transparent quoting and clear communication – eliminating uncertainty and ensuring accountability.
- Commitment to quality and timeliness – delivering court-compliant reports within agreed timeframes.
- Ongoing professional development – ensuring experts remain current and compliant with best practice standards.

Together, these elements create a service that is comprehensive, ethical, and efficient, meeting the needs of today's legal and rehabilitation sectors.

Conclusion

The Expert Witness Panel at Circle Case Management represents a new standard in the delivery of expert evidence. By combining independence, quality assurance, and administrative excellence, Circle Case Management offers a service that benefits experts, solicitors, and ultimately, the courts.

Through its transparent quoting, deferred payment options, and dedication to timely, high-quality reporting, Circle Case Management ensures that access to expert evidence is both fair and efficient.

As demand for trustworthy, professional expert witnesses continues to grow, Circle Case Management stands out as a beacon of integrity, reliability, and professionalism in the medico-legal field - providing expert reports that the legal profession can rely upon, every time.

For further information or to make an enquiry about instructing an expert witness, please contact:

Circle Case Management

expert@circlecm.com

www.circlecasemanagement.com/expert-witness-panel

0129724145

CIRCLE case management

Dr Saal Seneviratne

Consultant Psychiatrist in Private Practice

MBChB, MRCPsych, Accredited EMDR specialist and practitioner

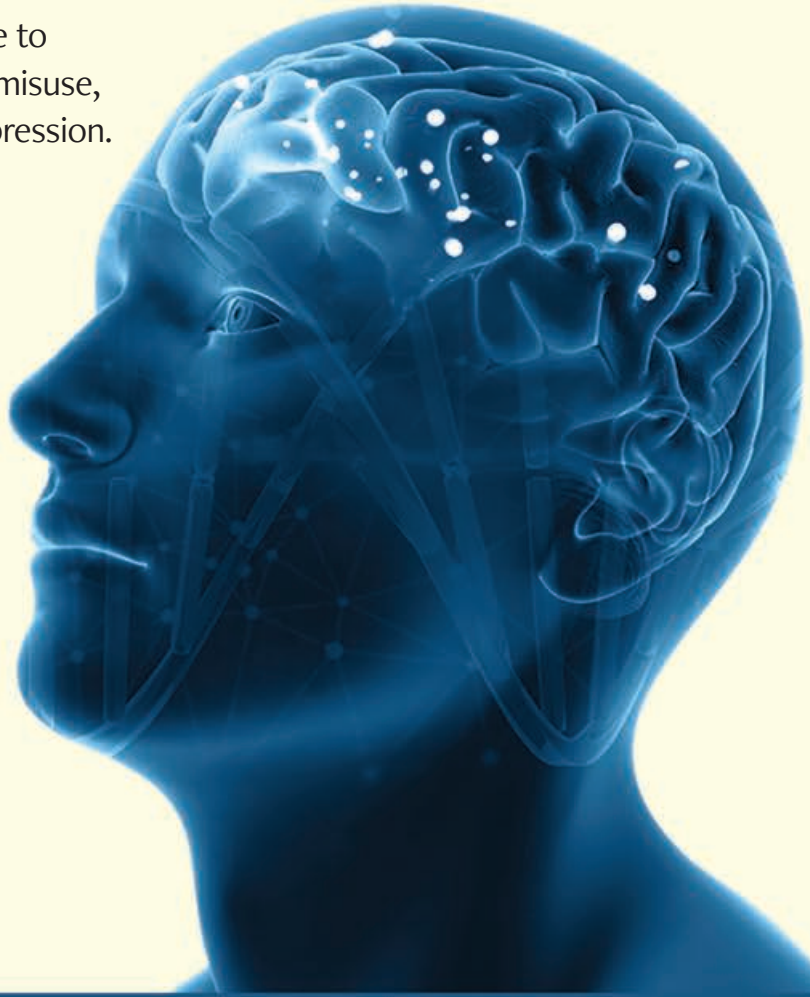
Consultant Psychiatrist | Expert Witness | GMC Assessor | Advisor to the Parliamentary Health Service Ombudsman

Saal Seneviratne is a Consultant Psychiatrist with over 25 years' experience in the assessment and treatment of complex mental illness.

An Expert Witness since 1999 (2,000 + reports and oral evidence 400+ hearings).

His practice includes work with musicians, and professionals in the creative sector through BAPAM.

He specialises in Complex trauma in Adults due to ACEs, mood and anxiety disorders, substance misuse, ADHD, Psychosis, Ketamine Treatment for Depression.



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Contact Name: Saal Seneviratne
Mobile: 44 7827 714164
Email: office@smshealthcareltd.com - Alternate Email: sigiriuk@yahoo.co.uk
Website: www.xpertwitness.co.uk
SMS Healthcare Ltd, 10 Harley Street, London, W1G 9PF
Area of Work, London and Nationwide

Understanding Conflict and Narcissism in Divorce and Separation

by Grainne Fahy & Yasmin Khan-Gunns

Family law is not only about statutes, evidence, and procedure. It is also about human behaviour – how people think, feel, and act when their most personal relationships break down. Every solicitor who practises in this field soon learns that success in a case is as much about managing psychology as it is about managing law.

Why Psychology Matters in Family Law

Divorce, separation, and disputes over children activate powerful emotional responses. Feelings of loss, rejection, fear, and anger can drive behaviour that seems irrational from the outside but makes perfect sense when seen through the lens of grief or trauma.

Clients often experience what psychologists describe as the fight, flight, freeze, or fawn responses. Some may seek control through endless correspondence or financial scrutiny; others withdraw or avoid all communication. Understanding these patterns helps family lawyers tailor their advice, set boundaries, and prevent escalation.

Research by Dr Elizabeth Kübler-Ross and later family psychologists such as Dr Susan Forward shows that people move through stages of denial, anger, bargaining, depression, and acceptance at different speeds. When one partner has reached acceptance but the other is still in denial, litigation risk is at its peak. Timing therefore becomes a psychological as well as a legal consideration.

Recognising Narcissistic Behaviour in Family Cases

In recent years, there has been increased public interest in the concept of narcissism, often used loosely but describing a genuine personality spectrum. At one end are individuals with strong self-esteem and confidence; at the other are those whose self-image depends on control, admiration, and the invalidation of others.

Within family proceedings, narcissistic traits can appear in a number of ways:

- **Financial control:** withholding information, refusing disclosure, or using money as a means of dominance.
- **Emotional manipulation:** gaslighting or rewriting events to make the other person question their reality.
- **Litigation as punishment:** using the court process itself as a tool for continued control, sometimes through repeated or unnecessary applications.
- **Charm followed by devaluation:** alternating between cooperation and hostility to unsettle the other party.

While it is not for lawyers to diagnose a personality disorder, awareness of these traits helps anticipate conflict patterns and protect clients from psychological harm.

Managing the Impact on the Legal Process

Where narcissistic dynamics exist, standard dispute-resolution models often fail. Mediation can still be useful but only if the mediator is trained in power imbalance and coercive control. In many cases, shuttle mediation, hybrid mediation, or arbitration may be safer and more effective.

Clear communication is key. Family lawyers should:

- Keep correspondence factual, brief, and non-emotive.
- Encourage clients to document events rather than react in real time.
- Avoid direct confrontation that feeds the narcissist's need for control.
- Set realistic expectations about how long change or closure will take.

Where children are involved, the court's focus remains on welfare but the presence of narcissistic or coercive patterns can inform the court's approach to parental responsibility, indirect contact, and safeguarding orders.

Supporting Clients Through Psychological Awareness

Lawyers cannot be therapists but they can recognise when a client may benefit from psychological support. Referrals to counsellors, coaching, or domestic abuse services such as Women's Aid can make a profound difference.

Integrating psychological insight into legal advice helps clients make rational decisions rather than emotionally reactive ones. It also preserves proportionality, reducing unnecessary hearings and costs.

The Takeaway

Family law sits at the intersection of law and emotion. Recognising psychological drivers and particularly narcissistic dynamics enables practitioners to advise with both empathy and strategy. A psychologically informed approach is not "soft" lawyering; it is the most effective way to secure fair, lasting outcomes in cases where logic alone is rarely enough.

If you have concerns about conflict and narcissism in your divorce or separation, please contact:

Grainne Fahy -
grainne.fahy@keystonelaw.co.uk

Yasmin Khan-Gunns -
yasmin.gunns@keystonelaw.co.uk

If you or anyone with you is at risk of harm or in danger, please call the police immediately.

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- 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.

New Guideline: Rehabilitation for Chronic Neurological Disorders Including Acquired Brain Injury

by Kim Milan, Senior Partner at Boyes Turner

The National Institute for Health and Care Excellence (NICE) has published new guidance on rehabilitation for people with chronic neurological disorders.

The new guideline, Rehabilitation of neurological disorders including acquired brain injury, provides both an inspiring vision and a practical, step-by-step guide to how rehabilitation should take place, in hospital and community settings, for people living with neurological disability after acquired brain injury (ABI) or spinal cord injury (SCI), or from acquired peripheral nerve disorder, functional neurological disorder (FND) or progressive neurological disease.

What is rehabilitation?

When we talk about rehabilitation after traumatic brain injury (TBI), spinal injury or major trauma, we are referring to treatments, interventions or support which will help reduce the injured person's disability, restore their function and independence, optimise their ability to carry out everyday tasks and participate in education, work or leisure, and meaningful social and family relationships.

Rehabilitation can involve working with the injured person to overcome health symptoms (such as pain management) or functional disability (such as physiotherapy). For many of our clients, it also involves adapting their home and environment, providing specialist aids and equipment, and teaching strategies or behaviours to increase their safety and independence.

Timely, personalised rehabilitation maximises the injured person's recovery and enhances their quality of life. Its wider benefits include reducing costs and pressure on the health and social care systems, and economic benefits from enabling neurologically-injured people to work or contribute to society.

How should rehabilitation take place under the new rehabilitation guidelines?

A single point of contact or case manager

The new rehabilitation guideline centres an individual's rehabilitation around coordinated case management overseen by a single point of contact. The guideline doesn't mandate that the coordinator or lead contact for rehabilitation should always be a professional case manager, but recommends assigning a 'complex case manager' (rather than a key worker) where the injured person has severe, complex and long-term rehabilitation needs and impaired cognitive function, difficulties with communication or comorbidities (such as depression) which make it difficult for them to access or engage in rehabilitation or advocate for themselves.

The guidance says that the single point of contact or case manager's role is to help the injured person understand and navigate rehabilitation services, coordinate their rehabilitation plan, support them in accessing rehabilitation services and refer them to other services where needed. Having an accessible, named, case manager who works closely with the individual and their family and understands their needs, ensures that rehabilitation is fully coordinated across multiple NHS, social care, voluntary services or private organisations but is also personalised and responsive to changes in the individual's health, circumstances or needs.

The guidance recommends that the injured person's need for rehabilitation should be identified and discussed with them and their family as early as possible after injury or diagnosis. At this stage, the individual and their GP should be given an initial contact for rehabilitation.

A holistic rehabilitation needs assessment

A holistic rehabilitation needs assessment should take place 'without delay'. This assesses the person's functioning, symptoms and impairment across a wide range of physical, mental, emotional and environmental needs, such as pain, physical activity and mobility, cognitive function, speech/language/communication, eating/drinking/swallowing, bladder and bowel function, and any equipment and environmental adaptations needed for independent living. The needs assessment should identify rehabilitation which maximises the individual's ability to participate in every area of their life across various times and settings.

A rehabilitation plan

A personalised rehabilitation plan based on the individual's needs and goals should be agreed with the individual and those who are important to their rehabilitation, such as family members, health and social care practitioners. The plan should focus on interventions to optimise or maintain the affected person's functioning and abilities, even if their prognosis or potential for improvement appears to be limited. It should be reviewed and updated when the individual's needs or circumstances change, such as when they move from acute to longer-term rehabilitation. Children's and young people's severe, complex rehabilitation needs should form part of their education, health and care plan (EHCP).

The guidance recommends that rehabilitation interventions take place in settings which are appropriate to the injured person's rehabilitation goals and preferences, such as at home, school, work or in other community settings. The injured person must be provided with any urgent equipment, assistive technology or environmental adaptations that they need at home, to support their rehabilitation and prevent delays to discharge.

With the overall structure for the injured person's coordinated, communicated and fully case-managed rehabilitation in place, the guideline then sets out step-by-step recommendations for the rehabilitative management of many of the specific needs that may be covered by the plan, such as for pain management, speech and language, feeding and swallowing, equipment and independent living, education and vocational rehabilitation, social and leisure activities and relationships.

What do the new guidelines mean for people with TBI or spinal cord injury?

The new guideline, Rehabilitation of neurological disorders including acquired brain injury, is a must-read for all who are involved in the recovery, rehabilitation and restoration of people with severe and chronic neurological disability after traumatic brain injury (TBI), spinal cord injury (SCI) and major trauma. It sets a clear expectation for what people with chronic neurological disability and their families should be entitled to expect from a system that cares about their rehabilitation and recovery. It gives healthcare and social care providers a detailed model of what good rehabilitation looks like in practice, with step-by-step guidance as to how they can get there.

As a head injury and major trauma specialist solicitor, and frequent navigator of existing NHS and social care rehabilitation services for severely injured clients, I welcome the new rehabilitation guideline wholeheartedly, in the hope that rehabilitation services for TBI, SCI and other neurological injury will one day consistently work that way.

NICE acknowledges that implementation of the new recommendations will take time, and this will depend on well-planned design, workforce planning and training, joined-up coordination, multidisciplinary and multiorganizational communication, significant funding, resourcing and equitable implementation.

Is rehabilitation accessible via a traumatic brain injury (TBI) or spinal cord injury (SCI) compensation claim?

Where the person's injury gives rise to a traumatic brain injury (TBI), spinal cord injury (SCI) or major trauma compensation claim, the scope and detail of the new recommendations for good rehabilitation practice make it all the more vital that the claimant's solicitor has the proven expertise and experience to ensure that their rehabilitation is prioritised, coordinated and funded, and is integral to the management of the claim.

The key to effective rehabilitation is timely, coordinated, personalised implementation. If our severely neurologically-injured clients are not receiving the required level of rehabilitation for their needs at the time that they need it, we are often able to obtain additional funding and specialist support through their claim to ensure that they receive rehabilitation in a way that is timely and properly coordinated.

Our clients' rehabilitation is backed by Rehabilitation Code and interim payment funding, and coordinated by professional case managers, with input from our medical and therapeutic rehabilitation experts and specialist legal, SEN, and deputyship teams.

In practice, this means that we can usually secure direct funding from insurers to instruct a case manager to carry out an immediate needs assessment

(INA) and then put in place the recommended rehabilitation. We take an active role in each client's rehabilitation and recovery, collaborating with our client's NHS clinicians to ensure that our client's rehabilitation continues seamlessly on from their acute (trauma) care, facilitating and attending MDT meetings, overseeing the implementation and follow-up of individualised rehabilitation, and ensuring that the client receives the rehabilitation when they need it, with full compensation for their injury and provision for further rehabilitation if needed in the future

If you have been seriously injured in a road collision, or accident at work, school or public facility, and you would like to find out more about funded rehabilitation or making a claim, you can talk to one of our experienced solicitors, free and confidentially, by contacting: **claimsadvice@boyesturner.com**

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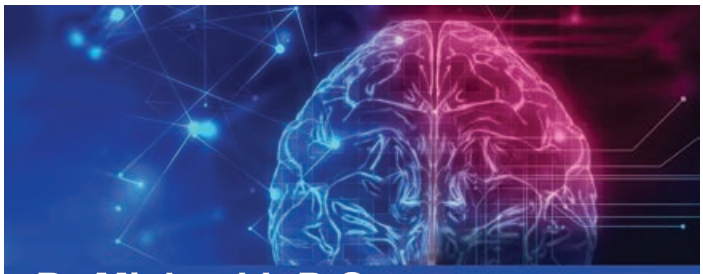

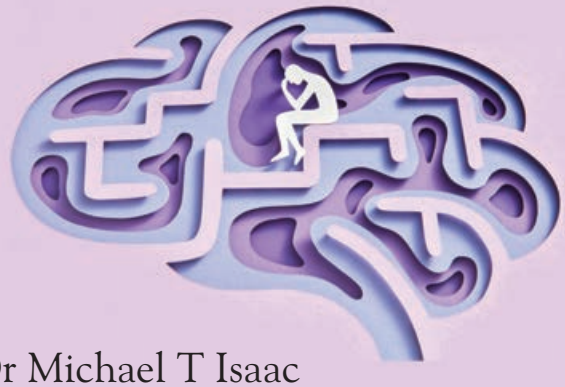

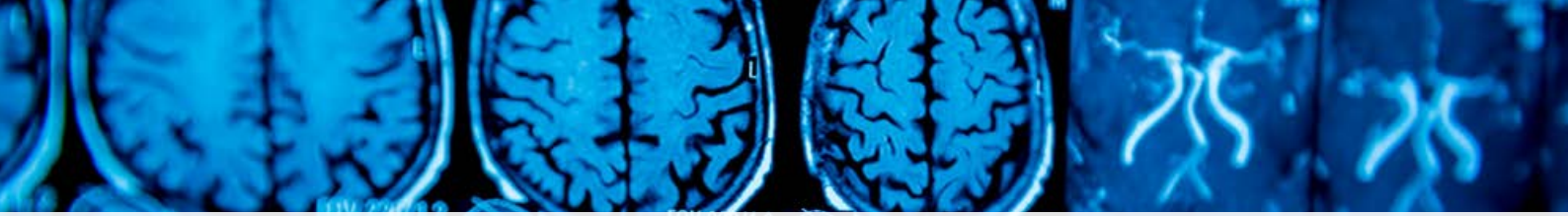

Forensic Psychiatry Experts: Navigating Complexities in the Legal System

by Forensic Access

Forensic psychiatry plays a crucial role in the criminal justice system, bridging the gap between law and mental health. As legal professionals increasingly encounter cases involving mental health issues, the insights provided by forensic psychiatrists have become indispensable. These experts not only assess the mental state of defendants but also provide the courts with informed guidance on matters ranging from fitness to plead to sentencing considerations.

Understanding the nuances of forensic psychiatry is essential for those working within the legal system. Knowing how to properly instruct forensic psychiatrists and what to expect from their expertise can significantly impact case outcomes.

This article is drawn from our latest webinar featuring Dr Peter McAllister, a Consultant Psychiatrist with over two decades of experience. During the session, Dr McAllister offered valuable insights into the role of forensic psychiatrists and shared practical advice for legal professionals when working with an expert witness.

Understanding the Difference Between a Psychiatrist and a Psychologist

One of the most frequent sources of confusion in the legal field is the distinction between psychiatrists and psychologists, both of whom can serve as an expert witness but with different qualifications and roles. A psychiatrist, as Dr McAllister clarifies, is a medically trained doctor, licensed by the General Medical Council (GMC), who specialises in the diagnosis and treatment of mental disorders. They have the authority to prescribe medications and often work within a medical-legal framework to assess individuals with mental health disorders in legal contexts. Psychiatrists also have the ability to recommend compulsory treatment under the Mental Health Act, a critical aspect of their role in forensic cases.

On the other hand, psychologists typically hold a degree in psychology and specialise in various fields such as clinical, forensic, or occupational psychology. Registered with the British Psychological Society (BPS), psychologists focus on therapeutic treatments and the study of behaviour, often utilising psychological interventions rather than medical treatments. This distinction can be crucial in legal cases, where it is vital to instruct an expert who has the appropriate qualifications for the specific issues at hand.

In recent years, cases have highlighted the need for courts to ensure they are appointing experts with the right mix of practical and academic experience. As Dr McAllister points out, the difference between psychologists who are experienced practitioners and those who are primarily researchers can have significant implications in court. Legal professionals must instruct experts who combine academic knowledge with real-world experience as well as continued professional development in both their clinical practice and their role as an expert witness.

Selecting the Right Forensic Expert

Instructing the correct expert is not always straightforward, especially within the complex and specialised field of forensic psychiatry. Psychiatry, like medicine, has multiple subspecialties, each addressing different areas of mental health. For example, forensic psychiatrists may specialise in areas such as child and adolescent psychiatry, learning disabilities, or addiction, and choosing an expert outside their specialty could weaken the integrity of their opinion in court.

Dr McAllister draws an analogy to medical practice: just as you wouldn't consult a hand surgeon for a hearing loss case, legal professionals must ensure they are instructing the right type of forensic psychiatrist. The expertise of forensic psychiatrists

extends beyond diagnosis and treatment. Their unique role in the criminal justice system allows them to recommend compulsory assessment and treatment within a legal framework, providing courts with crucial advice on cases involving mental illness.

A common task for forensic psychiatrists is assessing whether a defendant is mentally fit to stand trial. Fitness to plead encompasses several factors, including whether the defendant can understand the proceedings, instruct their defence, and participate meaningfully in the trial. A failure to assess this accurately can lead to miscarriages of justice, making the role of the forensic psychiatrist indispensable.

Case Studies: Understanding the Work of Forensic Psychiatrists

Dr McAllister shared several anonymised case studies that illustrate the complexities forensic psychiatrists navigate when working as an expert witness.

One case involved Mr Trumpton, a defendant who claimed that a conspiracy involving the media proved his mental illness. During his psychiatric assessment, Mr Trumpton referenced articles in a newspaper as evidence of his delusional beliefs. While his behaviour was odd, he remained calm and coherent throughout the interview, raising questions about whether his presentation was authentic, or a performance designed to mislead the court. Dr McAllister noted that truly unwell individuals often display confusion or an inability to maintain coherence during questioning—traits Mr Trumpton did not exhibit.

In another case, Mr Jiggly had a long history of mental illness and drug misuse. At the time of his offence, a serious assault, he was off his prescribed medication and was consuming street drugs, which aggravated his condition. When Dr McAllister interviewed him in prison, Mr Jiggly initially appeared calm and cooperative. However, when asked about his nickname, he became enraged and abruptly ended the interview, making it difficult to assess his fitness to plead. This case highlighted the challenges forensic psychiatrists face when trying to extract meaningful insights from individuals who may not be in a stable mental state.

In both instances, the expertise of the forensic psychiatrist was critical in providing the court with a thorough understanding of the defendant's mental health. These assessments informed not only whether the individuals were fit to stand trial but also whether they required compulsory treatment under the Mental Health Act.

The Importance of Clear Instruction

Clear communication between legal professionals and forensic experts is essential. Dr McAllister stresses the importance of specifying in the letter of instruction whether the psychiatric assessment should be conducted in person or remotely. Miscommunication about this can lead to delays in court proceedings, as Dr McAllister recounts in an example where a misunderstanding about the location of an assessment caused an unnecessary delay.

This issue is becoming more relevant as remote assessments have become more common since the COVID-19 pandemic. While remote assessments offer convenience, they may not always be appropriate, particularly for complex cases where face-to-face interaction may provide more reliable insights into the defendant's mental state.

Legal professionals must also ensure that the instruction provided to the expert are as detailed and clear as possible. This enables the forensic psychiatrist to tailor their assessment to the specific needs of the case and, if necessary, refer the case to a colleague with more relevant expertise.

The Future of Forensic Psychiatry: Changes in Mental Health Law

As the legal landscape evolves, so does the practice of forensic psychiatry. Dr McAllister touches on significant changes on the horizon, particularly reforms to the Mental Health Act. A government-commissioned independent review led by Sir Simon Wessely has proposed several changes that could have a profound impact on forensic psychiatry.

One of the key recommendations is that magistrates' courts should have similar powers to Crown Courts, such as the ability to demand psychiatric assessments without conviction. Additionally, there are calls for statutory time limits to be introduced for the transfer of individuals from prison to psychiatric hospitals, ensuring that mentally ill individuals receive timely treatment.

Another significant proposal is to expand the powers of tribunals in deciding patient care. Currently, tribunals can only recommend that patients be transferred to other hospitals, but they do not have the authority to enforce these decisions. The proposed changes would grant tribunals the power to direct patient transfers, offering more robust oversight of patient care and ensuring that mentally ill individuals are not forgotten within the system.

These reforms, if enacted, will likely enhance the role of forensic psychiatrists in the criminal justice

system, providing courts with more efficient and humane ways to manage individuals with mental health disorders.

Conclusion

Forensic psychiatry is a complex and evolving field that plays a crucial role in the intersection of law and mental health. Experts like Dr Peter McAllister offer invaluable insights into the mental state of defendants, helping to ensure that justice is both fair and informed by sound medical knowledge. From assessing fitness to plead to recommending compulsory treatment, forensic psychiatrists provide courts with the expertise needed to navigate the often-murky waters of mental health in legal contexts.

As reforms to mental health law are introduced, the role of forensic psychiatrists will continue to expand, underscoring the importance of choosing the right expert for each case. By ensuring that legal professionals provide clear instruction and select experts with the appropriate qualifications and experience, the criminal justice system can better address the needs of individuals with mental health disorders, ensuring fair and just outcomes for all involved.

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Beyond the Pill: The Medicolegal Significance of Deep TMS in Managing Treatment-Resistant Psychiatric Disorders

by Dr Behrouz Nabavi, MD, MSc, FRCPsych, Section 12 Approved

Abstract

In medicolegal practice, experts frequently encounter claimants with psychiatric injuries – most commonly Major Depressive Disorder (MDD), Post-Traumatic Stress Disorder (PTSD), GAD (Generalized Anxiety Disorder), and Obsessive-Compulsive Disorder (OCD) – who have derived inadequate benefit from first-line treatments. This 'treatment-resistant' population often presents a complex challenge in both prognosis and the quantification of future care needs. This article introduces Deep Transcranial Magnetic Stimulation (Deep TMS) as a validated, non-invasive neuromodulation therapy that is revolutionising outcomes for such individuals. We will explore its mechanism of action, evidence base, and distinct advantages over pharmacological and psychological interventions, arguing for its inclusion as a standard consideration in modern medicolegal reporting and future care plans. Its ability to alter the neurobiological substrate of trauma-related disorders positions it not merely as an alternative, but as a foundational intervention that can redefine recovery trajectories and settlement valuations.

Introduction: The Therapeutic Impasse in Medicolegal Cases

The landscape of personal injury and clinical negligence often features claimants with enduring psychiatric sequelae stemming from their trauma. Despite guideline-concordant care involving multiple antidepressant trials and psychological therapies such as Cognitive Behavioural Therapy (CBT) or Eye Movement Desensitisation and Reprocessing (EMDR), a significant proportion – estimated at 30% for MDD – do not achieve remission.[1] This state of Treatment-Resistant Depression (TRD), typically defined as a failure to respond to at least two adequate antidepressant trials, can lead to a perception of permanent disability and a poor long-term prognosis. The clinical narrative often becomes one of chronicity and managed decline, which is subsequently reflected in medicolegal reports, influencing substantial awards for lifelong care and loss of amenity.

For the medicolegal expert, this presents a profound dilemma. Is the claimant's condition truly intractable? Or have all reasonable and modern treatment options been explored? The advent of advanced neuromodulation techniques, particularly Deep Transcranial Magnetic Stimulation (Deep TMS), demands a re-evaluation of what constitutes a 'reasonable' treatment pathway. This article aims to equip medicolegal professionals with a foundational understanding of Deep TMS, highlighting its role as a pivotal, evidence-based intervention that can fundamentally alter the prognosis and, consequently, the accurate valuation of a case.

What is Deep TMS? A Primer on the Technology and Mechanism

Transcranial Magnetic Stimulation is a non-invasive brain stimulation technique that uses pulsed magnetic fields to induce electrical currents in targeted cortical and subcortical brain regions. It is based on the principle of electromagnetic induction, first described by Faraday, allowing for direct, non-invasive modulation of neuronal activity. While conventional TMS devices primarily stimulate the superficial cortex, Deep TMS utilises a patented H-Coil helmet design. This unique engineering allows the magnetic fields to penetrate deeper and broader neural circuits, modulating key structures implicated in psychiatric disorders, such as the dorsolateral and ventrolateral prefrontal cortices, the anterior cingulate cortex, and the insula.[2]

The procedure is conducted while the patient is awake and seated, requiring no anaesthesia or sedation. A typical acute treatment course involves daily sessions (20-30 minutes each), five days a week, for 4-6 weeks. The patient can resume their normal activities immediately thereafter, with no recovery period – a significant practical advantage

over electroconvulsive therapy (ECT). TMS is approved by the UK's National Institute for Health and Care Excellence (NICE) for TRD and holds FDA clearance in the United States for both MDD and Obsessive-Compulsive Disorder (OCD).[3] Its mechanism is believed to involve the induction of neuroplastic changes, including long-term potentiation (LTP) and long-term depression (LTD), effectively 'retuning' dysfunctional neural networks that are characteristically hypoactive or hyperactive in conditions like depression and OCD.[4]

The Distinct Advantages of Deep TMS in a Medicolegal Context

1. Overcoming Pharmacological Limitations:

Psychotropic medications, while foundational, operate on a system-wide basis, leading to a high burden of side effects such as weight gain, sexual dysfunction, emotional blunting, and gastrointestinal distress. These often contribute to poor adherence and subsequent treatment failure, creating a vicious cycle of hopelessness for the patient and complicating the clinical picture for the expert.[5] Furthermore, the pharmacokinetic and pharmacodynamic variations between individuals mean that finding an effective agent is often a protracted process of trial and error, which can extend over many years in a claimant's history.

- The Deep TMS Advantage: Deep TMS offers a targeted, non-systemic approach. It directly modulates the malfunctioning neural networks implicated in the disorder without exposing the entire body to pharmaceutical agents. Consequently, it is not associated with the systemic side effects that so often impair quality of life and adherence. The most common adverse effects are transient, mild scalp discomfort or headache, which typically resolve early in the treatment course.[6] This favourable side-effect profile makes it a viable option for patients who are intolerant to medications, a common scenario in longstanding medicolegal cases. It provides a clear, distinct therapeutic pathway when pharmacology has been exhausted or rejected.

2. Complementing and Enhancing Psychological Interventions:

Psychological therapies are cornerstone treatments for trauma-based disorders, but their efficacy can be limited in severe, treatment-resistant cases. Profound neurovegetative symptoms (e.g., anergia, poor concentration), emotional numbing, and high levels of cognitive distortion can impede a patient's ability to engage meaningfully and proactively in therapy. A patient cannot effectively process trauma if they are cognitively incapacitated by their depression.

- The Deep TMS Advantage: There is growing evidence that Deep TMS can create a 'neuroplastic window'. By priming and normalising the brain circuits involved in mood regulation, executive function, and fear extinction (e.g., the prefrontal-amygdala circuit), it can enhance cognitive capacity and emotional resilience.[7] This can, in turn, make patients more receptive and engaged in concurrent psychotherapy. The combination of Deep TMS (addressing the underlying neurobiological deficit) with trauma-focused psychotherapy (addressing maladaptive cognitive and behavioural patterns) can be synergistic, leading to more robust and durable recovery than either modality alone.[8] For the expert, this means that Deep TMS should not be seen as a competitor to psychotherapy, but as a potential catalyst for its success in previously non-responding claimants.

3. A Demonstrated Efficacy in Treatment-Resistant Populations:

The most compelling argument for Deep TMS is its proven efficacy in those for whom other treatments have categorically failed. Large-scale, randomised controlled trials and subsequent meta-analyses have consistently shown that Deep TMS leads to significantly higher response and remission rates compared to sham treatment in patients with TRD.[9] Many patients who have spent years, or even decades, cycling through ineffective treatments experience a significant and meaningful reduction in symptom burden. For instance, a multi-centre study published in World Psychiatry demonstrated that over a third of patients with TRD achieved remission after a six-week course of Deep TMS, a remarkable outcome in this challenging population.[10] This data provides the robust, evidence-based foundation upon which medicolegal opinions can be confidently built.

The Synergistic Potential: Deep TMS as Part of a Combined Treatment Strategy

The most forward-thinking clinical paradigm is not to view Deep TMS as a mere replacement for other therapies, but as a powerful component of an integrated, personalised treatment plan. The sequence can be conceptualised as 'Neuromodulation → Pharmacological Optimisation → Psychotherapy'.

1. Deep TMS as the Initial Catalyst: Deep TMS can be used to break the cycle of treatment resistance, alleviating core depressive symptoms such as anhedonia and psychomotor retardation. By

directly targeting neural circuits, it can initiate recovery at a biological level, providing the patient with the first experience of improvement in a long time.

2. Subsequent Pharmacological Optimisation: Once symptoms begin to lift, pharmacotherapy can be rationalised and optimised. This may involve simplifying complex regimens or reducing doses to levels that are better tolerated, thereby mitigating side-effect burdens while maintaining efficacy.

3. Concurrent or Subsequent Psychotherapy: The patient's improved cognitive state – better concentration, reduced emotional overwhelm – allows for more effective and profound engagement with trauma-focused psychotherapy (e.g., EMDR, CBT for PTSD), which is often crucial for addressing the root cause of the injury in medicolegal contexts.

This multi-modal approach offers the best chance for a holistic recovery, targeting the biological, psychological, and social dimensions of the illness. It moves beyond sequential monotherapies to a truly integrated model of care.

Specific Medicolegal Applications and Case Conceptualisation

The implications of Deep TMS extend across various medicolegal scenarios:

- Personal Injury and PTSD: Claimants with PTSD often exhibit hyperactivity in the amygdala and hypoactivity in the prefrontal cortex. Deep TMS protocols can be tailored to modulate this specific circuit, potentially reducing hyperarousal and re-experiencing symptoms, thereby making them more amenable to trauma-focused therapy.

- Clinical Negligence: In cases where psychological injury stems from medical negligence, and where standard treatments have failed, the failure to consider or refer for neuromodulation could itself become a subject of scrutiny in subsequent litigation, pertaining to the standard of ongoing care.

- Occupational Stress: Chronic work-related stress can manifest as severe MDD. Deep TMS offers a tangible, advanced treatment option that can be factored into assessments of fitness to work and future earning capacity, potentially supporting a return to productive employment rather than a lifetime of incapacity.

Implications for Medicolegal Practice and Reporting

For the expert witness, the existence and proven efficacy of Deep TMS have several critical, non-negotiable implications:

1. Assessment of 'Reasonable Treatment': A claimant with a well-documented diagnosis of TRD, PTSD, or OCD who has not been considered for or offered a trial of Deep TMS may not have exhausted all reasonable treatment options. This should be explicitly factored into opinions on prognosis, future care, and loss of earnings. An opinion on chronicity is incomplete without a consideration of neuromodulation.

2. Prognosis and Future Care Costs: The potential for Deep TMS to induce remission or significant functional improvement can fundamentally alter the long-term prognosis. This must be accurately reflected in any assessment of future care needs, loss of earnings, and general damages for loss of amenity. A care plan that includes a course of Deep TMS, while a significant upfront cost, may be profoundly more cost-effective than a lifetime of supportive care, repeated medication reviews, and lost productivity. The expert's role is to quantify this potential paradigm shift.

3. Quantifying 'Maximum Medical Improvement': In cases where a claimant with a treatment-resistant condition has not undergone a trial of neuromodulation, it is arguably premature to conclude that they have reached Maximum Medical Improvement (MMI). A robust medicolegal opinion should state that MMI can only be confidently assessed after all appropriate interventions, including Deep TMS, have been trialled or formally considered and ruled out for specific, documented clinical reasons.

Conclusion

Deep TMS represents a paradigm shift in the management of treatment-resistant psychiatric disorders. Its non-invasive nature, targeted mechanism, excellent safety profile, and proven efficacy make it an indispensable tool in the modern psychiatric arsenal. For medicolegal experts, familiarity with this technology is no longer an optional niche interest but an essential component of contemporary practice. By incorporating a thorough consideration of neuromodulation into their assessments, experts can provide more accurate, evidence-based, and equitable opinions on prognosis and future care. This ensures that claimants have access to the most advanced

treatments available, that settlements truly reflect the potential for meaningful recovery, and that the legal process adapts to the realities of 21st-century medicine. As we move further into an era of brain-circuit-based therapeutics, Deep TMS stands as a beacon of hope for the treatment-resistant patient and a critical, transformative factor in the fair and informed resolution of medicolegal claims.

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Research Establishes Wide Variation in Physical Side-effects of Antidepressants

by King's College London

Antidepressants differ widely in how they affect the body, according to new research from the Institute of Psychiatry, Psychology & Neuroscience (IoPPN) at King's College London, in collaboration with the University of Oxford.

Published in The Lancet[1], the large-scale study found that some antidepressants can cause clinically relevant changes in body weight, heart rate, and blood pressure within just a few weeks, while others appear largely neutral in their physical effects. Researchers are calling for antidepressant treatment guidelines to be updated to reflect these findings.

Up to 20 per cent of adults in Europe and North America are prescribed antidepressants to treat a range of conditions. While these medications are known to cause physical side effects, the degree to which these alterations occur in patients treated with different antidepressants was previously unclear.

Researchers in this study analysed the data from 151 different studies, comparing the physical health effects of 30 different antidepressants across more than 58,000 people.

> *"Our findings show that SSRIs, which are the most prescribed type of antidepressant, tend to have fewer physical side-effects, which is reassuring. But for others, closer physical health monitoring may be warranted."*
>
> **- Dr Toby Pillinger,**
> Academic Clinical Lecturer at the IoPPN, Consultant Psychiatrist at the South London and Maudsley NHS Foundation Trust, and the study's senior author

They found notable variation between drugs, even over relatively short treatment periods — most studies involved around eight weeks of antidepressant use. For example, there was up to a 4-kilogram difference in average weight change between some drugs, equivalent to around 2.5 kg of weight loss with agomelatine compared with about 2 kg of weight gain with maprotiline.

The study also estimated that weight gain occurred in nearly half of people prescribed drugs such as maprotiline or amitriptyline, whereas over half of those taking agomelatine experienced weight loss. Similarly, there was a 21-beat-per-minute difference in heart rate between fluvoxamine and nortriptyline.

By contrast, some commonly prescribed SSRIs — the most commonly used type of antidepressant — showed little or no adverse impact on these physical health measures.

Dr Toby Pillinger, Academic Clinical Lecturer at the Institute of Psychiatry, Psychology & Neuroscience, Consultant Psychiatrist at the South London and Maudsley NHS Foundation Trust, and the study's senior author said,

> *"Antidepressants are among the most widely used medicines in the world. While many people benefit from them, these drugs are not identical – some can lead to meaningful changes in weight, heart rate, and blood pressure in a relatively short period."*

> *"Our findings show that SSRIs, which are the most prescribed type of antidepressant, tend to have fewer physical side-effects, which is reassuring. But for others, closer physical health monitoring may be warranted."*

> *"The aim isn't to deter use, but to empower patients and clinicians to make informed choices and to encourage personalised care."*

Professor Andrea Cipriani, Professor of Psychiatry at the University of Oxford, Director of the NIHR Oxford Health Clinical Research Facility and the study's last author said,

> *"Most clinical decisions – especially in mental health – are still made by physicians with little input from patients."*

> *"Our results emphasise the importance of shared decision making, the collaborative process through which patients are supported by the clinicians to reach*

a decision about their treatment, bringing together their preferences, personal circumstances, goals, values, and beliefs. This should the way forward in the NHS and globally."

This research was funded by the National Institute for Health and Care Research, Maudsley Charity, Wellcome Trust, and Medical Research Council.

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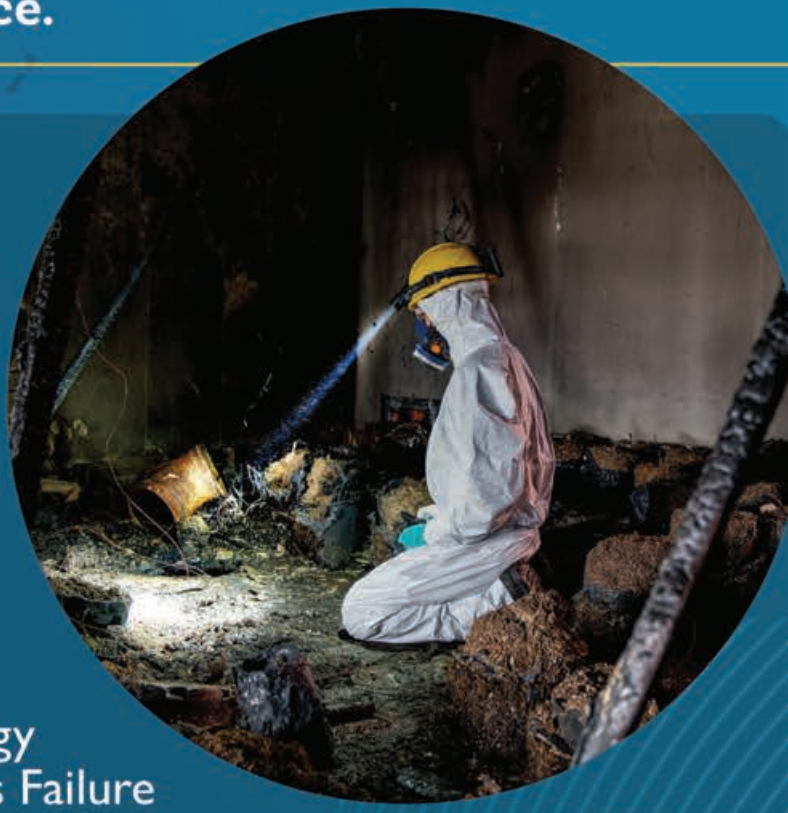

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Pedestrian Protection Through Vehicle Design

by Adam Barrow

Historically, pedestrian safety has been one of the most overlooked aspects of vehicle design. While significant strides have been made in protecting vehicle occupants through crashworthiness innovations like seatbelts, airbags, and energy absorbing structures, the same level of attention was not initially extended to those outside the vehicle. However, with the rise in urban populations and the increasing number of vulnerable road users (VRUs), pedestrian protection has become a critical focus in automotive engineering and regulation.

A Brief History of Pedestrian Safety

The first recorded road accident fatality occurred in 1896, when Bridget Driscoll, a pedestrian, was struck by a motor car in London. The coroner expressed hope that such tragedies would not be repeated. Unfortunately, it's estimated that over 120,000 pedestrian deaths have occurred in the UK since then. Early legislative efforts, such as the Road Traffic Act of 1930 and the introduction of Zebra Crossings in 1949, aimed to provide basic preventative measures for pedestrians. However, these measures did not improve the protection afforded to pedestrians when a collision did occur.

While there were examples of pedestrian focused design in vehicles, it wasn't until testing was introduced in the late 20th century that pedestrian safety began to be integrated into the wider vehicle fleet. The launch of EuroNCAP in 1997 marked a turning point, introducing consumer-focused crash testing that included pedestrian impact assessments. This was followed by regulatory milestones such as the EC Directive 2003/102 and the Pedestrian Safety Regulation No. 78/2009, which mandated pedestrian safety performance from the front-end design of vehicles.

Bridget Driscoll (circled), the first recorded pedestrian fatality, hit by a car in Croydon - 1896

Understanding Pedestrian Impact Dynamics

To design safer vehicles, engineers must first understand how pedestrians interact with vehicles during a collision. Pedestrian impacts typically occur over a very short duration (less than 0.2 seconds), with the head often striking the bonnet or windscreen within 0.1 seconds of initial contact. The nature of the impact varies depending on the vehicle's front-end geometry and the pedestrian's posture and movement at the time of collision.

Common impact scenarios include;

- Wrap-forward projections, where the pedestrian wraps around the bonnet and is then thrown forwards
- High-fronted projections, often seen with SUVs and trucks, where the pedestrian is launched forward and lands some distance in front of the vehicle
- Glancing collisions, which can result in the pedestrian being spun or thrown sideways

Each of these scenarios presents unique challenges for injury mitigation and requires targeted design interventions.

Designing for Safety: Key Impact Zones

To mitigate pedestrian injuries, vehicle designers focus on three primary impact zones: the bonnet, bumper, and windscreen. These zones are responsible for the majority of serious injuries in pedestrian collisions, and have therefore become the focus of both regulatory testing and design innovation.

Head injuries are the leading cause of death in pedestrian collisions. When a pedestrian is struck, their head often impacts the bonnet or windscreen, frequently resulting in skull fractures and/or traumatic brain injuries. To address this, vehicles are now tested using headform impactors that simulate real-world collisions. These tests have driven the adoption of energy absorbing bonnet designs, active bonnet systems that lift upon impact, and changes to vehicle geometry to increase clearance between the bonnet and engine components.

Leg injuries are also common, particularly to the long bones, and knee ligaments. The bumper and the leading edge of the bonnet are the primary contact points. Modern bumpers are designed with energy-absorbing materials and rounded edges to minimise injury. Testing protocols use legform impactors equipped with sensors to measure forces on bones and joints, ensuring that bumper designs meet safety standards.

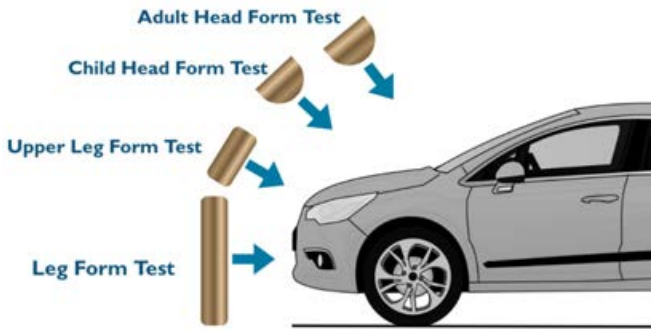

Figure 1 - diagram showing the pedestrian impact areas tested

The Windscreen Dilemma

Despite advancements in bonnet and bumper design, the windscreen remained unregulated for pedestrian head impacts until recently. In-depth forensic investigations revealed that a significant proportion of serious head injuries occurred from impacts with the windscreen, particularly in areas not covered by existing testing protocols. A 2018 study by the author titled Casualty Benefits of Measures Influencing Head to Windscreen Area Protection, highlighted that 42% of killed or seriously injured pedestrians contacted untested areas, with 22% suffering serious head injuries.

This research formed part of the evidence base that led to the amendment of Regulation 127 in March 2025, which extended the testable area using headform impactors to include the windscreen. This regulatory update aligns testing protocols more closely with real-world injury data, addressing previously overlooked impact zones.

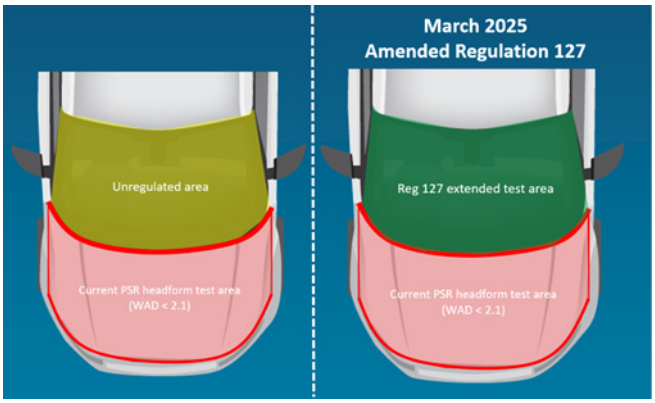

Figure 2 - The car on the left showing the testing area prior to the regulation changes. The car on the right highlights the extended test area including the windscreen

Active Safety Technologies and Innovation

In addition to passive safety features, modern vehicles are increasingly equipped with active safety systems designed to prevent collisions altogether. Technologies such as Advanced Emergency Braking (AEB) systems with pedestrian detection use sensors to identify potential collisions and automatically apply the brakes. Additional systems, including Intelligent Speed Assistance (ISA), night vision, and surround-view cameras further enhance driver awareness and response times.

Studies have shown that AEB systems could potentially prevent up to 56% of pedestrian fatalities and serious injuries, provided the collision parameters fall within the system's operational range. However, these technologies are not foolproof and must be complemented by robust passive safety features to protect pedestrians when collisions do occur.

The Role of Forensic Investigation

Forensic collision investigators play a vital role in understanding how vehicle design influences pedestrian injury outcomes. Pedestrian protection is a complex and evolving field that requires collaboration between engineers, regulators, and forensic experts. While considerable advancements have been made, particularly in bonnet and bumper design, ongoing challenges persist, especially in areas like windscreen safety and visibility in heavy vehicles. The integration of active safety technologies and the expansion of regulatory

testing into previously unregulated zones mark important milestones. However, innovation often outpaces regulation, highlighting the importance of continuous research and real-world data analysis.

About the Author

Adam Barrow is an expert in road traffic collision reconstruction, with over 13 years of experience in the field. With an academic foundation in Biomedical Sciences and Biomechanics from the University of Manchester, Adam developed a deep understanding of vehicle crash dynamics and injury mechanisms. His career includes a pivotal role at the UK's Transport Research Laboratory, where he led the Collision Research team and managed the award-winning National Highways Fatality Research Programme.

Prior to joining Hawkins, Adam worked at WSP, contributing to major national engineering safety initiatives, including Smart Motorway upgrades. His expertise spans collision analysis, vehicle safety, injury biomechanics, and road system safety, making him a valuable addition to Hawkins' forensic investigation team. If you would like to speak to Adam or another member of Hawkins' RTC team about an incident or query, please visit Hawkins' website, **www.hawkins.biz**

Operation Barbados

by Dr T. Walford, Banking Expert Witness at Expert Evidence International Limited

Operation Barbados was an HMRC investigation that began in late 2012 into an Organised Crime Group that conspired to cheat the Public Revenue and, moreover, succeeded in obtaining over £20 million in VAT due to the Revenue.

The Defendant was arrested in 2015 and interviewed over his connection to the conspiracy, which centred around a company named Winnington Networks Limited. Those behind Winnington had used the company's VAT returns to effect a massive Missing Trader Intra Community ('MTIC') fraud. They created bogus transactions in Voice Over Internet Protocol ('VOIP') airtime to generate false input tax reclaims, which were used to off-set against their output tax liability arising from their genuine trade in electrical goods and metals.

HMRC Charges

HMRC suspected that Winnington had been responsible for creating offshore companies and a fake alternative banking platform ('ABP') to facilitate the fraud and the distribution of the proceeds to the conspirators. The client was alleged to have done so using businesses in the US and United Kingdom and using banks around the world.

Charges were not brought until 2022, 7 years after his interview, which shows the complexity of the investigation. HMRC alleged that the Defendant was "important to the conspiracy ..... beyond helping to dispose of its proceeds ..... he helped to ensure the OCG could pay its necessary costs."

> "The most beautiful words in the English language are 'Not Guilty'."
>
> **Maxim Gorky**

Parties involved in the Defence

Simon Gurney was instructed by Daniel King of Forbes Solicitors, alongside Brendan Kelly KC of 2 Hare Court, to represent the Defendant. They worked together over a period of 3 years between charge and trial concluding in July 2025.

Stephen Taylor of Expert Evidence International Ltd was retained by Forbes Solicitors in relation to the operation and deployment of the financial software and the use of money remittance companies used to support the case that the Defendants activity was legitimate.

The Charge

The prosecution alleged that the software had been configured with the intent of performing illegal transactions and those using it were complicit in the cheat.

The Trial

By analysing the software programs that had been deployed, the manner in which they had been set-up and the way they had been used, Stephen Taylor, the expert witness, was able to demonstrate this had not been the reality. It was then necessary to convey these complicated technical and commercial insights to a jury, whose knowledge of financial software, cash management and treasury processes was assumed to be limited.

The Result

The Defendant was acquitted unanimously by the jury.

Expert Evidence

His solicitor, Daniel King of Forbes Solicitors added:

> "We instructed Stephen Taylor in his capacity as a software and systems expert in a complex fraud trial. He provided expert "fintech" evidence in relation to the operation of alternative banking platforms and money remittance companies. He was tasked with reviewing a large volume

of documentation relating to different software applications and helped to demystify the background to the case and to support the case that our client's behaviour was legitimate. His report was detailed, well-reasoned, and demonstrated a deep understanding of the technical and commercial aspects of the case. His analysis contributed to persuading the prosecution to step back from its initial stance that the software in question could have no non-criminal use, and to our client being acquitted."

Expert Evidence prides itself on assisting throughout the legal process where required and is a professional firm concentrating on the four main areas of dispute resolution; acting as expert witnesses in financial litigation, mediation, arbitration and adjudication. The firm has a civil, criminal and international practice and has advised in many recent cases. Areas of specialisation include banking, lending, regulation, investment, and tax.

Expert Evidence

Expert Evidence Limited

Expert Evidence International Limited
36 Old Park Avenue
London SW12 8RH

Telephone: +44 20 7884 1000
Mobile: +44 7769 707020
www.expert-evidence.com

Indirect Optic Nerve Trauma Resulting In Visual Field Loss

by Nicholas A Jacobs

Introduction

Classical teaching holds that a traumatic optic nerve injury will result in a major loss of visual acuity and pallor of the optic disc a few weeks later. [Ref. 1]

I present a series of thirteen patients who suffered indirect optic nerve injury. That is to say a blow to the head (10 cases) or to the eyeball itself (3 cases) without anatomical disruption of the optic nerve. The salient feature of these cases is that they all have a degree of visual field loss, but they all have completely normal appearing optic discs. The other test which is carried out on patients, apart from examination of the optic nerve and assessment of the visual field test is the OCT scan of the retina and retinal nerve fibre layer. Optical Coherence Tomography is a painless imaging test that uses light waves to create detailed cross-sectional 3 D images of the retina and its layers. In this series 6 out of the 13 had OCT scans, which were not helpful in predicting the visual field losses in these cases.

The message of this review is that even in relatively minor head injuries, not necessarily resulting in loss of consciousness, a visual field test is mandatory. This also applies to a direct eyeball blunt injury where a visual field test is feasible.

Case Presentations

I now present three (part-fictitious) cases.

As well as the visual field loss, symptoms such as photophobia and findings such as PTSD-like symptoms were common.

Patient A - Miss A had a road traffic accident (car v lorry). She sustained a blow to the right side of the head and lost consciousness. She noticed some loss of vision immediately after the accident. On testing 30% of the field of vision of the Right eye was missing on the outer side. Fortunately, the visual acuity was not affected. This field loss means that she has difficulty noticing people and objects on her right.

Investigation showed a normal appearing optic disc (Fig 1a) a normal OCT scan of the nerve fibre layer thickness (Fig 1b) and a visual field loss of the Right eye (Fig 1c)

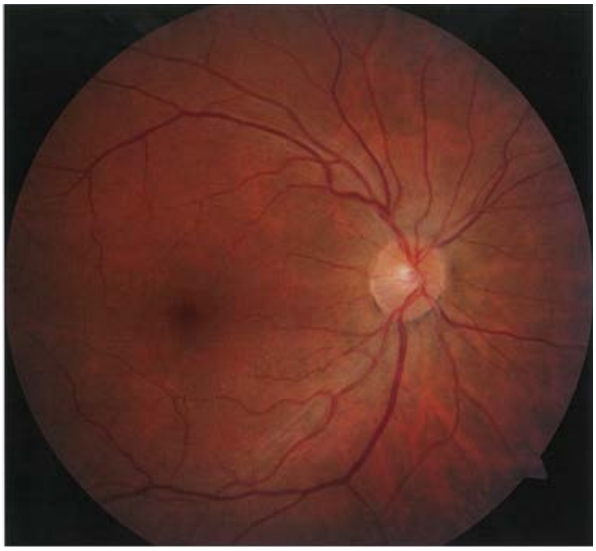

Fig. 1a

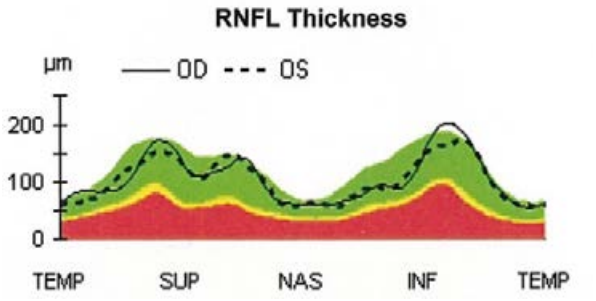

Fig. 1b

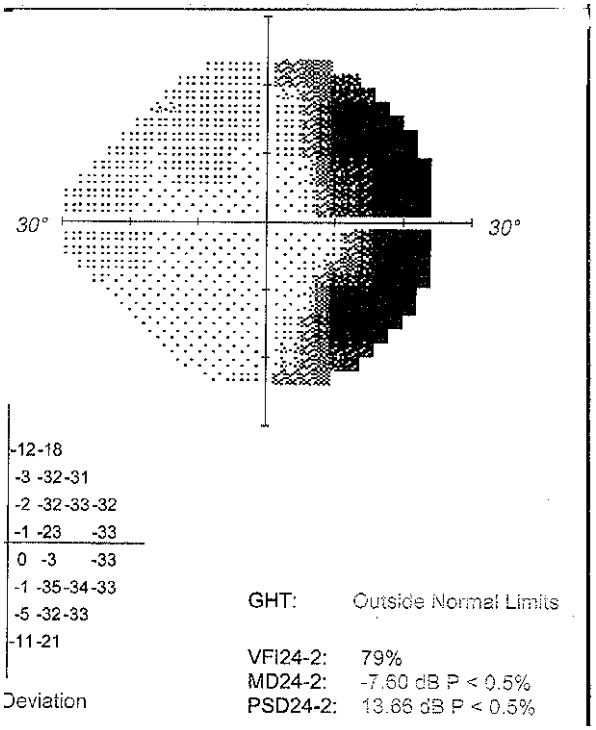

Fig. 1c

Patient B - Mrs B is an elderly woman who was run over by a car as a pedestrian. She had several injuries including a Left orbit fracture which was treated conservatively. Her eye was noted to be slightly sunken. She suffered ocular discomfort and altered sensation on the Left cheek due to infraorbital nerve damage. She has been incapacitated, cannot cross the road with confidence, and is now using a walking stick. She has a very marked visual field loss in the Left eye. (Fig 2)

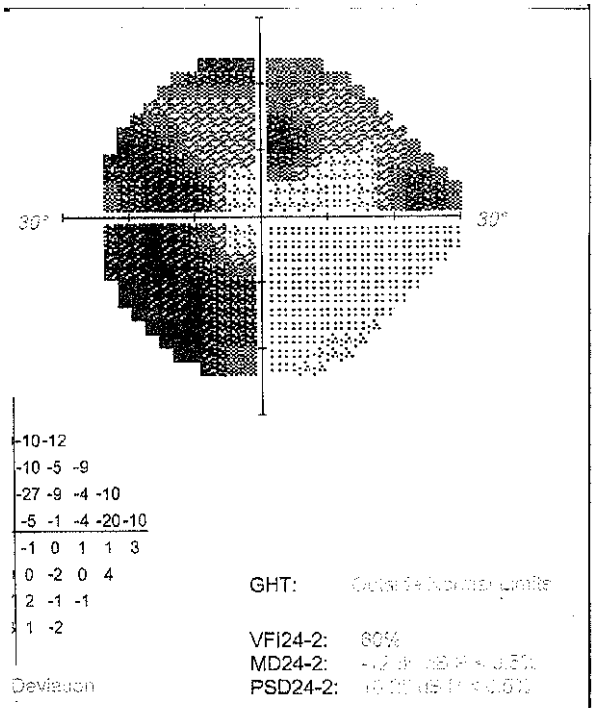

Fig. 2

However the Left optic disc appears healthy and the OCT scan of the nerve fibre layer is within normal limits.

Patient C - Mr C was injured in an accident at work when a powerful jet of water struck his Right eye. This was followed by extremely blurred vision. The optometrist found reduced vision and a visual field defect. He experiences a great deal of difficulty as the Right eye is his dominant eye. Right vision has reduced by one line on the Snellen chart and the quality of vision is poor. He suffers in bright conditions and finds great difficulty with his work and all day-to-day activities. His optic discs were normal in appearance and OCT scans were entirely normal. The Right visual field shows a superior temporal loss. (Fig 3)

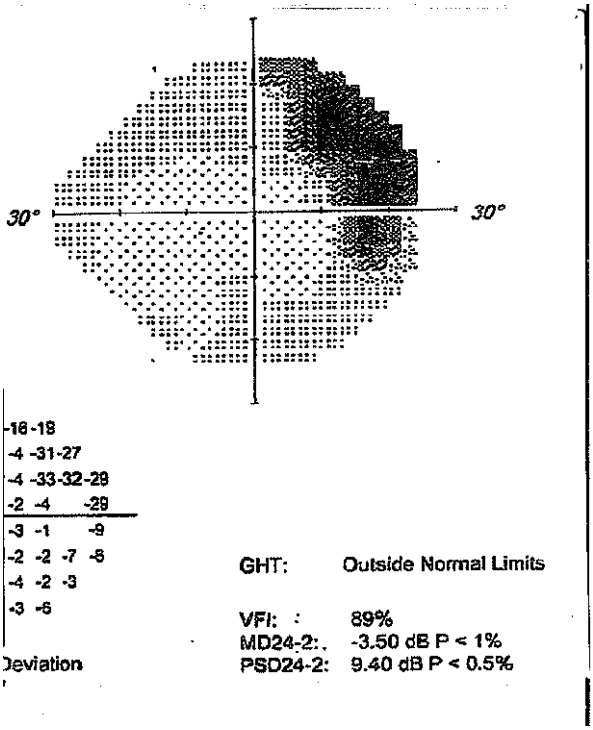

Fig. 3

Results

From this series of thirteen patients, eight were road traffic accidents two of which were pedestrian incidents, three were blunt injuries to the eyeball, one was a fall at work, and one was a head injury at home. Eight had lost consciousness. Visual acuities ranged from 6/5 to 6/12. Six had OCT scans of the nerve fibre layer of the retina. One scan out of the six showed a borderline result but this did not relate to the position of the visual field loss. The Visual Field Index, where 100% is normal, ranged from 96% to 60%. There were seven males aged 25 to 76 and six females aged 27 to 76. Three in the series had an orbit fracture. Hearing damage and loss of balance were other injuries seen in this series.

Discussion

It is not well recognised or understood in the ophthalmological fraternity that minor optic nerve damage can leave a healthy looking optic disc with varying degrees of visual field loss. [Ref.1]

In the United States where research has been done on army veterans who have suffered blast injuries, this phenomenon is more widely recognised. [Ref. 2]

However such papers, whilst showing that varying visual field damage and varying appearance of optic nerve are found, have not directly tallied the visual field tests to the optic nerve appearances specifically, as in this series.

In relation to blunt eyeball injury minor optic nerve damage is also poorly recognised. [Ref. 3]

There are varying reports of the usefulness of OCT scanning and whether the visual field test is in fact required, as the OCT might give the abnormal result in any event. [Ref.4]

In my series of thirteen cases the six OCT scans that were carried out were entirely normal in five. In the sixth the affected eye gave a borderline result which did not correspond with the visual field defect. Therefore it would have been an unreliable diagnostic tool.

Speaking as an experienced Consultant Ophthalmologist with an interest in glaucoma, patient B (Fig 2) showing a healthy looking optic disc, a normal OCT scan and a 60% visual field loss is, in my experience, something quite extraordinary.

Conclusion

In conclusion, for anyone involved in an injury where there is a significant blow to the head which does not necessarily result in a loss of consciousness, it is mandatory to carry out a visual field test. Relying on an OCT scan is not good enough. This also applies to a blunt injury to the eyeball itself where a visual field test is feasible.

Significant visual field loss in one eye is compatible with a normal driving licence but not with a heavy goods vehicle licence.

This investigation is critical, both for the patient, as loss of visual field may affect all aspects of their daily life, and for medico-legal clients in relation to their claim for compensation.

Legends for Figures

Fig. 1a shows a healthy appearing optic disc

Fig. 1b shows the retinal nerve fibre layer thickness of both the Right and Left eyes and both are comfortably within the normal range

Fig. 1c shows a significant visual field loss of the Right eye of the outer field

Fig. 2 shows extensive visual field loss on the Left eye showing widespread lateral loss of the visual field and also superior loss medially

Fig. 3 shows a superior temporal loss of the Right visual field

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What Does Ayinde Tell Us About the Use of AI in Legal Research?

by James Tumbridge, Robert Peake & Ryan Abbott

In their second article, Technology partners James Tumbridge and Robert Peake, and consultant solicitor Ryan Abbott consider the judgment in the case of *Ayinde, R (On the Application Of) v London Borough of Haringey [2025] EWHC 1383* and explain what it means for using AI in legal research.

Ayinde brought together two cases where lawyers used generative AI (genAI) to produce written legal arguments or witness statements which were not checked and false information ended up before the court.

Clearly, lawyers need to keep in mind their existing duties, whether barristers or solicitors. The Solicitors Regulation Authority's (SRA) Rules of Conduct mean that solicitors are under a duty not to mislead the court or others including by omission (Rule 1.4). They are under a duty only to make assertions or put forward statements, representations, or submissions to the court or others which are properly arguable (Rule 2.4). Further relevant rules include: the duty not to waste the court's time (Rule 2.6), and the duty to draw the court's attention to relevant cases ... which are likely to have a material effect on the outcome (Rule 2.7). Most importantly, a solicitor remains accountable for their work (Rule 3.5).

The court has a range of sanctions if a lawyer breaches the rules: public admonition of the lawyer, the imposition of a costs order, the imposition of a wasted costs order, striking out a case, referral to a regulator, the initiation of contempt proceedings, and referral to the police if the court thinks that is warranted.

In the case of *Ayinde*, it was submitted that the threshold for contempt proceedings was not met, because counsel did not know that the citations were false.

Background of *Ayinde*

The case originated with a judicial review claim by Mr Ayinde represented by Haringey Law Centre. Mr Victor Amadigwe, a solicitor, was the Chief Executive of Haringey Law Centre, Ms Sunnelah Hussain was a paralegal working under his supervision, and Ms Sarah Forey was the barrister instructed. Ms Forey used AI to settle and sign the grounds for judicial review, with the legal submissions mis-stating the statutory provisions of the Housing Act 1996 and citing five fictitious cases. The defendant's legal team requested copies of the cases they could not find. In a wasted costs hearing, Mr Justice Ritchie said:

> "*I do not consider that it was fair or reasonable to say that the erroneous citations could easily be explained and then to refuse to explain them.*"

Ritchie J then found that the behaviour of Ms Forey and Haringey Law Centre had been improper, unreasonable, and negligent. Before the Administrative Court, Ms Forey denied using AI tools to assist her with legal research and submitted that she was aware that AI is not a reliable source. She accepted that she acted negligently and apologised to the court.

Ms Hussain and Mr Amadigwe also apologised to the court. Mr Amadigwe explained that it was not their practice to check what counsel produced.

Administrative court findings

The Court said of Ms Foley's explanations:

> "*Ms Forey could have checked the cases she cited by searching the National Archives' caselaw website or by going to the law library of her Inn of Court. We regret to say that she has not provided to the court a coherent explanation for what happened.*"

While the Court found the threshold for contempt was met, it determined that counsel's junior nature and having already been publicly admonished and reported to the Bar Standards Board was sufficient sanction. Mr Amadigwe was referred to the SRA, and Ms Hussain as a paralegal under supervision faced no punishment.

The lessons of *Ayinde* apply in the trade marks registry

The risks of relying on genAI for legal research were demonstrated in a trade mark opposition appeal to the Appointed Person against a decision of the Registrar in the Intellectual Property Office (IPO). The grounds of appeal and skeleton argument of the appellant – for whom Dr Soufian appeared as a litigant in person – and the skeleton argument of the respondent, represented by Mr Caddy, a trade mark attorney, raised questions on the use of AI.

The Appointed Person noted that the grounds of appeal referred to a number of authorities and included 'quotes' from each one; the cases were genuine but the quotes cited in the grounds of appeal did not exist in those decisions. Dr Soufian's skeleton argument similarly listed cases relied upon, two of which had 'complex (but incorrect) references'. Those were accompanied with short summaries of the propositions for which each case stood; for three of these, the summary was held to have been a substantial misrepresentation of the case.

Upon questioning, Dr Soufian confirmed that ChatGPT had been used to assist with the grounds of appeal and the skeleton argument, and an unreserved apology was given for the noted inaccuracies. The Appointed Person observed that the arguments ChatGPT generated were 'largely not relevant to the issues' and were consequently unhelpful to the appellant's position.

Turning to the respondent's skeleton argument, three cases relied upon were genuine and were correctly cited. However, it was unclear that those cases stood for the propositions for which they were cited. The Appointed Person probed this during the hearing, and Mr Caddy was not able to point to the parts of the cited judgments despite being given additional time to do so.

In considering how to address the conduct on both sides which fell clearly below expectations for litigants, the Appointed Person reviewed the findings in *Ayinde*, and the decision in *Olsen v Finansiel Stabilitet A/S [2025] EWHC 42 (KB)* which considered the duties owed to the court by litigants in person, concluding:

> *'[I]t is clear that litigants-in-person (however inexperienced) have a duty not to mislead the registrar or the Appointed Person by providing fabricated authorities.'*

Litigants-in-person are given much greater latitude in the conduct of their case than those with professional legal representation. Honest mistakes and misunderstandings as to the authority for which a case may stand, ought not to give rise to punishment. Fabricating citations, in contrast, may occasion sanctions, and 'it does not matter whether fabrication was arrived at with or without the aid of generative artificial intelligence.'

Sanctions available for misconduct

The Appointed Person concluded that misconduct before the Appointed Person or the registrar of trade marks is unlikely to fall within the law of contempt.

The Appointed Person then considered sanction by way of a costs order. Neither the Appointed Person nor the registrar has the power to make a wasted costs order, nor to order costs against a representative of a party. Both the registrar (per rule 67 of the Trade Marks Rules 2008) and the Appointed Person (per rule 73(4)) may, however, *'award any party such costs ... and direct how and by what parties they are to be paid'*.

Whilst the usual rule on costs before the registrar is that they are awarded on the relevant scale at the time, 'off scale' costs can be awarded where a party acts unreasonably. The Appointed Person observed that *'[i]t is difficult to see a situation where the conduct of a party who has tried to rely on fabricated citations could be seen as anything but unreasonable.'* Accordingly, off scale costs should be the *'starting point'* in such instances. In the appeal at hand, the Appointed Person awarded no costs to the respondent, despite the appeal being dismissed, by reason of Mr Caddy's conduct.

Referral of a professional representative to a regulator, or admonition either publicly or in a decision were also considered. Referring to *Ayinde*, the Appointed Person noted that similar duties exist for trade mark attorneys as those which apply to lawyers. Considering the central principles of the Core Regulatory Framework adopted by IPReg in July 2023, he noted that *'one or more of these duties will clearly be breached by a trade mark attorney who puts fabricated case citations before the registrar or the Appointed Person'*.

The Appointed Person noted that the registrar has the inherent jurisdiction to strike out or stay all or part of a case, concluding however that 'the nature of proceedings before the registry and before the Appointed Person means that it is usually not cost-effective for a party to apply for a strike out in advance of the final hearing. Where a Hearing Officer or the Appointed Person is aware material is fabricated, it will be disregarded in any event whether or not it is formally struck out.

The Appointed Person considered that the registrar ought to adopt a practice of including a clear notice on the risks of reliance on genAI, and that 'a very clear warning needs to be given to make even the most nervous litigant aware of the risks they are taking'.

The future is clear: AI will be part of the administration of justice. What is also clear is that there is proper concern about its use. There likely need to be procedural requirements for the disclosure of its use and generally users must own the outcomes as their responsibility. Clearly AI in our justice system can only be used safely with human oversight and responsibility.

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

James Tumbridge -
james.tumbridge@keystonelaw.co.uk

Robert Peake -
robert.peake@keystonelaw.co.uk

Ryan Abbott -
ryan.abbott@keystonelaw.co.uk

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Arbitration and AI: From Data Processing to Deepfakes. Outlining the Potential - and Pitfalls - of AI in Arbitration

by Matthew R. M. Walker, Partner & Jack B. Salter, Senior Associate at K&L Gates

The following article was produced for and first presented at the 11th International Society of Construction Law Conference, 22-24 October 2025.

At the 11th International Society of Construction Law Conference held in South Korea recently, London & Doha partner Matthew Walker spoke on the topic "Options for User-Friendly Arbitration in the Future". Alongside this talk, Matthew and London senior associate Jack Salter authored a paper outlining the opportunities and risks posed by artificial intelligence in international arbitration.

Abstract

For all forms of dispute resolution, it is a case of "adapt or die." Conventional domestic construction arbitration in the United Kingdom has all but vanished, with most construction disputes now resolved in adjudication. Over the course of the next ten years, global projects will contend with increased competition for resources against the backdrop of growing populations and escalating pressures of climate change, while companies and their lawyers grapple with political change and the opportunities (and risks) that artificial intelligence (AI) will bring. Whether or not you are a fan of international arbitration in its current format, it will inevitably change in the next decade. Our panel will therefore explore how arbitration can adapt and stay relevant for its users, against the backdrop of the social, political and technological changes and challenges that it will face between now and 2035. In particular, we will look at how arbitration might harness AI to enhance, economise and expedite proceedings while avoiding the generation of fictional data and deepfakes.

Introduction

AI is the topic of the moment, and rightly so. For many, the authors included, AI represents the fourth industrial revolution.[1] If it has not started to do so already, AI will soon disrupt and change global economies and societies in a profound way. It is shaping energy policy,[2] it is playing a role in warfare[3] and it is already appearing in a courtroom near you.[4] Arbitral tribunals will need to get comfortable, and quickly, with using AI in arbitration–harnessing its strengths while avoiding its pitfalls.

Huge advances in the capabilities of large language models (LLMs) are accelerating the pace of change within the AI industry. No one is immune to its impact. Even lawyers, often reticent to change, are scrambling to get to grips with the library of platforms that are now marketed as game-changers in our work. As of September 2024, LexisNexis reported that more than 80% of lawyers use or plan to use AI in their work,[5] a figure set only to increase. Lawyers now need to invest in the right tech stack and must learn how to deploy it effectively. Firms which resist this change will find themselves losing out to their more innovative competitors.[6]

Nowhere is this pressure more obvious than in the world of disputes and in particular international arbitration, where rising fees provoke concerns for clients across the globe. The 2024 GAR-LCIA roundtable[7] discussed at length the notion that international arbitration had "lost its way," with spiralling costs, delays and lengthy submissions being criticised. While the complexity of disputes and the volume of information required to decide them appears to be increasing,[8] the search for procedural and cost efficiency requires parties and their counsel to seek solutions which achieve better results in a more proportionate way. AI will surely help to achieve that. The potential competitive rewards for those that push themselves to the cutting edge could be significant.[9]

It is not only lawyers who will need to contend with the advent of AI in arbitration, but also legislators and arbitrators. Only five weeks before this conference, and our discussion of this topic, the International Centre for Dispute Resolution (ICDR) announced its launch of an AI-based arbitrator for documents-only construction cases.[10] How quickly

parties and legislators adopt AI arbitration remains unclear, not least because doubts must exist as to the enforceability of AI-written awards, given legislation in several jurisdictions which expressly[11] or impliedly,[12 13] requires an arbitrator to be a person, i.e., a human.

There are huge opportunities with AI; there is a lot it can help lawyers do better. As much as practitioners need to invest in the right tools, however, they must also invest in the people that will be using them, encouraging them to incorporate AI into their practices in a way that is not only appropriate, efficient and innovative, but that is also ethical and meets the high standards required by the legal profession. Any lawyer utilising AI must be conscious of the quality of both the input and the output, as well as the limitations of the platforms. The risks in AI can be enormous, whether the cause be negligent or malicious.

Here we discuss both the opportunities and risks for the international arbitration community as it embraces AI. The message is clear: while technology may revolutionise how we conduct disputes, the revolution only works if the people using the tools know what they are doing.

Opportunity

LLMs are ideal tools for the complex tasks required of them by international arbitration:

- First, the training of the model gives it an incredibly powerful frame of reference to draw from when answering queries. When the generic training data is paired with legal-specific data, the resulting products can be extremely valuable.[14]
- The ability to ingest and analyse large amounts of data quickly makes AI tools an incredibly powerful means of increasing efficiency, doing what would take a human reviewer hours or more in a matter of minutes in a more predictable way.[15]

AI has the potential to revolutionise all parts of the international arbitration life cycle and the work of practitioners, experts and tribunals alike. It will allow participants to complete tasks at all stages of a case with greater efficiency and accuracy, finding added value whilst also reducing the cost of individual actions. Many of the issues that have been identified by the arbitration community can be in part addressed by AI. The following are a few of the areas where AI can support international arbitration.

Predictive analytics

When a dispute is contemplated, a client may wish to consider its position and its prospects of succeeding if the matter were to proceed to arbitration. Using AI, key documents can be analysed for an assessment of the likely strengths and weaknesses of various case strategies. Where parties use a legally trained AI database which has been trained to understand the concept of legal precedent, the ability to use AI to stress-test legal arguments may be an invaluable tool in helping a party to decide whether it is worthwhile pursuing a matter to arbitration or whether it is better to seek a commercial solution through negotiation or alternative dispute resolution.

This model of predictive analytics has been embraced by the International Chamber of Commerce (ICC) and the Permanent Court of Arbitration as being of assistance to parties in coming up with the most effective legal strategies.[16 17 18] In construction disputes, the American Society of Civil Engineers in 2023 tested the ability of AI to analyse and predict the outcomes of disputes that had already been decided in adjudication and concluded that the AI predicted the real result with 95% accuracy.[19] Such a use for AI can help clients who wish to consider their position before approaching external counsel; however, there is a limit to the reliability of the (albeit evidence-based) output of AI given constraints in precedent ingestion and the unpredictability of opposing counsel's arguments. The authors therefore doubt whether AI can ever truly substitute the judgment and experience of expert counsel when evaluating the likelihood of success of a case.

Arbitrator selection is a natural extension of this use case for AI in arbitration. AI solutions may provide parties with the ability to research in depth the candidates for appointment in their disputes. AI may be able to collate information on an arbitrator's previous awards or decisions—if those can be fed into a database—and it will also be able to search online for any public comments or publications that an arbitrator may have made on a particular issue. Such intelligence will allow parties to consider both their likely chance of success with an individual candidate. It will help parties to identify the arguments that might be likely to hold sway with a particular arbitrator and the likelihood of achieving a successful damages award based on the available facts and information.[20 21 22 23 24]

The key limitation of AI-assisted predictive analytics is the volume and quality of the data that it is using to make its predictions. One obvious restriction is the limit on the number of awards that an LLM might be able to review for the purposes of populating its database as to the decision-making of an arbitrator. An attraction of commercial arbitration is its privacy and confidentiality, with many awards not being published. Of major institutions, only ICSID publishes full awards, with others including the ICC, ICDR, LCIA and SIAC publishing only limited, redacted or summarised awards.[25] The disclosure of information regarding awards, including the names of arbitrators, experts and counsel, raises

questions of data protection and confidentiality which may limit attempts to broaden the spectrum of disclosures.

As such, the utility of predictive analytics may be limited in a world where arbitration maintains its privacy. Further, the available dataset for AI is likely to be restricted largely to written material, thereby omitting a potential wealth of oral and nonverbal information about an arbitrator–and, in particular, about what that arbitrator finds persuasive. According to the well-known behavioural scientist Professor Albert Mehrabian, face-to-face communication is made up of three main elements: nonverbal behaviour, tone of voice, and words. According to Professor Mehrabian,[26] words, body language and tone of voice account for 7%, 55% and 38% of effective communication, respectively.

Within that context, if AI is only able to review 7% of the available dataset around a person's communications, we must conclude that AI is not seeing the whole picture. The authors therefore do not consider that AI can supplant the experience of counsel who have sat face-to-face with an arbitrator and watched them listen to and evaluate evidence and submissions in a hearing room. AI is a tool to help human evaluation, not replace it.

Document Review

Collecting and reviewing documents can be an expensive and time-consuming exercise, particularly in complex scientific, technology or construction disputes, where data volumes can be vast. Although technology-assisted review has been in use in e-discovery for many years, AI-enabled discovery tools are a hot topic in the legal world as vendors release their solutions to the market.

An obvious question arises as to whether AI can replace first-level human reviewers, allowing arbitration teams to focus on the substance of a dispute rather than the binary decision-making of whether a document is "relevant" or not. However, vendors offering e-discovery solutions are still learning about the true utility of AI tools. In circumstances where e-discovery and AI review tools remain largely untested by the majority of practitioners, it may be difficult to justify to many clients–even those in the construction sector–the costs associated with licensing and deploying an AI review tool in circumstances where lawyers will still need to review the output in any event. This is because arbitration rules, evidential rules and ethical rules regulating legal practitioners have not yet evolved to the point where a human is no longer required to attest to the nature of a documentary search undertaken.

The investment required in up-skilling teams to be capable of effective "prompt engineering" required to use AI-enabled e-discovery can appear a difficult decision to justify from a time and cost perspective. Whether clients are willing to pay for such up-skilling and offer up their documents to allow teams to be trained is unclear. Nevertheless, prompt engineering can be refined and improved by allowing the uploading of small test-batches of documents to an AI database so as to allow e-discovery systems to be refined. Doubts also remain as to whether AI tools currently available are capable of handling matters with a large number of issues in dispute. For example, if there are numerous claims for variations within a construction dispute, it may be that the number of issues exceeds the capabilities of the platform–with the result that old-fashioned keyword searches may become necessary.

Within construction disputes, however, expert and professional advisory firms have been developing use-cases for these AI-assisted e-discovery tools, which are capable of ingesting large amounts of data. This has been used to develop better ways to handle the complex and data-heavy claims often seen in construction projects, including using AI in the collation of data around delay and disruption,[27] with the goal of reducing the time and cost of document review. Moreover, these seek to use the plain-language, context-based approach of LLMs to search on a more holistic basis for evidence that relates to these claims rather than blunt keyword searches which may miss a particular nuance in the document set. For example, just searching for the word "delay" is not going to pick up an email chain where parties discuss needing "an extra day". The way AI tools review data means that an AI system is more likely to pick up both types of documents when flagging for relevance.

Like lawyers, expert witnesses will be equally susceptible to the pressure to innovate in order to maintain relevance and competitiveness. The experts' facility with and ability to use AI may become a key consideration for law firms who are looking to appoint experts on disputes. Those that are willing to embrace AI in their analysis will naturally rise to the top.

Removing the human aspect of any first-level document review is not without its drawbacks. The first-level review in any e-discovery exercise–even one which has used a certain level of "machine learning" within a document-hosting and review engine–has been an area where junior lawyers within dispute resolution teams have "cut their teeth" on large cases. By learning how documents apply to the pleadings, witness statements and expert reports, junior lawyers gain the opportunity to understand how case theory develops and gives them an insight into the commercial operations of their clients. Removing junior lawyers' opportunity to conduct first-level reviews will have consequences for their development and risks de-skilling them if this aspect

of disclosure is not properly managed. Re-skilling lawyers so that they can analyse the results of AI-assisted e-discovery brackets (i.e., getting humans to conduct a second-level review) will be important to ensure that junior lawyers continue to learn about case theory and how to sift for truly relevant information.

Research

AI has a particularly strong use case in legal research, subject to the risks which are discussed in Section III, below. Clients with the budgets to access legally trained AI platforms may be able to dispense with outside counsel services for some research questions that they would ordinarily outsource. Being able to access complex legal analysis in a matter of moments rather than spending on junior lawyer research time may give clients enough of a steer to give them comfort in their decision-making. As such, research conducted by law firms will likely be confined to more nuanced, challenging questions of law which are not simply defined or answered. Given the ability of a large number of–at least institutional–clients to conduct their own initial research, firms will need to demonstrate clearly their "value-add" by their expertise in complex matters.

However, as the large–and growing–number of hallucinated case citations show, there are substantial risks in clients relying on open-sourced LLMs as their case-law source. Many law firms, instead, are collaborating with well-respected industry publishers who have a closed-source LLM working alongside those industry-publishers' case-law databases. With the right coding–and with specialist lawyers then interrogating the research–this type of hybrid, or limited AI may prove the best of both worlds. Law firms may still handle legal research, but when doing so will harness the power of an LLM to materially reduce the time spent trawling through case headnotes based on merely an index or a Boolean search.

Summarisation and Drafting

AI has proved itself to be very useful in ingesting large amounts of data, whether that be multiple documents or long documents, and presenting summaries of that data which allows for quick understanding of their contents. This particular skill has a number of applications for international arbitration, including condensing long documents into a short summary that allows lawyers to assess their relevance, or taking a series of documents and then sorting and creating a précis of those documents in a chronology.

The taking of evidence will also become an AI-assisted endeavour. Witness interviews have long been an exercise in notetaking and remembering the nuance to be able to craft appropriate and helpful proofs of evidence. Video conferencing platforms, now common, are almost all equipped with AI-assisted transcription capabilities. Subject to security concerns, being able to generate an AI generated transcript of a meeting can speed up the process of generating witness summaries and proofs of evidence while also ensuring that vital information is not missed.

Nevertheless, AI transcription remains a work in progress. It routinely misses or mishears text, and often contains errors, particularly when specific and unique information is being discussed. AI transcription is limited only to certain languages (for instance, the authors have not seen a reliable AI transcriber that operates in Arabic), requires good internet connections and good microphones, and also relies on slow and clear diction. But in a limited way and at a low cost, they provide a certain level of accuracy that will allow the reviewer to revisit and get the gist of a conversation rather than having to create a note of the meeting from scratch.

When coupled with a summarisation tool, it is possible to create an AI-generated proof of evidence that can materially streamline the process of evidence-taking. Indeed, in light of recent criticisms from the English courts[28] about witness statements failing to comply with English procedural law[29] as to the requirement for a witness statement to refer to "matters of fact of which the witness has personal knowledge that are relevant to the case", there is a temptation to think that witness statement drawn from a verbatim AI transcript might be the best way to ensure procedural compliance. However, as the English courts have also said, "the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations".[30]

In the authors' experience, memories are seldom sufficiently linear or reliable to allow for a verbatim transcript of a witness's recollections to be produced as a witness statement in a case. While an AI transcript will help the witness's voice to be communicated in an authentic way, achieving an accurate and useable witness statement will still require a detailed review of the documents. For the time being, useful and workable witness statements will still require the direction of a lawyer to help guide the witness to focus on relevant facts and documents in a chronological and thematic way, rather than simply relying on one person's ephemeral recollections.

Hearings

AI has the potential to revolutionise how hearings are conducted. Technology now pervades hearings: electronic bundles, live transcripts and hybrid video feeds are the norm in arbitration in a post-COVID world. The next stage is to use AI during a hearing both to reduce cost and to increase efficiency in what is an all-consuming stage. AI transcription,

as discussed above, could become an incredibly powerful tool once its accuracy rate improves. AI's sweet spot in analysing and summarising data means it is in prime position to quickly review a hearing transcript to pick out key themes relevant for future preparation and also any inconsistencies in the testimony given by witnesses or experts that can be seized upon to a party's advantage. Being able to quickly analyse evidence given on the stand against written statements is a game changer that will allow teams to use technology to gain an advantage during trials. In cases where there are multiple witnesses and experts, client representatives can obtain regular updates on the progress of the hearing and may notice key points which may warrant further reflection. In that scenario, using AI to quickly turn around a summary analysis following receipt of a daily transcript may give technologically literate teams the edge.

Risks

- The highest profile risk when using AI, about which practitioners and clients may be preoccupied, is the problem of hallucinations–principally of hallucinated (i.e. fictional) case-references. Stories from jurisdictions around the world have already shown how lawyers can get themselves into a lot of trouble when using LLM research tools without proper scrutiny. As at the date of this article, there are already 633 cases worldwide in which a hallucinated case reference has been created by AI.[31] Here are some high-profile examples.

- In England and Wales:
    - A junior barrister was handed a wasted costs order for relying on five authorities that did not exist. The barrister has been referred to the Bar Standards Board for disciplinary action, and the High Court considered whether their conduct amounted to contempt of court.[32]
    - 45 citations within a witness statement drafted by a solicitor were found to be false in some way, including 18 which did not exist at all. The solicitor was referred to the Solicitors Regulation Authority for disciplinary action.[33]

- In the United States:
    - A law firm and an individual attorney received a joint sanction of US$5,500 and a mandatory requirement to attend a course on the dangers of AI after filing a brief containing fake quotations and nonexistent authority.[34]
    - Three attorneys received public reprimands from the court for making false statements following the submission of two motions which contained fabricated citations. They were removed from the case and reported to the Alabama State Bar.[35]

- In Canada:
    - A lawyer with over 30 years of experience relied on fabricated cases in a memorandum submitted to the court. The court stated that "counsel who misrepresent the law, submit fake case precedents, or who utterly misrepresent the holdings of cases cited as precedents, violate their duties to the court".[36]

A seasoned practitioner will understand that the phrase "don't trust, always verify" means that even human generated research should be properly vetted and stress tested to ensure accuracy not only of the answer but of the sources themselves. When it comes to using AI for research, tools that are specifically designed for legal practitioners are likely to yield more trustworthy results than open source LLM platforms. This is because "guard rails" have been developed around the training data collated for legal industry AI tools. Nevertheless, this is not an automatic guarantee of accuracy; checking source materials and conducting searches independently in legal databases for cited materials is vital for avoiding the embarrassment and potential sanctions from falling into the fake case-citation trap.

Moreover, not only do sources require verification, but the answer to a research question generated by AI should not automatically be trusted to be correct. It is a well-known problem with LLMs that they will prefer to answer in the affirmative–i.e. to give you the answer that you want and to avoid telling you no. This is why it is so important to stress test the reasoning that has been given to you by the AI to ascertain whether it is a sound and defensible response. Even AI tools which are legally trained will sometimes use the wrong source material, or material that does not provide sufficient support for a proposition, to give an affirmative answer so as to please the user rather than answering in the negative or avoiding giving an answer at all. For example, you should check whether an answer comes from a valid case citation or whether it has come from a precedent document or template that has no legal force. The latter might be included in a legal database as part of the training data of a platform–and it can therefore still become a hallucinated response.

Senior lawyers need to understand how LLM platforms work and the type of results that are likely to be generated, so that they can properly supervise the juniors working for them and especially the next generation trainees, paralegals and junior lawyers. For them, using AI will be as normal as using email was to most senior lawyers at the start of

their careers. It is likely that the next generation of lawyers will use AI far more readily than any other generation of practitioner. Being able to properly supervise and train these lawyers to spot the pitfalls of using AI when conducting "manual" research will be vital to ensure that there is not a drop in the quality of the supervision given to these junior lawyers, and therefore to the quality of their work product and ultimately the service to clients.

Perhaps even more troubling than accidental reliance on fake citations is the potential deliberate use of falsified evidence in legal proceedings. The alarming quality of so-called deepfakes, which seek to use the image or voice of somebody to generate something that that person has not actually said or done, poses an extreme risk to dispute resolution since the veracity of evidence may become increasingly questionable.[37]

When faced with a document that one party alleges is fraudulent (or which appears questionable), how does an arbitral tribunal carry out the task of ascertaining the veracity of the evidence? While tools exist which claim to be able to spot deepfakes, testing has shown that these platforms are not yet reliable when it comes to spotting falsified evidence and therefore of limited utility in these circumstances.[38] [39] [40] If a tribunal cannot rely on technology to ascertain whether something has been created by AI, how can it equip itself to make that decision? Should it simply decide that the document in question holds no weight? Should it seek submissions from the parties on the issue? Should it engage forensic analysis? The answer to this will need to be one for each tribunal depending on the specific circumstances in each case.

Nevertheless, being alive to the evidential issues that AI can cause is already important, and will only become more so as the levels of AI content within arbitration increases. Within that context, the Global Investigative Journalism Network has released a guide to detecting AI-generated content,[41] in which it identified seven categories of AI detection, and has advocated for three levels of checking based on the time available for review: a 30-second red flag check, a five-minute technical verification, and a deep investigation.

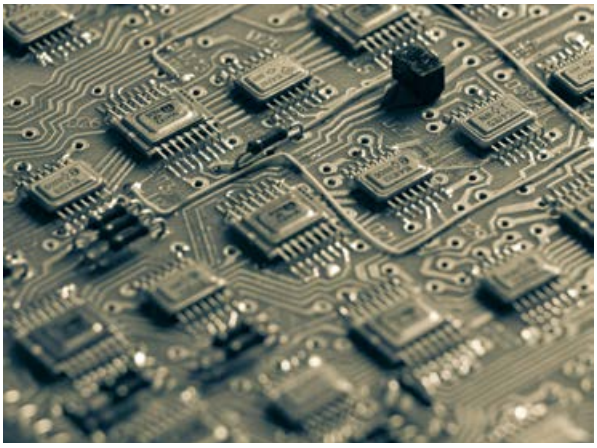
Maintaining data security and privilege is another area where practitioners will need to be extremely careful in the adoption of AI. Lawyers will need to ensure that their LLM products do not ingest privileged material into the training data and then apply that data in a way that inadvertently waves privilege. The security arrangements even for internal LLM platforms will need to be thoroughly scrutinised in order to assess the risks attached to them. External platforms will require explicit client waivers as to confidentiality, GDPR and privilege before data can be uploaded to a public LLM, given the public and accretive nature by which LLMs gather, store and share data. More importantly, however, when it comes to AI e-discovery, commentators have expressed that the use of such technology needs to be tested before the courts, and guidance and principles laid down to ensure that they can be utilised effectively without the risk of disclosing privileged information such as review logs and prompting.

Given the plain language nature of prompting will bring review protocols closer in line with case strategies, there is a danger that using AI too liberally or without proper consideration of privilege may result in accidental over-disclosure of one's strategy to the other side. AI in e-discovery may have its place for the time being in an initial internal review stage where the initial universe of documents is analysed for relevance to the dispute and key documents. However, when the disclosure requests and Redfern schedules are in play, it is likely that the use of AI will be limited to avoid over-disclosure, and those who use it should proceed with caution to ensure that they do not give away more than they would want using search terms.

Regulations and procedures

As noted above, there is a growing call for arbitrators to use all the powers at their disposal to better control arbitration, while clients are calling for their lawyers to be innovative in their approach to dispute resolution. AI will prove itself to be a catalyst to this increased focus on the efficacy and efficiency of arbitration, if all parties involved look to use the tools at their disposal appropriately.

To that end, discussions regarding the use of AI in arbitration are likely to become part of the early conversations both with clients and, more importantly, with opposing counsel and the tribunal. Seeking to set the parameters for the use of AI is likely to become part of the negotiation of the terms of reference or first procedural order of an arbitration as parties seek to use the tools to their advantage whilst catering for ethical and legal obligations.



As arbitral institutions issue more guidance and rules on the use of AI, and national courts develop their approach to the use of AI in court proceedings, there will be a more detailed body of guiding principles that will help arbitrators to establish the boundaries for effective AI use. Guidelines already exist from certain arbitral institutions which provide guidance on what they consider to be effective governance of AI in international arbitration. Two major developments are as follows:

- Silicon Valley Arbitration & Mediation Center[42] were first-movers, consulting on their guidelines which were published on 30 April 2024. Among the provisions contained within the guidelines, there are provisions:
    - For parties and their representatives to demonstrate competence and diligence in the use of AI, and a respect for the integrity of the arbitration and the evidence used within it, placing a duty on practitioners to ensure that they understand the tools that they are using and safeguard against the inappropriate use of those tools either by a failure to interrogate the output from the AI, or by using AI in a way which harms the integrity of the arbitration, including by falsifying evidence.
    - For arbitrators, by forbidding the delegation of the decision-making function of their mandate to AI, and ensuring the integrity of the proceedings by avoiding information outside of the record being introduced through AI, and by ensuring the verification of sources.

- The Chartered Institute of Arbitrators (CIArb) has issued guidelines[43] which set out both the benefits and risks of AI in arbitration, recommendations for the proper use of AI, and addressing arbitrators' powers to give directions and rulings on the use of AI by parties in arbitration. The CIArb guidelines can be distinguished from the ICDR AI-arbitration product mentioned in paragraph 4, above, since they prohibit decision-making being delegated to AI. Instead, the CIArb guidelines provide arbitrators with tools by way of a template agreement on the use of AI in arbitration, and a template procedural order on the use of AI in arbitration. These templates allow for agreement of parameters for establishing either (i) which tools can be used by counsel, or (ii) which functions and tasks AI can be used for. It also provides a list of obligations on the parties to ensure that they understand the tools that they are to use, their limitations, and the impact of their use including ethical/bias concerns, confidentiality and data security, and a duty not to mislead. The template protocol also provides governance for so-called "High Risk AI Use", described as a use-case that risks a breach of privacy/confidentiality or data security obligations, the potential to undermine procedural integrity, or the potential to assert a nonhuman influence on the award.

Further publications have been issued by other global institutions, with many law firms and barristers chambers also now providing their own guidance on the use of AI in arbitration. As governments and international bodies issue laws and regulations on the use of AI (including the EU's AI Act), and national courts issue not only judgments on the use of AI but also guidance and practice directions on how it should be used in court, practitioners and arbitrators will need to stay abreast of their legal and regulatory obligations. This will help them to ensure that their use of AI in arbitration complies not only with the relevant arbitral rules governing their dispute, but also the law of the seat of the arbitration, the governing law of the arbitration, and indeed their own professional obligations.

Conclusion

If we are to meet the challenge that AI sets for us and also meet the expectations of our clients as they evolve alongside the development of these tools, it will not be enough to stick with "tried and tested", nor will it be sufficient to rely on specialists or younger team members who have more experience and facility in using AI technology. As the famous computer pioneer Admiral Grace Hopper observed, when commenting on the future of data processing as far back as 1976, "the most dangerous phrase a [data processing] manager can use is 'We've always done it this way.'".[44] Arbitrators, experienced practitioners, experts and all levels of the legal profession–both in house and private practice–must make sure that they learn and appreciate the impact that AI is having and will have on how disputes are to be conducted. They need to learn this because AI is already here. Failing to understand it will not only mean being left behind, but may also run the risk of being caught out.

matthew.walker@klgates.com
www.klgates.com

K&L GATES

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Using Bleach to Eliminate Stachybotrys Chartarum on Masonry

by Dr Aaran Marriner-Clark, FRICS, FISSE, FCABE C.BULD.E, FNIBME, FRSPH, FAMI, MRSB, MRPSA, MBMS, MCIEH, MMSA MBSMM, MIBBS MBTS

It was affirmed that in a study by Kelly A. Reynolds, Stephanie Boone, Kelly R. Bright, Charles P. Gerba 2012 (Journal of Occupational and Environmental Hygiene, 9: 663–669 ISSN: 1545-9624 print / 1545-9632 online Copyright 2012 JOEH, LLC).

That the results of this study support those of others concluding that hypochlorite disinfectants are effective antimicrobials against moulds. Where in the study, Trichophyton mentagrophytes was not culturable in 10/10 trials following 10-min exposures to 2.4% NaOCl on porous surfaces.

I am of the opinion this may occur in a laboratory setting and the results though encouraging for Penicillium Spp and Cladosporium Spp have little effect or relevance to Stachybotrys Chartarum, (black pin mould) because on gypsum walls and gypsum plaster boards, the bleach has a very different effect.

The Sodium hypochlorite (NaOCl) does not chemically react strongly with gypsum, calcium sulphate dihydrate, $CaSO_4 \cdot 2H_2O$, but when mixed or used for disinfection, it can alter the physical properties of gypsum products when applied.

Studies show that immersion or mixing of gypsum with sodium hypochlorite reduces its compressive strength and surface quality.

Also, gypsum composition: $CaSO_4 \cdot 2H_2O$, calcium sulphate dihydrate and Sodium hypochlorite: NaOCl has no significant chemical reaction noted under normal conditions, since gypsum is relatively stable and NaOCl mainly acts as an oxidizer. However, some practical effect such as the interactions NaOCl solution penetrating the gypsum and disrupting its crystalline structure and hydration balance as a result of application.

Which is more physical than chemical but allows for the leaching of sodium from the gypsum the limiting factor in Stachybotrys Chartarum colonisation.

Gypsum exposure to bleach and sodium transport

Bleach introduces sodium into porous gypsum systems; it doesn't cause sodium to "leach out" of gypsum's crystal lattice. Instead, gypsum boards absorbs the bleach solution, and sodium remains as dissolved salts that can migrate, concentrate, and crystallize during drying effect of efflorescence formation. What actually happens chemically is the gypsum calcium and sulphate are already in stable oxidation states; sodium does not substitute for calcium in the crystal under ambient conditions. There is no meaningful ion exchange of Na+ into the gypsum lattice to do this. What actually happens is the bleach in aqueous solution, sodium hypochlorite exists as Na^+ and OCl^-. Over time—especially on porous, catalytic surfaces—it disproportionate to chloride (Cl^-) and chlorate (ClO_3^-). Carbon dioxide uptake can also convert alkalinity to carbonate/bicarbonate. Giving a net effect of the sodium remaining paired with anions as soluble salts. It is this that leaches the sodium from the gypsum when leaching or saturation occurs through structural defects and the drying process of efflorescence formation.

Salt migration and efflorescence:

Capillary transport draws solution into and through paper facings and pore networks. As water evaporates, NaCl, NaClO, $NaClO_3$, and occasionally Na_2SO_4 (from sulphate-rich environments) can crystallize at or near the surface, presenting as efflorescence. Once leaching of the sodium occurs through structural defects the sodium is reduced over time, the calcium is then available to the Stachybotrys Chartarum with a reduced sodium content high calcium and cellulose.

Practical material effects in buildings Surface contamination:

Residue formation: Sodium salts persist after bleaching, increasing surface conductivity and

hygroscopicity. Paper facing degradation: High pH ~11–12, (which the Stachybotrys Chartarum likes) saponifies organic binders and weakens cellulose, making the cellulose available to the Stachybotrys Chartarum as a food source as well as reduced sodium and increase in available calcium.

Residue Formation After Bleaching:

- Sodium salts (often sodium hydroxide or sodium hypochlorite residues) remain embedded in the paper matrix after bleaching.
- These salts Increase surface conductivity → paper becomes more prone to electrostatic interactions and moisture attraction.
- Raise hygroscopicity → the paper absorbs water more readily, creating a microenvironment favourable to mould colonization.
- Reduces the sodium through leaching.
- Makes available the cellulose and calcium as a food source.

Paper Facing Degradation:

- **High pH (11–12):**
- Promotes **saponification** of organic binders (e.g., oils, resins, adhesives).
- Weakens the structural integrity of cellulose fibres by breaking glycosidic bonds.

Resulting vulnerability:

- Cellulose becomes more accessible as a nutrient source.
- Opportunistic fungi such as *Stachybotrys chartarum* exploit this weakened cellulose, accelerating biodeterioration.

Microbiological Implications through biological colonization pathways.

Stachybotrys chartarum thrives in moist, cellulose-rich, alkaline and high calcium environments, through a combination of:

- Residual low sodium salts,
- Moisture retention and leaching of sodium
- High alkalinity binder breakdown exposed cellulose and calcium.
- Exposed cellulose and calcium as a food source

Which creates an **ideal ecological niche** for colonization and sporulation of Stachybotrys Chartarum on gypsum masonry walls.

Practical Considerations

- Preventive conservation:
  - Do not use bleach to control Stachybotrys chartarum
  - Increase the acidity of the gypsum to control stachybotrys chartarum growth.
  - Do not neutralize or wash out residual sodium salts.
  - Buffer paper to a safer pH (3-5) to stabilize cellulose.

Gypsum Chemistry

Gypsum is **calcium sulphate dihydrate ($CaSO_4 \cdot 2H_2O$)**. Normally, gypsum is close to neutral pH, but processing or contamination (e.g., alkaline residues from plaster additives) can lower its pH. By **increasing acidity** (lowering pH toward ~3-4), you:

- Reduce the solubility of cellulose breakdown products.
- Limit the availability of nutrients that fungi exploit.
- Create a less favourable environment for fungal enzymatic activity.

Add this to the control humidity (<80%) to reduce hygroscopic uptake. This then creates less favourable conditions for the Stachybotrys chartarum to colonise the gypsum plaster.

Effect on Stachybotrys Chartarum

Stachybotrys Chartarum prefers alkaline to slightly neutral substrates with abundant cellulose and calcium. Acidic conditions Inhibit fungal enzyme systems (e.g., cellulases and proteases), reduce spore germination and hyphal growth. Shift the ecological balance toward non-cellulolytic microbes that outcompete Stachybotrys Chartarum, such as penicillium spp

Practical Considerations

Controlled acidification:

Use acidifying agents such as strong mineral acids, Aim for a buffered pH ~ 3-4, not extreme acidity, to maintain material stability.

- Risks:
  - Over-acidification can weaken gypsum crystals, leading to mechanical instability.
  - Acidic environments may corrode embedded metals or interact with other building materials.
- Complementary measures:
  - Moisture control remains paramount: gypsum must stay below ~70-80% RH to prevent fungal colonization.
  - Surface treatments (biocides, sealants) can be used in tandem with pH adjustment. Also, the previously provided research indicates that the application of fogging and fungicidal agents could increase the toxicity of mycotoxin by 90.9%. therefore, mould eradication fungicides can produce more toxic mycotoxins which denies the eradication process.

The increase in mycotoxin toxicity is a very important paradox in mould remediation as fungicidal treatments can unintentionally worsen the toxicological profile of the contamination.

Structured causation chain:

Surface Treatments and pH Adjustment Biocides and sealants are often applied to gypsum, plasterboard, or paper facings to suppress fungal growth. pH adjustment (acidification toward ~3-4) reduces substrate suitability for Stachybotrys chartarum growth.

In theory, combining these measures should create a hostile environment for mould colonisation.

Forensic considerations

- In housing disputes, demonstrating that gypsum has been left alkaline (e.g., pH >9) can explain persistent *Stachybotrys* growth.
- Acidification protocols can be cited as **remedial measures** that directly alter the substrate ecology, reducing fungal viability without relying solely on biocides.

Fogging and Fungicidal Agents – The Toxicity Paradox

- Research indicates that **fogging and fungicidal application can increase mycotoxin toxicity by ~90.9%**. the mechanism of biocides does not work in that event.
- Fungicides stress fungal cells, triggering **secondary metabolite overproduction** (including trichothecenes).
- Dead or stressed spores may release **higher concentrations of bound mycotoxins** into the environment.
- This means eradication attempts can **increase airborne toxicity**, even if visible mould growth is reduced.

Given this the application of biocides does not control or eradicate the colonisation of Stachybotrys Chartarum.

Implications for Stachybotrys Chartarum

Stachybotrys Chartarum produces potent trichothecene mycotoxins (e.g., satratoxins). Under stress (biocide exposure, fogging), the fungus will:

- Intensifies toxin synthesis as a **defensive response**.
- Releases toxins into dust and debris, which remain hazardous even after fungal death.
- Thus, eradication by fungicides can **negate the remediation process**, leaving a more toxic environment than what we started with.

Key causation chain:

- Chemical treatment → fungal stress → increased mycotoxin release→higher toxicity→remediation failure.
- In housing disputes or expert witness contexts, this demonstrates why **biocide-only strategies are insufficient** and can worsen occupant exposure.
- Evidence of increased toxicity post-treatment can be used to argue for **alternative remediation protocols.**

Safer Alternatives

- **Physical removal** of contaminated materials (cut-out and replace gypsum/paper facings).
- **Environmental control**: humidity reduction, ventilation, and substrate a low pH stabilization.
- **Non-fogging approaches**: localized cleaning with neutral pH surfactants, followed by sealing with breathable, non-toxic coatings.
- **Monitoring**: post-remediation air and dust sampling to confirm toxin reduction, not just fungal absence.

Moisture dynamics:

Hygroscopic salts: Residual NaCl and NaClO attract moisture, elevating local equilibrium moisture content and slowing drying. This leaches the sodium after bleaching has occurred over time due to structural defects.

Wetting And Drying Cycles

Rewetting risk: Salt-laden surfaces can more readily reabsorb ambient moisture, this leaches the sodium and makes the calcium available to the Stachybotrys chartarum given time for the leaching to occur.

When moisture is reabsorbed:

- **Sodium salts dissolve** and migrate with capillary action.
- This mobilizes ions within the pore network.
- Over time, **calcium sulphate ($CaSO_4 \cdot 2H_2O$)** can partially dissolve, releasing Ca^{2+} into the pore water. Which the Stachybotrys Chartarum responds to.
- The leaching is relatively slow but cumulative, especially under repeated wetting–drying cycles. However, this process is sped up when leaching occurs through structural defects.

Implications for *Stachybotrys Chartarum*

- *Stachybotrys* thrives in **cellulose-rich, persistently damp substrates** (e.g., gypsum board paper facings).
- It requires **calcium and other cations** for enzymatic activity and sporulation.

- The leaching process effectively **enriches the microenvironment:**
  - Sodium salts maintain moisture.
  - Calcium becomes bioavailable in the damp pore sodium depleted water.
  - Organic paper facings provide carbon substrate.

Together, this creates a **nutrient-rich, moist niche** ideal for colonization.

Forensic Housing Context:

Bleach treatments on gypsum board can unintentionally worsen long-term risk as they leave hygroscopic sodium residues. Which is leached through structural defects. which alters ion balance, making calcium more accessible. Which masks visible mould temporarily but set up conditions for regrowth once the sodium is reduced by the application of bleaching and structural defects leaching.

In investigations, finding salt efflorescence + renewed mould growth is a strong indicator of prior bleach use and subsequent leaching. Bleach doesn't just fail to eradicate Stachybotrys chartarum, it can prime gypsum systems for recolonization by creating a damp, calcium, ion-rich environment which supports colonisation of Stachybotrys Chartarum. The apparent "cleaning with bleach" effect is short-lived, while the biochemical and moisture dynamics favour mould resurgence in the long term.

The Chief Constable of Sussex Police v XGY: Two doors shut, but others stay open

by Chris Greenwood & Faye Metcalfe at 4 New Square Chambers

Introduction

On 8 October 2025, Lady Carr, Dame Victoria Sharp P and Lord Justice Coulson handed down judgment in *The Chief Constable of Sussex Police and the CPS v XGY and the Bar Council* [2025] EWCA Civ 1230, rejecting a claimant's claims against the Crown Prosecution Service ('CPS') and the Chief Constable ('the police'). Those claims had involved challenge to the 'core immunity' – immunity from suit in respect of things said and done by advocates in court.

In this article, Chris Greenwood and Faye Metcalfe recap the background and inroads made into the core immunity thus far, consider what the decision in *Chief Constable v XGY* means for lawyers and expert witnesses, and explore its potential consequences on the routes by which litigants might still seek to attack lawyers and expert witnesses for conduct of and statements made in court hearings.

Immunity: a brief history

The core immunity, where it applies, acts as an absolute bar to persons taking part in legal proceedings (judge, counsel, witness, juror or other party) being sued for almost anything done or not done in the course of conducting a case in court.

The reasons underpinning the immunity are both policy driven – advocates and witnesses must be able to speak freely in court without fear of being sued for what they say, and advocates must also argue their client's case as best they permissibly can – but also practical; as the Court of Appeal held nearly 150 years ago: *"it is the fear that if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty."*[i] In simple terms, a 'floodgates' argument.

Given that the doctrine of immunity necessarily conflicts with the principle that every wrong should have a remedy, the test for extending the immunity *beyond* its core applicability to statements made in the courtroom is strict: it must be necessary for the proper administration of justice:

- Of importance to advocates, the immunity has been extended beyond statements made in court, but only *"where the particular work is so intimately connected with the conduct of the cause in court that it can fairly said to be a preliminary decision affecting the way that cause of action is to be conducted when it comes to a hearing": Saif Ali and Anor v Sydney Mitchell & Co* [1980] AC 198, 215D.
- *In Watson v M'Ewan* [1905] AC 480, the core immunity afforded to witnesses giving evidence in court was extended to include statements made by witnesses outside of court, but only where such statements were made with a view to giving evidence. The same extension was applied in *CLG v Chief Constable of Merseyside Police* [2015] EWCA Civ 836, covering claims arising out of the disclosure of a victim's address in a police officer's statement supporting an application for arrest warrants.
- In *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177, the House of Lords further extended the immunity to include statements made out of court by potential witnesses (as well as statements made by investigators), but again, only where they were made with a view to potentially giving evidence.

And in some cases, attempts to extend the principle have strayed too far outside the courtroom:

- In both *Darker v Chief Constable of the West Midlands* [2001] 1 AC 435 and *Singh v Reading Borough Council* [2013] EWCA Civ 909, the immunity was held not to cover claims that the defendants had conspired to fabricate false evidence and pressurised a witness to include inaccurate witness evidence in her statement; the defendants' actions in fabricating and procuring the evidence were held to have been divorced from the evidence/statements that resulted.

- The immunity also did not apply in *Daniels*, where a claim for misfeasance in public office arising from to the concealment/withholding of evidence was held not to be founded on the content of any statement, but rather the way in which the disclosure exercise was performed.

There are also some types of claims to which, even inside the courtroom, the core immunity does not apply at all:

- In *Arthur JS Hall & Co v Simons* [2002] 1 AC 615, the House of Lords held that the public interest in the administration of justice no longer required that advocates enjoy immunity from suit for negligence alleged by former clients in the conduct of civil proceedings. The principles of *res judicata*, issue estoppel and abuse of process were held to provide adequate protection against re-litigation, and the Court's power under CPR r.24.2 would restrict the ability of clients to bring unmeritorious or vexatious claims against advocates absent the immunity.
- *Jones v Kaney* [2011] 2 AC 398 built upon *Hall*, abolishing the expert witness's immunity for claims in negligence brought by their clients.
- Suits of malicious prosecution, malicious initiation of criminal proceedings, prosecution for perjury and proceedings for contempt of court have also long been held not to be covered by the immunity (*Daniels v Chief Constable of South Wales* [2015] EWCA Civ 680).

Accordingly, while the starting point remains that the immunity covers any cause of action brought against the relevant party for written or spoken statements made in court, it is a point from which very substantial departures have already been made.

Chief Constable v XGY

The claimant had been in a relationship with her former partner, DYP, who was the accused in the underlying criminal proceedings. Following the end of that relationship, the claimant moved addresses two times, relocating to an address in Hampshire, which she told the police about and asked to be kept confidential. Having initially accused the defendant of various forms of assault and threats to kill, at the same time as providing the address, she also told the police that during their relationship, DYP had raped her.

The police arrested DYP, and in preparing a file for DYP's bail hearing, passed the claimant's address to the CPS without marking it as confidential. During the bail hearing, the advocate for the CPS sought to include a condition of bail preventing DYP from going to the address and in doing so informed DYP of the address.

The claimant brought claims for damages against the Chief Constable and CPS pursuant to the Human Rights Act 1988 (by reference to Articles 2, 3 and 8 of the Convention), for breach of the Data Protection Act 2018, and for breach of confidence and misuse of and/or unjustified disclosure of private information.

Both defendants applied to strike out the claims against them.[ii] The CPS contended they were immune from suit since the claims related to something said by an advocate in court, and the police argued, amongst other things, that the core immunity extended to their provision of the address to the CPS.

Judgment of HHJ Brownhill

HHJ Brownhill struck out the claims against both defendants, holding that (1) although any new *extension* to an immunity required detailed examination, the law did not require cases falling within an already established immunity to be subjected to a trial into the relevant public policy considerations; and (2) *Hall* had only removed an advocate's immunity in relation to negligence claims brought by the advocate's own client, not any other immunity.

HHJ Brownhill concluded that since the disclosure of the claimant's address fell squarely within the established advocate immunity (statements made in court by an advocate) that action must fail, and that police's inclusion of the address in the CPS file was similar to the file note in *Taylor v DSFO*, such that it fell within an established extended immunity.[iii]

Judgment of Ritchie J

Ritchie J allowed the claimant's appeal.

Ritchie J considered that outside of certain 'core' categories of immunity (which he labelled *"Witness Immunity at Court "Judges Immunity at Court" and "parts of Advocates Immunity at Court relating to the evidence in the case"), "the appellate Courts have arguably stated the correct approach to claimed immunities... is to grant or permit them "grudgingly", because they undermine the key principle that every wrong should have an appropriate redress in law". Accordingly, where there were relevant factual issues potentially making the claimed immunity "unsettled" in scope or justification, "the justification should be analysed on the necessary evidence to see if it makes immunity necessary in the public interest".*

Ritchie J's rationale was that in the last 25 years there had been a move away from *"absolutism"* towards a *"justification approach"*: a *"careful consideration of whether the facts of each case actually do fit with the claimed "immunity" by reference to whether the long-established justifications for the immunity apply".*

So, Ritchie J held, where a defendant relied on the immunity but the claimant asserted it was unjustified or the claim fell outside of its scope on the facts, the court should conduct a *"balancing exercise to be carried out to determine whether the way the function was performed so undermined the justifications for the claimed immunity"* that it should not be granted.

Adopting this approach, Ritchie J held that:

- The police were not covered by the scope of 'Witness Immunity at Court', because the address was not evidence in relation to the criminal case being investigated. And while they may have been covered by 'Legal Proceedings Immunity before Court', this was not a 'core immunity' and so the Court should have considered the justifications for granting the immunity, and it was also arguable that the function performed was "administrative" and so fell outside the scope of the immunity altogether.
- As to the CPS, it was arguable that the core part of the 'Advocates' Immunity at Court' related to *"witness evidence in the case, not to extraneous or peripheral or administrative matters"*, so that again, a balancing exercise between public policy concerns should have been carried out by HHJ Brownhill.

The Court of Appeal's decision

On appeal by the Chief Constable and CPS, the Court of Appeal held that HHJ Brownhill was right to conclude that the claims against the CPS had to fail. Although the claimant's address should not have been disclosed, *"the words of the CPS advocate were spoken indubitably "in the course of court proceedings" and so covered by the core immunity"*.

In doing so, the Court of Appeal rejected Ritchie J's *"justificationism"* approach. Instead, the Court held:

1. Where the facts fall within an existing immunity (rather than requiring a new extension), the application of the immunity does not need to be justified on a 'case-by-case basis'.

> *It is wrong to elide the requirement to justify categories of immunity with the requirement to justify the actions of a person on the facts of every case. If a claim falls within the scope of the core immunity or its established extensions, the claim must be struck out. To be effective, foreseeability is essential if those involved in the administration of justice are to speak freely. The approach of "justificationism" fundamentally undermines the public policy underlying the existence of the immunity."*

2. It is only when a new extension is sought that the necessity of the immunity has to be justified.
3. The decisions in *Hall* and *Jones* did not exemplify a move *"away from absolutism"* towards *"justificationism"*. Instead, *Hall* involved a specific challenge to an existing immunity based on policy (namely that counsel should be immune from suit by their own clients in negligence), and *Jones* focussed exclusively on whether an expert witness' immunity should continue to extend to claims in negligence brought by their own client.
4. Contrary to Ritchie J's interpretation of *Darker*, *"The core immunity is not limited to evidential matters. It is far wider in scope. The immunity attaches to statements (said or written) made in court. Whether or not a statement is related to evidence, is a limiting factor only in the extension of the core immunity to statements made by potential witnesses outside of court – such statements are only within the scope of the extension if they are made with a view to giving evidence."* Accordingly, the claimant's address did <u>not</u> need to be related to the alleged offences for its disclosure to be covered by the immunity.
5. The core immunity and its extensions apply to bail hearings, such hearings being *"an integral part of proceedings in the criminal court"*.

The Court of Appeal further held that the police were covered by the extended immunity identified in *Watson*, *Taylor*, and *CLG*. The police's preparation of the bail hearing file fell within the process of criminal investigation and administration of justice. Accordingly, Ritchie J was wrong to impose the 'evidential' requirement that he did.

The Court of Appeal also addressed the question of what type of claims the immunity covers, reiterating that save for narrow exceptions – including claims for negligence by the party's own client – the immunity *"cannot be outflanked by other claims, no matter how they are formulated."*

Attacks on proceedings: does Chief Constable v XGY redraw the lines of defence?

The Court of Appeal's decision makes two things clear:

1. Where a claim falls within an established immunity category, it is not open to the claimant to simply invite the Court to consider whether the immunity is justified on the facts of the case.
2. The Court will not distinguish between 'administrative' or 'evidential' statements made in court; the test is simply whether the words were written or *"spoken "in the ordinary course of court proceedings"*.

But other doors remain ajar:

- The Court noted that *"Public policy can change over time and be re-evaluated"*. *Hall* is a paradigm example; thirty years earlier, in *Rondel v Worsley* [1969] 1 AC 191, the House of Lords considered the very same question concerning negligence

claims against advocates by their own clients, but gave the opposite answer. Does this mean that a claimant who raises a 'policy argument' will avoid having their claim struck out? Or are first instance judges tasked with deciding whether such arguments stand a real prospect of success? And how often will the higher Courts be willing to reevaluate previous policy decisions?

- Professional negligence claims by clients against advocates and experts are here to stay. But what if, in *Chief Constable v XYG*, the claimant had informed the CPS advocate at the hearing that she was considering not giving evidence at trial, but the advocate had promised not to reveal her address? This might arguably be a voluntary assumption of responsibility, i.e. a relationship 'akin to contract'; would an arguable claim therefore lie?

The Court of Appeal also made clear their decision did not concern the well-established exceptions to the immunity, nor does it impact claims in respect of actions outside of (and not sufficiently connected to) the courtroom. And in recent years there has been no shortage of litigants making use of them:

- Committal proceedings for contempt of court: Committal proceedings continue to represent a degree of risk to witnesses in proceedings, including expert witnesses. However, some of that risk is mitigated by the permission filter at CPR r.81.3. *In Frain v Reeves* [2023] EWHC 73 (Ch), the Court emphasised the need to exercise great caution before granting permission to bring committal proceedings, to assess the public interest in bringing such proceedings on a case-by-case basis, and to *"guard against the risk of allowing vindictive litigants to use committal proceedings to harass persons against whom they have a grievance"*.
- Malicious prosecution: In *Willers v Joyce* [2018] AC 799, the Supreme Court held that the tort of malicious prosecution included the prosecution of civil proceedings, and that witness immunity did not bar malicious prosecution claims, because they were not brought in respect of the evidence given in court, but rather in respect of the malicious abuse of process.
- Unlawful means conspiracy claims: This tort has proved a popular means by which litigants have sought to attack proceedings notwithstanding the immunity. Unlike the first two examples, it is fallible to the immunity. However, litigants can still argue that their claims do not arise from the content of statements made in court, but the manner in which it was procured, as the successful claimants did in *Darker, Singh* and *Daniels*.
- Causing loss by unlawful means: This tort is similarly fallible to the immunity, but that does not assist a defendant who never issued proceedings at all. In *Vanquis Bank Ltd v TMS Legal Ltd* [2025] EWHC 1599 (KB), the Court declined to strike out or grant summary judgment against a bank's claim that the defendant solicitors had caused it loss by unlawful means by making unmeritorious financial mis-selling complaints against it to the Financial Ombudsman Service.
- Claims for misuse of private information: Following *Chief Constable v XGY* there is no doubt that such claims fall within the core immunity, but as with unlawful means conspiracy claims, this will not assist a defendant who has misused such information in the process of producing their evidence; one example may be *Kul v DWF LLP* [2025] EWHC 1284 (KB), where the defendant did not seek to rely on the immunity, but in any event succeeded on other grounds.

Conclusion

The Court of Appeal's rejection of *"justificationism"* whenever the immunity defence is raised enhances foreseeability, and will be welcomed by those who practice in the courtrooms of England and Wales. The decision also provides helpful clarity that the statement complained of need not relate to the substance of the index claim in order for the immunity to apply. But potential exposure for lawyers and expert witnesses to claims by opponents in litigation (and other dispute resolution mechanisms) remains; the Court may have closed two doors, but others have been carefully left ajar – and some wide open – leaving plenty of room for future litigation.

This article is not intended as a substitute for legal advice. Advice about a given set of facts should always be taken.

References

[i] Munster v Lamb (1883) 11 QBD 588, 604, which the Court of Appeal cited with approval.

[ii] More particularly, the claims against them based on the disclosure of the address. The claimant's claim against the police contained a further strand, concerning other conduct, which was held to be arguable.

[iii] HHJ Brownhill also concluded that the claimant did not fulfil the section 7 criterion for bringing an HRA claim, however, this article will not consider this aspect of the decision nor its treatment in the subsequent appeals.

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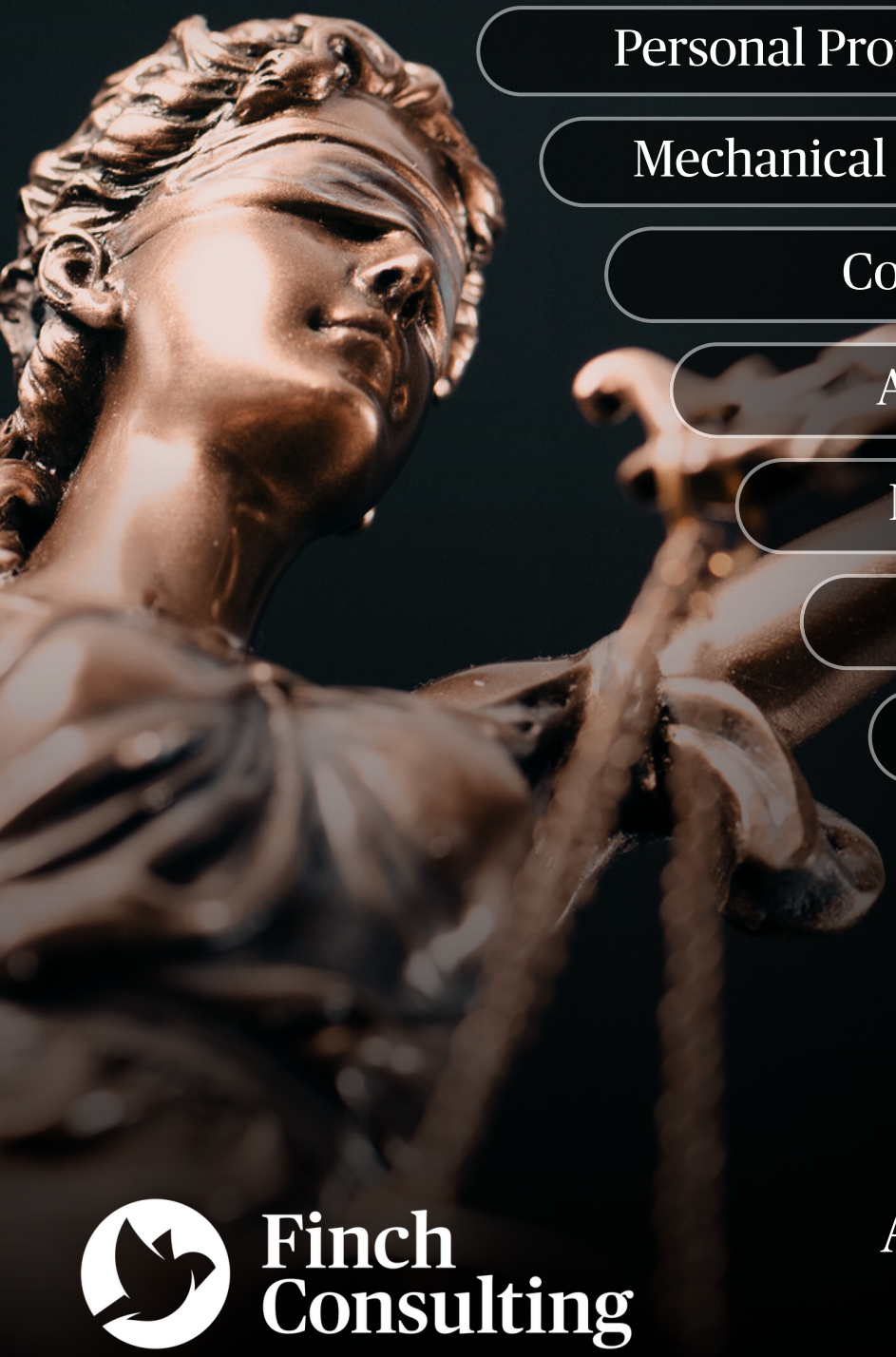

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