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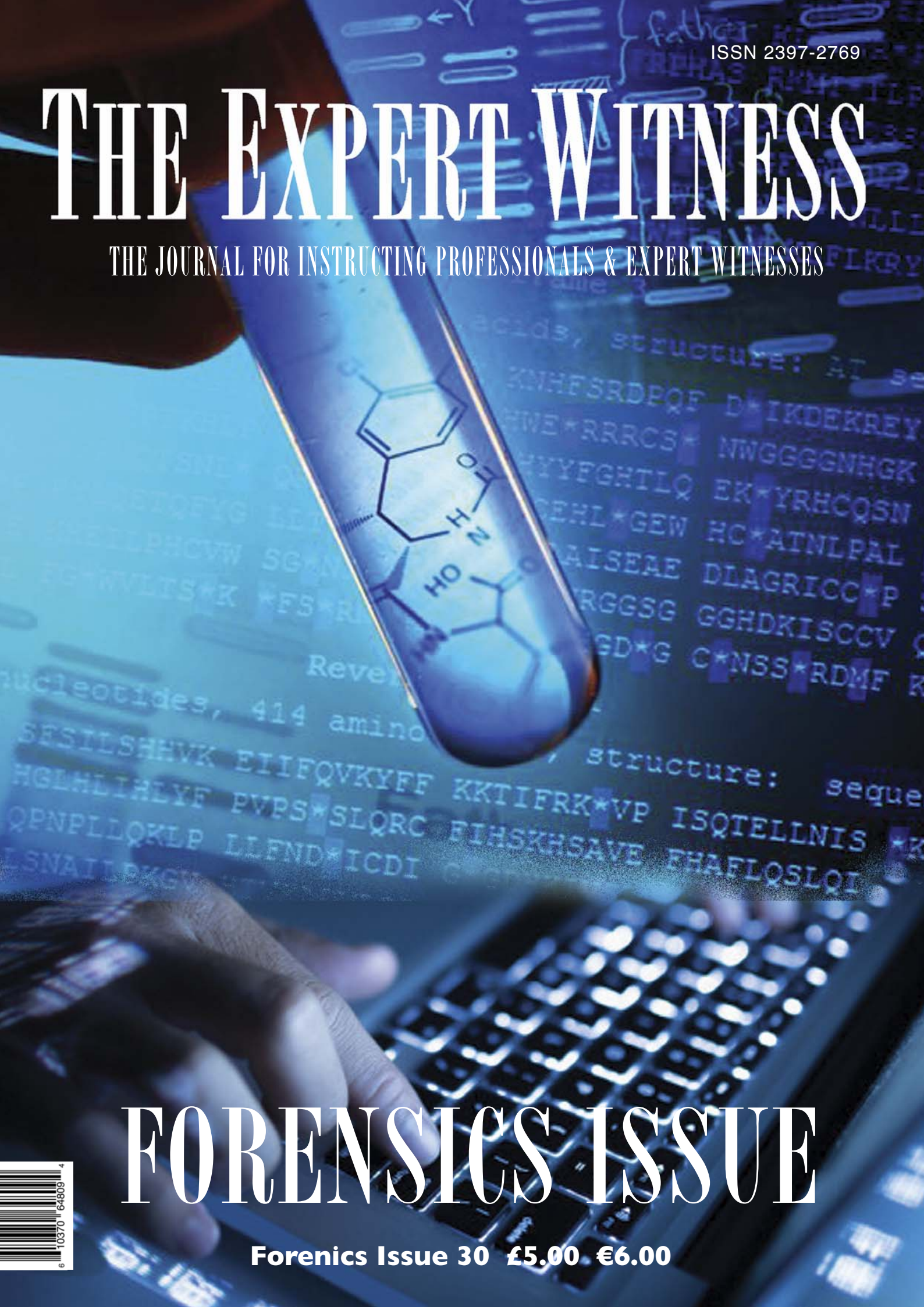
THE EXPERT WITNESS

THE JOURNAL FOR INSTRUCTING PROFESSIONALS & EXPERT WITNESSES



FORENSICS ISSUE

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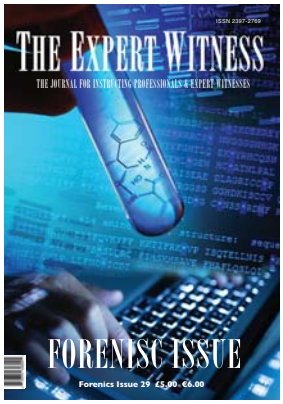

Welcome to the Expert Witness Journal

Hello and welcome to the 30th edition of the Expert Witness Journal, and a belated Happy New Year to all our readers.

In this edition we are focussing on Forensics, with a great range of articles including an interesting article from Ray Evans regarding a Death Row Appeal case that he has been involved with, the preservation of Kennedy's assassination bullets and 'How we can fix the Forensic Science crisis'.

If you are visiting the Forensics Europe Expo at the Excel, London, from 19-21 May 2020, please stop by stand FE37 and say hello.

As usual we also include articles on a wide range of topics, including Japanese Knotweed and an excellent article from Mark Solon of Bond Solon, reviewing the annual Expert Witness conference and discussing its findings.

Our next issue will feature articles on Personal Injury, plus many general related articles. If you would like to submit or comment on any articles, please contact myself at the email below.

Many thanks for your continued support.

Chris Connelly

Editor
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Contents

Some of the highlights of this issue

Events

Inspire MediLaw

Inspire MediLaw's medico-legal conferences cover a whole range of medical and legal issues relating to clinical negligence. Our Medico-Legal conferences focus on providing medical knowledge for legal professionals with presentations by leading medical experts, lively discussion and debate and the latest case studies. With an interesting balance between medical and legal speakers our APIL CPD accredited conferences will be of interest to both claimant and defendant practitioners.

Expert Witness Training for Medical Professionals
16th January 2020
Oxford Spires Hotel

Inspire's Expert Witness training is designed specifically to guide and prepare medical professionals for acting as expert witnesses in clinical negligence litigation.

The two day CPD course covers: the practicalities of setting up a medico-legal practice; what to expect from instructing parties; the legal procedural rules that govern expert witnesses; successful report writing; preparation of joint statements with opposing experts; meetings with counsel and giving evidence in court.

Introduction to Inquests
20th January 2020
Malmaison Oxford

This event is designed to provide an overview of the Inquest process. It is aimed at clinicians who have little or no experience of the Coroner's Court, but who are likely to be called as a factual witness.

The training comprises an overview of the scope and processes of an Inquest; guidance and practical tips on writing a factual witness statement for the Coroner; giving evidence at the Inquest; and the possible next steps following a verdict.

Delegates are also welcome to attend an Inquest at the Oxfordshire Coroner's Court on the day after the training, listed for 10am, at which there are due to be factual witnesses called to give evidence.

Introduction to Inquests
11th February 2020
Malmaison Oxford

This event is designed to provide an overview of the Inquest process. It is aimed at clinicians who have little or no experience of the Coroner's Court, but who are likely to be called as a factual witness.

The training comprises an overview of the scope and processes of an Inquest; guidance and practical tips on writing a factual witness statement for the Coroner; giving evidence at the Inquest; and the possible next steps following a verdict.

Delegates are also welcome to attend an Inquest at the Oxfordshire Coroner's Court on the day after the training, listed for 10am, at which there are due to be factual witnesses called to give evidence.

Expert Familiarisation Training
28th February 2020
Oxford Moot Court

This practical training will provide 6 experienced medico-legal experts experience of cross examination in a mock Courtroom scenario.

Many experts feel that appearing in Court is the most daunting aspect of medico-legal practice. It is an infrequent occurrence meaning there are few, if any, opportunities for experts to become familiar with the process. Yet, when it is called for, getting it right really matters.

Following an in-depth discussion of Court processes, and the opportunity to share experiences, each delegate will undergo in-depth examination of their evidence in front of their peers. The role play will be recorded so the group can review the video and feedback together.

Expert Witness Training for Medical Professionals
12th March 2020
Oxford Spires Hotel

Inspire's Expert Witness training is designed specifically to guide and prepare medical professionals for acting as expert witnesses in clinical negligence litigation.

The two day CPD course covers: the practicalities of setting up a medico-legal practice; what to expect from instructing parties; the legal procedural rules that govern expert witnesses; successful report writing; preparation of joint statements with opposing experts; meetings with counsel and giving evidence in court.

Medico-Legal Practice Management
23rd April 2020
Oxford

The practicalities of setting up your medico-legal practice can be daunting whilst juggling diary dates, trial commitments, report writing deadlines, growing your practice within your area of expertise, and getting to grips with legal tests and litigation procedure.

This course will encourage and guide those embarking on, or already managing, a medico-legal practice.

A smooth running medico-legal practice frees up your time as an expert to prioritise the crucial tasks of reviewing medical evidence, considering the research, crafting your report, preparing for and attending conferences with Counsel, Joint Meetings, and the Court.

Delegates on our November course said:
"An excellent overview of how to best run a medicolegal practice. Friendly group & lively interactions"
"Very useful; practically orientated; expertly delivered"
"Very helpful, interesting course, beneficial that one of the trainers is a solicitor"
"Very informative & user friendly. Speakers…excellent communicators"

Contact Inspire MediLaw
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RICS

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Mon 21 Oct 2019 - Fri 31 Jan 2020
Time: 09:00 AM - 05:00 PM
Venue: Birmingham Venue TBC, Birmingham
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Managing the post appointment process
Constructing a comprehensive expert report
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Duration: 1 Day

17 Feb 2020 09:30 in Manchester
03 Feb 2020 09:30 in London
04 Mar 2020 09:30 in London
20 Apr 2020 09:30 in London

Courtroom Skills
This one day course will provide expert witnesses with the core skills to effectively present opinion based evidence in court under cross-examination.

18 Feb 2020 09:30 in Manchester
04 Feb 2020 09:30 in London
05 Mar 2020 09:30 in London
21 Apr 2020 09:30 in London

Cross-Examination Day
A follow on day to the Courtroom Skills Training, this course enables expert witnesses to refine and enhance their skills in presenting evidence in court.

19 Feb 2020 09:30 in Manchester
08 Jan 2020 09:30 in London
05 Feb 2020 09:30 in London
06 Mar 2020 09:30 in London

Civil Law and Procedure
This course provides civil court experts with a comprehensive understanding of their requirements of CPR Part 35, Practice Direction 35, the Protocol for the Instruction of Experts and practice direction on pre-action conduct.

20 Feb 2020 09:30 in Manchester

Criminal Law and Procedure
This course provides criminal court expert witnesses with a comprehensive understanding of their requirements under Part 33 of the Criminal Procedure Rules.

14 May 2020 09:30 in London

Family Law and Procedure
This course provides family court expert witnesses with a comprehensive understanding of their requirements under Part 25 and 25A.

18 Jun 2020 09:30 in London

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What Happens to Cryptocurrency When Someone Dies?

A few years ago there was a surge in the popularity of Bitcoin. Despite prices plummeting over the last couple of years, more and more people are still investing in cryptocurrency. Cryptocurrency is an online currency and there is often confusion about the legal status of such currency.

As of August 2018, there were more than 1,600 types of cryptocurrency, with Bitcoin being the largest. Cryptocurrency is made up of a bundle of rights, therefore is cryptocurrency actually property you own? HMRC published guidance in December 2018 stating that cryptocurrency is included when calculating your inheritance tax bill.

You can be taxed on cryptocurrency but when it comes to your beneficiaries actually claiming that cryptocurrency there are logistical and legal issues to be taken into account.

What jurisdiction is the cryptocurrency located in and therefore which laws govern its succession? Who manages the online access, what terms of use govern it? How is the cryptocurrency to be accessed?

Cryptocurrency requires an online "wallet" but unlike your physical wallet which holds cash, your online wallet does not hold the cryptocurrency. Cryptocurrency holds "keys" which are needed to access the cryptocurrency.

Whilst there are many unanswered questions, what is clear is that when planning for the future, it is important to consider how your online assets will be treated and accessed should you pass away or lose mental capacity.

If you are interested in finding out more about how to include cryptocurrency in a Will, don't hesitate to get in touch with experienced Will writing solicitor, Mihiri Gajraj on 023 8082 0544.

Author Mihiri Gajraj
Partner
T: 02380 820544
W: www.trethowans.com

My First Christmas in London 1964; All White Experience with Cultural, Religious and Ethnic Surprises

by Dr Bashir Qureshi

FRCGP, FRCPCH, AFOM-RCP, Hon FFSRH-RCOG, Hon FRSPH, Hon MAPHA-USA.

- *Author of Transcultural Medicine, dealing with patients from different Cultures.*
- *Expert Witness in Cultural, Religious & Ethnic Issues in Litigation.*

My first Christmas in England, on 25 December 1964, was a white Christmas for me, in true sense. I was born in India, medically qualified in Pakistan. I started work in Whipps Cross Hospital, London, on 1st September 1964. On Xmas day, I saw for the first time that:

• The ground, cars, trees, rose bushes and buildings were covered with snow.

• The patients, all other doctors, matrons, nurses, some nuns who were nurses, paramedics, porters and all other staff, including cleaners were white.

• There were some male nurses. This was new for me. A charge nurse was called "Mr Rowbottom." He was a cockney, born in east London within sounds of Bow bells.

• Pearly kings and queens came to hospital, sang carols and danced. I saw western dancing for the first time. England was so peaceful, no war. Everyone looked happy and praised the Lord. I thought it was akin to what, I had been told, is in heaven.

• The ward sisters waited for a male consultant to cut a turkey and cake, for Christmas lunch. He wore a Father Christmas costume. The scene was magical.

• On the Christmas day ward round, as a houseman, I was pushing a trolley, full of bottles of wines and spirits. The consultant poured every patient's choice in a glass and the ward sister, with unusual smile, offered it to each patient, including the one with alcoholic cirrhosis, with a greeting "Merry Christmas & a Happy New Year".

• I joined nurses in carol singing, without opening my lips. I did not know carols and the singing tone, but I joined in. Since then, I am skilled in political & team work.

• Traditionally, some ward nurses, called "sisters" were very powerful under the Matron's rule. They even influenced consultants in decision making. Ironically, I observed that one in three ward sisters were unkind to house doctors, especially to female doctors. However, their staff nurses were extremely nice. They were all nicer at Christmas time. Fortunately, I was alright, as I am cheerful, careful and tactful.

• Charge nurses were merrier at Christmas. I was amused, bemused and confused. What a new white world. As a child I learnt, all angels were white, made of light.

• A Charge nurse, advised me on my first night duty of ward round on the Christmas eve "Doctor, write a laxative and sleeping pills for each patient and the night nurse can choose to give it, without waking you up to write it." Then he winked at me and said "If you keep their bowels open, they would keep their mouths shut!".

• I was taken aback as I knew that winking, by a male or a female, is a sexual gesture in the East! I was startled to see that a Charge nurse was winking at me; a strictly heterosexual soul. I learnt later on that "winking" is a benign friendly gesture in the West. No Easterner needs to worry. This was the beginning of my strong interest in pioneering new disciplines of "Transcultural Medicine" and "Transcultural Litigation".

At Christmas 1964, I had thick black hair, a moustache turning upward, slim figure, and no sense of humour. I was a typical Easterner, but nurses thought that I was very handsome. As a result of my age and westernisation over the last, 55 years, I shall not need a comb this Christmas 2019. I am not a slim guy anymore, but I have acquired a British sense of humour, including satire. I enjoy western music and dancing. I like helping people. I did my best to help people, as a caring doctor. I issued all prescriptions & certificates until 2016. Yesterday was history, tomorrow is mystery, I enjoy today age 84.I hope to remain a jolly good fellow for many Christmases to come.
I wish readers Merry Christmas 2019, Happy New Year 2020.

Dr Bashir Qureshi.
Email. drbashirqureshi@hotmail.com
Web: www.drbashirqureshi.com

Issues Often Raised by Experts Involved in Litigation or Potential Litigation

by Alec Samuels

The expert may find himself in an exposed and vulnerable situation. He may be criticised by the solicitor instructing him, by the expert and the solicitor on the other side, in cross-examination by counsel on the other side, and even by the judge, whose criticism may appear in the judgment and the published law report. Anything and everything may be criticised. For example, it may be alleged that the report is too long, or too short, or too complicated, or too simple, or there is a lack of structure, or analysis, or sources, or literature, or reasons.

There is no prescribed form for the report, though model forms are available from the expert institutions. Circumstances differ so much. Every case is unique. The following recommendations are diffidently proffered:

Think of the "audience", namely the expert on the other side, the lawyers involved, the lay people involved, the judge, and even the public and the press should the case attract public attention. Set out the instructions. State the facts. State any assumptions made. Give an appropriate chronology. Always maintain scientific and technical accuracy and mode, supported if necessary in language intelligible to the ordinary layman. Describe the investigation, calculations and analysis. Acknowledge the work of the "team". Indicate the limits of the expertise claimed. Indicate the limits of current research on the topic. Cite the literature. State the findings. In quantum distinguish between the calculable and the incalculable. Give the reasons. Give the conclusions. A simple, or at least a straightforward, summary may well be helpful for everybody. The mass of scientific and technical detail may well be better placed in an appendix or annex.

Following the joint meeting of experts the resultant joint report should concentrate upon the outstanding points of difference.

The child was very seriously injured in a clinical negligence case. The issue was quantum. The experts simply assumed that the claimant would return home and did not analyse the alternatives, such as a boarding school, paid for either by the parents or the local authority. The judge was unimpressed Harman v East Kent Hospitals NHS Foundation Trust [2015] EWHC 1662, QB.

Following a serious accident, out of which questions arise as to the capacity of the injured claimant, the experts involved must ensure that they are fully supplied with all the relevant material, in view of the importance of the issue of capacity to be considered by the judge Loughlin v Singh [2013] EWHC 1641, QB.

Proving cognitive impairment injury requires expert evidence of a specialist nature. Allegations of malingering likewise require expert evidence of a specialist nature Williams v Jervis [2008] EWHC 2346, QB, and [2009] EWHC 1837, QB.

The expert must always be aware of the limitations upon his role. He must not pontificate or lecture. He must not act as an advocate. Matters of credibility and reliability of the lay witnesses are matters for the judge. The expert confines himself to his expertise, his direct knowledge, and the information put to him. Often he has to deal with hypotheses. Findings of facts are for the judge. Ali v Caton [2013] EWHC 1730, QB. Walls v London Eastern Railway [2014] EWHC 4724. Sanderson v Sonae Industria (UK) Ltd [2015] EWCA Civ, QB. Mohidin v Commissioner of Police for the Metropolis [2015] EWHC 2740, QB. Garcia v Associated Newspapers [2014] EWHC 3137. Stagecoach Great Western Trains v Hind and Steel [2014] EWHC 1891, TCC.

A host of issues arose in the leading case Re W (a child) (non-accidential injury: expert evidence) [2005] EWCA Civ 1247 and [2007] EWHC 136 (Fam). The expert acted as a decision-maker rather than an expert witness. He did not explain how he reached his diagnosis. What were assumptions, deductions and hypotheses rather than scientific facts was not made clear. Inconsistencies in the alleged facts were not dealt with. The report did not indicate the range of professional opinions on the issues, and the generally accepted view in the speciality. The reason for deference to the opinion of a colleague was not given.The desirability or even necessity for a second opinion because of the limited knowledge and experience of the expert was not raised.

A relationship with those involved in the case

The integrity, independence and impartiality of the expert must always be protected. The situation may be delicate or potentially delicate. There may be very few experts in this speciality, and they all know each other. There may be very few solicitors engaged in the speciality. Perhaps the expert always acts for solicitor A, who always acts for claimants. The expert may know solicitor A well; perhaps they are fellow members of the local golf club; perhaps they are social acquaintances or friends. If there is any risk of challenge or criticism on the basis of bias the expert should simply declare the "relationship" such as it is in the report, and declare his independence and impartiality in the normal way. Any challenge or criticism from any source will then need to be proved, mere suggestion will not suffice.

The defendant, a radiologist, was sued for clinical negligence. The expert for the defendant was well known to the defendant, had worked with him and collaborated on research papers, yet none of this was disclosed. The judge rejected the evidence of the expert on the ground that independence and objectivity had been undermined by the failure to disclose the close connection Exp v Barker [2017] EWCA Civ 63, [2017] Med LR 121.

Conflict of interest

There is no reason in principle why an expert should not act for a defendant even though he has previously acted in another matter for the claimant. But if the expert had acted for the claimant in an allied or a very similar matter to the current matter, especially if there were a risk of disclosure of confidential information previously acquired, then the expert should disclose his previous involvement and if necessary stand down. However arising out of a fire the defendant instructed the expert on one aspect and the claimant instructed the expert on a quite different aspect, so there was no conflict Wheeldon Brothers Waste Ltd v Millenium Insurance Co Ltd [2017] EWHC 218 (TCC).

Alter the report

Sometimes the expert is asked by the solicitor to withdraw part of the report or alter something in the report. Having prepared the report in the normal proper professional manner, the expert should refuse to accede to the request. If, however, an obvious error is pointed out, or fresh or further information is supplied which casts a different light on things, then the expert should prepare a supplementary report explaining the extent to which he has changed his mind and the reasons.

A reduced fee

The expert should expect, indeed require, a proper fee. He is an independent professional of standing, a considerable amount of work will be required, of a proper standard, and the fee is normal and appropriate. There may be room for some negotiation, but only insofar as ascertaining the amount of work required and the appropriate fee. A request from the solicitor to do the work "on the cheap" should be rejected. The fact that the solicitor may be having difficulty raising the money from the client or a sponsor or crowd funders or the Legal Aid Agency or an insurer or whoever is a problem for the solicitor, not a problem to be passed to the expert. The expert who succumbs and does work "on the cheap" lays himself open to criticisms, that he did the work too quickly, or carelessly, or delegated to too junior staff, or did not check or double check the results of analysis.

Resort to the Judge

If the expert is concerned about a matter he should raise it with the instructing solicitor. Perhaps the instructions are unclear or incomplete or defective. If necessary he should raise the matter discreetly with his professional association. As a last resort, and at any stage in the proceedings, he is always entitled to refer to the Judge for advice and guidance and if necessary a judicial ruling. A good expert creates a good working relationship with everyone else involved in the case, and very rarely finds himself unable satisfactorily to resolve any professional matter. Experts under the Judicial Microscope, Sir Ernest Ryder, talk delivered to EWI 27 September 2018.

Admissibility of Evidence – Covert Recordings of Expert Examinations

by Ian Peters - Partner at Anthonygold

Master Davison handed down his judgement on the case of Samantha Mustard v Flower & Flower & Direct Line Insurance on 11 October 2019. The application before the Master was a unique one as it is concerned the admissibility as evidence of covert recordings obtained by the claimant of her medico-legal appointments with the insurer's experts. It was the insurer's application to exclude this evidence on the following grounds:

1, That the recordings were unlawful pursuant to the Data Protection Act 2018 and General Data Protection Regulation (GDPR) 2016/679;

2, That they should be excluded on because of the unlawful or improper manner in which they were obtained;

3, That they impaired or undermined the validity of the neuropsychological testing carried out by the insurer's expert;

4, Finally, that they gave rise to an unlevel playing field as the examinations by the claimant's neuropsychological expert had not been recorded.

The factual background to this claim, is that the claimant had suffered injuries as a result of a rear end shunt road traffic accident on 21 January 2014. Whilst liability was admitted by the insurers, causation was very much in dispute. The claimant alleged (supported by her expert evidence) that the accident caused her to suffer a significant brain injury, more specifically a subarachnoid haemorrhage and a diffuse axonal injury. The insurers and their experts alleged that the claimant suffered no, or only a very minor brain injury.

The parties relied on expert evidence in various disciplines. The claimant's solicitor advised her to record all examinations (both with her own and the insurer's experts) on a digital recording device. The claimant followed this advice, but she only recorded her appointments with the insurer's experts. In addition, she did not ask all the insurer's experts if she could record them. She recorded appointments with the orthopaedic consultant, Mr Matthews, and the neurosurgeon, Mr Kellerman, covertly without their permission.

The main point of contention concerned the claimant's recording of her appointment with the insurer's neuropsychologist, Dr Torrens. The claimant had actually asked Dr Torrens' permission to record the examination. Dr Torrens agreed that the claimant could record the clinical examination, but she refused to allow her to record the neuropsychological testing. The claimant inadvertently left the recording device on and this meant the whole of the examination was recorded and that included the Dr Torren's neuropsychological tests.

The claimant's solicitor listened to all the recordings of the appointments after the insurer served their expert evidence and he reached the conclusion that the reports did not in every case set out accurately the history the claimant provided during the assessment. The solicitor sent the transcript of Dr Torrens' appointment to the claimant's neuropsychologist, Professor Morris, in order to "to appraise the accuracy of the neuropsychological assessment". Professor Morris concluded that he felt Dr Torrens had potentially deviated from the correct procedures and this may have impacted on the claimant's overall test scores. Professor Morris' report then formed the basis of the claimant's detailed Part 35 questions to Dr Torrens.

Master Davison outlined the test to be applied in order to determine whether such evidence could be admissible. He stated that the court should consider the means employed to obtain the evidence together with its relevance and probative value and the effect that admitting or not admitting it would have on the fairness of the litigation process.

Master Davison rejected the insurer's submission that the recordings were a breach of any Data Protection legislation and were in anyway unlawful. He relied on Article 2c of the GPDR 2016. which stated it did not apply to the processing of personal data "by a natural person in the course of a purely personal … activity". He found that the recordings fell into that category. He accepted the claimant's evidence that she recorded the neuropsychological testing inadvertently, however he did not explain whether it would have changed his overall view had the circumstances been different and she had deliberately recorded the testing.

Master Davison then turned to the other considerations of the relevance and probative value of the evidence. He accepted that the recordings were highly

relevant and probative. He stated that the recording placed a question mark against Dr Torrens' conduct and so clearly had importance and that it would be artificial and unsatisfactory to expect the experts to ignore it during the joint statement process.

He considered all the issues in light of the Overriding Objective and came to the clear conclusion that the recordings should be admissible.

A couple of further points of note. Firstly, the Master ordered that the test papers used in Dr Torrens' neuropsychological testing be disclosed to Professor Morris in an unredacted form.

Secondly, he raised the general issue as to whether there should be some form of general guidance on the recording of medico-legal assessments. He invited APIL (the Association of Personal Injury Lawyers, representing claimants) and FOIL (the Forum Of Insurance Lawyers) to agree a protocol on the recording of appointments and how such recordings are used.

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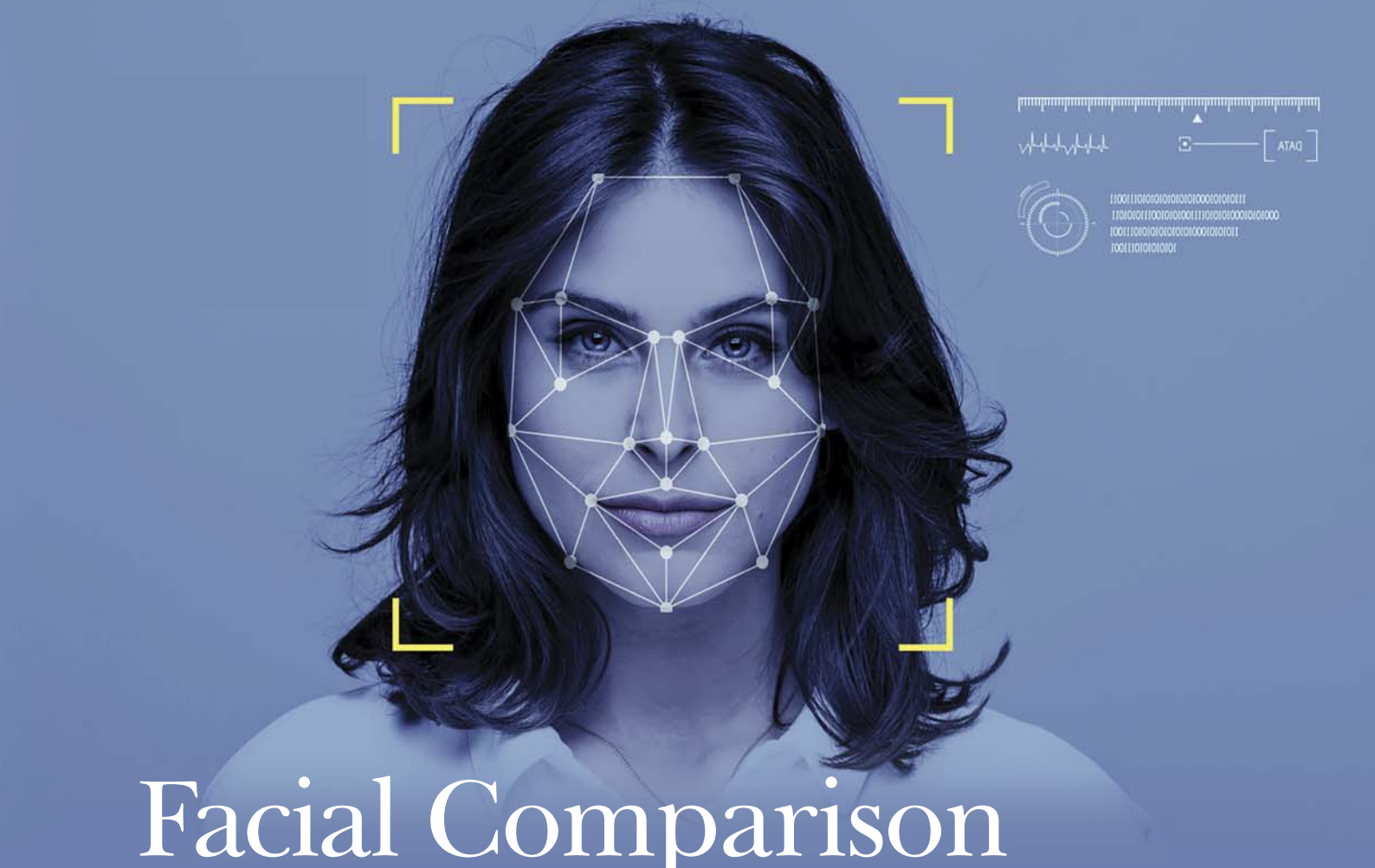

Facial Comparison

This is a personal recollection of a Death Row Appeal case, the brief outline of which was first published in this magazine in 2014 and became the longest running case I have been involved with.

As an expert in the area of Facial Comparison with over 25 years' experience through creating hundreds of reports for and giving evidence to, courts throughout the United Kingdom, the idea of giving expert testimony in a jurisdiction system outside the UK or Europe, was something I had not thought about in any meaningful way. So, when the opportunity to produce a report for a case in the USA presented itself, I had very few qualms and it seemed to be something I could take in my stride.

Little did I realise that this particular case I agreed to become involved with would turn out to be such a long and complex commitment.

Outline:
The case involved a male called Pablo Ibar, who in 1994, aged 22 along with an alleged associate Seth Panelvar, was charged with three counts of first-degree murder, one count of burglary, one count of robbery, and one count of attempted robbery.

Pablo Ibar was born in the US to a Spanish immigrant father Candido Ibar, a celebrated jai alai player and Cristina Casas his mother of Cuban origin. Pablo is the nephew of Spanish boxing 'great' Jose Manuel Ibar, better known as Urtain, and would later take Spanish nationality in 2000 thereby linking him to his father's home country. Ibar had been convicted in the triple homicide of a nightclub owner Casimir Sucharski, and two females, Sharon Anderson and Marie Rogers.

As the only Spanish national on Death row, his case drew attention from the government of the Basque region of Spain. The case was to become one of the most expensive, long running and convoluted murder trials in Florida State history.

The facts of the case:
Sunday, June 26, 1994, a Mercedes SL convertible is discovered on fire on a road in the Florida Keys by a Palm Beach County police officer. The Mercedes was registered to the owner of a nightclub called Casey's Nickelodeon, Casmir Sucharski. The officer notifies the Miramar Police Department and an officer is sent to Sucharski's home to tell him that his car had been found. As there was no answer, the officer left a note informing him of the find.

Monday, June 27, 1994, the mother of dancer/model Marie Rogers reported her missing to the Broward County Sheriff's Department. It was known that Rogers had gone to Casey's Nickelodeon on Saturday, June 25, 1994, with her friend, Sharon Anderson but neither girl had returned home. An officer went to Casey's Nickelodeon and learned that

Sucharski had left the club early Sunday morning with the models. The officer then went to Sucharski's home. Anderson's car was in the driveway, but no one answered the door. A blue T-shirt was in the porch area; this T-shirt would be significant. On looking within the house, the officer made a grim discovery. He saw three, bloodsoaked bodies on the floor. Sadly, the individuals found in the house were duly identified as Sucharski, Rogers, and Anderson. All three had died of gunshot wounds to the head.

Sucharski had recently installed a CCTV videotape surveillance camera system around his home. It transpired that the videotape had captured the activities of the previous night in the house, including the actual murders. The grainy, poor quality tape recording revealed that on Sunday, June 26, 1994, at 7:18 a.m., two men entered through the rear sliding door of Sucharski's home. One intruder initially had something covering his face, which we see he uses to wipe sweat from his face. This item was eventually discarded by him at the premises. The garment was identified as the blue T-shirt found in the porch area. This intruder was alleged to be Ibar.

The other intruder, alleged to be Seth Penalver, wore a cap and sunglasses, which were never removed, and carried a firearm. The videotape showed that the intruder in sunglasses had a semiautomatic handgun with him when he entered the home. The other intruder displayed a handgun only after he went into another room having left the camera's view. At one point, the intruder alleged to be Penalver hit Sucharski with the semiautomatic handgun in the face, knocked him to the floor, and beat him on the neck, face, and body. This attack on Sucharski took place over the next twenty-two minutes.

During this time, the intruders searched Sucharski's home. They rummaged through the house entering the bedrooms and the garage. Sucharski was searched and his boots removed. As he struggled, Sucharski was repeatedly hit by both intruders. The intruders were seen putting items in their pockets.

The man later 'identified' as Ibar shot Sucharski, Rogers and Anderson in the back of the head. The intruder alleged to be Penalver then shot Anderson and Sucharski in the back. The State presented evidence that Sucharski kept ten to twenty thousand dollars in cash, carried a gun, and owned a Cartier watch. The watch was not found, and Sucharski's gun holster was empty.

At the crime scene, of all the fingerprints from the many surfaces touched and T-shirt worn by one perpetrator, the blood stains, DNA fragments, shoe prints and latent prints collected, non were of Ibar.

Police extracted frames from the videotape system and produced a flyer with the grainy images of the intruders that was sent to law enforcement agencies.

Three weeks after the murders, the Miramar county police department received a call from the Metro-Dade county police department informing them that they had a man in custody on a separate and unrelated charge who resembled the photo on the flyer. The man in custody at the Metro-Dade Police Department was Pablo Ibar. In interviews by Miramar investigators, he told police he lived with his mother, and that on the night of the murders he had been out with his girlfriend. When told about the murders, Ibar agreed readily to checks on his house, his whereabouts and his alibi. He had four people independently verify his whereabouts on the night of the murders.

Ibar at that time, lived with several friends in a rented home in Hollywood, Florida. It was alleged that one of his housemates initially identified Ibar and the second male Seth Penalver, as the men on the videotape. In the initial trial, the housemate told police that early on the morning of the murders, Ibar and Penalver rushed into the Lee Street home, grabbed a Tec-9 semi-automatic firearm that was kept at the house, and left. In subsequent proceedings, this witness asserted that he had no memory of identifications in his earlier statements. On police prompting, other witnesses who had also given statements to police that the men in the photo resembled Ibar also denied making firm identifications. Many of these witnesses were successfully challenged by the Defence team as improper identifications by the police.

In 1997, both Ibar and Penalvar were tried together. Penalver's defence attorney asserted that Penalver was not the subject wearing the hat and glasses seen in the grainy videotape, and in his defence, utilised an expert in forensic anthropology to opine on the poor state of the footage which precluded a reliable identification the face of the subject and Penalver. Although not retained by Ibar's lawyer (which would be significant) the expert also opined that the deficiencies in the video and subsequent stills distilled from the footage, would also preclude a reliable identification of Ibar. After a hung jury, a mistrial was declared.

In 1999 the case was separated and Penalver was tried for a second time, the jury found him guilty of the charges and he was sentenced to death.

Ibar's second trial

In 2000, Ibar was tried for a second time, the jury found him guilty and sentenced him to death. In this trial, Ibar's lawyer Kayo Morgan, had issues with drugs, illness, his own jailing for battery of his pregnant girlfriend and failing to give his client correct advice. Morgan also admitted to failing to procure the services of the correct experts including a facial identification expert, failing to introduce relevant evidence such as the expert evidence of the anthropologist from the first trial. All this was cited as being due to his deteriorating health. These and other failings would open the way for a new trial with a different defence team.

My involvement:

In 2007, I was contacted through my academic links, by a US attorney. The lawyer, Mr. Benjamin Waxman was at the time, a partner at Robbins, Tunkey, Ross,

Amsel, Raben & Waxman, P.A. a Miami based firm described as 'super lawyers' and skilled in the area of Appellate Practice. I had heard of appellate practice but did not know precisely what it entailed and how it compared with the UK courts system.

In the USA all cases are initially tried at the trial court level. The losing party may appeal their case to higher courts known as appellate courts. Appellate attorneys concentrate their practice on advocating cases before state and federal appellate courts, including state supreme courts and the United States Supreme Court. These attorneys seek to correct errors of trial court judges and change the law by persuading appellate courts to overturn lower court decisions or to expand or change the interpretation of statutory law.

The attorneys job is to start with a case that has already been unsuccessful at least once in the lower courts, review and analyse trial records and other documents, research and analyse case law, draft persuasive briefs and appellate documents to try to earn something for their client, whether it is a new trial, the client's freedom, or something in between.

Taken from: https://bestlawfirms.usnews.com/appellate-practice/overview Taken from: https://www.thebalancecareers.com/appellate-practice-2164642

By the time I was approached, Ibar had spent almost fourteen years in a Florida prison, nine of those on Death Row.

I agreed to review the case outline and based on the limited material I had received by email, tentatively accepted the instruction and organised for payment in advance as it was an overseas case. I subsequently received some very grainy footage and proceeded to analyse the material. Having been stored on video tape which had deteriorated very badly, the footage showed the incident from one camera within the house with the three victims and the two intruders. However, the quality was so poor, it was impossible to clearly make out features. I requested that the lawyer approach the police and obtain an analogue to digital copy converted to the ITU-R-601 standard. In due course, a 'better' copy along with photographs and many further documents and photographs pertaining to additional evidence was sent to me by post.

Over a short number of weeks, a fully research supported report was prepared outlining what we could see and importantly, what we could not see of the face of the intruder alleged to be Ibar. A limited conclusion was reached which indicated that while we could not conclusively exclude the two men by clear and demonstrable differences, there were five apparent differences which suggested that they were not the same person. The report was then submitted to the attorney in the normal format.

In 2008, the decision was made to take this report forward to a post-conviction evidentiary hearing, I was requested to submit the report in the form of an affidavit. I spent several more days with the attorney, transposing my findings into a form that the US Supreme Courts could use. This was then submitted to the courts and was the start of a process that would conclude over a decade later.

In 2009, I was called to testify to the circuit court, trial level as an expert witness in facial identification. I was going to have to face intense US state attorney cross questions in open court. Despite there being established US organisations dealing with facial comparison (FISWG), unbeknownst to me, no expert had ever given evidence based solely on facial identification to a US court. The science was untested in the US justice system. If my report did not reach the requisite evidentiary standards, precedence would be set, probably leading to the exclusion of this form of evidence in the US courts. This would inevitably have ramifications for the use of this evidence in the UK. The stakes were high.

Frye Standard

The Frye Standard is used in the US to determine the admissibility of an expert's scientific testimony, established in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). A court applying the Frye standard must determine whether or not the method by which that evidence was obtained was generally accepted by experts in the particular field in which it belongs. The Frye standard has been abandoned by many states and the federal courts in favour of the Daubert standard, but it is still law in some states.

Taken from: https://www.law.cornell.edu/wex/frye_standard#

Daubert Standard

This is the standard used by a trial judge to assess whether an expert witness's scientific testimony is based on scientifically valid reasoning that which can properly be applied to the facts at issue.

This standard comes from the Supreme Court case, Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579 (1993).

Under the Daubert standard, the factors that may be considered in determining whether the methodology is valid are: (1) whether the theory or technique in question can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential error rate; (4) the existence and maintenance of standards controlling its operation; and (5) whether it has attracted widespread acceptance within a relevant scientific community. The Daubert standard is the test currently used in the federal courts and some state courts. In the federal court system, it replaced the Frye standard, which is still used in some states.

Taken from: https://www.law.cornell.edu/wex/Daubert_standard

The 3rd trial - Evidentiary Hearing

This is where the complexity of the case became very real to me. As usual, there had been no need for me to know the details that do not impact on my report, so I steered away from anything that might bias my opinion. Arriving in Miami, USA, I first met with Waxman and the full defence team for Ibar. They were, as many Floridians are, extremely polite and professional. Located in plush, downtown Miami offices, I could not help but think of the many American law dramas I had seen over the years, featuring the very clever fast-talking lawyers who had all details of their case at their fingertips. The team were certainly very bright and knew their stuff but were actually very reassuring and helpful; and in no way

pushy or coercive. During that first briefing, we went through the entire history of the case, the reasons why my report was so important to the case and how my position as a defence expert would be viewed by the prosecution. Although it was said with a little jocularity, nonetheless, I was a little taken aback when warned verbatim 'you know you will be viewed as the defence whore!' That broke the ice. Apparently, unlike in the UK where experts like myself regularly do defence AND prosecution work, that is not necessarily the situation in the US. One is generally a defence or prosecution expert. Sadly, the defence expert is often viewed as someone paid to get a result favourable for the defence. I thought it was going to be a task to ensure that my impartiality was visible to all and remained intact. Instead, the team were quite insistent that my impartiality came through to the judge and demonstrate that the same report conclusions would have been reached by anyone qualified to do this work had someone been instructed at the first trial.

The first day of the hearing arrived and I admit, I was somewhat apprehensive. While a great deal less formal than the wigs and gowns in UK criminal courts, the atmosphere in and around the court was tense. The courtroom was filled with family and reporters and cameras, and the setting of those courtroom dramas once more came to mind. The judge entered and after some preliminary introductions, the voir dire examination began. I was asked if I understood that these proceedings were a criticism of the trial attorney for failing to call an expert in the trial in 2000 and that we would be talking about my qualifications both at this time as well as in 2000. The questions ranged from my own personal qualifications and experience in analysis, report writing, the state of facial comparison use in the UK in 2000, the state of it now, was it accepted as a discipline on 2000, could someone from my department (or any others) at the time have done similar work. The prosecutor was also very interested in the growth of the discipline itself and explored the formation of the Forensic Image Analysis Group (FIAG), the creation of the six point scales of support we devised as a group (no support, limited support, moderate support, support, strong support and powerful support). She also explored in depth, the role of the now defunct Council for the Registration of Forensic Practitioners (CRFP) for which I was at the time, one of the very few certified national assessors. She also knew a considerable amount about the office of the Forensic Science regulator and how it was set to look at the processes involved in all forensic disciplines. These questions were ones which I had not been briefed on, and were essentially away from my report conclusions, but they were indicative of the hearing throughout.

There followed an in-depth exploration of my publications ranging from forensic and scientific journals to book chapters, she explored my managerial, teaching and training experience and responsibilities at the University where I worked at the time, along with affiliations to various forensic and medical art associations. It was clear, that the thrust of the questioning was to demonstrate that I was not qualified to do this sort of work, it was not available in 2000, and on a number of occasions during the trial, the prosecutor would make several challenges under Frye that whatever discipline this was and regardless of the literature produced, I was not an impartial and disinterested expert. The prosecutor made clear reference to my being paid to appear, the clear implication was that I had something to gain from appearing. I now fully understood the warning from the defence team that these tactics were pretty much standard in these hearings.

During the course of the hearing, I had to leave the stand as points of law were discussed, and due to the fact that I was eventually able to receive the full transcript of the trial and my testimony, I can see that the Court (trial Judge) reviewed the standards required and was sufficiently comforted to allow the trial to proceed and for me to continue with my testimony. Over the following two days on the stand, the prosecutor eventually found her way to the contents of my affidavit and I spent many hours under questioning explaining my findings, their significance to the identification of Ibar, their difference to anthropological measurements and my conclusions.

After the second day, this part of the case was done. After gathering my materials and being thanked by the judge for coming over from the UK, I was excused from the stand. I then had a few hours to reflect. I had worked with a team of lawyers from an unfamiliar jurisdiction, I had seen the inner workings of a large and complex trial. I had faced some really stiff questioning from the prosecutor and indeed from the Court. The experience forced me to review how I give evidence in courts that appear more adversarial even than our own. We would now await the Supreme Court's ruling on Ibar's case, I prepared myself for a relaxing flight back to the UK. On arriving at the airport, to my surprise, I was approached by a small group of Hispanic reporters who asked me while filming, about the case. Again, I had not been warned that this might happen, and over the following years, I would receive requests to expound on the case. I felt I did a professional job and the attorneys agreed; Benjamin Waxman, partner and case lawyer went so far as to publicly state that "Ray Evans was very professional, easy to work with, and a formidable expert in the courtroom. He worked seamlessly with me from across the pond, through email, fax, and telephone, and delivered a detailed affidavit under a tight timeline. He provided me a wealth of background materials of which I was otherwise unaware. In court he was poised and articulate.."

This court would eventually deny Ibar's motion for post-conviction relief, but the Defence team continued its task of working towards an appeal.

For the next few years, while awaiting the Supreme Court's ruling, I would communicate with the defence team, exploring ideas and refining the nuances exposed in my report.

A glimmer of hope
In 2012, after a 5-month trial, the courts reversed Penalver's conviction due to a number of errors and issues having to do with evidence not disclosed to the defence, Penalver was granted a retrial at which he was acquitted. Although the identification scenario was somewhat different, this was a good sign for the Ibar case.

The Ruling
In 2016 there was a ruling. In a 22-page decision, it was declared that a majority of the Supreme Court's justices ruled that Ibar had now provided enough evidence to change their minds. In summary, the justices wrote:

"*Ibar has established prejudice, given the relatively weak case against Ibar with no physical evidence linking him to the crime, the critical role of his identification derived from the video, and the errors we previously identified in Ibar's direct appeal,*"

Ibar's DNA was not found on a blue t-shirt recovered from the crime scene which was allegedly used to partially cover the face of the perpetrator whom the State claimed to have been Ibar.

Ibar's private defense attorney, was found to be deficient as he failed to present a facial identification expert or forensic anthropologist despite Ibar's request and his defense lawyer's agreement to do so. At the postconviction evidentiary hearing, Ibar's attorney, who detailed a litany of personal and professional issues that were occurring at the time of trial, testified that he did not understand "why [he] failed in this absolutely critical feature of the case" in not having a facial identification expert testify, among other failings.

As this record bears out, there was simply no excuse for the numerous deficiencies and failures of Ibar's defense attorney. None of the failures can be attributed to strategic moves nor could remotely constitute acceptable conduct for an attorney defending a first-degree murder charge with the death penalty being sought. Under any definition of "deficient performance," Morgan could not be deemed to be functioning as defense counsel must perform to fulfill his or her crucial obligations to the defendant under the Sixth Amendment. While there were numerous deficiencies in performance, the most salient was the failure of trial counsel to present a facial identification expert to explain the physical differences between Ibar and the perpetrator alleged to have been him in the video, and to demonstrate that the quality of the images were so poor that they were inadequate to make a reliable identification. As we more fully explain, Ibar has established prejudice, given the relatively weak case against Ibar with no physical evidence linking him to the crime, the critical role of his identification derived from the video, and the errors we previously identified in Ibar's direct appeal. Simply put, we cannot and do not have confidence in the outcome of this trial. Accordingly, we reverse the trial court's denial of postconviction relief and remand for a new trial".

They further wrote:
"*Although Ibar's postconviction expert Raymond Evans opined that it was impossible to say with certainty that Ibar and the perpetrator are the same person, Evans further testified that he could not completely exclude Ibar as a potential match because of the general similarities between them and the low quality of the videotape. Evans described Ibar and the perpetrator as having similar bilateral asymmetrical eyebrows and cheek bone widths. When Evans' description of the discrepancies is considered against his description of the similarities between Ibar and the perpetrator, the likelihood that the outcome of Ibar's trial may have been different is only conceivable, not substantial. Furthermore, the trial court found Ibar failed to establish that there was any generally accepted scientific field of facial identification at the time of his trial. It is unclear how Morgan's securing such an expert could have made a difference in the outcome at trial*".

Taken from:
https://caselaw.findlaw.com/fl-supreme-court/1725404.html

While the facial identification evidence did not fully convince the justices that it would have removed Ibar as a suspect, there was doubt and the way was clear for another trial and just as importantly, facial comparison could be used in a US trial. On this basis, Ibar is released from Death Row and placed in a regular prison.

The Deposition
In 2017, I was called to give a Deposition from the UK via video link to the US State prosecution. This again, was a new experience for me. The point of a deposition is for the opposing side to get as much information from the witness as possible. This information is taken in conjunction with the first testimony given in court from 2009. My first task was to re-familiarise myself with the 250 plus pages of my initial testimony. My second task was to recall any phone calls, texts, emails or relevant phone calls about the case with the defence team over that period. I had several months to prepare for this, but it was still a mountain of information to digest again. The rules of engagement are exactly as in a full courtroom, an oath is taken and the questioning as intense as in a trial. It is important to remain as close to the original testimony as possible, any new information leads to more questions and prolongs the questioning. I was questioned for over five hours.

The 4th Trial
In 2018, I was again called to Florida to give evidence at the 4th trial of Pablo Ibar. I now had a better idea of what to expect. I again worked closely with the defence who helped me organise the additional information and talk me through the system I was facing. On the day of the trial, the courtroom was once again filled with family, reporters, cameras and also, a delegation of members of the Spanish Parliament. Ten members of Spain's Parliament attended the hearing to hear the prosecution and Ibar's defence team present their initial arguments. According to a local news outlet EFE, the delegation travelled to the court in Fort Lauderdale to ensure both that Ibar received a fair trial and to show their opposition to the death penalty.

This time, during one full day of questioning, the emphasis was solely on my report / affidavit. The question of whether facial comparison as a discipline that reached the required standard, had already been answered with the 2016 Supreme Court ruling.

Again, the questioning was direct and robust, but I did not feel as intimidated now as previously, I hesitate to say it was enjoyable, but the courtroom experience was certainly less stressful the second time around. Maybe that also had something to do with my better understanding of the processes, or perhaps the decade of cases between my first appearance and the second. In this trial, the defence produced its evidence from the previous trials and the facial comparison report. The prosecution produced further (disputed) information. After 23 years, the significance of the blue T-shirt was again brought to bear on the case. Despite not finding Ibar's DNA from the hair, blood, sweat or saliva in the previous trials, the prosecution claimed to have now found key data.

Using a complex probabilistic genotyping 'black box algorithm' software, the prosecution claimed from the mixed DNA on the T-shirt, that they had obtained a partial match of Ibar's DNA on the blue T-shirt. This is a controversial method of boosting co-mingled DNA material. The T-shirt by now had been handled multiple times including by individuals who had access to Ibar and been shown in open court. The garment had also been received by the testing lab in an unsealed evidence bag and the DNA expert acknowledged that this single spot of DNA could have been transferred to the T-shirt by the touch of an intermediary, even by the comingling of other packages containing items that either belonged to Ibar (such as his shoes) or may have been previously touched by Ibar.

Despite these and many other strong defence objections such as matching bloody prints from shoes found on a separate suspect (not Ibar), the new 'evidence' was allowed before the jury.

The Verdict

Charged with the triple murder committed in Florida in 1994, and after spending 25 years in prison 16 of them on Death Row, Ibar was found guilty of the six counts brought against him in the long running case which became known as the Casey's Nickelodeon murders, an obvious reference to the name of Sucharski's business. The State once again sought the death penalty.

However, after an appeal by the defence and only 90 minutes deliberation, the jury refused the death penalty option and instead imposed a life sentence amounting to a further 60 years.

This left the way clear to file a new motion to the Florida District Court of Appeal. If that appeal fails, Ibar would still have the opportunity to appeal again to the Florida Supreme Court.

Taken from: https://www.youtube.com/watch?v=H6v_fDMJSKc
See: https://deathpenaltynews.blogspot.com/2019/05/convicted-murderer-pablo-ibar-escapes.html

The future

A motion for a new trial has been filed in The Circuit court of the Seventeenth Judicial Circuit in and for Broward County, Florida Criminal Division.

Florida Rule of Criminal Procedure 3.600 states that the court "shall grant a new trial" if "[t]he verdict is contrary to law" or "the weight of the evidence." In the instant case, a new trial is required because the verdict is both contrary to law and contrary to the weight of the evidence. In this case, the greater weight of the state's highly suspect trial evidence was consistent with Ibar's innocence and against the verdicts of guilt.

I don't think I've heard the last of this case...

About the author

Ray Evans founded **SRi Forensics** as a Private limited company in 2004.

SRi Forensics is an independent image analysis and e-forensics company located in overlooking the River Irwell on Exchange Quay, part of the famous Salford Quays complex.

We provide a number of vital services to the Criminal Justice system, both for the Prosecution and the Defence. Police forces have long recognised the power of CCTV as a crime-fighting tool and have increased their investment in this technology; consequently, the UK boasts the highest concentration of CCTV cameras in the world. SRi Forensics provides analyse of CCTV and provides expert opinion on the evidential usefulness of this material for use in Facial Comparison (Facial Mapping) and Video enhancement cases.

Their expertise is recognised around the world, being involved in many of the cases seen in the News and regularly receive instruction from places as diverse as Asia, Europe and the USA.

The importance of digital presentation of evidence in court is acknowledged as an important time and cost saver by authorities such as the CPS and the SFO. Under the CPS National Framework, SRi Forensics is a recognised provider of services to these authorities.

As one of the earliest adopters of digital evidence presentation technology, our experience has been gained through years of working closely with the Criminal Justice System on some of the largest and most high-profile cases in the UK, Europe, Asia and the USA.

Our in-house services include, Expert Facial and body comparison, a full Electronic Presentation of Evidence (EPE) design and coding service, Medical Illustration & Injury Depiction as well as Video editing & analysis.

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Following More Than Just Money

by James M. Beck - Senior Life Sciences Policy Analyst

In our How Not To Create an "Exception" to the Learned Intermediary Rule post two years ago, we criticized a couple of Texas trial court cases for attempting to create a company compensation exception to the learned intermediary rule, that prior decisions had almost universally rejected. That post includes a comprehensive discussion of nationwide precedent that has considered the effects (mostly negligible) of a treating physician receiving financial payments (royalties, consulting fees, clinical trial recruitment fees, etc.) from the defendant in a prescription medical product liability case. We won't repeat that here.

We are pleased to add Salinero v. Johnson & Johnson, ___ F. Supp.3d ___, 2019 WL 4316163 (S.D. Fla. Sept. 10, 2019), to that discussion. In one of the most thorough treatments of the issue to date, Salinero rejected an argument that the learned intermediary rule did not apply in a pelvic mesh case because the prescribing physician was allegedly "'biased' by his status as 'Defendants' long-time paid expert witness, consultant, corporate committee member, and . . . sales force lecturer, who happens to also have been [plaintiff's] treating physician." Id. at *7.

As the plaintiff's argument suggests, her treating surgeon was a longtime user of the product and thoroughly familiar with its risks. As we've discussed in too many posts to mention, prior prescriber knowledge is fatal to warning claims because a claimed failure to warn somebody of what s/he already knows cannot be causal. To get around the learned intermediary rule, plaintiff attacked, not the prescriber's knowledge or treatment, but his having been (well) compensated by the defendants.

Fail.

Predictably, plaintiffs relied on the two Texas cases that we had criticized in our prior post. Salinero, 2019 WL 4316163, at *8 (citing and discussing In re Depuy Orthopaedics, Inc. Pinnacle Hip Implant Products Liability Litigation, 2016 WL 6268090 (N.D. Tex. Jan. 5, 2016), and Murthy v. Abbott Laboratories, 847 F. Supp.2d 958 (S.D. Tex. 2012)). Defendants, however, argued that the result was "wrongly decided" and "point[ed] to a litany of other cases where courts granted summary judgment on the grounds of the learned intermediary defense, despite the alleged bias of a learned intermediary who had been compensated by the defendant." 2019 WL 4316163, at *9. We compared Salinero's discussion of the defendant's (id. at *9-10) cases with those in our post, and are pleased to report that we had them all.

The court rejected any purported exception to the learned intermediary rule for financial payments, and instead imposed on the plaintiff the obligation to come forward with actual evidence that the defendant should have expected its financial payments to influence the prescriber's medical treatment, and thus should not have relied upon this particular physician, as the learned intermediary rule would otherwise permit: *The Court predicts that the Florida Supreme Court would side with the weight of authority cited by Defendants . . . above. These cases do not stand for the proposition that these states' learned intermediary doctrines always apply in suits against manufacturers of drugs or medical devices. Rather, the cases suggest that the learned intermediary doctrine may not apply if the manufacturer knew or reasonably should have known that the intermediary-physician would not be exercising his independent medical judgment, such that the manufacturer could not rely on the intermediary-physician to duly consider the provided warnings when prescribing treatment.*

Id. at *10 (emphasis original). It agreed with us about the Texas cases, expressly "disagree[ing]" with Pinnacle Hip: *to the extent it suggests that the mere fact of [a prescriber's] having served as an expert witness for [a defendant], or the mere fact of [a prescriber's] having received "thousands of dollars in Honorariums, reimbursements, royalties, and payments for speaking engagements and promotional speaking events" and having been identified as a "Key . . . Surgeon," created a genuine dispute that those surgeons acted or reasonably could have been expected to act in a non-objective manner when choosing a course of treatment for the plaintiffs in that case.*
Id. at *11.

More than just money, to avoid the learned intermediary rule, a plaintiff must come forward with "proof of non-objectivity – . . . proof of [the prescriber] being 'so closely related' to the manufacturer 'that he could not exercise independent professional judgment.'" Id. (quoting Talley v. Danek Medical Inc., 179 F.3d 154, 163 (4th Cir. 1999)). Predictably, plaintiff in Salinero had no such thing.

Plaintiffs offer no evidence to suggest that Defendants knew or reasonably should have known that [the implanting surgeon] would not be exercising his independent medical judgment when he decided to implant [the device] in [plaintiff]. Plaintiffs cannot prevent the application of the learned intermediary doctrine here simply by pointing to [the implanter's] history as an expert witness and consultant for Defendants. . . . [N]othing in [his] deposition ties his role as a consultant or expert witness to the . . . product specifically. Plaintiffs have not presented any evidence to suggest it was a foregone conclusion that [he] would prescribe [the device] to treat [plaintiff].

Id. Calumny and innuendo are not enough.
[T]here is no evidence beyond Plaintiffs' conjecture and speculation to cast doubt on [the implanting surgeon's] testimony that he believed that he was fully apprised of the

risks of implanting [the device] . . . and still would have chosen to implant it in [plaintiff] anyway. As [the surgeon] testified, his decision to use [the device] in [plaintiff's] surgery had nothing to do with any consulting or expert witness work he had done for Defendants.

The end result was predictable, which is why plaintiff tried so hard to get around the learned intermediary rule in the first place. Any surgeon experienced enough to serve as a defense expert in mass tort litigation will have a full and complete understanding of the risks of the products s/he uses – and that was true in Salinero. Id. (discussing at length the surgeon's non-reliance on product labeling, prior knowledge of all relevant risks, and that no revised warning would have changed his decision to use the device).

JAMES M. BECK is Counsel resident in the Philadelphia office of ReedSmith. He is the author of, among other things, Drug and Medical Device Product Liability Handbook (2004) (with Anthony Vale).

James handles complex personal injury and product liability litigation. He has overseen the development of legal defenses, master briefs, and dispositive motions in numerous multidistrict litigation matters and other mass torts. On the appellate side, he has drafted major appellate briefs in significant product liability and related matters, including numerous amicus curiae briefs.

www.druganddevicelawblog.com

Northumbria Academic Receives £1.2 Million to Deliver World-Class Forensic Research

A Lecturer in Forensic Science at Northumbria University, Newcastle, has been awarded more than £1 million to develop a world-leading new technique that will unveil details to help solve investigations relating to unidentified bodies.

Dr Noemi Procopio of Northumbria's department of Applied Sciences is one of the second wave of researchers to be awarded the UK Research and Innovation (UKRI) Future Leaders Fellowship.

One of UKRI's flagship schemes, the Future Leaders Fellowships is a £900 million government investment fund that is helping to establish the careers of world-leading researchers and innovators across UK academia and business.

The initiative provides Fellows with the support, flexibility and time they require to work on ambitious programmes of research.

For Dr Procopio, the award of £1.2 million, of which £930k is funded by UKRI, will enable her to benefit from outstanding support to develop her career and to tackle challenging research in the field of forensic science.

At present it is estimated that 1,500 unidentified bodies are present in the UK and 40,000 in the USA, and it is thought that these numbers could represent just the tip of the iceberg.

Dr Procopio's research utilises some of the most cutting-edge technologies available to address two vital questions that a forensic scientist is asked to solve a crime or to assist in the identification of unknown victims: the time elapsed from his or her death, which is known as the post-mortem interval of the victim and the age at death of the victim.

Although several different approaches can currently be used to answer these questions, they have been criticised for their lack of objectivity, quantifiability and accuracy. This is largely due to the fact that the approaches are mostly based on the morphological examination of the skeletal remains and on the expertise of the forensic anthropologist who performs the analysis.

Additionally, most of the techniques presently used to estimate the post-mortem interval rely on evaluations that have to be performed on soft tissues, therefore shortly after death. Techniques aimed at determining the age at death often also rely on the completeness of the skeleton, which becomes challenging in situations such as cold cases victims, natural disasters, war victims, terroristic attacks, human trafficking victims, and also for archaeological excavations.

To overcome these challenges, Dr Procopio will use pioneering technology known as 'omics' which enables the extraction of biological information including DNA, proteins and metabolites from very small amounts of materials, such as a tiny fragment of bone.

She will then perform analyses on these biomolecules to deduce quantifiable features – also known as biomarkers - associated with both the post-mortem interval and the victims' age at death.

The work will be conducted in collaboration with two Forensic Anthropology Centres in Texas and Tennessee, which will provide the samples of human skeletal remains required to carry out the research.

All the recovered information will then be combined together with advanced bioinformatics tools, known as machine learning algorithms, to develop a mathematical model that will estimate the time elapsed since death and also the age of the victim at the time of death.

The ultimate goal is to use the newly found biomarkers to develop a new piece of commercial kit that could be used by forensic examiners, police officers or researchers to make these estimations in an easy, quick, un-biased and reliable way.

The kit will also allow "non-omics" experts to obtain fundamental investigative clues that will help to improve solving crimes involving the presence of skeletonised or highly fragmented remains.

Dr Procopio hopes that this research will have a strong national and international impact, and that its results may benefit the overall community, reduce the costs of the criminal investigations and ultimately promote faith in the justice system.

Dr Procopio said: "I am thrilled to be finally able to share this fantastic news with everyone. It is a great honour and pleasure to have become a Future Leader Fellow, it is like a dream come true! UKRI Future Leader Fellows are an eclectic group of high-calibre and talented researchers and innovators from all over the UK, and I am extremely proud to be part of it – now I cannot wait to start to work on my project and to start to build my own team at Northumbria University. This is an amazing opportunity not only for my professional growth, but also for the world of forensic science and for the whole society."

Above, Dr Noemi Procopio, Lecturer in Forensic Science at Northumbria University, Newcastle

Science Minister Chris Skidmore said:
"Delivering on our research and innovation ambitions means putting people first, whether they are just starting out in their career or are leading major projects in academia or industry.

"These inspirational Future Leaders Fellows will generate the ideas of the future, helping to shape science and research for the 21st century. But to realise the full potential of these discoveries, their ideas need to be taken out of the lab and turned into real products and services, where they can actually change people's lives for the better."

UK Research and Innovation Chief Executive, Professor Sir Mark Walport, said:
"The Future Leaders Fellowships will enable the most promising researchers and innovators to become leaders in their fields, working on subjects as diverse as climate change, dementia and quantum computing.

"UKRI is committed to creating modern research and innovation careers and our Future Leaders Fellowships aim to support and retain the most talented people, including those with flexible career paths."

Fascinated by forensic science and its impact on crime-solving? Find out about our Forensic Science courses here.

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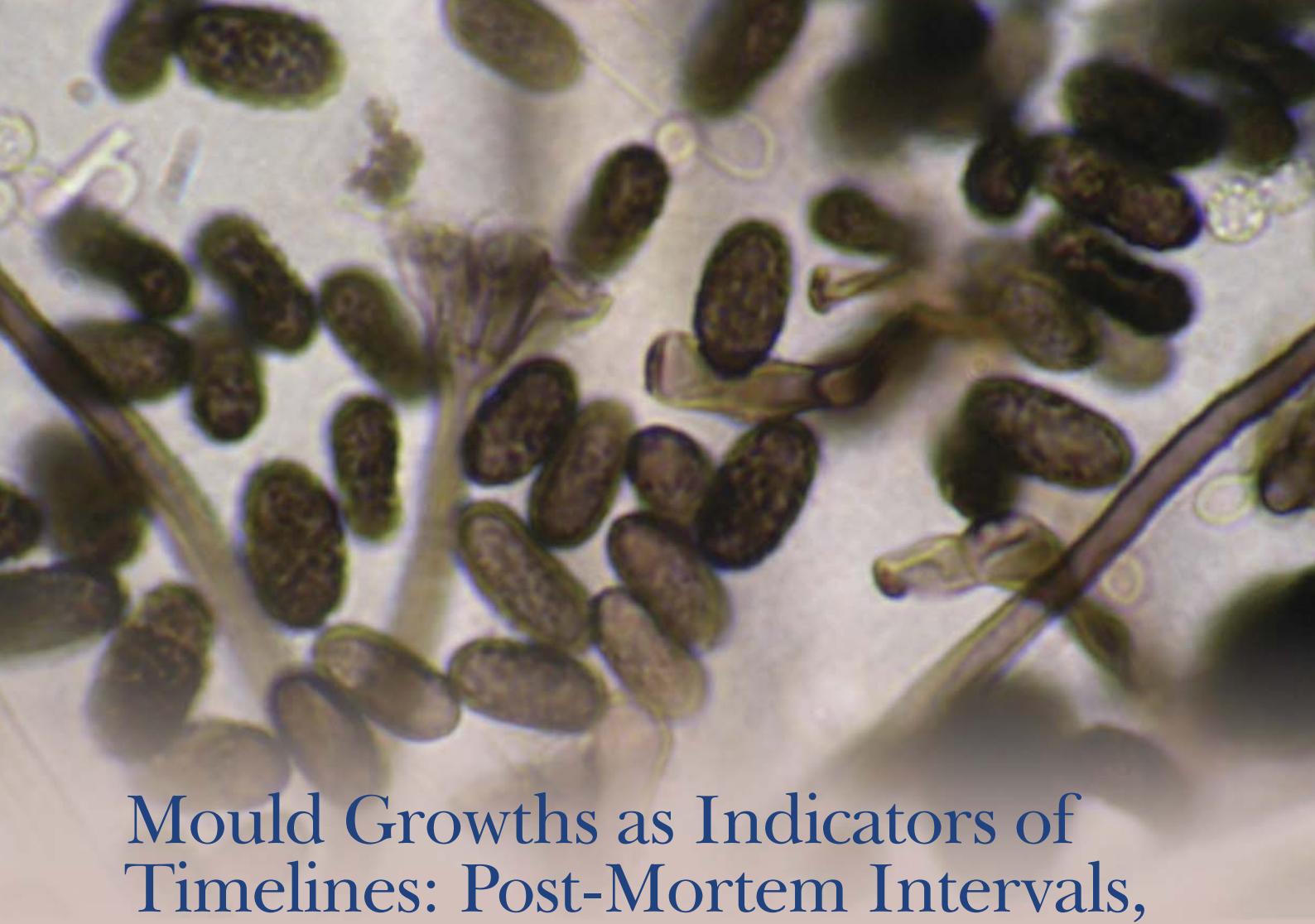


Mould Growths as Indicators of Timelines: Post-Mortem Intervals, Food and Materials Spoilage, and Damp in Buildings

by Professor David L Hawksworth CBE and Professor Patricia E. J. Wiltshire, Consultants and Expert Witnesses in Forensic, Environmental, and General Mycology

Moulds are generally rapidly growing fungi that can cause spoilage on surfaces and materials whenever the conditions are suitable for growth. Almost everyone must have experienced circular often somewhat fluffy or powdery circular patches on stale bread, overripe apples, and citrus fruits, or damp plaster; and in shades of brown, black, green, grey, pink, white, or yellow. Individual mould species differ in the levels of humidity and temperature they require to develop, but they also grow at characteristically different rates. Some can form colonies several cm across in 1–2 days, while others may take several weeks to reach a similar size. These characteristics have led to them providing crucial intelligence on time intervals in a variety of criminal and civil investigations – but often their potential goes unrecognized by scenes of crime officers, pathologists, and insurance claims investigators.

It may seem daunting to learn that there are around 2,000 species of fungi that are commonly considered as moulds, and that precise identification requires critical microscopic, cultural, or molecular sequence data. However, only around 100 are regularly encountered in Europe and North America, and it is not always necessary for investigators to name the fungus to obtain pertinent intelligence. Here we outline the key points of the methodology we apply, and give some examples of types of cases where this has provided information on the times of events.

Methodology

The same methodology can be applied regardless of the nature of the material on which colonies develop. We are only able to present a brief outline here, but plan to submit detailed protocols for publication in *Forensic Science International* in the next few months. The sizes of the largest discrete colonies are measured, tape lifts taken and transferred to sterile slides, and swabs taken. In the laboratory, the material on each tape-lift is stained and examined microscopically for preliminary identification, while the swabs can be

cultured on agar plates, and (or) used for molecular identification. It is critical to measure ambient temperature and relative humidity prevailing at the time of sampling as well as ascertaining how these had varied over a specific period. This is achieved by using data loggers which record values at specified intervals during the period chosen for the observation.

Growth rates of moulds at a range of temperature are regularly recorded in the mycological literature and, in some cases, are of value in species identifications. If the identity of a mould is known, and growth rate data are already available for the temperature range of concern, it is possible to use the published growth rates to determine the time period of colony growth at the crime scene. If the identity of the mould is unknown, or not readily determined, it can be inoculated onto agar plates. These experimental plates are maintained at the temperature of the material (biological or otherwise) on which it was growing, and measurements of the colony size made periodically. The growth rate of the fungus can then be measured for any pertinent temperature range. Fungal growth rate varies greatly and, depending on species and ambient conditions, the time taken for a colony to spread over a 5 cm diameter Petri dish can vary between 1-2 days to 1-2 weeks; it can even take several months. A calibration curve can then be constructed from the measurements made of colony size against time, and the age of the colony can be read directly from the growth curve.

Fungi will only grow when sufficient moisture is available, either from humid air or damp surfaces, and the ambient temperature is suited to them. As not all colonies present in a single situation necessarily started to develop at the same time, it is important to concentrate on data from the largest discrete colonies. Further, as the moisture and temperature values can vary, conditions may not have permitted continuous growth from colonization to when they were measured. For this reason, estimates of time obtained from this type of approach can only be used to indicate a minimum and not a maximum number of days since colonization commenced. Nevertheless, in some cases in which we have been involved, we have found the data to give timings that proved to be accurate to the day.

Applications

Post-mortem intervals

The moulds found on human remains are generally not those causing diseases or other medical conditions in living people. They tend to be spoilage moulds able to grow on foodstuffs and damp surfaces; species of pin moulds (*Mucor*) and blue moulds (*Penicillium*), for example, are especially frequently encountered. In our experience in the UK, a corpse takes around a week to become amenable to colonization by moulds, although there are indications that the time may be much less in warmer countries. The reasons for this are obscure; temperature may be the key as many fungi will not grow optimally at body temperatures, but we have hypothesized that the break-down of the immune system, or conditioning of the skin after death, may be involved in this time-lag.

Fungi were first used to assist in the determination of post-mortem interval in the investigation of the murder of a Belgian baroness in 1982, but the first case of which we are aware of mould growths on a corpse being used in the UK was in West Yorkshire where a woman was estimated as having been murdered at least 3–4 weeks before her body was found in January 1996. In a case involving a headless and handless corpse that had been kept in a freezer and then dumped near a stream in Hertfordshire in 2007, entomological evidence for estimating post mortem interval was absent and this was probably because temperatures were too low to allow fly activity. A small *Mucor* colony had , however, developed on the torso, and the stage of development of the fungus indicated that the corpse had probably been in position for only 1-2 days; botanical evidence corroborated this observation.

We have found fungal growth data to be especially valuable in other cases where entomological evidence was lacking, either because flies had no access, or because conditions inhibited their activity. In a frenzied stabbing case in a closed flat in Dundee in 2009, we did not have access to the corpse, but fungal colonies had developed where body fluids had splashed and leaked onto furnishings and the carpet. Fungal growth had ceased after the corpse was removed and the furnishings and carpet dried out, and we established by further experimentation that this was because the humidity had been too low for continued fungal growth. We isolated and examined the growth rates of the fungi involved in Petri dish cultures kept at the same temperatures as in the flat, and came to an estimate of five days since the fungi had started growing. This time was confirmed by a subsequent admission of guilt. The following year we assisted in another case in Dundee where the corpse of a raped and murdered woman had been deposited in shrubbery by a roundabout; this was in February and again it had been too cold for flies. Fungal growth on exposed parts of the corpse were so extensive that they indicated a time of around two weeks. This proved to be consistent with the date of CCTV footage showing the accused close to the deposition site.

Food and materials spoilage

There is an enormous amount of information available on food spoilage fungi, mostly focussed on conditions that have led to deterioration of the foodstuffs, and the toxins (mycotoxins) some of the fungi involved can produce. We have found that food left exposed at a scene can give key evidence of timings. In a case for the Metropolitan Police in 2013, a mother had abandoned three children in an apartment, the youngest of which had been severely neglected and died while she was away. There was an issue over determining the length of time she claimed to have been absent. Extensive mould growths were present on plates with dried food remains, and in a deep cooking pan which also contained dried food. The food on the plates and in the pan supported extensive mould growths of five different species. From the sizes of the colonies and the known growth rates of the species identified at temperatures similar to those

recorded in the apartment, it was clear that the oldest had been growing for 10-14 days; this supported the view that the mother had been away for more than a long weekend.

Damp in buildings

Mould growth in buildings can pose health risks as well as causing damage, but the time of commencement of fungal growth can be crucial to some insurance claims for damages to inhabitants and (or) properties. In 2013 we assisted in a case where there had been sewage ingress into two adjacent houses in Hertfordshire, and the occupant of one was claiming for substantial damages to both health, and the structure and contents. In this instance, the moulds were identified microscopically and the colonies on the walls in different rooms measured. The largest sizes of fungal colonies revealed that the extensive growth of two species in particular had happened much more recently than when the ingress had occurred in 2010. The problems could actually be attributed to a combination of rising damp, a flooding episode from an upstairs bathroom, and the home being neglected and unoccupied for several years. The case went to court, and the judge found in favour of the water company rather than the claimant.

Conversely, fungal growth data may also provide evidence to support claimants as well as defending insurance companies. A home-owner in West Lothian was away for almost three months, but on return found that there had been a water leak which had not been noted when his brother checked the property three weeks before his return in February 2013. In this case, colonies formed by eight different moulds were identified microscopically. From what was known of their growth rates and the sizes of the colonies developed on walls and carpets, and the temperature in the property, it was apparent that these had developed in not more than 2–3 weeks, and perhaps less. This result was consistent with the leak having developed after the brother's visit on 2 February 2013, as had been reported by the home-owner, and the claim was met by the insurance company.

Further information

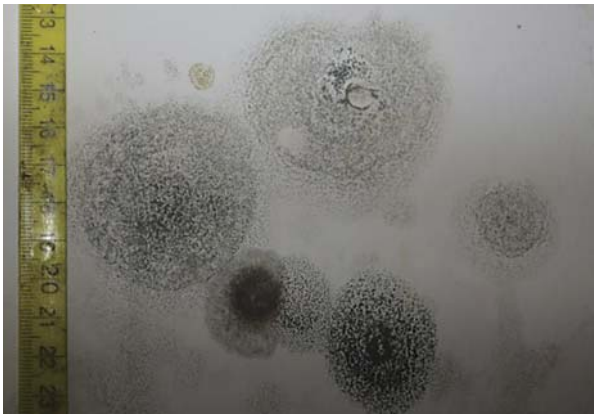
Further information on the use of fungi in forensic cases can be found in the following publications:

Hawksworth DL, Wiltshire PEJ (2011) Forensic mycology: the use of fungi in criminal investigations. Forensic Science International 206: 1-11.

Hawksworth DL, Wiltshire PEJ (2015) Forensic mycology: current perspectives. Research and Reports in Forensic Medical Science 5: 75–83.

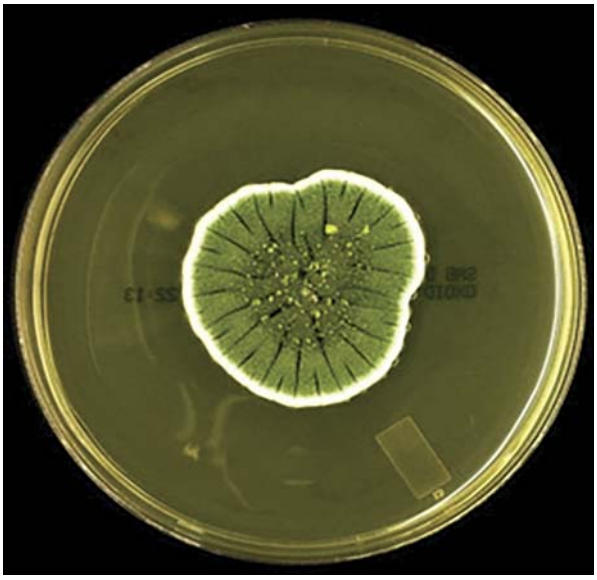
Wiltshire PEJ, Hawksworth DL (2014) Palynology and mycology: forensic evidence from soil, clothing, corpses, carpets, walls, and food. Expert Witness 1 (7): 28–31.

Opposite, Penicillium stoloniferum *(green) and other fungi growing on remains of a meal.*



Above, Aspergillus niger *colonies developed on a wall following a water leak.*

Above, Mucor hiemalis *(arrow) growing on the abdomen of a human corpse.*



Above, Penicillium brevicompactum *colony growing in a Petri dish.*

Kennedy Assassination Bullets Preserved in Digital Form

NIST scientists used advanced imaging techniques to create digital replicas of these important historical artifacts.

In the palm of his hand, Thomas Brian Renegar held two small metal objects that had changed the course of history. Twisted pieces of copper and lead, they were fragments of the bullet that ended the life of President John F. Kennedy on Nov. 22, 1963.

A physical scientist at the National Institute of Standards and Technology (NIST), Renegar was not yet born when the nation was robbed of the young, charismatic leader who fought for civil rights and set America on a course for the Moon. But he felt the weight of history. He picked up one of the fragments using rubber-tipped forceps and, with the care of a jeweller setting a stone, placed it into a housing beneath the lens of a 3D surface scanning microscope.

These artifacts are usually held at the National Archives. They were transported to NIST so that Renegar and the rest of the NIST ballistics team could scan them and produce digital replicas that are true down to the microscopic details.

Viewing the digital replicas on his computer screen, Renegar said, "It's like they're right there in front of you." The National Archives plans to make the data available in its online catalogue in early 2020.

Why do this, so many years after President Kennedy's tragic death? The mission of the National Archives is to provide the public with access to artifacts such as these, and it receives many requests for access to them. This project will allow the Archives to release the 3D replicas to the public while the originals remain safely preserved in their temperature and humidity-controlled vault.

"The virtual artifacts are as close as possible to the real things," said Martha Murphy, deputy director of government information services at the National Archives. "In some respects, they are better than the originals in that you can zoom in to see microscopic details," she said.

In addition to the two fragments from the bullet that fatally wounded the president, the digital collection includes another bullet that struck both the president and Texas Gov. John Connally. That one is known as the "stretcher bullet" because it was found lying near Connally at the hospital. The collection also includes two bullets produced by test firing the assassin's rifle, and a bullet that was recovered following an earlier, failed assassination attempt on Army Maj. Gen. Edwin Walker that was thought to involve the same firearm.

NIST physical scientist Mike Stocker places the bullet, wrapped in a silicone sleeve, on the microscope for a new run. Credit: J. Stoughton/NIST

In the lab, the NIST ballistics team used a technique called focus variation microscopy to image the artifacts. At each location along the object's surface, the microscope created a series of images at different focal distances. By analyzing which parts of those images were in focus, the microscope measured the distance to the object's surface features. As the lens moved across the object, it built a 3D surface map of the microscopic landscape beneath it, like a satellite mapping a mountain range.

Renegar and NIST physical scientist Mike Stocker spent countless hours rotating the metal fragments beneath the lens of the microscope to image every facet, then stitching the image segments together where they overlapped. "It was like solving a supercomplicated 3D puzzle," Renegar said. "I've stared at them so much I can draw them from memory."

If you held one of the original fragments in the palm of your hand, you would see that the metal is warped and twisted into a complex shape. But magnified on the computer screen, it is a world unto itself: a highly complex and undulating terrain that bends, dips and doubles back. Zoom in, and you can see rifling grooves left by the barrel of the gun. Zoom in closer, and you can see the microtopography — ridges and scratches that would be far too fine to feel with your fingertip.

The focus variation scans had a horizontal resolution of 4 micrometers, about one-tenth the width of a human hair, and a vertical resolution of 0.5 micrometers, or eight times better. This allowed the scans to record the depth of minute scratches in the metallic surface of the artifacts. Other members of the team, including mechanical engineers Xiaoyu Alan Zheng and Johannes Soons, used a technique called confocal microscopy to image selected regions of the artifacts at higher resolution.

Although this was an unusual project for the NIST ballistics team, its members do spend a lot of time imaging bullet surfaces. Their regular work has them researching advanced forensic techniques for identifying firearms used in crimes.

For more than a century, forensic examiners have matched pairs of bullets by viewing them under a split-screen comparison microscope. If the striations on a pair of bullets - or on microscopic photographs of those bullets - line up, examiners might consider them a match.

The NIST ballistics team is developing methods for comparing bullets using 3D surface maps, which can provide greater detail and accuracy than comparing two-dimensional images. It's also developing methods so that, instead of just saying whether or not two bullets appear to match, forensic examiners will be able to statistically quantify their degree of similarity. This research is part of a larger effort by NIST to strengthen forensic science so that judges, juries and investigators have reliable, science-based information when deciding guilt or innocence.

Robert Thompson, the NIST forensic firearms expert who oversaw the project, said that the bullet fragments from the Kennedy assassination were bent and distorted in ways that made them difficult to image. "The techniques we developed to image those artifacts will be useful in criminal cases that involve similarly challenging evidence."

The team did not conduct any forensic analysis of the bullets from the Kennedy assassination. This project was strictly a matter of historic preservation. However, once the National Archives makes the data available to the public, anyone who is interested in analyzing those bullets will be able to do so without risking damage to the originals.

Though Renegar is too young to remember the event that indelibly marked the memories of an earlier generation, he feels deeply connected to that day in history. Speaking for the entire team, he said, "It

Below, a fragment of the bullet that fatally wounded the president - Credit NIST

was an honour to put our expertise toward such an important project."

The National Institute of Standards and Technology (NIST) was founded in 1901 and is now part of the U.S. Department of Commerce. NIST is one of the nation's oldest physical science laboratories. Congress established the agency to remove a major challenge to U.S. industrial competitiveness at the time - a second-rate measurement infrastructure that lagged behind the capabilities of the United Kingdom, Germany, and other economic rivals.

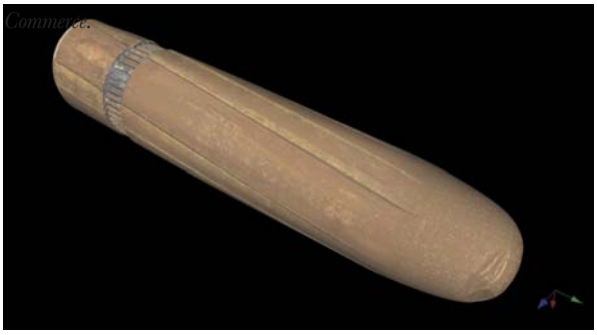
From the smart electric power grid and electronic health records to atomic clocks, advanced nanomaterials, and computer chips, innumerable products and services rely in some way on technology, measurement, and standards provided by the National Institute of Standards and Technology.

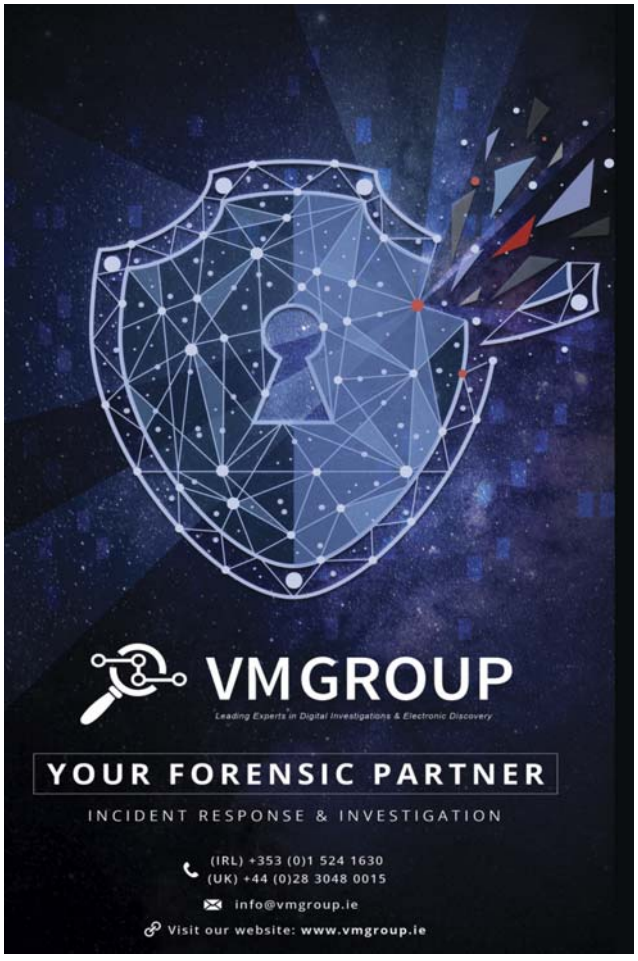
Today, NIST measurements support the smallest of technologies to the largest and most complex of human-made creations - from nanoscale devices so tiny that tens of thousands can fit on the end of a single human hair up to earthquake-resistant skyscrapers and global communication networks.

This story originally appeared on, **www.nist.gov.** Many thanks for permission to reprint.

It was written by **Rich Press**, Science Writer and Public Affairs Specialist.

The National Institute of Standards and Technology (NIST) was founded in 1901 and is now part of the U.S. Department of Commerce.





Edinburgh Tech Start-up Wins Pan European Pitching Competition

- *Cyan Forensics has been announced as the winner of PitchGovTech as part of the GovTech Summit 2019*
- *The Scottish digital start-up has created a digital forensic analysis tool to find child sexual abuse material (CSAM) on devices within minutes*
- *Cyan Forensics recently signed contracts with the UK Home Office to make their 'ground-breaking' technologies available to all police forces in the UK and the UK's Child Abuse Image Database (CAID) to produce a Contraband*
- *Filter that connects to their national database of images*
  Recently an agreement was also reached with the American National Center for Missing and Exploited Children (NCMEC), which is the first step in introducing their product into America

The pitch competition took place as part of the GovTech Summit, where political leaders and start-up founders from across Europe gathered in Paris to discuss the role of technology in society and how they can work together to improve public sectors. Pitch-GovTech is the largest ever startup pitch event dedicated to innovative technologies to advance the public sector. Organisations' that took part came from fields as diverse as aerospace, agriculture, clean technology, construction, education, financial services, healthcare services, energy, robotics, security and software.

Hundreds of start-ups from across the globe entered PitchGovTech hoping to be one of the ten finalist start-ups chosen to pitch against the clock for three minutes, followed by two minutes of Q&A by the judging panel. Competition was fierce, and only those taking on the public sector in extremely innovative and transformative ways made it through to pitch on the day.

Senior political leaders from across Europe in attendance included: French Digital Secretary Cedric O; Florence Parly, French Minister for the Armed Forces; Kersti Kaljulaid, President of Estonia; and Mircea Geoana, Deputy Secretary General, NATO. They were joined by start-up and tech sector leaders including Travis Vanderzanden, CEO of Bird; Cyril Lage CEO of Cap Collectif; and Robin Klein, Founding Partner at LocalGlobe.

Cyan Forensics' CEO Ian Stevenson said:
"We are delighted to have won #PitchGovTech. Cyan Forensics' goal is to use tech for good, building and selling transformative new technologies to help law enforcement, social media companies, and cloud providers find and block harmful content from pedophiles and terrorists. Images and videos shared online are the lifeblood of groups that represent a great threat to our society. Prosecuting people who access this content and even better, blocking it from circulating online, are vital for public safety.

"As well as this win, the last few months have been particularly exciting for us, seeing Cyan Forensics sign major agreements with the UK Home Office to make our product available to all police forces in the UK, the UK's Child Abuse Image Database (CAID) to produce a Contraband Filter that connects to their national database of images, and an agreement with America's National Center for Missing and Exploited Children (NCMEC) which is the first step in our tools being introduced in America."

Cyan Forensics' prize consists of $15k worth of Amazon Web Service (AWS) credits, a meeting with the UK Department for International Trade and a MacBook Pro.

Digital evidence is vital to investigations into child sexual exploitation, but these investigations often take months due to delays. Delays are caused by backlogs of devices waiting to be searched and the amount of detailed work required to search each device. Cyan Forensics' software quickly scans devices for any recognised content and can be used on the device before it enters the queue. It can also help to better inform officers on the ground if a suspect should be taken in for further questioning and a comprehensive digital search. This is far more serious an issue than just the financial and time cost to the police force. Quicker decisions mean that vulnerable children can be safeguarded faster, and suspects brought to justice sooner.

Cyan Forensics' technology has been built by experts in digital forensics, originally off the back of three years of research and development with Edinburgh Napier University. The research involved CTO,

Bruce Ramsay, who worked as a forensic analyst for Lothians and Borders Police and experienced the issues of forensic analysis firsthand. He was joined by CEO Ian Stevenson during the commercial phase of the research project, which resulted in the two spinning the company out and forming Cyan Forensics in 2016.

The Home Office recently announced Cyan Forensics as a tool that will be made available to police forces across the UK. One of three pioneering new tools to be rolled out in the fight against child abusers, Cyan Forensics will play a key part in improving the capability of the Child Abuse Image Database (CAID). Every police force across the UK will have access to the new tools, which will speed up investigations of online child abuse and limit the number of indecent images of children (IIOC) police officers must view. You can see more on this announcement, here.

The Legal Framework for Cyber Security - Current Developments

by Mareike Christine Gehrmann, Salary Partnerin, Düsseldorf

On 27 March 2019, the German Federal Ministry of the Interior, Building and Home Affairs (BMI) presented a draft bill on the IT Security Act 2.0. The proposed legislative amendment will have significant implications for companies. The draft provides an expansion of the companies to which the IT Security Act 2.0 applies and plans to hold manufacturers of critical infrastructures accountable. Furthermore, the IT Security Act 2.0 provides for the German Federal Office for Information Security (BSI) to be equipped with extended powers and for the current provisions on cyber criminal law to be tightened up.

In 2015, with the creation of the IT Security Act 1.0, the German legislator took the first step to counteract the threat of cyber crime. Due to the ongoing digitalization and the increasing networking of IT systems, the situation of IT security in Germany has become worse in the past few years. In order to ensure protection against cyber attacks in the future, the German governing parties have therefore decided to develop the IT Security Act 1.0 further. On 27 March 2019, the BMI presented the draft bill for the IT Security Act 2.0 – with far-reaching changes.

Addressees are to be expanded

The IT Security Act 1.0 aims to protect IT infrastructures against cyber attacks in order to prevent supply bottlenecks for business, government and society. Primarily, it addresses operators of so-called critical infrastructures – companies which are part of the sectors energy, IT and telecommunications, transport and traffic, water, health, nutrition and finance and insurance and which are of great importance for the functioning of a society.

The IT Security Act 2.0 is intended to address further sectors, namely, waste disposal. Furthermore, the IT Security Act 2.0 shall apply to infrastructures of special public interest such as, for example, the defence and security industry, the chemical and automobile manufacturing sector, companies in the sector of culture and media and companies, which are of considerable economic importance.

The draft bill redefines core components of critical infrastructures – IT products that serve the operation of critical infrastructures and which are developed or modified especially for this purpose. In the future, manufacturers of such core components will be obliged to submit a declaration of trustworthiness, which covers the entire supply chain. Otherwise, operators of critical infrastructures may no longer use their products. Additionally, the manufacturers of core components of critical infrastructures – as well as operators of critical infrastructures – must notify the BSI about disruptions related to their products caused by cyber attacks.

The so-called Ordinance on the Designation of Critical Infrastructures under the IT Security Act of the BSI defines thresholds and sets out whether a company is to be classified as an operator of a critical infrastructure within the above-mentioned sectors. If a company does not reach the threshold, the IT Security Act 1.0 does not apply. This is where the IT Security Act 2.0 comes in: The BSI may impose the obligations of the IT Security Act 2.0 on a company in justified individual cases where a disruption of this companies' IT security could endanger society.

BSI provided with extensive powers

The bill further provides for the tasks and powers of the BSI to be expanded comprehensively. As a central certification and standardization body, the BSI will have more responsibility and further tasks, for example in the area of digital consumer protection.

Currently, the BSI is dependent on the BMI. This relationship of dependence gives rise to conflicts of interest: On the one hand, the BSI's task is to close IT security gaps; on the other hand, however, the BSI itself partly generates these gaps by participating in the development of statestrojans. Therefore, the BSI shall become more independent and neutral. At the same time, it is provided with extensive warning and investigative powers as well as an extensive authority to issue directives. The BSI shall be equipped in particular with powers that enable offensive action against botnets, risks in the Internet of Things and the distribution of malware. The BSI shall, for example, be empowered to penetrate third-party IT systems in order to install patches or remove malware. Furthermore, it shall be authorised to direct providers to block or redirect data traffic in order to ward off and defend against cyber attacks.

Moreover, the IT Security Act 2.0 is intended to introduce an IT security label. The label aims to make it easier for consumers to assess the cyber security of IT products and services. In the future, manufacturers will be able to voluntarily apply for the IT security label for their products in case they

have implemented the „state of the art" of IT security defined by the BSI through technical guidelines.

Tightening up of cyber criminal law and increase of fines

The IT Security Act 2.0 provides for the cyber criminal law to be tightened up. Adjustments to the substantive criminal law will map out the injustice and danger of cyber crimes more reasonably. Criminal liability gaps will be closed up, and for particularly serious cases of computer crimes, new qualification criteria will be created.

According to the IT Security Act 2.0, a larger number of offences can lead to a fine in the future. Besides this, the draft provides for a sharp increase in fines – comparable to the level of the regulations on fines in the EU General Data Protection Regulation (GDPR). As in the GDPR, fines of up to a maximum of 20 million Euros or up to 4 percent of the total worldwide company turnover can now be imposed. The increase of fines is to ensure that companies devote more attention to the requirements of IT Security.

IT security versus public security

The companies to which the IT Security Act 2.0 will apply will have to make considerable investments in order to comply with the legal requirements – unless they are already obliged to a high IT security standard due to other regulations. Companies should take into account that the security level is constantly evolving and rising.

Conclusion

Many initiatives of the IT Security Act 2.0 are useful, especially the IT Security label, the reporting requirement and the innovations in the area of consumer protection. However, the planned fundamental new orientation of the IT security policy in Germany, the comprehensive extension of the powers of the security authorities and the planned tightening up of the cyber criminal law will probably be discussed controversially – including from a constitutional point of view.

Many thanks to **Mareike Christine Gehrmann**
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When the Judge Criticises the Expert

by Alec Samuels

The claimant had a difficult labour. There was what the judge found to be culpable delay by the responsible medical people. There was a belated emergency caesarean delivery. The child survived, but was brain-damaged. Thereafter the child needed much special looking after. The mother suffered severe worry, anxiety, depression, mental problems.

The first issue for the judge was whether both the child and mother were primary victims entitled to sue, and she decided that in law they were both entitled.

The second issue for the judge was causation. The claimant's lawyers claimed that the culpable delay and incompetence in a difficult labour situation, the anxiety suffered by the mother and the heavy burden of caring falling upon the mother caused harm and injury to the mother. The defence lawyers claimed that the mother suffered from a pre-existing general genetic condition and her harm and injury were not caused by the birth.

The judge (para 68) liked the expert consultant psychiatrist for the claimant. "I found Dr…. to be a compelling expert witness in whom I had confidence. He appeared to have thought carefully about the claimant's case. He has met the claimant twice [for several hours]. He observed her in the witness box. He had tried to identify and explain the claimant's symptoms, first and foremost, before coming to any conclusion on classification. He evidently found it difficult to fit her symptoms within the grid lines of classification… Dr… had flagged up in the joint statement…. that classification was difficult….."

The judge (paras 71-80) did not like the expert psychiatrist for the defendant. The expert did not appear to have a great deal of experience in the psychiatric matters before the court. Her experience lay largely elsewhere in psychiatry. She did engage in private practice, but only to a small degree. She did a lot of medico-legal work. She admitted that she preferred to work for defendants(!). She had met the claimant, once, though her account of what happened at the meeting differed for that of the claimant, and the judge preferred the version of the claimant. In her written report she claimed to have seen the hospital records but it emerged that she had not read them. At the trial the expert was unclear, inconsistent, confused, defensive. On occasions she seemed to resile from or to contradict what she had agreed to in the joint report. She raised points not previously raised before the trial. She was overly dogmatic, irrational, implausible, making points not sustained by the evidence and not analytically sound.

Not surprisingly, the claimant won the case and secured substantial damages YAH v Medway NHS Foundation Trust [2018] EWHC 2964 (QB), [2019] 1 WLR 1413.

Why Forensic Science Is In Crisis and How We Can Fix It

by Professor Ruth Morgan (UCL Security & Crime Science) writes about the misinterpretation of forensic evidence and the issues that this causes for the criminal justice system.

Imagine you're in court, accused of a crime that you know you didn't commit. Now imagine a scientist takes the stand and starts explaining to the court how your DNA is on the murder weapon.

Forensic science is nothing short of a technological success story; it is possible to detect and identify forensic traces at greater levels of resolution and accuracy than ever before, and we can capture, retain and search more data than at any other time in history. These capabilities are transforming what forensic science can do. However, at the same time, forensic science is facing a huge challenge.

What crisis?

Forensic science sits at the intersection of science, law, policing, government and policy. It is a complex ecosystem that has competing demands and drivers to deliver science to assist the justice system. A recent inquiry by the House of Lords Science and Technology Select Committee in the UK recognized that forensic science is in a state of crisis, to such a degree that it is undermining trust in our justice systems. This crisis is multifaceted, and while some of the results of the crisis have been reported, such as miscarriages of justice, instances of malpractice, and failures of quality standards, there is an aspect of the crisis that has been overlooked. A recent study in the UK identified all the cases upheld by the Court of Appeal where criminal evidence was critical in the original trial over a seven-year period. In 22% of those cases, the evidence was misinterpreted. These cases are only the tip of the iceberg and indicate a broader root cause of the crisis forensic science is facing.

The crisis is a result of a deep-seated and systemic issue of how science is used in the justice system. It is not enough to be able to detect critical forensic traces (whether they are physical traces like DNA or digital traces like GPS data), we need to be able to interpret what those traces mean in the context of a crime reconstruction. If we find gunshot residue on a jacket, it's not enough to be able to accurately detect that those particles are gunshot residue. We need to know whether the person wearing the jacket fired the gun, and if they did, if it was fired during the crime.

At the moment, we don't always have the data that we need to be able to do that. This isn't only about understanding how and when a trace is transferred. For example, a study from the US in 2018 found that when 108 crime labs received the same complex DNA mixture, 74 of the labs correctly included two reference samples as contributors to the mixture, but they also incorrectly included a reference sample from an innocent person. That is 69% of the labs interpreting the profile erroneously. This is an issue for every type of forensic science evidence from fingerprints and DNA to fibres, gunshot residue and digital evidence, and it is an issue that strikes at the heart of how we use science in the justice system, and the fabric of our communities. We can detect traces better than ever before, but for robust forensic science, we need to know what those traces mean.

How have we got here?

The recent House of Lords inquiry asked probing questions across the whole remit of forensic science (from crime scene, investigation, lab analysis, to the presentation of evidence in court), in a way that also brought together the voices from all the relevant domains (the police, advocates, judiciary, scientists, researchers, government ministers and policy-makers). As a result, the committee revealed the root causes of the crisis in forensic science in England and Wales, and their findings offer valuable insights for forensic science all over the world. They found that the piecemeal approach to forensic science, where different parts of forensic science are distributed between law enforcement (who address the collection of exhibits and samples and some analysis), forensic services (who undertake the analysis and interpretation) and the courts (who seek to establish the significance and evidential weight of those materials), has led to a devastating lack of strategic oversight and accountability for forensic science.

This fragmentation has led to a situation where the value of forensic science has not been effectively articulated or appreciated, which in turn has led to a situation where forensic science has not been a strategic priority. For example, it is not (yet) possible to effectively demonstrate the true value of detecting the source of a material that leads to a confession of guilt. A confession during an investigation may save advocate and court time down the line.

But despite the clear importance of forensic science within the justice system, demonstrating the value

and strategic value of forensic science has been elusive. This is in part due to the lack of connections between the investigation and prosecution phases of the forensic science process, which makes it difficult to connect an outcome in one part of the process with an action in another part of the process. There is also the thorny issue of finding an accepted approach to equate the value of societal good on the one hand and economic cost on the other – arguably, in the justice system value should not only be considered as a fiscal issue.

This situation is exacerbated in the UK where a market has been created for forensic science services where private companies can compete for tenders to provide forensic analyses of samples and exhibits. The financial value of the market has been reduced in the last 10 years from £120m a year. to c.£50-55m a year, and the remaining market suffers from a lack of sustainability (in part due to a procurement process that can value cost over quality) and regulation. At the same time, the main procurers of these services (usually the police) have been contending with significant budget cuts, and this has led to significant instability in the market with severe challenges for ensuring solvency of providers and preserving the integrity of evidence.

There are also serious issues around the science itself, and the evidence base that underpins forensic science. Forensic science has historically fallen between the cracks of major funders due to its interdisciplinary and applied nature. Where there has been funding available, the focus has been on equipping the industry with tools that aid the detection of materials more quickly, more accurately, at greater degrees of sensitivity and in a context of creating economic value within the market. This has meant that "… the interpretation of forensic evidence is not always based on scientific studies to determine its validity" (National Academy of Sciences 2009), which the Lords report found to still be the case in 2019. The focus on detecting forensic materials over the interpretation of what they mean, has led to a lack of funding for foundational research that can produce the evidence base that is needed to understand how (and when) your DNA got on the murder weapon.

A path to justice?

The crisis in forensic science is a complex global challenge. These kinds of challenges rarely have simple solutions and require engagement across many disciplines and sectors to find the pathways that will offer progress. For forensic science, it is clear that addressing individual "symptoms" (such as a quality standards failure in a lab, or creating better technologies for real time intelligence at a crime scene) will at best offer short-term solutions to specific problems in isolation. Instead, the future of forensic science lies in tackling the root causes of the crisis in a way that keeps both technology and people at the heart of reform.

Looking forward, forensic science needs to establish a holistic vision that ensures meaningful connectivity between the investigation and the courts. There needs to be strategic oversight to set priorities for current operational approaches, to establish sustainable markets for the provision of forensic science services, and set the agenda for research to underpin each part of the forensic science process (crime scene to court). This will need to be a collective corporate strategy that provides a voice for all the key stakeholders.

A key part of addressing the crisis in the UK will be stabilizing the market, particularly in terms of addressing the procurement processes, quality standards and equitable access to forensic science services for both the prosecution and defence. But to address the core issues in forensic science globally, it will also be critical that the science being used is underpinned by excellent research.

Research in forensic science needs to be harnessing the emerging capabilities in technology, AI, and machine learning to develop novel technological tools to address the emerging challenges that are arising in the detection and identification of traces and individuals. But it must also develop the foundational underpinning needed for reliable, transparent and reproducible evaluative interpretation of what those materials that are detected mean in a specific crime investigation. This will require a stepwise change in the current funding structures at the international and national levels, and dedicated funding streams. There is a long way to go – in the UK 2009-2018 less than 0.03% of the total research funding at the national level was devoted to forensic science, and less than 0.003% on foundational research.

Given how the justice system shapes our societies, the stakes are far too high to ignore the crisis in forensic science. The integrity of the forensic science system is critical to the delivery of justice and public trust, and so this is an urgent challenge for the global community. Like plastics in our oceans, this is a problem that has gone under the radar for far too long. The time for action is now.

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To see the data on the current forensic science research funding situation in the UK see: https://www.sciencedirect.com/science/article/pii/S2589871X19301457

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Toppled From the Top – The Risk of Fraud

by Roger Isaacs, Forensic Partner at Milsted Langdon.

Fraud has become a significant issue for modern businesses, particularly with the development of new technology, that has made the facilitation of fraud much easier and detection far harder.

Regardless of its scale or complexity, fraud can have a devastating impact on businesses and their shareholders, leading to a loss of jobs, a devaluation of shares and ultimately insolvency.

This has been recently highlighted by the case of bakery Patisserie Valerie. Founded in 1926, the once small London bakery bloomed into a national institution with almost 200 stores in operation across the UK.

In the months since the story of its administration broke much has now become clearer about the mismanagement and allegations of accounting fraud at Patisserie Valerie, which ultimately left the once successful business with a £94 million black hole in its accounts.

In the wake of its collapse, the administrators, KPMG, revealed that the firm's cash position had been overstated by £54 million, while its liabilities had been understated and the amount it was owed overstated to the tune of £17 million. To make matters worse there was a £23 million discrepancy in the way it had valued its assets.

However, the company hadn't seemed like a sinking ship when it was valued at £450 million just months before it flagged up the potential fraud, which led to the administration that wiped out the value of the business.

Its former auditor Grant Thornton had given it a clean bill of health at the time, which gave investors in confidence the value of their shares. Following the administration, Grant Thornton said that it was not the role of accountants to uncover fraud.

Speaking to MPs back in January David Dunckley, chief executive of Grant Thornton, said: "We're not looking for fraud, we're not looking at the future, we're not giving a statement that the accounts are correct. We are saying [the accounts are] reasonable, we are looking in the past and we are not set up to look for fraud."

Dunkley was grilled by MPs for some time about the failure of Patisserie Valerie and their role as auditor but he reiterated: "If people are colluding and there is a sophisticated fraud, that may not be caught by normal audit procedures."

Five arrests have since been made in relation to alleged accounting fraud and the individuals have been questioned following an investigation by the Serious Fraud Office (SFO), which worked in collaboration with the Hertfordshire, Leicestershire and Metropolitan police.

Amongst the people arrested was Chris Marsh, Patisserie Valerie's former Chief Financial Officer (CFO). The SFO is yet to comment further on charge or actions it may take against those arrested.

In addition to the SFO, the case has attracted the attention of several other watchdogs, including the Financial Reporting Council (FRC), the Insolvency Service, the Aim market regulator and the HMRC fraud investigation service.

It has also led to further questions being raised about the effectiveness of the UK's audit procedures and rules, with the likes of BDO and PwC both questioning whether change is needed.

In response, the FRC has issued a revised going concern standard, which requires auditors to challenge more robustly management's assessment of going concern and thoroughly test the adequacy of the supporting evidence.

The FRC has also introduced a new reporting requirement for the auditor of listed and large private companies to provide a clear conclusion on whether management's assessment is appropriate and a stand back requirement to consider all of the evidence obtained when the auditor draws its conclusions.

The Council has also launched an investigation into Grant Thornton's handling of the audit of the financial statements of Patisserie Holdings for the years ended 30 September 2015, 2016 and 2017 under its audit enforcement procedure.

Alongside this, the FRC will investigate Chris Marsh, over the preparation and approval of Patisserie Holdings Plc's financial statements and other financial information which had been provided by him.

Patisserie Valerie was bought by an Irish private equity firm, Causeway Capital Partners (CCP) for £5 million after its collapse, in a move that helped to save around 2,000 jobs and has kept some outlets open.

Since acquiring the business, it has revealed the shocking state of the company it purchased, including an extreme approach to cost-cutting.

Measures used by the company before its administration included managers who stopped using

butter in puff pastries, broken ovens, unpaid suppliers and an unrepaired leak in the roof at a key bakery site.

While shareholders await more details that are likely to come from the SFO's and FRC's investigations, it seems clear from the work of the administrators that Patisserie Valerie had been mismanaged and its accounts overstated to elevate its share price artificially.

Many commentators have discussed how such a large company could get into such a state, how the warning signs could be missed and how auditors failed to flag up problems in the business or spot the fraudulent activity.

Unfortunately, for many of the staff and shareholders, the damage has already been done. This case, like many before it, has helped to highlight the dangers of fraud and the devastating impact that it can have on the lives of those affected by it.

It also demonstrates the enormous gap between the public perception of what an audit should achieve and reality. An audit is significantly different from the type of focussed forensic accountancy investigation that has now been undertaken at Patisserie Valerie. The former has the objective of giving "reasonable assurance" that financial statements are free from material errors arising from fraud, but an audit gives "no guarantee".

Many commentators argue that the rules should be changed to place a greater onus on auditors to find fraud but this would inevitably increase the cost of an audit which would be at odds with the government's stated aim to reduce the burden of bureaucracy and red tape on business.

Roger Isaacs,
Forensic Partner at Milsted Langdon, is an award-winning expert witness and forensic accountant, who is renowned for the quality and breadth of expert advice he provides to clients.

Roger is the National Technical Director of the Network of Independent Forensic Accountants ("NIFA") and former Chair of the ICAEW's Forensic Accountancy Advisory Committee. He has considerable experience in the witness box and in addition to giving evidence by means of traditional cross-examination, Roger has on a number of occasions given evidence concurrently by means of so-called 'hot-tubbing'.

In September 2019, Roger was awarded 'Partner of the Year' at the British Accountancy Awards.

Milsted Langdon has offices in Bath, Bristol, London, Taunton and Yeovil and offers a wide range of services for individuals and businesses, including compliance matters, specialist tax advice and planning, corporate finance, insolvency, forensic accounting and mediation services.

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Pension Offsetting - Some Further Thoughts

by Peter Crowley

Many useful recent publications have been published on putting a value on a pension. The pensions Advisory Group's July 2019 report (referred to as the "PODE" report) – Actuary article –Hilary Woodward and Rhys Taylor's "Apples and Pears" paper (2015) - Hay, Hess and Lockett's "Pensions on Divorce (2018- updated from 2013). Apples and Pears described their offsetting inputs as follows: "The present authors do not presume to be qualified to adjudicate upon the rival views of a congregation of nine experts and the Duxbury proponents. However, they are at odds with one another and it would be a worthwhile exercise to see such positions adjudicated upon by reference to evidence."

The PODE report appears to have achieved some consensus, but there are still differences of opinion. The following general themes emerging regarding offsetting:

• It is acceptable to use a Cash Equivalent (CE) alone for small/DC cases – but not advisable otherwise

• Possible methods include DCFE (including annuity purchase), Realisable Value, Cash flow with parties' capacity for risk assessment, "Actuarial value", where cash flows are discounted for investment return and mortality, and Duxbury tables.

• Critical remarks were made about the CE not being the "True" value (or a similar aphorism)

• Some describe the DCFE as the "true" value or "fair" value, but as the PODE report explains, there is no such thing. Accordingly, all terms should be defined when first introduced.

• There is a fear of "Expert shopping" – pushing an expert whose methodology favours either H or W

In choosing a method, or a combination of methods, my input might be useful. I have worked for some years as a Scheme Actuary – the only actuaries allowed to advise Trustees on and then set the bases for calculating Cash Equivalents – and have also worked on an annuity desk – although that was quite a few years ago.

Methods which are most regularly cited are:
DCFE, and CE (although described in alternative language)

Almost invariably, but not always, the DCFE is greater, sometimes significantly, than the CE.

Two obvious questions then arise:
1 Why is the DCFE so high? and
2 Why is the CE so low?

Regarding 1, annuities are provided commercially by an insurance company. It needs to ensure the price it charges is adequate so that its solvency is not endangered in the future. However, the market is keenly competitive, and rates charged may need to change quickly, especially if market yields change, so the price it can charge is limited. Efficient providers will become market leaders, but must continually watch the market. Despite the competition, annuity rate caution will mean the DCFE is usually at the top end of the range of possibilities.

Regarding 2, the CE is calculated by a Scheme Actuary for a current scheme member. The 2004 Pensions Act transferred the ultimate decisions on pensions funding to Scheme Trustees – however, the Scheme Actuary is responsible for advising them on a suitable range of options. The scheme may not be fully funded on a solvency basis (similar to a DCFE basis for the membership as a whole) – however, THE CE MUST REPRESENT THE COST TO THE SCHEME OF PROVIDING ALL THE BENEFITS ACCRUED, USING ACTUARIAL ASSUMPTIONS – the Pensions Regulator will insist on that. In addition, the Trustees and Scheme Actuary also have a duty to ensure the remaining members are not disadvantaged by the CE being taken. Accordingly, the CE is usually at the bottom end of the range of possibilities.

In other words, the annuity actuary (it is usually an actuary) is keen to prevent new annuitants joining the insurer's current population at too cheap a cost – so the purchase amount is relatively high.

Correspondingly, the Scheme Actuary (an actuary with certified experience) is keen to prevent leavers exiting the scheme's current population at too expensive a cost – so the 'sale' amount is relatively low.

Some additional points:
a) Occasionally, the CE is reduced from the cost to the scheme of providing the benefits, due to underfunding. This must be formalised by a published report, and all CEs reduced by fixed percentages. In this case, both pre and post reduction figures must be published, and special consideration should be given.

b) A few well-known schemes (eg, Armed Forces Pension Scheme) offer early payment of accrued benefits, the advantages of which are lost immediately on early leaving (which drives the CE), or gradually, if the member works until later than the option date.

c) Both 1 and 2 may suffer from imprecision – some of which is by design. For example, post the Test Achats case, market annuity rates MUST be unisex, whereas CEs generally use sex specific mortality rates, and are more accurate in this respect. On the other

hand, CEs may assume a certain proportion married in valuing Spouses' benefits to construct the CE, rather than consider the current marital status of the individual.

d) Duxbury tables contain a large allowance for "husband failure*", ie, husband being unable to make payments due to sickness, death, or redundancy. Because of this, Duxbury is not thought to be suitable for pension valuation by many practitioners. (* The husband is usually the payer)

e) Historically, some schemes have provided relatively low CETVs – primarily government schemes. Under the 2016 guidance *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/755674/basis_for_setting_the_discount_rate_for_cetv.pdf* it is stated:

"1.8 Under the transfer value regulations, a CETV should be the amount required within the pension scheme to make provision for the accrued benefits, options and discretionary benefits which would otherwise be provided."

Our experience is that the CETVS for government schemes have improved in recent years, and such anomalies are rarer. It would be interesting to compare other experts' recent experience.

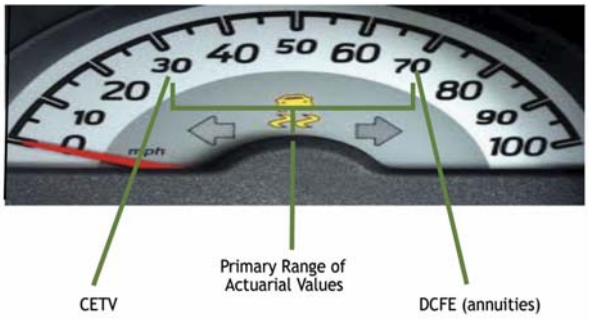
Regarding the possible methods above, Realisable Value uses the CE (there is no choice but to do so). Actuarial Value means a PODE replicates in some way what a Scheme Actuary or annuity actuary (or both) is doing – the definition covers what each of these does. Careful thought should be given as to why the PODE believes his Actuarial Value is "better" than that of either actuary.

If the use of the CE is not to be barred, a sensible suggestion seems to be to derive a value between 1 and 2 above – the "high" value, and the "low" value. The two values can also be seen as a "buying price" and a "selling price" – where buying involves absolving oneself of liabilities, and selling means taking them on. That would avoid extremes. To recap, the Scheme will pay no more than the CE, and the pension provider will accept no less.

In addition, it should be noted that neither of the benefits are actually being purchased in the market, nor is the CE actually being taken. Both are hypothetical factors in assessing a current offsetting value. The above would also appear to be consistent with the aim of making outcomes more predictable and consistent.

Finally, while sole use of the CE would arguably undervalue the benefits on offsetting, which might lead to H favouring offsetting and W pension sharing, sole use of the DCFE would result in the opposite – W would always be tempted to go for offsetting and H pension sharing. Expert shopping would then be inadvertently encouraged.

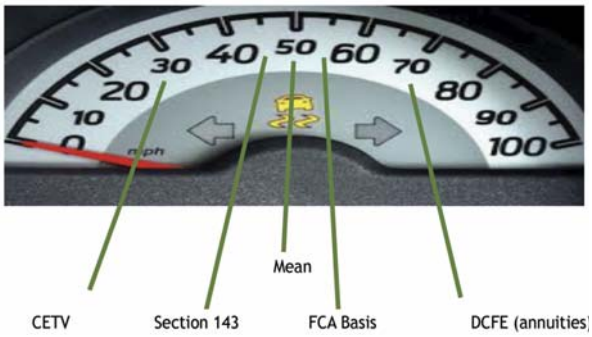
One way to put all views into context might be to consider a "Pension Offsetting Dashboard" (akin to the much-lauded Pensions Dashboard). In fact, perhaps only a "Pensions Speedometer" would be needed. This might take the following format:



It would be expected that any figure outside the primary range would need additional explanation.

The PODE report includes the FCA transfer test basis, suggesting this as a starting point for offsetting calculations. Another possible basis is the PPF's "Section 143" basis, used for schemes entering the PPF. More simply, the mean of the outside limits might be used. The starting point may then be as follows:

The above makes no allowance for tax or other pension illiquidity. It is proposed the experts allow for tax, but leave the Courts to adjust for further liquidity preference.



Blockchain vs Trust: The Fundamental Expert Dilemma

by Dr Stephen Castell

Abstract:
The General Data Protection Regulation (GDPR) includes in its provisions Article 17, the Right to be Forgotten, which could potentially be a formidable barrier to the ubiquitous introduction of cryptographic blockchain software and technology. Despite this, there has been an investment mania for Blockchain Technology, with more money having gone into Bitcoin and other cryptocurrencies, blockchain, smart contracts and distributed ledger technology than even into Artificial Intelligence (AI). A few of these may prove to be commercially-successful, disruptive game-changers, and usher in the possibility of a new global 'crypto-economy' paradigm. But so far many have tended to have been significantly fuelled by the 'black cash' of drug-dealers, money-launders, traffickers and the like; and in Q2 2019, misappropriation of cryptocurrency funds netted criminals some $4.26 billion. The foundations of global digital currencies go back well before the Satoshi bitcoin paper of 2008. Those early digital e-commerce visions did not require a cryptographic blockchain 'mining', or 'distributed consensus', existential model, and were not intentioned of being so readily riven with the criminal black market profiteering of money-launders, scammers and fraudsters that bedevil much current cryptocurrency activity. Looking ahead, Facebook's Libra digital currency could establish a new global e-commerce paradigm much closer to the pre-bitcoin electronic cash visions, and one more compliant with the existing norms and customs of the Rule of Law, where a responsible Trusted Third Party, in this case, Facebook, is fundamental. Cryptocurrencies apart, some blockchain applications more generally are likely here to stay, and the majority will be robust implementations by established major corporations, with most of us, as consumers, hardly needing to know any of the details. For the properly-cautious ICT expert and professional, when considering the use of blockchain for any proposed use case, the 'fundamental things apply'. The legal status of blockchain cryptocurrency, smart contract and distributed ledger technology is not clear, or uncontentious, and in the USA, there is already ICO litigation on foot. There is always the need for Trusted Third Parties, and for probative Electronic Evidence. Crypto Dragons, the many and varied Financial Disputes over Crypto Assets have arrived. Such complaints, disagreements, conflicts, with civil and criminal claims and legal actions, are increasing, driven by the growth in crypto scams, thefts, losses and investigations,

with many such disputes reaching the courts. A key point at trial will be examination of the Digital Evidence and, although a Crypto Asset may essentially be 'decentralized digital vapour', a Court of Law can make a binding Order to get forensic traction on it, because of the legally well-established Obligation of Disclosure. This article concludes with a Checklist giving practical, generally applicable wording for an effective Digital Asset Disclosure exercise.

1. Introduction:
Blockchain and the Right to be Forgotten

"Blockchain technology introduces permanence and immutability into the digital world. … the technological revolution that commoditizes trust … Trust normally has to be enforced via laws, courts, … fallible institutions. Replacing these with disinterested cryptography promises a revolution in the way we enable trust. … [This brings up] the right to be forgotten. A law that grants individuals, under some circumstances, the right to demand of websites that they remove information about themselves. However, in a distributed consensus system like blockchain, enforcing the right to be forgotten becomes technically impossible. …"
Júlio Santos, November 6th, 2017 [1].

The Right to be Forgotten could potentially be a formidable barrier to the ubiquitous introduction of computer and communications systems applications based on cryptographic blockchain software and technology. The General Data Protection Regulation (GDPR), in force from May 25, 2018, includes in its provisions Article 17:
http://www.privacy-regulation.eu/en/article-17-right-to-erasure-'right-to-be-forgotten'-GDPR.htm
"*Right to erasure ('right to be forgotten')*" *... (e) the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject; …*

With the 'permanence and immutability' of data records written to the blockchain being emphasised as one of its fundamental, key features, in a wide range of use cases where acquisition, processing and recording of personal data is critical blockchain could possibly be structurally unable to be compliant with Article 17, Right to Erasure, of GDPR. The Commission nationale de l'informatique et des libertés (CNIL), the independent French administrative regulatory body whose mission is to ensure that data privacy law is applied to the collection, storage, and use of personal data, has identified this fundamental issue:

"… one of the characteristics of blockchains is that the data registered on a blockchain cannot be technically altered or deleted: once a block in which a transaction is recorded has been accepted by the majority of the participants, that transaction can no longer be altered in practice. … technical solutions … should be examined by stakeholders in order to solve this issue. The CNIL … questions their ability to ensure a full compliance with the GDPR. …

As a reminder, a blockchain can contain two categories of personal data:

The identifiers of participants and miners:

Each participant has an identifier comprised of a series of alphanumeric characters which look random, and which constitute the public key to the participant's account. This public key is linked to a private key, known only by the participant…

The CNIL therefore considers that this data cannot be further minimised and that their retention periods are, by essence, in line with the blockchain's duration of existence.
Additional data (or payload):

Besides the participants' identifiers, the additional data stored on the blockchain can contain personal data, which can potentially relate to individuals other than participants and miners.

As a reminder, the principle of data protection by design (Art 25 of GDPR) requires the data controller to choose the format with the least impact on individuals' rights and freedoms."

Others have proposed potential technical solutions, for example:
"The Workaround …Storing personal data on a blockchain is not an option anymore according to GDPR. A popular option to get around this problem is a very simple one: You store the personal data ***off-chain*** *and store the reference to this data, along with a hash of this data and other metadata (like claims and permissions about this data),* ***on*** *the blockchain."*
Andries Van Humbeeck, November 21, 2017 [2].

There is also a technician's view that, in regard to interpreting and implementing 'erasure' in practice, simply 'putting data beyond use' electronically will satisfy the standards for GDPR data privacy. This would mean that, for example, setting record 'delete' flags, 'losing' cryptographic keys, or overwriting hash tables, will be sufficient to qualify as 'erasure'.

However, I consider this too weak to satisfy what is intended and stipulated by Article 17 GDPR. If Article 17 had sought to provide only for 'putting data beyond use' it would have said so. The people doing the drafting would have been aware of, amongst other things, the established legal precedents and court orders on:

- •. data records, and recording media, destruction (and proof/certification thereof);
- corporate, industry and professional standards as regards Record Retention and Destruction; and
- •. Statutes providing Requirements and Guidelines for Public Bodies as regards Citizens' Records Disposal [3].

The word chosen in Article 17 of GDPR is 'erasure', and its intention and meaning is something clear, stringent and strong. If GDPR had intended 'erasure' just to mean, or include, 'putting data beyond use', or even 'deletion', in the usual technical sense that these terms are used and implemented in electronics and computer data technology practice, it would have made that, too, clear.

GDPR was years in the drafting, with many highly-qualified legal and technical people involved, globally, in intensive discussions and reviews, before finalisation. 'Erasure' and 'erased', being the actual words carefully enacted in the GDPR, have many clear synonyms in English: 'Erasing': eradicating, obliterating, destroying, abolishing, removing, shredding, disposing of, wiping out, dissolving, doing away with, getting rid of...

From an expert point of view, where digital data recorded on servers, or electronically held, copied, distributed and communicated in computer and communications media, systems and networks are concerned, 'erasing' can even mean, for true efficacy in practice, 'returning to a free molecular state' by way, for example, of 'burning, consuming in flames'.

It follows that anyone implementing applications or systems using a blockchain, given the foundational, inherent 'permanence and immutability' of its data records, where such records may contain personally identifiable details of a 'data subject', will do so at risk of not being physically or verifiably able to comply with Article 17 GDPR, and thus potentially subject to the significant financial and other penalties available and arising thereunder.

It may be considered that there will be little likelihood of requests, whether to companies or organisations holding or processing systems and databases containing personally identifiable details of 'data subjects', or to the courts, for applicant data subjects to be 'forgotten'. A few years back the possibility of widespread use of such requests may have seemed fanciful, but since the Cambridge Analytica allegations - that this data analytics firm used personal information harvested from more than fifty million Facebook profiles, without the data subjects' permission, to build a system that could target US voters with personalised political advertisements based on their psychological profile - anyone using social media, for example, is now well aware of the right not to have personal data used for purposes for which they were not originally, and freely, provided.

Furthermore, even before the coming into force of GDPR the English Courts had upheld such a critical request: www.theguardian.com/technology/2018/apr/13/google-loses-right-to-be-forgotten-case

Google loses landmark 'right to be forgotten' case Jamie Grierson Ben Quinn Fri 13 Apr 2018

Businessman wins legal action to force removal of search results about past conviction

A businessman has won his legal action to remove search results about a criminal conviction in a landmark "right to be forgotten" case that could have wide-ranging repercussions. … the claimant … was convicted more than 10 years ago of conspiracy … [4].

2. The new 'crypto-economy' - a fraudsters' playground?

Despite that the GDPR Article 17 risk to systems implemented using a blockchain, in use cases where personal data is to be recorded, presents a potentially serious implementation difficulty, there has been an investment mania for Crypto-Algorithmic Blockchain Technology, with far more money having gone into - gambled on - Bitcoin and other cryptocurrencies, blockchain, smart contracts and distributed ledger technology than even into Artificial Intelligence (AI). It has in the past seemed that almost every other Millennial was involved with an Initial Coin Offering (ICO) or Initial Token Offering (ITO). With just a 'White Paper', little or no investment due diligence, and taking advantage of a regulatory vacuum, this 'Crypto Tribe' raised billions in real legal tender, 'fiat currencies'.

This substantial finance-raising has been used to fund fantasy coins and tokens, with no obvious economic utility or asset value, in the hope of developing and successfully launching a plethora of brave new business and social ideas, products and services, heralded by enthusiasts as a whole new 'crypto-economy'. A few of these may prove to be commercially-successful, reputable, significantly disruptive game-changers, and usher in the possibility of a new global 'crypto-economy' paradigm. But so far, it has often been discovered that ICOs/ITOs, cryptocurrency 'mining', and crypto-coin trading exchanges have tended to have been significantly fuelled or taken over by the 'black cash' of drug-dealers, money-launders, traffickers and the like, and in a substantive not-easily-reversible way.

The 'Q2 2019 Cryptocurrency Anti-Money Laundering Report' from Ciphertrace revealed that misappropriation of funds "from cryptocurrency users and exchanges netted criminals and fraudsters approximately $4.26 billion in aggregate". This is in the context of the amount of cryptocurrency traded in September 2019 on crypto-trading exchanges being over $500 billion (down from nearly $800 billion in June 2019), with Hong Kong-based exchange Binance reporting that, in the last two years, it alone made over $1billion of profit.

Many of those yearning for the putative 'crypto-economy', for example Millennials let down after the post-2008 credit crunch by governments, the banks, and educational system, have tended to disregard any need to be subject to Know Your Client (KYC) and Anti-Money Laundering (AML) strictures, and may not have been too worried from whence came their ICO money, how it was actually going to be (accountably) spent, or whether it could even possibly result in a viable business.

It is worth being reminded that the foundations of global digital currencies go back well before the Satoshi bitcoin paper of 2008. The early pioneering international digital economy e-commerce visions did not require a cryptographic blockchain 'mining', or 'distributed consensus', existential model. And they certainly were not intentioned by any thought or expectation of becoming so readily riven with the criminal black market profiteering of money-launders, scammers and fraudsters that apparently increasingly bedevil much - but of course not all - current cryptocurrency activity.

David Chaum, in a scientific paper of 1983, is reckoned to be the first to describe digital money. His proposal used cryptography to create a blind, digital signature to make money anonymous, and he founded a company in 1989 that invented the virtual currency DigiCash. -But it had a hard time commercially, with a 1999 article in Forbes summing it up as: "A beautiful idea for a beautiful new world with one problem: nobody wants it. Not the banks, not the dealers and above all, not the customers. E-commerce is flourishing, but as it turns out, the customer's Mastercard and Visa are his preferred currencies".

Milton Friedman, the economist, said in 1999: "One thing we are still lacking and will soon develop is reliable e-cash- a method by which money can be transferred from A to B on the Internet without A knowing B and vice versa". Even earlier than these, I myself put forward, nearly thirty-five

years ago, a new, disintermediated wholly digital cash currency, as set out in my letter published in July 1995 in Computing magazine:
"… As cybertrading grows, the new, powerful common electronic trading currency will be 'owned' by no single physical nation state, central bank institution, economic or political grouping. … the Electronic Cash Unit".

And, long before Millennials were even born, my fictional article, 'Ye Nom De Das Geld', in the December 1971 issue of GONG (the student magazine of the University of Nottingham), went even further with my vision of a 'Post-Purse Paradise':
"Brother and sisters, I welcome you to the post-purse paradise. … Geld is in heaven, all's well with the world. … Cromstock and I first mooted the possibility of an Economic Reformation taking place in Britain in The Journal Of Comparative Economics during … 1969. … to put into practice … the tenets of the Quasicurrency Theory which I had been formulating over the preceding twenty-five years. … ".

Looking ahead, Facebook has plans for its Libra digital currency that so worry regulators they are seriously considering trying to prevent it happening; but it may already be too late, and Libra could be 'unstoppable'. Facebook recently reported that it now has 2.4bn monthly users across its various apps with users on at least one of these apps every day. Furthermore, Libra may turn out to have little to do with any putative 'crypto-economy' and could establish a powerful new digitalised global e-commerce paradigm much closer to the pre-bitcoin electronic cash visions of early digital currency thought-leaders and entrepreneurs – and a paradigm more comfortably compliant with the existing human society and regulatory norms and customs of the Rule of Law, where a responsible Trusted Third Party, in this case, Facebook, is fundamental, and pivotal.

For all these reasons many of the current species of cryptocurrencies - not excluding Bitcoin - may in their present manifestations fade away, and/or the hoped-for 'crypto-economy' may at some point even be regulated out of existence [5].

3. Blockchain: Sceptical ICT Professionalism and Legal Due Diligence

Cryptocurrencies apart, however, some blockchain applications more generally are likely here to stay. The majority of these will be serious, robust implementations, by established major corporations, with most of us, as consumers, hardly needing to know about the technical, legal or operational details. It seems clear that, within a few years, a widespread settled, but vigorous and continually innovating, 'blockchain applications industry' may be in place, one perhaps bearing little resemblance to the frantic cryptocurrency 'bandit territory' landscape of today.

For the properly-cautious ICT expert and professional, when considering the use of blockchain for any proposed use case, the 'fundamental things apply'. This caution is an essential part of being a skilled professional applying knowledge and experience to assess the most appropriate tools and technologies for a given (business or other) application's requirements. The savvy ICT expert bears in mind, for example, that not only are there no finalised international/ISO standards yet for blockchain (the eight standards in development under ISO/TC 307 are not due out until 2020 at the earliest), but also there is far more to specifying, designing, developing, testing, deploying and maintaining an appropriate complete QA-assured system than just 'the blockchain component'.

And whether to use blockchain as a component at all for a given business/system requirement is a critical feasibility exercise that the seasoned professional will know is vital. Any duly diligent ICT systems engineer may therefore conclude, on an experienced expert assessment, that many things can be achieved just as effectively by other means. He or she will carefully and responsibly consider all the pros and cons to ensure that the non-expert customer/client/investor/employer (to whom a professional fiduciary duty is owed) gets the most suitable, 'fit for purpose', secure, robust and performant system available. Ideally this will also take properly risk-assessed competitive advantage of any - and not just crypto, or blockchain - new developments in technologies, tools, methodologies and processes, always consistent with the budget/price willing to be paid, of course [6].

Furthermore, the legal status of blockchain cryptocurrency, smart contract and distributed ledger technology is not clear, or uncontentious. In the USA, there is already ICO litigation on foot [7]. Having been involved in advising on ICOs, I have encountered some significant tensions and challenges between the crypto-enthusiastic, blockchain technical specialist, and the sober business development objectives of, and the professional due diligence to be done for, the putative ICO-issuing company owner or managing executive.

Consider, for example, this scenario: a proficient, high-profile, software engineering entrepreneur and thought-leader, let us call him Joshua, a US citizen, a highly experienced and imaginative technical and regulatory expert working in the blockchain and cryptocurrencies field, is developing and launching various Initial Coin Offering ventures and services. Joshua asserts "nobody knows more about how to do this work in the right way, in compliance with every single rule and regulation, than I do". There is a substantial going-concern OTC-listed company, let us call it XYX-CAP, Inc. ('XYX-C'), which is poised to do an ICO, designed, led, promoted, launched and actioned-to-market by Joshua.

The following queries and issues arise:
(1) If the XYX-C Coin created by this ICO is likely to be deemed by any relevant (US or other) regulatory or law-enforcement authority to be 'asset-backed', and equivalent to issuing a security, would it not be advisable to seek securities regulatory approval for this ICO before it is publicly launched? If so, what exactly is the relevant and correct 'securities regulatory approval' to be sought, with whom, where, etc and how does one go about that, correctly, accurately and timeously?

(2) Joshua says "It's very important to be aware that this is an open community blockchain project. This necessarily involves launching something that will have the XYX-C name attached to it in perpetuity, but giving up exclusive control of what it becomes". If the CEO of XYX-C is not wholly comfortable with this, are there any sensible steps that XYX-C can take to protect its name, brand and trade-

mark to counter (or at least ameliorate) 'giving up control of what it becomes'? If so, what, and how, and at what cost to put it in place?

(3) Suppose this ICO goes badly wrong at some point, and either the XYX-C company, or the public at large investing in the XYX-C Coin, claim they have lost money, or otherwise been damaged by taking part in its launch, and also claim that Joshua made misrepresentations, and was negligent/fraudulent, and thus seek reparations or, worse, criminal prosecution, what can he do to avoid, or protect against, that possibility, or its consequences, at the outset, i.e. before the ICO is launched publicly? Are there any sensible legal and practical protective steps he can take? [8].

4. The need for Trusted Third Parties, and for probative Electronic Evidence

Commissioned by the UK's CCTA (H M Treasury), I carried out a major study, still seen by many as definitive in the field, on the admissibility of computer evidence in court and the legal reliability/security of IT systems, published as The APPEAL Report (1990). This concluded with what became known as:
Castell's (First) Dictum: "You cannot secure an ontologically unreliable technology by use of an ontologically unreliable technology".

It is vital for any operational computer system, and, not least, one purporting to provide goods, services, currencies, communications etc to the public, upon which the public relies, to have one or more Trusted Third Party (TTP) standing behind it and responsible for it, given the ontological unreliability of computer technology, and the associated need for disclosure of probative Electronic Evidence and computer 'documents' when (not if!) disputes arise. Electronic Evidence has become widely acknowledged to be based on the concept of a transactional chain of trust, and I also identified in 1993 the latter's dependency on Trusted Third Party Services (TTPS):
"A Trusted Third Party is an impartial organization delivering business confidence, through commercial and technical security features, to an electronic transaction. It supplies technically and legally reliable means of carrying out, facilitating, producing independent evidence about and/or arbitrating on an electronic transaction. Its services are provided and underwritten by technical, legal, financial and/or structural means".

Thus TTPS are provided and underwritten not only by technical, but also by legal, financial, and structural means and are operationally connected through chains of trust (usually called certificate paths) in order to provide a web of trust: the whole structure being what we might call simply an Implementation of the Rule of Law [9].

5. Conclusions: Blockchain vs. Trust - the Future Expert Issues in Disputes over Crypto Assets

Given that it is implicit that the trust and reliability of 'blockchain only' systems and services are provided merely technically, by virtue of the 'distributed consensus' algorithm, there is essentially and fundamentally no TTP involved or standing behind the creation and valuation of, and dealing and trading in, blockchain-held Crypto Assets. The internet is not a sue-able party. It has no intrinsic financial value, and 'belongs' to no-one. Since a Crypto Asset fundamentally consists of zeros and ones scratched on an internet-accessed blockchain, changes stored and processed, written into, a distributed ledger, it may seem futile, perhaps legally meaningless, to ascribe a tangible value to a decentralized blockchain, without any substantive, sue-able TTP responsible for or standing behind its integrity and security.

However, when Crypto Assets become the subject of disputes - Crypto Dragons, as I christened them, in a recent article in Solicitors Journal - the identification, location, and financial valuation of any Crypto Asset, access to it, holdings of it, and dealings and trading in it, will be critical.

And here's the key point: Crypto Asset holdings and dealings are certainly not beyond legal protection or action, nor regulatory reach. Although a Crypto Asset may essentially be 'decentralized digital vapour' a Court of Law can make a binding Order to get forensic traction on it, because of the legally well-established Obligation of Disclosure. This obligation applies as much to a digital Crypto Asset as it does routinely to all other computer-held digital materials and 'documents', i.e. the Electronic Evidence relevant to any forensic investigation, whether for a Civil Dispute or for a Criminal Prosecution.

Thus, Disclosure and Valuation of Digital Assets, including Crypto Assets, is a significant issue arising in such financial and technology legal actions, Civil or Criminal. During years of expert witness work I have routinely assisted solicitors and Senior Counsel in framing appropriate technical Requests for Disclosure, and at request of attorneys I recently drafted a Checklist giving practical, generally applicable wording for an effective Digital Asset Disclosure exercise. Details of my Digital Asset Disclosure Wording Checklist are summarised in my October 2019 article in Solicitors Journal [10].

The Checklist should assist litigation lawyers and ICT experts, in Financial Audit, Tax Assessment, Fraud and Theft Enquiry, Fintech Due Diligence, Investment Exchange Issues and Listings, M&A Projects, Corporate Risk Assessments, Divorce Proceedings, IP Conflicts and Smart Contract Audit forensic investigations.

More generally, some of the potential future issues that ICT systems professionals and experts may well be asked to investigate and upon which to provide analyses, conclusions and opinions, in regard to trust in, legal and technical reliability of, and associated disputes over, blockchain-based systems applications, are likely to include:

Cryptocurrency ICOs/ITOs:

- Allegations of false or negligent representations in 'White Papers', Public Issue Documentation and Presentations, Websites.
- . Failure to carry out due diligence as to project viability, systems and business integrity, quality standards, financial probity, implementation rigour.
- Consequential losses: investors losing money, business going bust, causality.

Blockchain:

- Operational systems failures: the blockchain itself may be reasonably robust and reliable, but all interface/interconnect systems still need to be specified, designed,

coded, constructed, tested and commissioned to acceptable ICT industry and professional quality assurance standards.

•. Consequences: assessment of outages, denial, inaccuracy and unreliability of service, data transaction failures, errors or faults, data going missing, people losing money unable to conduct reliable business, smart contracts corrupted, distributed ledgers not capable of being trusted.

•. Assessment and apportionment of causality, liability, and responsibility for damages, losses and compensation.

Blockchain and GDPR Article 17:

•. In regard to requests 'to be forgotten' by data subjects, where their personally identifiable data are held on, or linked to, 'permanent and immutable' blockchain records: advice and management in regard to Court Orders granted for 'erasure'.

•. Opinion as to efficacy of 'erasure' techniques, transactions, technologies, processes, proposed or implemented.

•. Verification of the 'erasure' carried out: what constitutes sufficient evidence and proof of accuracy, correctness, completeness and persistence?

•. Assistance with discussions with Information Commissioner's Office as to validity of requests 'to be forgotten', confirmation of the extent, reliability and security of 'erasure' (to be) carried out, and reasonableness of any possible/proposed fines or penalties to be imposed.

Ownership of IP:

•. Advice and guidance as to: whether relying on third-party blockchain platforms, or developing its own blockchain software, any company seeking to build blockchain-based applications runs an IP infringement risk (there are no ISO standards, and more than 1,000 blockchain patent applications filed with the US Patent Office).

•. Assessment of impact, consequences, remediation: e.g. litigation over patents and software copyright.

•. Expert investigation, search and advice as regards Prior Art, and/or Lack of Inventive Step, for patent infringement actions and challenges to the original Grant of Patent.

•. Advice and guidance in connection with negotiations with patent or copyright owners over use restrictions, licence fees, development capability.

This is of course in addition to the 'usual' relentless occurrence of disputes over computer systems failures generally. Failures of confidence, good faith and expectation (Cambridge Analytica alleged private data misuse), of dependable cybersecurity (potential Facebook password hacking), of mission-critical financial systems implementation (TSB online banking deficient systems upgrade), of product 'fitness for purpose' (VW Dieselgate emissions 'cheat' software), of clinical operational reliability (NHS faulty breast cancer-screening algorithm), and of aircraft flight systems reliability and integrity (Boeing 737 MAX crashes): these are just a few examples of a growing stream of ever-upscaling IT Disasters that have regularly emerged over the past thirty years.

I have been involved as expert witness in the largest and longest computer software and systems contractual disputes to date reaching the English High Court, and Sydney Supreme Court, with damages claimed in such actions in the hundreds of millions of pounds. Indeed, nearly twenty years ago, in the USA Foxmeyer case, the failure of an entire substantial multi-billion corporation occurred and was directly due to the faulty implementation and management of a major company-wide computer systems upgrade project [11].

With blockchain-based Distributed Ledger, Smart Contract and Cryptocurrency developments and systems becoming ever more established, Crypto Dragon disputes - whether Civil, or Criminal (thefts, scams, frauds) - are certain to increase, and potentially cause increasingly widespread and relentlessly-larger financial and other anxiety, consequences and damages. When it is your Crypto Assets that are the ones under examination in pursuit of, or arising from, disputes, allegations, valuations, tax demands, thefts, systems failures, prosecutions or other forensic investigations you had better hope that there is a TTP to be held responsible for disclosing the Electronic Evidence essential to your case, rather than rely on the 'trustless' digital cipher of the blockchain 'distributed consensus' mechanism itself to be of any practical or material human assistance.

Biographical Note

Dr Stephen Castell CITP CPhys FIMA MEWI MIoD, Chairman of CASTELL Consulting, is an award-winning independent ICT expert, management consultant and project manager professional, with extensive experience in risk assessment, quality assurance, and dispute resolution. For over thirty years Dr Castell has acted internationally as an expert witness in major complex computer software and systems disputes and litigation, including the largest and longest such actions to have reached the English High Court (AirTours v EDS, 2001; GEC-Marconi v LFCDA, 1992), and Sydney Supreme Court (ITSL & ERG v PTTC, 2012), and in IP (patent, software copyright, commercial secrets actions, eg USA cases BI v Echostar and Lodsys v Kaspersky), data forensics, e-document authentication and software and technology valuation and quantum cases. His seminal paper 'Forensic Systems Analysis: A Methodology for Assessment and Avoidance of IT Disasters and Disputes' is a Cutter Consortium Executive Report, Enterprise Risk Management & Governance Advisory Service series (Vol. 3, No. 2, March 8, 2006).

In the early 1980s Dr Castell was a high-profile pioneer of the Over The Counter Market in the UK, raising risk capital for new technology-based companies, responsible for assessing several hundred such companies in a five year period, in preparing their flotation prospectuses, and serving as Non-Executive Director. In 1982, he was founder Technical Director of the venture capital funded International Communications Technology Holdings SA, based in Luxembourg and listed on the London Stock Exchange, and was Chairman of its UK subsidiary Telephone Broadcasting Systems plc.

He is a Panellist on CBTV ('CryptoBlockTV'), a blockchain and cryptocurrency programme on Property TV, broadcast in the UK on Sky198. The initial poster programme is at: www.vimeo.com/user36208838/review/257927211/7ff86eed15

Dr Castell is the author of the best-selling Computer Bluff (1983, Quartermaine House, ISBN 0 905898 15 X), "The Which Computer book for people who know nothing about computers … and would like to have left it that way".

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The position, security, ownership, handling, (mis)use, etc of 'personal data' and who should profit from such data, is becoming central to the future social media and digital economy, globally. Sir Tim Berners-Lee has introduced a new breed of " … personal online data stores, or Pods, that contain the wealth of information people generate, and are their exclusive property …", as part of the future 'Web 3.0'.

My own www.Zykme.net, a new P2P cross-platform comms App (hybrid, beta test version), designed to provide instant private one-to-one secure transfer of personal data using a unique proprietary one-time Zykword code protocol, is consistent with this Pod Philosophy. The Zykme App does not demand the user's email address, nor any other 'logon' ID data; and, as made clear at the foot of its 'Your ZykPod History of Contacts Received" page, "NOTE Unlike other social media, this unique Zykme App, which securely provides instant two-way peer-to-peer communication, does not and will not acquire, store, process, analyse, use nor pass on to any third party any of your entered data. Using Zykme, your personal 'My details' information as 'Sender' remains completely under your control, and, at entirely your own decision and choice, is privately and confidentially shared and exchanged between you and your selected 'Receiver' alone, when you press 'Share info'".

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"Addressing the AML risks of cryptocurrencies OCTOBER 22, 2019 BLOG

With the recent explosion in cryptocurrencies, from the early beginnings of Bitcoin back in 2009 through to J.P. Morgan testing their own digital coins for institutional clients in 2019, there still remains serious unanswered questions about the money laundering risks they bring to banks, consumers and regulators. Ciphertrace's 'Q2 2019 Cryptocurrency Anti-Money Laundering Report' makes some stark revelations. It claims that theft, scams and other forms of misappropriation of funds "from cryptocurrency users and exchanges netted criminals and fraudsters approximately $4.26 billion in aggregate. … Dr Stephen Castell, an independent FinTech consultant, admits that there are few innocent investor protections to fall back on: "This is essentially the case worldwide today, and it looks like it will continue that way for the foreseeable future." He reminds us that there is a need to keep everything in perspective, suggesting that "the actual, and potential, total global 'crypto' business for banks and other financial institutions is tiny – in the less than 1% area." So, with the increased anti-money laundering (AML) risks associated with blockchains and cryptocurrencies, he believes it's right for the compliance departments of banks to proceed cautiously, if at all. …".

"… Traditional exchanges around the world will be looking at Binance's latest quarterly results with envy, as in the last two years it has made over $1billion of profit. CEO of Binance, Changpeng Zhao, sometimes called CZ (Chinese-born, now living in Vancouver) established Binance only in 2017. Binance raised $15 million via an Initial Coin Offering (ICO) and CZ is reported to be worth $1.2 billion. Binance, based in Hong Kong, is different from its competitors which, apart from Huobi (Singapore), are based in the USA e.g. Coinbase (San Fran), Kraken (San Fran), Bittex (Las Vagas) and Bitbox (NYC). The amount of Cryptos that were traded in September 2019 on exchanges like Binance was still over $500 billion - down from nearly $800 billion in June 2019. According to the website Coin.Market there are now over 260 different Crypto exchanges …".

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"The Amazing Story of Cryptocurrencies Before Bitcoin Marcell Nimfuehr, October 14th 2019

What—you exclaim with disbelief. Cryptocurrencies before Bitcoin? Yes, indeed. Don't get me wrong, Bitcoin was the first blockchain-based currency. But by far not the first purely digital money. That one has a colorful history of dreams, prosecution and failure. ...".

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ISO/TC 307 Blockchain and distributed ledger technologies

Scope: Standardisation of blockchain technologies and distributed ledger technologies.

8 ISO standards under development under the direct responsibility of ISO/TC 307 34 Participating members
12 Observing members

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1. Go to http://journals.sas.ac.uk/deeslr/issue/view/336/showToc__

2. See 'Documents Supplement' at foot of contents; click on 'Draft Convention on Electronic Evidence' to see Abstract: http://dx.doi.org/10.14296/deeslr.v13i0.2321

3. Then click on 'PDF' (http://journals.sas.ac.uk/deeslr/article/view/2321/2245) to download the full text of the Draft Convention.

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... FoxMeyer was the fifth largest drug wholesaler in the United States (1995) with annual sales of about 5 billion US$ and daily shipments of over 500,000 items. ... FoxMeyer was driven to bankruptcy in 1996, and the trustee of FoxMeyer announced in 1998 that he is suing SAP, the ERP vendor, as well as Andersen Consulting, its SAP integrator, for $500
million each ...".

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"Fox-Meyer Drugs A $65M investment in an Enterprise Resource Planning System (ERP) and new warehousing facilities results in the destruction of a $40B business. … Delays in delivery and the failure to fully realize the business benefits results in the organization being unable to profitably service contracts it had entered into. … cash flow issues forced the company into Chapter 11 bankruptcy. The
company that had been worth $40B prior to the project was then sold off for just $80M to rival McKesson Corp ...".

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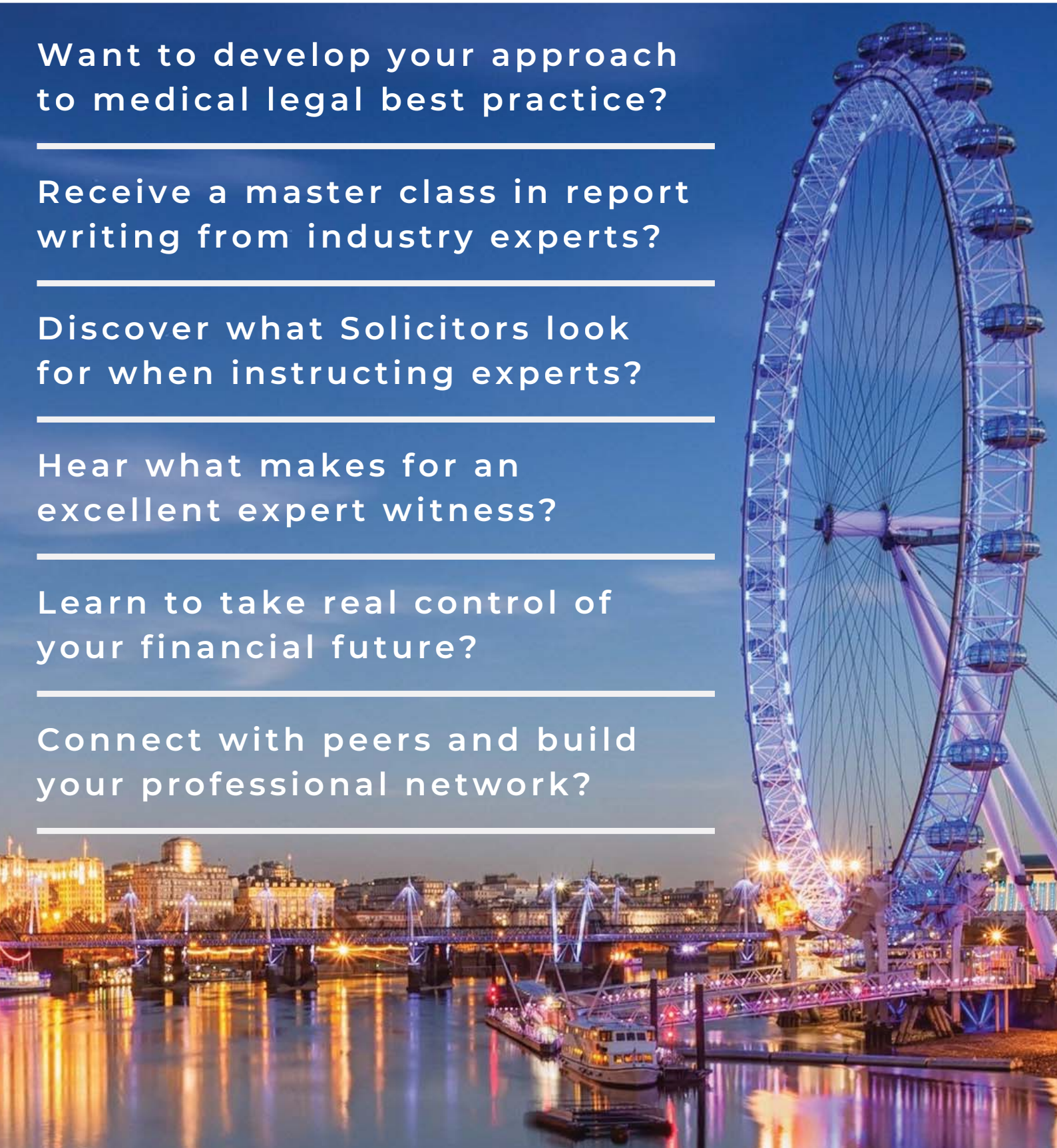

The Times Bond Solon Expert Witness Survey 2019

The Times and Bond Solon Annual Expert Witness Survey 2019 was conducted online from 13th September 2019 to 30th September 2019. 569 experts completed the survey making it one of the largest expert witness surveys conducted in the UK. The report provides the analysis of the results from the survey. Let's look at some of the findings.*

During 2019, there were several cases that exposed some expert witnesses who have not understood the basic requirements of the role of an expert witness. The survey asked if judges have the power to permanently disqualify such experts. Experts clearly want all experts to understand their role and agree that those who do not have the necessary understanding should not continue. Nearly 60% agree that judges should permanently disqualify such experts. It is so basic that an expert's duty is to the court and not the instructing party that it seems incredible that some experts still do not understand the principle. However, some experts do not and continue to be "hired guns" as Lord Woolf memorably described them in his report, Access to Justice. Instructing solicitors also need to be cognisant of the principle as the survey found that experts continue to be asked or feel pressurised to change their report by an instructing party in a way that damages impartiality. Interestingly, 44% of respondents said they had come across experts who profess expertise in an area in which either they are not qualified or does not warrant expertise.

In May 2019 a multi-million-pound fraud trail collapsed when the witness Andrew Ager was found not to be properly qualified to give expert evidence. The experts surveyed were asked if instructing solicitors should be liable for costs when they fail to exercise due diligence in the selection and instruction of an expert witness. Following on from the attitude to experts who do not understand their role, experts are also concerned about those who are not properly qualified. Again around 70% of experts consider the instructing solicitor should be liable for costs if they fail to exercise due diligence in the selection and instruction of an expert witness. Some 25% of experts reported that they had experienced pressure from solicitors on their impartiality. Solicitors need to be careful in the way they treat experts as well as in the way they find them in the first place. Costs can be considerable, and solicitors need to be very careful at the pre-instruction stage to make sure an expert is properly qualified and experienced in the field relevant to the issues in dispute.

An out of date or unsuitable expert witness is a dangerous expert witness and can create considerable risks for the instructing party. So, what should a solicitor look for in terms of currency for before instructing a potential expert?

Expert witnesses obviously need to be up to date in their professional field (see Question 4 dealing with retired experts), but they also need to be up to date in their role as an expert witness. Clearly instructing solicitors will want to know that the expert they choose is current in their professional field. Experts do have a sell by date and so those that have retired will have a limited time to act as an expert witness. Solicitors should look for current practice and credibility. In civil matters, the time of the events in dispute will be relevant in the choice of expert.

A good place to start is with the expert's professional body if they work in a field that has one. The due diligence process solicitors go through before formally instructing an expert should include checking that the expert is registered with their professional body and this by implication will confirm that the expert is up to date with continuing professional development.

Also, solicitors should look for consistency in the way the expert's details are presented to the public. Experts need to regularly review their websites, LinkedIn profiles, CVs, directory entries, lecturing profiles on university sites, expert witness organisations etc to ensure they are consistent and accurate. Any inconsistencies may be picked up by the other side to show incompetence and potentially discredit the expert. Experts should make sure areas such as attending training courses, attending and speaking at conferences, writing articles and publishing papers, research work and other activities are current. Solicitors should go through what is in the public domain to make sure there is consistency before the other slide does.

In terms of their work as an expert witness, the expert will need to ensure that their reports are consistent with current court rules, practice and protocols. If reports are not court compliant, then the instructing solicitor will need to guide experts, but this could have the unfortunate consequence of a suggestion of influencing the opinion. Better that the expert knows what is needed and gets things right first time. So, ask about current training if this is not set out in the CV.

Experts need to keep up to date with the law relevant to experts and this is best done through regular training either online or by attending specialist courses. Experts also need to hone their courtroom skills. Most civil cases settle, so actual court appearances can be infrequent and challenging and although lessons in presentation are learnt the hard way. Solicitors do not want their expert to learn that way on the case in hand. Practice in a training session can be very valuable, less damaging and will give comfort to the solicitor that their witness will not collapse under real pressure. Again, ask about courtroom training if the matter is likely to involve the expert giving oral evidence and even suggest that the expert gets trained.

The experts were asked if professionals who have retired should not be allowed to continue to act as expert witnesses. Many experts ask this question of themselves as they may have had a long and a distinguished professional life and would like to continue after retirement acting as an expert witness. Clearly there are cases when the issues in dispute in a matter require expert help on best practice at a point in time and retired experts may then be acceptable. Unfortunately, professional practice and the law itself change so quickly these days that retired professionals have a limited shelf life. Some 20% of respondents said that retired professionals should not continue to act as expert witnesses. The same principles apply to instructing solicitors in the due diligence phase of finding the right expert. The longer the potential expert has not been in day by day practice in a field, the greater the hurdle to jump to instruct that expert.

In May 2019, the Academy of Medical Royal Colleges published a guidance for healthcare professionals who act as expert witnesses. This guidance has been endorsed by most healthcare professional organisations and bodies and their regulators. The guidance sets out the minimum standards and conduct expected of all healthcare professionals acting as expert witnesses in the UK. The experts were asked if all professional bodies and regulators should provide clear guidance to their members who act as expert witnesses. In May 2019, the Academy of Medical Royal Colleges** published. This guidance sets out how healthcare professionals should be trained to be expert witnesses to ensure more consistency and better standards in the evidence provided by medical expert witnesses. The respondents to the survey were overwhelmingly in support (90%) of the idea that such guidance should be given to all experts by professional bodies and regulators even for non-medical experts. The guidance clearly states what healthcare professional bodies expect of their members in terms of standards, training and behaviour when acting as a witness. The guidance reflects good practice set out by other bodies and highlights the legal requirements of witnesses.

All healthcare practitioners should read the review and guidance if they are expert witnesses or are considering becoming an expert and instruction solicitors need to make sure any expert instructed is compliant. It is essential that experts follow the guidance as if they are in breach, there could be serious consequences. Professional training as an expert witness is at the heart of the guidance.

Within the new guidance "Acting as an expert or professional witness – Guidance for healthcare professionals", it prescribes that all healthcare professionals who act as expert witnesses should now be required to attend specific expert witness training (relevant law and procedure, expert report writing and court training) and to keep up to date on an annual basis. Furthermore, this specific expert witness training should form part of their CPD, annual appraisals and revalidation. The experts were asked if expert witness training should form part of the annual appraisal of all professionals acting as expert witnesses. Some 70% of respondents agreed that annual appraisals should include reference to specific expert witness training. This would clearly improve standards and hopefully reduce the number of experts who do not understand their role and do not have the requisite skills needed to conduct expert witness work.

51% of expert witnesses surveyed act in legal cases. 2019 marked the seventeenth anniversary of legal aid, introduced in July 1949 to help pay for legal fees for those who cannot afford to pay for legal advice or proceedings. Richard Miller, head of the Justice Team at the Law Society, said provision of legal advice across England and Wales was disappearing, creating "legal aid deserts". Experts are not obliged to accept legal aid cases. One must remember that expert work is for most experts a secondary source of income. If the expert's fees are too low, experts must decide whether the case is worth their time and worth coping with the stress of respecting the tight deadlines set by the Court. Also, since the judgment in Jones v Kaney, experts are now facing the risks of being sued in contract or negligence. In facing such risks, experts may prefer not to work for low rates of pay. However, for those funded by legal aid cases, the lack of willing expert witnesses means a restricted choice of experts to support those cases, which could affect fair access to justice.

Those who do legal aid work were asked if they would continue to work in such cases if expert witness fees were further reduced. 73% of the experts surveyed indicated that they would not continue working in legal aid cases if expert witness fees were further reduced. The danger is that if rates are reduced yet again, expert evidence might not be available anymore for legal aid cases.

Since the introduction of the Civil Procedures Rules in 1999, many experts are still being criticised for being advocates rather than independent experts – acting as a "hired gun". The experts were asked if in the last 12 months, they had come across an expert that they would consider to be a "hired gun." As in last year's survey, 41% of experts surveyed indicated that they have come across an expert they consider to be a "hired gun". The question now is what leads an expert witness to be a hired gun. Pressure from instructing parties will be one of the reasons although

Lord Woolf made clear in the Civil Procedure Rules 1999 that an expert's duty is to the court, not the paying party. However, as in last year's survey, 25% of the experts surveyed said they had been asked or felt pressurised to change their report in a way that damages their impartiality by an instructing party. These findings can only be explained by the inherent contradiction that although one party pays for the expert, the duty of the expert is to the court and not to the paying party. We have an adversarial system that is based on winners and losers. Experts already have recourse to the courts under procedure rules, but the concern must be that if that recourse is taken, the solicitor would not use that expert again. One expert reported that a "lawyer completely changed my report, put in extra paragraphs and deleted great chunks in order to make my opinion suit his client. We have historically been sending reports as Word documents, but now we will send everything as PDF files which cannot be altered."

Interestingly, of those who act in personal injury cases, 31% said they have been asked or felt pressurised to change their report, by an instructing party, in a way that damages their impartiality. Of those who do not act in personal injury cases, 14% said they have been asked or felt pressurised to change their report, by an instructing party, in a way that damages their impartiality.

As in last year's survey, almost half of the experts surveyed have come across experts who profess expertise in an area in which they are not qualified or does not warrant expertise. Hopefully this was pointed out to the instructing solicitors at the time so it could be raised as part of the litigation process. However, it is concerning that such experts still put themselves forward and are then instructed. This also reflects on the adequacy of due diligence necessary from instructing solicitors.

Again, as in last year's survey, most of the experts surveyed (79%) indicated that their rates remain the same as last year.

* Full survey report:
www.bondsolon.com/expert-witness/expert-witness-survey-report-2019/

** Interview with Professor Carrie MacEwen who led the authorship of the guidance:
www.bondsolon.com/2019-guidance-for-healthcare-professionals-acting-as-expert-witnesses-what-do-you-need-to-do-now/

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CSI: Current Research Into the Impact of Bias on Crime Scene Forensics is Limited – But Psychologists Can Help

by Lee John Curley - Lecturer in Psychology, The Open University and James Munro - Psychology Researcher, Edinburgh Napier University

This article originally appeared in The Conversation many thanks for permission to reprint www.theconversation.com

THE CONVERSATION

When a jury decides the fate of a person, they do so based on the evidence presented to them in the courtroom. Evidence obtained from forensic analysis, such as DNA analysis, is often interpreted as strong evidence by jurors.

This perception of forensic evidence is enhanced by popular TV shows like CSI: Crime Scene Investigation, where physical evidence is used to solve murders in a "whodunit" showdown between deductive cops and crafty criminals covering their tracks. All it takes is the right evidence to piece the story together.

But recent research suggests that the reality of forensic analysis is that it can be subjective and fallible. For instance, forensic evidence can sometimes be ambiguous because of factors such as the presence of DNA on samples that originates from more than one person.

When forensic evidence is ambiguous, contextual information (such as knowledge of a confession) may influence how forensic examiners evaluate the evidence. This distortion in their evaluation is called contextual bias and has been stated to be a reason why miscarriages of justice occur.

Our research agrees with this recent research that contextual information may influence the decisions of forensic examiners. But this may not necessarily be a bad thing. We believe it is premature to remove context from forensic analysis. Contextual bias on the part of a forensic examiner does not necessarily mean that errors will be made.

It is difficult for psychologists in the UK to make recommendations about the effects of context on forensic examiners because the research to date has been fairly limited, particularly in the the way it has been conducted.

For example, some studies had a very small sample size. Some lacked a control group. In others, accuracy was not measured. This means that the researchers could not know for certain if participants would have performed differently if no contextual information had been available to them. So it has been difficult to generalise about the effects of contextual bias on forensic examiners' decisions.

Bias does not equal error

But our study presents the idea that contextual information does not necessarily always lead to inaccurate decision making.

First, forensic evidence will be generated from both the crime scene and the suspect, meaning that the fingerprints left at a crime scene are more likely than not to match the fingerprints of the suspect. For this reason, contextual information (such as knowledge of a confession) that biases forensic examiners towards finding a match may lead to more accurate decisions being made.

Contextual information may also inform the examiner which tests to conduct. If the examiner knows which questions they must answer, then they may avoid worthless tests. But this also means they may overlook something. For example, one piece of research cited a rape-homicide case. In this case, a forensic laboratory was told by detectives to only analyse the evidence for semen samples. This meant that the forensic examiners missed blood samples that turned out to be integral to the case.

Based on this example, researchers stated that contextual ignorance may have more of a negative effect on forensic decisions than contextual bias. This view is supported by psychological studies which have shown that biased decision processes can lead to accurate decision outcomes.

Impact on jury decisions

Despite the potential positive effects, it may remain ethically and legally inappropriate for forensic examiners to use contextual information. For instance, jurors may interpret the different types of evidence, such as a confession and forensic evidence, as being independent of one another.

But if contextual information such as a confession aids the interpretation of forensic evidence, jurors may incorrectly think that each piece of evidence independently supports the other when this is not

actually the case. This means that jurors could be overestimating the chances of a defendant being guilty.

Our review suggests that concerns relating to the study of contextual bias in forensic examiners – small sample size, no accuracy measure and failure to use a control group – makes it difficult for implications and recommendations to be drawn.

We suggest that future research employs the skills of both forensic examiners and cognitive psychologists. Then that both skill sets can be used to create realistic experiments. Examiners have the necessary knowledge of both lab environments and forensic evidence, but we believe that access to this knowledge will help psychologists design more rigorous experiments targeted towards the study of contextual bias in forensic examiners. Only then will we discover can proper conclusions be drawn about whether contextual bias is a help or a hindrance.

Many thanks to The Conversation for permission to reprint.

New Insect Database to Help with Forensic Investigations

Researchers at Cranfield University are using blowflies and other insects to develop a database which will provide a complementary method of estimating time since death in forensic investigations.

The database – thought to be the first of its kind in the world – uses chemical profiles from the waxy coating on the outside of insects and will provide a library for forensic entomologists to refer to when investigating cases.

Forensic pathologists can give an accurate post-mortem interval estimate up to 72 hours after death. After this, forensic entomologists are often called to crime scenes and use the age of insects that inhabit decomposing remains to give a more accurate indication of how long the person has been deceased.

Dr Hannah Moore, Lecturer at Cranfield Forensic Institute (CFI), said: "Knowing how long someone has been dead, particularly in the case of murder, is vital in proving the innocence or guilt of suspects. Insects can also tell us if the person consumed drugs, if their body was moved or whether it has been frozen – they're the most reliable witnesses in many cases."

The most established way to estimate the age of insects is to use their length, as well as other variables, but these are highly influenced by the temperature of an environment.

The project will also examine geographical differences within the same species across different climates to model the stability of the CHC samples, which are taken from the larvae of the insects.

It is estimated that the database will take five years to complete and will include all forensically important species, with a focus on blowflies (Calliphoridae).

Dr Martin Hall, forensic entomologist and head of division at the Natural History Museum, London, said: "*Dr Moore is one of the leading scientists studying the application of chemical ecology and chemical taxonomy techniques to forensic entomology. Her work has demonstrated the potential to reveal information from insect evidence that was previously unobtainable, such as the age of adult flies or the species identity of fragments of a puparium.*"

Dr Moore's research applies analytical chemistry to the field of forensic entomology and she collaborates with numerous universities throughout the UK as well as Europe and the US, along with the Natural History Museum and Alecto Forensics.

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Expert's Duties: Independence and Impartiality Again

In a recent case concerning the wonderfully named Pepe's Piri Piri Ltd an expert got his fingers burned. He was criticised by the judge for failing to understand his duties and comply with them.

Experts' duties: what the rules say
The rules are clear. An expert's duty is to the court. The duty of experts is 'to help the court on matters within their expertise'. That duty 'overrides any obligation to the person from whom experts have received instructions or by whom they are paid'.

Further:
1. Expert evidence should be the independent produce of the expert uninfluenced by the pressures of litigation.

2. Experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate.

3. Experts should consider all material facts, including those who might detract from their opinions.

4. They should make clear when a question falls outside their expertise.

The question of bias
An expert may want to help the party instructing him or her – perhaps out of sympathy for their case. They may have an unconscious bias tending to support that case or to maintain on opinion for which the evidence is becoming less favourable. But their overriding duty is to the court.

An expert gets criticised
An accountant giving expert evidence in the Piri Piri case felt the heat when he was criticised by the judge at trial for failing to fulfil that duty.

The criticisms were:
1. He acted as an advocate for the Defendant's case – and this is a criticism that is repeated regularly in reported judgments.

2. He gave evidence on matters outside his expertise.

3. He made criticisms of the way the Claimant had conducted its case. This was (in the judge's words) 'more a critical commentary on the Claimant's conduct of the litigation than an assessment of their claimed losses'.

When asked in cross-examination about his duty, he said that although his ultimate duty was to the court, where he was instructed by a particular party he would do his best to put that party's case in the most favourable light. That was inconsistent with his duties under CPR Part 35. The judge's words bear considering – they are clear comments on the duties of expert to maintain their independence:

'It is not part of the duty of an expert to advance the case of the party instructing them, whether by advancing arguments of fact or law which are outside their expertise or by seeking to present that party's case in a favourable light. An expert witness should present evidence which is uninfluenced by the pressures of litigation and contains independent assistance by way of objective opinion.'

That did not mean that he entirely rejected the expert's evidence. But where there was a conflict between the two experts, the judge placed greater weight on the claimant's expert.

Tips for experts
So here are some tips for experts.
1. Understand your duty. The expert was clearly cross-examined about the nature of his duty. He got the answer wrong. The duty is clearly expressed in the Civil Procedure Rules and Practice Direction. If you cannot explain to the judge correctly what your duty is, you will undermine your evidence at the outset.

2. Ask yourself the question, 'would I give the same evidence if I was instructed by the other party?' If the answer is 'no', think again.

3. Answering 'yes' still does not necessarily mean you are independent. Unconscious bias may be at work. You might want to look at a checklist provided by the Expert Witness Institute in 'Towards Expert Witness Independence and Impartiality' which tries to address this (see *https://www.inspiremedilaw.co.uk/independent-expert-witnesses/*).

4. Avoid the language of advocacy. Leave that to the lawyers.

Unfortunately getting it wrong in a misguided attempt to promote one party's case may well undermine your evidence, as it did in this case. In short, understand your duties and don't get your fingers burned.

Inspire MediLaw

Paul Sankey is a regular speaker at Inspire MediLaw's medico-legal conferences. An experienced medical negligence solicitor, Paul is a Partner at Enable Law, and is recognised as a 'Leader in his Field' by the Legal 500 and Chambers directories.

Inspire MediLaw are delighted to have Paul as a member of our distinguished training faculty for our two day Expert Witness Training conference in Oxford.

The training programme includes essentials for expert witnesses at all stages in their medico-legal practice. Paul provides training on the legal tests for a negligence claim; guidance on report writing; tips on working with lawyers; and practical advice on preparation for and attendance at Joint Expert meetings, Conferences with Counsel, and giving evidence in Court.

The Inspire MediLaw Expert Witness Training is designed for medico-legal experts with a clinical negligence practice, and is accredited by the Royal College of Surgeons of England for up to 12 CPD points.

Training can be booked online at **www.inspiremedilaw.co.uk/event/** or by calling us on **01235 426870.**

Dentists Urged to Support National Survey of Antibiotic Prescribing

Six national dental organisations are encouraging dentists to participate in a new survey of antibiotic prescribing in dentistry.

The Faculty of General Dental Practice UK (FGDP), the British Dental Association (BDA), the Association of Clinical Oral Microbiologists, the Association of Dental Hospitals, the British Association of Oral Surgeons and the dental sub-group of the Scottish Antimicrobial Prescribing Group all support the initiative, which aims to build an understanding of dentists' knowledge of, and attitudes toward, the prescribing of antimicrobials.

The survey, open to all practising dentists as well as trainees and students, is available until 31 May 2020. Participants are awarded a certificate for one hour's CPD, and the incorporated educational material covers the main national resources for antimicrobial prescribing and prophylaxis in dentistry, indications for the use of antimicrobials to manage dental infections, and key points from the NICE antimicrobial stewardship guidelines.

Antibiotic-resistant infections already cause an estimated 25,000 deaths each year in Europe, and 700,000 worldwide. Their incidence is expected to increase markedly over the next 20 years due to over-prescribing, leading to even simple surgical procedures becoming high-risk due to the potential for post-surgical infection with resistant micro-organisms.

Since 2015, all healthcare providers in the UK have had a statutory duty to reduce the risk of antimicrobial resistance by ensuring appropriate use of antibiotics. While there has been a steady reduction in the number of antibiotic prescriptions issued in NHS primary dental care over recent years, the sector still accounts for around 5-7% of NHS antibiotic prescriptions, and an estimated one in six patients are prescribed antibiotics each year as part of their NHS dental treatment.

Dr Nick Palmer, a member of the BDA's Health and Science Committee and Editor of the FGDP's Antimicrobial Prescribing for General Dental Practitioners guidance, commented:

"Dentists have a significant role to play in keeping antibiotics working by ensuring that every prescription for antibiotics is based on clinical need and national guidelines, and by educating patients to take and dispose of antibiotics responsibly. I urge colleagues to take the prescribing survey in order to support this vital work and refresh their knowledge of this important aspect of clinical practice."

Antibiotic resistance in dentistry

Dentists have a role to play in reducing the amount of antibiotic prescribing. We are campaigning for properly funded urgent treatment slots and we have called for a removal of the pressures that push dental patients to GPs, to help bring down antibiotic prescribing rates.

HANDLING A DENTAL NEGLIGENCE CASE?

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

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Consultation will be provided within days of written instruction and complete reports can be provided within ten days.

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Whether acting for the claimant or defendant, please call.

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In the Interest of…

In every profession there is a major governing body, and within that governing body there are rules and principles that one has to abide by.

In the field of dentistry, the prevailing rule is that the patient's interests come first. To expand this into the expert witness field, it is essential to ensure one must put the court's interest above all.

However, and despite best interests, it is not uncommon to hear that someone, somewhere completely ignored this cardinal rule and forgot that an expert witness is supposed to be serving the court first and foremost with their knowledge and expertise.

Pressure from lawyers for various reasons, or lack of legal experience are among some of the reasons that could lead to this lack of judgment as to what the expert is serving.

Remaining wholly non-partisan and acting only for the courts is the duty of every expert and drawing a distinct line under this is paramount so that there are no conflicts of interest.

On a recent major London conference for expert witnesses, this was highlighted on several occasions (backed with real cases) and needless to say, the problems kept being repeated by some experts, which can only indicate the frequency that it might be occurring.

That is why training is crucial. Training in legal matters such as what the courts want to know, and how to write reports and if you are one of the "lucky" experts standing in front of a judge one day, knowing what to do and how to present and answer counsel's questions, can all be done in the utmost professional manner for the benefit of everyone, especially the court.

Legal disputes can be complex, requiring specialist experts to give their honest expert opinion and evidence, however, some experts can get carried away in making bold and sometimes misleading statements, resulting in their evidence becoming worthless in court and go against the oath they took, and finally leading to the entire expert's opinion and evidence being disregarded by the court.

A very unfortunate position for any expert to find themselves in.

The question is, did they bring it on themselves or despite the expert's best intensions, this was a compound effect of many little things that went wrong and led to the expert being in such an unfortunate position?

In addition, ignoring courts instructions in a particular matter, can irritate the judges, causing damages to the expert beyond repair.

A quick overview and brief reminder highlighting problems that an expert witness may knowingly or unintentionally find themselves in are identified in the following points and based on real historical cases and their unfortunate outcome for the expert.

- Industrialising report writing, to the extent that the reports seem copy and paste, with no real substance or evidence that the case and examining the evidence was given enough time and attention, let alone expert opinion.

- Experts not understanding or complying with their duty to the court and the requirements of CPR 35, PD 35. Their duty should be ultimately to the court and not as an advocate for the party that has appointed them.

- Under CPR there is no duty of an industry expert being trained in report writing or in presenting evidence in court, however, good training in how to be an expert witness can prove very valuable, and perhaps less mistakes will occur, as an industry expert does not necessarily makes a good and compliant expert witness.

- Expert evidence needs to be based on facts and reliable clinical practice, and conclusions need to be on proven facts and not assumptions, allegations or agendas from the instructing party, and to make conclusions as transparent as possible, experts need to provide an explanation of the methodology showing how they reached the conclusions to show they have been competent, honest and transparent.

- An expert witness should avoid being 'coached' by lawyers and not to rehearse and practice in giving evidence in a certain way, as this could lead to persecution for preventing the course of justice by allowing to be coached.

- It is good practice that every report should be written in such a way that if the experts end up in the witness box, they are not contradicting themselves, which could look really bad with dire consequences. An honest, professional and reliable opinion does not need to change.

In conclusion, as an expert one has to be mindful of one's role and duties.

There is a grey area 'danger zone' between the evidence and the facts the expert is relying upon to form his professional opinion/testimony, and

"Everything Else" and this grey area is where the opposing side wants to pull the expert towards it, and is best to be avoided.

Being aware of this grey zone at all times, and avoiding it from the beginning can guard the expert against getting there in the first place, in other words, creating a firewall, and always remembering that every witness in any legal forum, must tell the truth , the whole truth and nothing but the truth.

Dr. Diyari Abdah
DDS DDS MSc ImpDent MBA CUBS
Adj. Clinical Assistant Professor

A Day In The Life Of An Expert Witness

by Susie Boyle

◆ **How did you get into this field of work?**
Until I started working as an expert witness, my sum total of legal experience was half a law A-level back in the 1990's. During my nurse training, I was always very interested in the legal and fitness to practice elements, and the moral and ethical dilemmas we face daily. I qualified as an adult nurse in 2001 and had a long and successful career in the NHS, mostly in London and then latterly in the south west. I left full time work in the NHS in 2015, for a number of reasons, taking some time out to find what else I might want to do. As there is always demand for casual and flexible working in nursing, I joined a local staff bank and an agency…which gave me the space to explore new avenues. I came across an advertisement in the nursing press for Somek & Associates and expressed interest immediately. I had no idea that it would become quite such the backbone of my working life as it has.

◆ **Is there a typical working day?**
A very important part of the medicolegal process is to stay on top of your workload, so I will generally spend the first part of my day checking my deadlines, the requirements for each case, and making a plan. Things can change quite rapidly as more information arrives, and as a cog in a complex machine I need to make sure that I am communicating my needs to the other parties clearly, and in plenty of time. It may be that more information comes in and I realise that I am not the right expert for a particular case after all, and that needs to be dealt with immediately. Or the documents I have received are incomplete and I need to ask for the missing parts. Organisational skills are a must for this kind of work. The work itself is challenging, and I need to be entirely focussed on what I am doing, so I will block out several hours at a time for writing a report. We do short form and long form reports, and I will usually do the short ones in one sitting or do the reading first and then the writing. You get a feel for the case as you are reading the documents. Sometimes, it is hard to come to a decision around an opinion, so I might deliberately sleep on it, and come back to it in the morning. I take my responsibility as an expert witness very seriously, so it is vital that I am sure of my opinion.

◆ **What are the highs and lows?**
I find it immensely satisfying to come to an opinion, articulate it clearly, and to read back a report that answers the questions asked and will ultimately help my legal colleagues to do their job; it is a gratifying experience. The outcome of the case is not really relevant to my work, as my overriding duty is to the court, and my opinion is objective, regardless of which 'side' I am instructed on. It is nice to get good feedback, and to be requested by solicitors with whom I have worked before. I am also an associate trainer, which means I help less experienced experts to learn the medico-legal process, which gives me pleasure in a different way.

The lows are that sometimes it can feel overwhelming, as Murphy's law dictates that further work will come in when you are exceptionally busy! The law is also very black and white, and sometimes nursing falls in the grey area, and that can be challenging.

◆ **What advice would you give to aspiring Physio's/Nurses/OT's/SLTs/Midwives looking to enter the medico-legal profession?**
I would recommend working with a consultancy such as Somek & Associates. The thought of trying to do this without that level of support fills me with dread! Ask questions and read up on what is actually required…what people generally know about this work is just the very tip of the iceberg. Once you are starting the work, the biggest piece of advice would be to stick with it. The learning curve is immense, and quite unique, as at first we are literally both novice and expert at the same time. This can be quite hard, as we generally have quite established careers by the time we come to this work. Respect the work, it is a big deal, but you don't have to be frightened of it. This work is not for everybody, and it takes quite a lot of up-front commitment, and a particular skill set. If you don't enjoy writing, or don't have much time, it is not likely to work for you.

Many thanks to Somek and Associates and Susie Boyle.

Susannah Boyle
Registered Nurse
MSc Advanced Practice (Leadership), Dip (HE) Nursing (Adult)

Susie has been an expert witness with Somek and Associates since 2016 and has been an Associate Trainer since 2018, helping to train a range of new experts.

She accepts instructions from both Claimant and Defendant Solicitors and Insurers. Susie has undertaken formal training in the medico-legal process and is fully aware of her responsibilities under the Civil Procedure Rules (CPR) pertaining to Expert Witnesses.

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What can Football Clubs do When Medical Treatment Given to a Player by a Third Party Goes Wrong?

In recent years, football Clubs and their medical teams have seen a trend towards players seeking medical or holistic treatments from third party practitioners in circumstances where either the treatment provider is not approved by the Club or the treatment takes place without the knowledge of the Club.

This article will set out the nature of the issue, the potential impact on the Club and possible factors for Clubs to consider to afford themselves some protection.

Scope of the Issue

Over the past year, the author's firm have been approached by a number of football Clubs who are concerned about medical and holistic treatments being provided to their players by unapproved third party practitioners (Third Parties) such as physiotherapists, personal trainers and masseurs. The most common scenarios are as follows:

1, Players are receiving treatment outside of their Clubs from Third Parties and in circumstances where the Club and the Club's medical team are not aware of the treatment.

2, Players have invited Third Parties to attend the Club premises and the advice or treatment given by the Third Party for the management of the player conflicts with that given by the Club's own medical team. For example there is a disagreement over the correct recovery plan for a player following an injury or a difference of opinion over whether the player is fit to return to play.

3, The player and the Club's medical team agree on the appropriate treatment required but there is a difference of opinion over which medical practitioner should provide the treatment. For example we are aware of scenarios where a player requires an operation but the Club doctors and the player disagree over the identity of the orthopaedic surgeon to carry out the operation.

A topical example is that of Leroy Sane, who is choosing to undergo knee surgery in Austria by Dr Christian Fink, rather than be treated by Dr Ramon Cugat in Barcelona, who is Manchester City's preferred orthopaedic surgeon.

These scenarios are extremely difficult to manage as of course the player has autonomy and cannot be compelled to undergo treatment he does not consent to, however on the other hand the Club has a significant financial interest in the player, his value as an asset and his ability to continue to play football at a professional level for the Club. It is therefore understandable that a Club will wish to "vet" and approve any Third Party providing treatment to a player. In the case of an orthopaedic surgeon, for example, the Club's doctors will want to know the surgeon's success rates and infection rates and be able to liaise with the surgeon as to the player's aftercare and management of his recovery. Unfortunately we have been advised that sometimes the player insists on undergoing surgery with a surgeon who will not communicate with the Club's medical team to provide the required information and who the Club therefore cannot endorse to carry out the surgery.

Impact on the Club

In reality the majority of treatment provided by a Third Party to a player is unlikely to result in long or short term injury, albeit the managerial issues of dealing with disputes between players and their Clubs

over treatment should not be underestimated. However, where the Third Party is, for example, a physiotherapist or an orthopaedic surgeon then the consequences of sub-standard treatment can be far more serious, which is why these classes of practitioners should be thoroughly vetted to ensure they are appropriately qualified to reduce the risk of an injury to the player.

The "worst case scenario" for a Club is that a player receives sub-standard or negligent treatment from a Third Party leaving the player unable to play for the Club, either temporarily or permanently. This could result in the Club losing millions of pounds including the loss of the value of the player's contract, the cost of replacing him and lost wages. Even if the Club can prove that the treatment provided by the Third Party was negligent, they are **not** entitled to an indemnity from the Third Party in respect of their losses as in most circumstances the Third Party will **not** owe the Club a duty of care in tort or contract.

Whilst most prudent Clubs will have some form of Asset Protection Insurance that may pay out in the event that a player is unable to continue their professional career as a footballer for the Club, there will inevitably be a shortfall or uninsured element that will not be covered and that the Club will have to bear themselves as they cannot seek recovery from the Third Party. Even if the player is only temporarily unable to play, the Club will find themselves responsible for the player's wages for significant periods, without deriving any benefit from the player during this period. While it is possible to obtain insurance for "temporary total disablement" or "payroll protection", this is less commonly obtained and will often exclude pre-existing injuries etc.

As an aside, any insurance that the Club holds may contain conditions related to the treatment to be provided to players that could be invalidated if, for example, the Club's medical team have not signed off on the treatment or the identity of the practitioner. Therefore there is also a risk that the Club could lose whatever insurance cover they do have if the Third Party practitioner providing treatment is not suitably qualified.

Case Example – West Brom v El-Safty

The case of West Bromwich Albion Football Club Ltd v El-Safty perfectly demonstrates and confirms that where a player receives negligent treatment or advice, the practitioner is not liable to the Club as there is insufficient proximity between the practitioner and the Club for a duty of care to arise.

In the El-Safty case the Club's physiotherapist referred the Player to the Surgeon and attended the appointment with him. The Surgeon diagnosed an injury to the Player's right posterior cruciate ligament and recommended reconstructive surgery. The Player and the physiotherapist discussed and adopted the recommendation. The surgery was paid for by the Club's medical insurance providers. Unfortunately after undergoing the surgery the Player was unable to play professional football again and it was accepted that the Surgeon's recommendation for surgery was negligent and that the injury should have been treated conservatively.

In a completely separate action, the Player, Michael Appleton, brought a claim for damages against the Surgeon. Negligence was admitted and the Player was awarded approximately £1.5million.

The Club then attempted to sue the Surgeon for their losses in a separate action, arguing that the Surgeon owed duties to the Club both in contract and in tort. Both at first instance and on appeal the Court held that there was no direct or implied contract between the Surgeon and the Club and the Surgeon owed no duty of care in tort in respect of any foreseeable economic loss to the Club resulting from the negligent treatment.

Mr Justice Royce in his judgement at first instance found that the physiotherapist had referred the Player to the Surgeon in his role as health professional, rather than with an intention to create a contract between the Club and the Surgeon. Therefore there was no intention on the part of the Club to create legal relations directly with the Surgeon.

In relation to whether a duty of care arose in the circumstances, Mr Justice Royce considered the following requirements, as set out in Caparo v Dickman:

i, The loss should be reasonably foreseeable;

ii, There should be sufficient proximity between the parties to the claim;

iii, It is fair, just and reasonable to impose the duty of care.

In finding that the Surgeon owed the Club no duty of care, Mr Justice Royce reasoned that there was not sufficient proximity between the Surgeon and the Club. Whilst the Surgeon of course knew that the Player was a valuable asset to the Club, he was not privy to specific details, such as the exact value of the Player or the terms of his contract. Mr Justice Royce pointed out that any surgeon treating a patient from a fairly substantial company under a company health insurance policy will be aware that the patient has a value to the company, however this would not ordinarily give rise to a duty of care owed by the surgeon to the company.

Finally Mr Justice Royce concluded that if there was sufficient proximity between the Surgeon and the Club to give rise to a duty of care it would not be fair, just or reasonable to impose such a duty. He briefly noted that the Surgeon would presumably have to try and ascertain the Player's value and try and limit his liability in some way, which it would be unreasonable to expect the Surgeon to do. In the Court of Appeal, Lord Justice Rix went further and stressed that the Surgeon did not assume a responsibility to advise the Club and stated his primary concern ought to be the Player's well-being and not the Club's

financial circumstances. If, Lord Justice Rix stated, the Club had wanted the Surgeon's advice for the purposes of their own interests "it could have made that plain to him. He would then have been put in a position where he could choose to charge for that advice and the risks of giving it, and/or of disclaiming liability".

This case shows that the basic premise is that a Third Party providing treatment to a football player is merely providing medical care to a private patient and does not owe a duty of care to a third party (i.e. the Club) not to cause financial loss.

Considerations for the Club

As already outlined, there is a clear risk to a Club if a player undergoes sub-standard or negligent treatment from a Third Party and is then injured and unable to play for any length of time. The likelihood of this happening will be reduced if the player and the Club can adopt a collaborative approach to the player's treatment plans and ensure that any significant surgery etc is performed by a jointly chosen, suitably qualified practitioner. Unfortunately this is not always achievable and there is not a clear cut solution to the issue. Some factors that Clubs may find it useful to consider are set out below.

Player's contract

The Standard Form Premier League Contract entered into between players and Clubs in the Premier League does contain various clauses that a Club could seek to enforce to prevent a player from undergoing controversial or unapproved treatment. Notably one clause states that players agree they will not (except in the case of emergency) arrange or undergo any medical treatment without first giving their Club proper details of the proposed treatment and physician/surgeon and requesting the Club's consent. The same clause states the Club is not to unreasonably withhold consent.

The difficulty of enforcing this clause is that most Clubs start from the premise "it is your body". Further the Club will most likely not wish to alienate one of their valuable assets and realistically they are unlikely to want to threaten to terminate the contract and lose their player, attracting significant press coverage and also alienating team mates. There is also a risk that the player will undergo treatment without the Club's knowledge and therefore the Club will lose any control over the decision making process.

One possibility is for the schedule/annex to the Standard Form Premier League Contract (which can be amplified) to include further detail about what information regarding the proposed treatment and physician/surgeon are required and this reiterated to players upon joining the Club. For example it could be made clear that where an orthopaedic surgery is proposed that as a minimum the Club's medical team will require details of the surgeon's success rates, infection rates and insurance cover. This may help prevent internal disputes over whether or not a proposed treatment is reasonable.

Insurance

As touched on above Clubs can, and often do, take out Asset Protection Insurance that usually responds when a player is unable to continue to fulfil their professional obligations to a Club due to accidental death or permanent total disablement or where a player is temporarily disabled. Coverage for these policies is arbitrary and Clubs can choose the sum for which to insure a player, as long as the figure is reasonable and can be justified. Careful attention should be paid to the wording of the policy, as policies can specifically exclude cover when the injury to a player is caused by negligent medical treatment or arising from treatment for an existing injury etc.

To protect against uninsured losses Clubs should consider giving careful thought to the wording of their policies and the level of coverage insured and calculate such with reference to the player's contract or transfer value. The flipside could mean an increased premium, however this is likely to pay for itself in multiples if a claim under the policy becomes necessary. Interestingly the Court of Appeal in the El-Safty matter stated that it seems more reasonable to "expect the Club to insure against suffering the financial loss of the kind claimed against Mr El-Safty than to expect him [the surgeon] to insure against additional loss of this kind suffered by someone other than the patient". This perhaps shows the attitude that Courts will take in the future to any further attempts to hold a practitioner liable to a Club for medical treatment provided to a player.

Of course even with an increased level of coverage there may still be a shortfall between the level of cover and the losses sustained by a Club, however anything that can be done to close this gap will be beneficial to the Club.

Direct Contract with the Third Party

A final option is to try and establish a direct contractual relationship between the Club and any Third Party providing treatment to a player. For example, if a player has a physiotherapist or personal trainer who regularly provides services/treatment to the player, the Club may wish to consider entering into a contract for the provision or services with the physiotherapist/personal trainer. If a contract is established then the Club gains an element of control over the Third Party and can ensure they have adequate qualifications/insurance etc. Furthermore if there is a suggestion of negligence on the part of the Third Party causing harm to the player and subsequent losses to the Club then it will be much easier for the Club to establish a duty owed by the Third Party and attempt to cause the Third Party to indemnify them for any financial losses. The cost of the treatments is unlikely to be an issue for any top level Club.

Although this option may seem the most attractive to a Club it does have a host of difficulties of its own. It is clear from the El-Safty case that any contract between a Club and a Third Party would have to go beyond a simple contract for the payment of fees in

order for the Third Party to be held liable to a Club for losses caused by negligent treatment to a player. It would therefore need to include an element of tendering formal advice to the Club or reporting the Club on proposed treatment/surgery. Any Third Party could quite simply refuse to enter into such a contract, refuse to give formal advice to the Club or disclaim liability.

Furthermore, even if a Third Party did agree to enter into a direct contract with a Club and the Club were able to successfully establish a duty owed by the Third Party to a Club, there is no guarantee that the Third Party would have appropriate insurance cover that would respond to the claim or have a limit of indemnity sufficient to cover the Club's losses.

Finally, the Third Party may be in breach of various ethical codes of practice, including General Medical Council Guidance, if they were to enter into such a contract as to do so may place them in a position where they have a conflict of interest between the interests of the player and the interests of the Club.

Comment

The issue of players seeking additional treatments outside of their Clubs from unapproved Third Parties is difficult to resolve and likely to continue, particularly in light of players' increased salaries and pressures to perform.

Whilst there is no fool proof solution, Clubs would be advised to ensure they are adequately insured for their own losses in the event that a player is injured following negligent medical treatment and fully understand the terms and conditions of their insurance so that these are not breached.

To try and prevent players seeking treatment from unapproved Third Parties we would encourage a collaborative approach between the players and Clubs' medical departments with clear guidelines set down from the start to ensure players understand what is expected of them. Whilst this article has considered the issues from a Club's perspective, any player of course has a vested interest in remaining fit to play and this shared interest should encourage collaboration.

Author, Oonagh Webster
Solicitor, Keoghs

Oonagh is experienced in handling the defence of player on player claims for Premier League clubs/players/their public liability insurers, advising Premier League Clubs on a variety of contractual issues, and advises Premier League club doctors both as to their obligations to parent club and their players/players' families.

The team at Keoghs are experienced in advising on sports injury claims, club healthcare practitioner issues, disciplinary and regulatory matters and contract issues - both contentious and non-contentious.

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Can Defendants Rely on Life Expectancy Expert Evidence Following Dodds?

by Lea Brocklebank and David Williams at DAC Beachcroft

The question of whether a Defendant can rely on expert evidence on life expectancy in a high value personal injury claim has been considered by the Courts in recent judgments. On 8 November 2019, the High Court considered this question in Russell v Davies.

The Claimant pursued a claim for personal injuries following a road traffic accident on 6 May 2015 in which he suffered a severe head injury. The Defendant applied for permission to adduce expert evidence on life expectancy from a physician, albeit the report was based on statistics, contending that a number of factors affected the Claimant's life expectancy and that the expert evidence was reasonably required to resolve the proceedings. The Claimant opposed the application, asserting that the expert evidence of the medical experts dealt with the questions of life expectancy and that a combination of their expert evidence and the Ogden Tables was sufficient to enable the Court to resolve the claim without further expert evidence.

The factors to be considered by the Court in deciding whether expert evidence in an additional discipline should be allowed, whether the expert evidence is reasonably required to resolve the proceedings, as set out in British Airways plc v Spencer and others and the recent High Court decision in Dodds v Arif and Aviva Insurance were reviewed by Her Honour Judge Walden-Smith.

In Dodds the Master refused the Defendant permission to rely on expert evidence on life expectancy and set out the proposition that permission to rely on expert evidence in this field should not be given where the injury in the claim has not impacted on life expectancy unless the Claimant is atypical, that where the injury has impacted on life expectancy the normal route is for the medical experts to give expert evidence on life expectancy, and that permission to rely on bespoke life expectancy expert evidence will not normally be given unless the medical experts cannot offer an opinion at all or state that they require specific input from a life expectancy expert.

Granting permission to the Defendant to rely on expert evidence on life expectancy in Russell, the judge concluded that it would be of considerable assistance to the Court in this matter. The medical experts had caveated their opinions and the Claimant's history of ADHD, smoking and illegal drug use in combination with the increase in his risk of developing epilepsy as a consequence of his injuries meant that the Claimant was atypical and fell outside the cohort on which the Ogden Tables are based.

This judgment should be taken into account alongside Dodds when considering whether expert evidence on life expectancy should be sought, and demonstrates that, in appropriate cases, permission will be granted by the Court.

DAC Beachcroft represent the Defendant in this matter.

Our Complex Injury team deal with a wide variety of cases on a daily basis. For more information or advice, please feel free to contact one of our legal specialists.

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To view the original article please see,
https://bit.ly/2XizqVW

‘Like a Fitbit in Your Heart’ – Remote Pacemaker Study to Help Cardiac Patients Avoid Hospital Admissions

Pacemakers will monitor heart patients’ activity levels, triggering early healthcare intervention

A study at The University of Manchester will analyse heart patients’ activity levels through their pacemakers, to determine which people are at the highest risk of frailty and help them avoid long hospital stays.

The British Heart Foundation-funded study, supported by Medtronic, aims to help older people living with heart disease and heart failure. By identifying predictors of illness, it is hoped that doctors will be able to treat patients in the community before they become acutely ill. Older cardiac patients with frailty have high rates of long-term and often unsuccessful hospital admissions, and helping them to recover at home could relieve pressure on the NHS.

Cardiac monitoring devices, such as pacemakers and implantable cardioverter defibrillators (ICDs), can record and store data on patients’ physical activity which can be transmitted via a Bluetooth connection. Many patients are able to upload this data from home.

The researchers at The University of Manchester, led by Dr Adam Greenstein, will download this data, and use it to analyse whether patients with lower levels of physical activity are more likely to be hospitalised. This may be because they have a virus or infection, or have suffered a fall. If that is the case, in the future it may be possible to intervene before a patient’s health deteriorates to the point of needing to be hospitalised, for example by sending out a community nurse.

The clinical fellowship was awarded £123,000 by the BHF and will last two years, involving 150 patients aged 60 and older, recruited from Manchester Royal Infirmary.

The University of Manchester recently received a £1million Research Accelerator Grant from the BHF to support world-leading research into heart and circulatory diseases, which kill more than one in four people in the UK.

“ This data can show us how a person’s activity levels correlate with their likelihood of being hospitalised for frailty, and that means we can treat them in their home before they get so ill that they need to be in hospital.” **Dr Joanne Taylor**

Jim Standing, 75, from Clayton le Dale in the Ribble Valley is one of those taking part in the study. In May 2016, Jim was travelling back from Manchester with his wife from a show when he suffered a cardiac arrest. Fortunately, there was a nurse on the train who gave Jim CPR until paramedics arrived with a defibrillator.

Jim said: “I got on the train, sat down, and simply died. It was terrifying for my wife. I had always been fit and healthy, but my dad died from cardiac ischaemia at the age of 63 and that was always a shadow hanging over me.

“Following a poor prognosis I spent three weeks in Manchester Royal Infirmary and that’s when I started to realise just how lucky I had been. During this time I often wondered what my future might hold, would I be around for my wife's mother's 100th birthday, see my grandson graduate or be able to celebrate our golden wedding anniversary?

“I had an ICD fitted and nine months later I had a quadruple bypass. There has been a steady improvement since my bypass operation and I now feel fine. I’ve equipped my garage with a couple of exercise machines, walk most days and make sure I’m active as possible.

“I'll be forever grateful for all the help and support I’ve received – from the people on the train who saved me, to the doctors and nurses in the NHS. I feel like I owe it to them and to my family to do my best to stay healthy and active, take part in research, and enjoy life.”

Dr Joanne Taylor, the Clinical Research Fellow who is the study’s principal investigator, said: “In geriatric medicine we spend a lot of time with older people trying to work out how mobile they are and how frail. An older person might get a minor illness such as a virus or infection, but it has a disproportionate impact on their physical functioning. They may become unable to look after themselves, and that’s a common reason for people to end up in hospital. We see this particularly with heart failure patients.

“We noticed that cardiac devices are measuring daily physical activity in older people – like a Fitbit in your heart, that’s always on. This data can show us how a person’s activity levels correlate with their likelihood of being hospitalised for frailty, and that means we can treat them in their home before they get so ill that they need to be in hospital.”

BHF Senior Research Advisor Noel Faherty said: “The results of this study could help the thousands of people in the UK who have cardiac devices to avoid having to go to back to hospital for relatively minor illnesses. This would remove a significant burden from the NHS, as well as improving people’s quality of life.

“The British Heart Foundation is the UK’s largest independent funder of research into heart and

circulatory diseases, such as heart attack and stroke, and the risk factors which cause them, such as diabetes. Our vision is a world free from the heartbreak caused by these conditions, and we rely on the support of the public to help us get there."

Margaret Long, 77, from Prestbury in Cheshire had a pacemaker fitted in May 2018. In 2008 Mags began suffering from atrial fibrillation, an abnormal heartbeat. She visited her GP who performed an ECG and a diagnosis came back within half an hour. Mags had two cardioversion procedures – where an electric shock is sent to the heart to restore a normal rhythm – followed by an ablation, where the piece of heart tissue which is causing the abnormal rhythm is destroyed. In 2012 Mags had a stroke, which is more common in people with atrial fibrillation.

In 2016 Mags had a pacemaker fitted to make sure her heart is beating at the right pace. She said: "All those years I had atrial fibrillation, I had to go to Macclesfield A&E so many times. Since having the pacemaker fitted I've been able to stay out of hospital. I can be more active – I've played a full season of bowls, I can walk a mile in 20 minutes. My cardiologist can see how well I look. I'm so grateful for what's been done. Life is wonderful. I'm catching up on so many physical things that were nigh on impossible before.

"I usually upload data from my pacemaker every three months and am seen once a year. For me, taking part in this study is a way to help other people in my situation."

New Imaging Technique Unlocks Secrets of the Zebrafish Heart

Scientists develop a new type of 3D microscopy to capture the growing hearts of zebrafish embryos for the first time, which could also teach us more about how the human heart develops, grows and heals. This is according to research part-funded by us and published in Nature Communications.

The development of the zebrafish heart begins in a similar way to humans, making them very useful for heart research. In the zebrafish the heart beats several times every second. It is this constant motion that tends to create blurry images, making it difficult to study the images in depth.

Researchers at the University of Glasgow and University of Edinburgh have developed a way to gather many images of the heart into a 3D image layer-by-layer over 24 hours to produce a time-lapse video. The computer program is able to control exactly when to fire lasers for imaging, which means that the growing and dividing cells in the beating heart can be viewed with great detail for the first time.

Dr Jonathan Taylor, lead researcher at the University of Glasgow, said: "This lets us watch continuously as the heart forms over the course of a whole day, without causing any harm to the fish. It's pulled back the veil on processes such as cell division within the heart which we just didn't have any way to visualise before."

From imaging to future treatments

Dr Martin Denvir, co-author at the University of Edinburgh, said: "There are two very promising potential applications of this new technique. Firstly, now that we can see detailed images of the growth of the heart on a cellular level, we hope to be able to apply that new knowledge to develop treatments for abnormal heart formation in the future.

"Secondly, we've been able to observe immune cells travelling to injured areas of the heart, which could help us guide the modification of immune response to more effectively treat cardiac inflammation and heart disease."

The research was also funded by the Engineering and Physical Sciences Research Council and the Royal Society of Edinburgh.

Psychiatric Diagnoses 'Neither Necessary Nor Sufficient' for Access to NHS Care

A new study, published in the Journal of Mental Health, finds psychiatric diagnoses are seldom used as entry criteria for NHS mental health services.

Despite controversy over their validity, and the damage they can do to people who receive the labels, psychiatric diagnoses are usually argued to be essential for accessing care, determining treatment options, communicating between mental health professionals, and planning services.

However, a new study conducted by researchers from the University of Liverpool, has found, contrary to expectations, that psychiatric diagnoses are seldom used as entry criteria for NHS mental health services.

The study involved Freedom of Information requests made to 17 NHS adult mental health Trusts, asking for the entry criteria for their services.

Results

The research revealed that diagnoses were neither necessary nor sufficient in service entry criteria. Broad clusters of difficulties were used rather than specific diagnoses (except when diagnoses were used, contrary to NHS recommendations, as exclusion criteria).

The researchers found that while psychiatric diagnoses are commonly thought of as 'essential', in fact most NHS services did not use diagnoses as inclusion criteria. Instead, most services accepted referrals on the basis of need and the specialist skills of their staff.

The authors conclude that diagnostic labels in mental health are not, as is commonly assumed, necessary for NHS service access. Psychiatric diagnosis may be more of a historical artefact than a necessity for service entry. This opens the way for alternative – more scientifically valid and less stigmatising – ways to meet the practical requirements of modern mental health services and address people's needs.

Good news

Lead researcher Dr Kate Allsopp, said: "Psychiatric diagnoses are controversial – defended strongly by many psychiatrists and psychologists but also criticised as scientifically invalid and pathologizing. One reason that psychiatric diagnoses survive, despite the criticisms, is that they are usually thought of as essential tools for accessing mental health services.

"Our research clearly shows that access to NHS services rarely depends on diagnosis, but instead on need. This is good news, because it means that there is no barrier to developing better, more humane, services."

Professor Peter Kinderman, said: "This study shatters a myth about psychiatric diagnosis that has blocked progress for decades. Although we have always been aware of the limitations of biomedical psychiatric diagnosis, we have also always been told that diagnoses are vital tools in determining access to services.

RCOphth Receives Funding Boost to Improve Patient Outcomes

The Royal College of Ophthalmologists is delighted to announce it has received more funding to support the National Ophthalmology Database (NOD), in a move that will continue to improve patient outcomes and reduce surgical errors.

The sum of £80,000 a year for 3 years comes from Alcon, a leading Surgical and Vision Care Ophthalmology manufacturer, signifying an effective partnership between industry and the RCOphth to use real world data to improve outcomes for patients undergoing cataract surgery.

"Alcon is delighted to be partnering with the National Ophthalmology Database and Royal College of Ophthalmologists. As the global leader in eye care we are committed to ensuring that we continue to develop innovative technologies and solutions with patient outcomes and health system specific benefits at the centre of what we are trying to achieve. This partnership is a great opportunity to future-proof the ability of the NHS to measure these outcomes through objective means, both now and in the future." Mike Turner Surgical Business Unit Head UK & Ireland

Further funding has also been committed by Bausch + Lomb in a one-off sum of £10,000. This investment will ensure the highest standards of quality assurance and improvement, helping to facilitate cutting edge research that will maximize the efficiency of NOD data.

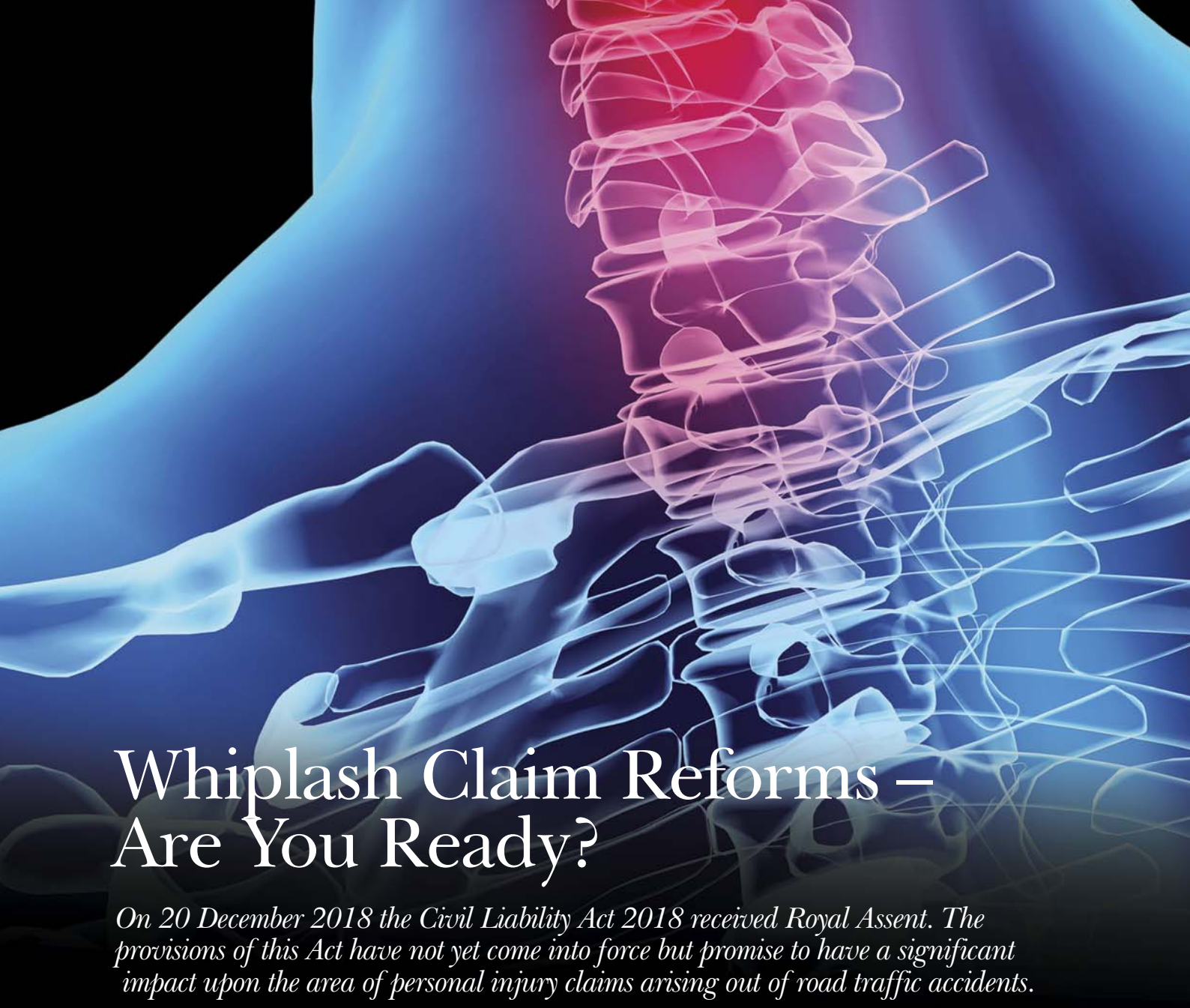
Since its inception, NOD has demonstrated significant clinical and economic benefits, including:

- A 38% overall reduction in PCR complications since 2010
- In the 2017-18 only 1.2% of operations were affected by PCR
- A 37% overall reduction in visual acuity (VA) loss since 2010
- Reduction in PCR complications since 2010 equates to 3,400 fewer complications annually across the NHS
- Cost saving from avoided PCR complications of £2 million per annum
- Close to 100% data completeness for PCR outcomes, currently a compulsory field in Electronic Medical Records

Alongside the support of industry, RCOphth's lobbying has resulted in NODs potential being recognised at the highest levels of government and the health service. In a letter to RCOphth President Mike Burdon, Nadine Dorries, Minister for Health praised the 'striking' economic and clinical benefits offered by NOD, having the potential to eradicate variation in cataract surgery and reduce surgical errors.

Reacting to the announcement, Mike Burdon, President of RCOphth said: "This investment by Alcon demonstrates how crucial partnerships between industry the college and are in sustaining projects that make a real difference."

"With NOD being at the forefront of reducing complications, achieving high data completeness and resulting in considerable savings for a stretched health service, contributions by Alcon and Bausch + Long will also us to continue and improve an already high performing service."



Whiplash Claim Reforms – Are You Ready?

On 20 December 2018 the Civil Liability Act 2018 received Royal Assent. The provisions of this Act have not yet come into force but promise to have a significant impact upon the area of personal injury claims arising out of road traffic accidents.

The Act is geared up to tackle whiplash claims and seeks to limit damages and costs for those claims. The general view has been that whiplash claims are spiralling in England and Wales and, as such there has been pressure for reform which reduces sums being paid to Claimants.

Section 1(2) of the Act defines a whiplash injury as; '…a sprain, strain, tear, rupture or lesser damage of a muscle, tendon or ligament in the neck, back or shoulder, or…an injury of soft tissue associated with a muscle, tendon or ligament in the neck, back or shoulder'. It excludes an injury which is soft tissue but is connected to another injury which is not defined as a whiplash injury under the Act. An individual's injury can only fall within the definition for the purposes of the Act if they are the driver or a passenger in a motor vehicle and travelling on a road or other public place in England and Wales. The definition excludes motorcycles, also excluded are pedestrians, cyclists and horse riders. It is likely that most minor injuries arising out of road traffic accidents will fall within this definition.

Section 3 of the Act gives powers to the Lord Chancellor to set limits on what a Claimant would receive for a whiplash injury with a duration '…not exceed[ing], or…not likely to exceed, two years, or would not have exceeded, or would not be likely to exceed, two years but for the claimant's failure to take reasonable steps to mitigate its effect'. Early indications are that the tariffs are likely to allow for significantly lower awards in comparison to the guidance provided by the Judicial College which is what is generally relied upon at the moment. For example a 3-6 month whiplash injury is likely to attract an award of £450 under the new tariff, whereas the current JC Guidelines give a value of between £2,150-£3,810. Whilst the tariff is likely to provide certainty to all parties, and reduce sums being paid out to Claimants by insurers and self-insuring companies, there are fears that it will lead to an overall under-compensating of claims.

It is not a part of the Act itself but part of the overall package of reforms is a change to the small claims limit which, coupled with the above adjustments to the compensation for whiplash claims, will have a

huge impact on the area. As things stand the small claims track applies to claims where the value of damages does not exceed £10,000 and where damages being claimed for pain, suffering and loss of amenity (PSLA) do not exceed £1,000. This means that the small claims track is currently the correct track for exceptionally minor injury claims only (current Judicial College Guidelines provide that minor injuries lasting up to 28 days attract awards of up to £1,200 with those of up to 7 days attracting an award of up to £600) with the vast majority exceeding the £1,000 threshold for PSLA and being allocated to the fast track and benefitting from the higher fixed costs provisions under the Civil Procedure Rules.

Under the new proposals, the limit for PSLA within the small claims track is to be increased to £5,000 for road traffic claims where you are the driver or passenger in a vehicle and £2,000 for employers and public liability claims. The limit for a pedestrian, horse rider, cyclist or motor cyclist (classified as vulnerable road users) who is involved in an accident on the road will remain at £1,000. On the small claims track there will only be a small amount of fixed costs available for solicitors which will not come close to matching those which can be recovered on the fast track under the current rules. With this squeeze on costs, a large number of firms are likely to pull out of the area as it will not be cost effective to undertake the work.

This in turn is likely to mean that a number of Claimants will choose not to bring a claim – due to the reduced awards and need to incur the experts fees and court fees themselves – or will do so without the assistance of solicitors as a litigant in person. This, in itself, raises questions about access to justice for a Claimant. In addition, whilst it is suggested that the changes will lead to a reduction in claims overall and a release of court time, with a likely increase in the number of cases being handled by litigants in person with little or no knowledge of legal procedure, each individual case is likely to take up more court and defence time so there are question marks over whether court time will actually be saved.

The view amongst many lawyers is that with the reduction in costs being recoverable in PI claims it is likely that Claims Management Companies (CMCs) will fill the gap if firms drop out of the market . It is a general view that CMCs do not have the same level of expertise and that it may lead to under compensation and a low grade service for Claimants. There is some concern around claims that start out as low value but develop into higher value claims as they require additional work and recognition by the solicitor. Given the low level of costs that are recoverable for solicitors, it is perhaps inevitable that less time will be taken on individual cases which could lead to a failure to recognise a higher value case when it comes along.

The proposed changes to the small claims track leaves an odd situation which provides different limits for different types of claims. For example an employee who is hit by a company vehicle in the company yard is less likely to benefit from legal assistance than if he had been hit by a vehicle on a public road or a footpath. The distinctions are likely to cause some confusion initially as Claimants will have to clearly indicate the type of claim and the expected award for PSLA to allow the court to correctly allocate the claim. It does beg the question as to whether a litigant in person who wants to pursue a claim would understand the distinction between cases when taking the step to issue court proceedings.

As part of reforms for road traffic accidents, a new MOJ claims portal is to be created to allow Claimants to submit their claims. This is being put together in conjunction with the MIB and is a strictly online portal. Currently it is not believed that the online portal will be ready and in place for the proposed implementation of the Act in April 2020 but even setting that aside there are some concerns about it. Whilst computers and the internet are part and parcel of most people's daily lives, there are still those who do not have access or the knowhow to use it. A strictly online portal does potentially prevent Claimants who are unable to use or access the internet from being able to submit a claim without assistance .

Under the current MOJ Portal for Road Traffic Claims the rules are clear on what occurs when liability is denied by an insurer – namely that the matter will drop out of the portal and be dealt with outside of it with the option of issuing court proceedings if required – there is nothing to indicate whether the new portal will have a similar process in place. In addition any rules in place will have to be simple as they have to be understood and followed by litigants in person who will have little or no knowledge of how the legal process works.

Whilst the Act is due to come into force in April 2020, after having been delayed already, there is a suggestion that it will be delayed further whilst ongoing issues are ironed out. A number of interested parties from both sides of the fence are still discussing the changes and the provisions may themselves change in the interim. Even if changes are made which limit the impact of the Act, it is clear that the impact is going to be huge on the area with the full consequences unlikely to be realised until some time after the provisions have come into force.

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County Court Considers Costs Rules in Personal Injury Case (Khan v Aviva Insurance Ltd)

by Colm Nugent

Personal Injury analysis: Where the personal injury aspect of a claim had resulted in the case being allocated to the fast track, the claimant was awarded costs to be assessed on the normal fixed costs basis under CPR 45.29B. The decision offers a useful affirmation of the default costs rules that will be applied by the courts in fast track claims. Colm Nugent, barrister at Hardwicke Chambers, discusses this case.

Khan v Aviva Insurance Ltd [2019]
Lexis Citation 330

What are the practical implications of this case?
The decision offers a useful affirmation of the default costs rules that will be applied by the courts in fast track claims:

❖ implicit in the wording of CPR 26.5 is the principle that individual parts of a claim cannot be allocated to different tracks. Where a party believes a case to have been wrongly allocated, the proper remedy is to apply for re-allocation to the proper track

❖ the starting point remains the familiar rule at CPR 44.2, whereby unsuccessful parties will be ordered to pay the costs of the successful party. When identifying the successful party, the 'most important thing is to identify the party who has to pay money to the other by deciding who has to write the cheque' (at para [17])

❖ defendants should seek to protect themselves from costs liability by making appropriately pitched CPR 36 offers. In this case, the defendants had failed to make a sufficient offer

Practitioners will be familiar with cases where costs are assessed according to the principles applicable in different tracks. In such circumstances, Khan v Aviva is of practical assistance by reaffirming the court's general discretion to award issue-based costs, despite the presence of more restrictive costs regimes. The case therefore provides a helpful route to resisting adverse costs orders. In addition, the route provided is well signposted, as the judgment provides useful guidance on when the normal rules will be displaced:

❖ the fact that the fixed costs regime is applicable suggests that the power to make alternative orders under CPR 44.2 should be exercised with caution

❖ if, after allocation and success at trial, a claimant nonetheless fails to win damages above the level initially required for allocation to the trial track, that is not automatically a sufficient reason to depart from the normal costs rules

❖ under CPR 44.2(4), when deciding any order on costs, the court must have regard to the parties' conduct, successes at trial (even if partial), and offers to settle. 'Conduct' per CPR 44.2(5) includes before proceedings, the reasonability of raising, pursuing or contesting allegations or issues, the manner in which that is done, and any questions of exaggeration of claims. CPR 44.2(6)(f) (issue-based costs orders) can only be considered after the court has contemplated the orders at CPR 44.2(6)(a-c)—ie paying a proportion of another party's costs, a stated amount in respect of another party's costs, or costs from/until a certain date

❖ the case provides a useful judicial interpretation of cases cited by the defence:

◦ Green v Arriva North West Wales Ltd [2010] QBD 25 (not reported by LexisNexis®) does not stand for a general proposition that if awarded damages do not exceed the small claims limit, then costs should be limited to those permissible on the small claims track. It simply underlines the court's wide discretion as to costs, when taking into account the matters at CPR 44.3(4)

◦ Painting v University of Oxford [2005] EWCA Civ 161, [2005] All ER (D) 45 (Feb) was a case where the judge erred in exercising his discretion as to costs. He had found the claim to be exaggerated and therefore found wholly in the defendant's favour. The case does not address the propriety of issue-based costs assessments in fixed costs but demonstrates the judge's discretion. Kay LJ noted that the defendant's protection lies in making appropriate CPR 36 offers

What was the background?
This was a claim in damages for modest personal injury and special damages including for credit hire and vehicle repairs, arising out of a minor road traffic accident. Although damages were valued in the claim as between £5,000 and under £10,000, no specific value was ascribed to the personal injury.

Liability was accepted—both parties made (ultimately unsuccessful) CPR 36 offers.

The trial was allocated to the fast track, the defendant arguing this was a low velocity impact claim and alleging fundamental dishonesty, relying on the decision in Molodi v Cambridge Vibration Maintenance Service and another [2018] EWHC 1288 (QB), [2018] All ER (D) 136 (May).

The judge at trial determined that the claimant failed to prove his claim for personal injury, but both that the vehicle had sustained damage and that the claimant was impecunious, allowing the credit hire claim in full. The judge declined to make a finding of fundamental dishonesty.

The parties failed to agree the costs order that should follow from the decision.

The claimant submitted that costs should follow the event, in accordance with CPR 44.2(2)(a) and the fixed costs regime in CPR 45.29B.

The defendant submitted that the claim had only been allocated to the fast track due to the failed personal injuries claim. It followed that:

- the claimant should therefore pay the defendant's fixed recoverable costs under CPR 45.29F as regards the personal injury
- the defendant should pay the claimant's small claims costs as regards the credit hire claim and the two sums ought to be set-off against one other
- the defendant relied, in part, on conduct issues

Alternatively, the defendant submitted it should pay the claimant's costs, limited to those that would be recoverable on the small claims track.

What did the court decide?

The judge accepted that the personal injury aspect of the claim had resulted in the case being allocated to the fast track, but he accepted the proposition that different parts of the claim cannot be allocated to different tracks. The judge held that the claimant was 'the successful party' and declined to depart from the fast track fixed costs regime, or 'the normal rule' that costs follow the event.

He accepted there was a tension between the court's general discretion as to costs (CPR 44.2(6)) and the apparent restriction of the court under a fixed costs regime to make an issue-based costs order, or award costs less than the fixed costs sum.

The judge determined that the fixed costs provisions did not oust the general discretion of the court in assessing costs, nor did it prevent the court assessing costs by an issue-based order if considered appropriate. However, against the background of the applicable fixed costs regime, the court's discretion to do so should only be exercised with caution.

The fact that the sum awarded fell below the threshold of a particular track is not an automatic reason to depart from the normal rule concerning costs. The claimant was therefore awarded costs to be assessed on the normal fixed costs basis under CPR 45.29B.

Colm Nugent is a specialist barrister in the fields of personal injury and related insurance issues. He is also instructed in a variety of disputes outside these core fields including difficult interlocutory applications, having lectured extensively on the CPR and related costs issues.

Thanks to Rob Hammond for his contribution.
This article was first published on Lexis®PSL Personal Injury on 18 October 2019

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Safety over Glamour: The Dangers of Unregulated Cosmetic Procedures

Tina Patel and Irene Karidas from the consumer law and product safety team discuss the risks associated with cosmetic procedures and the lack of regulation in the industry.

We are now in a generation where a fuller and plumper look is high in demand and glorified by those in the social media industry as producing results with highly favourable photogenic effects. As enticing as they may be, it is extremely important to stress the danger that comes with the procedures used to achieve such effects and the lack of regulation of the industry.

The risks of lip and dermal fillers

Lip and dermal augmentation and fillers are used for the enhancement of the lips and face through products such as collagen or hyaluronic acid. Liquid silicone injections are also widely used for similar enhancement purposes on various areas of the body, with self-injected dermal and lip fillers being preferred by some consumers for their cost and time effectiveness. Many consumers opt for such enhancement procedures, which they believe do not require the expertise of a medically trained professional, due to their apparent ease in application. A recent case, however, exemplifies the extent of how dangerous these procedures can be.

In the U.S, a woman was killed after having a 'botched buttock enhancement injection'. This treatment took place in a house basement where the woman went into cardiac arrest after the treating beautician administered the silicone injections. This untimely death was caused by the silicone entering the woman's blood stream. The treating therapist was found guilty of gross negligence manslaughter which resulted in a four year prison sentence. Although this may be viewed as an extreme case, it is not rare for consumers to experience severe adverse effects as a result of such treatments. In cases relating to lip fillers, there have been reports of those undergoing treatment noticing swelling that was "migrating from their lips to their face".

There are a few points to take from such devastating cases. Those wishing to get such treatment should always be mindful to check the reviews of the salon where they are undertaking the procedures, ensure that the treating beautician has had the appropriate training, ensure that the establishment has the appropriate license to carry out the procedure and be satisfied that they are qualified to carry them out. . Of course, there is only so much that consumers can do. It is up to regulating bodies to impose limits on such beauty treatments and ensure that they are closely monitored as it is clear that amateur practices and slip-ups can have very serious consequences.

'At home' cosmetic procedures

There are also products available that allow individuals to have their cosmetic treatment in their own home, known as 'self-injecting dermal and lip fillers'. Unsurprisingly, these also come with significant risks.. The problems that appear with such fillers could simply be aesthetic such as producing uneven results or lumps. They can also result in a painful amount of swelling. In turn, the swelling can lead to infection which in turn can cause necrosis- the death of skin cells. It is necessary to acknowledge that injecting such products requires extra care even before actually purchasing the product. To minimise the risks consumers should make sure to read the ingredients of these products, ensure that they are from a reputable manufacturer and follow the application instructions as provided in the product leaflet.

The problem is clear cut: when it comes to cosmetic treatments in the UK, there is no legislation to ensure these practices are closely regulated nor explicitly impose any sanctions on non-medically qualified practitioners that undertake such treatments in unsafe ways. This means that anyone who is not qualified can tend to such practices and procedures

without having the adequate knowledge or expertise on how to deal with the procedure itself or any adverse reactions that it may cause. Whilst consumers can seek redress following an injury, more needs to be done to prevent such injuries occurring in the first place.

Treatment tourism

A further cause for concern is cosmetic treatment tourism. It is not uncommon to read horror stories about cosmetic procedures going wrong in other countries. Back in 2018, a British woman died after having a lifting procedure in Turkey. The NHS and the British Association of Plastic Reconstructive and Aesthetic Surgery have issued warnings about procedures that take place abroad and would strongly advise against it. Although the prices may seem enticing, there are a fair amount of potential risks which are similar to the red flags consumers should look out for domestically. Further to the risks of travelling after surgery, consumers need to ensure that the treatments abroad are regulated properly, that their treating beautician/surgeon has the appropriate qualifications and that post-treatment care is guaranteed. Consumers should also be mindful of the different laws that apply to each country, especially outside of the EU, where means of redress might be fairly limited and consumer protection laws may vary.

It is entirely unacceptable that cosmetic procedures have led to the death of people and around the world. Now more than ever, these tragic cases demonstrate the need for stricter regulations and sanctions in the cosmetic industry especially in an age where such cosmetic procedures have been glamorised and are high in demand by women and men of all ages.

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We welcome all correspondence, articles observations and comments. Please email our Editor at chris.connelly@expertwitness.co.uk

Experts and Lawyers, Lawyers and Experts

by Alec Samuels

Whenever the experts are gathered together they grumble and complain about the lawyers instructing them; and whenever the lawyers are gathered together they grumble and complain about the experts they instruct. In fact there is fault on both sides. The expert, an independent specialist professional, must conform to his own professional ethics and codes of conduct and also conform to the law's requirement in the rules and conventions of litigation. The lawyer, an independent specialist professional, must conform to the legal professional ethics and codes of conduct and the rules and conventions of litigation, and must also respect the professional ethics and codes of conduct of the expert community.

The duty of the instructing lawyer

Without being patronising or pedantic, the instructing lawyer is under a duty to ensure that the expert knows, or is politely reminded of, his duty, and the relevant rules, practice directions and guidance. Where the expert goes wrong, could and should the lawyer have foreseen the possibility and prevented it happening? R v Pabon (2018): Understanding the expert's duty to the court, Dr John Sorabji, EWI Newsletter summer 2018, pp 6-7.

The duty of the instructed expert

Without being patronising or pedantic, the instructed expert is under a duty to ensure that his instructions clearly set out what is expected of him. What can the expert do? Does he have the material supplied that he needs in order to carry out the necessary investigation and analysis so as to be able to express an opinion and compile an appropriate report?

Conflict of interest

Both the expert and the lawyer should be sufficiently astute to recognise and to prevent any conflict of interest arising. The leading expert in a particular field who has frequently appeared in the cases involving his speciality may be at risk of conflict of interest. Technome Ltd v Bluecrest Health Screening, Dr John Sorabji (2017) EWI Member Newsletter 9. At the trial it emerged that the expert called by the doctor defendant in a medical negligence case was closely connected with the doctor having worked in research with him and this fact was not disclosed. The judge doubted the independence of the expert EXP v Barker [2017] EWCA Civ 63, [2017] Med LR 121.

The whole file

The solicitor will often hand a copy of the whole file to the expert. The advantages are that the expert can then see all the evidence, and better understand all the issues. The disadvantages are that in reading all the witness statements, the often conflicting statements, the expert may consciously or subconsciously be influenced by the opinions expressed by the witnesses. For example, in a clinical negligence or

personal injuries case the role of the experts is to examine and describe the injuries, and to say with what those injuries are consistent; he must avoid finding himself saying that he agrees with the assertions of one side or the other as to who was or was not negligent.

The lawyer may take the view that all the expert needs to be provided with is the opportunity to examine the claimant and to describe the injuries and to say how those injuries might have been received. No doubt when the case gets to trial the advocates on both sides will put suggestions to him as to how those injuries might or might not have occurred. But the expert will not have been exposed to any bias from the witnesses before writing his report.

Please change the report

The expert compiles his report. The instructing lawyer is unhappy about the report or some aspect of it, because it could be unhelpful or even damaging for the client. So the lawyer asks the expert to change the report. The expert refuses. He insists on maintaining his independent opinion. The lawyer can simply drop the expert. Though he will need the leave of the judge to call a new expert witness, and the judge might refuse leave because shopping around for a new and more favourable expert is discouraged. If leave is granted for a new expert witness it will probably be on condition that the first report is also disclosed. The judge will wish to know the reason for asking for an additional or replacement expert, e.g. the first expert was unfavourable – not a good reason – or the first expert withdrew – a good reason. The lawyer is justified in expecting the report to be clear, relevant, focused, logical, coherent, consistent, analytical, evidence-based, rational, reasoned. Guntrip v Cheney Coaches Ltd [2012] EWCA Civ 392. Edwards-Tubb v JD Wetherspoon [2011] EWCA Civ 136, [2011] 1 WLR 1373. Vasiliou v Hajigeorgiou [2005] EWCA Civ 236, [2005] 1 WLR 2195. Allen Tod Architecture Ltd (in liquidation) v Capita Property [2016] EWHC 2171 (TCC). BMG (Mansfield) Ltd v Galliford Try Construction [2013] EWHC 3183 (TCC). Clarke v Barclays Bank [2014] EWHC 503 (Ch). Even where leave is granted conditions may be imposed to limit the issues to be considered Wattret v Thomas Sands Consulting [2015] EWHC 3455 (TCC).

If the lawyer keeps the original expert then he will have to seek to overcome or play down his own expert, not a very promising prospect for the trial. Perhaps it would be preferable to try to settle the case than to take it to trial.

Is the expert right in refusing to change his report? If an obvious error is pointed out to him he should change the report. If adding supplemental material would be an improvement then that should be done. If the language of the report is over-technical, lacking explanation to the intelligent layman, or is ambiguous and unclear, then clarification is indeed called for. Is the request to change the report reasonable, sensible, rational, designed to clarify and to enhance the report?

If yes, then the expert should accede. Flexibility is preferable to obstinacy. Is the request to change the report in essence a request to change the professional opinion of the expert, for litigious reasons? If yes, the expert should resolutely refuse, his professional integrity is everything.

Consistent with

In a criminal case the prosecution says that the defendant intentionally inflicted the injuries upon the victim whereas the defence pleads accident; and in a civil case the claimant says that the defendant negligently inflicted the injuries upon him whereas the defence pleads reasonable care or accident. The medical expert was not present on the occasion. It is not for him to judge the credibility of the conflicting witness assertions. But he can describe the injuries, and he can say how in his professional opinion those injuries might have arisen, i.e. they are consistent with this theory and inconsistent with that theory.

The asylum seeker exhibited quite serious scars or wounds which he claimed he received under torture and was therefore entitled to asylum. The immigration authority claimed that the scars or wounds were self-inflicted or inflicted by a third person with consent and he was therefore not entitled to asylum KV (Sri Lanka) v Secretary of State for the Home Department [2019] UKSC 10, [2019] 1 WLR 1849. The medical expert acted with perfect propriety. He did not seek to assess the credibility of the asylum seeker. He kept within his field of expertise. He avoided expressing belief or opinion. He simply followed the Istanbul Protocol, The Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the UN General Assembly 4 December 2000. There are five suggested categories:

(a) Injuries not consistent with…
(b) Injuries consistent with ….
(c) Injuries highly consistent with….
(d) Injuries, such as trauma, typical consequence of….
(e) Injuries diagnostic, do not occur in any other way….

In other words, the guiding principle is that the expert is essentially giving his expert opinion on the degree of consistency or otherwise with the various possibilities of how the injuries might or might not have occurred.

Over-zealous

The expert must be careful, especially in a criminal case, especially when called by the prosecution, not to be over-zealous. Forensic evidence relating to DNA, and to gunshot residue (Barry George, the Jill Dando case), and to nitro-glycerine on the hands (The Birmingham Six), and to an earprint (Dallagher), and to eccentricity and physical proximity to the scene of the death (Christopher Jefferies), may be relevant and admissible, but their significance should not be exaggerated. See Under the Wig, William Clegg QC,

Canbury Press, 2018. Although the expert may form a firm view of what happened he should also consider the alternative possibilities because those possibilities may be put before him; and the lawyer should remind him of this R v Arshad [2012] EWCA Crim 18.

Disclosure
The lawyer will prepare the list of documents to be disclosed, such as police and medical notes, witness statements, photographs, electronic documents, documents which are reasonably and proportionally relevant to the dispute. Privilege from disclosure may be claimed for good reason. If privilege is relevant then the lawyer has the responsibility for observance ACD (Landscape Architects) v Overall [2011] EWHC 3362 (TCC). The expert will want to be sure that he sees all the documents relevant to his role.

Challenge
The expert must expect challenge. He must be robust. He may not like challenge. He is the expert, qualified, knowledgeable, experienced, an authority, respected, a person of position and dignity. He is not accustomed to challenge. However in the courtroom it is the judge and the lawyers who are in control, they are the experts in the law and the legal procedures.

The expert should always carefully prepare his report. If because of time or resources or inadequate fee he cannot do a "proper job" then he should refuse the instruction. In meeting his opposite number he should make every effort to agree or to narrow the issues of disagreement to a minimum. The expert often dislikes the cross-examination process, so he might suggest to the lawyers the concurrent expert evidence procedure, which can be more of a roundtable conversation. The expert should simply answer the questions put to him, as shortly and intelligibly as he can. If he feels that he is being prevented from saying what he considers vital to his evidence he can always seek the advice and assistance of the judge, who will generally be sympathetic. But the advocate may have a perfectly good legal reason for not raising a particular matter.

Of course the lawyer has the duty to acquaint himself so far as possible with the technicalities in the case, at least so as to be able to draw out the main issues in the case in the course of the questioning. Sometimes to the expert the question put by the advocate lawyer is seemingly ill-informed or stupid or silly. The expert must keep calm and simply and patiently explain the position. Anger, contempt, sarcasm, superiority, all such reactions can be counterproductive, and are to be avoided. The judge, an intelligent layman, needs to grasp the essence of the expertise; the jurors, ordinary layman, need to come to grips with the bare essentials of the expertise.

Pictures as well as words
The victim was found dead at the bottom of the stairs. The prosecution alleged that the defendant had punched the victim in the face and fractured her cheekbone and as a result she fell down the stairs and died. The defence pleaded accident. A prosecution witness, an expert in bio-medical engineering and kinematics, gave her evidence and opinion as to how the death occurred, and used a computer generated animation to illustrate and to support her evidence. This evidence was admissible, because the computer gave a visual picture of her evidence, not random generated pictures R v Metcalfe [2016] EWCA Crim 681, [2016] 2 Cr App R 21.

The ultimate issue
The expert may, and indeed should, express his medical, scientific and professional opinion on the matter calling for his expertise. But he must not go further and express an opinion on the legal issues, as these are matters of law for the lawyers. Straying inadvertently from scientific fact to pronouncement upon culpability and liability is easily done, and must be avoided by the expert and prevented by the lawyer.

In a rape and murder case the defendant had made a confession, but he called experts to say that his confession was unreliable. Expert A said that the defendant fulfilled the diagnostic criteria of an alcohol-related neuro-developmental disorder, explaining why the confession might have been false: admissible. Expert B said, "trenchantly asserted", that the confession was unreliable and should not be relied upon and advanced a supporting theory: inadmissible. It is not for the expert to give an opinion on the ultimate issue for the court, namely is evidence admissible or not, and is the defendant guilty or not Pora v R [2015] UKPC 9, [2016] 1 Cr App R 3, paras 23-34.

The decision
Having given his evidence, and after the opposing expert has given his evidence, the expert will normally wish to be released from the rest of the hearing in order to get back to his "proper job". He is not interested in the result of the case. Though in due course no doubt he will wish to read the judgment, or at least that part of it dealing with the expert evidence, and any comments upon the performance of the expert witnesses. We are all learning from experience all the time.

Conclusion
So for the expert and the lawyer "each to his own last". The system requires co-operation, collaboration, mutual understanding, mutual respect. Everybody must follow the legal rules and the professional ethics. The lawyer will always have difficulty in understanding the technical elements in the expertise of the expert, and in helping to render the expertise intelligible to the laymen involved in the process. The expert will always have difficulty in conforming to the legal process. Searching for the truth carries a different meaning in medicine, science and forensics to searching for the truth by the lawyer in the courtroom.

Provided that he has adhered to the highest standards and done his professional best the expert should not be concerned if his evidence is rejected. Sometimes the judge will even reject the expert evidence from both sides. Experts and lawyers have played their part in ensuring a fair trial Maitland-Hudson v Solicitors Regulation Authority [2019] EWHC 67 (Admin), [2019] 1 WLUK 207.

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Further reading

A particularly authoritative, logical and lucid account of the law and practice relating to expert evidence is to be found in the annual lecture given to the EWI by Sir Rupert Jackson in 2018.

The servant of two masters: How can the expert witness spare the circle of serving both his client and the court?, Peter Caillard (2019) 26 The Expert Witness 79-81.

For the medical fraternity see The Importance of Expert Evidence, Dr Rob Henry, Medical Director Medical Protection Society, The Expert Witness (2018) issue 24, 15-16.

What is the problem with amending an expert report?, Giles Eyre (2019) 26 The Expert Witness 66-67.

Ethics and the expert witness, Martin Burns (2019) 26 The Expert Witness 72-73.

EWI Code of Professional Conduct and Complaints Procedure.

We welcome all correspondence, articles observations and comments.
Please email our Editor at chris.connelly@expertwitness.co.uk

Report from the Expert Witness Institute Singapore Conference

Held at the Grand Copthorne Waterfront Hotel, Singapore 15th October 2019

Opening Remarks
Professor Leslie Chew – President of the Expert Witness Institute Singapore Branch and former Senior Partner and Consultant of Withers Khattar Wong. He is now Dean of the School of Law at the Singapore University of Social Sciences. He gave a kind welcome to everyone and also emphasised that this was the first conference to be held by the branch since its establishment on 19th May 2019. He expressed his thanks to EWI in London and Sir Martin Spencer (Chairman) for their support.

Patron's Message
Sir Vivian Ramsey – former UK High Court construction judge and current justice in the High Courts in Singapore referred to the need for experts in the litigation process. He said that there was increasing complexity of litigation matters and that experts were therefore pivotal in the litigation process. Many cases need technical input. There was a high quality of expert evidence. He proposed the need to have a register so that experts can be easily found by the judiciary and also counsel in the litigation process. Experts needed to restrict themselves to their own area and to have a specific expertise and the ability to help a court. Often there are unclear questions to the expert and litigation solicitors should try and ensure that these are as clear as possible. Care should be taken in expressing the views of others. It must be clear what you bring to the party. Be very careful of experts reports which have been drafted by the lawyers.

Gregory Vijayendran - Key note speaker for this conference and is also the President of the Law Society of Singapore, he made reference to the Woolf Reforms and the need to ensure that litigation is done efficiently and at a cost commensurate with the case in question. He went on to discuss the use of Single Joint Experts, where a sole expert is either chosen by both parties or by the judge. He discussed the benefits of reduced cost but lamented the fact that the expert opinions were not normally challenged in these cases. He emphasised that the use of the adversarial process in common law systems meant that opinions were properly tested. He also looked at the position where undue pressure was exerted from the instructing solicitors and the dangers that this posed. Sometimes experts can become more extreme than their instructing parties, which was felt to be regrettable. He continued that there were situations in some Asian markets where there was excessive use of experts which then incurred excessive costs.

Session 1 – Expert Evidence in Singapore
The first discussion session was chaired by Derek Tan, Managing Director of Stoa Law in Singapore. He was joined on the podium by Professor Leslie Chew, Ms Gho Sze Kee, LCC manager of the Shipowners' Club, Singapore and Tan Teng Hooi, Associate Professor and Head of the Building and Project Management Programme at the Singapore University of Social Sciences.

As the need for experts increases, long-standing concerns about the independence of party-appointed experts and increased costs naturally arise.

One of the great strengths of the Singapore legal system is its willingness and ability to adapt and change with the times. The Court decision to move from a paper-based system to an electronic system is an example of this.

At present, there are proposals that will change how expert evidence will be adduced in proceedings in the Singapore Court. The most significant of these proposed changes would be the move away from party-appointed experts as the default position and the move towards having a joint-expert as the default way of adducing expert evidence.

Assuming the proposals are not implemented at the time of the Conference, the session is intended to: Review the pros and cons of the current system; Discuss the issues that are likely to arise if and when the proposed changes are implemented; and Encourage an exchange of ideas on how pitfalls can be avoided and how the system can be further improved.

Assuming the proposals are implemented at the time of the Conference, the session is intended to:
Review the pros and cons of the previous system;
Discuss the issues that have arisen and/or are likely to arise from the changes; and Encourage an exchange of ideas on how potential pitfalls can be avoided and how the system can be further improved.

Professor Leslie Chew provided information on the definition of an expert drawing on the Singapore Evidence Act, section 47. How do we know who is a good expert? The proposal for an Accreditation System was discussed. The training and education of experts in the legal process was considered mandatory so that experts can play their part correctly.

Session 2 – Developments in Expert Evidence in the Asia Pacific

The second session discussion was led by John Gibson – an international shipping expert at Brookes Bell. He spoke of situations where an expert can raise the cost of litigation. Drew James spoke about the Court Codes (or rules for experts) at the Federal Court in Australia (Note GPN-EXPT by JJB Allsop dated 25th October 2016) and at the state level (e.g. New South Wales Consolidated Regulations – Uniform Civil Procedure Rules 2005, Reg 31.23 Code of Conduct and 31.25). James Monteiro drew attention to the Malaysian experience of using experts, including situations where judges have taken it upon themselves to be the expert.

John Battersby, a Construction Expert Quantity Surveyor based in HK has worked throughout Asia. He considers that methods of measurement can be very confusing and there needs to be more generally adopted standards. There is a need for rules for practising experts and training to be an expert witness. His experience was mainly working as a party-appointed expert. Finds the experts' meeting very useful and it can lead to clearer focus on the issues. 'Hot tubbing' very good for resolving delay problems. He finished by drawing on the need for bringing on new talent.

Paul Aston of HFW gave the lawyers' view. Experts are there to help the litigation process and this should be remembered at all times. He spoke about the principles behind the Ikarian Reefer requirements.

❖ Phillips v Symes (Costs No 2) [2004] expert's report lacked objectivity and common sense. Could result in additional costs.

❖ Independent reasoning needed by both experts and lawyers.

❖ Experts who come back after the experts' meeting and have a different view – may have been nobbled by their lawyers so that they cannot concede a point.

❖ Need to have experts in computational fluid dynamics to provide experience and knowledge in that area.

❖ Sometimes the young expert has better knowledge in an area.

John Gibson – Obligations to the expert are the same irrespective of the size of the claim. Expert needs to have first-hand knowledge of the instances in question.

Expert's role of mediation. Although a very strong requirement for experts, however it requires caution as the expert can be asked to take on the role of an advocate.

Session 3 – Expert Evidence in International Arbitration

Iain Potter, Director of Matson Driscoll & Damico Ltd, a firm of forensic experts and accountants Singapore led the discussion. Ms Christine Artero, an International Arbitrator with The Arbitration Chambers (Singapore) and Fountain Court described her experiences with international arbitration in Asia. Mr Stephen Cheong, Director of Morgan Lewis Stamford LLC, Singapore told the story of a 6th Avenue flooding of box drains that led to the flooding of an underground car park with a number of vintage cars. Case done by 'hot tubbing'. This was proposed by the Judge and accepted by both parties. The two experts asked each other questions and learnt a lot from the experience. Make sure you have an expert who has the ability to hold his own in a hot tub. Ms Charis Tan, Director of International Arbitration at DWF – described the Michael Huang Protocol. Structure to how hot tubbing is done. Usually used for expert witnesses, not usually for factual witnesses. Take each issue in turn, e.g. what is the view on the price of gas in 2000. Three main methods – Arbitrator needs to be well prepared and knowledgeable on the subject as he is going to be asking the questions. Arbitrators normally get the claimants' experts to go first. Arbitrator will then ask a question of the claimants' expert followed by the defendants' experts. Then can rephrase the question to the claimants' expert again.

Alternatively, this can be achieved by a panel discussion with each person as long as each person is as keen to provide their view. Counsel can jump in at any time and ask questions.

Finally, the claimants' expert is allowed to ask the defendants' expert questions. Each can challenge the other.

The final method is becoming increasingly proposed. Efficient – all angles on the point are expressed at the same time.

Effective – Most people are unlikely to be misleading in front of their professional peers.

Credibility – Important at all times.

Other points that were discussed were:

❖ No protocol on how the hot tubbing should be undertaken.

❖ Hot tubbing is not always liked by Judges and arbitrators as it requires them to be fully informed and knowledgeable on the subject.

❖ The Joint statement should produce a very outcome to the hot tub.

❖ Relationship between experts and litigants is a very bad idea.

❖ Language – very difficult if the expert does not speak English as their mother tongue.

❖ Use of law experts on matters of foreign law.

❖ Discovery. What is privileged in arbitration?

❖ Instruction can be released but draft reports are privileged. Not a problem in international arbitration.

❖ Experts should be comfortable in their own skin.

Just turn up and ensure to be seen around on the circuit.

Session 4 – Expert Evidence – Where it is now and where is it Heading?

The final session was a panel session led by Derek Tan and involving John Gibson, Iain Potter, and Dr Thomas Walford, CEO of Expert Evidence. In this segment of the Conference, we assemble the moderators of the earlier sessions and bring to bear the combined "wisdom" of the earlier sessions, to first undertake an overview of where expert evidence is today and second, to do a little crystal-ball gazing to perhaps foreshadow what is in store for expert evidence in the era of disruption. They will be asked to touch on aspects of expert evidence which may be on our minds but which may not be part of the current discourse.

Essentially, this session invites the participants to pose questions, even those without answers, so as to encourage the community of experts, and users of expert evidence, to ponder over what might be new but urgent issues. How might technology weigh in to enhance the role of expert testimony in dispute resolution? Or will technology disrupt the expert evidence space altogether; will there be a need for expert evidence in the conventional sense? Could, for example, expert evidence be replaced by Artificial Intelligence?

Concluding Remarks

Thomas Walford drew attention to the case of Kenney v Cordia Supreme Court [2016], which specifically identified the expert's role in connection with: The admissibility of evidence – Four considerations should be taken into account here:

❖ whether the proposed skilled evidence will assist the court in its task;

❖ whether the witness has the necessary knowledge and experience;

❖ whether the witness is impartial in his or her presentation and assessment of the evidence; and

❖ whether there is a reliable body of knowledge or experience to underpin the expert's evidence.

❖ The responsibility of a party's legal team to make sure that the expert keeps to his or her role.

❖ The court's policing of the performance of the expert's duties

❖ Economy in litigation

He also drew attention to The Dream Star case collision with Meghna Princess on 16th May 2014 and the Murder trial of Oscar Pistorius regarding the case of Reeva Steenkamp in 2014. In both cases the expert with a duty had confused the position with also having different obligations to others. The court took a very poor view of this and the practice should be avoided.

Below, From left to right: Chris Easton, Associate Professor Tan Teng Hooi, Derek Tan, Professor Leslie Chew, Iain Potter, John Gibson, June Tan and Dr Thomas Walford.

The conference was concluded by **Dr Thomas Walford,** who gave the closing remarks. He wanted specifically to thank our sponsors, without whose contribution we would not have been able to hold this conference:
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If any reader would like to feature in the Asia Pacific database of Expert Witnesses - please contact **Charlotte Hodgson**
E-mail: charlotte@expertwitness.co.uk

Experts wishing to receive details of the conference to be held late summer/autumn/fall 2020 to be held in Singapore - please email **June Tan** at
Email: secretariat@ewi.org.sg
Early registrants will receive an early bird offer.

Above, From left to right: Luke Steadman, Dr Thomas Walford and Nick White.

Above, From left to right: Professor Leslie Chew and Dr Thomas Walford
Below, Lawrence Seah and HT Ong

Practical Completion – Essential, but Difficult to Define

by Jacki Saunders and Leigh Belasco

For the parties to a building project, achieving Practical Completion (or "PC") is both a key objective and a commercial imperative. As the term implies, practically (if, not always actually), it means that the project is finished, and the Employer is able to take possession of the site and use the property which he has funded. For the contractor, typically, it means that he no longer has responsibility for the site and the property, no further risk of damages or incurring extra expense for late completion, he can re-deploy his personnel and supply chain elsewhere and pursue payment of his final account. Because, PC is a matter of such commercial importance, it has always been an issue liable to cause disagreement or dispute on a project.

There are many standard and bespoke forms terms and conditions of contract in which the authors have attempted to define PC, but a fail-safe definition still appears to allude the construction industry. The Court of Appeal last considered PC in 1969, in Westminster Corp v J Jarvis & Sons. Salmon LJ suggested that PC meant "…completion for all practical purposes, that is to say, for the purposes of allowing the employers to take possession of the works and use them as intended".

These words have been interpreted differently by various parties, depending often upon their motivations at the time. It is commonly argued that if there are patent defects in the works (unless minor) the project is not at PC. However, deciding whether or not the work is finished and whether any defects are minor or "trifling", is always where the problems arise.

50 years later, PC has again been considered by the Court of Appeal. In Mears Ltd v Costplan Services (South East) Ltd [2019], Coulson LJ reviewed the case law applicable to PC and this can be summarised as follows:

- Practical completion is easier to recognise than define;
- Unless there is a specific contractual definition or condition(s) precedent, practical completion is a matter for the certifier;
- The existence of latent defects cannot prevent PC. Clearly, if the defect is latent, nobody knows about it so it cannot prevent the certifier from concluding that PC has been achieved;
- In relation to patent defects, there is no difference between an outstanding item of work (that is, one that is still to be completed) and an item of defective work that requires to be remedied;
- On a practical level, works must be free from patent defects, other than ones that can be ignored as 'trifling'. Whether an item is 'trifling' is a matter of fact and degree, to be measured against the purpose of allowing the employer to take possession of the works and to use them as intended.
- If the works are capable of being used for their required purpose, minor deficiencies should not prevent the certifier issuing a PC certificate
- The fact that a defect cannot be remedied does not mean that PC cannot be achieved.

The matters above will, as ever turn on the facts. Coulson LJ noted that one factor to consider was 'the purpose of allowing the employers to take possession of the works and to use them as intended' (re Jarvis). For example: if there are to be fit-out works following the completion of the project, PC may be certified despite minor outstanding or defective items. This is justified because rectifying those defects may not prevent the fit-out works from proceeding.

Disputes as to whether or when PC has been achieved are all too frequent and notwithstanding the further clarifications provided in Mears v Costplan, it is probable that these will continue. Whilst the judgement offers some clarity, it does not, in our view assist in the perennial problem of specifying what is required for PC. This is always project-specific and is, in the first instance, a matter for the contract drafting stage.

Practical steps for a contractor

There are several practical steps a contractor can take to mitigate the risk of failing to complete, with all the damages and loss and expense this involves. Examples of such steps include:

Understanding the requirements in the contract

It is common practice for standard contracts to be amended (and for bespoke contracts to include) a definition of PC accompanied by various conditions precedent, for example: specific documents or information required before PC such as as-built drawings, executed collateral warranties, performance bonds and guarantees, provisions of spares, commissioning results etc. These conditions may be in the Preliminaries, the Specification, the Contract Conditions or (often), any combination of these.

Prior to entering into the contract, all the contract documents should be carefully reviewed by the contractor to ensure that the specified conditions precedent are understood and can be met. If bespoke conditions relating to PC are included in the various documents, they may often be contradictory or ambiguous. The contractor needs to ensure that any

such conditions precedent are properly drafted so that it is clear from the wording when PC is achieved. Clarity is essential – can PC be referenced to specific tests, measurements or compliance with a specification or a clear state of affairs?

Further, it is vital that any interaction between main and sub-contracts in respect of PC are clear and known. There are often clauses that state that the sub-contractor must comply with terms of the main contract; therefore, if this is the case, any main contract conditions that apply to PC must be considered.

Ensuring compliance by the supply chain

It is to no avail if the contractor takes steps to meet the conditions precedent, only to find that it has not imposed the same on its supply chain. It is all too common to find at the end of the project that sub-contractors who are long finished, have not provided (for example) a collateral warranty and consequently, PC is being withheld.

All conditions precedent to PC should be included in the supply chain sub-contracts. For example, if it is a requirement that specific test results are provided for certain items of equipment, the equipment supplier must be similarly bound to comply as the contractor. Similarly, if certain sub-contractors are to provide collateral warranties, this requirement must be included in the sub-contracts.

Managing the process

It is essential to have detailed practices and procedures in place to ensure that all conditions precedent are met. It is frequently a requirement to give certain contractual notices prior to PC. Contractors need to ensure that these timescales are clearly identified in the programme and highlighted to the relevant personnel. It is also essential to diligently undertake the necessary 'administrative' procedures to ensure that all necessary documents, guarantees and collateral warranties are provided. Last, but not least, self-evidently the conditions precedent usually come into play towards the end of the project when time is at a premium. The conditions imposed may take additional time and contractors should ensure that specific time is allowed and identified in the programme.

In conclusion, we may not yet have a fail-safe definition of PC but, we are in an economic environment where it remains of vital importance to:

- Understand the obligations in the contract relating to PC;
- Ensure proper and binding engagement of the supply chain in respect of those obligations; and
- Diligently manage the timing and fulfilment of the contractual requirements to achieve PC.

It is, we suggest, vitally important to specify exactly what PC requires (be it overall or for sectional completion) and this starts at the contract drafting and negotiation stage.

Many thanks to authors Jacki Saunders and Leigh Belasco at Belasco Associates.

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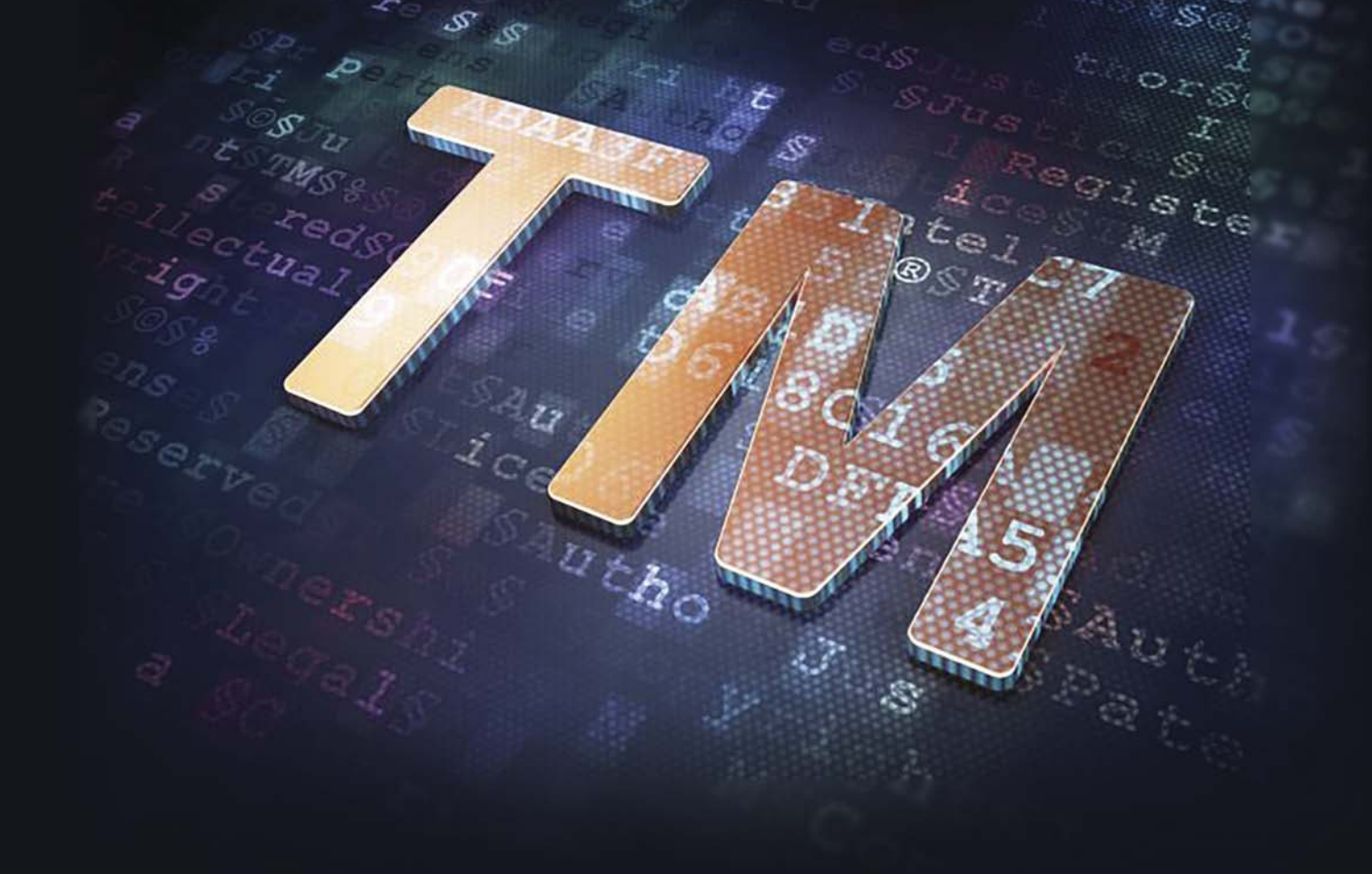

Churchill Gowns Told to "Fight on the Beaches"

by Julie Hamilton

Lord Doherty, sitting in the Outer House of the Court of Session, last week issued his judgement in the case of The University Court of The University of St Andrews v Student Gowns Ltd. An intellectual property cause in which St Andrews University [the University] seeks an interdict against Student Gowns Ltd [Student Gowns] to prevent them from infringing their trademark for the signs "University of St Andrews, "St Andrews University" and "The University of St Andrews". It also seeks to stop the company from passing off its gowns as those of, or authorised by, the University. Student Gowns – part of the Churchill Gowns group – denies the claim and argued that the case had been raised in the wrong country or jurisdiction, favouring an English court for the hearing. The decision relates to the preliminary issue of jurisdiction only.

Background and Facts

Student Gowns is a business which is incorporated in England and Wales and has its registered office in London. It seeks to disrupt the UK academic gowns market, which is currently dominated by the Ede & Ravenscroft group. At the beginning of the academic year 2018, in pursuit of this aim, it sourced 200 gowns to sell to St Andrews' students. It is alleged by the University that the gowns were marketed on its website using the protected signs. The company also attended a gown sale at the University in September 2018 where they marketed and sold their gowns to students. It is claimed by the University that they represented to the students that the gowns were made to University of St Andrews' specifications. The University maintains that this marketing and sales activity has confused undergraduates. According to the University, the gowns were of inferior quality, and the infringements damaged the trademark and its reputation. Two hundred fewer gowns were sold in the 2018 academic year than usually were, a reduction that could be, in part, attributed to the sale of the alternative gowns. Their claim was based on trademark infringement and the passing off of these gowns as authorised by the University.

Jurisdiction

In the United Kingdom, as with all EU states, a defender is usually sued in a court in the country that he resides, or is domiciled. If the University had followed that rule, then the case ought to have been raised in England and Wales. However, the person that raises the claim may also choose to do so in a court in the place 'where the harmful event occurred

or may occur'. Harmful event encompasses 'both the place where the damage occurred and the place of the event giving rise to it'. It was argued for the University that in each of the claims that it had made the harmful event occurred in Scotland.

Harmful Event

In civil cases, it is usually relatively straight forward to ascertain where the harmful event has occurred. An accident or breach of contract, for instance, ties parties to a specific location and a specific court. Where the harm has occurred in an intellectual property dispute, however, is often harder to ascertain.

The Decision – Passing-Off

Passing off is a common law wrong designed to stop businesses from passing off their product as that of another company, or to stop them claiming that their product is associated with another company. To make a claim you must also show that the goodwill of the company has been damaged by this action. The harm, therefore, is the impact on the goodwill and it is reasonably settled law that the place of damage in a passing off case is the place where the goodwill exists. Lord Doherty accepted the University's argument on that point.

The Decision - Trade Mark Infringement

Registered trademarks are protected by statute, and trademark infringement is pursued by reference to that. In the 2012 case of Wintersteiger AG, the European Court held that in relation to infringement of trademarks, the place the damage occurs is the place where the trademark is registered. The question raised by parties in the Court of Session was whether that judgement helps either argument as the trademark was registered in the UK – which encompasses both disputed jurisdictions.

Lord Doherty found that a trademark registered in the UK means that each of the jurisdictions in the United Kingdom constitutes a place of damage. The University could choose any of those places to raise the claim. With the largest number of UK students at the University coming from Scotland and most students who buy gowns doing so once they have arrived in St Andrews, the online advertising could be said to be directed largely at students who would be in Scotland when they buy. Opting for Scotland was a valid choice for the University in this case.

Nonetheless, he could see some strength in the argument that applying the approach in Wintersteiger AG where the disputed jurisdictions were both in the UK might lead to a situation where the case was raised in a court in Scotland, for instance, but all the material damage was sustained in one of the other UK jurisdictions. In that case, the result might be that the court hearing the case did not have a close enough connection with the dispute.

What does this mean?

From the outset, Student Gowns put forward a case that was much broader than the facts required for the Court to make a decision. Keen to break into the academic gowns market the Churchill Gowns Group have issued letters before action to Ede and Ravenscroft and several UK universities challenging their anti-competitive market activities. At the time of the hearing, however, no court proceedings had been issued. They argued that the interdict action raised by the University was not to protect goodwill but to thwart this bigger challenge. They wanted the action to be heard in England and Wales to streamline the potential number of judgements and hearings as part of their wider strategy. Ultimately this was of no importance for the jurisdictional points upon which the Court had to decide.

By challenging jurisdiction in this way they have reaffirmed some well-established rules, but in doing so, they have left the door open to a potential challenge to Wintersteiger in intra-UK jurisdictional debates in the future. Although it is for the claimant to decide where to base jurisdiction, it is clear that in trademark disputes in the UK a close connection to the disputed issues will also feature heavily in considerations

Engineering Risk Investment Consultancy Invests £120k in Office Refurb to Launch Training Division

Work has been completed on a £120k office refurbishment project at the headquarters of risk management consultancy Finch Consulting based in Ashby de la Zouch.

The investment has also provided state of the art training and conference facilities. The launch of the training service is expected to increase revenue and create new employment opportunities.

Finch is located on the Ivanhoe Business Park in a modern but traditional style office building and consider this investment a vital part of the company's overall growth strategy to bring its brand and company values to life from the moment people enter the building.

Blueprint Interiors, which is also based on the Ivanhoe Business Park completed all the design and installation works to create the new look for the Finch offices which have been affectionately named 'The Nest'. Brand design elements were created by the Cafeteria, and installed by Hardy Signs, who also supplied an 86" CleverTouch screen for the new training facility.

In creating the new workplace, an important objective was to ensure the design encouraged Finch's widespread consultants, who mainly work remotely, to come to 'The Nest' to collaborate, innovate, share ideas and engage together on a more social basis.

The ground floor was previously a myriad of offices and meeting rooms. This space has been opened out to provide hot desking facilities for the Finch community to hold informal meetings with large project benches, focus desks, booths, and touchdown areas.

Ensuring the Finch community enjoys being at work is also a key ethos, therefore plenty of socialising opportunities were factored into the design through the provision of comfortable relaxed seating areas, and an open plan café including a pool table.

*Photo above: L-R **Andrew Millington** – Finch Consulting – Finance Director. **Janine Watterson** – Finch Consulting – Operations Director. **Dom Barraclough** – Finch Consulting – Managing Director and **Chloe Sproston** – Blueprint Interiors – Creative & Commercial Director*

Hello.
We are Finch Consulting

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Our combination of services makes us unique, and a leading provider to clients in legal, financial and insurance, food and drink, leisure, manufacturing, energy and waste sectors.

At over 25 years old, our reputation is stronger than ever. In that time we have built a legacy of trust and confidence – our clients value the depth and quality of our insight and we take great pride in delivering intelligence and results that they have real faith in.

They tell us that this reassurance is priceless.

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+ Asbestos
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Birmingham
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Edinburgh
Edinburgh Princes Street
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EH2 2ER

Sheffield
The Balance
2 Pinfold Street
Sheffield
S1 2GU

+44 (0) 1530 412 777
enquiries@finch-consulting.com

finch-consulting.com

Commenting on the fit-out, Andrew Millington Finance Director said, "Finch Consulting continues to invest heavily in creating a brand identity which accurately reflects our culture, entrepreneurialism and expertise as risk consultants who inspire 'Engineering Confidence.' – a strapline that is used to underpin our market positioning."

He added, "From the outset it was clear Blueprint Interiors understood the rationale for our investment in our office-fit out. The initial design meetings were very creative, the design proposal was superb, and the install was completed by Blueprint Interior's own team of very competent and professional contractors who were very attentive to the finest detail. The project was also finished as promised and ready for us to reveal to all of our colleagues who were at Charm, our annual conference, which we were able to host for the first time at The Nest."

Blueprint Interiors Creative and Commercial Director, Chloe Sproston, added, "The delivery of this project had to be meticulously planned around the need for Finch to remain fully operational throughout the eight week period of works to ensure staff were relocated with minimal of disruption to their daily routine. We are delighted that the overall, finished project has delivered a range of work spaces that support Finch's wellbeing initiatives and enables the Finch community to share, escape, focus, explore, create and socialise together."

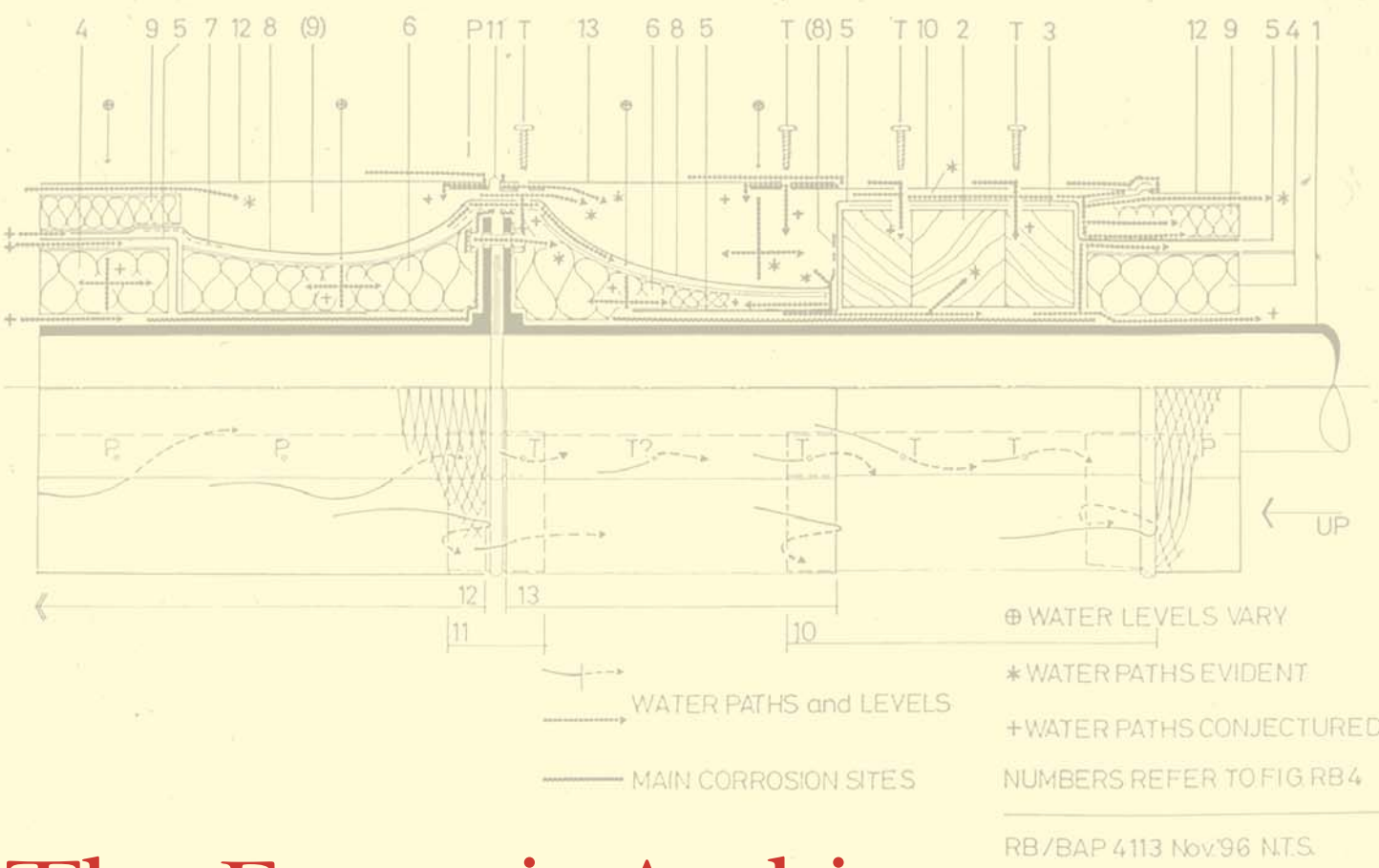
The Cafeteria's Senior Designer, Tom Peet, said "Finch have such a strong understanding of their brand and the significant role it has in presenting their offer to the world. But it's just as important to present that brand message internally as it is externally. The interior graphics created for The Nest help to build a collective understanding of the mission and values that ultimately drive Finch forward."

Tom Hardy, Operations Director at Hardy Signs, also added "Hardy Signs is delighted to have been involved in this stunning project for Finch Consulting, a company with whom we have a long-standing relationship. As a company, we aim to transform spaces for our clients. The results offer a great example of just what can be achieved through signage, wall graphics and branding from Hardy Signs."

Its unique position enables Finch engineers, lawyers, specialists, ex-regulators and consultants, to offer world class advice, investigation, training and representation to its clients in a wide range of market sectors, including legal, financial and insurance, food and drink, leisure and entertainment, manufacturing, energy and waste, and defence.

Finch Consulting provide expert witness, legal counsel, training and consulting services to clients in the legal, financial and insurance, food and drink, leisure and entertainment, manufacturing, energy and waste, and defence sectors.

Established in 1991, Finch has a turnover of over £4m and employs a team of 33 personnel who work from locations across the UK as well as the company's headquarters located at the Ivanhoe Business Park in Ashby de la Zouch.



The Forensic Architect

by Roger Bloomfield, Dipl Arch RIBA MAE

It ought to be widely known that architects are inveterate generalists. My earliest recollections of and about architecture are of the everyday picturesque and of physicality, of brick and iron, cracks and rust in concrete, of what buildings are made of and who made them, the river and the towpath, and what may be the sense of having an arcade on one side of a street and not on the other. This essentially holistic view has continued through contemplation of apprenticeship to a carpenter, early studies in structural engineering, architecture school, practice and teaching until, by professional accident and the passing of time, increasing involvement in disputes as an expert. And then, one morning, I found myself at a business breakfast with a card at my place-setting announcing me as 'Forensic Architect'. For present purposes, then, the cap fits.

I have been engaged in two main types of forensic activity. On one hand, discovering and ferreting among documentary and other records to produce and explain historical narrative and, on the other, systematically having eyes and hands on the fabric of buildings, recording, interpreting and presenting what is found.

Modelling information

Most buildings come first to life on paper, or on screen as diagrams and sketches, or in three-dimensional miniatures of widely varying realism. This skill, of descriptively modelling things that do not yet exist is a particular attribute of architects and can seamlessly lead through multiple iterations to detailed representations of complex structures integrating the contributions of extensive teams of other professionals whose knowledge bases far outreach all but the most superficial grasp of architects. Architects have had, and commonly still do have the leading responsibility for the functional outcome, and it is not surprising that co-ordination and integration appear as key issues in disputes about design, project management and the communication of information to builders. Forensics here are largely a matter of documentary study, not only of drawings and specifications but also of design team management, of who said what to whom and when. Here, forensics leads to documented history, sometimes peppered with justified opinion and careful open speculation. 'Justified' and 'careful' not least because contradictory and new opinions and facts may be expected to emerge and experts are to maintain sufficient openness of mind to accept and respond that.

Forensic reverse engineering

It seems to me sensible to see that since the production of buildings is 'engineered' in this way then, when things go wrong, there is much to be gained from reverse engineering the outcome in order to identify the key moments, participants, and actions that have caused, or failed to avoid it. That too can engage a team of professionals, sometimes also requiring the forensic participation of specialists in

areas such as adhesives, geology, industrial chemists who understand long-chain polymers and, once, the managing director of a manufacturer of warehouse floor screed hardeners who took my urgent plea for help as an excuse to avoid Christmas with his in-laws to plough through his archives and confirm that it was his firm's material that I and a chemist had seen revealed by a scanning electron microscope. The culprit in that case turned out to be a panicky sub-contractor who, when he was not laying hospital floors, operated as a hairdresser in Portsmouth. If he is reading this...

Thus, whereas records of a project can be read from its inception, physical reverse engineering starts with what can be seen, sampled, tested and recorded of what is on the surface, and proceed through successive layers and elements to similarly reveal defective roofing slates, piles slipping into peat under their own weight, failure to take the detailing advice of specialist curtain wall suppliers, installation of damp proof membranes up-side-down, failure to earth electrical supplies, incorrect maintenance of perfectly good building fabric and, as I realise looking back, a thousand possible reasons why it has not been surprising that things have gone wrong and require remedy or, as I have preferred, are going wrong and need to be avoided.

Spots, or measles.

Proportionality and the justification of possibly ruinous amounts of time and money present difficult questions for an expert examining complex or extensive buildings. A barrister helpfully put it to me that one of the first objects of investigation should be to determine whether the case was of spots or of measles, a localised matter, or infection of a whole body or an entire population, a question that is often bound to arise eventually, for example in establishing quantum. This goes to sampling, a process with forensic discipline of its own which should aim to reasonably satisfy everyone who, for whatever reason, has not had direct access to the same facts. Every dog wants at least to see the rabbit. It is difficult, and often unwelcome, to admit to having insufficient evidence and we are required to consider and be open about that too. Moreover, we must be able to accept or acknowledge both counter arguments and the possibility that what we have said is wrong or otherwise irrelevant as, for example, when I realised that for all my surreptitious research into the fee-charging arrangements of distinguished architects, I should foreshorten a line of questioning that would eventually reveal my inability to say what a particular architect would have charged in a particular case.

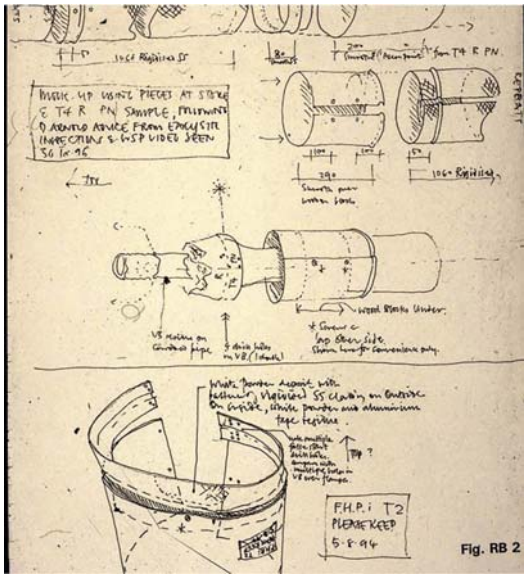
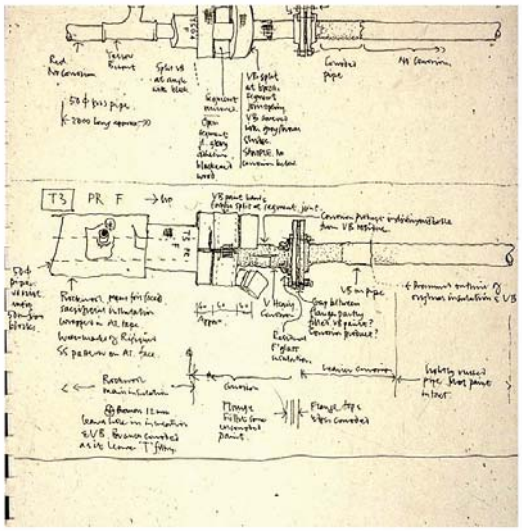
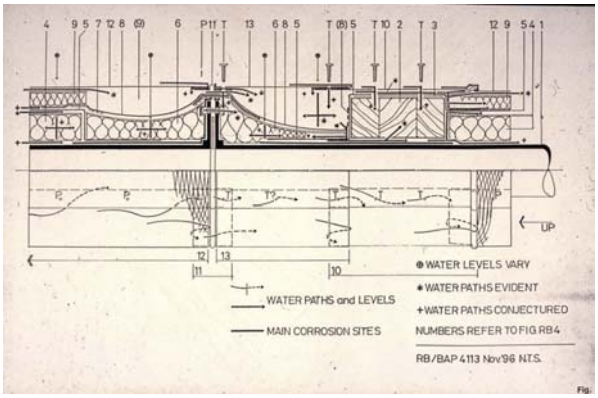
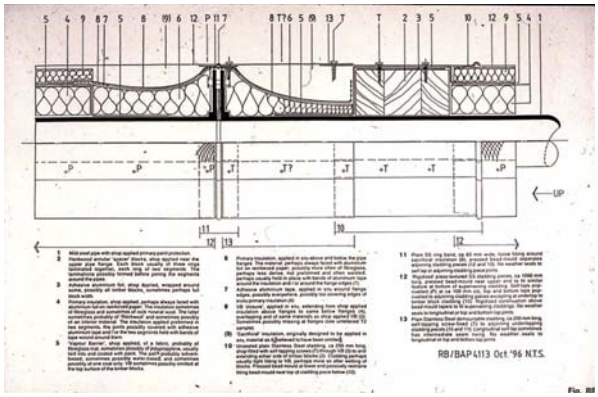


Fig. RB 2

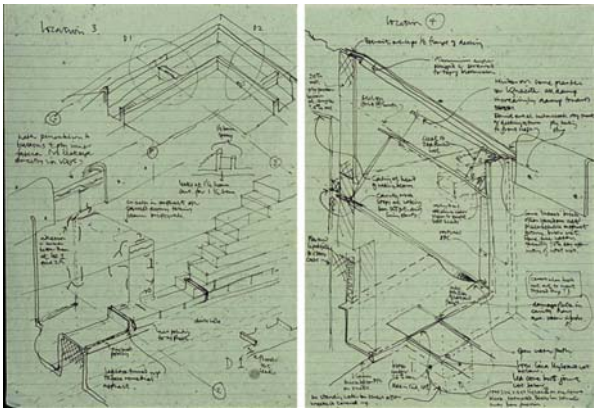






Opposite, Illustration: Drawing made on site of opening-up to reveal water paths through defective damp proofing, supported by photographs at each stage.

Process and purpose.
Forensics ought to underlie many activities that may have consequences. A forensic approach to devising the design, specification and monitoring of tower block cladding, a type of project in which I have been engaged, ought to have fire and maintainability at the top of the list of key factors at every stage. In Grenfell, and increasingly after the Bolton 'Cube', this is an arena of intense forensic scrutiny and public interest. In the field of dispute resolution, however, forensics is about the gathering of evidential information in the absence of which there is no relevant expertise to be applied and, perhaps, little justice to be obtained. We do this as part of our duty to help and, however weighty we may be, we are the demand-led servants of processes that we cannot govern in which we will be tested, which is a sometimes lengthy and unsparingly arduous process to which I have never been able to sit light. It is expected of us that we recognisably possess requisite expertise beyond a simple degree of knowledge and it is this that entitles us to express our opinions and have them regarded and be examined on them. The helpful application of expertise requires an open frame of reference illuminated and made accessible to persons who are not themselves expert, some of whom will examine the expert and on which, for all of whom, a very great deal may depend. The expert should accept responsibility for ensuring that such illumination and accessibility are available to be provided to all participants. In doing this we may refer to and must be able to distinguish between theoretical and practical knowledge bases as well as precedent and conventional wisdom, and we should always be able to show their relevance to the matter. In my view, just as artists often turn their work upside down and examine it in mirrors to be sure that it makes sense and is what they intend, this requires us to forensically review the relevance and clarity of what we say.



Above, Illustration: Measles: drawings of and about hot water pipework corroded by electrolytic effects of salts and acid penetrating cladding and corrosion protection. Photographs, less able to show detail, supported the drawings by identifying physical samples stored in a warehouse.)

Roger Bloomfield Dipl Arch RIBA MAE
Working mostly in Britain but also in Switzerland, Norway, Greece, Poland, the Channel Islands and Pakistan. Continuously engaged on small and large projects, conservation planning and historic buildings, he has more than thirty years diverse experience as a technical and forensic consultant and expert witness. Recent jobs have included large-scale and private residential work, conservation and historic buildings, schools, hospitals, care homes and commercial buildings.

Dispute and remedial work has covered design, specification, workmanship and professional issues. Formerly teaching at London Metropolitan University the University of Westminster School of Architecture and Kings College Department of Construction Law. Roger has been an RIBA Pt 3 examiner.

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The Future for Dispute Resolution in Construction and Engineering

by Martin Burns RICS

In the future there will be fewer disputes in the construction industry. There will be greater co-operation between employers and suppliers, who will work together to ensure conflict is avoided where possible. When differences do arise,employers and suppliers will routinely adopt procedures that resolve matters early, quickly, cheaply and amicably, thus ensuring projects are delivered on time and on budget.

For anyone who has been involved in the construction sector for any length of time, the above declaration may appear to be a tad optimistic. Some may even say an industry that is geared to avoid disputes completely, or even deal with emerging issues promptly and cordially, is improbable. The industry has a long reputation for being rife with disputes. Relationships between employers and the supply chain have historically endured a prevailing mindset of contention that has seemingly made disputes inevitable. So much so that many employers and suppliers effectively include the costs of resolving disputes as part of their budgeting programmes, typically under a category such as "legal" or "contingency".

When I first started working for RICS in the early nineties, the use of alternative dispute resolution was a relatively new concept in the UK construction sector. In those days formal dispute resolution consisted mainly of lengthy, complicated and costly litigation or lengthy, complicated and costly arbitration.

There were certainties one could rely on when taking a construction dispute to court or arbitration. No one, except perhaps the judge or arbitrator, could understand what was going on. Lawyers and surveyors acting for the parties involved in the dispute would often talk at length without coming to an agreement as to what the issues were. Decisions on disputes were a long time coming. Party representatives who were young when they were first engaged in the dispute were often significantly older when it was eventually resolved. I know of some who even had time to die before the end of it.

In the course of litigation or arbitration, many surveyors and other professionals would find themselves appointed at various stages in long drawn out disputes without knowing how or why matters had got so far. Newly qualified surveyors would join a firm only to become embroiled in a long running dispute, and thus inherit their new firm's perpetual dislike of another firm which acted for the other party. Several governments and incumbent Prime Ministers could have come and gone while the process for resolving the dispute dragged on. In the end, the parties and their professional advisers, at least those who had made it that far, had often forgotten what the dispute had been about in the first place. Both parties will most likely have wondered why their bill outweighed the amount that had been in dispute by several fold, and how they were going to pay it.

The most recent attempt to address the myriad of problems caused by the normality of constant disputes across the UK construction industry was over 20 years ago. This was the introduction of the statutory right to adjudication in 1998, since when thousands of disputes of varying complexity and value have been decided by independent adjudicators.

That nearly 2000 adjudications are happening each year in the UK can be seen as testament to its success. Adjudication has enabled the industry to deal with an abundance of disputes that continue to persist, by using a timetable and procedure that is designed to be quick, focussed and cost-effective. But it is apparent that poor payment practices, and a deep-seated adversarial and claims-conscious attitude continue to prevail, and that adjudication has done little, if anything, to bring about a culture change that will improve employer/supplier relationships and thus reduce the numbers of disputes that occur in the industry.

There is little doubt that a construction industry where there were fewer disputes would be welcomed by employers and suppliers. One may also presume that decision-makers from both the employer and supplier sides genuinely want to avoid disputes, and that they would be prepared to proactively ensure that the mechanics for conflict avoidance are in place, and, when disputes arise, adopt systems to resolve them quickly, cheaply and amicably.

In the pursuit of a better future for dispute resolution in the construction industry, a coalition of professional organisations and industry bodies is currently embarked on a tremendous campaign of innovation and co-operation. The Conflict Avoidance Coalition was set up by RICS and ICE in 2014. It has since expanded and now includes the RIBA, CIArb, DRBF, ICES, ICC (UK), Network Rail and Transport for London.

The purpose and vision of the coalition is to support the development of a culture of collaboration, and reduce the numbers of disputes and the damage they cause to commercial and personal relationships, finances, project delivery and brand reputations,
The coalition's strategy is to inform people working across the industry, at every level, about how conflict avoidance and early intervention techniques prevent

and resolve disputes, and thus support the delivery of infrastructure and property development projects. Network Rail (NR) has made an immense contribution to the coalition's aims by demonstrating a real commitment to improving its relationships with suppliers and reducing numbers of disputes. NR is leading the way in developing working practices and a culture that encourages contracting parties to adopt a forward-looking approach to risk management, which avoids confrontation, saves money and ensures projects are delivered on time and on budget. The DAP programme, as it is called, has been helping NR and suppliers to identify potential problems, and deal with them, before they ever arise. DAP involves setting up an early warning system that explores potential risks connected to a project. It often includes the use of contractual procedures which are designed to mitigate against problems arising and settle differences before they crystallise into formal disputes.

DAP is normally introduced early on, even before a contract is signed. If required, it can continue through the lifetime of a project, e.g. were parties desire a neutral insight into how identified risks are performing over time. Its primary aim is to detect potential problem issues and ensure there is a coherent understanding of the risks across the relevant project teams.

DAP evidences NR's commitment to breaking the cycle of constant disputes through greater co-operation between employers and suppliers, who actively work together to avoid conflicts arising in the future. The implementation of DAP by NR has demonstrated that it is a viable dispute avoidance system that recognises the value of open and honest communications between parties on how to deal with potential risks. A justification is that parties who regularly connect with each other freely and openly are more informed and able to tackle problems collaboratively, without fear of negative consequences.
Transport for London (TfL) has also demonstrated a sincere willingness and ability to take a lead in reducing the number of disputes with suppliers that end up in formal dispute resolution procedures. TfL has worked with RICS to develop a highly effective methodology for identifying emerging disputes early and dealing with them quickly, cheaply and amicably. The process is called "CAP", and to date, it has been exceptionally effective at preventing disagreements from becoming full-blown disputes that require lots of legal spend, and would place TfL and suppliers into long-standing positions of confrontation.

A key benefit of CAP has been its ability to safeguard against commercial managers and directors for both TfL and suppliers, losing the capacity to choose how their differences will be resolved, as would happen if they were moved into the hands of lawyers.

Generally, CAP involves an impartial review of an issue, or issues, on which parties do not agree. The review is undertaken by an independent person who is a highly credible and experienced subject matter expert. He or she usually engages with all relevant parties, undertakes an investigative role and provides substantive, fully reasoned, recommendations for settlement.

CAP is a flexible dispute avoidance method. For example, parties can opt for CAP to yield binding or non-binding recommendations. Where they are non-binding, recommendations can be used to inform discussions between the parties and stimulate settlement. In addition, parties can choose a CAP procedure where, if either party declines to accept a non-binding recommendation through CAP, they will be required to provide written reasons. This can dissuade a party from unilaterally declining a recommendation simply because they do not like it.

The Conflict Avoidance Coalition has also created close links with the industry-wide change programme known as Project 13. This government backed initiative has been established by the ICE and Infrastructure Client Group (ICG) as a vehicle to improve the way UK infrastructure is delivered and managed. The rationale for the coalition to be engaged with Project 13 is that effective dispute avoidance and early intervention procedures are key components of efficient project management.
The Coalition has prepared a conflict avoidance pledge (www.rics.org/capledge) which, inter alia, commits organisations to adopt conflict avoidance into their projects. To date, over 130 organisations have signed the pledge.

A toolkit has also been prepared which provides information about a wide range of things people can do to avoid, manage and resolve disputes, and prevent small problems from escalating into big ones.

https://www.rics.org/globalassets/rics-website/media/upholding-professional-standards/regulation/drs/conflict-avoidance-toolkit.pdf

The establishment of the pan-industry Conflict Avoidance Coalition, and the successful adoption of dispute avoidance and management procedures by NR and TfL are evidence of the profound changes that are happening in the construction industry, and that they are happening at an unprecedented pace. The Coalition is now helping a number of other leading industry bodies to apply conflict avoidance and early intervention procedures.

The adoption of innovative and highly effective methods for avoiding and managing conflicts by 2 of the UK's major employers, the appetite to apply similar methods that is being shown by other organisations and the commitment of 7 leading professional/membership bodies to help them, signals that the future of dispute resolution is exciting and will lead to a better, more efficient, more attractive construction industry.

Martin Burns
RICS, Head of ADR Research and Development
10 January 2020

HKA launches its 2019 CRUX Insight, A Global Market Sector Analysis into claims and dispute causation factors

HKA, *the world's leading engineering and construction claims and dispute resolution firm, publishes its second annual CRUX Insight Report, considered the most comprehensive and detailed analysis of its kind in the industry today.*

As part of its integrated research programme into claims and dispute causation on major capital projects around the world, HKA's 2019 CRUX Insight, A Global Market Sector Analysis, identifies over 4,000 causes across 700 projects in 72 countries, with total project capital expenditure (CAPEX) in excess of US$1.2trillion, where HKA has provided claims consulting and dispute resolution services.

HKA draws on this unprecedented bank of knowledge to provide valuable insight into the factors and pattern of causation on major engineering and construction projects across multiple sectors worldwide. Analysis, from what is believed to be the broadest and most in-depth dataset in the industry, shows that the dominant drivers of disputes are a significant lack of control over scope and design, along with poor drafting and administration of contracts. Skills gaps, cultural differences and overinflated claims are also prevalent within the web of interrelated causation factors.

This year's CRUX Insight presents a sector-by-sector analysis of dispute causation, focusing on: Buildings; Defence, Aerospace & Military; Industrial; Infrastructure; Oil & Gas; and Power & Utilities.

Simon Moon, Partner and COO said: "We know from this year's report that lessons are still not being learned in the industry. The consequences of delay, disruption, lost productivity, cost overrun and poor quality are not only significant for clients but for industry and economies at large."

"All decision-makers on projects can benefit from a clearer understanding of the recurring causes of claims and disputes. We would encourage governments, policy-makers, influencers and professional bodies to engage with our CRUX research findings and its implications for the engineering and construction industry," added Simon.

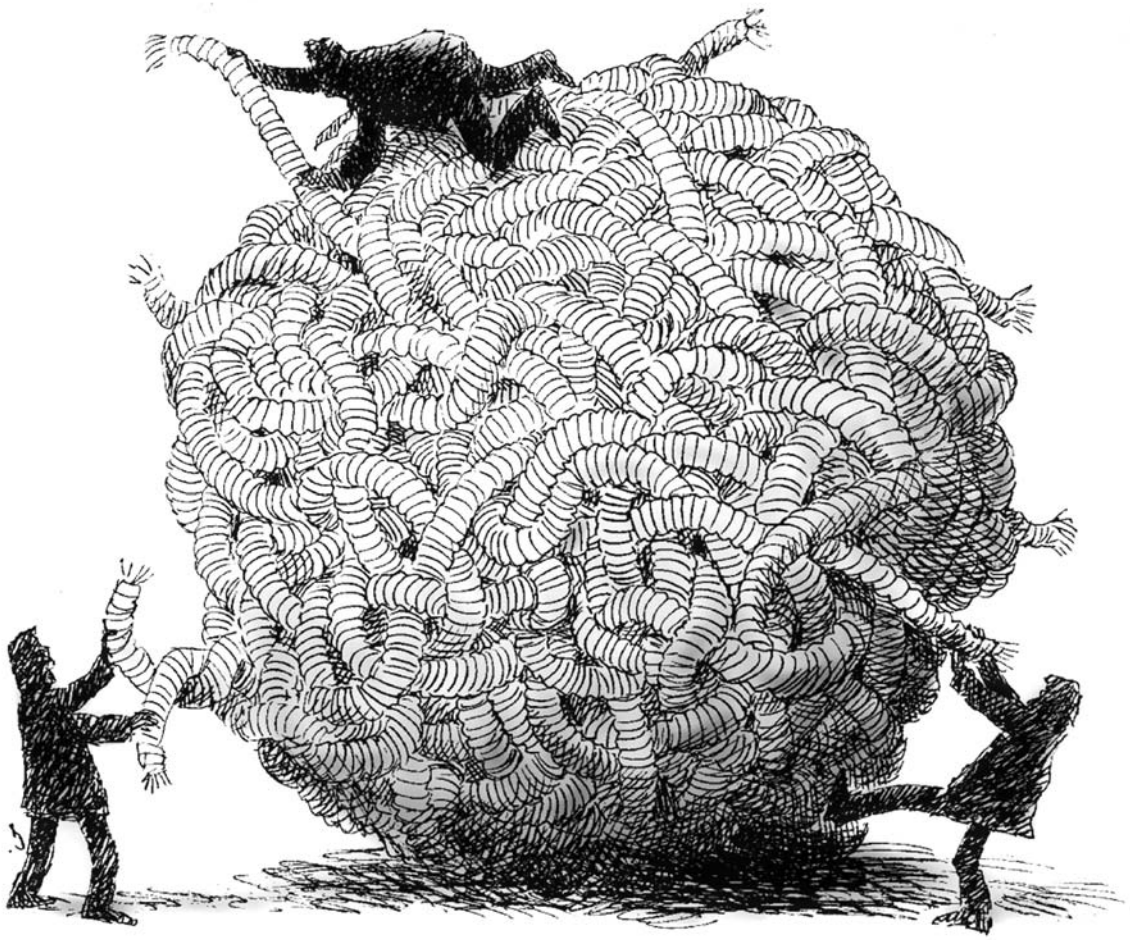
The investigation also questions the fitness for purpose of procurement strategies and operational models, with earlier and greater engagement with the market required to pre-empt unforeseen problems that emerge later in the project lifecycle.

The report highlights advancing digitalisation as a way to improve the information flow, with timely access to data expected to raise the performance of project delivery teams and the design process in particular. However, it acknowledges that there is no easy technological fix for disputes that stem from human actions and omissions.

Toby Hunt, Chief Business Development Officer, said: "If the industry is to break the cycle of repetitive disruption, delay and spiraling costs, employers, contractors and the whole supply chain must better understand, prepare for and manage the complexity of their projects."

"All stakeholders should benefit from the use of CRUX data to re-assess the risk profile of their business, including by service, sector and location," added Toby.

For further information, contact:
CRUX@HKA.COM



Japanese Knotweed

by Neil Inman.
Partner at surveying and property management firm Scanlans and heads the Birmingham office

Mention the words Japanese Knotweed and many people will shudder with fear.

They see it as some kind of house-eating triffid that is untreatable and therefore unstoppable.

Japanese knotweed is a fast-growing, bamboo-like plant which was first imported into the UK in the late 19th century and was planted due to its capacity to stabilise the ground through its root structure.

However, the belief that knotweed cannot be eradicated is a major misconception.

Multiple studies have been undertaken in this regard and a paper released a few years ago following the completion of the world's first extensive Japanese knotweed trial suggested that chemical treatment could be effective.

There is also a widely-held belief that properties are unmortgageable where knotweed is found nearby. This used to be true but, with the spread of knotweed across more areas of the country, this is no longer the case.

Mortgages can be obtained through a variety of mainstream and high street lenders, although it is the case that some will require a survey to confirm the extent of the knotweed growth, and potentially a management plan with an insurance-backed guarantee to be instigated before the monies can be drawn down. In some instances, the cost of treatment may be held as a retention.

With mortgage funding widely available, the impact of diminution in value arising from 'restricted market appeal' of a property is significantly reduced.

Despite all of this, ambulance-chasing solicitors and so-called knotweed specialists have over recent years been pursuing claims for tens of thousands of pounds on behalf of property owners affected by the plant.

The claims are for compensation arising from an alleged diminution in value of properties because

knotweed has been found on their land, even as little as a sprig.

The trend for claims of diminution in value is growing. The bandwagon keeps rolling.

Claimants often maintain the knotweed has spread to their property from their neighbour's root structure, but the simple truth is that the plant is everywhere and can be treated effectively.

Since the 1981 Wildlife and Countryside Act, it has been an offence to plant Japanese knotweed in the wild.

It's not against the law to have on your land, but it is not permitted to let it spread beyond your boundary. I am acting as an expert witness in an increased number of cases on behalf of insurance companies whose clients are property owners facing claims from neighbours because knotweed has spread to their land and they say the value of their homes has fallen.

Some claim they are trying to sell their homes but have been erroneously told by their estate agent that they cannot put the property on the market because no-one will buy it.

Others are simply panic-stricken because of the hysteria about knotweed.

My instructions mainly come from solicitors representing insurers. The cases span the country, from the north west to the south coast, and defendants include homeowners, schools and large companies and organisations.

Many cases end up in court and I have extensive experience in such matters, often helping to substantially reduce the value of claims arising from knotweed.

To those with knotweed on their land, my message is: Don't panic. It's not as bad as it is made out to be.

There are some genuine claims, from people with knotweed that has spread from next door and who face costs to remove it or treat it properly.

The issue is the level of the claim. I believe the sum is often vastly inflated because of the hysteria surrounding knotweed, and the fact that people get worked up into an emotive state.

In many cases I have viewed, the reason a property's value is diminished, or a sale cannot take place, is due to poor maintenance of the property itself, not because of the knotweed.

In my experience, the upper levels of claims, which can range from £10,000 to £80,000, are rarely upheld.

Yes, Japanese knotweed is an undesirable plant, but it can be controlled or eradicated over a period, and in some circumstances can be dug out and removed. It's not the end of the world.

Neil Inman is a partner at surveying and property management firm Scanlans and heads the Birmingham office.

Scanlans is a national practice with offices in Manchester, Leeds and London as well as Birmingham. Neil joined Scanlans in 1988 and established the Birmingham office in 1995.

He has been actively involved in the valuation of all types of residential and commercial property for nearly 25 years.

Neil also has extensive experience of preparing expert reports for property and land valuations, diminution of value cases involving Japanese knotweed and neighbour nuisance matters, boundary disputes, landlord and tenant disputes and compulsory purchase compensation.

Through these, he has experience of mediation and court appearances. He also provides development advice for residential and commercial opportunities, and he gives consultancy advice to banks for valuation audits.

Neil has a host of professional accreditations and qualifications to his name.

He has been a professional associate of the Royal Institution of Chartered Surveyors since 1992. He is a fellow of the Association of Property and Fixed Charge Receivers, a Registered RICS Fixed Charge Receiver and a RICS Registered Valuer. He is also a member of the Association of Registered Letting Agents, now known as ARLA Propertymark.

Forensic Defence

Nationwide Expert Witness provider to defence solicitors, family solicitors, barristers and privately funded clients.

At Forensic Defence we specialise in providing expert witnesses in a number of disciplines. We provide experts that can assist in criminal and civil cases and we will always endeavor to provide a wide selection of experts to meet our clients needs.

We at Forensic Defence understand the importance of meeting deadlines especially in legal cases, we therefore pride ourselves on an efficient and expedient service. Our experts have years of experience in preparing reports for Court purposes and will provide reports within the time and format required.

Our expert witnesses include Psychologists, Psychiatrists, Accountants, DNA experts, Cell site experts, Phone/computer experts, Drug analysis, Facial Mapping, Voice recognition, Handwriting samples and more.

Our services include:

CCTV Enchancement
Computer & Mobile Forensic Examination
DNA Reports
Psychology Expert Witnesses
Mobile Phone Analysis
Firearms
Drug Testing and Analysis
Accident Reconstruction Reports
Cell Site Analysis
Drink Drive bacs calculation
Forensic Accountancy Reports
Psychiatry Expert Witnesses
Footwear marks
Handwriting Analysis
Dangerous Dogs Assessment
Toxicology

Our staff have worked in the legal industries for over 10 years, they know exactly what solicitors, barrister and clients are looking for. We aim to obtain a quote within 1 working day of receiving instructions, as we know cases can be under time constraint.

LAWYER MONTHLY
Expert Witness Awards 2019
Medico Legal
WINNER:
Forensic Defence

Email: **info@forensicdefence.co.uk**
Website: **www.forensicdefence.co.uk**
Tel: **0121 288 3225**
Forensic Defence
Bradford Court Business Centre
123-131 Bradford Street, Birmingham, B12 0NS
Available Nationwide

Gain status in the market

RICS Expert Witness Certificate

This 12-week blended learning programme is designed to give you a sound knowledge of the law and best practice. Practically orientated, this course will ensure you develop the core competencies needed to be an effective expert witness.

Learning outcomes

- Managing clearly the expectations of those who appoint you
- Marshalling accurately the materials you need to function
- Cooperating productively with other experts
- Constructing a comprehensive expert report
- Delivering effective expert evidence in court.

Speak to our dedicated experts to find out how this course can impact your career.

To find out more:

t **024 7686 8584**

w **rics.org/expertwitnesscertificate**

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