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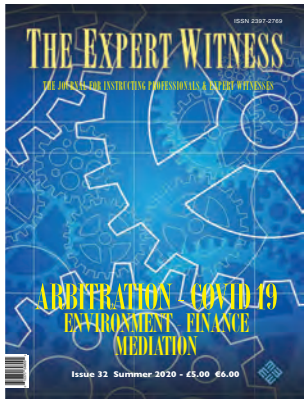

Welcome to the Expert Witness Journal

Hello and welcome to the 32nd edition of the Expert Witness Journal. I hope you have all been keeping safe and well during the last few months.

In this edition we are concentrating on the non-medical side of expert witness work, with a great range of articles including a great piece from Dr David Lowe on Terrorists' use of Tradecraft, an informative article on Food Safety Culture from Dr Peter Wareing and the Challenge of Valuing Business during the Covid-19 Pandemic by Roger Isaacs.

A lot of the usual conferences and courses that would be taking place this year are now available online including the EWI's Online Conference (Friday 18th September 2020) delivered via Zoom and the Annual Bond Solon Expert Witness Conference (Friday 6th November), which will this year be run as a fully virtual event (please see the EWI and Bond Solon websites for further details.) For further information regarding online events and training please see our Events pages.

We are now collating articles for the autumn issue, 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
Email:chris.connelly@expertwitness.co.uk

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Apology

Expert Witness wish to apologise to **Dr M.J Rowland-Warmann** BDS BSc Biomed.Sci. (Manc) MSc Aes.Med. (QMUL) PGDip Endod. (Ches) MJDF RCS (Eng) for an error in our Spring 2020 publication of The Expert Witness.

The matter of attribution is extremely important in the context of all our publications. The articles we publish are authored by leading academics and Consultants who are authoritative voices within our Judicial framework. They have a high degree of qualification and expertise which is used in court and by instructing solicitors and insurers to ensure litigation is carried out to the highest of standards. It is therefore regrettable that Dr M.J Rowland-Warmann's name was not published as the author of her article.

We are therefor republishing the article in our Autumn edition, entitled 'Dermal Filler:Lack of Regulation poses a real threat to Patient Safety' authored by Dr M.J Rowland-Warmann. The article provides an authoritative and long overdue necessary voice in the field of Dermal Fillers where there has been a rise in litigation.

Yours sincerely
Chris Connelly - Editor

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Some of the highlights of this issue

Events

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Inspire MediLaw's medicolegal training covers a wide range of medical and legal issues pertinent to professionals with a clinical negligence practice. Our CPD accredited conferences and events are designed to encourage the sharing of knowledge and good practice between medical experts and lawyers.

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To find out more about Inspire MediLaw, upcoming conferences for expert witnesses, and other course dates for 2019 visit their website at **www.inspiremedilaw.co.uk**
or contact Caren Scott or Vikki Forrester on 01235 426870
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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.
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Remote Hearings and Witness Evidence

by Ezra Macdonald and Simon Purkis at Pump Court Chambers

Remote hearings come with particular difficulties. One obvious difficulty is that the parties cannot see each other as well as they might in the courtroom. But how much of a problem is this?

If the demeanour of witnesses (or indeed parties) is relevant to an issue to be decided by the Court, then restrictions on the Court's ability to evaluate witness demeanour are significant – and might prevent a fair trial.

If the demeanour of witnesses is irrelevant (or, worse, outright misleading), then restrictions on the Court's ability to evaluate witness demeanour simply don't matter. They should not be an obstacle to proceeding with a remote hearing (although there may be other reasons for an in-person hearing).

Rather unhappily, the case law on this issue is a) inconsistent between jurisdictions – specifically as between criminal and civil cases, and – even worse – b) inconsistent within jurisdictions, with conflicting cases in both civil and family jurisdictions.

This is a real problem, because a live issue in a great number of cases is whether they can fairly be dealt with remotely. It needs to be resolved. My view is that the correct approach is the one taken in the civil courts (following R (SS) cited below). It must be the correct approach because it is the only approach informed by science. I discuss some of the relevant research at the end of this post.

Civil and family cases

In *R (SS) v Secretary of State for the Home Department [2018] EWCA Civ* 1931 Leggatt LJ had some fairly trenchant observations to make about witness demeanour and its importance (or lack of importance) when it comes to assessing credibility.

[46] No doubt it is impossible, and perhaps undesirable, to ignore altogether the impression created by the demeanour of a witness giving evidence. But to attach any significant weight to such impressions in assessing credibility risks making judgments which at best have no rational basis and at worst reflect conscious or unconscious biases and prejudices. One of the most important qualities expected of a judge is that they will strive to avoid being influenced by personal biases and prejudices in their decision-making. That requires eschewing judgments based on the appearance of a witness or on their tone, manner or other aspects of their behaviour in answering questions. **Rather than attempting to assess whether testimony is truthful from the manner in which it is given, the only objective and reliable approach is to focus on the content of the testimony and to consider whether it is consistent with other evidence (including evidence of what the witness has said on other occasions) and with known or probable facts.** (emphasis added)

In the Family Division of the High Court, the point was applied by Macdonald J in *Cumbria County Council v S, E, R* [2019] EWHC 2782 (Fam):

26, Within the context of the foregoing legal principles, this court must bear in mind that the assessment of the credibility and reliability of the parents should coalesce around matters including the internal

consistency of their evidence, its logicality and plausibility, details given or not given and the consistency of their evidence when measured against other sources of evidence (including evidence of what the witness has said on other occasions) and other known or probable facts. The credibility and reliability of that parent should not be assessed **simply by** reference to their demeanour, degree of emotion or other aspects of their presentation. (emphasis added)

Back in the Civil Division of the Court of Appeal, in *Staechelin, Paisner, McCaffrey v ACLBDD Holdings Limited & ors* [2019] EWCA Civ 817, Lewison LJ considered *Yaqoob v Royal Insurance (UK) Ltd* [2006] EWCA Civ 885 and remarked:

37, What seems to have been the deciding factor for the trial judge was Mr Yaqoob's demeanour in the witness box. At [36] Chadwick LJ held that the finding was flawed because it failed to deal with the real issues of credibility, namely (a) the conflict of evidence (b) the agreed profile of the arsonist and (c) the low level of stock on the premises. In short, the judge had not taken advantage of the benefits of seeing and hearing the witnesses. Chadwick LJ concluded at [38]:

"If, as I have sought to explain in the present case, the judge has not taken proper advantage of that opportunity — by failing to make findings of fact which were essential, by failing to address the question of credibility and by failing to analyse and give proper weight to the necessary conclusions to be drawn from the forensic evidence as to the profile of the perpetrator — then it cannot be enough for this court simply to say, "Oh well, the judge believed the witness and so must we"."
38, It is, to my mind, of critical importance that the trial judge based his evaluation on the demeanour of Mr Yaqoob in the witness box. For the reasons that Leggatt LJ explained in *R (SS) (Sri Lanka) v Secretary of State for the Home Department* [2018] EWCA Civ 1391a conclusion simply based on the demeanour of a witness is not built on a solid foundation. (emphasis added)

It is perhaps significant that in S, E, R as in Staechelin the Court has qualified what was said in R (SS) by the addition of the word "simply". With respect, I think this is an error. The point in R (SS) is that "to attach **any** significant weight to [impression created by demeanour] risks making judgments which at best have no rational basis . . ."

In *Liverpool City Council v M, F, C* [2018] WL 06249888 (another first-instance decision), the Court had been invited to make findings about allegations of serious sexual abuse of a physical nature. There was disagreement as to whether the (by that time adult) complainant should give evidence by way of screens or video link. The subject of the allegations said that the Court's ability to assess the credibility of the witness would be compromised if the Court were unable to assess the witnesses' demeanour when giving evidence. HHJ Greensmith noted that "[t]he relevance of demeanour as an indicator of credibility is questionable", and that the Judicial Colleague's teaching was that judges should be "very circumspect" about the value of demeanour. The Court also referred to R (SS). Directions for evidence by way of video link were given.

In *Auliffe and ors v Ellis* [2019] EWHC 1427 (QB) (an appellate decision), Baker J remarked (perhaps slightly opaquely):

24, Demeanour in the witness box is indeed understood to be no general indicium of honesty. But that is not to say that judging issues of primary fact involves no element of reading witnesses as individuals, and one aspect of that is, or at least can be, evaluating the meaning or significance, if any, of variation in a witness's demeanour as between different topics or particular questions. Nor does treating demeanour as, in general, an unreliable guide to reliability mean that reading a written transcript is always, or even usually, as good as being at the trial.

Again, that is to dilute the observations of the Court of Appeal in R (SS). What could be involved in "reading witnesses as individuals" other than assessing demeanour? The observation in R (SS) is that to attach any significant weight to demeanour risks making judgments which "at best have no rational basis".

Conversely, in R*e P (A Child: Remote Hearing) [2020] EWFC 32,* the Court was asked to consider whether a case involving "a particular form of child abuse which requires exquisite sensitivity and skill on the part of the Court". The President of the Family Division commented that

". . . it is a crucial element in the judge's analysis for the judge to be able to experience the behaviour of the parent who is the focus of the allegations throughout the oral court process; not only when they are in the witness box being examined in chief and cross-examined, but equally when they are sitting in the well of the court and reacting, as they may or may not do, to the factual and expert evidence as it unfolds during the course of the hearing."

Criminal cases
In R. v. Popescu [2011] Crim L R 227, CA, the Court considered whether the jury should have been given the transcript of the complainant's evidence and said this:

" .... Secondly, if the transcripts are given to the jury, we suggest, first, that the judge must warn the jury then and there to take care to examine the video as it is shown, **not least because of the importance of the demeanour of the witness in giving evidence.** (emphasis added)

More generally, the Crown Court compendium refers at various points to the importance of demeanour – e.g. where discussing hearsay evidence, noting that the jury should be warned about the limitations of that evidence, including "the inability of the jury to assess the demeanour of the witness . . ."

Moreover, the judge has the option of suggesting that although the jury may take notes (during evidence), "it would be better not to take so many notes that they are unable to observe the manner / demeanour of the witnesses as they give their evidence."

The one point in the Compendium at which demeanour is suggested to be misleading is when it comes to sexual offences:

"The experience of judges who try sexual offences is that an image of stereotypical behaviour and demeanour by a victim or the perpetrator of a non-consensual offence such as rape held by some members of the public can be misleading and capable of leading to injustice . . ."

Lastly, in *R v D [*2014] 1 LRC 629, a first instance decision, the judge considered whether the defendant should be permitted to testify in her own defence without removing her niqab. HHJ Murphy stated that "it is essential to the proper working of an adversarial trial that all involved with the trial – judge, jury, witnesses, and defendant – be able to see and identify each other at all times during the proceedings." He decided that the defendant would need to remove her niqab in order to give evidence. At paragraph 59 he said this:

"It is unfair to ask a juror to pass judgment on a person he cannot see. **It is unfair to expect that juror to try and evaluate the evidence given by a person whom she cannot see, deprived of an essential tool for doing so: namely being able to see the demeanour of the witness; her reaction to being questioned; her reaction to other evidence as it is given."** (emphasis added)

Research

It has been known for some time that people are not good lie detectors (DePaulo, B. M. 1994). Their ability does not necessarily improve with practice: for instance, one study found that federal law enforcement offers working in jobs which require attempts to detect deceit were no better at detecting deceit than untrained, undergraduate students – they only thought they were (DePaulo, op. cit.)

The point is plainly made in Jeremy Blumenthal's 1993 discussion on the topic (available here), which concludes – with some cogency – that "[i]t is unforgiveable that the legal system deliberately ignores demonstrated, relevant findings about demeanor evidence and wilfully adheres to an ineffectual traditional approach."

A comprehensive meta-analysis by Bond & DePaulo (Bond & Depaulo) synthesised results from 206 documents and 24,483 "judges" (i.e. test subjects) and found that people achieve an average of 54% correct lie-truth discrimination – which only increased marginally for professional lie-catchers. In other words, just a little better than a coin toss. Worse still, the ability deteriorates with age (Curci et al., infra)

The issue is discussed in wide-ranging detail by Curci et al. (Curci et al., 2009), available here. Rather problematically, the authors comment that "judges and jurors evaluate witness evidence based upon categories which correspond to what laypeople usually consider as indicators of turhtful / deceptive criteria." The authors comment that "[p]eople rate themselves as sufficiently expert at identifying lies from the interlocutor's physiological pattern and expressive behaviour, but the laypeople's ability at lie/truth discrimination based upon non-verbal signals has been demonstrated as being only slightly above chance . . . **the basis for the legal evaluation of witness evidence across jurisdictions is experiential and, as such, mainly unwarranted."** (emphasis added).

Arguably, jurors should be given a direction that this is the case, and judges should direct themselves of the fact (much in the manner of a Lucas direction, i.e. that a witness may lie for many reasons . . .)

Conclusion

The judicial guidance is not merely inconsistent, it is starkly inconsistent. This observation has already been made (in slightly less strident terms) by Lady Hale in her 2019 address on religious dress, given to the Woolf Institute, the Judicial College guidance cautions against evaluating credibility from demeanour in civil cases, but advises judges to be "particularly careful to point out that [wearing the veil] might impair the court's ability to evaluate the reliability and credibility of the wearer's evidence . . ." in criminal cases.

For the reasons I have set out above, I take the view that the approach should be harmonised across jurisdictions and should follow the very sensible guidance given in R (SS). It is the only guidance which is informed by, and consistent with, the scientific research. It is the most likely to be correct.

Whatever the obstacles to proceeding with a remote hearing are, the hypothetical difficulty of assessing a witness's credibility from her demeanour should not be one of them.

This article on 'Remote hearings and witness evidence' was written by **Ezra Macdonald** and **Simon Purkis** if you would like any further information on instructing Ezra or Simon, have any other queries please contact our clerking team through our switchboard 020 7353 0711 or via email at,
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References

Blumenthal, J. A. 1993 "A Wipe of the Hands, A Lick of the Lips: the Validity of Demeanor Evidence in Assessing Witness Credibility", 72 Neb. L. Rev.

Bond CF Jr, DePaulo BM. Accuracy of deception judgments. Person Soc Psychol Rev. (2006) 10:214–34. doi: 10.1207/s15327957pspr1003_2

Curci, A. et al. 2019 "Accuracy, Confidence, and Experiential Criteria for Lie Detection Through a Videotaped Interview" Front. Psychiatry 22 January 2019, doi: 0.3389/fpsyt.2018.00748

DePaulo, B. M. 1994 "Spotting Lies: Can Humans Learn to Do Better?", Current Directions in Psychological Science3(3): 83 – 85.

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Facing the Challenge – Capita Real Estate and Infrastructure; Tackling the Coronavirus Crisis

by Dan Jarvis, MCIEH

Early this year Capita Real Estate & Infrastructure's (REI) and Health & Safety Expert Witness Services identified that Coronavirus was likely to become a significant challenge to how people in the UK live and work. As a responsible employer, Capita REI prioritized the safety and wellbeing of colleagues, shifted to a supported homeworking and a phased reduction of staff at our offices while striking a balance between colleagues safety and maintaining our services to our clients dealing with the complex commercial and financial factors arising from the Coronavirus Crisis. The challenge was to deliver these two strands within the restrictive parameters of changes to working patterns and restrictions imposed by legislation introduced.

At the start of the year, Capita REI identified that the knowledge pool at its disposal was a significant asset to be mobilised to provide innovative strategies for both our colleagues and clients to utilise. With this in mind, a dedicated team of Consultants have been ensuring that clients receive up to date and accurate information as the crisis has developed. Government, industry and scientific sources of information are monitored and collated to ensure we can cut through to the crucial elements of legislation and guidance and refine that information into a succinct and accurate information stream for our clients. This approach also allowed us to develop strategies for clients that ensures ongoing compliance with both the Health and Safety at Work Act and the Coronavirus Act, and its supporting regulations. Current guidance is condensed into concise guidance notes that are sent to clients, covering both general and sector-specific guidance,

Delivery of 'traditional' consultancy services" has had to be reassessed. In line with Government guidance, Capita REI staff are greatly home-based with a few exceptions who are fulfilling key worker or essential worker roles. This meant that we would have to look at how both employees and clients could be successfully supported to deliver, 'business as usual'. Accepting that robust social distancing is a key control mechanism, we have limited face-to-face contact to protect our clients and employees. Only essential site visits are undertaken, subject to rigorous dynamic risk assessment process, with stringent controls in place. Utilising platforms such as Microsoft Teams and Zoom, we are providing dedicated remote support complimented with conferencing software to maintain the 'hands on' feel of a dedicated professional; a trusted advisor.

A significant challenge that Capita REI has faced was how to ensure that we are able to support our clients to stay compliant with Health and Safety and Fire Safety legislation under Coronavirus restrictions. Capita REI recognised that the Health and Safety challenges of day-to-day business operations continue alongside new challenges posed by the Coronavirus. This catalyst has introduced a range of remote auditing and expert inspection packages which utilise technology to allow consultants to undertake a thorough review of site documentation, conduct interviews and visual inspections of workplaces. This approach also allows consultants to assess the client protocols in place for the control of Coronavirus exposure, as such controls fall under an employer's statutory duties under Sections 2 and 3 of the Health and Safety at Work Etc. Act 1974. In addition, the change in working highlights how effective our Capita Assure SHE software application is for supporting Health and Safety and Fire Safety management remotely.

Clients needing to address their 'back office' issues such as management systems and training are still able to do so with Capita REI support. To support clients in utilising 'downtime' efficiently, Capita REI have adapted traditionally face-to- face training courses so that they can be delivered remotely as tailor-made, insightful packages by a consultant providing support in a way that on-line training modules cannot. We offer IOSH-accredited courses to our clients as a remote option, as well.

The current COVID-19 pandemic has seen businesses significantly embrace homeworking; effectively dispersing and distancing workforces while maintaining operations and limiting the risk of infection. Capita REI has developed strategies by our Display Screen Equipment Assessors and Healthy Buildings experts to deliver guidance to clients in transition to a remote working workforce including providing welfare strategies and remote assessments for workers who require specialist assistance in setting up homeworking safely.

Not every business has moved to a homeworking model. As our client portfolio includes a wide range of sectors who either cannot operate remotely, or who are specifically permitted to carry on business from their established workplaces, Capita REI has supported such clients by developing site specific measures including physical separation, vehicle and pedestrian management plans and hygiene protocols that will allow the business to continue in as unaffected a manner as possible.

As the Coronavirus curve begins to flatten off, we are seeing that many businesses are keen to return to their premises and a level of normality. Capita REI have developed a comprehensive suite of supported services, including remobilisation planning; Covid-19 Audit and Assurance (for "Covid Secure" premises); technological solutions including thermal screening and proximity management; training solutions including virtual classrooms, e-learning; and remote auditing and inspections. We have also recognised that, for some businesses and individuals, the effects of Coronavirus restrictions have come as something of a wake-up call in terms of a greater appreciation of health and wellbeing. Capita REI have prepared strategies for clients who may wish to switch to a dispersed workforce model and the legal, technological and technical challenges that may bring.

About the Author - Dan Jarvis

Dan Jarvis's extensive career in the Health & Safety and Environmental Services spans 25 years across the UK and overseas. He is a member of Capita H&S Expert Witness Service registry. As a former H&S inspector, Dan has a strong background providing training and fire risk assessment reports. He provides specialist and general Health and Safety advice to clients in educational, local government, commercial and construction sectors.

Please contact **Juliet Kelly** at Capita H&S Expert Witness Services with any queries on Dan Jarvis' article at Juliet.kelly@Capita.com

Court of Appeal Decides that Holland Park Leaseholders can Rely on Aesthetic Grounds in Refusing Consent to Development Next Door

The Court of Appeal has handed down its judgment in Hicks v 89 Holland Park (Management) Limited [2020] EWCA Civ 758, in which the long leaseholders of flats in 89 Holland Park successfully appealed against the decision that they had unreasonably withheld consent to development proposals of the neighbouring property, pursuant to a restrictive covenant.

This decision has some important consequences for the law where consent pursuant to a restrictive covenant can validly be withheld, when it is a requirement that consent can only be withheld reasonably.

Firstly, the facts:
89 Holland Park adjoins a piece of land which had been bought by architect Sophie Hicks at auction. She intended to build a modern property on this land with a glass cube at ground level and a large subterranean level extending across most of the site. The plans have been described as a "gently glowing glass box" but nonetheless were approved by the local planning inspector in 2015.

89 Holland Park is now split into several flats which are owned as long leasehold interests. The long leaseholders each own a share of a management company, 89 Holland Park (Management) Limited, which owns the freehold. Before the property had been sold off as separate leaseholds, in the 1960s the freehold owner (Brigadier Radford) had entered into a restrictive covenant with the then owner of the neighbouring land.

The covenant provided firstly that no application could be made for planning permission until he had approved the designs, and secondly that no works of construction could commence until the detailed specifications and drawings had been approved.

Sophie Hicks and the long lessees of 89 Holland Park have been engaged in litigation for some time to determine how this covenant now applies. It was held in a previous High Court decision (89 Holland Park (Management) Limited (and others) v Sophie Hicks [2013] EWHC 391 (Ch)) that although the covenant was expressed to benefit the freehold owner of 89 Holland Park, those deriving title under that interest were also entitled to the benefit of covenant - which included the long lessees.

In 2016, Ms Hicks applied to 89 Holland Park (Management) Limited for consent to her proposed development and in January of 2017, the plans were rejected in a 10-page letter detailing numerous reasons for the rejection. Crucially, those included aesthetic reasons and the loss of amenity of the trees, which the development would impact upon. The long lessees relied on the earlier High Court decision that they were entitled to the benefit of the covenant in forming their decision.

Ms Hicks challenged this. They may have the benefit of the covenant, she said, but that only gives them the right to enforce the requirement that approval is sought from the freeholder before any works can commence. It does not, however, entitle them to consider their own personal opinions and only the impact that the works might have on the freeholder (the shell company that owned only the common parts of the property) could be taken into account.

The High Court agreed with this in principle and held that in practice the only reasons that 89 Holland Park could have for validly withholding consent were that the works would have a detrimental effect on the structure of the physical property, or the value of the reversionary interest.

The Court of Appeal disagreed.

The Appeal Decision
In a unanimous decision, the High Court decision was overturned on the basis that HH Judge Pelling QC had incorrectly held that the only relevant interest for the purposes of giving or withholding consent was the freeholder's.

Lewison LJ found that it had already been established that the long leaseholders had the benefit of a restrictive covenant and this meant that their interests were relevant factors that could be taken into account in providing or withholding consent.

Quoting Lewison LJ directly, "I consider that the inescapable conclusion is that the decision-maker considering whether or not to approve plans is entitled to take into account the interests of those with the benefit of the covenant".

Are aesthetics a relevant consideration?
Not only this, but Lewison LJ also determined that aesthetic factors could be taken into account: "in my judgment a neighbour has a legitimate interest in the appearance of what is built next door to him". The correct construction of the restrictive covenant, was that no.89 was entitled to take into account the aesthetic design of the development proposals.

It has been established in earlier case law that there are some contexts in which a decision maker is entitled to refuse to consent to works on aesthetic grounds – see Lambert v FW Woolworth & Co Ltd (No 2) [1938] Ch 883. But this is a contentious issue and continues to be the subject of many disputes about the particular context in which this general rule may apply.

Mr Rainey QC, acting for Ms Hicks, argued that aesthetic objections in this case cannot be objectively evaluated and that it should only be a relevant factor where it can be established that the design would had a detrimental impact on the value of the adjoining land. This argument was ultimately rejected as being too narrow a view of the covenant.

What now?
Now that the Court of Appeal has clarified that the long leaseholders are entitled to have regard to their own interests, and that those interests can include aesthetic considerations, the High Court has to determine whether the reasons they gave for refusing consent were, in fact, reasonable.

Lewison LJ noted that the letter presented a rational case "but rational is not necessarily the same as reasonable".

How Lewison LJ's comments regarding aesthetics are to be applied in practice is therefore yet to be seen, but he gave some pointers in his judgment, noting that it would be too narrow to limit aesthetic objections to a case where there is an effect on capital or rental value. Furthermore, that it might be enough to show that the plans are out of keeping with what is already there. Albeit it is not necessarily enough to say that the proposals are not to the taste of the leaseholders.

Lessons from the decision
The two key points to take from this decision are:

1, how section 78 of the Law of Property Act 1925 operates in situations where a freehold with the benefit of a covenant is subject to long leasehold interests and

2, how aesthetic factors can be a relevant consideration in applying the test of reasonableness in refusing or withholding consent under a qualified covenant.

Section 78 Law of Property Act 1925
Section 78 states that a covenant is deemed to be made with the covenantee, his (or her) successors in title and the persons deriving title under them, and shall have effect as if such successors and other persons were expressed.

The Court of Appeal said that if the Court now decided that, notwithstanding the earlier decision that the leaseholders had the benefit of the covenant, in reality they could not take into account their own interests, that would render the previous decision and any benefit they derive from the covenant as "almost worthless".

The correct interpretation of this provision, as per Lewison LJ, is that the "decision-maker considering whether or not to approve plans is entitled to take into account the interests of those with the benefit of the covenant. Those persons include both the owners and the occupiers of the land. If it were otherwise the general purpose of the covenant would be undermined".

Many residential properties across the country are now owned in the same way as 89 Holland Park, with long leaseholders each owning a share of freehold that is held by a management company.

This decision makes clear that in cases where the freehold has the benefit of a restrictive covenant, those individuals with long leases, should they meet the other tests under which the benefit of a restrictive covenant may pass to them, will be able to take their interests into account when considering whether or not to grant consent.

Aesthetics
Lewison LJ made several obiter comments worth taking note of:

- An objection based on the fact that proposed works are "out of keeping" with the area may be enough;
- The current state of the land may be a relevant consideration;
- Objections on the basis merely that the proposals are not to someone's taste would not in itself be enough; and
- Expert evidence may assist in such disputes when determining reasonableness.

As the case is now remitted to the High Court, further updates will follow when the final decision as to whether consent was in fact reasonably withheld is determined.

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Much a Door About Nothing? When is a Door a Landlord's Fixture?

Q: "When is a door not a door?"
A: "When it's ajar."

However, the less amusing (except perhaps to a property lawyer) "When is a door a landlord's fixture?" was the central question in Fivaz v Marlborough Knightsbridge Management Ltd [2020] UKUT 0138 (LC).

The facts

The facts of the case were simple.

Mr Fivaz had (and still has) long leases of two flats in a block owned by Marlborough. In around 2014 he unilaterally replaced the front door of each flat. About 5 years later the landlord complained that his actions constituted a breach of the leases. It brought proceedings in the FTT for a determination of breach pursuant to s.168(4) of the Commonhold and Leasehold Reform Act 2002.

The covenant relied on by Marlborough and alleged to have been broken was a covenant by the tenant:

"Not at any time during the … term to make any alterations in or additions to the demised premises or any part thereof or to cut main alter or injure any of the walls or timbers thereof or to alter the internal arrangement thereof or to *remove any of the landlord's fixtures therefrom with first … having received written consent of the lessors …"*

It was common ground that entrance doors were not part of the structure of the flat, and that the general prohibition on the making of alterations or additions was not engaged by Mr Fivaz's replacement of the doors. The landlord pinned its colours to the mast of 'removal of landlord's fixtures'.

The issues and the FTT decision

That meant there were two issues. (1) Were the doors "landlord's fixtures"? (2) If so, were the doors "removed"? Only if both questions were answered affirmatively would the asserted breach be established by the landlord.

Marlborough prevailed in the FTT. The FTT concluded that the doors were not chattels; they were fixtures. It also said that the doors, although replaced, had been removed. It found that the leases had been breached.

The appeal

Mr Fivaz appealed. The Upper Tribunal (Lands Chamber), has now allowed his appeal.

The classification of objects brought onto land

The Upper Tribunal (HHJ Stuart Bridge) agreed with Mr Fivaz that the FTT had failed correctly to address the issues before it. Mr Fivaz's argument had not been that the doors were chattels; he had accepted that, given the method and degree, and the object and purpose, of their annexation to the flat, they were not chattels. However, he had maintained that they were part and parcel of the flat itself. The FTT had wrongly omitted to engage with this argument.

In this context the Upper Tribunal acknowledged the three-fold classification of articles laid down in *Elitestone Ltd v Morris* [1997] 1 WLR 687, HL. An object brought onto land may be (a) a chattel; (b) a fixture; (c) part and parcel of the land itself. The Upper Tribunal also accepted that the status of an article, initially a chattel, may change – but such change may not necessarily result in it becoming a fixture (as opposed to a part of the land).

Were the entrance doors "landlord's fixtures"?

The above approach meant that the Upper Tribunal had to determine whether the doors were "landlord's fixtures".

Unfortunately, the concept of "landlord's fixtures" is neither clear nor felicitous. In *Elliott v Bishop* (1854) 10 Ex 496 Martin B described the term as *"a most inaccurate one"*. Vaughan Williams LJ in *Lambourn v McLellan* [1903] Ch 268 spoke of it as "not a happy expression". And in *Boswell v Crucible Steel Co* [1925] 1 KB 119 Scrutton LJ stated that he had *"always had a difficulty in understanding"* what the phrase means. Hardly a promising platform!

All that one can really say with confidence is that a "landlord's fixture" is a sub-species of fixture. So it must be a fixture. It must also be a fixture which is not a tenant's fixture (i.e. installed and removable by the tenant). Beyond that it may (in the light of the above dicta) be unwise to tread, unless absolutely necessary. Indeed, as was suggested by DJ Alan Johns QC (as he then was) and Greville Healey in their 2017

Blundell Lecture, the term "landlord's fixtures" ideally should be avoided.

Of course, in this case the Upper Tribunal could not avoid the term. It featured in the leases.

In *Boswell v Crucible Steel* Atkin LJ had said:

"A fixture, as that term is used in connection with a house, means something which has been affixed to the freehold as accessory to the house. It does not include things which were made part of the house itself in the course of its construction. And the expression "landlord's fixtures", as I understand it, covers all those chattels which have been so affixed by way of addition to the original structure, and were so affixed either by the landlord, or, if by the tenant, under circumstances in which they were not removable by him."

Following that approach, the Upper Tribunal concluded that the doors had been made part of the flats in the course of their construction.

The Upper Tribunal decided that the entrances doors were not "landlord's fixtures". Rather, they were an inherent part of the demised premises themselves. In each lease the demised premises were the individual flat. The demise included the door. The absence of a door would derogate significantly from the grant of the flat by landlord to tenant. There was no doubt that the FTT's decision (that the doors were landlord's fixtures) was wrong in law.

In so doing, the Upper Tribunal rejected Marlborough's submission that because the doors were not part of the structure of the building, they fell within the meaning of "landlord's fixtures" in the above sense. The Upper Tribunal observed that the demised premises were not the building (the block of flats) but the individual flats, entailing that the doors to the flats assumed a far greater significance in that context.

In reaching its decision the Upper Tribunal stated that the the issue of classification (landlord's fixture or no) is one of contractual interpretation. It is not a question to be asked and answered in the abstract; it is possible that in different contexts an entrance door may or may not be categorised as a landlord's fixture.

In this case, in addition to the points made above, the Upper Tribunal was influenced by the repairing covenant in the lease which distinctly placed on the tenant a liability to repair the entrance door to the demised premises and, separately, an obligation to keep in repair all fixtures and additions. This served to underscore the status of the front door as an inherent part of the premises. If the doors had been been intended to be classed as fixtures, they would have been captured by the reference to 'fixtures' in the repairing covenant and the express reference to the doors themselves in that covenant would have been otiose.

Had the doors been 'removed' by the tenant?

Because of its clear conclusion that the doors were not landlord's fixtures the Upper Tribunal did not decide this issue.

The competing arguments were:

- (for the tenant) removal connotes a situation where an item is taken away without any substitute being provided; it does not embrace the scenario in which the result of the process undertaken is that there remains something fulfilling the function of the relevant item (here a door); that is replacement, not removal.

- (for the landlord) the fact that the original item has gone inevitably means that removal has occurred, even though a replacement is supplied.

Resolution of this dispute will have to await another case in which the issue is live.

The result

The Upper Tribunal decided that Marlborough had no hope of establishing any breach of covenant caused by Mr Fivaz having replaced the external doors. As a matter of law the doors were not landlord's fixtures and so, necessarily, the covenant relied on by the landlord had not been infringed. The Upper Tribunal allowed the appeal and substituted its own conclusion to this effect.

Observations

In the light of the Upper Tribunal's decision that whether something is to be classed as a "landlord's fixture" is a matter of contractual interpretation, it cannot be said that the entrance door to a flat must *invariably* be regarded as part and parcel of the flat (as opposed to a landlord's fixture).

However, bearing in mind that a flat is not realistically built or complete without an entrance door (lacking which it is not self-contained and enclosed), a feature which provides essential weatherproofing, security and privacy to the flat, and that an entrance door is not (again to use the language of Atkin LJ) an 'accessory' to a flat, it is suggested that it would have to be a truly exceptional case (driven by highly unusual wording in the relevant lease) in which the front door of a flat (which is surely of the essence of the flat) would be adjudged to be anything other than an inherent part of the demised property. As the Captain of HMS Pinafore put it, "Hardly ever!"

Decisions on "landlords' fixtures" are few and far between. Many, if not most, date from the 19th century. Even if (as explained above) the decision in *Fivaz* is not wholly determinative of the status in law of something as fundamental as the entrance door of a flat in every possible case, nonetheless the Upper Tribunal's conclusion no doubt provides a welcome and helpful indicator of the stance which is likely to be taken in similar cases.

The decision is also in line with view expressed in Woodfall, para.13.136 (a passage endorsed by the Upper Tribunal) that:

"All structures are constructed out of materials which were originally chattels, such as the bricks used to build a wall. *Where an article which was originally a*

chattel is built into the structure of a building, it will not usually be regarded as a fixture but as part of the building itself. Thus "things may be made so completely a part of the land, as being essential to its convenient use, that even a tenant could not remove them. An example of this class of chattel may be found in doors or windows." (Citing *Climie v Wood* [1869] LR 4 Exch 328)

Armed with the decision in *Fivaz v Marlborough Knightsbridge Management Ltd,* practitioners can now have some confidence that in the 21st century a robust and common sense approach will be taken to issues regarding the classification of objects such as doors. Hopefully, the notion of "landlord's fixtures" will no longer prove unduly troubling in most cases.

Need for clarity in FTT decisions

Finally, the Upper Tribunal's decision is also worthy of note for its criticism of the FTT's failure clearly to identify the breach the existence of which it purported to find. The FTT's decision stated only that there had been a breach of covenant. Moreover, its unspecific decision was compounded by the fact that the final paragraph of its reasoning alluded, confusingly, to the breach having rested with both the alterations and the repairing covenants - despite it never having been contended that there was any breach of the latter.

The Upper Tribunal recorded that there was considerable merit in the submission that the FTT's decision was inadequate on this basis (although in the end the point did not matter because of the reversal of the FTT's conclusion that there was any breach). The Upper Tribunal stated:

"The purpose of s.168(4) is to provide clarity and to ensure that the parties know the scope and extent of tenant default prior to the inception of forfeiture proceedings. *Where application is made for a determination pursuant to s.168(4) it is essential that if a breach is proved the FTT states in clear terms what covenant (or condition) has been broken by the tenant.* It should not be left to the parties to read between the lines."

A sage observation indeed.

Martin Dray acted for the successful Appellant, Mr Fivaz, in the appeal.

About the Author

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Boundaries, Documents and Mistakes

by Jack Dillon

I'm predicting a 2020 increase in disputes concerning ownership of and rights over residential land. The numbers of properties going onto the market, inquiries from potential buyers, sales, and mortgage inquiries seem to be pointing to renewed interest in a market that has been depressed for two to three years. Churn in housing stock will likely lead to buyers' inquiries about potential legal issues. Vendors will need to resolve long overdue issues. Then there are those that have decided against selling in favour of development, which tends to push the envelope with respect to boundaries lie and permissible use of land. Disputes which have lain dormant for years can become active.

In particular I anticipate a rise in boundary disputes. By reputation these cases are among the more costly to run compared with what is at stake. A disinterested outsider, often, would wonder whether the risk and cost are worth the reward. In part this stems from the specific characteristics of cases. The key period often long pre-dates the trial. For example, in one sub-species of boundary disputes, adverse possession, it is far from uncommon for the relevant period to be in the outcome can depend on the physical state of land decades ago. The physical features of the land have often changed in the interim. How does the court to determine that issue?

Witness evidence from owners is often not available. The hope, often, is for precise, unbiased recollections from a longstanding owner of neighbouring land. This is seldom available at trial. Perhaps there is a statutory declaration on file somewhere. But these, often quite short, documents are rarely sufficiently detailed or comprehensive to resolve all disputes that arise. At trial the court will have to pore at length over old plans attached to deeds or covenants – often in too large scale to assist particularly. Cross-examination is often pushed to the side in favour of technical argument and expert evidence. Core solicitors' skills – conducting an investigation, interviewing neighbours, navigating the Land Registry to obtain historic documents – are essential to building a strong case.

One new tool that is increasingly used at an early stage of boundary disputes are historic aerial photograph archives. These are not that cheap, or guaranteed to show what is needed. Clients will be told by the archivist when and where the photo was taken; but they have to lay out money without knowing whether or not the photo will actually have any probative value. This can run to hundreds of pounds. While this seems like unnecessary cost for a client early on in a dispute it may be negligible compared to the eventual total costs; in fact this can be money very well spent. It is certainly worth making inquiries at an early stage.

What can be learned from recent cases? Litigation risk means that sometimes even the best prepared cases come unstuck at trial, even where live witness evidence doesn't play a huge role. Points that have seemed important are dismissed out of hand, and points that seemed impregnable are undermined by new issues. The opposite happens too. Cases that look hopeless heroically succeed. Sometimes this happens when, whisper it, judges make mistakes with evidence. A judge's evidential findings are, as a rule, treated with great respect on appeal. The unfortunate victim can generally only grin and bear it.

But a recent case seems to hold out some hope for those that consider errors have been made about documentary evidence. Judge Hodge QC's judgment on 31 January 2020 in Boas v Aventure [2020] EWHC 237 (Ch) opens the door to a wider range of appeals.

It was a case about a boundary dispute between industrial units. A fence built in 2004 had been replaced in a different position in 2014 and a grass sward had been concreted over. The trial judge considered old aerial photos, ordnance survey plans, Google Earth images from 1999, and a surveyor's 2000 photo. After a site visit the judge decided that the 2000 photo and Google Earth images did not assist much, and found that the 2014 fence sat on the boundary. On appeal, Hodge QC (as a s.9 judge) took a different view: the 2000 photo showed differences in width between the 2004 and 2014 fences, which was supported by the Google Earth images. As a result he overturned the decision and found for the 2004 fence.

The judge described the relevant proposition as follows (para 33)): "where the key evidence is documentary (in the form of photographs and plans) rather than oral evidence, an appeal court is said to be in just as good a position as the trial judge to interpret the evidence and is entitled to reverse the findings of fact on which the trial judge relied to find in favour of a party." The test was whether the court was "convinced that the [first instance judge] drew the wrong conclusions from the photographic and other evidence relied upon by the appellants" (para 54(3)). On the facts of the case, he was satisfied. This was "… one of those extremely rare cases where the first instance judge clearly failed to appreciate the true significance and impact of a piece of evidence … and failed to draw the correct inferences and conclusions from it" (para 101).

It is early days to comment on the actual effect of this decision. It could open the door to an erosion of the principle of respect for the trial judge's findings. Or it could be one of those cases that becomes understood to have been so fact dependant that it is not relevant to other matters. For the time being, all things

being equal in boundary disputes we can expect more appeals being brought about documentary evidence than previously.

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Law Commission Backs Making Commonhold "Preferred Alternative" to Leasehold Ownership

The Law Commission has proposed replacing leasehold with commonhold as the "preferred alternative" as it outlines long-awaited recommendations for reforming home ownership in England and Wales.

The legal body has released three separate reports advising the Government on how to make it easier for home owners to extend their leasehold or buy the freehold, reforming the right to manage process and making it easier to create and build a commonhold property. It recommends that leaseholders should be able to make a claim to purchase a freehold straightaway, rather than having to wait for the current two years

There should also be a new right to a lease extension for leaseholders of both houses and flats, for a term of 990 years, in place of shorter extensions of 90 or 50 years under the current law, the Law Commission said.

There would be no ongoing ground rent under the extended lease.

The Law Commission also recommends eliminating or controlling leaseholders' liability to pay their landlord's costs.

Similarly, with right to manage, the Law Commission recommends removing the existing obligation on leaseholders to pay the landlord's costs of the, including of any Tribunal action and relaxing the qualifying criteria so that leasehold houses, and buildings with up to 50% non-residential space, can qualify.

Its commonhold report proposes introducing flexibility into the way commonholds can be built and managed, enabling their use for developments of all types and sizes.

The Law Commisison said: "It is now for Government to decide whether it should be compulsory, in all or some circumstances, incentivised, or left optional."

Campaigners at the National Leasehold Campaign backed the report and called for the Government to immediately create legislation to be created as soon as possible.

Bruce Collinson, a director at Leeds estate agent and property company Adair Paxton was less sure of the benefit of the changes though. He said: "The Law Commission's recommendations are driven by the south and London where the premium for a lease extension is often millions of pounds.

Arbitration v Expert Determination: What are the Relative Merits?

This article first appeared in Construction Law in 2016. However, the key points remain relevant and with parties increasingly looking beyond traditional court hearings to determine their disputes, we republish it now. The issue of expert determination in property transactions was also debated on 21st May 2020 in the Hardwicke Property Team's #HardwickeBrew.

Catherine Piercy and Andy Creer of Hardwicke consider the relative merits of using expert determination over arbitration as an alternative means of dispute resolution. The former is increasingly used where a valuation has to be determined or a technical expert opinion required.

Key points

- Expert determination is more unfamiliar than arbitration to some and the case law is less developed.
- Uncertainty surrounds the jurisdiction of the expert, the procedure and the nature of the decision.
- It is however often a quicker, cheaper and less adversarial method of resolving disputes.
- This can assist in maintaining good relations between commercial parties.
- Arbitrations can be incredibly expensive whereas expert determination often presents a much cheaper method of dispute resolution.

Introduction

Arbitration is a long established dispute resolution procedure and commercial parties, their advisors and the Courts are familiar with the process and the extent to which the Court will intervene. Expert determination presents more unfamiliar territory to some and the case law is less developed, resulting in more uncertainty as to the jurisdiction of the expert, the procedure and the nature of the decision. However, as further explained below, it often presents a quicker, cheaper and less adversarial method of resolving disputes, which may assist in maintaining good relations between commercial parties.

Procedure

Arbitrations in England and Wales are regulated by the Arbitration Act 1996. The procedural rules will be identified in the contract, usually by reference to one of the standard sets of rules, such as ICC, LCIA or UNCITRAL. The procedural rules set out the requirements of the request for arbitration and the response, how the tribunal is to be appointed, the procedure for adducing evidence and conducting hearings and the delivering of awards.

Conversely, standard form rules do not often apply to expert determination. However, as with arbitration, the scope of the expert's instructions will be defined by the underlying contract and, once a dispute or issue has arisen, it will be further informed by any letter of appointment. The procedure the expert is required to adopt can be prescribed, but absent such parameters, the expert is free to determine the reference in any way he thinks fit. The consequence of this is that specific provision needs to be made for a reasoned determination, as a determination without reasons is generally binding on the parties unless a requirement for reasons is provided in the terms of the expert's appointment.

By their contract, the parties can displace any of the functions of the Court and allocate them to the expert. An expert can make decisions on points of law if that is within the scope of his instructions, alternatively (and more usually) an application can be made to the Court resolve any points of contractual interpretation which affect the expert's remit.

The courts will respect the parties' freedom to contract and, therefore, not interfere with the procedure adopted by the expert provided that he has not departed from his instructions. Indeed, an expert's interpretation of the procedural rules has been upheld by the court with the court stating that it would only interfere with the expert's interpretation where the expert was obviously in error (Conoco (UK) Ltd v Phillips Petroleum Co, unreported, 19 August, 1996.

Evidence

Unlike the quasi-judicial function that an arbitrator performs, the expert is required to exercise his own skill and judgment. He is responsible for the information gathering process and, therefore, unlike an arbitral tribunal, can adopt an inquisitorial approach. Inevitably, in practice, this includes receiving submissions from the parties, but the expert is not bound to have regard to them: Palacath Ltd v Flanagan [1985] 2 All ER 161. Conversely, an arbitrator is likely to seek the parties' permission before carrying out its own investigations and the parties should be given an opportunity to make submissions on the results of such investigations before the final award is made.

The expert, as the name suggests, is chosen for his particular knowledge and expertise. He is expected to draw on his own experience to decide the questions referred to him and may dispense with the need for the parties to instruct their own independent experts if deemed appropriate. An expert is required to make his own inquiries unless he reasonably considers that the evidence provided by the parties is sufficient. It is very rare that an expert will conduct an oral hearing, whereas in arbitration, similar to litigation, there is often a fully contested hearing with involving

examination of witnesses and experts and oral submissions by legal representatives of the parties.

Unlike an arbitrator, unless the contract expressly provides that an expert can, for example, order a party to disclose relevant documents or to issue a witness summons compelling a witness to give evidence, there will be no jurisdiction for him to do so (British Shipbuilders v VSEL Consortium plc [1997] 1 Lloyd's Rep 106). Consequently, expert determination is often less suitable for cases in which there are substantial issues of fact in dispute.

Liability

One of the important distinctions (not least from the appointee's perspective) is that an expert has no immunity from suit. They owe a contractual and tortious duty of care to both sides and a party can obtain damages if the expert has been negligent: Arenson v Casson Beckman Rutley & Co [1975] AC 901

In valuation cases it is necessary to show that the value determined by the expert was outside of the permissible margin of error. In effect, the expert's decision has to be so wild of the mark that proving negligence is rare in practice. In fact, the Handbook of Rent Review (Vol 1) section 14.3 contains case summaries of five cases of alleged negligence, all of which failed.

The expert can limit the scope of this liability in his retainer, for example, to instances of deliberate misfeasance and can also attempt to negotiate immunity from suit with the parties, but there is no automatic immunity.

Conversely, arbitrators, like judges acting in their judicial capacity and the Official Receiver, are in the diminishing categories of individuals who still retain immunity from liability in negligence.

Challenging the decision

The grounds on which an arbitration award can be challenged are provided in the Arbitration Act 1996, namely

- challenging the tribunal's substantive jurisdiction (section 67)
- challenging on the basis of serious irregularity affecting the tribunal, proceedings or the award (section 68) and
- appealing on a point of law (section 69).

In relation to expert determination, as the referral to the expert arises from contract, there is no right of appeal. Case law shows that it is extremely difficult to set aside an expert's decision even in the face of a patent error of law, as this would undermine the contractual bargain made between the parties: Pontsarn Investments Limited v Kansallia-Osake-Pankki [1992] 1 EGLR 148.

There are, therefore, limited grounds on which an expert determination can be challenged: (i) if the expert can be shown to be biased; (ii) if the decision is vitiated by fraud or dishonesty; and, (iii) if the expert has materially departed from his instructions.

Grounds (i) and (ii) arise from the expert's duty of good faith. Even if the expert applied the wrong methodology, it appears that so long as he did it in good faith, his determination is unimpeachable. Whereas, ground (iii) involves the expert acting outside of the scope of his instructions, for example, if he incorrectly interprets the instrument. In such a case, it does not matter that the outcome is not significantly different from what it would have otherwise been: the expert has not done what he was appointed to do (for example, see Veba Oil Supply and Trading GmbH v Petrotrade Inc [2002] 1 All ER 703).

A successful challenge invalidates the decision and the parties have to start again.

Enforcement

Unless otherwise agreed, the expert's determination will be contractually binding, so can be enforced in the same manner as any agreement: by an application for specific performance or action for breach of contract (where summary judgment should no doubt be considered).

Arbitral awards, however, are capable of enforcement in a similar way to a judgment within England and Wales and, often internationally where the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 applies.

Whilst there are benefits to the ease with which an arbitration award can be enforced, there is often a greater chance of finality with an expert's determination, because the parties have often chosen that expert for a reason and are prepared to accept the decision as resolving the dispute. Although it may be due to the greater volume of judgments and arbitration decision, in the past such rulings have been more likely to be the subject of a challenge or appeal than an expert's determination.

Costs

In arbitration, the tribunal usually has jurisdiction to allocate the parties' costs, with the general rule being that costs follow the event. An expert, however, has no power to award costs unless his instructions or the terms of the contract provide for it.

Typically, as in arbitration, the parties share the cost of the appointment, but there is no means for the Court to tax the costs. There is also no statutory control over experts' fees as there is over the fees of an arbitrator as provided by section 64 of the Arbitration Act 1996, which states that arbitrators can only recover reasonable fees and expenses incurred unless the parties agree otherwise.

A significant difference between arbitration and expert determination is the level of costs that will likely be incurred by the parties; arbitrations can be incredibly expensive, whereas expert determination often presents a much cheaper method of dispute resolution, primarily because the process is much shorter and less labour intensive.

Timing

Expert determination is likely to provide a far quicker alternative to the Courts. The length of an arbitration

very much depends on the issues in dispute, the scope of the evidence being adduced by either party and, increasingly, the availability of the tribunal both to conduct hearings and write the decision. However, in substantial disputes it is not uncommon for arbitrations to last 18-24 months.

Conclusion

Expert determination should no longer be considered only appropriate for rent review and lease renewals. It has a wider applicability to any decision involving quantification of loss in a specialist field, for example, the cost of remedial works or technical issues affecting a plant or a project.

One of our colleagues summarised the key differences thus: "Expert determination is quicker and cheaper but you're stuck with the decision".
For some clients, in some disputes (where the cost of litigation, especially an appeal, may be prohibitive) this may be exactly the resolution they're looking for. Indeed, in an over-stretched legal system, one could see a possible place for a hybrid emerging: with liability determined by the Courts and the parties agreeing that quantum is referred to an expert assessor.

Summary

Catherine Piercy and Andy Creer, Hardwicke

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Summary

	Arbitration	Expert Determination
Procedure	Governed by the Arbitration Act 1996 and procedure identified in the contract, often by reference to standard form rules.	No statutory control and procedure defined by the contract.
Timescale	18-24 months	~ 3 months
Remit	Contractual	Contractual
Evidence	Disclosure, witness statements, expert evidence oral hearing.	Normally by agreed statement of facts and parties' respective submissions.
Liability of tribunal	Immune from suit.	No immunity from suit.
Costs	Costs can be allocated by the tribunal.	Costs of referral borne by each party.
Challenging the decision	Limited to points of law.	Contractually binding unless set aside.
Enforcement	Enforceable often internationally.	Enforceable as a contract.

Hybrid Contracts - Should Payment Notices Distinguish Between Sums due for Construction Operations and Non-construction Operations?

Hybrid contracts are one of the more unusual creatures arising from the Housing Grants, Construction and Regeneration Act 1996. They are contracts that include both "construction operations" (as defined in the Act) and works which are excluded from the operation of the Act. They have given rise to a number of cases considering how the statutory right to adjudicate applies to such contracts. Lord Justice Coulson referred to this as a "self-inflicted problem" which the courts must do their best to resolve until the Act is amended to do away with these "unnecessary distinctions".

In the recent decision of C Spencer Limited v M W High Tech Projects UK Limited, the Court of Appeal considered hybrid contracts again in the context of the payment provisions in the Act.

Background

MW High Tech Projects UK Limited was the main contractor appointed for the design and construction of a power plant capable of processing refuse-derived fuel produced by waste. C Spencer Limited was engaged as MW's sub-contractor to design and build the civil, structural and architectural works for the facility. The sub-contract price was over £35 million.

The sub-contract was substantially comprised of works falling within the definition of "construction operations" for the purposes of the Act. However, the works also included the assembly of plant and erection of steel to provide support or access to plant and machinery. Such works are expressly excluded from the definition of "construction operations" in the Act.

The sub-contract provided for milestone payments and included an Act compliant payment mechanism that did not distinguish between "construction operations" and "non-construction operations".

A dispute arose in relation to a payment application submitted by C Spencer. This payment application made a distinction between construction and non-construction operations. It allocated approximately £2.6 million plus VAT to construction operations and provided a breakdown of that figure. However, MW issued a payment notice which stated that C Spencer actually owed MW approximately £6.8 million excluding VAT. MW's payment notice (in line with previous payment notices) did not distinguish between construction and non-construction operations.

C Spencer argued that this was not a valid payment notice and therefore the sum they had applied for was due by default. The key point to this argument was that the payment notice was not valid because it did not distinguish between construction and non-construction operations. C Spencer commenced Part 8 proceedings seeking payment of approximately £2.6 million on this basis.

The Court's decision

The issue for the Court was therefore whether a payment notice under a hybrid contract had to distinguish between "construction operations" and non-construction operations in order to be valid?

The Court of Appeal agreed with the TCC that this was not the case and so dismissed C Spencer's claim on the basis that:

- There was nothing in the sub-contract which required the parties to differentiate between construction and non-construction operations in their payment or payless notices.
- Analysis must start with the contract terms in order to see if they comply with the Act. The Act envisages that the parties will contract on terms agreed between them. If those terms comply with the Act, the Act is no longer of relevance to the parties. The Act envisaged hybrid contracts but did not go on to say that hybrid contracts should require separate or distinct notification of sums due for construction operations. It could have done so. The contract therefore complied with the Act.
- Parties are free to agree a payment mechanism for their contract that sits alongside the statutory provisions. In other words, they can "contract in" to the Scheme for Construction Contracts (which operates under the Act), but they cannot "contract out" of the Act for construction operations. In practice, this is commonly adopted in sub-contracts which include both construction and non-construction operations in certain industries. Lord Justice Coulson went on to say "that approach is not only permissible, it is to be welcomed". It provides certainty and transparency and avoids the complications that having two separate payment regimes would bring.

The Court of Appeal also found that the importance of the distinction between construction and non-construction operations under a hybrid contract only

arises if there is a dispute over the sum due. Unless it is extended by agreement between the parties (which it had not been in this case), an adjudicator will only have jurisdiction to deal with disputes relating to construction operations under the construction contract.

What does this mean for hybrid contracts?
It is likely that parties will continue to use one payment mechanism for hybrid contracts. This means the payment provisions needs to be compliant with the Act, otherwise the Act will imply the relevant provisions from the Scheme for Construction Contracts to replace any non-compliant terms in the payment mechanism for the construction operations only. This would result in two payments mechanisms in the contract.

The Act does not require payment applications or notices to distinguish between construction and non-construction operations.

The Act will only imply a right to adjudicate into the contract in respect of the construction operations. A party will therefore only be able to bring an adjudication claim in respect of the non-construction operations if there is a contractual right to do so. If not, any adjudication that does not clearly confine itself to the construction operations could be subject to a jurisdictional challenge. In such circumstances, the claiming party will have to make sure that the application subject to the adjudication claim clearly differentiates the sums applied for in respect of construction operations. Otherwise, it will be difficult to establish that there is a dispute in relation to the sums claimed for those specific items of work and that the adjudication claim only relates to sums due in respect of construction operations.

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Avoiding and Managing Disputes - The New Normal in a Post Covid-19 Construction Industry

by Stephen Blakey, Network Rail, Commercial Projects Director
Martin Burns, RICS, Head of ADR Research and Development

For many years, there has been a prevailing acceptance in the construction industry that disputes over contractual entitlement are almost inevitable. It's an attitude that has substance and something of a long history with an industry that has often been adversarial, with complex, protracted and costly disputes being seen as normal .

In recent times, however, there have been significant moves by government and commercial decision-makers to address the claims conscious, divisive, nature of the industry. A key feature of these moves has been a desire to establish an integrated approach to collaborative working. Major industry bodies have embraced collaboration, and some have underpinned their approach by engaging in effective conflict avoidance procedures or mechanisms that facilitate prompt resolution of emerging disputes. Whether the focus of an industry body is on avoiding disputes or dealing with them early and amicably, the objective is the same. Employers and suppliers want to avoid disputes and prevent problems from escalating to damaging and costly adjudication, arbitration or litigation.

The recognition of the problems inherent in the construction industry, and the desire to address them, is not exactly new. Sir Michael Latham's report in 1994 described the industry as being so rife with disputes that almost any solution would be welcome. In subsequent years, Sir John Egan made his recommendations on improving relationships, and Sir Roy McNulty added his wisdom to the question of how to achieve value for money in the rail sector. Lately, the baton has been picked up by the Infrastructure Clients Group which has been providing advice and guidance designed to make infrastructure delivery more efficient and collaborative with an emphasis on enterprise delivery models such as Project 13. Such models are designed to inhibit the propensity and corrosive consequences of disputes.

The Covid-19 emergency has now brought into sharp focus the need for the industry to step up a gear. The Government and industry leaders are clearly concerned that major problems lay ahead. There is genuine concern that a tidal wave of disputes will happen as the industry emerges from the crisis caused by the pandemic.

The government has promised unprecedented levels of investment, both in the private and public sectors. This puts a greater focus on to techniques that decrease the likelihood of disputes arising in the first place. Put simply, industry needs to adopt techniques that help contracting parties to avoid disputes and, where problems do arise, address them early and effectively. There is an urgency to make real the aspirations of Latham, et al and establish conflict avoidance and early intervention procedures as a normal part of procurement and contract delivery.

Network Rail is an organisation that is leading the way. It is the UK's largest infrastructure client, with a demanding £multi-billion capital works programme delivering enhancements and renewals over a five-year control period up to 2024. The contractual regime for much of this work is via long-term frameworks and collaborative forms of contract for which Network Rail and its suppliers have built a credible capability. Its answer to the problems caused by disputes was to create a model procedure for Dispute Avoidance Panels (DAP) that looked at avoidance/prevention rather than early intervention, seeking to stop disputes from arising in the first place.

The concept is simple. Establish a DAP comprising subject matter experts who understand the genesis of disputes and practical ways to avoid them. Their terms of reference are prevention, not intervention. The approach is the equivalent of establishing a team of seasoned firefighters, all of whom are experts and understand what causes and sustains a fire. Their role; to be on 'fire watch', spotting the smouldering embers of dispute in the dry grass and alerting others to take action to ensure a fire doesn't start.

Alerting stakeholders to the danger takes the form of an Observations Report that highlights where the potential for a dispute is growing and invites the project's leadership team to remove the key components that would otherwise nurture and ultimately give rise to a dispute. It is a high value proposition that many a team would wish for when standing on the steps of the court, and through a successful pilot has proved it can be highly effective. Network Rail developed the DAP process in collaboration with its key suppliers and has incorporated provision to instruct a DAP into its major framework contracts, and a programme to establish a cluster of active DAPs has commenced.

Network Rail is not alone in its commitment to deploy conflict avoidance/management procedures and, through this, change the attitude of the construction industry. Transport for London (TfL), for example has been successfully using its Conflict Avoidance Process (CAP) for several years, though in reality CAP is focused on early disposal of emerging disputes – i.e. stamping out that small fire, rather than straightforward avoidance.

CAP involves the introduction of an independently nominated subject matter expert who provides impartial advice and recommendations for settlement of an issue before it can escalate into a lengthy and intractable dispute. One of the benefits of CAP is that after it has been established in the contractual matrix, it can have a preventative effect. TfL has reported that the introduction of CAP into frameworks and contracts has actually prevented needless disputes from arising in the first place.

Both Network Rail and TfL have joined with professional membership bodies such as RICS to establish the Conflict Avoidance Coalition Steering Group. The coalition also includes the ICE, RIBA, ICES, DRBF, ICC, CIArb, and CECA.

The coalition's purpose is to support the development of a culture of collaboration and reduce the number of disputes and the damage they cause to relationships, finances and reputations.

The coalition has issued a Conflict Avoidance Pledge which commits organisations to adopt conflict avoidance and early intervention techniques for their projects. To date, over 180 organisations have signed the pledge. Significantly, over 60 have signed up after the beginning of the Covid-19 lockdown.

On 07 May the Cabinet Office issued guidance to contracting bodies on responsible behaviours. The guidance, which is a pre-emptive against the potential tidal wave of disputes anticipated by the government, encourages contracting parties to sign up to the principles in the pledge for collaborating on avoiding and resolving disputes.

On 16 June, the Construction Leadership Council, which is co-chaired by the Minister for Business and Industry, Nadhim Zahawi, published the construction industry roadmap to recovery. It too references the work of the coalition and encourages parties to adopt the pledge. In Scotland, the members of the Construction Industry Coronavirus Forum, (CICV Forum) which is made up of 24 key industry bodies and advises the Holyrood government, signed the pledge and effectively made a commitment to conflict avoidance on behalf of the Scottish construction industry.

The Covid-19 emergency has created the potential for a tsunami of disputes that can cause immense. long-term, damage to the industry. And yet it has also mobilised industry by drawing attention to the existence of tried and tested techniques for avoiding and managing disputes, such as DAP and CAP. There is clearly a fertile environment in the UK for conflict avoidance and early intervention techniques, and it is evident that COVID19 may actually be an industry wide event that accelerates these techniques becoming the new normal.

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The Latest Rights of Light Injunction Case – Beaumont v Florala

by Rashpal Soomal - Partner, Bryan Cave Leighton Paisner

In this case the High Court granted a mandatory injunction ordering the demolition of part of a newly constructed (and occupied) hotel development in the City of London in order to protect the rights of light of an adjoining serviced office building. Whilst this case does not establish any new law, it is of great importance as a rare practical example of how the existing legal principles would be applied in a relatively common factual matrix. The fundamental risk profile remains that infringing a neighbour's rights of light carries a real injunction risk that needs to be handled carefully, and as always the court's perception of conduct is key.

This case concerns a hotel development in the City of London, located in Moorgate, a few minutes' walk from the Bank of England. The developer Florala had PC'd the scheme and a hotel operator was in occupation and trading, when this case came on for hearing at the High Court in London for a 4 day trial with live evidence from multiple witnesses and expert evidence from four valuers on rights of light, office valuation, hotel valuation, and design feasibility. The claimant Beaumont operated high quality serviced office accommodation in a building adjoining the Florala hotel, and sought and secured a mandatory injunction requiring the demolition of the Florala scheme to the extent necessary to restore light to their offices.

A few main themes emerge from this important case:

1. Injunction

Following the Supreme Court case of Coventry v Lawrence, there had been some hope for developers that an injunction might not be automatically awarded for every nuisance caused by loss of light. This case reminds us all that an injunction is still the primary remedy and that the burden of proof is on the developer to show why an injunction ought to be avoided. The mere fact that a building has been PC'd and is occupied is not in itself sufficient evidence of "oppression" to avoid a mandatory injunction to demolish. Interestingly, Florala did not provide any evidence of the cost of any cutbacks, thus leaving open the question whether it would be sufficient evidence of "oppression" if cutbacks were disproportionately expensive. Similarly, here Beaumont did not seek an emergency injunction to stop construction on site and the court held that this was not to be held against them. It was sufficient that Beaumont wrote to Florala objecting to the works; from that point onwards Florala built at risk. We do not know whether Florala had any rights of light insurance in place, but if they had, it might not have covered them for all losses from this point. It is typical for insurance policies to carve out losses from agreements (e.g. building contracts or pre-lets) entered into after proceedings have been issued or a claim has been notified.

2. Book values

Neither side argued for damages based on the conventional valuation of loss of light in terms of book values which assume a value of light lost at £5 per square foot. Of course book values are often used by parties to assist them to come to a reasonable settlement figure and that approach is likely to continue in terms of market practice. However developers should treat with caution any technical analysis or rights of light report based purely on a mechanical 3 or 5 times uplift of notional book values. You are looking for a surveyor's report which sets compensation budgets by reference to the surveyor's professional judgment of where deals tend to be struck, taking into account a myriad of factors such as the severity of light loss, the use of the impacted property and – crucially - the assumed risk profile of the neighbour. We may now begin to see a softening of the reliance previously placed on book values.

3. Beaumont's actual loss

The valuer on behalf of Beaumont gave evidence of rents achieved within comparable lettings before and after Florala's development and sought to rely on the reduced rents as evidence of the loss caused to Beaumont by the loss of light. The valuation evidence was lengthy and complex, and took up a large proportion of the live evidence and court time. What is notable is the difficulty in establishing causation; how were Beaumont to prove that the reduced rents were caused by the loss of light as opposed to other factors that were present? Florala pointed to the following which they argued all had a depressive effect on rents: the Brexit referendum; the presence of scaffolding during the lengthy construction works which would have undoubtedly put serviced tenants off; another development site nearby which caused general construction nuisance, and finally the fact that service office accommodation saw increased competition in the City during this period. Nevertheless the judge found that the loss of light generally caused a 2.5% reduction in rents equivalent to £20,000 per annum across the affected space. This resulted in a capitalised sum of say £240,000.

4. Profit share

Whilst the court granted a declaration that Beaumont was entitled to an injunction as against Florala, the court also stated that if Beaumont wanted to secure an actual order for an injunction, they would have to join the hotel tenant into the proceedings. For that reason the court went on to decide what measure of damages would be appropriate in lieu of an injunction. The court came down firmly in favour of damages based on the classic hypothetical negotiations for a release of rights, which would look to award a share of the profit derived from the offending massing. The court said that a 50% share of profit was simply too high and did not adequately reflect the developer's risk in proceeding with the scheme. Following a line of cases, the court awarded damages based on a one third share of profit, which in this case came to £350,000. The court sense checked that figure to see if it "felt right" against the expert valuation evidence of the impact of the loss of light at £240,000 and stated that a figure of one third "would not be out of all proportion to Beaumont's actual loss of £240,000". This leaves open the interesting question of the appropriate measure of damages in those cases where the two figures are out of all proportion.

5. Conduct

As always in injunction cases, conduct is key. Here Florala were branded by the judge as acting in a "high handed or at least unfair and unneighbourly manner". Was the judge a little harsh given the context and background? There was evidence that Florala had made the initial approach to Beaumont and considered making an initial offer of compensation based at a 5 times uplift of book value at £155,000; and there was further evidence that they had consulted with Beaumont and implemented a partial redesign of their scheme to restore light to the one room which originally went from well-lit to insufficiently well-lit. And all this against the context that Beaumont had itself carried out its own development a few years earlier, adding a sixth storey, for which no compensation had been agreed or paid to Florala's predecessor. Despite this, the court took a dim view of the developer's behaviour. It is imperative therefore for developers and their advisers to carefully consider the strategy at an early stage and ensure that the developer's behaviour is impeccable under scrutiny. Obvious things to consider include initiating an approach, issuing appropriate undertakings for the neighbour's costs, sharing technical analysis and making appropriate offers on an open basis. Careful consideration should be given to any insurance policies which contain agreed conduct obligations which cut across or constrain such behaviour.

6. Money money money

It is a classic statement of the law that a court will refuse an injunction if it is clear that the neighbour is really only interested in money. However this case suggests that the threshold for proving this is high. Here there was evidence of a deed agreed between Beaumont and the previous owner of the building as part of a sale and leaseback transaction under which any damages awarded for loss of light would be shared between the parties. The court held this was equivocal and did not demonstrate that Beaumont were only after money. In a similar vein, during live witness cross examination, Beaumont gave evidence that they discussed figures with Florala at a number of meetings and said "This was the figure we would need". Despite the existence of the deed and the live evidence, the judge held the discussions around money merely evidenced why Beaumont were so keen to preserve their light and did not demonstrate that they were really only interested in money. Clearly the court formed its impression based on the witnesses and evidence before them, but this case raises an important question as to what kind of evidence would satisfy a court on this front. As always, impression and perception is key. It is possible that even subtle differences in evidence could lead to a different conclusion in another case. How would the courts approach a situation where a party has released its rights in exchange for money to an agreed profile but the constructed scheme breaches the profile?

7. Waldram v Radiance

Ever since the Law Commission consultation paper on the reform of rights of light, there had been increasing debate as to whether the Waldram basis of assessing loss of light, dating back to the 1920's, is still appropriate today. The court here held that Waldram had stood the test of time and was still the appropriate starting point. So we can expect to continue to see the classic EFZ tables and contour drawings in all well drafted rights of light reports. However the court was receptive to looking at new ways of deciding whether there is a perceptible reduction in light to a neighbouring building, and considered evidence based on Radiance, which also takes into account reflected light rather than being narrowly focussed on sky visibility. The court held that these images were helpful, although it was to be noted that the reflected light (e.g. from light colour cladding, white rendering or paintwork) on which these assessments were based was not guaranteed and such factors could be subject to change at any time. So these types of modelling, and also climate based daylight modelling (which takes into account variances in climate and weather) have a role of play in understanding whether a nuisance is caused, but Waldram is here to stay at least in the medium term.

8. Objection to planning

Does it matter that an impacted neighbour has not objected to the developer's application for planning permission? Whilst it might be considered that public law and planning should be entirely separate from private law and rights of light, the judge left this point open and suggested that in an appropriate case any lack of objection at planning might be a significant factor to be considered when deciding whether to grant an injunction. The judge said "Had Beaumont been seeking a demolition of the entire hotel or a cutback what would make it inoperable, then the fact that the hotel has planning permission which Beaumont did not oppose, might have been significant. But here, all Beaumont is seeking is a relatively small cutback". This is an interesting point and one that may be developed in an appropriate case.

9. Poorly lit premises

It was accepted by the parties that the Beaumont serviced offices were already poorly lit. Florala argued that if a poorly lit building is merely made worse lit following a development, no nuisance is caused. The court rejected this concept. It is not just loss which takes a room from well lit to poorly lit which is actionable. Where a building is already poorly lit, any loss of light which would make the space substantially less comfortable and convenient than before, is actionable, although not every perceptible loss is a nuisance. Here the court held that given the intense competition for serviced office accommodation, every little shift in advantage or disadvantage mattered. This is a sensible restatement of the basic principles of what constitutes a nuisance. This does mean however that developers should treat with caution any over reliance in rights of light reports on the so called "50/50 rule" or any undue emphasis on any threshold for what is "well lit". Everything must be considered on a room by room basis and in this regard the shape of the contour of light loss will be important – is the loss evenly spread in a thin sliver across the room or is the loss pooled in an area in the middle and nearest to the window? Developers will as always need to rely on expert surveyor advice and any mechanical reliance on so called thresholds is likely to be misplaced without a more nuanced assessment of the quantum location and nature of loss.

Conclusion

Whilst this case is fact specific, it reminds us all that building without resolving rights of light issues is a risky venture. Loss to commercial space may be protected by an injunction, and the key test is whether the loss makes the space substantially less comfortable and convenient than before. Evidence of reduction in rental income is likely to establish this. Crucially, conduct is key and developers should be mindful of how their conduct would be perceived by a judge. One can also expect well advised claimants to join in occupying tenants (after PC) or say a building contractor (during construction) in order to maximise the impact of any adverse order if secured. Developers should carefully consider their strategy and seek to engage where appropriate in good time and in a neighbourly manner. Developers should also carefully scrutinise any insurance products which constrain or govern their conduct to assess to what extent such policies cut across any preferred form of neighbourly conduct.

We understand that Florala have sought permission to appeal.

About the Author

Rashpal has over 20 years experience in all aspects of contentious property matters with a particular focus on issues that commonly arise out of development, including rights of light claims, development constraints such as restrictive covenants or easements, and vacant possession strategies. Her particular specialism is in the area of rights of light where she regularly advises on strategy, risk mitigation measures such as placing agreed conduct insurance policies or implementing s203, and dealing with litigation.

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Package Travel Claims in Aviation: The fallacy of Local Standards for Piloting an Aircraft

Peter Neenan *and* ***Rebecca Smith*** *of Stewarts' Aviation team represent two passengers injured when a private chartered flight operated by Aquarius Aviation crashed in southern Ethiopia in 2016. In this article, Peter and Rebecca look at why the decision in this case has broader implications for those involved in international aviation claims.*

On 20 October 2016, Dimitris Palaiokrassas and his wife, Eftychia Tsakou (the claimants) were travelling on a Gulfstream Twin Challenger 690C Aircraft in a domestic private charted flight operated by Aquarius Aviation from Addis Ababa to an airstrip in South Omo, Ethiopia.

Following touchdown, the aircraft advanced to the left, left the runway and collided with a tree. On impact, the aircraft was engulfed in flames. Fortunately, there were no fatalities, but the claimants sustained long-lasting injuries.

Accident investigation report

In the claim brought by the claimants, reliance was placed on the findings of a report issued by the Ethiopian Accident Investigation Authority (EAIA). The EAIA had investigated the accident pursuant to their duties under Article 26 of the Chicago Convention 1944 (to which Ethiopia is a signatory). While these investigations are undertaken, and the reports are produced, for the purposes of safety and not blame, as a result of Stewarts' Court of Appeal win in the case of *Rogers v Hoyle*, such reports can be used in the litigation surrounding liability for aviation accidents.

The report makes a number of causal findings including that the pilot failed to apply the correct landing procedures and arrest the advancement to the left, which it ascribes to inadequate piloting skill and nerves. The report concludes that the probable cause of the accident was the pilot's inadequate recovery procedure from the accident landing, and identifies several contributing factors including that Aquarius Aviation assigned the pilot without considering the actual level of the pilot's skill.

High Court proceedings were brought against Black and Trading Limited (trading as Journeys by Design) pursuant to the Package Travel Regulations 1992. The package had been sold by the defendant, a luxury tour operator, and the flight performed by their supplier, Aquarius Aviation, a local air carrier.

The case recently came before the court on the defendant's application to set aside the Default Judgment obtained by the claimants following the defendant's failure to file an Acknowledgement of Service in time. The defendant initially explained its failure as an administrative diary error, and latterly attempted to blame the coronavirus for the error.

The Denton test

The defendant failed in its application to set aside the judgement following the court's application of the Denton test. The Denton test is whether (a) the failure that gave rise to the judgment was serious or significant, (b) whether there was a good reason for the default or failure and (c) whether, in all the circumstances of the case, the default judgment ought to be set aside.

On the application of the Denton test, the court considered that the breach was a serious one and called for an adequate explanation. It was not persuaded that the explanation provided for the failure to lodge the Acknowledgment of Service, namely that this had been due to "an administrative diary error" was an attractive one without at least a further coherent explanation as to the cause of the precise error being fully set out. Ultimately, the court concluded that there was no reasonable explanation and that in all the circumstances of the case, there was no good reason for the default judgment to be set aside.

No reasonable prospect of success

The defendant also failed in its application to set aside the judgement under CPR 13.3(1)(a) as it was unable to demonstrate that the defence had any reasonable prospect of success.

The defendant had argued that judgment should be set aside because expert evidence was required to determine local applicable safety standards and the application of those standards to aviation principles.

The court accepted the claimants' argument that aviation is governed by a set of international rules and that a consumer can expect reasonable conformity with those rules. Master Thornett went on to say:

"I entirely accept the claimant's submissions that it surely cannot be defence having any realistic prospect of success to argue that there might be a different local standard in Ethiopia how to fly and land an aircraft;

as distinct from, say, standards of maintenance or cleansing. The defendant fails to satisfy me that anything could be argued to the effect that the manner in which an aircraft is operated can vary from locale to locale: with or without the assistance of expert evidence in this regard."

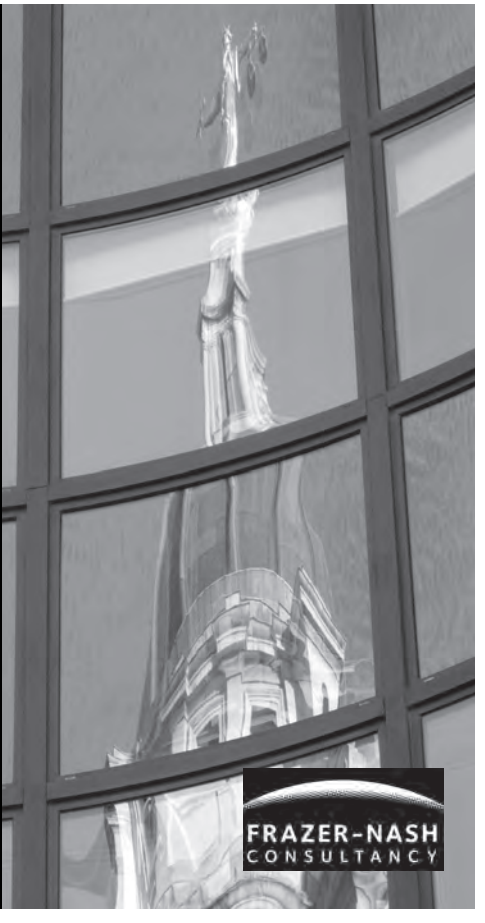
Conclusion

The decision is a welcome one for those involved in international aviation claims. It confirms that expert evidence is not a requirement to determine "local standards" where, as was the case here, there had been an official investigation and a clear causal finding against the operator and crew.

The decision serves as yet another reminder to lawyers that breaches of the CPR are not to be taken lightly and that there needs to be a full explanation before the court as to how the breach occurred in order to avoid sanctions being imposed.

Further details of that hearing and an analysis of the reasons can be found here:
www.internationalandtravellawblog.com/2020/04/22/package-travel-aviation-and-the-role-of-local-law/
A blog written by Max Archer, who was counsel on the case.

You can find further information regarding our expertise, experience and team on our Aviation pages.
www.stewartslaw.com/expertise/aviation



Potential Unintended Consequences Due to a Lack of Scientific Rigour

by Dr Angus Ramsay

Background

The author has written previously in this journal presenting in 2017 the concepts and importance of simulation governance and, in 2019, examples of the sort of work a structural engineering expert might undertake and how he/she can ensure, through simulation governance, that the results presented will withstand the sort of scrutiny likely to be seen under cross examination [1,2]. In this year's article I am going to present a case study from a recent project involving the repair of cracks found in a 30-year old overhead crane. Whilst interesting in itself from a structural engineering viewpoint, the project highlights the difficulty of assessing a situation where the facts are sparse and where opinion, not based on the scientific method, has the potential to lead to unintended consequences and costs.

Introduction

This case study comes from a recent commercial project undertaken by the author at his engineering consultancy, Ramsay Maunder Associates (RMA). The owner of the crane contacted RMA after a recent inspection had revealed cracks in some of the main structural members. The owner had employed a reputable crane maintenance organisation to repair the cracks. This included two aspects, firstly, the gouging out and welding up of the crack and, secondly, the welding of a cover plate over the previously cracked region. The insurer of the crane asked the owner to provide confirmation that the stresses under and adjacent to the new cover plate were unlikely to cause problems with fatigue at a future date. A schematic of the overhead crane is shown in Figure 1. The regions where the two cracks were observed are highlighted and it is the crack at the northern end of the crane that we will consider in this article.

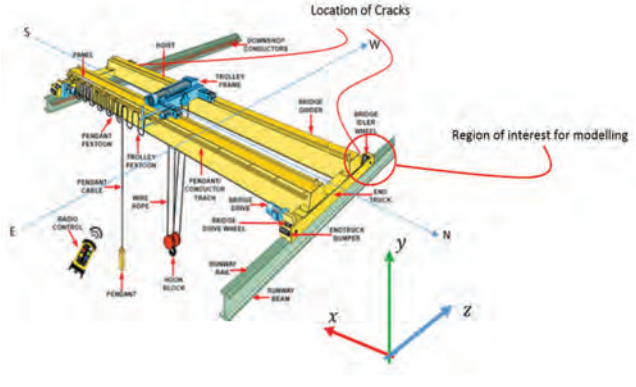


Figure 1: Schematic of the overhead crane highlighting the region of interest in this study

The crack in the region of interest emanated from a sharp corner where the bottom flange of the rectangular hollow section end truck member had been removed to allow the idler wheel to penetrate the member and reach the track on the runway beam – see Figure 2(a).

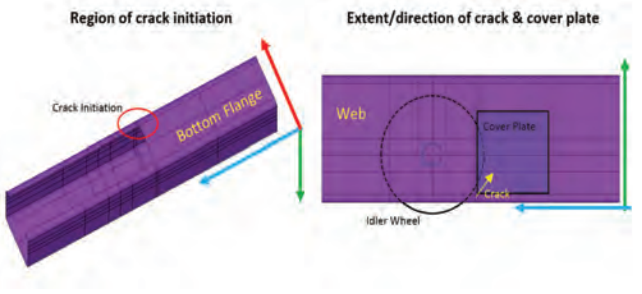


Figure 2: Crack initiation, direction of growth, extent and cover plate repair

At an inspection during my site visit it became apparent that the removal of the end portion of the bottom flange had been undertaken using some form of flame-cutting approach which left a rather poor finish of the sort that is fertile ground for early onset fatigue crack initiation. The cover plate used to repair the crack is shown in Figure 2(b). It is welded to the web of the end truck member around the four sides of the plate and the question posed by the insurers of the crane is how does this plate influence the stresses in the member. To answer this question some stress analysis is required both of the member alone and then with the cover plate welded on to it. But before presenting this, it is worth noting a brief history of the crane.

History of the Crane

The crane was built in the early 1990s for the previous owner of the building and was operated at about 90% of its Safe Working Load (SWL) capacity. Since about 2005 its present owner has operated the crane at only 30% of capacity. Whilst the number of lifts per day is currently only about 20, it is not known how often the crane was operated during its previous ownership. Of additional note is that the two cracks were only observed during the 2020 inspection which, it is understood, was a 'particularly thorough inspection'. So, it could be the case that the cracks pre-existed this year's inspection but were simply not detected. It is interesting to consider also that whilst there are eight sites where similar cracks could have developed, only two were detected.

Free Body Diagrams - Reaction Forces

Engineers tend to view structures in terms of free body diagrams. Such diagrams use arrows to show the loads applied to the structure together with the reactions at the supports which hold the structure in equilibrium. The applied forces come from the mass of the structure in a vertical gravitational acceleration field, i.e., force = mass x acceleration. The mass of the crane structure alone, m_d, leads to what is called the dead load, $m_d g$, whereas the mass of the trolley and payload, m_l, lead to the live load, $m_l g$, where g is the gravitational acceleration, 9.81m/s^2.

The reactions due to dead and live load are shown in Figure 3. The live load can, of course, be positioned anywhere along the bridge beams, i.e., $0 \leq x \leq$, however, as we are interested in capturing the worst case with the highest live load reaction at the northern end of the crane, the case where the trolley is adjacent to the northern end of the bridge beams, i.e., with the smallest value of possible, will be taken.

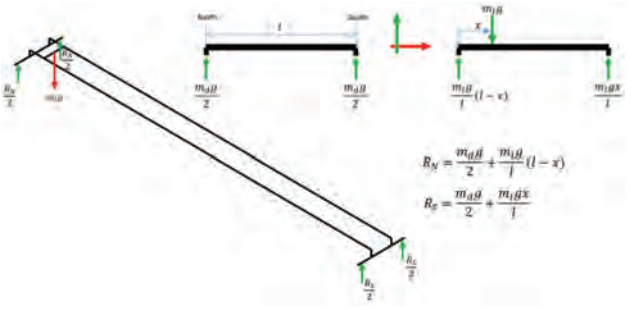


Figure 3: Free body diagram of the crane

Stress Resultants – Internal Forces/Moments

Thus, the reaction at the north-west crane wheel is half the total for the northern end trolley and the loading diagram shown in Figure 4 can be drawn. If we consider a cut through section z-z then the force and moment required to keep the section to the left of the cut in equilibrium are simply determined as shown in the right-hand part of the figure. Engineers tend to call these quantities 'stress resultants' and it is possible to draw diagrams of shear force and bending moment stress resultants showing how these vary in the region of interest.

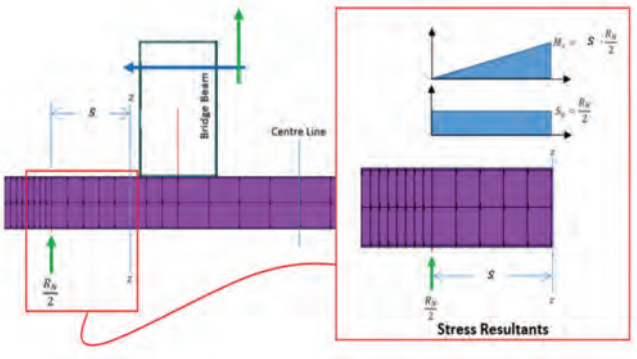


Figure 4: Stress resultants in region of interest

Stress Trajectories – Internal Load Paths

Once the stress resultants are known then using simple engineering theory for beam members, the stresses at any point across the depth of any section z-z may be determined. This theory tells us that the bending moment resultant produces a normal stress distribution that is linear through the depth of the member and a shear stress distribution which is parabolic. Whereas the shear distribution remains constant along the length of the region of interest, the linear normal stress distribution decreases (linearly) to zero at the point where the vertical reaction forces is applied, i.e., at the wheel. These stresses are shown in Figure 5 where principal stress trajectories have been used to represent the stresses. Principal stress trajectories are extremely useful to the practising engineer since they capture, in a single image, the load paths inside the member. They form a network of orthogonal lines and may be coloured according to the magnitude of the principal stress that they represent. Cracks tend to grow in a direction that is at 90 o to the maximum principal stress trajectories, i.e., parallel to the minimum principal stress trajectories, and the direction and extent of the crack shown in the figure are consistent with the actual crack observed in the crane.

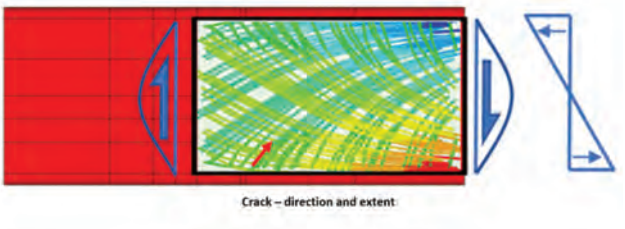


Figure 5: Stresses in region of interest

Although we have come a long way in determining the stresses in the members of the crane, this is about as far as we can go with hand calculations. In order to consider the influence of the cover plate on the stresses in the web of the end truck member, a different approach will be required. The reason for this is that the addition of the cover plates leads to plate thickness discontinuities which, in turn, will lead to stress discontinuities and concentrations which are nowadays tackled using finite element (FE) stress analysis. However, the work we have already done is not wasted, since the FE results may be verified, one of the essential parts of simulation governance, with the forces, stress resultants and point stresses already calculated by hand.

Finite Element Analysis

In a FE model, the structure is discretised using finite elements and there is a range of element types available to the engineer. In modelling the crane, I have chosen to idealise the majority of the structure using beam elements and then to idealise the region of interest, i.e., under and adjacent to the cover plate, using shell elements. The model is shown in Figure 6 where the cover plate is shown and the weld around the four sides of the cover plate is idealised using rigid-beam elements (shown as red lines).

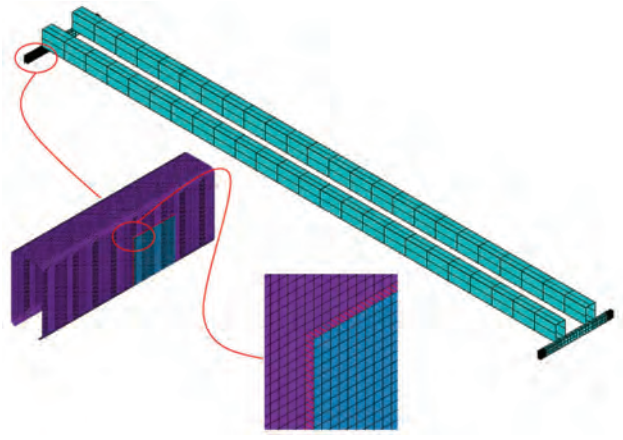


Figure 6: Beam/shell finite element model with removable cover plate

The contours of normal bending stress shown in Figure 7 agree extremely well with those calculated by hand. However, the stress distribution though now shows the local disturbances caused by the idealisation of the idler wheel axle as a point support and by the sharp corner of the flange cut-out.

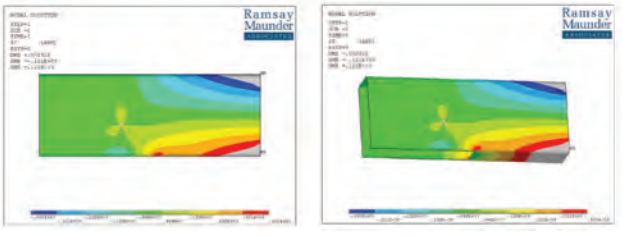


Figure 7: Contours of normal bending stress at full payload (without cover plate)

To model the influence of the cover plate correctly the analysis has to be split into two steps. In the first step the crane without the cover plate is analysed under dead load and then for the second step the cover plate is added and the live load applied. The contours of normal bending stress for the crane with the cover plate added are shown in Figure 8.

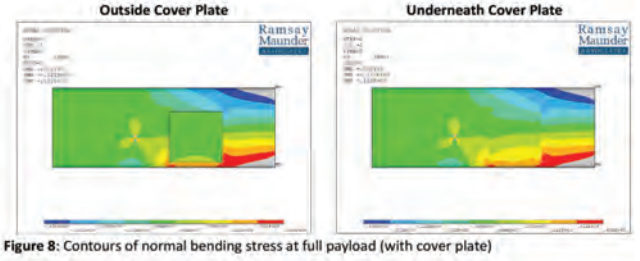


Figure 8: Contours of normal bending stress at full payload (with cover plate)

Figure 8: Contours of normal bending stress at full payload (with cover plate)

The insurers of the crane are essentially interested in the difference in the normal bending stress in the web of the end truck member due to the addition of the cover plate. This can be established by subtracting the stresses shown in Figure 7 from those shown in Figure 8 – see Figure 9.

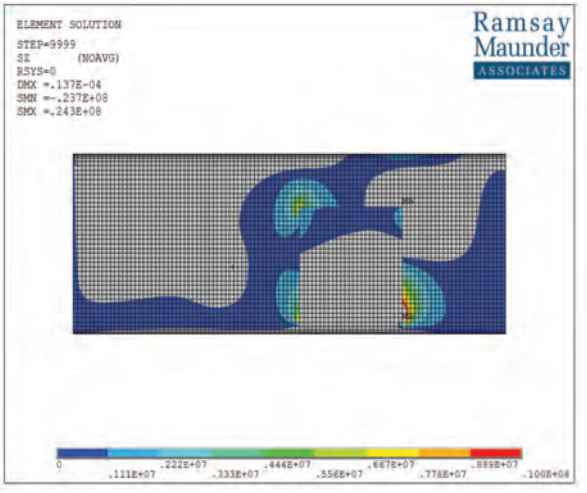


Figure 9: Contours of difference in normal bending stress for full payload

The contour levels in Figure 9 were chosen such that regions of negative stress, which indicate a reduction in stress due to the addition of the cover plate, are coloured grey. All other colours represent different ranges of increased stress and locate regions where the addition of the cover plate has impinged in a potentially harmful manner on the structural integrity of the member. It is noted that at the bottom left of the cover plate, where the original crack existed, the stresses have been reduced which might ameliorate crack growth should the crack reappear in the future. However, this has been at the expense of the top left corner and in particular the bottom right corner of the cover plate where the stress has been increased.

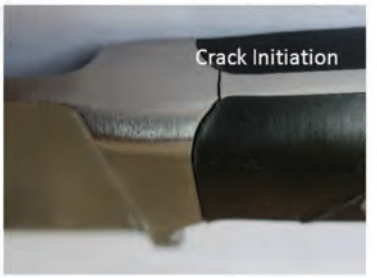
Fatigue Assessment of Crane

In designing a structure such as the crane, the engineer will need to ensure that the crane has sufficient stiffness so that under the service load the deflections are not unreasonable, and that the members have sufficient strength that even under an overload condition, the structure does not collapse. At least on an empirical basis, these conditions have been met. Had they not, the crane would have been scrapped a long time ago. There is one other potential mode of failure, known as fatigue failure, which the design engineer should also have considered during the design of the crane. This mode of failure only occurs when a structural member or machine component is subjected to tensile cyclic stresses. Most readers will have encountered fatigue failure during their life whether or not they recognised it as such, and two recent examples from the author's own experience are shown in Figure 10.

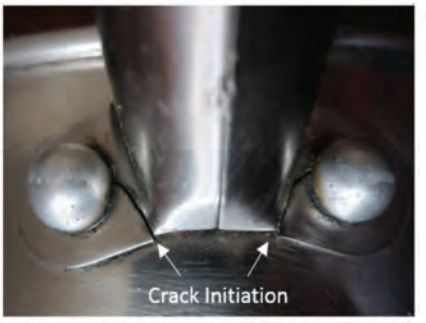
Figure 10: Recent fatigue failures from the author's kitchen (picture on next page)

The members of the crane are, mostly, subject to bending and will, therefore, see tensile stress regimes on either the top or bottom surfaces (flanges) of the member depending on whether the local mode of bending is hogging or sagging. For the region of interest in this case study, the mode of bending is

Figure 10:



The crack was probably initiated due to regular use of the knife to crush garlic which caused bending about the weak axis. The crack grew to the level seen at which point the knife was dropped and suffered a brittle fracture.



The cracks initiated at the sharp corners where the tabs for the two rivets used to join the handle to the pan were bent outwards from the pre-formed handle. The crack grew to the extend shown before the reduction in stiffness became noticeable. Had the pan continued to be used then it is likely that a ductile fracture would have been observed with the handle tearing from the pan.

sagging which leads to maximum tensile stresses occurring on the bottom face of the member – see Figures 7 and 8.

The realisation that failures could occur in metal components which were otherwise soundly designed based on a strength criterion was first noted in the early days of railway transportation with the rotating axles of railway vehicles which were observed to suddenly fail with stresses well below the yield stress for the material. This observation led to controlled experiments which subjected seemingly identical material specimens to the same cyclic stress regime. The results from these experiments, whilst containing some scatter, showed a relationship between the applied stress, *S*, and the number of cycles to failure ,*N*, Since this early work on fatigue, and despite an increased metallurgical understanding of the mechanics of the phenomenon, empirically derived *SN* curves remain the main approach to fatigue used in engineering design.

For the design of steel structures with welded connections, the Eurocodes provide a range of *SN* curves (EC9). Figure 11 shows the two extreme curves where the lower curve is for the type of welded connection or design detail producing the worst fatigue strength whereas the upper curve is for plain, unwelded material. Once the engineer selects the curve appropriate for his/her design detail then it may be used in a design mode, i.e., to find the design stress, for a given cyclic operating life of the structure, *N*, or in assessment mode where the stress is known, as for the crane, and the operating life needs to be determined. For the crane, the upper curve is appropriate for the end truck member away from any welds whereas, when the cover plate is welded onto the member, the lower curve becomes appropriate.

It will be noted that the *SN* curves in Figure 11 flatten out or become horizontal to the right of the figure. This indicates a very useful property of ferrous materials called the endurance limit. Stresses below the endurance limit for a particular design detail can be safely endured without the risk of fatigue failure.

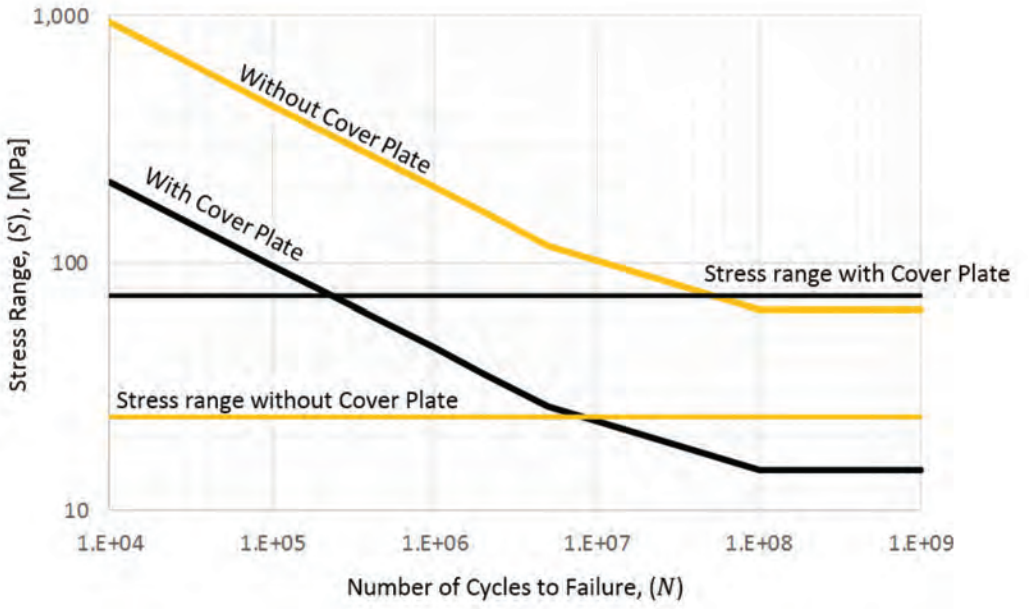


Figure 11: The lower and upper *SN* curves from Eurocode 9

The *SN* curves of EC9 use the stress range on the abscissa (y-axis). The stress range is simply the maximum stress in the operating cycle minus the minimum stress, i.e., the stress under full payload minus that under zero payload. For the case without the additional cover plate, analysis not shown in this paper gives the maximum and minimum stresses as 33MPa and 21MPa. This means that the stress range at the point of interest prior to adding the cover plate was 33 – 21 = 12MPa. When the cover plate is added to the member the stress at full payload is increased by 25MPa (Figure 9) giving a stress range of 33 + 25 – 21 = 37MPa. If we assume a dynamic amplification factor of two to account for the dynamic loads caused by acceleration and deceleration of the crane, then the stress ranges are doubled to 24MPa and 74MPa respectively.

It is seen from the annotated *SNS* curves of Figure 11 that whereas prior to the addition of the cover plate the stress range in that region was sufficiently low as to imbue an infinite fatigue life on the member, the addition of the cover plate leads to a finite fatigue life of just under 200,000 cycles.

In practice, under the current ownership, the crane is only loaded to 30% of its SWL and only undergoes about 20 lifts per day. However, on a conservative basis and taking the 200,000 cycles calculated for the full SWL cycle, the fatigue life of the crane is 200,000 / 20 / 365 = 27 years. The design life of the crane, when new, is not known although a reasonable life for an overhead crane might be 30 years. It has already served this period of time and so one might expect any further life to be a bonus.

Discussion

This article has presented a case study taken from one of the author's recent commercial projects. The first step was to establish the vertical reaction forces at the four wheels. With the reactions determined it is possible to plot stress resultant diagrams for shear force and bending moments. Had we been interested in the strength of the structure then these could have been compared with the capacity of the members to establish whether or not the structure was sufficiently strong. Since we were interested in fatigue, which requires knowledge of point stresses, we were able to use simple beam theory to establish how the stress resultants convert to stress distributions in the member of interest. For beam sections which have been modified as, for example, by having a cover plate welded onto the web, the step change in thickness will lead to stress concentrations. The correct magnitudes of these concentrations need to be established for a proper fatigue assessment but they require a more detailed analysis using finite elements. It is unlikely that the crane designer would, 30 years ago, have had access to FE in the design of the crane and any attempt to evaluate the stress concentrations would probably have been via published tables of such data. Inevitably such data does not generally cover all cases that the design engineer needs and, typically, not the particular one he/she requires.

As far as the commercial project on which this case study is based, RMA were able to present the necessary evidence to their client, the owner of the crane, and as required by the insurer showed that the addition of the cover plate did not unduly influence the future fatigue life of the structure. In this case study the fatigue life was quoted as 27 years. This was based on a payload of 90% of the SWL. In practice the maximum current loading is only 30% of the SWL and the corresponding fatigue life is in excess of 600 years!

It is the case that the large proportion of structural failures seen in structures or machines are fatigue failures. Some sources put this proportion as high as 90%. The reason for this is obvious. If there is an issue with stiffness, strength or stability then this will generally be picked up during commissioning of the structure or machine. The number of cycles required to initiate and grow a crack to its critical crack length when fracture will occur naturally takes time, so that any lack of fatigue resistance takes time to be detected.

The time taken to develop fatigue induced fracture might be many years or it might be very early on in the structure's life. The author has been involved with legal cases where early onset fatigue cracks were not picked up during inspections and the resulting fracture of a member in a statically determinate lifting appliance, i.e., one with no structural redundancy, led to collapse of the structure and the loss of life, [2].

The author is always amazed, when being called to look at fatigue cracks in industrial machinery, at just how obvious it should have been to the designer that a fatigue crack would be initiated. The crane was no exception. The sharp corners left by removal of part of the bottom flange are obvious sites for stress concentration. Furthermore, not addressing the rough flame-cut edges simply exacerbates this issue by leaving probably multiple sites adjacent to the high stress at the corner where fatigue cracks would easily initiate. With additional effort at the design stage it is likely that a more suitable geometry could have been determined which would have alleviated the likelihood of fatigue initiation at this point. Even a healthy fillet radius would have probably done the trick but such a study would have required detailed analysis using FE analysis which was probably not available to the crane manufacturers some 30 years' ago.

The author recalls an occasion when he was privy to a discussion in the design office of a manufacturer of industrial gas turbines. Their previous blade design, whilst having great aerodynamic performance had suffered from early fatigue failures. Such failures are expensive since when one blade 'lets go', the resulting damage to the machine can be enormous and expensive to repair. The chief engineer was in the office giving a pep talk to his troops in preparation for the design of a new machine and concluded his talk with the statement '… and remember, NO SHARP CORNERS!!'.

In design against fatigue induced fracture, the engineer can adopt a fracture mechanics approach rather than a fatigue damage methodology of the form adopted in this article. In this approach the structure is assumed to have pre-existing cracks and the method is then used to establish whether the crack will grow and if so its critical length, i.e., the length at which fracture will occur. Such an analysis needs to be undertaken in conjunction with a member collapse analysis since it is possible that the reduced capacity of the member due to the presence of the crack might lead to the development of a plastic hinge prior to fracture.

Without a proper timeline for the crack in the crane it is impossible to tell when it started and how it grew, although it is clear by the absence of fracture of the member that it had not reached its critical length. The owners of the crane, by necessity to maintain production, on hearing that there was a crack in a critical member instigated the repair work. Had there been time at this stage an alternative approach would have been to commission a fracture mechanics assessment of the crack which might well have shown that it was dormant under the current loading regime and perfectly safe to live with.

The repairs made to the crane appear to have been undertaken on the 'belt & braces' principle and without any consideration of the unintended consequences of the repair that a more detailed analytical approach might have brought up. It is the case that the gouging out and welding up of the crack should have returned the fatigue resistance back to the 'as new' condition, [3]. The re-initiation of the crack could have been ameliorated and potentially stopped by addressing the poor geometry and surface finish at and adjacent to the sharp corner where part of the flange had been removed. It is also noted that the repair work was undertaken when the crane was unloaded. A more thoughtful approach might have been to repair it when fully loaded since by doing so a decent set of compressive residual stresses would have been gained for any future loads up to the fully loaded condition. And, finally, the whole area could have been treated with shot-peening to impart residual compressive stresses to the surface of the member to discourage future crack initiation. The purpose of the cover plate is unclear. It might, though, have been added as a gesture to increase the structural strength of the member should the crack reappear. The repairers would, I guess, be somewhat surprised to understand, as explained in this article, that by adding the cover plate they have reduced the fatigue resistance of the structure. As it happens, and it is guessed that this is purely by serendipity, the reduction in fatigue resistance is unlikely to result in crack initiation during the foreseeable remaining life of the crane.

Practical Conclusion

This case study has revealed a general lack of scientific rigour surrounding the inspection and repair of the crane. Apart from the fact that a crack was discovered in 2020, there is no timeline available and one is left having to guess the timeline or to substantiate it with associated structural analysis. A fracture mechanics assessment at the time the crack was discovered would have revealed whether or not it was still growing and how far away it was from being critical. Whilst the repair is likely to work, in the sense that a properly gouged out and welded up crack should recover the original fatigue resistance of the structure, it is unclear whether or not the root cause of the crack has been addressed. The addition of the cover plate, seemingly to add structural capacity to the member should a crack reappear, has had unintended consequences. Without the added cover plate the member had an infinite fatigue life but now, as a result of the addition of the welded cover plate only has a finite one. It is, seemingly, a matter of luck that the remaining fatigue life of the member is more than adequate to see the crane through the last part of its life.

Whilst I would not wish to cast aspersions on the inspector's competence, it is the case that they only discovered this crack during what was termed a 'particularly thorough' inspection. Why weren't all inspections thorough and what parts of the crane were checked for cracks during previous inspections? Inspectors of critical lifting appliances such as overhead cranes or scissor lifts should be aware of the critical points within the structures they inspect. Whilst

this knowledge can come from engineering experience, it was certainly obvious to most engineers that cracks would emanate from the stress concentration resulting from the removal of part of the bottom flange in the end truck member, this knowledge can only really come from the results of analysis. Based on the presumption that the manufacturer of the appliance has undertaken a formal analysis of the structure, it might be of benefit to the purchaser of the appliance to request a list of structural 'hot spots' which need to be inspected regularly and if this is not available, to commission one at their own expense.

It is worth noting also that whilst two cracks have now been detected and repaired, it seems unlikely to the author that similar cracks are not also present at the other side of the end truck member. The stress levels on either side of the member are, essentially, identical (Figure 7) and the sharp corner due to the partial flange removal is also present on both sides. It seems likely, therefore, that cracks will be present on these webs also but, because these sides of the member are close to the wall of the building and difficult to inspect let alone repair, these have been neglected or missed.

Had the crack not been detected in the 2020 inspection and had it grown to its critical length (assuming it still is growing) leading to the fracture of the end trolley member, and had the crane come crashing down on whoever was below it then the Health & Safety Executive (HSE) would have been brought in to inspect the situation and legal proceedings would, no doubt, have been initiated between some of the parties involved. The owners of the crane would probably defend themselves, arguing that they had employed reputable inspectors and repairers whilst the crane's insurers would no doubt attempt to avoid a pay-out by passing as much blame as they could reasonably get away with onto the inspectors and repairers. Likewise, the insurers for the inspectors and repairers might attempt to find fault in the way the crane was loaded and operated by the owner. At this juncture opposing sides might employ their own technical expert or the court might impose a joint party expert who will employ the same sort of techniques presented in this case study to assist the court in reaching a settlement. If the failure of the crane had led to fatalities or serious injury and there was suspicion of criminal behaviour, e.g., gross negligence or professional misconduct, then the consequences might be far more serious than the financial losses ….

Closure

The potential consequences of the structural failure of a crane or indeed any other lifting appliance are serious and should be taken as such by all involved. If the author were the owner of such a structure then he would make sure that he was aware of the potential failure points of the crane and would ensure that during inspection these points were monitored. He would also ensure that any repair was backed up, a priori, by suitable analysis of how the repair might impinge on the existing structure to make certain that there were no unintended consequences.

References

[1] Angus Ramsay, 'Simulation Governance for the Expert Witness', The Expert Witness Journal, Summer 2017.

[2] Angus Ramsay, 'The Structural Engineering Technical Expert – What does he do?', The Expert Witness Journal, Summer 2019.

[3] The Welding Institute (TWI), https://www.twi-global.com/technical-knowledge/faqs/faq-what-isthe-recommended-method-of-repairing-fatigue-cracking-and-how-long-will-the-repairs-last

[4] Crane FEM Consulting, http://crane-fem-consulting.com/articles/fatigue-life-assessmentapproaches-comparison-based-on-typical-welded-joint-of-chassis-frame/

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The author is grateful to Dr Edward Maunder, a practising structural engineer and the Reverend Max Ramsay, an intelligent and interested layman, for their reading of and comments on this article.

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Resisting Enforcement of An Adjudicator's Decision - No Change Here!

It is accepted that the grounds for resisting enforcement of an Adjudicator's Decision are extremely narrow. The court's 'go to' position is to enforce. The decision in J&B Hopkins v Trant Engineering Limited [2020] EWHC 1305 (TCC) is yet another example of this – but interestingly the resisting party raised a novel argument not based on jurisdiction or natural justice.

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The facts

Trant employed J&B to carry out M&E works at a recycling plant. In accordance with the payment provisions set out in the contract, J&B submitted its Interim Payment Application No. 26 in the amount of £812,484.94 plus VAT. Trant failed to issue a valid payment or pay less notice in response and the sum stated as due in that application therefore became the notified sum due for payment. However, Trant refused to make payment and a dispute arose between the parties, which was referred to adjudication.

In that smash and grab adjudication, Trant sought to argue that it had in fact issued the requisite notices but those submissions were rejected by the Adjudicator, who proceeded to decide that the sum stated as due in Payment Application No. 26 was due and payable to J&B immediately and without deduction. Trant still refused to make payment and J&B had to enforce the Decision.

Of note, Trant did not allege that the Adjudicator had acted in breach of natural justice, nor did it raise any challenge to the Adjudicator's jurisdiction. Instead, Trant argued that Payment Application No. 26 had been superseded by subsequent interim payment cycles where valid payment notices had been issued such that no further sums were due to J&B. On Trant's case, to enforce the Adjudicator's Decision in respect of the sums due for Interim Payment No. 26 would be to "undermine the correction principle'" which permits interim payments to be corrected in subsequent payment cycles.

The decision

The TCC did not accept that as a valid ground for resisting enforcement, finding that a dispute in regards to Payment Application No. 26 had arisen and referred to adjudication. That dispute did not cease to exist because subsequent applications were made and 'corrected' by Trant's corresponding payment notices. In the words of Mr Justice Fraser:

"What, in law, was the notified sum under Interim Application 26 does not, in my judgment, become incapable of adjudication simply because the payment cycle moves on to Interim Application 27 and subsequent applications..."

Although this was thought by most practitioners to be the case, it is useful to have the TCC's confirmation. In effect, it means that a party can get every other notice in on time, but if it fails with just one at any point during the life of a project, it may open up a smash and grab opportunity.

Trant also argued that if the decision was enforced, it should be granted a stay of execution on the grounds of manifest injustice. This was because a true value adjudication was underway for a later interim application and it was said that this would determine the true value of J&B's account.

However, the TCC said it is dangerous to consider a stay on the basis of manifest injustice in these circumstances. It pointed out that if that was an effective means of securing a stay, it would frustrate Parliament's intention in passing the Housing Grants, Construction and Regeneration Act 1996 , which sets out in clear terms the necessity of issuing, and the repercussions of failing to issue, timely payment notices and pay less notices.

Conclusion

The outcome of this case is perhaps unsurprising, but it reinforces the difficulty of resisting enforcement even with novel arguments. It is also useful for the court to confirm that a party must comply with an adjudicator's decision on a smash and grab adjudication on an earlier payment cycle even where there have been developments, including valid notices, in future payment cycles.

If you would like to discuss any of the issues raised in this article further, please contact Adam Brown on adam-brown@birketts.co.uk, or another member of Birketts' Construction and Engineering Team.
www.birketts.co.uk/construction

Ecological Assessment of Air Quality The Need for Multidisciplinary Expert Witnesses.

by Andrew Baker FCIEEM

Air quality climbs the agenda

The effects of poor air quality on human health has become a cause celebre in recent years as a string of key court cases often instigated by the NGO Client Earth have found the UK government wanting in its approach to meeting air quality standards e.g. ClientEarth vs Secretary of State for Environment, Food and Rural Affairs ([2018] EWHC 315 (Admin)). At the same time, the courts have made other, far reaching decisions on air quality issues relating to the effects of poor air quality on the natural environment under what is now Conservation of Habitats and Species Regulations 2017.

The case that 'rocked' (to quote one preeminent solicitor working in this area) the world of air quality Habitats Regulations Assessments, was the High Court decision of March 2017 (Wealden District Council v Secretary of State for Communities and Local Government, Lewes District Council and South Downs National Park Authority [2017] EWHC 351 (Admin). This case concerned the effects of air pollution from traffic (notably nitrogen deposition upon Ashdown Forest Special Protection Area (SPA)/Special Area of Conservation (SAC) a site which is protected under the European Directives. The cases have far reaching implications for air quality assessments and how the impacts upon European sites (SPAs, SACs and Ramsar sites) are addressed. Notably the judge in the case heavily criticised the guidance current at the time, and the advice from statutory bodies, for providing flawed advice which led him to conclude that an assessment of a local plan had been 'vitiated by Natural England's plainly erroneous advice' that had resulted in a 'clear breach of Article 6(3)'. Since then, further cases have come forward which have tackled similar issues and while some have provided further clarity, others seemingly muddied the waters further. Meanwhile in the Netherlands another key case was decided in the Court of Justice of the European Union (CJEU) (Joined Cases C-293/17 and C-294/17). This examined the Netherlands approach to mitigating the effects of poor air quality, and consequential nitrogen deposition, on protected sites. The case did not go the way the Netherlands government had wished and led to what the Prime Minister Mark Rutte described as "the biggest political crisis of his career".

These cases have combined to push the ecological effects of air quality firmly up the agenda of policy makers, statutory conservation bodies, lawyers and pressure groups. The cases have been complex from a legal point of view but underlying this legal intricacy are further layers of scientific and technical matters that crossover the technical expertise of highways engineers, air quality consultants and expert ecologists.

The challenges of cooperation

As a veteran of many 'call in' inquires, examinations in public of Local Plans, planning appeals, hearings into Development Consent Orders and Parliamentary Select Committees, I am very familiar with the rigours of being on the stand as an expert witness. As an ecologist I am used to working in teams of planners, heritage consultants, hydrologists, noise consultants etc, etc. While there is often some crossover between my area of expertise and the other disciplines, exploration of air quality issues requires an entirely new level of interdisciplinary cooperation to in order to thoroughly explore the effect of poor air quality on the natural environment. The work of the traffic consultant, air quality expert and the ecologist need to be seamless, cooperation is essential, a level of mutual understanding must be achieved, while all the time ensuring that an expert witness one does not stray into your colleague's area of expertise and out of your own.

Guidance and Thresholds

Following the 'Whealden' cases touched on above, there was a scramble from Natural England to put in place updated guidance on air quality assessment. Equally, the bodies representing air quality consultants (Institute of Air Quality Management (IAQM)) and ecologists (Chartered Institute of Ecology and Environmental Management (CIEEM)) have sought to develop guidance for their members on air quality assessments . Highways England has updated the Design Manual for Roads and Bridges (DRMB) in an attempt to address some of the issues. These various guidance/advice documents all feature thresholds below which effects upon habitats or species are considered to be de-minimis in nature. For example, the Natural England guidance sets out thresholds below which ecological effects can be ruled out, these include thresholds for traffic (1000 Annual Average Daily Traffic movements), air quality change the 1% of the relevant critical load) and ecological thresholds. From the beginning of any assessment it is therefore essential that all three disciplines are aware of the relevant guidance and how to apply that guidance. In practice the guidance can cause problems. For example most traffic assessments concentrate on peak flows (rather than AADT) as traffic engineers are quite rightly primarily concerned with assessing a project against the capacity of the available road network. It is my experience that in many cases the traffic data does not include AADT figures. Likewise, the air quality consultants may well not have experience of the guidance and may not have considered the emissions to air against the relevant criteria set out in the guidance. Natural England are of the view that if a plan or project does not contribute 1% or more to the Critical Load or Level for the habitat or species concerned, then the potential impacts are considered to be trivial and further, detailed assessment is not needed. It is therefore clear that even simply assessing the screening stage of an ecological assessment of air quality impacts, requires three disciplines to work closely together and a certain level of mutual understanding is needed.

Controversy and pitfalls.

While Natural England has made significant progress on ensuring that its advice is reliable, the approach to screening still generates a certain amount of controversy within the scientific community. For example, the screening threshold of 1% of critical loads does not take into account whether or not a site is already receiving atmospheric pollution which is already above critical loads or levels. Critical loads have been defined as "*a quantitative estimate of exposure to one or more pollutants below which significant harmful effects on specified sensitive elements of the environment do not occur according to present knowledge*". The obvious corollary of the definition is that where critical loads are exceeded it can be argued that significant harmful effects may occur in which case any screening test would fail at that point. By contrast the Netherlands has taken a very different approach in that they not only regard exceedance of critical loads as indication of a failure at the screening stage of a Habitats Regulations Assessment but they also regard exceedance of critical loads as an adverse effect upon the integrity of the site at the full assessment stage. There is some legal backing for the view as well as scientific which was expressed in the legal opinion of Advocate General Kokkot when considering the Joined Cases C-293/17 and C-294/17 at paragraph 62 she said '*… it seems difficult, if not impossible, to accept values that are higher than the critical loads.*' The problem is that if we take nitrogen deposition for example, a species of pollution which is proven to have adverse effects on the ecology of many habitats, most sites are already exceeding the critical loads for nitrogen deposition as it is generated by the burning of fossil fuels. Natural England's approach is clearly a pragmatic one however, it is not necessarily consistent with the Habitats Directive nor the science on nitrogen deposition. It is my expectation that further cases will be brought on this point and the current caselaw will be updated.

There are other areas of controversy on the ecological effects of poor air quality which are likely to feature in future cases. For example, while the effects of nitrogen deposition are well documented as causing deleterious effects on plant communities (the peer reviewed literature goes back over forty years) it is only recently that evidence is coming forward that high levels of nitrogen are having adverse effects on insects. Some researchers have demonstrated effects in laboratory conditions and have postulated that nitrogen pollution may be the reason for the wide spread observed decline in the populations of many invertebrates in western Europe even on protected sites. The effects of nitrogen pollution further up the food chain is likely to be an area of contention as the peer reviewed literature begins to test the theories which are now coming forward on wider effects.

Mitigation and Compensation.

As the ecological effects of air quality are now firmly on the environmental agenda and beginning to be more widely understood, the means of mitigation and/or compensating the ecological effects are also starting to be explored. The measures fall into two

broad categories; mitigating the source of pollution and, ecological management of sites to compensate the effects of pollution. As with the assessment process, mitigation and compensation measures require close cooperation between the traffic engineer, air quality consultants and the ecologist.

Stopping the generation of pollutants at source is evidently the preferred solution. The automotive industry had in recent years made significant progress in technologies which aim to reduce the production of oxides of nitrogen (NOx) which, at high concentrations, are very damaging to human health. However, there is now evidence that new catalytic converters actually increase the levels of ammonia in exhaust gasses. From an ecological point of view this is highly problematic as ammonia is more biologically available than NOx. Some of the air quality assessment tools used by consultants do not even include ammonia and therefore entirely miss out what is becoming an increasing component of nitrogen pollution that is relevant to ecologists. Of course, the increasing number of electric cars in the national fleet will have the effect of lowering the levels of pollutants generated by traffic. How quickly electric cars become a significant part of the fleet is however a moot point. I have seen projects where the developer took the approach of making no provision for private vehicles within the development – thereby entirely mitigating any air quality issues from traffic.

If mitigation cannot be implemented by reducing the source of the pollutants then it may be possible to compensate the effects of reduced air quality by managing habitats. Some have proposed that tree belts next to roads can assist in reducing emission to air. While this may be true for some species of pollutants there is little evidence in the peer reviewed literature that the effects are significant particularly for nitrogen. Another approach that we can expect to come forward in the next few years is management of sites (for example lowland heaths) to redress the effects of high levels of nitrogen pollution. Measures include a wide range of techniques including soil and turf stripping, grazing, cutting and removing vegetation and burning. While these techniques can be effective they all have unintended ecological consequences, which must be considered carefully.

Team work is the key to success

As an ecologist I am accustomed to working with others in my expert witness work, after all ecology is the study of the interactions of all things with the natural environment. The successes of air quality cases however takes the need for close cooperation within the expert witness team to an entirely different level so that water tight arguments can be formulated and successfully presented to the examining authority. It is also clear that the increasing awareness of the effects of poor air quality both on human health and the natural environment is going to lead to further demand for those expert witnesses who are not only knowledgeable of their own subjects but have a working knowledge of traffic and air quality but at the same time know the boundaries of their expertise.

Andrew Baker FCIEEM

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The Challenge of Valuing Businesses During the Covid-19 Pandemic

This article considers the challenges of dealing with private companies during the Coronavirus crisis.

Litigation is uncertain at the best of times but the present unprecedented economic uncertainty means that litigants who are dealing with cases that rely on company valuations face particular challenges.

It has become clear that it will be many months before the world will return to any semblance of normality. Consequently, for those clients looking for definitive answers, the best advice is probably that they should put their litigation on hold for a year to two in the hope that the prevailing financial climate may by then have become less volatile. Of course, that approach is very unlikely to be supported by the courts which will be unwilling to stay litigation indefinitely. In any event, not only do clients need to get on with their lives but also there is no guarantee that delay will result in them achieving a more favourable outcome than can be achieved now.

Accordingly, the nettle of business valuations needs to be grasped now, despite the inherent difficulties that will inevitably arise and the fragility of any valuation that has been undertaken at a time of uncertainty.

Whenever accountancy expert witnesses express opinions about the value of businesses, they are effectively estimating what they think a hypothetical buyer would pay to acquire them. Such buyers are either acquiring assets or, more commonly, a future stream of profits. One of the critical aspects of business valuation is therefore the estimation of what those future profits might be and seldom has predicting the future been as difficult as it is now.

A conspicuous feature of the economic landscape in recent months has been the enormous variation in the way in which different sectors have been affected by the restrictions of social distancing and government Lockdowns. Some sectors, albeit relatively few, have flourished, notable among which are online platforms such as Zoom and Amazon. By contrast many more businesses have faced a collapse in sales or have had to close completely.

Against this backdrop, it is perhaps not surprising that there is anecdotal evidence that the volume of business sales has also plummeted. Buyers are likely to discount the prices that they are willing to pay to acquire businesses to a level that is lower than sellers are willing to accept. Arguably, if a business cannot be sold, it is difficult to ascribe any positive value to it above that which could be achieved on a break-up basis.

Simply concluding that there is temporarily no market for the shares in a business, is unlikely to help the court achieve a outcome. Accordingly, even if there is compelling commercial evidence that a particular business may be unrealisable at the date of trial, the courts will have to explore mechanisms by which fairness can be achieved even if this involves peering into the future.

In those circumstances, to the most appropriate starting point is likely to be the value of the business immediately before it started to be affected by Covid-19.

Certainly, for any business on which the Lockdown has had a profound effect, it would make sense to include in the letter of instruction sent to the business valuer a request that an opinion is given in relation to a pre-Covid valuation.

It should also be possible for the valuation expert witness to assess the degree to which the business has been affected by the Lockdown up to the date on which the valuation report is issued. Such assessments might include an analysis of any losses that may have been incurred and the extent to which liabilities may have been accruing during periods in which the business might have been moth-balled or working at reduced capacity.

Up to date information will be of critical importance for any analysis. Companies often prepare their annual financial statements only just in time to meet the deadline for filing them, nine months after the end of the relevant accounting period, which means that they will therefore be unlikely to shed any light on recent trading performance. Consequently, although reliance on end of year accounts (especially if they have been audited) will usually be preferable, the need to obtain up to date information means that there is unlikely to be any alternative but to consider unaudited management accounts.

Not only will these accounts help to identify what losses may have been incurred but they should also assist with the identification and quantification of the ongoing financial effects of any restrictions caused by the pandemic on a month by month basis.

Having established the current financial performance of the business, the valuer's next challenge will be to assess the degree to which the business is likely to be capable of "bouncing back" and both the degree and timescale of its likely recovery.

Many businesses that may not have been in the habit of producing financial forecasts have found themselves forced into preparing projections in recent weeks to support applications for loans or emergency funding. This type of documentation can give an invaluable indication as to the business-owners' own view of the future and should always be requested, regardless of whether an expert valuer is to be instructed.

However, even if no forecasts have been prepared, it ought to be possible for the business valuer to form an opinion as to the resilience of a given company to withstand any temporary adverse pressures to which it had been subjected. Equally, in some cases, the consequences of the pandemic may be long-lasting or permanent. For example, if a business finds itself in a position in which a number of significant customers have become insolvent, it may not only have to deal with one-off bad debts but may also struggle to find new customers to replace those that have been lost.

On a more positive note, it is possible that the Lockdown could be a catalyst for some businesses to undergo a restructuring that results in them becoming more efficient and profitable, albeit perhaps while operating on a reduced scale. Any significant reorganisation is likely to result in one-off costs being incurred such as redundancy costs or costs of relocation to cheaper premises. Once again, financial projections will almost inevitably have been produced in such circumstances to help to identify both the extent of any short-term costs as well as the quantum of the longer-term benefits.

"forced sale basis"

Another measure that may be relevant for any business valuer will be the price that could be achieved for the net assets of the company in question if they were sold on a forced sale basis. This assessment of a liquidation scenario will represent a "floor" to the range of possible valuations because it would be very difficult to justify ascribing a value at less than that which would arise on a cessation of trade. Equally, it is important to recognise that, unless the viability of the business is genuinely in doubt, a valuation on a break-up basis will not be appropriate.

Even if it is reasonably likely that the business will continue as a going concern, it may well be necessary to consider the value of its net assets. Typically, the value of a business will be more resilient if its future earnings are underpinned by strong asset values. A business valuer will therefore need to assess the extent to which assets may have been eroded during the lockdown by such issues as:

a. the depletion of cash deposits to fund losses or working capital increases during the crisis;

b. increased bad debts arising from the insolvent failure of customers;

c. reduction in stock values arising from obsolescence caused by periods during which trade might have been suspended; and

d. reductions in the values of freehold properties.

In summary, it ought to be possible for a business valuer to conduct an objective assessment that results in:
1. measurement of the degree to which the pandemic has already affected it financially; and

2. an estimation of the prospects of a recovery together with the associated likely future costs that may be required to achieve it.

These factors could be used to inform the choice of an appropriate discount factor that could be applied to the pre-Covid-19 valuation. In essence the greater the adverse effects of the Lockdown on the business to date and the more remote its prospects of recovery, the higher should be the discount factor. Conversely if the business had been only mildly affected and was very likely to recover fully, a relatively low discount factor might well be justified.

If this approach is taken it ought to be possible to suggest a range of values for businesses during the pandemic albeit that the ranges may well be greater than would otherwise have been the case.

In the most extreme cases, the discount that is applied to the pre-Covid valuation might be so large as to reduce the value to that which would be achieved on a break-up basis. However, many businesses will be able to avail themselves of government support packages and will weather the financial storm. They may be battered by it but they will probably survive.

Appeals and Prayers (1)

W v H (divorce financial remedies) [2020] EWFC B10
Pension on Divorce Judgment of His Honour Judge Hess (HHJ Hess)

Glossary

FS – Final Salary – a pension scheme where each year counts at exit (final) salary level
DB – Defined Benefit – includes both Final Salary and CARE types of pension scheme
CARE – Career Average Revalued Earnings – more nuanced revaluation than a FS scheme
DC – Defined Contributions – contributions are just rolled up with investment return earned.
CE – Cash Equivalent – what a pension scheme pays out to absolve itself of a pension liability
DCFE – Discounted Cash Flow Equivalent – a pension valuation using a market annuity rate.
PAG Report – A Guide to the Treatment of Pensions on Divorce - The Report of the Pension Advisory Group - July 2019–Nuffield Foundation
HHLT(3) –Pensions on Divorce – A Practitioners Handbook by Fiona Hay, HHJ Hess, David Lockett and Rhys Taylor – Third Edition.

This is a commentary on the pension aspects of the above case, the details of which may be found here: www.familylawweek.co.uk/site.aspx?i=ed210560

Although it is not really my place to comment on other than pension issues, I cannot but help admire the masterly skills of our judiciary – the judge pouring oil on the troubled waters of what was clearly an acrimonious separation. As a technical expert, I am glad that I do not have to face such difficulties, which are dealt with regularly by practitioners in the family courts.

Returning quickly to pensions, the learned judge applied principles from the PAG Report to rule on, inter alia, the following issues, in respect of DB pension schemes

a. Whether to divide pensions according to capital value or income value

b. Whether to exclude pension assets acquired before the marriage (a.k.a. 'apportionment' or 'ring-fencing')

c. Whether to treat pensions separately or whether to 'offset' the division of pension assets against the division of other assets

Regarding a, the judge decides to opt for a pension share, with division on the basis of income. In doing so, he uses a very powerful and elegant method to establish fairness between the parties:

i) He endorses a model involving both short term and long term elements

ii) He assumes part of the Cash Equivalent of the husband's pensions will be transferred for the benefit of the Wife. This is a short-term element of his model, which is manifested as an instruction to the Husband.

iii) He assumes that, ultimately the Wife will purchase an annuity at a date in the future, whose qualities replicate to an adequate degree the benefits remaining for the husband. This is a longer-term element of his model

iv) He therefore deals with income issues by equalising incomes at the apposite dates, which is difficult to criticise as a method of achieving income fairness.

v) Regarding pension capital, he deals with both the margins in the Cash Equivalent and also the margins in the market annuity rate by effectively adding those margins together, then dividing the total burden between the parties. As this facilitates income equalisation, it is also difficult to criticise this as a method of achieving capital fairness.

Using this method, it is difficult for either party to subsequently be able to demonstrate cogently why they have been treated unfairly. Accordingly, any appeal should not have a "prayer".

Regarding c., (the significance of which arguably outweighs that of b.), the judge decided to decline the husband's proposal to include an element of offsetting, citing unfairness:

'that mixing categories of assets runs the risk of unfairness in that valuation issues become very difficult, and, absent agreement, it may be unfair anyway to burden one party with non-realisable assets while the other party has access to realisable assets.

The consequences of this are uncertain, as offsetting is "The dominant practice"(see the PAG report) – implying that this practice is popular in lower courts – this is likely to be due to, at least in part, the fact that a pension share is very likely to "Destroy Value" (again see the PAG report – page 39) – in this case, my calculations indicate that prior to the share, the pension income would have been around £81,500 pa, and post share it is £36,100 pa each – a fall of about 11%. This is typical, in our experience of around 1,000 historic cases. (A fuller analysis of the mathematics of the sharing and offsetting for this case will shortly be available on request).

(Note that, while there are apparently more complaints concerning offsetting decisions (PAG report,

page 4) this should be considered in the context that this would be expected in a more common practice – also, that offsetting is an easier concept for a laymen to grasp than that of pension sharing).

From the PAG report recommended by the judge, five potential methods for offsetting are cited, of which two are discouraged, and one is pushed forwards (page 40). Examining the three acceptable possibilities in the order presented:

A) DCFE Method (the method promoted)
This method involves assuming the future or current purchase of an annuity in the market to match the income of the pension being compared. The former involves a long term model and the latter a short term one. While this has attraction in terms of income issues, the capital effect is that all of the margins in the annuity rate are assigned to the husband as a negative asset. It is important to hold firmly in mind that, in reality, no annuity is to be purchased, and no cash equivalent is to be taken out – as opposed to the situation in pension sharing, where both are assumed to happen. Ideally, we would use the "BEL", or "Best Estimate of Liability" – this is the amount certified by the Chief Actuary of any life assurer as the value of the annuity with margins taken out his or her "true" or "fair" value – but it is difficult to calculate this margin directly, and the Chief Actuaries of life assurers do not provide it on an individual basis on demand, in part because of commercial confidentiality reasons). Even then, there are additional mortality issues for market annuities that arguably themselves generate unfairness.

For anyone who assumes that annuity margins are insignificant, because a "best in market" rate has been selected, please see the following – reviewing the diagrams should suffice.
www.actuaries.org.uk/system/files/field/document/IandF_SA3_SolvencyII-2016.pdf

Commission and other onboarding costs would, of course, also have to be added to the BEL.

The following illustration shows the main reason for annuity margins.

B) "Realisable Value"
This actually involves two things: First, it acknowledges that for certain ages, (55 or above), and for most DB pension schemes, benefits can be taken as immediate cash, subsequent to transfer to DC scheme, involving possible expenses, and taxation at the member's marginal rate.

A question to be asked early on in the proceedings by the legal teams is -"Is the needs position such as to require these pension assets to be realised as cash?" If so, should it be assumed that the benefits are converted to such, after tax and expenses are allowed for, perhaps with the assistance of an IFA –and then used as such? If so, those pensions would then play no further part in the proceedings, and a specialist PODE may not be needed. In WvH, the answer to this question was no.

Second, if it is decided that there is no need to exploit pension freedoms, (which represents part of the "short term elements" of the judge's model – see later) then the realisable value is simply the CE (prior to tax and any tax free lump sum). It is important to understand this. The Scheme Actuary does not change what the scheme pays out just because freedoms are being utilised.

Only Scheme Actuaries are allowed to formally advise on the levels of Cash Equivalent that may be appropriate. They must follow the Pension Regulator's rules on fairness when calculating them. Unfunded and underfunded schemes have different rules.

In fact, the main reasons for the CE margins are identical to those for the DCFE margins

D) "Actuarial Method"
(Method C) having been disfavoured) This involves first principle assumptions (which should be stated) for interest rates, mortality, and pension increases (if not fixed). This should allow us to avoid the problem of determining margins, as they need never arise.

The problems are subjectivity, and accessibility. Subjectivity issues will be lower with the advent of the Single Joint Expert – similar issues used to vex the Personal Injury courts, with experts having argued different interest rates and inflation in their clients' favour until Lord Irvine, the then Lord Chancellor, felt the need to fix the real discount rate at 2.5% pa in back in 2000 - (leading then to other issues regarding farness). Regarding accessibility, courts may have problems in objectively assessing interest and mortality assumptions without substantial assistance – even if they had the time to do this. There are logistic problems in constructing tables similar to Ogden tables.

The Actuarial Method would, however, be useful in assessing the validity of other methods –particularly the margins in Cash Equivalents, or annuity rates.

However, most notably, the judge did not see ANY of the PAG proposed methods as suitable, (it is unclear to me if this is due to the case being a "needs" one). My suggestion for a method with greater fairness is shown later in this article.

Regarding issue b. - Should some pension be excluded from the marriage period, and if so, how should this be done? The judge came out firmly against the practice in needs cases – for others, he cited the "Deferred Pension" method as preferable to the "straight line" method. The "Cash Equivalent" method was also cited, but not ranked. (All of these methods are described in the PAG report – page 140).

Interestingly, the PAG report ordering of these methods is as follows:

• Deferred Pension method (with a very clear explanation in Appendix S Section S5, regarding how the spouse's efforts should be recognised as contributing to the member's pay rises)

• Cash Equivalent method

• Straight Line method (Stating that this favours the member spouse the most)

It leads with the "No Apportionment" method (no division, which is what was decided here)

This differs from that in the HHLT (3), which uses the following order –

• Straight line (uniform accrual) method

• CE Method (stating it to be "at the extreme")

• Deferred Pension method

My proposals on the above would be as follows:
Offsetting – the starting point would be the mean of the DCFE method, (with an actuarial basis in deferment with actuarial assumptions similar to those of the annuity) and the CE – this automatically offsets the margins present in both the Cash Equivalent and DCFE – perhaps imperfectly, but is certainly an improvement on the sole use of either.

Adjustments would need to be made to the CE if the scheme was unfunded, or underfunded. This is the case for Public Sector schemes, or the CE had been reduced, (subsequent to the formal production of an "Insufficiency Report" for the scheme).

If the pension is to be split into marital and non-marital sections, as I see it, there are two justifiable methods:

A Straight Line method, which follows the structure of the scheme – this conforms to the pattern of scheme accrual within any DB scheme

B Deferred Pension method – as A, but also assigning the effect of any marital pay increases above inflation, relating to non-marital periods, to the marriage period completely.

(I cannot see how the Cash Equivalent method can be justified unless the spouse claims to have been responsible for national changes in interest rates and mortality, as well as their partner's salary – this would be hard to substantiate)

As an aside, there are three methods for dividing DC pensions similarly.

Finally, for any method, the expert should try and see things from the point of view of both husband and wife. This may involve revisiting any proposed solution more than once, and seeing it from each party's point of view – in turn. While solicitors and barristers usually have a counterpart in divorce to help them achieve this perspective, single joint experts do not – so this step is valuable in checking robustness.

One size may not fit all – but it should be able to protect us from a charge of indecent exposure. It also allows the wisdom of the senior courts to be passed down to assist the lower ones – while more junior judges can choose a different size if they can justify the variation to each party – and to more senior courts if necessary.

Using these methods should mean that any possible appeal should be (s)quashed from the outset, and future relations between the parties should be more cordial.

I will expand on scheme categorisations, and the required adjustments for unfunded and underfunded schemes in future articles.

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Windsor Actuarial is an independent firm of actuarial consultants with considerable expertise in corporate pensions.

The UK's Unexplained Wealth Orders - How System Is Performing

by Edward Grange, Partner at law firm Corker Binning

The Unexplained Wealth Order has captured much attention since its inception. Nicknamed the McMafia order, reports of extraordinary amounts of money being used to purchase homes in the most exclusive London postcodes and a £16 million ($20.3 million) shopping spree at Harrods were always going to make headlines. Compared with the prosaically named Account Freezing Order, introduced at the same time under the Criminal Finances Act 2017, the UWO was inevitably going to grab the limelight. But as history often tells us, "all that glitters is not gold" and a recent setback for the National Crime Agency has given the AFO its time to shine.

This article aims to explain why, in spite of being overshadowed by the UWO, the AFO (and the related Account Forfeiture Order ("AFrO") appears to be the more effective tool in the state's armoury against organised crime and corruption, and what respondents can do if served with one.

The rise and (minor) fall of the UWO

Some of the attention-grabbing headlines of 1978 related to police disrupting a country-wide drug network that apparently sprung to life when a group of academics started to manufacture and sell LSD.

"Operation Julie" not only made for a good crime story because its undercover police officers dressed as hippies, it also created a legal problem that needed to be solved. Ex turpi causa non oritur actio - a person should not profit from their wrongdoing - but in this case a decision of the House of Lords resulted in the return of close to a million pounds seized by the police as there was no legislation in place to strip the drug traffickers of the profits from their crimes. The start of the millennium culminated in the introduction of the Proceeds of Crime Act 2002, which introduced an array of powers enabling the state to confiscate the proceeds of crime via the criminal and civil courts. But concerns remained that law enforcement agencies, whilst suspecting assets were the proceeds of crime, continued to have insufficient power to freeze or recover them. This lacuna was closed when the UWO and the AFO were introduced in 2017, designed to "make the UK a more hostile place for those seeking to move, hide or use the proceeds of crime or corruption". [1]

Both draconian measures, the UWO in particular is intrusive as it requires a respondent to i) make a statement, ii) answer questions, and iii) disclose confidential records in respect of sensitive personal financial matters. Failure to comply can result in the forfeiture of the property and results in criminal liability if a respondent makes a statement that is false or misleading. The intention of gathering such information is that if proceeds of crime have been used to purchase the property, civil recovery of that property would be made easier, although to date, no civil recovery proceedings have been commenced against any of those subject to UWOs.

Until April 2020, it appeared to be plain sailing for the National Crime Agency, which had blazed a path in utilising the UWO. During the first 12 months of their existence, 15 UWOs were obtained (albeit within just four cases), the highest profile being against Zamira Hajiyeva. But on 8 April 2020 two prominent Kazakh nationals [(2)] successfully persuaded the High Court to discharge three UWOs made against three residential properties owned for the benefit of Nurali Aliyev and his Kazakh politician mother, Dariga Nazarbayeva. The value of the properties on "Billionaires Row" in London exceeded £80 million. The NCA suspected the properties were bought with funds embezzled by Mr Aliyev's deceased father, Rakhat Aliyev, nicknamed "Sugar" for his control over the sugar trade said to have been the basis of his fortune. However, in a 68- page judgment, Mrs Justice Laing found that the NCA's approach to the case and their assumptions that Rakhat Aliyev was the source of the money were mistaken and unreliable. Importantly, the Judge reiterated an important point of principle that "the use of complex offshore corporate structures or trusts is not, without more, a ground for believing they have been set up to enable money laundering". As the Judge correctly highlighted, many very wealthy people invest in complex offshore corporate structures or trusts for a variety of lawful reasons such as privacy, security or tax mitigation.

The rise of the AFO

Whilst the NCA have indicated they intend to appeal the decision of Mrs Justice Laing, it remains a setback for the agency. In contrast, even though the AFO has yet to have the benefit of judicial scrutiny from the High Court, it has eclipsed the UWO both in terms of the frequency of its use and its ability to actually recover the proceeds of crime held in the UK.

Like the UWO, the AFO is an investigatory tool; it allows for law enforcement agencies (upon application to the court) the power to freeze a UK bank or building society credit balance with a minimum value of £1,000. Unlike a UWO, which has to be obtained in the High Court, an AFO is obtained in the magistrates' court, the same court that presides over summary only criminal cases and licencing matters. Only property over £50,000 and held by a person who is a politically exposed person, or connected to such a person or if there is evidence that they are involved in serious crime can be made the subject of a UWO; the AFOs are not so restricted.

An AFO can be obtained if there are reasonable grounds to suspect the monies held in the account are recoverable property (namely obtained through unlawful conduct) or intended for use in unlawful conduct. The intention is to freeze the money whilst the law enforcement agencies are given time to collect evidence so they can make an application for it to be forfeited.

In August 2019, the NCA obtained AFOs in respect of eight bank accounts holding a total of more than £100 million that they "suspected to have derived from bribery and corruption in an overseas nation" [(3)]. An additional £20 million in another individual's account linked to this investigation had previously been subject to an AFO in December 2018. The monies were forfeited after the individual concerned agreed to a settlement that did not result in adverse finding against him. In the last 12 months AFrOs (the forfeiture of frozen accounts, the next step after AFOs) have resulted in the SFO recovering approximately £1.5 million, and the Metropolitan Police recovering its biggest ever Forfeiture Order in the sum of €1.9 million. A recent freedom of information request revealed that HMRC obtained 67 AFrOs in 2018/19, a 379 per cent increase from the previous year, recovering some £4.75 million in the process [(4).]

An AFO can last a maximum of two years, although the length should always be proportionate to the investigatory work required. The impact on those whose assets are frozen can be immense. A Suspicious Activity Report alone could be sufficient for law enforcement agencies to make an application for an AFO. There is no requirement that the accounts are frozen with an expectation of a criminal investigation or indeed criminal prosecution will commence

The forfeiture proceedings that follow are civil in nature even though heard in the magistrates' courts. The standard of proof is on the balance of probabilities that the monies have been obtained through unlawful conduct or are intended for use in unlawful conduct.

What can be done if served with an AFO?

It may seem trite, but the first step if served with an AFO should be to seek specialist legal advice. The Act allows for applications to be made to discharge or vary the AFO. An individual faced with an AFO should consider whether there is a legal basis on which the granting of the AFO could be quashed. In order to assess the merits of such an application, given that AFOs are often obtained ex parte, a request should be made immediately for disclosure of the application notice (and material underpinning it) that was placed before the magistrates' court. In addition, an application to vary the AFO may need to be made in order to exclude funds from it in order to pay living, business and legal expenses.

The decision as to whether there are good grounds to challenge the grant of an AFO will vary from case to case but areas to consider are a) whether it can be shown that the reasonable suspicion is linked to the specific money in question, b) whether it can be traced to show that the money 'under suspicion' has already been moved from the frozen account, or c) if it can be shown that there is no causal link between the suspicious activity and the money (where, for example, the suspicious activity was too long ago).

Another important consideration is whether there are any third-party funds frozen in the account. The Act provides that any person affected by the AFO can make an application to release funds. They would need to show that the money is theirs and why it is legitimate. It will be important for this to be raised at an early stage as once forfeiture is granted, there are no provisions to allow money to be released as compensation.

Conclusion

Whilst UWOs made a good start to life and delivered on the early promise to be tough on crime and corruption, the AFO and AFrO have now outgrown their sibling and have had more far-reaching consequences for wealthy individuals and families. UWOs have been utilised to gather information about some substantial properties but have yet to result in the recovery of any monies.

The AFO/AFrO in contrast have recovered substantial sums of money and are more attractive to law enforcement given how simple they are to obtain. Like the UWO, the AFO may yet succumb to a setback should the High Court examine this draconian power, but in the meantime, the UK's criminal enforcement agencies are pressing ahead enthusiastically with their newest and most effective toy.

Footnotes:

1,https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/517992/6-2118-Action_Plan_for_Anti-oney_Laundering__web_.pdf

2, National Crime Agency v Baker and others [2020] EWHC 822 (Admin), [2020] All ER (D) 59 (Apr))

3, https://www.nationalcrimeagency.gov.uk/news/100m-account-freezing-orders-arelargest-granted-to-nca

4, https://www.ft.com/content/bc4128d8-8bd7-4088-aae6-8d7686e26fda

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De Sena v Notaro [2020] EWHC 1031 (Ch):The Family, the Demerger and the Expert who wasn't an Expert

by Tom Stafford - Hailsham Chambers

The parties

The case arose out of a corporate demerger which took place in relation to a family owned company, S Notaro Holdings ('Holdings'), on 28 April 2011. The First Claimant (C1), and the First Defendant (D1) were siblings. Prior to the demerger, they were both shareholders in and directors of Holdings. Neither were majority shareholders. D1 held 43.75% of the shares in Holdings, and C1 held 31.25%. In the demerger, C1 gave up her shares in Holdings in exchange for some assets of Holdings or its subsidiaries being transferred to the Second Claimant (C2),a company formed for that purpose, owned and controlled by C1.

The Second Defendant (D2), was the company which, following the demerger, would retain the remaining assets of Holdings. In essence, the claim against D1 and D2 was that the demerger was procured as a result of undue influence by D1, that D1 acted in breach of fiduciary duty to C1, and that D2 had been unjustly enriched at C1 or possibly C2's expense.

The Third Defendant (D3) was a firm of accountants who had been retained to act on the demerger. The Fourth Defendant (D4), was a firm of solicitors who had been similarly retained. It was alleged that D3 and D4 had acted in breach of their duty of care to C1 and C2, were in breach of fiduciary duty, and that (D4 only) was in breach of contract. Both Defendants' position, broadly, was that they had been retained by Holdings rather than C1 or C2, and consequently did not owe a duty to either in tort or contract and that no fiduciary duty had arisen.

C1 alleged that, following their father's death in 1993, D1 had become increasingly controlling towards other family members and in 2003 had commenced a campaign to expel her from the business, and that this had continued up until the demerger.

It was a central tenet of the Claimants' case (against all Defendants)that, because C1 had held 31.25% of the shares in Holdings, she was accordingly entitled to 31.25% of the group's assets following the demerger.

Findings

In relation to the claims against D1,HHJ Paul Matthews held that C1 had found it difficult to adjust when D1 had taken over from their father as managing director: *'she did not like the fact that it was now her younger brother (whom she had helped to look after) and not her father making business decisions and giving the instructions'* (paragraph 91). The court took into account the fact that D1 was a minority shareholder, and could have been removed by the others, had they so wished.

It was also material that, once or twice every year, D1and C1 would sit down together to revalue the company's assets. At these meetings, they would go over the land and buildings owned by the group and consider whether the value of these properties ought to be altered to reflect their current view of what they were worth. These were never the subject of any third-party valuation.

Moreover, after hearing evidence from both C1 and D1, the judgerejected the notion that a deal more beneficial to C1 could have been negotiated. He found that, just as C1 had some reservations about the assets she was receiving for her shares, D1 had *'been pushed as far as he would go'*(paragraph 137).

Ultimately, the court found that there had been no undue influence by D1 towards C1. This was not a case in which they had a relationship giving rise to a presumption of undue influence, so actual undue influence had to be proven. The Claimants had failed to do so. This was not to say D1 did not put anypressure on C1. He was a businessman who was not averse to looking after his own interests. However, C1 had failed to prove any conduct by D1 that amounted to improper or illegitimate pressure, or coercion.

Furthermore, the court held that the assertion that C1 '*was entitled to a pound for pound equivalence between her share in the company and the assets she received* [was] entirely without foundation'(paragraph 220). This would suggest that she owned a proportion of the company's assets. This was an *'elementary error'*which had been 'exploded long ago' by the House of Lords in *Macaura v Northern Assurance Co Ltd*[1925] AC 619 (paragraph 220). No shareholder had the right to any property owned by the company. Rather, a shareholder was entitled to a share in the company's profits whilst it carried on business, and a share in the distribution of surplus assets when the company was wound up. As a demerger was a consensual transaction, she did not have an entitlement to any particular share of assets, but only to what she could obtain by negotiation. There was no basis for saying that her shares were disposed of at an undervalue.

In relation to the claims against D3, it was found that, at no point had D3 been advising C1 personally as a shareholder as against the interests of the other shareholders or the company. At every instance, it was found, D3 had been acting for the company.

Furthermore, the court accepted the evidence of David Savill, an employee of D3, that at a meeting in March 2011 he had advised C1 to obtain independent valuation advice.Therefore, no duty of care or fiduciary duty had arisen.

As to the claims against D4, it was found that the partner at D4 dealing with the transaction had made it clear to C1 and D1 at a meeting on 10 March 2011 that D4 was acting only for the company and not the shareholders. Furthermore, though D4 had received the list of properties to be transferred to C2 in the demerger, D4 had had no role in selecting or negotiating those properties. It was also found that each step of the demerger had been explained to C1 and the other shareholders by D4. The court rejected the submission thatthe fact that D4 had acted for C1 personally in the past, and was at the time of the demerger acting jointly for D1 and C1 personally in relation to a family dispute against another sibling, was a sufficient basis to found a personal duty to C1 in relation to the demerger.As regards the demerger its role was limited to preparing the legal documents for a pre-agreed deal: 'a kind of *"execution only"* role'(paragraph 261).

The expert evidence

It is perhaps the section of the judgmentwhich deals with the parties' expert evidence which is of greatest general interest. Indeed, it serves as a stark warning of the mistakes which litigatorsshould avoid when instructing experts and putting questions to them.

Expert evidence was adduced by the parties on 3 issues: (i) property valuation (with Mr Gladwin giving evidence for the Claimants, and Mr Jones giving evidence for the Defendants); (ii) share valuation (Mr Mesher for the Claimants and Mr Butterworth for the Defendants); and (iii) aspects of accountants' liability (Mr Mesher for the Claimants and Mr Plaha for D3).

In summary, the court was unimpressed with the expert evidence before it on issue (iii). 2 problems are identified in the judgment:

1.Whether Mr Mesher or Mr Plaha in fact had the appropriate expertise to give evidence on demergers; and

2.The questions posed to the parties' respective experts; namely the fact that they were asked to advise on issues of law and fact that were a matter for the tribunal.

On the first point, the court expressed reservations regarding the *'assumption made by the parties that, no doubt because accountants regularly advise clients on demergers such as to acquire the relevant expertise therefore any accountant, whether he has the experience of advising clients on demergers or not, is qualified as an expert witness in this field'* (paragraph 154). The judgeobserved that, on scrutinising Mr Mesher's CV, there was no reference to any experience in demerger transactions in his list of professional specialisms;neither did Mr Plaha's CV state that he had any experience in demergers. Afterthis was raised with counsel, a supplementary document dealing with Mr Mesher's expertise in more detail was provided. However, this stated frankly that Mr Mesher did not *'claim to be an expert in "demergers" perse'* (paragraph 156), but that from 1993 to 2010 he had worked at KPMG and had been exposed to various M&A transactions, had worked at Grant Thornton where he had dealt with the drafting of sale and purchase agreements, and that from 2012 he had been practising at his present firm where he had dealt with many post-transaction disputes. However, the judgefound that, whilst he may have had the opportunity to see one or more demerger transactions and may even have participated in them, this did not make him an expert in demergers, and *'it is for the expert witness tendered to demonstrate the expertise, not for the court to assume it'*(paragraph 156).

In the circumstances, the court found that neither Mr Mesher nor Mr Plaha had acquired sufficient experience in carrying out demergers to be able to claim expertise in the area. The judgestated the general principle as follows: *Those firms that provide expert witness services really ought to have learned by now that expertise is acquired by doing the thing in question, usually over many years, and that merely being an accountant (or anything else) for a long time does not mean that you thereby become an expert in everything that accountants (or whatever it may be) commonly do* (paragraph 157).

Given that the court had disregarded both the Claimants' and D3's evidence on accountants' liability, it was strictly unnecessary to examine the substance of that evidence. Nonetheless, the court took the opportunity to raise grave concerns about the questions that had been put to the respective experts.

For the Claimants, Mr Mesher had been asked to consider a number of questions, including:

(i) What were the terms of the contractual retainer which BF [of D3] had with SNHL group of companies (the 'Group')?

(ii) Was the Group's retainer limited to BF's function as auditor?

(iii)If so, should BF have entered into a further contractual retainer to advise the Group of a demerger?

(iv) In order to advise the Group on a demerger would it have been necessary to have the assets of the Group independently valued?(

v) What are the circumstances in which BF could act for the Group and also advise the shareholders on a demerger?

(vi) In particular, would BF need clear written instructions from each of the shareholders that there was no conflict of interest inter se and that the terms of the demerger had been agreed?

(vii) BF's case is that it was acting for the Group and not the shareholders. If it became apparent to BF (or if BF ought reasonably to have concluded) that there was no agreement between all the shareholders as to the terms of the demerger, should BF have:

> *(a) advised [C1] that it could not continue to act for her and that she should be independently advised; and, or*

(b) ceased to act for any party on the demerger?

(viii) would a reasonably competent chartered accountant in the position of DS or AB have considered it necessary to record in writing any suggestion given orally to [C1] (none being admitted) firstly as to the conflict of interests and secondly that she should obtain separate accountancy of valuationadvice?

(ix) do you consider that BF came under a duty of care to [C1] or [C2] having regard to the principles set out in the case of BCCI (Overseas) Ltd (in Liquidation) v Price Waterhouse...

(x) What was the scope of BF's duty, if so, when did arise?

On these questions, the judge stated, in rather uncompromising terms:
I have to say that I have never before seen such an extraordinary set of questions put to a witness being asked to give expert evidence. Questions (i), (ii) and (iv) are mixed questions of law and fact, both of which are for the court and not this witness. Question (iii) is not relevant, given that the third defendant obviously did advise on a demerger. Questions (v) and (vii) are questions of law for the court. Questions (vi) and (viii) are, to the extent that they are relevant at all, questions of law for the court.Question (ix) is one of the most egregious and naked usurpation of the functions of the court that I have ever seen. Moreover, since it refers only to one authority (and that more than 20 years old, when there have been many relevant decisions since), even if it were admissible, it would be of no use to the court. Question (x) is almost as egregious and objectionable. I am unable to regard the answers to any of these questions as admissible evidence in this case. I am astonished that these questions were asked at all, and almost as astonished that they were answered (paragraph 159).

The court did consider that question (xi) was better than the others, as it did concentrate on important aspects of the *Bolam* test; however, this question still failed to ask whether or not the particular Defendant's actions fell below the standard required of a reasonably competent firm of accountants.

The judgment is almost as critical of the questions put to Mr Plaha, specifically:

(a) whether BF had a duty to advise [C2] and/or [C1] personally, and specifically:

(i) in circumstances where BF were engaged by SNHL and/or the Notaro Group from whom were BF entitled to take instructions?

(ii) Were BF engaged formally to act for [C1] personally?

(iii) Did BF assume responsibility to advise [C1] personally?

(iv) Were BF formally engaged to act for [C2]?

(v) Did BF assume responsibility to advise [C2]?

(b) Comment upon the following issues that would only be relevant if the Court were to determine that BF owed a personal duty to [C1] and/or a duty to [C2] (which BF denies):

(i) The advice which [C1] should have received in relation to the alleged duty to advise her to obtain an independent valuation of assets. In particular, what with the duty of a reasonably competent firm of accountants have been and, in the circumstances of this case, did the actions of BF fall short of that standard?

(ii) BF's duty to advise [C1] on the impact of the bulk transfer discount on her and/or [C2]

(c) Explain the reasons for the second capital reduction and comment on:

(i) What was the reason for the second capital reduction; and

(ii) The effect of the second capital reduction on the value of [C1] shareholding in [C2].

(d) Comment on the allegations in relation to the Clearance Letters.

In commenting on these, the judgment concludes:
Question (a) is just as objectionable as questions (ix) and (x) were in Mr Mesher's report. They are questions of law for the court. The first sentence of question (b) (i), the first 15 words of the second sentence and the whole of question (b)(ii) are also questions of law, and likewise objectionable. The remainder of question (b)(i) is acceptable. Question (c)(i) is a question of fact, which is also for the court (and on which the witness has none but hearsay evidence to give). Question (c)(ii) is partly a matter of law, but partly a matter of share valuation expertise, which I do not understand Mr Plaha (or Mr Pooler) to claim to possess.Question (d) is hardly a proper question at all (paragraph 162).

In short, both parties' expert evidence in respect of accountants' liability was rejected wholesale, due to both the lack of appropriate expertise of the experts, and the nature of the questions put. Clearly, this was a stark result. It provides a cautionary tale for litigators, and serves as a reminder that:

1.When instructing experts who are to give evidence in a specific field of a discipline, be sure to enquire whether that expert has the appropriate experience and expertise in that field. Do not assume, because they are an expert in that discipline, and may have had some exposure to the field in question, that a court will accept that they have the appropriate expertise. As stated in the judgment, it is for the party tendering the expert to demonstrate that that expert has the appropriate expertise.

2.When putting questions to an expert, the Bolam test is central. Any gloss on that test is undesirable. Questions which are nakedly questions of law, fact, or mixed questions of both, should be avoided at all costs. For example, when asking about the appropriate construction of D3's retainer, it may have been more prudent to ask:On reviewing D3's retainer, would a responsible body of accountants consider the that the retainer limited D3's function to that of an auditor? Depending on the answer that was given, this may have provided strong evidence as to the scope of D3's duty, without usurping the role of the court.

In relation to the expert evidence tendered by the parties on property and share valuation, the court held that there were no such problems. However, the court observed that D1 and D2 hadmounted an argument that such evidence was not relevanton the basis that a shareholder was not entitled to the proportion of company assets correlating to her proportion of the shares.

Conclusion

The judgment is interesting primarily due to the treatment the expert evidence received by the court. However, the case also provides a useful illustration that, when professional advisers are clearly retained by a family company, it can be very difficult for a shareholder of that company to establish that any duty was owed concurrently to them personally. This was even true in D4's case, despite the fact the firm had acted for C1 personally in the past and was continuing to act for both C1 and D1 in an ongoing family dispute against their other sibling.

Prepared by Tom Stafford - June 2020

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Love is in the Ear – Federal Court of Australia finds copyright infringed by the sound of lyrics sung

On 24 April 2020, Justice Perram of the Federal Court of Australia gave judgment in relation to a copyright dispute concerning the iconic Australian pop-hit classic, Love is in the Air, finding that a substantial part of the song had been copied by a US pop-duo, Glass Candy, and by France's national airline, Air France, as part of its international marketing campaign.

Despite establishing that the song had been copied, Perram J upheld only a few of the Applicant's several claims, finding that the infringing works had been made available for download in Australia from a US website and, in the case of Air France, played as hold-music on its toll-free Australian call-line.

The decision highlights the importance of identifying at the outset of any copyright proceeding:

- What rights do I have in the musical work?
- What infringing acts has defendant performed?
- What remedies are available?

This is particularly important in a musical context where exclusive rights may have been assigned and/or exclusively licensed to publishers and various collecting societies over the years and where technologies play an important role in determining which rights are in play.

In this love-themed instalment of IP Whiteboard, we unpack Perram J's decision in *Boomerang Investments Pty Ltd v Padgett (Liability) [2020] FCA 535*. Stay tuned throughout; we promise it'll be worth it.

Relevant players

The Applicants in the case were:

- Mr Vanda (who, along with the late Mr George Young, composed "Love is in the Air");
- Ms Young (the daughter of the late Mr George Young);
- Boomerang Investments (the successor-in-title to the original publishers of the work); and
- Australian collecting societies, APRA and AMCOS (who were joined to the proceedings when it became apparent that the other Applicants might not have the relevant standing to sue).

The Defendants were Mr Padgett and Ms Monahan (together the musical duo Glass Candy), Kobalt (the Australian publisher of the alleged infringing work "Warm in the Winter"), and Air France.

Love is a battlefield

The dispute at the centre of the case concerned three songs:

1, "Love is in the Air" (Love), composed by Mr Vanda and the late Mr George Young Sydney in 1977, and popularised by the recording of John Paul Young;

2, "Warm in the winter" (Warm), composed by Mr Padgett and Ms Monahan , in Portland, Oregon sometime after May 2008 which features the sung line "love's in the air"; and

3, "France is in the Air" (France), an adaptation of Warm composed and recorded by Glass Candy in the US around 2014 for use in Air France's international marketing campaign which ran from 2015 to 2018. France features both "France is in the air" and "love's in the air" as sung lines.

Copyright infringement is made out when it is proved that a substantial part of an original copyright work has been reproduced and/or that reproduction has been published / made available online. The Applicants' central claim was that:

- both Warm and France contained a substantial part of Love; and
- by making the songs available for streaming and download in Australia and, in the case of France, playing it as hold-music to customers on Air France's toll-free Australian line, Glass Candy and Air France committed acts of copyright infringement.

At the outset, Perram J notes his surprise at the Applicants' decision not to pursue a claim in relation to the principal act of making the original recordings of Warm and France (i.e. the original reproduction that had to be made prior to the making the songs available for streaming and download in Australia). His Honour observed that such a suit would likely need to be brought in the US (the location where the infringement occurred) and that this may have been unappealing to the Applicants given Glass Candy's entitlement under US law to demand a jury trial (not to mention the cost of US court proceedings!).

As it transpired, the decision to pursue this strategy proved damaging – although not fatal – to the success of their case.

Where is the Love?
In assessing whether Warm and France were infringing reproductions of Love, Perram J follows the three-step analysis set out in *EMI v Larrikin Music Publishing Pty Ltd [2011] FCAFC 47:*

Identify the work(s)
Justice Perram found that the sound of the opening line "Love is in the Air" being sung in Love formed part of the musical work.

In this respect, he noted that written words/lyrics perform two functions in a song; first, as bearers of meaning (i.e. as a literary work), but also as instructions to the singer to make the sounds denoted by words, in much the same was that sheet music instructs a violinist to play certain notes.

Given this, Perram J concluded that the opening line "Love is in the Air" as sung formed part of the musical work Love.

In reaching this conclusion, Perram J was careful to note that it is not John Paul Young's performance of the line that is relevant (this forming part of the sound recording in which a separate copyright inheres), but the lyric as part of the instrumentation or orchestration comprising the musical work.

Identify the part(s) said to have been taken
The second step in the analysis required consideration of whether the sung lines and music in Warm and France were objectively similar to the sung line in Love and, if so, whether there was a causal connection between the two.

On the question of objective similarity, Perram J was guided by the evidence of expert witnesses in finding that the line in Warm would be regarded as objectively similar to that in Love by the ordinary reasonably experienced listener, notwithstanding minor differences in style and accompanying instruments. Perram J also found objective similarity with France, noting that adaptation to the word "France" was of little importance. Justice Perram did, however, reject the Applicant's claim that the longer musical couplets found in Love ("Love is in the air, everywhere I look around / Love is in the air, every sight and every sound') were objectively similar to the corresponding musical couplets in Warm ("Love's in the air, whoa-oh / Love's in the air, yeah'), citing clear melodic and rhythmic differences.

On the causal connection, Perram J found Glass Candy's evidence on the iterative process of creating Warm (which it claims took place in 2005 or 2007) to be inconsistent and conveniently framed so as to foreclose documentary evidence indicating that Mr Padgett had heard and knew of Love from at least as early as 2008. While Perram J accepted that the phrase "Love is in the air" was a common English expression, he noted that this did not account for the objective similarities in the melody and phrasing of the line. Given this, and the unreliability of Mr Padgett's evidence, he concluded that Warm had been composed in 2008 and that there had been deliberate copying.

In relation to France, the evidence showed that the advertising agency engaged by Air France to produce its campaign had concurrently sought to obtain a licence from the Applicants for the use of Love while also engaging Glass Candy for its use of the adapted Warm. Accordingly, Justice Perram not only concluded that France had been copied from Warm by Glass Candy, but also that Air France had deliberately caused France to be made so as to copy the sung lyric from Love (removing any question of innocent infringement and establishing flagrancy).

Determine whether the part(s) taken constitutes a substantial part
On the final step, Perram J had little difficulty in finding that the sung line "love is in the air", although short, was, in qualitative terms, "the essential air of the song" and therefore a substantial part of the work.

Stop! In the name of Love
As noted above, the Applicants chose not to plead that the creation of Warm and France were infringements by Glass Candy and Air France. Instead, they built their case around the following alleged acts of infringement:

Streaming or downloading from platforms
The Applicants alleged that Glass Candy and the Australian publisher of Warm, Kobalt, had made Warm available for streaming and download in Australia via online music platforms (e.g. iTunes, Spotify, Google Play) and/or authorised the platforms to perform such acts. The Applicants also alleged that Air France had made France available for streaming in Australia via YouTube.

As a preliminary step, Perram J found, through a protracted analysis of assignments and licensing arrangements, that the rights in relation to streaming were held by APRA and the rights in relation to digital downloads were held by Boomerang and AMCOS.

As to actual merits of the claims, Perram J found that Glass Candy did not themselves directly stream or make available the songs via the platforms. Furthermore, he found that the platforms could not have infringed these rights as they held blanket licences from APRA and AMCOS in respect Love (including reproductions of a substantial part thereof, i.e. Warm and France). As such, Glass Candy could not be said to have authorised infringement when there was no primary infringement to be found.

Authorising downloads from IDIB website
The Applicants further alleged that Glass Candy had authorised the downloading of Warm by Australians from the websites run by IDIB. In this instance, Perram J found that both Boomerang Investments and AMCOS had standing to sue and that websites, unlike the platforms, could not rely on blanket licences.

As a result, Perram J found that Boomerang and AMCOS were entitled to injunctions, with Boomerang also entitled to damages or an account of profits, and a hearing on additional damages given the flagrancy of the copying. Notably, while the

evidence indicated that Warm had been downloaded in Australia a grand total of 13 times over the period of 2011 to 2018, Perram J hinted that additional damages may not be so modest if assessed on a foregone licence basis.

Playing France as hold music to Australian toll-free callers

Finally, Perram J found that the playing of France was indeed an infringement of the communication right, although found that this right had been assigned to APRA. As such, Boomerang did not have standing in relation to this claim and APRA was only entitled to an injunction restraining use of France in this manner.

You give Love a bad name

In addition to the copyright claims, Mr Vanda and the late Mr George Young asserted a moral rights claim on the basis that France involved a material distortion/alteration to Love that was prejudicial to their honour or reputation. While Perram J found that alterations to Love were indeed capable of being prejudicial to honour, he concluded that the claim was barred by reason of s 195AX of the Copyright Act which provides that acts outside Australia cannot infringe an author's moral rights.

Life after Love?

While the Applicants were able to establish infringement in principle, the Applicants' (or more accurately, Boomerang's) case was in many ways hindered by its lack of standing and the preference to fit the facts to their case strategy (not vice versa). One expects that Boomerang will now turn its focus to recovering additional damages at a further hearing.

Key Takeaways

- Clearly map out all the aspects of one's claims before considering infringement proceedings, particularly in the context of musical copyright where exclusive rights are often carved up between various different stakeholders and different technological processes can trigger different exclusive rights (e.g. streaming v. downloads).
- Undertake due diligence when procuring music for any use, particularly for use in an international marketing campaign. Care should be taken not to express a preference for music that has the sound or feel of a particular song as this may give rise to claims to infringement down the road (and additional damages for flagrancy where the preference is in writing).

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Expert Witnesses at a Conference with Counsel - A Practical Guide

by Mark Solon, Bond Solon

This guide is intended to help expert witnesses understand the purpose of a conference with counsel. If you are a lawyer, you can cut out and keep this article to pass to your expert if they are to attend a conference. I will focus on civil claims but similar principles apply to arbitrations, criminal and family matters.

The starting point is the Guidance for the instruction of experts in civil claims by the Civil Justice Council: (www.judiciary.uk/wp-content/uploads/2014/08/experts-guidance-cjc-aug-2014-amended-dec-8.pdf) The purpose of this Guidance is to assist litigants, those instructing experts and experts to understand best practice in complying with Part 35 of the Civil Procedure Rules (CPR) and court orders. Counsel will use this to ensure the conference complies with the CPRs and experts should read and follow the Guidance. So lets look at the basics.

What is a conference with counsel?
A conference simply means a meeting with the barrister who has been instructed by a solicitor to advise on or be the advocate in a case. There may be two barristers if the case warrants this, a QC who will advocate at the hearing and a Junior Counsel or just a Junior Counsel. The solicitor conducting the case will be there and sometimes assistants and trainees. The meeting is sometimes called a "Con." Sometimes a conference will be by phone or conducted remotely by one of the many links available now.

Why do barristers need conferences?
There are several purposes for holding a conference. The first question counsel will consider is "Do we need an expert?" Those intending to instruct experts to give or prepare evidence for the purpose of civil proceedings should consider whether expert evidence "...is required to resolve the proceedings" (CPR 35.1). Almost by definition, an expert will be required if there are issues that need someone who knows the area to explain the issues clearly and proffer an opinion so that the court can make an informed judgment.

Although the court's permission is not generally required to instruct an expert, the court's permission is required before an expert's report can be relied upon or an expert can be called to give oral evidence (CPR 35.4). So initially counsel will need to see the expert to decide if one is actually needed and if required to produce a report and potentially give oral evidence.

The second question is: "Is this the right expert for the particular issues in the current case?" The instructing solicitor will have done much work prior to the conference to make sure that the expert is needed and the right one for the issues in question. However, counsel will want to satisfy himself that there has been proper due diligence in the selection of the expert. Remember an expert is issue specific and needs to have the right qualifications and experience for the issue in dispute.

There have been several cases in recent years where the expert is not properly qualified or suitable. There are two sets of skill that counsel will look for, first the qualifications and experience as an expert in the right field and secondly the skills of being an expert witness: how to write a court compliant report, how to give oral evidence and deal with cross examination and lastly a good working knowledge of the relevant law and procedure.

Expert witness training can give comfort to the lawyers as the expert will know how to construct a court compliant report without hand holding by the lawyers and the consequent possible suggestion of interference and also be practiced during training in the skills of dealing with the rigours of cross examination. Many cases settle before trial, so an expert may have written many reports, but not actually been to a courtroom and stood in a witness box. Training will have given the expert at least a good flavour of what to expect. The way the expert handles questions at the conference will also help form a view of his performance at trial.

Counsel should make sure the expert is up-to-date in the practice in their field and be wary of retired experts or those with limited experience.

If the case does require an expert and this is the right expert, then the third question is: "Does counsel really, really, really understand the expert evidence?" Counsel should use the conference almost as a lesson in understanding the technical issues. If counsel does understand then it is likely the judge will. Counsel

should not end the conference until he really understands the expert's evidence. This will also assist in preparing cross examination of the other side's expert. It will also give the lawyers a better insight into whether the matter should settle.

When does a conference take place?
There are several phases during the litigation process where there may be a conference with counsel. Each use of a conference has to pass the tests of being reasonable and proportionate and be justifiable in budgeting. Here are some possible points:

- Pre-action: Looking at the merits of the claim and advising the client and in settlement discussions.
- Issue and statement of the case: Preparation of particulars.
- Disclosure
- Expert report: Identifying and engaging suitable expert(s). Reviewing draft and approving report(s). Dealing with follow-up questions of experts. Considering opposing experts' reports. Meetings of experts and preparing agenda.
- Trial preparation
- Trial
- ADR and settlement

Preparing for the conference
Preparation for the conference is obviously important and what is to be covered will depend in which phase of the litigation process it takes place. There should be a clear purpose. The attendees should set an agenda and schedule for the meeting depending on the number of attendees. Practical arrangements will normally be coordinated by the solicitor including organising a convenient time and place for a physical meeting and call in details for remote conferences. Again with remote conferences, all should make sure the connection system and devices work to avoid wasting valuable meeting time dealing with technical details. All relevant materials should be made ready and if necessary the right number of copies of documents printed. A reminder E-mail is useful and aim to start the meeting promptly at the given time. It goes without saying that all attendees should have read the appropriate material thoroughly and have prepared questions and matters to be raised.

Do both the expert and the lawyers understand the duties and obligations of experts?

Experts always owe a duty to exercise reasonable skill and care to those instructing them, and to comply with any relevant professional code. However when they are instructed to give or prepare evidence for civil proceedings they have an overriding duty to help the court on matters within their expertise (CPR 35.3). This duty overrides any obligation to the person instructing or paying them.

The Guidance says: "Experts must not serve the exclusive interest of those who retain them and must provide opinions that are independent, regardless of the pressures of litigation. A useful test of 'independence' is that the expert would express the same opinion if given the same instructions by another party. Experts should not take it upon themselves to promote the point of view of the party instructing them or engage in the role of advocates or mediators."

Although counsel is entitled to probe and question what the expert says at the conference, he may not seek to change the evidence of the expert. However, the last thing counsel wants is for the expert to change the opinion in the courtroom, so counsel will want to make sure the expert is clear on the evidence and knows where there are grey areas in the opinion. The expert has to indicate if there is a range of opinion anyway.

So in essence counsel will want to test the experts qualifications and experience to be an expert on the issues and then to test the opinions expressed. Counsel should explain to the expert that these same areas will be tested in court by cross examination.

Getting to the issues
Counsel will want to answer two questions:

- What are the matters which are material to the disputes that require expert opinion?
- Do these matters lie within the expert's area of expertise?

Much of the conference will focus on these questions and the expert should expect some quite difficult questioning. They should not take this personally but do all they can to satisfy counsel. Experts should indicate immediately where particular questions or issues fall outside their expertise. There have been several cases where an expert has moved outside their field with unpleasant consequences for example the cases involving Sir Roy Meadow. Counsel should be careful to avoid mock cross examination on the issues as this could verge on coaching which of course is forbidden.

The whole thrust of the CPRs is to narrow issues and the options of discussions between experts and putting questions to the other sides expert should be discussed in detail.

The CPRs (35.4) require that when parties apply for permission to instruct an expert, they must provide an estimate of the costs of the proposed expert evidence and identify the field in which expert evidence is required and the issues which the expert evidence will address. Permission if granted shall be in relation only to the expert named or the field identified and the court may specify the issues which the expert evidence should address and may limit the amount of a party's expert's fees and expenses that may be recovered from any other party. It is clearly important that the issues are identified from a costs point of view but also to help narrow the issues for the purposes of experts discussions, on how the case is pleaded and in the preparation for cross examination.

Has the expert seen all the relevant evidence?
Counsel should make sure that the expert has been provided with all the appropriate evidence. As the Guidance says: "Experts should take into account all material facts before them. Their reports should set out those facts and any literature or material on which they have relied in forming their opinions. They should indicate if an opinion is provisional, or qualified, or where they consider that further information is required or if, for any other reason, they are not satisfied that an opinion can be expressed finally and without qualification." Counsel should remind the expert that he should inform those instructing them without delay of any change in their opinions on any material matter and the reasons for this.

Counsel should advise on whether the expert should be formally instructed if he has not been prior to the conference.
The Guidance provides:
"Before experts are instructed or the court's permission to appoint named experts is sought, it should be established whether the experts:

a. have the appropriate expertise and experience for the particular instruction;

b. are familiar with the general duties of an expert;

c. can produce a report, deal with questions and have discussions with other experts within a reasonable time, and at a cost proportionate to the matters in issue;

d. are available to attend the trial, if attendance is required; and

e. have no potential conflict of interest."

No doubt the instructing solicitor will have established these matters, but counsel should confirm that the expert is actually fully aware of them. The solicitor normally will have agreed the terms of appointment including timing of reports, charges, cancellation fees etc. So these matters should not concern counsel.

Going through the expert's report
The expert's report forms the backbone of the expert's evidence. It should not be served until counsel has advised. The Guidance provides helpful information about the form of the report and this should be read carefully. The lawyers should make sure that the report complies with all the requirements and it is in order to point out discrepancies to the expert provided this does not affect the opinion.

Expert reports must contain statements that the expert understands the duty to the court and has complied with the CPRs. Most importantly, the expert must sign the statement of truth. In the recent case of Zafir,(www.judiciary.uk/wp-content/uploads/2020/04/CO23962019-ZAFAR-Final.pdf) the expert lied and was given a suspended prison s entence and struck of his professional register.

Does the report set out all material instructions?
The report should also set out all material instructions sent by the solicitor. Counsel should check this is accurate as the Guidance states: "The mandatory statement of the substance of all material instructions should not be incomplete or otherwise tend to mislead. The imperative is transparency. The term "instructions" includes all material that solicitors send to experts. These should be listed, with dates, in the report or an appendix. The omission from the statement of 'off-the-record' oral instructions is not permitted. Courts may allow cross-examination about the instructions if there are reasonable grounds to consider that the statement may be inaccurate or incomplete."

Also prior to filing and serving an expert's report solicitors must check that any witness statements and other experts' reports relied upon by the expert are the final served versions. Counsel should make sure this happens as the opinion may change in the light of later evidence.

The Guidance further states: "Experts should be aware that any failure to comply with the rules or court orders, or any excessive delay for which they are responsible, may result in the parties who instructed them being penalised in costs, or debarred from relying upon the expert evidence." Counsel should remind the expert of these unpleasant possibilities.

Getting paid for the conference
A conference with counsel may well be a fully justifiable cost but judges are becoming increasingly strict when it comes to costs and budgeting. The impact of the reasonable and proportionate rule can be seen for example in BNM v MGN Limited [2016] EWHC B13 (Costs). The successful party claimed costs of £241,817. Following a line by line assessment of what were reasonable costs needed to be incurred in order to bring the case, this sum was reduced to £167,389. However it was concluded that even this was twice the sum which would be proportionate and the costs were reduced further to £84,855.80.

When asked for an estimate of fees for the purposes of costs budgeting that includes a conference with counsel, ensure that it is accurate, detailed and transparent and gives good reasons for the need for a conference. In any such estimate, include likely contingencies for example further work such as clarification and amendment of reports, further reports, examinations and tests which may become necessary as a result of the other side's expert evidence or what transpires from the conference. Getting the estimate right is important although where the original budget is likely to be exceeded, an application to review the budget can be made. The court can make a costs management order (CPR. 3.15) to control recoverable costs.

Record keeping
As is good practice in any professional meeting, careful notes should be kept of the conference including the date, start and finish times, who was pre-

sent and what was said. It is also good practice at the end of the conference to run through any action steps agreed noting who is responsible and when the actions are to be completed.

Conclusion

A conference between the expert and counsel is an important stage in the litigation process. Both lawyers and experts should prepare carefully to ensure conferences are as effective as possible. Many problems ranging from embarrassment to criminal proceedings can be avoided if a conference is conducted properly.

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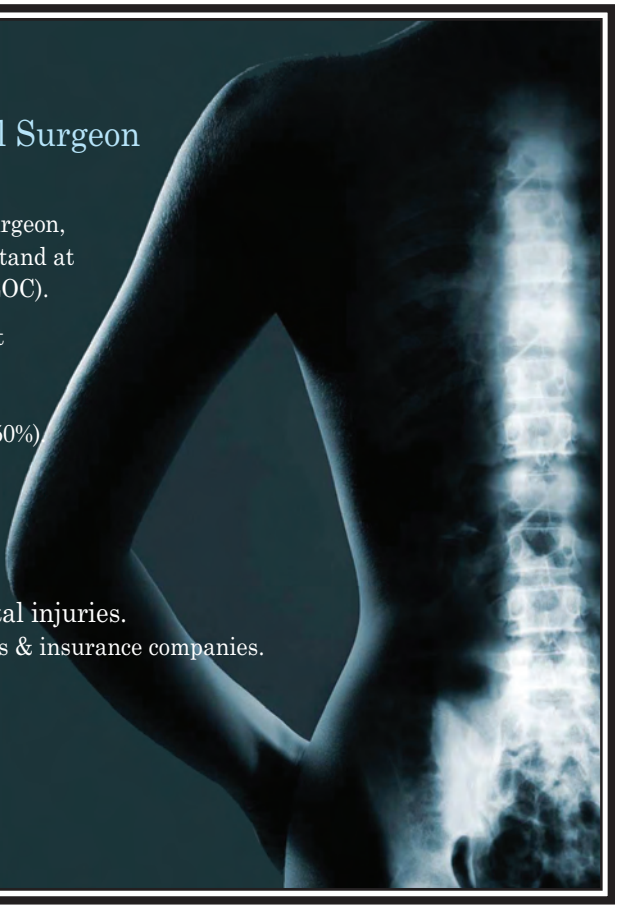

Legal Thoughts: How to Improve Lawyer Wellbeing Post-COVID-19

by Prof. Hugh Koch, Ms. Lynn Fulford, Dr Beena Parmar, Dr Ashley Francis and Mr Michael Davies

As we enter the next phase of becoming more COVID-19 resilient and its continued professional and economic uncertainty, being aware and making strategic plans for our future is of paramount importance. Efficiency, productivity and wellbeing are all essential factors for lawyers to consider. There is a growing conversation both amongst legal practitioners, academics and law students about how to take legal wellbeing seriously, especially as working practices at both individual and organisational levels are changing.

Whether based pre-virus in a law firm, chambers or university, the stressful context of legal learning and practice has been made more so since the spread of COVID-19.

Wellbeing and Resilience: what are they?
These two words have overlapping meaning and implications: They include:

• The psychological, social and physical ability to feel healthy, relaxed and content.

• The mental ability to predict and cope with adverse events.

• The ability to 'bounce back' and if possible, learn and benefit, when one's world is negatively affected by adverse events.

• The ability to incorporate the above in an organisational context, whereby wellbeing and resilience benefits work or study performance.

We know that there is a clear, positive relationship between the average level of job (and study) satisfaction and workplace performance (Richardson, 2020), productivity and quality of action and service, through the harnessing or thinking (cognitive) ability and processes, cooperative and collaborative social behaviour and general physical health.

Lawyers, like the rest of working adults, can experience problems affecting their wellbeing and resilience and also have personality traits which adversely affect their resilience. (For example, perfectionism, rumination, excessive self-criticism, wavering self-motivation.) The professional expectations on being a successful and high-quality lawyer can result in significant personal cost to their self-esteem and relationships.

Three challenges and stressors affect lawyers:

1. Perfectionism, because if wrong the fear of being sued for negligent advice, whether a reality or not (not all incorrect advice is negligent).

2. The unremitting demands of fee earning targets.

3. The sanctioning powers of the SRA/SDT, which can lead to the ending of a career for what many consider

to be relatively minor infractions - leaving a laptop on a train and then lying about the same = strike off and end of legal career. (If you are a Doctor and through misconduct kill someone, provided you can show insight and have taken training you are likely to be allowed to practice).

Continuous Improvement or Perfectionism
Lawyers often struggle with perfectionism, perceiving it as a key driver behind high quality work output. It can, however, reinforce performance anxiety and reduce task satisfaction and task completion ("it's never good enough"). It is dysfunctional because it implies one should be able to perform better at every opportunity. Replacing perfectionism by the concept and practice of 'Continuous Quality Improvement' with thoughts of 'could' not 'should' are crucial.

Managed Empathy or Over-Involvement/Vicarious Trauma
Understanding our clients and colleagues, listening to their narratives are both part of the key skill of empathy which all lawyers have and aspire to. It enables a deeper level of communication with them. The risk is that we take on board another person's distress and trauma and don't differentiate what is the client's anxiety and our own. Lawyers, unlike psychologists, do not typically have therapeutic support built into their training. Lawyers need to manage their empathy and maintain reasonable involvement.

CPD/Supervision or unmanaged risk-taking
Lawyers, like other highly trained professionals, are expected to adhere to a large number of professional guidelines and standards. The risk and criticism for not doing so can be high and socially and professionally very damaging. Regular supervision can help lawyers predict and manage risky situations and prevent inappropriate actions, as well as enhancing their self-esteem.

University Wellbeing: Law Staff and Students
Most universities have in recent years investigated the levels of stress and anxiety in both students and staff, acknowledging that wellbeing and resilience is everybody's responsibilities. Many universities have developed student and staff Mental Health and Wellbeing strategies (e.g. Bristol, Birmingham City), in which the University vision and aims to protect and support students and academic and support staff are made explicit. This strategy includes leadership, partnership with outside bodies, early intervention and treatment services, and general overall support – one of these key strategic aims is the promoting of healthy behaviour and positive mental health in education, with wellbeing and resilience skills development being embedded into teaching and extra-curricular programmes. This initiative is often supported by wellbeing advisors, tutors and administration within the University, plus collaboration with external community experts (e.g. 'Becoming more resilient' video programme, Birmingham City University).

Alongside support for students, Universities should expect to support staff in enhancing their work-based wellbeing and resilience to ensure the university environment and culture impacts positively on staff mental health and wellbeing. Recent work by Buckingham University (Seldon and Martin, 2019) has proposed how these intentions for higher education can address staff and student welfare in a "Positive and Mindful (University)" way, integrating positive psychology and mindfulness into higher education.

Putting it all together: A Daily Resilience Plan
Recent weekly blogs on the internet-based Personal Injury Brief Update Law Journal (Koch, 2020) and webinars for APIL and Birmingham City University have summarised key factors which can enhance psychological and social wellbeing including:
1. Being organised and focused on the here and now
2. Thinking and positivity at home
3. Feeling relaxed and managing difficult feelings at home
4. Communicating well at home
5. Showing compassion and gratitude at home
6. Enjoying work at home

These are illustrated in figure 1 below:

The Active Steps methodology (Koch and Koch, 2008), encourages identifying and practising practical behavioural steps for enhancing resilience and stress management techniques.

For example, the following steps for each of the six resilience factors are: -

- **Thinking Positively:**
  - Watch your language (thoughts and comments)
  - Use positive words and phrases
  - Avoid perfectionism, but get things done
- **Anxiety Management**
  - Relax frequently
  - Cut problems into small tasks
  - Be mindful
- **Being Organised and Focused:**
  - Have a tidy, organised desk
  - Keep an up-to-date task list
  - Focus on one job at a time

- **Communicating well**
  - Monitor your social skills
  - Increase friendliness and smiling behaviour
  - Have 50%/50% conversations
- **Being compassionate**
  - Reassure others
  - Listen and learn from others
  - Spread kindness and positivity
- **Enjoying work and leisure**
  - Making positive comments at start of day (at home and at work)
  - Phone, write, text with a smile on your face
  - Practice a 'bias for action' and get things done

Lawyers work and study hard and are frequently under pressure from themselves and their professional and educational environments. They need to use their considerable logical and social skills to enhance and build up their wellbeing and resilience, especially at this very difficult time. Lawyers make their legal decisions on evidence-based information. This article has presented the widely accepted factors and techniques which help maintain and enhance wellbeing and resilience. Happier and healthy lawyers are more productive, make fewer mistakes and are less likely to be absent due to illness.

In addition to practicing the six resilience factors mentioned above, bear in mind the strategies below to help you "become more COVID-19 resilient": -

• Identify and manage any pre-existing (pre-virus) vulnerabilities and notice how the virus situation has exacerbated these.

• Manages our social isolation and loneliness.

• Maintaining your collective momentum through your understanding, compliance with directives, coping with lockdown.

• Visualise the 'light at the end of the tunnel' and plan for this.

• Keep things in perspective and maintain social connections.

The legal workplace remains one of the best arenas within which we can help improve people's physical and mental health on a national scale. For thousands of lawyers, their 'work' gives them an identity, a purpose in life, and may be their main source of important social interaction. Commuting to work may be the closest that some lawyers come to regular exercise, or to being offered healthy food choices during the day, so the benefits of keeping people 'working' in healthy workplaces are widespread. Work, and especially meaningful and productive work, is one of the strongest predictors of longevity and general health, so anything that can be done at this crucial juncture in the world of lawyers (and how work is 'done') is worth trying and considering (Jackson, 2020).The post-COVID-19 legal workplace allows real opportunities to make workplaces better for everyone.

References

Jackson C (2020) Personal Communication. May.

Koch, HCH. (2016) Legal Mind: Contemporary Issues in Psychological Injury and Law. Expert Witness Publications. Manchester.

Koch, HCH. (2018). From Therapist's Chair to Courtroom: Understanding Tort Law Psychology. Expert Witness Publications. Manchester.

Koch, JWH and Koch, HCH (2008) Active Steps to Reducing Stress. Bracken Books.

Richardson, M (2020) Think Like a Lawyer to Improve Wellbeing. Solicitors Journal, January.

Seldon, A and Martin, A (2019) The Positive and Mindful University. HEPI. Occasional Paper 18

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Dateline 2120: Will Everyone Be Not Guilty by Reason of Diminished Responsibility?

by Timothy Cray QC, Esther Schutzer-Weissman

What is left of guilt if science can explain a defendant's actions? We may be a long way yet from understanding all human behaviour, but recent developments in the law on diminished responsibility suggest a step towards deferring to scientific interpretation. As the science develops, could there be scope for taking into account further psychiatric analysis when attributing responsibility?

Episode #91 of the 'Making Sense' podcast is entitled 'The Biology of Good and Evil.' The speaker is Robert Sapolosky, Professor of Biology and Neurology at Stanford University. Professor Sapolosky predicts that our current ideas about guilt and punishment will wilt in the face of advances in neuroscience. The interviewer (Sam Harris) puts the counter argument: the public will never accept liberalising reform of criminal law that excuses defendants on the basis that science proves that they should not be blamed for their actions. Sapolosky's response is to sketch the legal ascent of man i.e. brutal tribal retribution / state takes over some of the brutal retribution / state has a monopoly on brutal retribution / state retribution is brutal, but behind closed doors / state retribution stops being quite so brutal. He then points out that every civilizing step was met with the refrain, 'the public will never wear that'. But they do, says the Professor, because the public come to see that the new way is better and they just get used to it.

So, in 2120, will cherished legal ideas such as the doctrine of mens rea or even trial by jury be regarded much as we regard trial by ordeal and the ducking stool? More parochially – will criminal barristers join the ranks of haruspices, pardoners and water diviners - professions that were once in good standing, but which have been eliminated by the march of science? (Who knows – it's hard to find a decent soothsayer these days in order to get a view). What we can say however is that one small but definite score in favour of science as applied to the law of homicide can be chalked up following the decision of the Court of Appeal in R v Brennan [2014] EWCA Crim 2387 and the cautious approval of that decision by the Supreme Court in R v Golds [2016] UKSC 61.

The defendant in Brennan had a nine-year history of disturbed childhood, sexual abuse and outpatient mental health treatment together with one instance when he was sectioned following a suicide attempt. On the undisputed psychiatric evidence, he suffered from a schizotypal disorder as well as an emotionally unstable personality disorder. He was obsessed with witchcraft and Satanist killings. He was also depressed. He had planned and executed the ritualistic killing of a client whom he had served as a male prostitute. He left notes of what he planned to do, and after killing the man with one or more knives, had scored his back and painted or written on the walls symbols such as a pentagram and references to Satan and to Krishna, before cleaning himself up and going to the police station to report what he had done.

The only issue at trial was diminished responsibility. Despite the undisputed psychiatric evidence, the Crown argued that the issue should be left to the jury, who duly convicted Mr Brennan of murder. The Court of Appeal held that in that case there was only one possible outcome. There was simply no basis for a verdict of murder and moreover this was so clear that the judge ought not to have left it open to the jury.

The consideration of Brennan by the Supreme Court in Golds (paragraphs 44 -51) repays careful reading. Fans of Lord Hughes will not be disappointed. He starts from the proposition that in most diminished responsibility cases, reason and science prevail because the psychiatrists and the parties agree on the outcome. The further step by the Supreme Court in the development of the defence was the conclusion that reason and science should be the foundation of all future progress. The principle was stated in the following terms:

"if the jury is to be invited to reject the expert opinion, some rational basis for doing so must at least be suggested, and none had been at trial nor was on appeal. It is not open to the Crown in this kind of situation simply to invite the jury to convict of murder without suggesting why the expert evidence ought not to be accepted."

At first glance this rationale does not appear to subvert the primacy of the jury as the ultimate decision maker, but viewed more closely that primacy is something of a fig leaf. Science is based on rational experience that leads to the establishment of objective truth. It is therefore difficult to see how there is much room for any alternative 'rational basis' that could overturn a true scientific consensus on issues that a jury would be ill-equipped to decide. Science is, or could become, the ultimate decision maker.

When the law allows scientists to determine the state of a defendant's mind for the purposes of a statutory defence, that rationale must open the door for further advances in the study of our minds. What if the science of mind develops to the point that experts agree that the firing of certain neurons in the frontal cortex conclusively demonstrates that an action was intended – would there be a rational basis for a jury not to accept that conclusion? At present, any constraint on this brave new world is probably due to the state of forensic psychiatry rather than any innate conservatism on the part of lawyers. The identification of psychiatric conditions tends to focus on identifying clusters of symptoms. As specialists in other fields of medicine more closely anchored in bio-chemistry like to point out, this is like trying to understand the causes and development of measles by saying that

it's all about the spots. We also have to acknowledge that the hybrid and complex nature of the test necessary to establish the defence of diminished responsibility shows, yet again, that lawyers are rough lumberjacks of the crooked timber of humanity. One day, science will help us to become French polishers of that timber, but we are not there yet.

An article of this kind is not the best forum to consider all the ramifications of developments in the law of homicide and there are several important qualifications that would need to be examined before you could conclude that diminished responsibility is now a question of trial by expert rather than trial by jury e.g. in R v Blackman [2017] EWCA Crim. 190 at paragraph [43] the Court of Appeal emphasised that it would be a rare case where the judge would withdraw a charge of murder from the jury where the prosecution did not accept that the evidence gave rise to a defence of diminished responsibility. We suggest however that Professor Sapolosky would note and approve the Supreme Court's direction of travel. Our inspection of the entrails exposed in Golds is therefore confined to the prediction that where the science leads, the law will eventually have to follow.

References

1, See recent approval in: R v Hussain [2019] EWCA Crim 666; and R v Sargeant (Charlene) [2019] EWCA Crim 1088 (para. 30).

Timothy Cray QC
Esther Schutzer-Weissman

Embracing the Change in Psychology of Working From Home

To support our clients who are team and business leaders, Shoosmiths hosted a webinar on 2 June 2020 focusing on embracing the change in psychology of working from home as part of #TheNewHow.

Introduction

As the saying goes "when the wind blows, some people build walls, while others build windmills". We know that we're facing a crisis unlike any other, but what's been illustrated clearly is that a lot of our old assumptions on how we work can be challenged. We can be working smarter, faster, better. We want to emerge from lockdown with something positive to show for it: a new normal better than the old one. We need a new how.

On 2 June we hosted a webinar focusing on how the change in psychology around working from home will impact on #TheNewHow. The panel of speakers comprised Caroline White-Robinson, Head of Knowledge Management and Learning and Development - Shoosmiths, Jack Evans - Robertson Cooper and Sian Harrington - The People Space.

Below are our key tips and takeaways.

Is now the time for change?

- Having had to rapidly adopt remote working and instigate quicker decision-making, the time is ripe for businesses to adopt new working practices.
- While stability has been paramount, we are now moving in to the next stage – accelerating recovery. The third stage will be to consider what changed ways of working were successful and could benefit the business operations going forwards. It is important to keep this on the agenda.
- Seize the opportunity to engage with employees and gather feedback (use polls/ surveys) to understand what has worked well and what has not worked to ensure that good practices and new working ways are adopted going forwards.

68% of attendees believe that now is the time for change and 51% of attendees indicated they aim to keep more employees working from home.

Where does change originate from?

- Change needs to be instigated at board level but is best achieved when there is collaboration with employees – two-way conversation is key.
- Where remote working has been successful, employee expectation is likely to be for things to change.
- In many instances the 'here and now' is not sustainable – use learnings from the current crisis to instigate better working ways.

What is required to initiate change?

- To initiate and achieve change it is important to consider the mindset, culture and climate within the business.
- Look at the vision for your business to help shape where new working practices can be adopted.
- Change will be easier to achieve where the business places trust and autonomy in the hands of its employees.
- Note the same approach may not be appropriate for the whole business, by undertaking employee surveys and inviting employee engagement about the implementation of changes will ensure the continued success of any change and whether this needs to be tailored to specific areas of the business.

How do you address anxiety about returning to work?

- Gathering employee intelligence is key – you need to ascertain what the cause of the anxiety for each individual is – take a personalised approach.
- Based on any employee assessments made, consider phasing the return to work in a way to allow those ready to return to work to return first, learning and adapting from this experience to ensure everything is in place where those more anxious about returning to work finally return.
- Issue clear communications about steps taken to ensure a safe return to work as a lack of information and direction can contribute to anxiety.
- Provide training and support to line managers to ensure they know how to deal effectively with employee anxieties whilst understanding that line managers may themselves be managing their own anxieties as well as those of the employees they are responsible for.

63% of attendees have increased their focus on mental health during the COVID-19 crisis.

How do you manage employee's productivity?

- Consider how you measure productivity – hours spent working or outputs (reaching sales targets etc)?
- How are you communicating to your employees what productivity looks like? Ensure that this is clear and achievable.
- If you are able to trust your employees and give them more autonomy – presenteeism should not be an issue.
- There are many new technologies emerging to monitor employee productivity remotely - but businesses should consider to what extent these align with their brand/culture before implementing.

Key takeaways:

- Adopt a personalised approach to make sure that any measures you adopt are right for the individuals within your organisation - acknowledging there is no 'one size fits all'.
- Change is best achieved through two-way conversation - from the bottom up and from the top down.
- Clear communications on the steps being taken to achieve a safe return to work should help to alleviate employee anxiety.
- Employee well-being is not a tick box exercise and businesses need to ensure that they are living and breathing what they put in place.
- Assessing productivity using output-based results will aid the move to more flexible and agile working and employee trust is key.

Managing Your Judicial Review Costs

The High Court handed down judgment in *R (on the application of Bertoncini) v London Borough of Hammersmith and Fulham* (and the interested party) in June 2020. The decision is worth noting, particularly for developers.

Bertoncini had been refused permission to proceed with his judicial review challenge and his cost cap had been increased from £10,000 to £20,000 in total. This was of particular importance to the interested party as it was unlikely that it would receive any costs if the lower limit were applied.

The court very shortly dismissed Bertoncini's argument that the third party did not have the standing to apply for such a variation to the cost cap. The court went on to support the interested party's costs award which included counsel's and solicitor's fees, plus the cost of an expert witness.

His Honour Judge Bird stated that the interested party should have their costs paid and to do otherwise would disincentivise participation in proceedings of this kind. The voice of the interested party is an important one.

When can planning permission be challenged?
The grant of planning permission can be challenged by way of judicial review. Judicial reviews are not cheap. The total legal cost of even the simplest of challenges can easily be in the range of £20,000 to £30,000, but the total costs are regularly much more than this when two or three sets of legal teams gear up for a full day's hearing.

In the six weeks following the grant of planning permission, the local planning authority and the successful applicant face an uncertain period when judicial reviews can be commenced. Planning authorities with public funds are unlikely to welcome a challenge. However, it is harder for the applicant who, prior to this decision aced the real possibility that the costs of steps they take to protect their planning permission are unlikely to be recoverable.

Worse still, some claims are brought specifically to delay and frustrate planning permissions despite them having limited prospect of success. The judicial process offers some protection against un-meritorious challenges in the form of refusing permission and by flexing the cost cap in the event of frivolous claims.

What is the costs cap and when does it apply?
The Aarhus Convention is a European wide convention which, among other things, promotes access to justice for environmental issues. By access to justice this primarily means that litigants are not put off commencing challenges due to the costs of such challenges.

The worst case outcome for the litigant bringing the challenge is losing and having to pay their own legal costs and those of the defendant council. This is where the Aarhus Convention comes into play. The judicial review of a planning permission is an environmental claim and Aarhus allows the challenger to take the benefit of costs cap. The cost cap manages the claimant's cost exposure. By securing a costs cap the claimant knows how much they may have to pay out at the outset.

The starting point for a claimant's cost cap is £5,000 if they are an individual and £10,000 if they are a business. If they lose they pay the defendant up to the cap, together with the costs of their own legal advisors. There is a reciprocal cap of £35,000 on what they can recover from the defendant should they win.

This default cost cap can be varied on application to the court. The court can increase or decrease the cap or remove it altogether if satisfied that to do so would not make the costs of the proceedings prohibitively expensive for the claimant. This requires, among other things, an assessment of the claimant's financial resources which are disclosed by the claimant at the outset.

TLT has extensive experience in judicial reviews. If you would like to discuss your requirements, please get in touch.

About the Author
Fergus Charlton
Fergus is a legal director at UK law firm TLT specialising in planning and compulsory purchase.

He regularly advises clients in the energy, mineral, development and local government sectors on issues such as strategic planning, infrastructure agreements and compulsory purchase.

Fergus' legal and previous work experience means that he is able to deliver honed legal advice aimed at adding value and meeting client aims.

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Online Training: How it Works and What's in it for the Expert

At Inspire MediLaw we believe that medical experts acting in clinical negligence litigation should be trained, supported and encouraged to maintain a high standard of practice.

There are a range of challenges for clinicians learning and adapting to litigation process in clinical negligence and personal injury work. It is our aim to ensure that medical experts understand their duty to the Court, and are equipped to discharge their duty with integrity and confidence.

This can be achieved through ongoing training, peer support, and dialogue between medical and legal professionals. Learning from experienced medicolegal experts and lawyers gives new experts an insight into the practicalities of expert witness practice, and encourages existing experts in their ongoing professional development.

We firmly believe in the importance of 'doing' to learn,rather than just listening, watching or reading.

Caren Scott, Managing Director, InspireMediLaw

At present, with social distancing guidelines, that's not so easy to achieve, and it's not always possible to schedule interactive webinars at a time convenient for all delegates. Our recently launched online learning modules, accredited for CPD by the Royal College of Surgeons (Eng), are the answer!

These training modules are carefully designed to encourage experts to get to grips with the concepts and practical advice presented by our training faculty.

Each starts with video sessions, delivered by experienced medicolegal professionals, followed by a short assessment of understanding. There is also a self-directed task set by way of follow up. Those who take advantage of the opportunity to submit written work will receive feedback from a member of our training faculty, and a one to one consultation is also offered.

The four online training modules cover the key elements of a medicolegal expert's involvement in litigation: report writing; conference with Counsel; meeting of experts; and giving evidence in Court.

The modules can be utilised as one off training sessions to refine a particular area of an expert's practice, or can be purchased as a package. All four modules are based on the same case study. We recommend taking them in order, as the report writing module requires the expert to familiarise themselves with the details of the case.

Medicolegal experts who have completed all four courses can apply to become an Inspire MediLaw Accredited Expert, whether they are relatively new to medicolegal work, or have a long established practice.

You can find out more about our Online Learning programme for medicolegal experts on our website: **www.inspiremedilaw.co.uk/online-training/** or contact us on, **info@inspiremedilaw.co.uk**

You can find out more about our Accreditation programme for Experts and Senior Experts on our website: **www.inspiremedilaw.co.uk/inspire-medilaw-accreditation** or contact us on, **info@inspiremedilaw.co.uk**

Keep up with details of our events, and the training and support we offer to medicolegal experts. Follow us on **Twitter @InspireMediLaw** and **LinkedIn @Inspire MediLaw.**

Court of Appeal Rules on Consequences of Witness Failing to Produce Documents Prior to Trial

The Court of Appeal has held that the defendants in a recent action were not accountable where a witness failed to voluntarily provide documents for the purpose of discovery, where those defendants had no legal right to obtain the documents.

In the Court of Appeal's recent judgment1 dismissing Ryanair's appeal against a jury verdict in its defamation action against three pilots (see *Whether Qualified Privilege Applies is a Question of Law to be Determined by the Trial Judge in Defamation Proceedings)*, an issue of wider application was addressed concerning Ryanair's contention that the defendants had failed to discover a critical document held by a witness and that this should ultimately have led to a re-trial. The Court of Appeal upheld the decision of the trial judge that the defendants did not have an obligation to discover documents held by a witness, where those defendants themselves had no legal right to obtain them from the witness in question.

Background

Ryanair had brought defamation proceedings against three pilots, founders of the Ryanair Pilot Group ("RPG"), a nascent pilots' trade union. The proceedings arose out of an update email RPG issued to an email mailing list for Ryanair pilots which Ryanair claimed accused it of market manipulation and insider dealing. The defendants had not sought to prove the truth of the email but had relied on the defence of qualified privilege at the trial.

In the course of witness evidence for the defence, it transpired that the witness in question held a document which Ryanair said was critical to its case and had not been discovered by the defendants. Ryanair sought a retrial, which the trial judge refused as he was satisfied that the defendants had complied with their discovery obligations, having had no entitlement to obtain the document from the witness and having had no prior knowledge of its existence.

The jury ultimately found that Ryanair had failed to prove malice on the part of the pilots and the defence of qualified privilege succeeded. Ryanair appealed a number of the trial judge's directions to the jury, including those relating to the disputed document and the refusal to send the matter for a retrial.

Decision of the appeal court

The Court of Appeal pointed out that any obligation on the witness to provide documents to the defendants depended on whether or not he was their agent. The Court concluded this was not the case, meaning that the defendants had no legal entitlement to obtain the document from the witness and the document was not in their power, possession or procurement for the purposes of their discovery obligations. Moreover, Noonan J noted that there was nothing to suggest that the defendants were even aware of the existence of the document.

Even if the witness made a deliberate decision to withhold the document in question or any other documents from the defendants, this would not have impacted their discovery obligations. It was a matter for the defendants to make discovery of all relevant documents in their power, possession or procurement – the witness was essentially beyond their control and they were not in breach as a result of his failing to produce the document.

Conclusion

A critical document coming to light at trial can have serious consequences for the conduct of the trial and the parties affected by it, including the risk of the trial collapsing depending on the facts surrounding the emergence of the document. It is important when intending to put forward witness evidence to ensure as far as possible that the witness has made available any relevant documents on which he or she will rely when giving evidence and that these are produced. If the witness is an agent of the party making discovery, then serious consequences may flow for the party putting forward the witness if there is a failure to produce material documents.

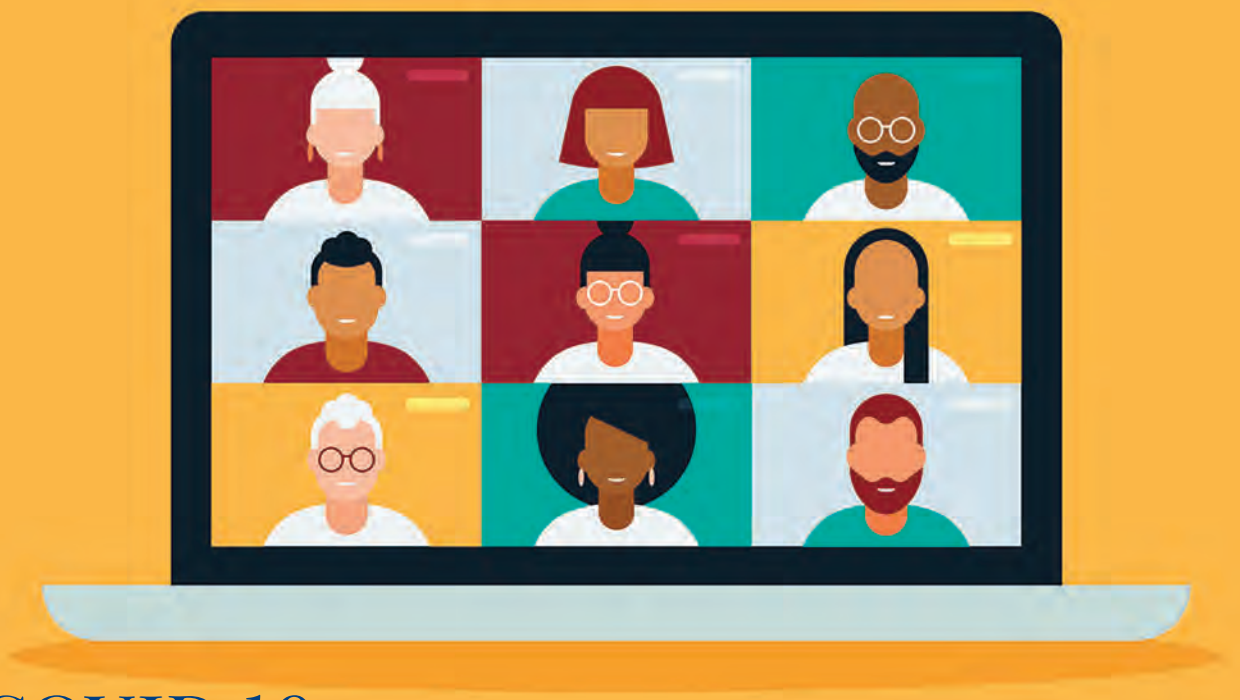
The Media Defence Group at **McCann FitzGerald** is available to answer any queries you may have in relation to this briefing. Alternatively, your usual contact at McCann FitzGerald would be pleased to provide further information.

www.mccannfitzgerald.com

Also contributed by Emily Cunningham.

Reference

1, Ryanair DAC v Van Zwol [2020] IECA 105.



COVID 19: The Challenges of Videoconferencing

I (Graham Rogers) was recently asked to comment on why ghost appointments in court were needed, leading me to consider the issues with assessment and client contacts during the time of COVID 19.

As a psychologist, I have access to Zoom, Skype, and MS teams, for the purposes of remote access, though I have discovered that for some strange reason, going through a third party at considerable cost, ultimately to the criminal justice system, is preferred.

The excuse proffered is 'security,' but as users of mainstream, cloud-based systems will know, they are also secure. Indeed, MS Teams offers numerous choices of security, including for medical professionals, and via personal contacts, I am aware some elements of the security services also utilise it. However, both Skype and Zoom are secure, providing the right settings are activated.

I recently completed a two hour video conference/assessment with a client in prison using this expensive system, where screen sharing was not available and as such, I was unable to use a test of reasoning ability. This resulted in the assessment having to rely on an interview, which as psychologists are aware, is the least valid or reliable system of assessment, as shown by decades of research, Ash (1949), Meehl (1954), Schmidt and Fonda (1956)….Aboraya et al (2006), Baca-Garcia et al (2007), Large et al (2009), Gowensmith et al (2013), First et al (2014), Schmidt et al (2017), McCrea (2018)…and many more.

However, the situation was more complex, because the client was placed into a room that was unsuitable, the acoustics bouncing sound off the walls affecting what the client heard and what they said. Added to the poor rooms, the microphones and speakers do not appear to have the 'quality' required, added to which, clients have no ability to adjust the settings to their own personal needs.

Who are we interviewing with this poor system?
The population with whom we work, especially within the prison system have an average IQ of just 87, as good if not better than 20% of the population as a whole; solving problems for such people is not an area of strength. That is, half the prison population has an IQ of 87 or less. Part of the difficulty is that those of lower ability, shown by decades of research, are increasingly compliant and suggestible, and as such, even when faced with a difficult video experience, they are unlikely to complain. Rather, they just comply, irrespective of whether they understand what is happening or what they are being asked. Those with mental health problems, problems of addiction and problems of low intellectual/cognitive functioning all have strong tendencies toward compliance, Gudjonsson and Clare (1995), Smith and Gudjonsson (1995), Davison and Gossop (1996), Murakami et al (1996), Beail (2002), Gudjonsson et al (2004), Coddington (2013), Thorley (2013) and so on.

Yet the prison population has added challenges. For example, we know that roughly 65% of prisoners have speech, language, and communication disorders, where up to 20% of those would be classified as 'severe,' as identified by the Royal College of Speech and Language Therapists in their written submissions to the MOJ (2012, 2017). Hence, when we interview

them, or video-conference, the majority of prisoners will struggle with aspects, or even all that we say. In essence, if we video conference and provide poor facilities, we potentially exaggerate distortions in the information from the client, and consequently, the information provided to the court.

Allied to the above, we know that at least 15% of prisoners accessed mental health services prior to entering prison, and many others needed access. Therefore one must assume that in interviewing clients we are also interviewing those with considerable emotional and psychological fragility where what we say and how we say it is important, and where misinterpretation may have a significant effect on how they interpret and respond to what we say.

However, even with poor facilities, the issues simply grow. In the past, the courts would need videoconferencing access, as would solicitors and barristers, while now, probation services have seen an increased need, psychologists and social workers, counsellors and others, are all requesting time and as such, the resources of the prisons are overwhelmed. Indeed, I recently asked a prison for the next videoconferencing date, to be told I had to wait around 10 weeks; and this is not the fault of the prison.

Although the video conferencing facilities in prisons are poor, so too are those in the community: I attempted to undertake a video conference a few weeks ago via a client's home, only to find the client's internet service and/or computer was too poor to sustain Zoom. We achieved a picture, but needed to use a phone to speak with each other. Yet even when the computer and internet facility is adequate, the client's mental health may prevent access. With another client he managed a light 40 minute video-contact, to establish a basic rapport, but was unable to repeat. Another client was able to complete online assessments, but not face to face conferencing, due to the multiple voices and delusional thoughts; his cousin is helping by sharing his own medication….I have told the NHS…who have subsequently discharged him because he was with the wrong department.

In my view COVID 19 is providing significant challenges, though it is not clear the courts have understood these. The videoconferencing facilities of prisons are inadequate and as such, the information being provided to the courts may be of questionable value.

The alternative is the real challenge for the court, providing well-ventilated rooms where client and counsel/psychologist are at least 6 feet apart, but where they can pass papers and materials back and forth; where both parties have N95 or better face masks and both have face shields; 70% alcohol gel is available and where rooms are wiped down between meetings. In my experience, the interview rooms below the courts are not appropriate. An alternative would be to use the court itself and the tables and chairs within them, or the main visitor meeting areas of prisons, which are currently not in use; these would be suitable.

Graham Rogers
Consultant Psychologist

Overcoming the Challenges of Interpreting Online: Psychologists Release Guidance for Working with Interpreters Remotely

As the Covid-19 pandemic continues to change and shape the way we work and interact with people, the British Psychological Society (BPS) has released new guidance on working with interpreters via video or telephone.

The guidance from the BPS Covid-19 working group offers advice about technology; the consultation itself; and specific advice for working with different client groups and British Sign Language (BSL) interpreters to ease anxiety and maintain access to crucial services for those who need it most.

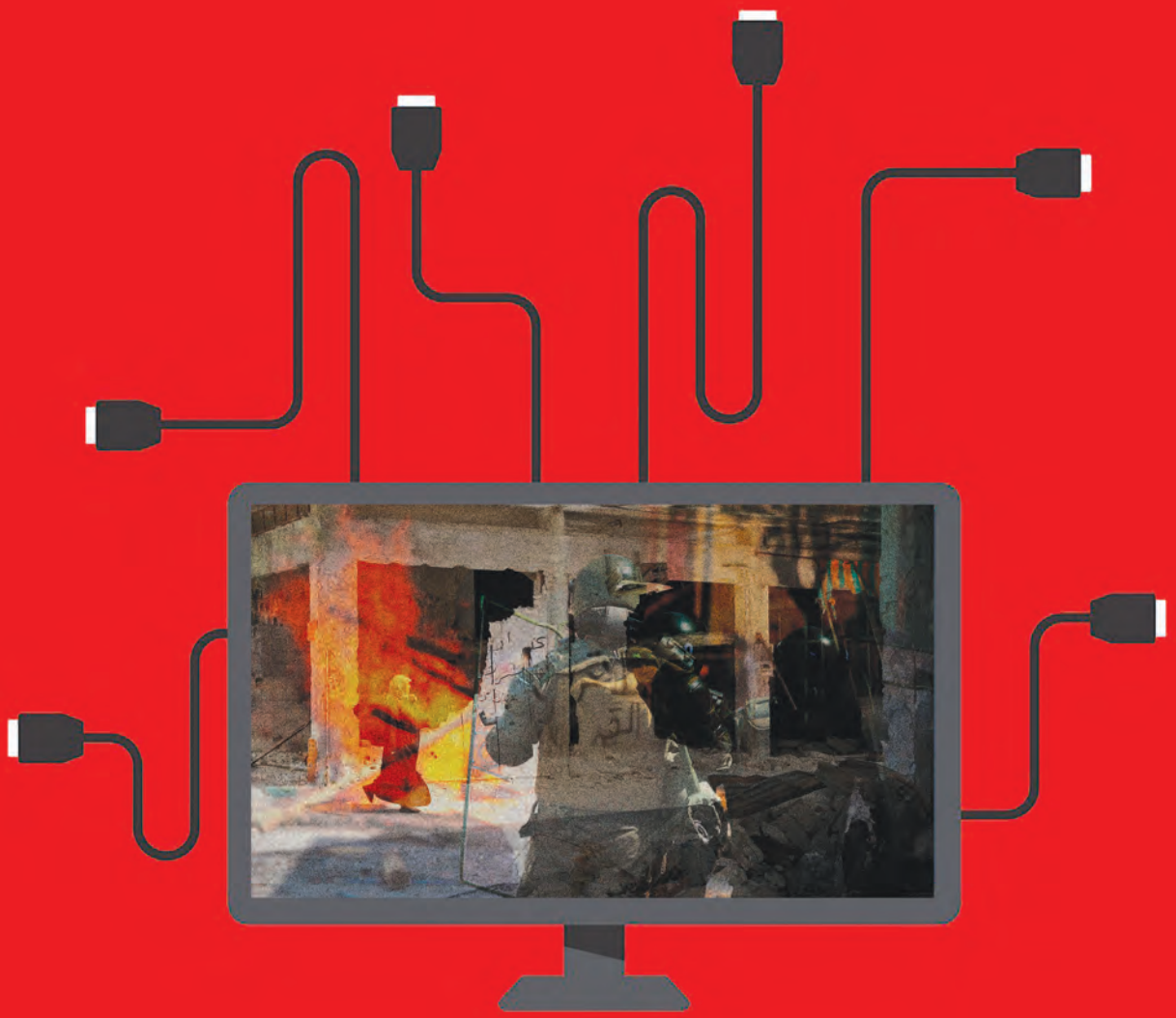
Dr Roman Raczka Chair elect of the Division of Clinical Psychology said: "There is no doubt that using remote media for consultations impacts the way a psychologist works and raises challenges for all involved.

It is important to realise that it may be the first time an interpreter has worked in this way and it may be a new experience for the participant as well. We need to be mindful that initially everyone might be experiencing some anxiety.

We hope this guidance will go some way to easing that anxiety, offering practical tips and advice on how to make working remotely with interpreters as smooth as possible and ensure our services are still accessible during this time."

The advice covers a range of aspects, from the importance of preparation to practical tips:

- Preparation is crucial and guidance should be available for the participant and interpreter before the session about what to expect. Technical instructions can be provided in the client's native language if possible.
- Psychologists may wish to learn a few words within the relevant language for checking in with the participant, this can help build a rapport.
- Ensure equipment is set up properly so the participant and interpreter can be seen clearly in order to pick up on body language cues
- Ensure regular 'check-ins' with the participants and interpreter and also have a debrief with the interpreter following each session
- Establish a 'turn taking' system when interpreting over the phone to avoid participants talking over each other
- For psychologists working with BSL Interpreters the interpreter should have access to information beforehand to prepare regarding diagnosis and history and also the aims of the session.



Terrorists' Use of Tradecraft

by Dr David Lowe

In our current lifestyle there is a heavy reliance in various forms of electronic communication. For example, using mobile phones we can bank or shop online while on the go, listen to the radio or watch television, keep in touch with friends and colleagues on various social media platforms and communicate via email, text or on various apps. Less we forget, we can also make calls on the mobile phone! The mobile phone is in addition to the personal computer, laptop and tablet we use to access the various forms of electronic communication. Lewis and Callahan's 2018 study of the digital world found that 4.3 billion people use the internet, 3.9 billion people use a mobile internet and 3.4 billion people use various forms of social media.

Their study found that every 60 seconds:
1. One million people log into Facebook;
2. 3.7 million Google search enquiries are made;
3. 4.3 million videos are viewed on YouTube;
4. 18 million text messages are sent;
5. 38 million WhatsApp messages are sent;
6. 187 million emails are sent.

This study did not include Twitter, Instagram, Snapchat, Skype and other social media use, but it does reveal how widespread global electronic digital communication use is. In addition to innocent, everyday usage, terrorists and criminals also take advantage of current methods of electronic communication and as the figures above reveal the enormity of the task facing security service and policing agencies in monitoring communication between terrorists. This article will provide an illustration of activities that amount to tradecraft, mainly those carried out by state agencies. This is followed by looking at how terrorists exploit the various electronic communications via their own methods of tradecraft, which in essence are methods of counter-surveillance techniques.

What is Tradecraft?
Tradecraft use is not exclusive to terrorists and criminals, it is used by state agencies such as the security services and specialist police departments within the intelligence community. Tradecraft refers to the techniques, methods and technologies used in modern espionage and generally, as part of the activity of intelligence. There is a wide range of tradecraft activity used by state agencies including:

1. Agent/Informant Handling – this is where persons

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1. Agent/Informant Handling – this is where persons already operating within terrorist organisations are recruited to pass on intelligence on their peers;

2. Black Bag Operations – these are covert entries into buildings and locations to obtain information on targets during human intelligence operation, such as placing covert listening devices in rooms and vehicles;

3. Use of Legends – this where mainly trained state agency officers are given a well-prepared and credible made-up identity with the aim of infiltrating a target organisation;

4. Surveillance – this activity includes physical static and mobile surveillance operations to surveillance of targets' electronic communications.

Because tradecraft is intrusive into the lives of targets (and potentially their family members), state agency tradecraft activity is not arbitrary, they are strictly controlled powers granted under statutory authorities/warrants issued either by the judiciary or a secretary of state (with subsequent judicial examination). Factors considered when issuing these authorities and warrants are the legal issues of necessity and proportionality. Necessity is where due to the circumstances in which the target is operating, obtaining evidence using conventional investigative methods are ineffective and these powers are needed. Proportionality is balancing the reasons for the requirement of this power with human rights provisions such as right to privacy and data protection. The main legislation covering these powers in the UK are the Regulation of Investigatory Powers Act 2000 regarding use of informants (referred to as covert human information sources in the Act) and applying static and mobile observation. The Investigatory Powers Act 2016 provides authorisations for various forms of surveillance of electronic communications, with other powers being granted under terrorism statues introduced from the Terrorism 2000 Act to the Terrorism and Border Security Act 2019. In Ireland the Communications (Retention fo Data) Act 2011, the Criminal Justice (Surveillance) Act 2009 and Criminal Justice (Terrorist Offences) Act 2005 provides authorisations for state agency tradecraft that is predominantly carried out by An Garda Siochana (the Irish police).

Terrorists' Counter-Surveillance Tradecraft Methods
Knowing or expecting to be under state agency surveillance, terrorists also use tradecraft techniques as counter-surveillance methods. In his book, 'On Guerrilla Warfare', Mao Tse-Tung stated that the guerrilla must move among the people as the fish swims in the sea and it is the same for the terrorist that in order not to bring attention to themselves, they must act as normal as possible in their day-to-day activities. In order to do so, terrorists must be conscious of how and what content they communicate or promote using open sources, such as social media sites like Twitter, YouTube or Facebook and, potentially to be careful in their use of more deeply encrypted sites like WhatsApp.

In order to prevent state agencies from monitoring their activity there are two distinct methods of tradecraft deployed by terrorists. Firstly, those active within a terrorist group know it is highly likely their movements and use of electronic devices are being monitored by states' counter-terrorism agencies and therefore must be extremely mindful who they associate with and how they communicate. Most terrorist groups give advice on counter-surveillance tradecraft to group members and followers, an example of which is the group Islamic State (IS) who in issue 2 of their online magazine Rumiyah published an article regarding the use of electronic communications. It informs its members and followers to be aware of the

various malware methods adopted by state agencies to gain access to electronic communication used by the group, along with how to counter the impact of the malware. The final piece of advice IS provide is, if all else fails return the device to factory settings thereby wiping off all communications data. Although returning a device to factory settings can frustrate investigations into terrorist activity, such a move is not a total failsafe move as forensic examination can still detect images and, albeit broken communication, some relevant information related to terrorist activity. When this is added to other evidence, it can still provide an overall pattern of activity revealing terrorists' use of tradecraft.

Being aware their communications is being monitored, be it far-right, nationalist or Islamist terrorist groups, they are now regularly using more deeply encrypted sites to communicate through the likes of Telegram, GAB (mainly by far-right groups and followers) or WhatsApp and darknet sites. In order to attract custom, darknet sites promote a world of complete freedom and anonymity, claiming users can say and do what they like uncensored, unregulated and outside society's norms. This has resulted in terrorist groups increasingly moving to the darknet to communicate. For example, Islamic State use the darknet marketplace Silk Road to raise funds, sell books on how to carry out jihad, make bombs and homemade firearms, as well as purchasing weaponry. A popular darknet site used by terrorists to communicate with each other is Tor. Tor is a virtual private network that protects the identity of the user by wrapping layers around the communication, a process referred to as 'onion rooting'. As such, Tor hides the location and identity of its users allowing terrorists and extremists to have various forums and to communicate relatively freely without detection. However, most state agencies, including the UK and Ireland, have malware technology to infiltrate and monitor most terrorists' darknet usage.

The second method of tradecraft deployed by terrorists is in their handling of cleanskins. Cleanskins are people who do not have an existing criminal record or who have not attracted the attention of police or security services, or, occasionally, those who may be on the periphery of intelligence systems that are not regarded as a great risk. As such, cleanskins imbued with an extremist ideology are a valuable commodity to terrorist groups. Once directed to a more deeply encrypted site, or ideally though clandestine meetings, advice is passed onto cleanskins on how to apply counter-surveillance tradecraft, including how to create a legend to portray what appears to be innocent, normal day-to-day activity.

An example where I provided expert witness evidence on terrorists' use of tradecraft concerned an individual who became imbued with the Islamist ideology. His electronic footprint and activity over a two-year period was submitted at his trial by England's Crown Prosecution Service as evidence for the offence of engaging in the preparation of committing acts of terrorism under section 5 Terrorism Act 2006. After watching online YouTube videos of radical Muslim preachers, he became influenced by the Islamist ideology. Following certain terrorist attacks this individual emailed/messaged politicians and journalists who were critical of Al Qaeda and IS activity. None of these messages contained a violent threat, but they were extremely critical of violence against Muslims in the Middle East by Western states' military action in the region.

At this stage this individual's actions are not illegal, but it is a pattern that an individual is at a stage of being vulnerable of being drawn towards terrorism. If such behaviour is exhibited by persons in Britain today, especially for staff in specified British authorities (health, education and criminal justice system) who have the statutory responsibility under section 26 Counter-Terrorism and Security Act 2015 in having due regard to the need to prevent people from being drawn into terrorism, this is a stage where individuals can be referred to agencies involved in the Prevent strategy. Even though his extremist behaviour was prior to the introduction of the 2015 Act, even without the statutory responsibility, the Prevent strategy was still in place and he could still have been referred to Prevent agencies, but he was not given this opportunity (The Prevent strategy does not apply to Northern Ireland). In the autumn of 2015, following a visit to his extended family in Bangladesh, his actions went beyond simply expressing extremist commentary.

In 2016 IS still controlled large areas of Syria and the group were actively recruiting foreign fighters, which included males from the UK, most of whom travelled to Turkey, then onto the Turkish border with Syria. In January 2016 this individual planned to travel to Syria to join IS, but prior to doing so he created his own legend. He booked online a return flight to Istanbul, the e-visa for Turkey and four-night hotel accommodation in Istanbul via his credit card. In addition to this he purchased Turkish Lire to the amount that would reasonably be expected to cover costs of a four-night stay in Istanbul. A few weeks prior to his departure he joined an online dating site and made connection with a female from Istanbul, stating he would meet her on his arrival. Should he be challenged by the police prior to his departure, this online activity was his cover story for travelling to the region.

On the day of his departure he checked-in at the airport and prior to boarding the flight, at the airport ATM he withdrew all the money he had in his bank account. On arrival at Istanbul he checked into the Istanbul hotel, and, as is normal practice, he presented his credit card to cover any extra hotel costs to the reception staff. Evidence revealed that after checking in, this individual did not stay at the hotel, instead he returned to Ataturk Airport and purchased with cash a single air flight ticket to Gaziantep. From there he boarded a bus from Gaziantep to Kilis, close to the Turkish/Syrian border. At the border this individual was stopped by Turkish border authorities who searched his property and found camouflage fa-

tigues, military style boots and a black IS shahada flag. As a result, they contacted the UK's counter-terrorism police and sent him back to the UK. On his return he was stopped by the police at the airport under Schedule 7 Terrorism Act 2000 who examined the sites he was looking at and the communications he made on his electronic devices. A sim card linked to a pay-as-you go mobile phone was also found. He was arrested under section 5 Terrorism Act 2006, for the offence of engaging in the preparation of committing acts of terrorism. Following his subsequent police interviews and forensic examination of his electronic devices it revealed the sim card was from a pay-as you-go phone used during his time in Bangladesh, and later the UK, where he was in communication with IS members. It was found that they groomed and instructed him in relation to creating a legend prior to joining the group as a foreign fighter in Syria. During the forensic examination of cell site data that provides geographical locations, it revealed the individual's use of his i-phone and the pay-as -you-go phone were in the same location, thereby proving his use of both phones.

Conclusion

In this summary of terrorists' use of tradecraft, what can be provided by expert witnesses who research and have practiced in this area is:

1. Showing patterns of behaviour linked to internet and communications use revealing a progression from interest in extremist/terrorist sites to becoming vulnerable to being drawn towards terrorist activity. This is linked to Britain's Prevent strategy and the statutory responsibility of specified authorities under section 26 Counter-Terrorism and Security Act 2015;

2. Identifying methods and rationale behind terrorists' tradecraft through their use of more deeply encrypted communications sites;

3. Identifying and revealing terrorists' tradecraft in their use of internet and electronic communications in creating a legend;

4. Associating investigations into terrorists' use of internet and communications sites with the relevant law and practice by state agencies. This includes the relevant state statutes granting these agencies powers to intercept and carry out surveillance as mentioned above, data protection law including the EU's Directive on the protection of personal data processed for the purposes of preventing, investigating, detecting or prosecuting criminal matters and human rights legal provisions such as the European Convention on Human Rights and updates in courts' decisions in interpreting the statutes be it from domestic courts, the Court of Justice of the European Union or the European Court of Human Rights.

As communication technology advances, so do terrorists use and application of that technology. As such a 'cat and mouse' game between state agencies investigating terrorists' activity develops with continuous changes of behaviour and practice by terrorists use of electronic communication that investigators must monitor, and with-it legislative provisions introduced to keep pace with technological advances, ensuring that state agencies investigatory methods remain within the rule of law.

About the Author

Dr David Lowe is a retired police officer and is currently a senior research fellow at Leeds Beckett University Law School researching terrorism & security, policing and criminal law. He has many publications in this area including his recent books 'Terrorism and State Surveillance of Communication' and 'Terrorism: Law and Policy', both published by Routledge. David is regularly requested to provide expert commentary to UK national and international mainstream media on issues related to his research areas.

Judicial Views of Experts

by Alec Samuels, Formerly Reader in Law, University of Southampton, UK

Most experts are aware of the dispute between the subpostmasters and the Post office, the subpostmasters claiming that the computer system was making mistakes in the figures, the Post Office claiming that the subpostmasters were careless or fraudulent because the accounts were showing deficits. The case ran for years. The case was eventually settled 11 December 2019, without admission of liability, for some £58m, the parties having seen what the judge was going to say. The judge gave a decision, in favour of the subpostmasters Bates v Post Office [2019] EWHC 606 QB,16 December 2019. There was a principal expert witness for the subpostmasters and another for the Post Office. The evidence about the computer system was technical and detailed and controversial. In the end the judge praised one expert and accepted his evidence and heavily criticised the other expert and rejected his evidence. There is much to be learned from what the judge said paras 870-902.

The good expert

What every expert, and those instructing him, like to hear. The expert was fair and balanced. He was independent, neutral and impartial. He indicated his sources, e.g. analysis relied upon, information from colleagues, and the difference with the expert from the other side. The analysis was extensive and substantial, the views expressed were considered and sensible, the expert agreed as much as possible with his opposite number in order to save court time, and was helpful to the court. He did not dispute facts, did not prefer the factual account of one side rather than the other: he simply took all the various and competing facts as alleged as the hypotheses on which he gave his expert opinion. Decision on the law and the facts was for the judge. The expert gave his opinion on all the possible scenarios.

In cross-examination he rebutted accusations and criticisms regarding analysis, conclusions, independence, reliability. He gave straight answers, not evasive answers. He did not change his evidence. He emerged unscathed.

True, at one stage in a long trial he did get a little flustered and muddled, but it got sorted out and was in the event no reflection upon his quality as a reliable witness.

True, in a previous recent case the witness had come in for criticism by the judge. But the current judge in the current case did not expect all experts to be paragons of virtue and for the reasons given accepted the evidence in this case as reliable in the current case.

The bad expert

The appraisal of the bad witness by the judge was chilling. The witness was egregiously lacking in objectivity and was partisan. He accepted the alleged facts from one side (his side) and rejected the alleged facts from the other side (the opposing side), instead of working on the hypotheses principle. He did not make clear when he had relied upon material from other experts or technicians or team members. Many assumptions were made which were conceptually flawed and invalid. Additional evidence was produced at a very late stage, and communicated to the judge, but not the other side. The analysis was insufficient, based on small samples, incomplete. All the various possibilities for defects leading to errors in the computer system were not considered.

Significance

The integrity of the experts in the experts profession must be of the highest order, in order to retain the forensic confidence of the judges, the instructing lawyers, the confidence of the public, especially those involved in disputes and in litigations and the reputation of this indispensable widespread diverse experts' profession. The moral and ethical and professional requirements are clear. The Civil Procedure Rules are explicit and based on many years experience. Professional standards are rightly high. There is "no excuse" for not acting with integrity and competence. The evidence of the expert may be challenged, quite probably will be, but hopefully not his integrity or competence. Two experts of good standing may disagree, probably do in some respects. The judge will determine the facts. The judge will prefer the evidence of one side or the other. But that is life. What we all want to see in all cases is that the experts on both sides acted to the highest standards. Justice was done, thanks to the quality of the good expert.

The 'Causation' Hurdle - Why Breach of Duty is Not Enough to Prove Your Case

by Rachael Jane Ruth
litigation solicitor at Brodies LLP.

It is well-established law that for a claim of negligence to succeed, three elements must be demonstrated:

- The defendant owed a duty of care to the claimant and has breached that duty.
- The claimant has suffered a demonstrable loss.
- The defendant's breach of duty caused the loss suffered by the claimant.

A claim will not be successful simply because a breach of professional duty has been determined. As the recent case of Taray Investments Limited v Gateley Heritage LLP (2020) demonstrates, proving a causative link remains a crucial task for the claimant.

Background to the case

Taray Investments Ltd and Bellevue Homes Ltd, the claimants in this case, entered into a joint venture in November 2012 with the intention of purchasing the site of Clare Parsonage in London. Taray and Bellevue instructed Gateley Heritage LLP - the defendant - to act for them in acquiring the site.

Gateley Heritage prepared a report on title for the claimants, which failed to identify that part of the site encroached upon a footway. Therefore, for any development on the site to proceed, a stopping-up order to extinguish the highway rights over the footway was necessary. The issue was only discovered several months later.

The timescale for obtaining a stopping-up order could have been in the region of 12 months. This added to Taray and Bellevue's funding difficulties and, crucially, Bellevue refused to provide the 10% deposit required to purchase the site, in the knowledge that the money could ultimately have been tied up for a year, with no guarantee that the order would then be granted. The transaction thereafter quickly fell apart.

Damages sought

Bringing a claim in the High Court of England and Wales, Taray and Bellevue sought damages of £600,000 on the basis that, had Gateley Heritage highlighted the issue within the report on title, there would have been sufficient time to obtain a stopping-up order, thereby allowing them to negotiate a deal with the site's vendor.

They alleged that, as a result of Gateley Heritage's negligence, they lost the opportunity to purchase and develop the site. Gateley Heritage did not dispute that there had been a breach of duty but argued that, even if the report on title had identified the issue with the footway, Taray and Bellevue would not have had the financial resources to proceed with the transaction.

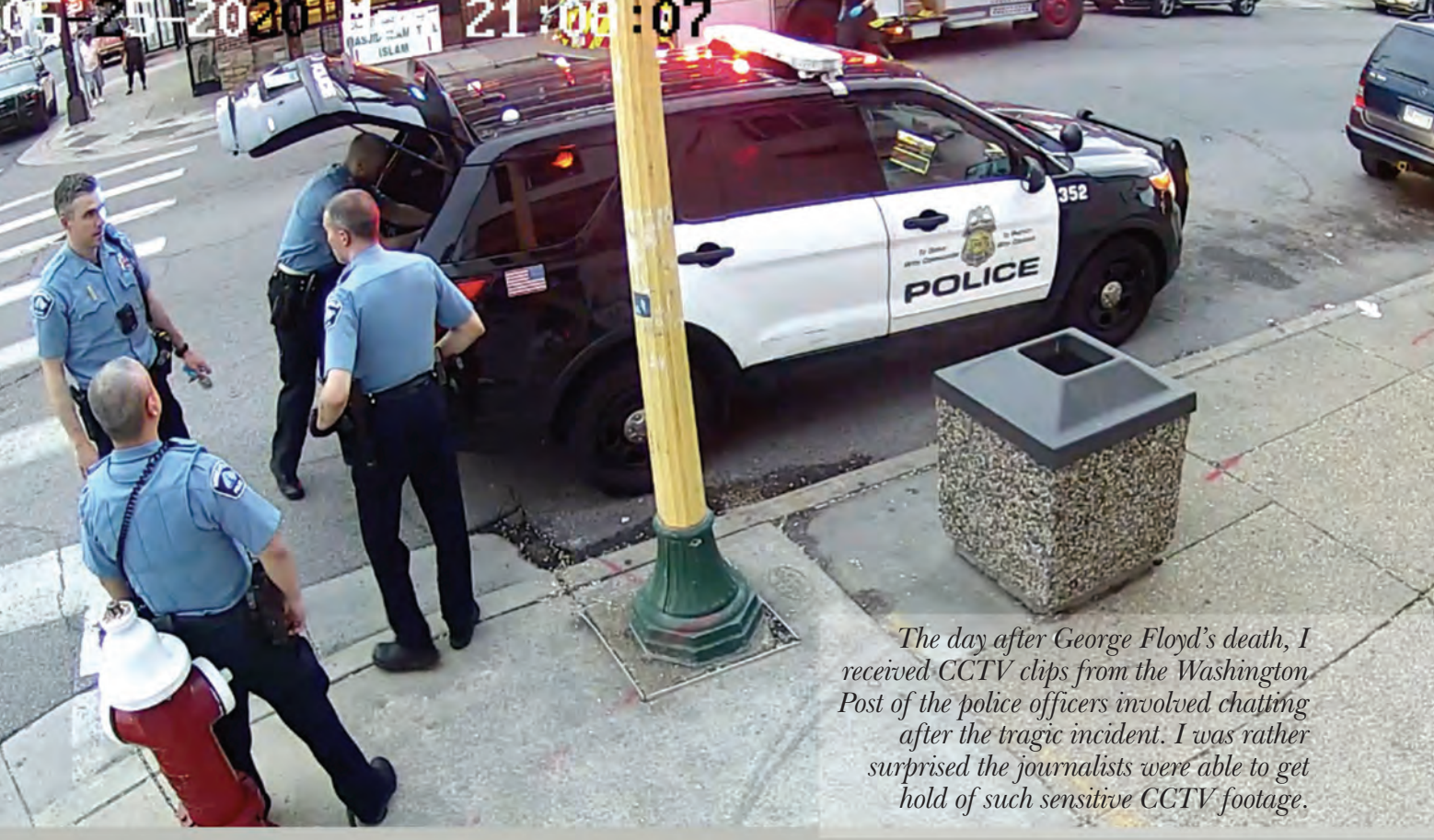
Mrs Justice Tipples heard evidence from a number of expert witnesses and witnesses of fact. She found that Taray and Bellevue would not have incurred any costs in respect of obtaining a stopping-up order, nor did she accept that they would have persuaded the site's seller to enter into an exclusivity agreement with them while the stopping-up order was obtained.

She also concluded that they had not demonstrated they would have taken the steps necessary to acquire and develop the site, because they did not have the financial means to do so. Mrs Justice Tipples noted that the prospect of the claimants successfully acquiring and developing the site was "fanciful in the circumstances".

Establishing the causative link is key

The decision in this case demonstrates that even where a breach of duty is clear-cut or even conceded, establishing causation remains an essential element of making a successful claim. Consider whether the loss would have been incurred regardless of the breach. Even the most obvious instances of negligence require a clear and demonstrable causal link with the loss suffered, otherwise the claim will fail.

Rachael Jane Ruth is a litigation solicitor at Brodies LLP.



The day after George Floyd's death, I received CCTV clips from the Washington Post of the police officers involved chatting after the tragic incident. I was rather surprised the journalists were able to get hold of such sensitive CCTV footage.

A Lipreader Must Remain Impartial and Unemotional

Tina Lannin is a life-long lipreader, she is totally deaf and is a certified lipreading teacher. She has worked as a forensic lipreader for over 20 years and heads up the forensic lipreading team at 121 Captions. 121 Captions specialise in remote live captioning and transcriptions, using court reporters.

Public emotions continue to run high in the case of George Floyd, but a lipreader must remain impartial and unemotional. Judge Peter Cahill in Minneapolis has instructed both sides to limit pretrial publicity and argue this case in court, not the media. With my forensic lipreader hat on, this was just another assignment where I was to rely solely on the evidence to give me useful information.

Due to the officers often turning away from the camera and the video quality being slightly fuzzy when their lips moved, I could only pick up words from Derek Chauvin and Tou Thao. It is quite normal not to pick up 100% of everything that is said, as people move around or are too far from the camera, and CCTV footage is rarely broadcast quality. Context can help somewhat, too.

As no masks were being worn by the police officers, I was able to see their speech and expressions clearly. In the future, should wearing PPE become common practice, masks will make it impossible for a lipreader to pick up anything. Clear masks are now being produced, the best examples to date coming from Redcliffe Medical Devices Inc, Safe N Clear, and face shields from Rapid Response PPE. In 2021, the Swiss Federal Laboratories for Materials Science and Technology (EMPA) will supply HelloMask, a fully transparent surgical mask.

As the pandemic continues, it may be likely that a trial would be conducted with face masks and social distancing. If a lipreader is called to give evidence in court, communication may prove problematic as a lipreader will obviously not understand anyone wearing a mask, and being more than 5 feet away from a speaker makes it difficult to see lip patterns clearly. This can be overcome by having a speech-to-text reporter (court reporter, stenographer, or palantypist) display their laptop screen to the lipreader during the proceedings in the courtroom. A deaf lipreader may not have a clear voice and may also require a professional lipspeaker from the Association of Lipspeakers to revoice what they are saying for the court.This will be tricky if they have a very quiet voice and the lipspeaker needs to work at a social distance.

This set-up can also work remotely as a court reporter and lipspeaker would listen in on the conference call, and the lipreader would be given a remote stream of live captions to read in real-time. Our court reporters would typically use their computer to join a Zoom call, and their landline or Skype to dial in, and then we would give the encrypted URL of the live-streaming captions to the lipreader. The captions stream can be embedded into Zoom, Webex, or dragged on top of a Skype video call on the lipreader's screen using our live captions app.

Our court reporters are members of BIVR (British Institute of Verbatim Reporters), NCRA (National Court Reporters Association) or NRCPD (National Register of Communication Support Professionals to Deaf People) and abide by their professional code of conduct. Some also sign the Official Secrets Act. We use encrypted communication technologies for end to end encryption of live captioning and emails to ensure confidentiality.

In the UK, the capacity for video and phone hearings has seen a significant increase. There are 157 priority court and tribunal buildings open for face-to-face hearings to ensure effective social distancing. Where it is not possible to attend in person, judicial consideration will be given to the media and the public joining a hearing remotely, or have a transcript provided afterwards. A further 124 buildings are staffed but not open to the public; these will support video and telephone hearings. Determining whether to use audio or video technology to meet the needs of a lipreader will be a matter for the judiciary. The civil and family courts allow telephone and video hearings; at the moment they have phones, some video facilities, and Skype.

To set up for remote hearings, it is recommended that parties first enquire whether a court is prepared to allow and is equipped to handle, video conference hearings and deliver a clear audio output feed to the speech-to-text reporter. I recommend using a computer for video and a phone for audio. Failing that, run with what is available - smartphones work well enough. All parties should mute their audio so only the person speaking can be heard. If you are using a smartphone or tablet to call in, be sure to disable all incoming calls and notifications so that others won't hear them. The key things are to check everyone has a good internet connection (minimum 1.5Mbps, connect to router with an ethernet cable if possible), understands how to use your tele or web conferencing tools, has high-quality microphones and headphones, andI'll say it again and again, test the set-up to make sure it works. With several people involved, several types of devices in multiple locations, you'll want to make sure everyone knows how to join the call, how to connect their microphones and cameras, and how to mute/unmute their microphones.

If you haven't used Zoom, I would recommend a look at the Zoom 101 webinar series which are run several times a day by the Zoom team. You'll learn how to schedule, host, and join Zoom meetings.

Auto captioning in Zoom and Skype is abysmal and not recommended. A speech-to-text reporter is a trained court reporter with 99.8% accuracy, writing at speeds up to 360 words per minute.

Consideration should be given to any special procedures that need to be in place for submission of exhibits or demonstratives, questioning the witnesses, making objections, or how video files would be handled. The hearing can be video recorded or recorded in real-time and a live captions feed (and transcript) provided by the court reporter. We recommend using a laptop, high-quality cameras and USB microphones, a telephone, and minimum 5 Mbits/sec internet connection (upload and download). A web-based deposition platform can integrate all of these. Remote hearings can be successful with smartphones, however, all lawyers and interpreters should use a laptop with a headset. The audio is much cleaner when they use a microphone. Zoom allows for simultaneous interpreting, but the host has to join the meeting to make it work. Interpreted hearings will be slower so if you're hiring interpreters - make sure they have a strong internet connection and can handle consecutive interpreting. Skype group calls can work but the host has to initiate the call and add everyone else in.

Managing a dialogue during a remote call requires careful observation and more pauses by all parties, particularly when a deaf person is present. A deaf lipreader will require more time to read captions, consider their response, and then respond or have their response voiced over for them. It's important that everyone speaks one at a time and waits for

others to finish before continuing. Clear enunciation into your microphone is also vital. These tactics help the court reporter as well as everyone else. Video conference platforms can drop words when people talk over one another so be prepared for the court reporter to interrupt so they can hear what is said and deliver accurate captions to the lipreader.

The time lag with captions appearing on the lipreader's screen can be assisted by identifying yourself before speaking. Video calls require more concentration and are more tiring, so frequent breaks are helpful. Although technology does sometimes require troubleshooting, this can be overcome with an IT technician on hand.

Non-verbal cues are not possible during a remote hearing, therefore each speaker should be careful to make explicit references to each exhibit so that it makes sense in the transcript and to the lipreader reading captions. Anyone who wants to make an objection can simply raise their hand and everyone stops.

Looking ahead, I would expect to see an increased reliance on web-based proceedings and for these to become the norm as the pandemic progresses. Both travel costs and travel time will reduce, and as remote hearings become more acceptable, it will be easier for lipreaders to attend hearings since there are so few available within the UK.

If you'd like to find out more about our remote live captioning, lipreading or remote court reporter services, contact 121 Captions at bookings@121captions.com or call 020 8012 8170.

Food Safety Culture: Prevention is Better than Cure for Allergens

by Dr Peter Wareing, Director, P Wareing Food Safety Ltd
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In the Spring 2017 issue of The Expert Witness Journal, I wrote about the need for independent, scientific expertise in food safety disputes. In this article, I examine the increasing number of food allergy cases that have resulted in serious injury or death, in some cases. I will outline the role of Food Safety Culture as a mechanism to reduce the risk of food poisoning or food allergy cases occurring, and what can happen if Food Safety Culture is poor or non-existent. This article highlights three cases as examples of good, poor, and non-existent food safety culture, as examples of what to look for in organisational culture.

Food Safety Culture has been described in various ways; the following is a good summary:
"The aggregation of the prevailing relatively constant, learned, shared attitudes, values and beliefs contributing to the hygiene behaviours used within a particular food handling environment" (Griffith, 2014).

Food Safety Culture is grounded in behavioural science, it is learned, developed, and exhibited by employees, from director level to the shop floor. If it is written down, but not followed by staff, then new employees will learn that is does not matter. It is a case of "Do as I say, and do as I do", rather than "Don't do what I do, but do as I say". Companies can have a positive Food Safety Culture, or a negative one. The Food Standards Agency describes companies as being "Calculated Non-Compliers through to Leaders".

There are three tiers to Food Safety Culture

- Level 1 – outer, most visible – noted during audits/inspections
- . Level 2 – middle - organisational values that guide employee behaviour
- Level 3 – core values, taken for granted

It is at Level 3 that we find the true state of organisational Food Safety Culture.

A recent survey of the implementation of food safety behaviours gave the following responses:

- I carry out all FS behaviours all the time. 37%
- Sometimes I do not carry out all FS behaviours all the time 59%
- Often I do not carry out all FS behaviours all the time 4%

Fourteen allergens are required to be declared by law in EU Food Information for Consumers Regulation (EU FIC)1169/2011 and 78/2014, in the ingredient list on the label. Regulation (EU) No. 78/2014 states that "When a product is not required to provide an ingredients list such as a bottle of wine, any allergenic ingredients within this product must be declared using a 'contains' statement followed by the name of the allergenic substance as listed in Annex II…."

Some of the recent cases involving people injured by food containing undeclared allergens have hinged around the flexibility of allergen declarations in 1169/2011 for caterers, foods prepacked for direct sale and non-prepacked (loose) foods, in comparison to prepacked foods. Although businesses at all stages of the food chain are required to provide allergen information, the placing of that information for the first three categories has been flexible, up to now. It is, however, an offence to provide inaccurate or incomplete information about allergenic ingredients, refuse to provide allergen information on foods served or give wrong information on a menu or through verbal communication. The Sentencing Council Guidelines 2016 gave new advice on penalties for food safety breaches, for organisations and individuals. For

organisations, penalties are based on a combination of turnover, culpability and the degree of harm caused. For individuals, penalties are based on previous convictions, poor food safety/hygiene records, the degree of intent for financial gain.

Case 1 Natasha Ednan-Laperouse – Pret a Manger
In this case, Natasha bought an artichoke, olive, and tapenade baguette at Heathrow in July 2016, prior to a flight with her father to Italy. Natasha was allergic to sesame seeds; there was no mention of sesame on the label, but sesame seeds were within the baguette. The product was prepared and packed in store, counted as non-prepacked food under 1169/2011, and therefore on pack allergen labelling was not required under the UK interpretation of EU law. An allergen guide was displayed within the shop. She became unwell on the flight and died at Nice hospital despite two EpiPens and CPR being administered on the flight.

Whilst following the law at the time, Pret, as a large takeaway food operator, had made operational decisions that potentially compromised public food safety to a large number of people, given their turnover. A public campaign by Natasha's parents has led to 'Natasha's Law' being published in the UK, as a result of this tragedy. This requires full ingredient labelling on packaged foods prepared onsite. The legislation will come into force by October 2021. In the meantime, Pret a Manger launched a new Allergy Plan in May 2019, changing its labelling process over a 6 month period, rolling out full ingredient labels on all freshly made products, with allergens highlighted in bold, by the end of September 2019 in all 391 shops. They also removed some allergens from a range of products. This is an example of a company with a generally good Food Safety Culture taking on board the potentially harmful effects of previous decision and moving to a new safer position.

Case 2 Paul Wilson – Indian Garden Takeaway
Paul Wilson requested a nut-free chicken tikka masala takeaway meal from the Indian Garden restaurant, Easingwold as a takeaway meal, in January 2014. Paul suffered from peanut allergy and was careful to request no nuts in the meal. After eating the meal, he died from anaphylactic shock at home. The restaurant owner, Mr Zaman, substituted cheaper peanut powder for almond powder in the recipe. There were no warnings to customers that peanut powder was used, and 'no nuts' written on the takeaway lid. Another non-fatal allergy case occurred a few weeks prior to Mr Wilson's death. Investigations by the Local Authority showed that staff training was poor or non-existent. The prosecution opined that Mr Zaman put profit before safety and stated that he had received numerous warnings that he was putting customer's lives at risk. He was found guilty of six food safety offences and gross negligence and sentenced to 6 years in jail. It could be argued that the Food Safety Culture of this business was non-existent.

Case Study 3 - Local Authority Investigations
In many a case, a Local Authority will investigate a food business suspected of poor allergen controls after a previous visit, by anonymously purchasing a meal requested to be nut free, or prawn free, for example, and then testing the meal for presence of the suspect allergens. I was involved with a case like this, where the owner pleaded guilty to selling a meal containing a particular allergen, which was not declared on the menu. My role was to identify potential sources for the allergen; was it deliberately added or a cross-contaminant, if the latter, what were the potential sources of the cross-contaminant, and how could the restaurant prevent this from happening in the future. Their acceptance of this guidance was used to reduce the sentence. It could be argued in this case that the company had a poor food safety culture because they were unaware of the consequences of their actions, but their willingness to accept help indicated that they were prepared to improve.

Allergen Management
There are clear procedures laid down in food safety legislation on the methods to be employed to ensure that a food business produces safe food. Hazard Analysis and Critical Control Point (HACCP) is a risk based hazard analysis system which aims to:

1. Identify Hazards, their likelihood and severity to the consumer
2. Identify their Critical Control Points (CCPs)
3. Determine the Critical Limits of the CCPs
4. Determine the Monitoring mechanism
5. Determine what Corrective Actions may be required if Critical Limits are exceeded.
6. Develop the Verification procedures required to show the system has been implemented correctly, that practices are consistent with the HACCP Plan, and that the HACCP System controls significant hazards.
7. Develop the Documents and Records necessary as evidence to show that all activities have been performed according to approved procedures, and to provide instructions to operators on the correct procedures.

For allergens, as with all hazards, control procedures start at purchasing from an approved supplier, to a designated specification. Goods in and rejection protocols are required, ingredients must be correctly segregated according to allergen risk.

Key factors for allergen control are the measures to control cross contamination between ingredients, packaging, machinery, personnel, the factory structure. Much of this is by segregation in space, equipment, utensils or time, correct cleaning protocols, visitor controls, the correct use, disposal, and cleaning of personal protective equipment are also important factors. Equipment much be designed for efficient cleaning, and ideally, cleaning efficiency monitored, either by testing for specific allergens, or the absence of protein residues. Many of the controls are procedural: the use of colour coded utensils, clothing,

cleaning equipment, which quickly identifies if the person, utensil, or equipment is in the wrong place, or being used incorrectly.

After food production, the removal and disposal of waste and spills, to reduce pest food sources, ensuring food bins and receptacles are sealed, cleaning and site management to remove harbourage areas for pests, are of vital importance.

For restaurants and food takeaways, it is vital that customer facing staff are familiar with the allergens present in the menu choices and are able to effectively communicate with customers if asked. Clear signage regarding the allergens present in the foods, on their website, in a catalogue, menu, charts on display, on menu cards, leaflets, or orally over the phone. It is a good idea for staff to be proactive towards customers with respect to allergens. When food is delivered, any food containing or not containing certain allergens, as per the order, should be labelled, in the form of stickers, or orally as the food is delivered.

Summary

Serious allergen issues are increasing, in the majority of cases from catering and retail service. In food manufacturing, there may be issues, but these are usually detected at the production or post packaging stage but recalls due to allergens are rising. In the majority of cases, a lack of, or poor FSC is the root cause of the problem. Allergen controls are based on basic food safety measures, for example HACCP. It is of critical importance to conduct regular reviews of ingredients, menus, and processes, and to change any aspect if the review indicates that there is a risk of the consumer becoming ill due to contamination with an allergen.

References

Griffith, C. 2014 Developing and Maintaining a Positive Food Safety Culture, Highfield.co.uk.limited

Dr Peter Wareing,
Director, P Wareing Food Safety Ltd.

Dr Peter Wareing has served as an expert witness in a number of civil and criminal trials. Peter's specialist areas are food safety systems, including HACCP, microbiology and mycology. In his role as Director and Consultant, Peter undertakes troubleshooting audits and investigations for clients, provides guidance on traceability systems and delivers food safety related training. Peter obtained his BSc in Agricultural Science from the University of Leeds and a PhD in Plant Pathology from the University of Hull. Peter is a Fellow of the Institute of Food Science and Technology, a Registered Food Safety Manager and a Professional Food Mentor

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Company profile – P Wareing Food Safety Ltd

P Wareing Food Safety Ltd provides expertise and support to a range of clients in the food and drinks industry, ranging from startups, SME's, through to retailers, larger food manufacturers and local government, both in the UK, Europe and internationally. P Wareing Food Safety Ltd can work in association with a number of food safety and food technology professionals where required, to provide solutions to complex problems.

New Memorandum of Understanding between the Coroner and the HSE - 6 Months on

In June 2019 the Chief Coroner for England and Wales issued a new Memorandum of Understanding ("MoU") with the Health and Safety Executive ("HSE"). We take a look at what changed and how the changes are being adopted.

What is it:
Coroners and the HSE have different, yet overlapping, functions following a work-related death. The HSE's function is to investigate the actions of the duty-holders, gather evidence, interview witnesses and take enforcement action against those they deem not to have discharged their duties under health and safety legislation. The statutory responsibility for ascertaining the Deceased's identity together with when, where and how they came to their death, remains with the Coroner.

The MoU aims to define the relationship between the Coroner and HSE by promoting consistency, setting out the level of cooperation the Coroner expects from the HSE and promoting the wider public interest of holding effective Inquests, without prejudicing ongoing investigations or criminal proceedings.

What did the new MoU introduce and what has it changed:
We set out below our comments on some of the key changes.

Communication
In circumstances where the HSE have commenced an investigation (and retain primacy), the HSE will now provide the Coroner with an initial report within four months of investigation commencement (and quarterly thereafter). The initial report must contain a summary of the HSE's investigation to date and the final report must be full and factual, summarising and providing the evidence in support.

• The intention behind the quarterly reporting was not to provide lawyers with an early insight into the HSE's investigation. Instead, the MoU made clear that these reports would be provided to assist the Coroner understand the issues, identify witnesses / interested persons and project a timetable for proceedings. They were not to be disclosed to interested persons.

• It was hoped that these reports would serve as a prompt to the HSE to keep cases progressing, resulting in speedier enforcement decisions. The reality is that at this stage it is too early to see any real changes. If the HSE continue to have limited resources, cases are likely to progress at the same rate as before and little change will be seen.

Chronology
The Coroner should usually consider suspending the coronial investigation pending completion of the criminal investigation.

Where the HSE has completed its investigation, it will consider whether it is appropriate to commence criminal proceedings for breach of health and safety legislation at that stage, or await the result of the Coroner's Inquest.

• It remains to be seen whether in practice Coroners will suspend an Inquest pending the HSE investigation. This is established procedure when the Police investigate manslaughter offences, but with the new MoU advocating such, lawyers are now arguing (with varied success) that all Inquests should wait until the conclusion of any HSE enforcement proceedings.

• The obvious benefit is that witnesses should be less concerned about incriminating themselves giving evidence and therefore, in some cases, witness evidence should be given more freely.

• Furthermore, lawyers are arguing that by awaiting conclusion of the HSE investigation and enforcement decision, the number of full Inquests that need to be heard can be reduced, if the HSE investigation has aired all the facts of the case.

• Six-months on, our experience is that it remains commonplace for the HSE to argue that the Inquest should be heard first, giving them the ability to test the evidence prior to making an enforcement decision.

• Coroners are clearly retaining discretion here, and what constitutes a "completed investigation" remains open to interpretation, with parties taking very different views.

Specialist Inspectors
Coroners are to give proper consideration to reading out the report of a Specialist Inspector, as opposed to calling them.

• It is a welcome addition to the MoU to see that Coroners may now give consideration to the reading of the Specialist Inspector's report – this has the potential to speed up Inquests.

• However such reports are a common area of contention in health and safety cases and if the view in the report is disputed (as it often is), it remains that

the parties are unlikely to agree to the report being read.

• The recommendation in the MoU should, however, ensure that Specialist Inspectors are not having to attend Inquests unnecessarily.

• Of course, should a Specialist Inspector need to be called to answer questions, the MoU is very clear that they may only answer questions on matters covered in their report and only where necessary to assist the Coroner answer the statutory questions about the Deceased (who, when, where and how they came by their death).

• Finally, to achieve a balance in situations where the Specialist Inspector cannot be asked questions, will the Coroner allow expert evidence (such as from the representatives of interested persons, who may be potential suspects in the criminal investigation) to be read as well? It is too early to comment, but in the interests of justice, the default position of lawyers must be that the Coroner should hear expert evidence from all interested parties.

Conclusion – 6 months on:
The effectiveness of the 2019 MoU was always going to be largely dependent on its application by individual Coroners. From a regulatory viewpoint, the possibility of more efficient HSE investigations and speedier enforcement decisions was attractive. But there was no guarantee of such and six-months on, little has changed in reality.

The coming year will be the real test for the MoU. Concerns about the increased pressure on the HSE to report to the Coroner regularly, resulting in more aggressive investigations, may prove to be unfounded. Instead, it is hoped that the MoU will result in greater consistency around the structure, content and timings of preliminary hearings, reducing the number of full Inquests taking place and ultimately providing for more efficient and effective Inquests. This benefits all parties, none more so than the families of the Deceased. No doubt this was the Chief Coroner's intention.

Ultimately, all of those involved in Inquests can shape how the MoU is applied given they can make representations about their application, subject to the Coroner's discretion. But with the MoU set to be reviewed again after five years (or more frequently as required) these areas are likely to be debated for many years to come.

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About the Author
Chris works within DAC Beachcroft's Regulatory group. He advises corporate and insured clients on health, safety and environmental compliance and risk issues, responses to regulatory enquiries and prosecutions. Chris regularly advises clients in the immediate aftermath of an incident. He has experience acting for clients in a wide range of regulatory investigations, including Gross Negligence Manslaughter prosecutions. Chris regularly advises on enforcement notices and has experience of representing clients in the Coroner's Court.

New Artificial Heart Valve Could Transform Open-Heart Surgery

A new type of artificial heart valve, made of long-lived polymers, could mean that millions of patients with diseased heart valves will no longer require lifelong blood-thinning medication after valve replacement surgery.

The valve, called PoliValve, has been developed by scientists at the Universities of Cambridge and Bristol. The team's latest in vitro results, published in the journal Biomaterials Science, suggest that the PoliValve can last for up to 25 years in patients, far longer than other types of replacement heart valves. In addition, a small pilot study in sheep showed that the valve is highly compatible with biological tissue. The researchers anticipate that the PoliValve can be tested in humans within five years.

More than 1.3 million patients with diseased heart valves need valve replacement globally each year. There are two types of artificial valves currently available, however both have limitations either in durability or in biocompatibility.

Biological valves are made from pig or cow tissue and have good biocompatibility, meaning patients do not need lifelong blood-thinning medication; however, they only last 10-12 years before failing. And mechanical valves, while they have good durability, have poor biocompatibility and patients must take daily blood-thinning drugs to prevent blood clots.

Professor Geoff Moggridge from the University of Cambridge and Professor Raimondo Ascione from the University of Bristol have spent three years conducting developmental work and testing on the PoliValve, supported by funding from the British Heart Foundation.

The device is made from a special co-polymer and is designed to resemble a natural heart valve. It was created by Professor Moggridge, Dr Marta Serrani and Dr Joanna Stasiak at Cambridge and Professor Ascione in Bristol, and builds on earlier work by Professor Maria Laura Costantino's group at the University of Milan.

The PoliValve combines excellent durability with biocompatibility, addressing the limitations of current biological and mechanical artificial valves. It is made through a simple moulding process, which also sharply reduces manufacturing and quality control costs.

"These impressive results show the PoliValve is a promising alternative for valve replacement surgery," said Moggridge, who leads the Structural Materials Group at Cambridge's Department of Chemical Engineering and Biotechnology. "While further testing is needed, we think it could make a major difference to the hundreds of thousands of patients who get valve replacement surgery every year."
According to ISO standards, a new artificial heart valve must withstand a minimum of 200 million repetitions of opening and closing during laboratory testing, equivalent to five years of life span, before it can be tested in humans. The new Cambridge-Bristol polymeric valve has comfortably surpassed this.

Initial testing in sheep has been undertaken at Bristol's Translational Biomedical Research Centre (TBRC) facility as a first step to ensure safety. Long-term testing in sheep, also funded by the British Heart Foundation, will be carried out before bringing this new treatment to human patients.

"Patients requiring an artificial heart valve are often faced with the dilemma of choosing between a metallic or tissue valve replacement," said Professor Sir Nilesh Samani, Medical Director at the British Heart Foundation. "A metallic valve is long-lasting but requires the patient to take lifelong blood-thinning drugs. Although this medication prevents clots forming on the valve, it also increases the risk of serious bleeding. Patients who have a tissue valve replacement usually don't need to take this medication. However, the valve is less durable and means the patient may face further surgery.

"The polymer valve combines the benefits of both – it is durable and would not require the need for blood-thinning drugs. While further testing is needed before this valve can be used in patients, this is a promising development, and the BHF is pleased to have supported this research."

The PoliValve has also exceeded the requirements of ISO standards for hydrodynamic testing, showing a functional performance comparable to the best-in-class biological valve currently available on the market. The small pilot study in sheep demonstrated the device is easy to stitch in, and showed no mechanical failure, no trans-valvular regurgitation, low trans-valvular gradients, and good biocompatibility with tissue.

"The transformational PoliValve results from an advanced Bristol/Cambridge-based biomedical cross-fertilisation between experts in biomaterials, computational modelling, advanced preclinical development/testing and clinical academics understanding the patient needs. The new valve could help

millions of people worldwide and we aim to test in patients within the next five years," said Ascione.

The British Heart Foundation-funded study also included Dr James Taylor from Cambridge's Whittle Laboratory, a team at Newcastle University headed by Professor Zaman, Professor Saadeh Sulaiman at University of Bristol and Professor Costantino's group at Politecnico di Milano.

Reference:
Joanna R. Stasiak et al. "Design, Development, Testing at ISO standards and in-vivo feasibility study of a novel Polymeric Heart Valve Prosthesis." Biomaterials Science (2020). DOI: 10.1039/D0BM00412J

Adapted from a University of Bristol press release.

The Emergency General Surgical Patient Treatment Opportunity, Treatment Choice and the Right to be Informed

by Martin C Brett
Consultant General and Gastro-Intestinal Surgeon

In this article my aim is to discuss an area of clinical and medicolegal practice that I perceive to be complex and evolving. It is based on my thoughts and experience to date which may differ from those of others and may change in the future as these fields develop. I have largely focused on my area of expertise as a General / Gastro-Intestinal Surgeon although I believe that these issues are not unique to General Surgery, having parallels in other surgical and non-surgical specialties.

In times past consent may have been viewed as a passive process in which a patient was asked to agree to undergo a treatment choice proposed by a clinician along with any information the clinician considered appropriate.The clinician was the arbiter of the treatment choices and the information shared according to the clinical standards of the time (Bolam Test - Ref. 1). However, the General Medical Council (GMC) Guidance "Seeking patients' consent: The ethical considerations" published in 1998 (Ref. 2), while using the traditional language of "Patient" and "Consent", places the emphasis strongly on the right of a patient to choose their treatment. Specifically, it states that it is the responsibility of the clinician to inform a patient of all the treatment choices available, including the option of no treatment. For each potential choice, the likelihood and the intended benefits should be balanced against the risks of mortality, complications and short / long term adverse effects, and all information shared that may affect patient choice. The Guidance also states the importance of conveying information in an unbiased and objective way that makes sense to the individual patient and, with the patient's permission, their relatives / carers. Mental Capacity should be assumed, and, if partially impaired and /or fluctuating, maximum use should be made of residual capacity. It is the for the patient to choose their preferred treatment option with advice and recommendations, but not pressure, from the clinician and it is the duty of the clinician to establish and respect the values and wishes of a patient when giving advice and making a recommendation. Nevertheless, the Guidance upholds the right of a clinician to refuse to administer a treatment choice that she / he does not consider to be in the patient's interest, although it is for the clinician to justify such a decision. The Guidance states that there is no precise formula for this process which depends on openness, honesty and the establishment of trust.

The updated GMC Guidance published in 2008 upholds the 1998 principles (Ref. 3) and there is little indication there will be significant alteration in a further update due to be published in 2020. The Montgomery v Lanarkshire legal case of March 2015 has been hailed as a landmark ruling concerning the process of "consent" but is considered by many simply to clarify in case law the established right of a patient to make a treatment choice with full knowledge of the options available and in receipt of all the information that may affect their choice (Ref. 1). However, the case has brought issues around the consent process into sharper focus.

With elective surgical procedures, particularly those performed relatively frequently, there is likely to be a relatively well-established body of information about success rates, mortality risk, potential complications and adverse effects. Often there are a small number of specific treatment choices available. The risk of non-surgical complications, such as cardiac events, may differ between patients for the same surgical condition according to their history of chronic conditions, but there is likely to be a time window to investigate and obtain complementary clinical opinions to clarify such risks, even when treatment is urgent as in the case of malignant disease.

In emergency presentations there are additional challenges, particularly in the case of a serious condition threatening life. Examples of serious conditions in General Surgery are intra-abdominal sepsis, gastro-intestinal bleeding and visceral obstruction. While a broad diagnosis may be possible at presentation (e.g. abdominal sepsis or peritonitis) clinical history and examination often only allows a guess to be made as to the underlying condition. There is often a time window to investigate prior to decision making. However, condition may change very rapidly in some cases. Immediate supportive treatment is very likely to be needed and a rapid decision made on definitive treatment, be it an attempt to resolve the condition or to palliate, before more diagnostic detail can be obtained. If treatment is surgical, for example abdominal exploration for peritonitis, definitive diagnosis may only be achieved at exploration and the optimum treatment must be chosen during the procedure.

In a self-caring patient without significant previous mental or physical ill health, there is unlikely to be disagreement about a decision to continue with

maximum active treatment for a major emergency condition. At the other end of the spectrum, for those already known to be close to the end of their life (e.g. due to advanced malignancy), or who deteriorate rapidly despite maximum treatment, symptomatic care is often the only realistic option. It is in the intermediate category that decision making may be more difficult. While there may be more potential treatment options, the balance of benefit and risk / adverse outcome may be less clearly in favour of a specific choice. Therefore, deciding how to proceed depends on diagnosis of the underlying condition being as accurate as possible, careful assessment of fitness and, crucially, carefully informed patient / family choice.

What is the ideal approach to this intermediate category? This is a complex and controversial area, but I would include the following:

1. Full active treatment of immediate threats, such as sepsis or dehydration, while further investigation / discussion takes place. Without early active treatment as the default deterioration will occur narrowing the available choices. Palliative or symptomatic treatment can still be instituted at any stage if agreed appropriate.

2. Rapid assessment and investigation to achieve as detailed a diagnosis as possible of the primary condition and integrity of key body systems such as the cardiovascular and respiratory systems.

3. Establishing as unbiased a clinical consensus as possible on the balance of benefit, risk and adverse outcome for each option. Senior clinical, and possibly multispecialty input is likely to be essential.

4. Discussion of options established in 3 with the patient / family, to establish their values and priorities, and to advise and support them in making their choices.

5. Institution of the agreed treatment plan with regular reappraisal depending on progress, and regular communication with patient and family to address any concerns.

Any who have worked in an emergency service will recognise that the ideal can be difficult to achieve in practice due to fluctuating and often heavy demand. Frequently, despite investigation, there is persisting uncertainty about diagnosis and risk levels. However, my experience is that a substantial majority of patients and their relatives are willing to appreciate these difficulties if the above is carried out with best intent. Those who survive are grateful for their care, even if there is a reduction in quality of life after recovery. The families of those patients who die, despite a choice of active treatment, are grateful for the efforts made. Those who choose palliative / symptomatic care are grateful that their wishes have been respected.

Under what circumstances might a patient or their family be dissatisfied and consider legal action? The patient and / or family may consider that a diagnosis was missed, incorrect or only made after unacceptable delay such that treatment was less effective resulting in an increase in suffering and / or avoidable death. A poor outcome may also be attributed to a failure in the technical quality or vigour of treatment. On investigation it may be found that diagnosis, treatment and communication met the standard that could reasonably be expected in the healthcare setting and outcomes were within the range of that which could reasonably be achieved. Despite the best efforts of clinicians, expectations of speed and accuracy of assessment and the efficacy of treatment may have been in excess of that reasonably achievable. However, the evidence may be that the diagnostic processes and treatments were inadequate. Assessment may not have been carried by a clinician of sufficient seniority. The urgency of the situation may not have been recognised and potentially valuable treatment options may not have been known about or considered. Other requested specialist opinions may not have been delivered in a timely manner or with sufficient care.

Another area of perceived failing may be that goals of and delivery of care may not have been in accordance with the patient's or family's wishes. This may arise because of disagreements between a patient and their family, or between family members if the patient has died. It could also arise because clinicians may have made their own decision as to how they believe treatment should proceed without discussion with the patient and / or family. In effect this has denied patient and family informed choice. This "dictatorial" approach may follow careful consideration by the clinician(s) and the treatment may be "reasonable" on clinical grounds but still neglect patient wishes.

In my experience it is less likely that treatment will be more active than a patient wishes, possibly because the consent process makes it easier to refuse treatment than to request treatment, and it is easier to change from active treatment to symptomatic treatment than the reverse. The converse is where an early clinical decision has been made not to treat actively. If carefully considered, such a decision may be "clinically reasonable" but, without having the chance of being informed and having a choice, subsequent death or disability may be a source of resentment in a family for many years. However, such decisions can occasionally be based on snap judgements that a patient is not a candidate or priority for active treatment. This may be partly subconscious and / or based on a superficial impression, for example due to mobility / balance problems or apparent confusion. This may be another cause of the diagnostic delay and inadequate assessments discussed above and allow deterioration to occur with increasing loss of opportunity for successful active treatment. The assumed negative outcome becomes a self-fulfilling prophesy and a patient may be denied a chance of survival and recovery.

On reviewing a case, indicators of this kind of snap judgement may be statements such as "not fit for surgery", "not a candidate for critical care", before

there is evidence that all available information and all reasonably available treatment options have been considered and discussed objectively with the patient / family. The focus has been on the clinical view of patient suitability for a specific treatment rather than discussion as to the best treatment choices for a patient. My experience of such cases is that there is often an opportunity for reappraisal during the clinical course in response to new clinical information / observations or to concerns expressed by the patient or their family, but the opportunity is frequently not taken.

Clinical judgements may also be influenced by established and rigid clinical views about the value of an outcome. Didactic statements such as "procedure not appropriate as mortality risk greater than 90%" may suggest that the clinicians have not considered what significance a patient / family may attach to a 10% chance of survival. This approach may be reinforced using an "outcome score". Various scoring systems have been devised, largely based on multivariate analysis, to attempt to quantify outcome in terms of mortality and / or complication rates, the score varying from 0% to 100%, although never reaching these ends of the scale. While useful for comparing large series of patients in research studies, they may be much less reliable when used for individual decisions due the large number of confounding variables. During my training (many years ago) I recollect a man aged 87 presenting with a leaking aortic aneurysm whose predicted survival on "scoring" was less than 10%. However, he wished to take his chance with an operation, and his son was clear in his view that "5% was still 5% and better than 0%". My enlightened supervising consultant agreed to proceed with repair and the patient was discharged two weeks later into the care of a very grateful family and with his condition steadily improving. However, another patient some 10 years younger had a similar presentation and on "scoring" was deemed to have too low a survival chance to merit an operation. This was explained to him and he acquiesced to being placed on a palliative care pathway, but he was still alive and alert, although in worse condition, the following morning. He asked for an operation which was carried out, but he passed away over the next 24 hours. I still feel that if a balanced account of the options from a patient-based perspective had been discussed with him on the day of presentation he would have chosen an operation and had a chance of survival, possibly less than 50%, but still a chance that he did not have.

In summary, I believe that most patients receive diligent attention, are well informed, able to make treatment choices and they / their families are satisfied with their care. While dissatisfaction may still occur occasionally, I believe that if there is evidence of reasonable delivery in the five areas outlined above it would be difficult to conclude that care fell below a standard that could reasonably be expected. As to "evidence", frustration among clinicians often arises due to increasing administrative burdens, but I suggest that time spent carefully documenting these key decisions and discussions will be time well spent.

References:

1. Montgomery and informed consent: where are we now? - BMJ 2017;357:j2224
doi: https://doi.org/10.1136/bmj.j2224

2. GMC: Seeking patients' consent: The ethical considerations. November 1998
https://www.gmc-uk.org/-/media/documents/patient-consent-1998---2008-55678021.pdf?la=en

3. GMC: Consent: patients and doctors making decisions together
https://www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/consent

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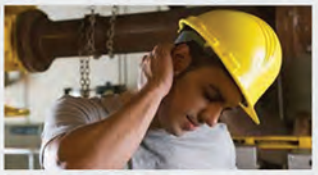

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Vaginal Mesh Injury Compensation: UK Claimants Receive Settlement from Johnson & Johnson!

A group of Scottish women has received £50 million in compensation from Johnson & Johnson for injuries caused by vaginal mesh in an out of court settlement, following similar awards in the United States.

Over the last decade, there have been significant concerns about the safety of synthetic meshes used for prolapse and incontinence surgery. In July 2018, the NHS implemented a temporary ban on the use of vaginal mesh, unless it was considered absolutely necessary. This ban was extended in March 2019.

The complications arising from mesh implanted during surgery can include persistent pain, sexual problems, mesh exposure through vaginal tissues and injury to the bladder and/or bowel. Until recently, there has been a lack of comprehensive data on these complications.

Johnson & Johnson is one of the main manufacturers of vaginal mesh. The group of women from Scotland brought a claim against the corporation, alleging that the mesh was faulty and as a result had caused them injury.

Prior to a court hearing, Johnson & Johnson's legal representatives flew to Edinburgh to discuss the settlement, and it is understood that it has agreed to pay approximately £100,000 to each individual participating in the claim. Johnson & Johnson has been keen to stress that liability has not been admitted as part of the deal.

Elise Bevan, a senior associate in the clinical negligence team at Penningtons Manches Cooper, said: "We act for a number of patients who have suffered complications from vaginal mesh and who were not adequately warned about the possible consequences before surgery. While this settlement will be a relief for the many women participating in the group action claim against Johnson & Johnson, it will not give them back their previous quality of life, nor the time they have spent in pain as a result of this mesh."

Penningtons Manches Cooper has a dedicated team of solicitors who specialise in vaginal mesh claims and who are able to provide initial advice on a free and informal basis.

Record the Interview of the Claimant by the Defence Expert?

by Alec Samuels

The claimant suffered a serious brain injury in an accident, perhaps from a motor accident or on the operating table. The claimant was examined and reported upon by an expert instructed by the claimant's solicitor. The defendant's solicitor then asked for permission for an expert for the defendant to examine and report upon the claimant. The solicitor for the claimant wanted the examination by the defendant's expert to be recorded, video or audio. The solicitor for the defendant objected.

Claimant

The solicitor for the claimant said that the expert was certainly assumed to be honest and competent, but the litigation process should be open and transparent, there should be reciprocity on both sides, the evidence should be as full and comprehensive as possible, and, perhaps most importantly, if by chance there were any professional flaws in the conduct of the expert for the defence those flaws would be exposed, in the interests of justice.

Defendant

The solicitor for the defendant said that the examination should not be recorded; and this might apply especially in neuropsychological and neuropsychiatric cases. If the patient knows or suspects that he is being recorded he behaves differently, aware that he is, or might be, being recorded. If he subsequently finds out that he was covertly recorded, thenceforth, e.g. at the trial, he may be resentful and distort his evidence. Following the recording and before the trial the patient might watch and listen, and indeed rewatch and relisten, to the recording, and thus consciously or unconsciously change or modify his evidence. The recording may indeed be harmful to the patient if disclosed to him. This practice of examination by experts follows a standardised practice, so as to promote quality and consistency generally in the profession. Unless and until agreed by the parties or ordered by the judge the assumption is that the consultation is private and confidential, not to be recorded, the expert report to be disclosed to the court and the other side in due course. The standardised practice should be followed. There should be reciprocity. The practice should be scrupulously fair to both sides. In his work the expert should be as comfortable and content as possible, so that he may give of his independent professional best, as a witness making a report of his examination and assessment to the court.

Pre-action Protocols

The Practice Direction – Pre-action Conduct and Protocols of October 2019 covers personal injury, though there is no specific reference to recording of consultation by expert for defendant of the claimant.

The Association of Personal Injury Lawyers APIL and the Federation of Insurance Lawyers FOIL have a pre-action protocol, with recent coronavirus covid-19 additions, but not specifically directed to this particular problem. This protocol is being reviewed May 2020.

The current guidance by the British Psychological Society BPS, Psychologists as Experts Witnesses: Guidance and Procedure, 4th edition 2017, does not deal specifically with this issue. A full review is about to start in 2020. The Guidance indicates the confidentiality of the situation, although the claimant is not the patient or client of the defendant's expert, and in due course both sides must disclose the experts' reports. The solicitors on both sides, along with the experts, could always agree upon a particular procedure to be followed, and if necessary seek the order of the judge in the event of an impasse.

For the exposition of the arguments see Spencer J in Macdonald v Burton [2020] EWHC 906 (QB).

For further information on this subject please see *Mustard v Flower; Are Recordings of Medical Examinations Now Going to be the Norm?* by Anthony Boba in EWJ issue 31.

Professor Kayvan Shokrollahi

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Professor Kayvan Shokrollahi LLM FRCS(Plast) is a consultant Burns, Plastic and Laser Surgeon in Liverpool. He is clinical lead for the Mersey Regional Burns Service and was appointed by NHS England as Clinical Lead for the Northern Burn Network of Burns services across the whole of the north of England. He is also Chairman of The Katie Piper Foundation Scar and Burns Charity, Editor-in-Chief of the Journal Scars, Burns & Healing - the worlds only scientific scar journal, as well as Associate Editor of the Journal Annals of Plastic Surgery.

He leads a scar and burns rehabilitation centre in the north of England catering for national needs and he gained his Master of Law degree with commendation in 2005.

He deals with a wide spectrum of acute and elective adult and paediatric patients across of range of plastic surgery, reconstructive and cosmetic problems from a wide regional catchment of 4.5 million including Wales and Isle of Man, as well as nationally including complex cases from other burns units as far as London.

He also undertakes private practice relating the broad areas of plastic, reconstructive and cosmetic surgery from a number of hospitals in the region, and has national expertise in the area of assessment and treatment of scarring.

Professor Kayvan Shokrollahi has experience in a wide range of cases from personal injury and negligence, to criminal law, torture & asylum, and inquests.

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Do The Records Reflect Your Work?

by Dr. Diyari Abdah

Practicing Medicine or Dentistry is challenging. Despite the vast amount of global research contributions to evidence-based medicine, sometimes, we still feel that we are dealing with the unknown. There are so many variables; such as biological and anatomical variations, diagnosis and technique variations, expertise, just to mention a few.

Adding to all this, poor communication, lack of clarity in consent, patient's understanding of their conditions or the limitations of their treatment.

Therefore, any one or a number of factors can go wrong, ending up with the clinician to deal with.

In dental implantology, we have noticed over the years two trends; patients become 'fussy' and expect more, the more they pay for their treatment (which is expected anyway due to consumer psychology), secondly, despite eleven pages of a consent letter and form, and sometimes a few consultations, some patients still do not remember everything (not expected to anyway), and the issue is that the majority never even revisit their consent copy or their post-operative information to check for answers, and immediately jump into conclusions and possibly legal threats, ignoring the information that was given to them before.

Dental implantology is a rewarding special area of dentistry, where we get to change people's lives and self-esteem, and the majority are very happy and grateful.

At the same time, this field of dentistry is full of pitfalls, risks and potential problems and complications; best to be avoided from the very start if possible, as one complication can have a compound effect very rapidly, leading to multiple problems for the patient and the surgeon a like.

In over 30 years of experience in dentistry, I have only come across a handful of patients who admitted their fault when something was wrong.

The rest will try to find someone or something to put the blame on, again, another human psychology characteristic.

So, as clinicians, we have to be prepared, regardless that we did our utmost best, and the fact that there were no issues with the diagnosis, treatment planning or execution, we still have to be prepared that someone, someday will point the finger somehow.

Then, we have to be ready to show what we have done by producing detailed records describing the sequence of events and why.

It goes without saying the importance of staying current with the latest technologies and techniques for patients' benefits, however, as important as that is patient education, and keeping a thorough record of everything and every meeting, in addition to the procedure itself, describing outcomes and post-operative information to the finest details which can save the clinician a great amount of headache and stress.

It is good practice to always pay attention and keep records as if they are presented in court.

That way, there is consistency and above all quality. Let's face it, no one likes to 'waste' hours to write notes, but creating impeccable notes is as important as the treatment itself.

Nothing makes a clinician more satisfied like when going back to old notes, finding out they were taken thoroughly, and every detail was accounted for.

This can be done easily by using certain formulas and 'templates', or in case of dictations, having a checklist to go over.

A pilot, even a small aircraft pilot, knows his airplane probably like the back of his hand, yet he has a long checklist that he goes over every time, before, during and after flights, that way creating a consistent habit to improve safety and quality.

Dr Diyari Abdah
Dento-Legal Expert

DDS, DDS, MSc (Implant Dentistry), MBA, CUBS
Adjunct Clinical Assistant Professor

Dr Diyari Abdah has over 30 years of general experience (25 years in Dental Implants), with special interest in reconstructive and implant dentistry.

Dr Abdah has placed hundreds of implants and is highly experienced in advanced implant techniques and complex mouth reconstruction.

Areas of extensive expertise include:

- Dental Implants / Bone and Sinus Augmentations
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- Aesthetic Dentistry

Dr Abdah undertakes instructions as an expert witness, including the preparation of medico legal reports, in cases involving dental injuries. He offers a fast track service for the legal community in cases of clinical negligence.

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After all, we are human, and we all forget. By having a checklist and certain templates and repeated phrases, we can cut the time of record keeping by half.

All it takes is being consistent; after all, it is our professional duty. It is not a choice!

It is the only way to show proof that we have done what we say we have.

So, why let an excellent surgery be followed by less than acceptable notes.

At the DA Academy for advanced dental training, we encourage delegates to learn the art of thorough record keeping, because we think it is as vital as the treatment itself.

Taking contemporaneous notes could be seen, by a judge or anyone else, as a sign of quality record keeping and authenticity.

Applying these principles for taking records, will assist the clinician in case of a medico-legal claim against the clinician.

Records should be honest, truthful, thorough and present a detailed description of the clinical events for the pre- during and after treatment, and all the discussions that went with it.

There are plenty of good courses that teach record keeping, and the legal profession should play their part as well in educating clinicians, since it will benefit everyone in the long run.

This could be done via links to information, seminars and webinars, which could serve both sides, the clinicians and the legal profession a like.

Clinical Negligence: Birth Injury Claim

***Ruwena Khan** reviews Clinical Negligence Birth Injury Claim NKX (By his L/F NMK) v Barts Health NHS Trust [2020] EWHC 828 (QB)*

Clinical negligence litigation continues apace as Simeon Maskrey QC, sitting as a Deputy High Court Judge, handed down Judgment last week in a clinical negligence birth injury case (severe neuro-disability consequent upon an acute near total hypoxic-ischaemic insult) following a two-week trial which concluded early last month. This case highlights the ever-increasing importance placed on a patient's right to autonomy in the decision-making process and the need to ensure that any information provided, including as to the risks to themselves and their baby, is properly understood and appreciated (Montgomery v Lanarkshire Health Board [2015] UKSC 1 considered). The Judgment can be found here: www.bailii.org/ew/cases/EWHC/QB/2020/828.pdf

The Issues

It was the Claimant's case that:

his mother was given no or no sufficient warning that she should have continuous foetal monitoring (CFM) when she was in labour;

if she had been given appropriate warnings, she would have accepted CFM rather than, as in fact occurred, monitoring by intermittent auscultation (IA);

CFM monitoring would have detected abnormalities of the foetal heart earlier than abnormalities were in fact noted;

as a consequence, a uterine rupture would have been detected more quickly than in fact was the case; and,

delivery would therefore have been achieved more quickly, thus avoiding some of the acute profound hypoxia that accompanied the uterine rupture and some or all of the permanent brain damage resulting from it.

Further to the above, it was argued that had IA been increased in frequency from the point at which midwifery staff should have known or assumed that his mother was in the second stage of labour, that this would also have resulted in earlier detection of the uterine rupture.

The Defendant's case was that:

the Claimant's mother opted for delivery in the birthing centre monitored only by IA fully aware of the risks and benefits of so doing and exercising her undoubted right to choose how and where she would undergo labour and with what monitoring;

had she been the subject of CFM there was no reason to suppose that there would have been significant early warning of the impending uterine rupture and thus no reason to suppose that delivery would have been achieved sufficiently early to have avoided damaging hypoxia; and,

the period of hypoxia was more likely to have lasted 35 minutes rather than the 25 minutes contended for by the Claimant (and thus brain injury brought about by the hypoxia would not have been avoidable in any event).

The Law

Time has moved on since the opinions of the medical profession were the unique proponent of assessing the standard of care in clinical negligence claims (Bolam v Friern Hospital Management Committee [1957] 1 WLR 583]). Lord Scarman's dissenting judgment in Sidaway [1985] AC 871, taking as a starting point the patient's basic human right to make his own decision, led to ever increasing number of cases seeking to mould the test as the years passed.

Finally, in Montgomery, the Supreme Court emphasised that an adult person of sound mind was entitled to decide which, if any, of the available forms of treatment to undergo, and their consent had to be obtained before treatment interfering with their bodily integrity was undertaken. Doctors were under a duty to take reasonable care to ensure that patients were aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments. The test of materiality was whether, in the circumstances, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor was or should reasonably be aware that the particular patient would be likely to attach significance to it.

Antenatal Counselling

The Claimant's mother was seen by Midwife Finney and she was booked into the VBAC clinic (vaginal birth after caesarean section). A VBAC was considered to be 'high risk' because there was a small but real risk of uterine rupture through the caesarean scar during labour. The Claimant's mother appreciated these factors in addition to the fact that there would be "close monitoring".

At a later appointment with Midwife Hart, the risks and benefits of a VBAC delivery were discussed and a proforma was completed which suggested that the risk of uterine rupture was discussed. The Claimant's parents stated, however, that they did not appreciate what CTG monitoring entailed and did not appreciate that it was designed to give early warning where possible of uterine rupture. They also denied appreciating that a risk of rupture was permanent brain damage. They were adamant that Midwife Hart did not explain what continuous CTG monitoring was or how it might mitigate the risk of brain damage being the consequence of uterine rupture. They also stated that there were no discussions about the differences between CTG monitoring and IA.

The Judge accepted the Claimant's parent's account. Likewise, he accepted that they did not appreciate that hypoxic-ischaemic encephalopathy (HIE) might result in their baby suffering brain damage. The proforma did not mention brain damage or the consequences of HIE. He further went on to find that by the time the Claimant's mother came to have a consultation with the Consultant Midwife, she had been informed that VBAC was regarded by many women as the more positive experience and that having a water birth in the birthing centre was a reasonable option that would be considered in detail at the consultation.

However, the Judge viewed the consultation with the Consultant Midwife as the "crucial consultation" with its purpose being to discuss the birth plan and agree it if possible. He held that "it was essential that the Claimant's mother be alerted to the risks and benefits of the plan and it was essential that she understood the risks…" (paragraph 25).

The Consultant Midwife and the Claimant's mother had starkly differing accounts of the advice that was given during their consultation. The Claimant's mother stated that she did not appreciate that IA carried with it more risk for the baby and she did not know why there needed to be more staff if there was to be IA. She did not appreciate the difference between continuous and intermittent monitoring although she heard the words. She did not understand or reflect upon the difference it made in terms of risk of injury consequent upon uterine rupture.

Breach of Duty

The Judge concluded that the Consultant Midwife told the Claimant's mother that IA was not recommended by the RCOG; that a uterine rupture was a small possibility but that CFM reduced the risk of a rupture damaging the baby; and, if she wanted to labour in the birthing centre without CFM (where it might not be available) that would only be possible if staffing levels permitted. He also concluded that the Claimant's mother did appreciate the difference between CFM and IA and did appreciate that CFM carried a greater chance of detecting a rupture than IA. These conclusions were reached on a number of bases, including the fact that the Claimant's mother was intelligent and would appreciate the difference between 'continuous' and 'intermittent'; she had been provided with a leaflet that stated a VBAC would necessitate continuous heartbeat monitoring; the Consultant Midwife had also texted to emphasise that CFM was the standard care offered; the birth plan summary made it clear that the Consultant Midwife's preference was for continuous rather than intermittent monitoring.

There was no breach of duty in relation to the antenatal counselling.

Care and Counselling During Labour

The Claimant's mother went into labour at 41 weeks' gestation over a bank holiday weekend. It was alleged that she immediately wished for IA and the birth centre. Midwife Havire stated that she explained to the Claimant's mother the risks of not having continuous CTG monitoring and that IA only took place every 15 minutes. The Claimant's mother consented to initial CTG monitoring only after, it was alleged, Midwife Havire explained there were additional risk factors, namely that she was contracting and that she was 7 days overdue. The birthing notes did not record that the Claimant's mother was insisting on IA or was declining CFM. The Claimant's parents denied that there was any request or insistence to be transferred to the birthing centre or to have IA only.

The Judge accepted the Claimant's parents' evidence, noting Midwife Havire took no steps to escalate her worries to the Midwife Coordinator or to an obstetrician prior to the transfer to the birthing centre. The first time she mentioned anything out of the ordinary was at about 1am when the Claimant's mother was in the birthing centre. This did not tally with her allegations about the Claimant's mother. Similarly, the Judge was not persuaded by the evidence of the other Midwives as to the events that took place on triage. It was found that the midwifery staff simply considered the birth plan had been agreed with the Consultant Midwife and that they did not warn the Claimant's mother of the risks or potential consequences of IA nor did they recommend she should have CFM in order to reduce the risk to the baby.
Breach of Duty

As there was no counselling or re-assessment of risks when the Claimant's mother came to the hospital in labour, it was held that there was a breach of duty on the part of the Defendant during the night of labour. Counselling and a re-assessment of risks was necessary because there was a very real possibility that the Claimant's mother would change her mind if provided with a sober re-assessment of the risks and benefits of IA given that the maternity unit was very busy and there was no assessment as to whether Midwife Bigwood (who took over from Midwife Havire) was or was not someone capable of managing a VBAC labour with IA. Further, CFM simply could not happen in the pool because there was no available wireless CTG monitor.

Causation
It was held that had the Claimant's parents been given counselling and re-assessment on the night of labour, in conjunction with the fact that the Claimant's mother was not as closely monitored as had been anticipated during this period of time, there would have been acceptance of whatever additional monitoring could be provided whatever the previous thought processes had been. This was particularly so if they had been told that there were no midwives present who had had the experience of caring for a VBAC labour without CFM. Therefore, there would probably have been continuous CTG monitoring as a consequence of which there would have been a vaginal examination at 00.45 hours, and it would have been appreciated that the cervix was fully dilated. Even if he was wrong as to the choice of CTG, the Judge held that there should have been IA every 5 minutes from 00.45 hours.

Management/Delivery
Once the Claimant's mother had entered the second stage of labour, as noted above, it was the Claimant's case that the IA should have been every 5 minutes. Thus, heart abnormalities would or should have been detected from 00.30 hours even without CFM and a decision to deliver should have been made by 01.00 hours as the Clamant alleged the second stage of labour commenced at 00.20 hours. Whether or not she was in the second stage of labour, an obstetrician should have been called soon after 01.00 hours because of the complaint made by the Claimant's mother that she was in continuous pain.

It was agreed between the expert paediatric neurologists that effective resuscitation was probably achieved at three minutes of age at 01.49 hours. The Claimant was transferred to the neonatal unit and then to RLH for therapeutic cooling. HIE was noted. An MRI was performed approximately one week later which revealed changes suggestive of the Claimant having sustained brain damage consequent upon an acute near total hypoxic-ischaemic insult. It was confirmed that the Claimant was suffering from four-limb cerebral palsy.

Breach of Duty
The Judge found that the Claimant's mother was in the second stage of labour from 00.35 hours (paragraph 81) given that it was recorded that she was pushing with contractions. He held that IA should have taken place every 5 minutes thereafter. Further, it was a breach of duty not to have recognised that being in continuous pain at or around 01.00 hours was a sign of uterine rupture and to have called for obstetric assistance. The Judge concluded on the evidence that the rupture probably occurred between 00.45 hours and 01.00 hours and that the normal auscultation recorded at 01.00 hours was not a bar to that finding.

Causation
If the Claimant's mother had been the subject of CFM it would have been apparent by 01.00 hours that there was a potential obstetric emergency – this was in the context of a number of factors, including a VBAC woman apparently in or nearing the second stage of labour with atypical decelerations and complaining of continuous pain. Even without the added factor of a pattern of decelerations an obstetrician ought to have been called. If the Judge was wrong in his conclusions as to CFM and/or that the Claimant's mother complained of continuous pain, if IA had been every 5 minutes, he remained of the view that obstetric assistance ought to have been sought by 01.05 hours.

As a result, delivery would have been 15 minutes earlier at 01.31 with effective resuscitation by or about 01.32 hours (or alternatively 01.36 and 01.37 hours, respectively with IA).

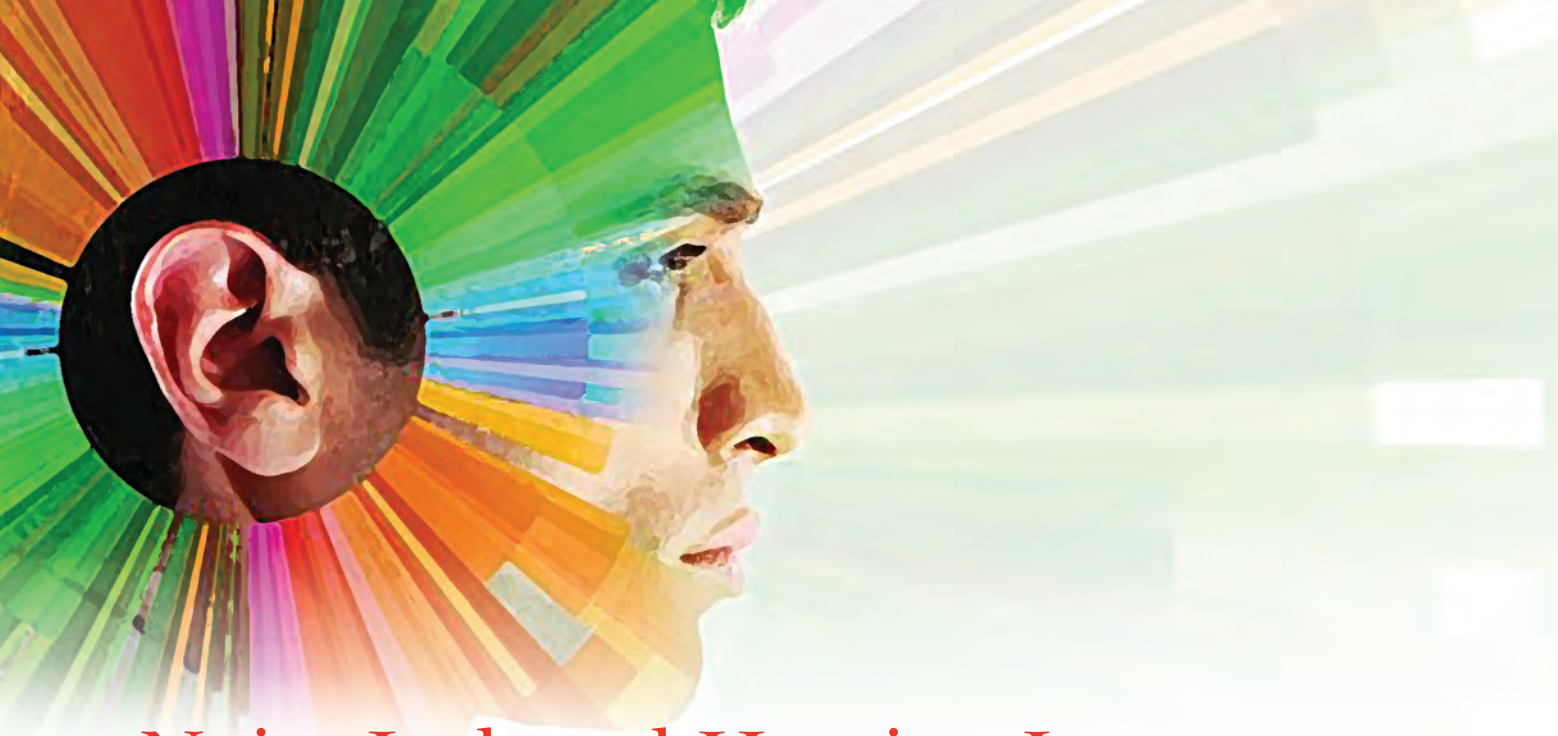
The Claimant's expert evidence was that the Claimant sustained a bradycardia at 01.14 hours; that it had no effect on the Claimant's oxygenation until 01.24 hours and that the Claimant then sustained 25 minutes of acute profound hypoxia. The Claimant's experts agreed that had delivery and resuscitation occurred before 01.34 hours the Claimant would have avoided all permanent brain damage.

The Defendant's experts were of the view that the Claimant sustained 35 minutes of acute profound hypoxia and that as survival after 30 minutes was unusual, there must have been some oxygenation of the brain after 01.14 hours. Readjusting the Myers model, they concluded that the Claimant needed to be delivered and resuscitated by 01.38 hours to avoid all damage and 01.35 hours to suffer only mild brain damage.

The Judge preferred to adopt the extended Myers model because he considered there was some oxygenation of the placenta and thus the foetus after 01.14 hours which meant that the period before which foetal reserves were exhausted was extended. Therefore, damage would have started to occur at 01.28 hours and mild damage would have resulted until 01.35 hours when it would have become moderate. On the basis that it was found that delivery and resuscitation should have taken place by 01.32 hours, the Claimant would still have sustained brain damage, but it would have been mild, rather than severe as is now the case.

Conclusion
As noted above, the patient's right to make their own decisions with all material risks and information being disclosed is of central importance in clinical negligence litigation. This Judgment emphasises that the need for a patient's decision to be an informed one is continuous as risks and circumstances can change and evolve, particularly during the labour process.

Ruwena Khan
Ruwena is a Legal 500 Leading Junior in Personal Injury and Clinical Negligence law, recommended as being "extremely capable", "highly experienced across a range of personal injury matters" and having "strong legal knowledge". Ruwena has been recently appointed Deputy District Judge (North Eastern Circuit, 2019).



Noise Induced Hearing Loss (NIHL)

An Introduction, by Jim Hester

Even those who are experienced in personal injury cases in general can sometimes find industrial diseases cases difficult to get to grips with. Noise induced hearing loss cases can fall into this category. Such cases sometimes appear littered with seemingly impenetrable, highly technical arguments.

However, the starting point for any disease case, and so any NIHL case, is that basic principles remain: Is there a duty? If so, what is the duty? If so, was that duty breached? And if all of the above, then was injury caused by that breach? Limitation is also a common feature of NIHL claims.

This article will touch on each of these areas, with future articles going into more detail.

What is Noise Induced Hearing Loss?
Seemingly a simple question – but NIHL should be distinguished from 'acoustic trauma'. Acoustic trauma is caused by a short-lived exposure to the highest levels of noise. Many of the reported cases are in a military context when individuals have been exposed to explosions. Damage is instant and causes immediate effect on the hearing. Such cases are comparatively rare.

However, classic Noise Induced Hearing Loss (which this article is solely concerned with) is caused by long-term exposure to high levels of noise, but not levels of noise at such levels so as to cause instantly noticed injury. Other than possibly some short-term tinnitus or alteration in hearing (say for up to an hour or so after exposure), no effect will be noticed at the time in the vast majority of NIHL cases. It is usually many years after exposure that the permanent effects may become to be noticed by the individual.

Onset of Symptoms – and so limitation
It is generally agreed by experts that exposure to noise which can cause NIHL causes that damage at the time of exposure. So any NIHL does not increase or get worse once exposure to noise has ceased.

However, what is almost always the case is that the symptoms are not noticed until some time after exposure. The reason for this is that as a young person, an individual's hearing is usually good enough to withstand a degree of hearing loss and so some NIHL does not make any difference to an individual's day-to-day ability to hear. As an individual gets older though (from beyond about 25) an individual's hearing gets progressively worse through the ageing process. It is the combination of this naturally deteriorating hearing with the addition of Noise Induced Hearing Loss which causes an individual to notice problems. Typically, first difficulties involve understanding speech in the presence of background noise. In the majority of cases an individual would have problems with their hearing in any case at some stage in their life; it is the addition of NIHL which means that the point at which hearing problems start is earlier than it would otherwise have been.

To complicate matters (because nothing is ever simple with NIHL), of course, there may be numerous other factors causing problems with hearing other than ageing and possible NIHL.

It is, therefore, almost always the case that a claimant will rely upon the 'date of knowledge' under section 14 of the Limitation Act 1980. The damage will have been caused often many years before, with the effects only more recently noticed.

Is there a duty?
Clearly employers have owed a common law duty of care to their employees since long before the Second World War as helpfully consolidated in *Wilsons & Clyde Coal v English* [1938] A.C. 57; but such common law duty has never been an absolute duty. An

employer could not be expected to protect his/ her employees from a risk that he/ she could not reasonably be expected to know about. Whilst the detail can follow in subsequent articles, as a general rule, the 'date of guilty knowledge', that is when measures ought to have been taken regarding noise in the workplace, is 1963 for NIHL cases. As Mustill J famously put it in *Thompson v Smiths Shiprepairers (North Shields) Limited* [1984] QB 405:

"From what date would a reasonable employer, with proper but not extraordinary solicitude for the welfare of his workers, have identified the problem of excessive noise…"

What is the duty and was it breached?
It will come as no surprise that the point at which noise would be considered to be 'excessive' has changed (and reduced) over the years. What may have been considered acceptable (and so not in breach of duty and not excessive) in the 1970s, say, would not be considered acceptable by the 1990s, and then again those levels would not be permitted by the late 2000s. The actual levels of 'excessive' noise over the years will be set out in later articles.

However, the way that noise levels are assessed is by an individual's actual daily noise exposure being averaged as it were at a constant level for an 8-hour period (to represent a working day). Clearly very few individuals will be subject to precisely the same levels of noise for precisely 8 hours and so the assessment of noise levels will usually be subject of noise assessments/ expert engineering evidence – taking into account the variations in noise levels throughout the day, and the actual length of exposure which may be more or less than 8 hours.

There are obviously noisy occupations/ work equipment, and those which are obviously not. Happily though (for the expert engineers), there are plenty of cases which fall between. The assessment of noise levels in such cases, unless conceded, will need to be a matter for such expert engineering evidence.

Causation
As might be expected, different people's ears do not respond in the same way to noise exposure. Even if exposed to 'excessive' levels of noise, some people will have their hearing damaged and others will not.

It is also very unlikely (certainly in historic cases) that an individual will have had their hearing tested prior to employment commencing, and tested again afterwards, so that a comparison might be made. Accordingly, the actual degree of deterioration during a period of employment cannot usually be directly measured.

So in order to show that an individual's hearing has been damaged by noise exposure, interpretation of the results of audiograms (hearing tests) is required. For those with hearing damaged by noise exposure there is a typical pattern to such an audiogram. However, it is the combination of exposure to noise and a typical audiogram which leads to a diagnosis of NIHL. With one, but not the other, then there is no NIHL and a case cannot succeed. Whether an audiogram is consistent with NIHL will be explored in later articles.

What should also be mentioned is that occasional exposure to excessive noise is not sufficient to cause NIHL. The exposure to high levels of noise will normally be measured in years, though there are exceptions.

Noise Induced Hearing Loss – a basic checklist
The features that one would expect to find in a NIHL claim:

1. A history of exposure to excessive levels of noise. The exposure would usually be measured in years. It has got to be 'noisy enough for long enough'.

2. An audiogram which is consistent with damage caused by noise exposure (rather than suggesting simple ageing or another cause).

3. A claimant who has actual or constructive knowledge for less than 3 years (unless the discretion under section 33 of the Limitation Act 1980 is to be relied upon) before issue.

Whilst this sounds simple (and some cases are), each and every area mentioned above can be hotly contested. For example, though there are generally accepted guidelines for the diagnosis of NIHL, the interpretation of the guidelines is often a source of disagreement between medical experts.

There are also factual matters – when exactly did a claimant work for a particular company; what sources of noise was he exposed to and for how long; was hearing protection provided, and if so was it is fact worn. The list can go on. Such factual matters will impact the expert engineering evidence as to noise levels. It is a feature of NIHL cases that one area tends to impact the other areas also.

Of course, it is for a claimant to show that he/ she can prove each element of his/ her case, and a defendant need only find a weakness in one area.

This very brief introduction has peeled off the first layer of the NIHL onion - I just hope that you aren't already reduced to tears. The next article 'What is noise?' will start to put some meat on the bones. Again, it appears a simple enough concept. However, the seemingly simple term '90 decibels', for example, can mean at least 5 different things depending on context when applied to NIHL. Rarely are matters straightforward in NIHL cases…

About the author
Jim Hester is the Parklane Plowden Industrial Disease Group co-ordinator, and welcomes solicitors contacting him regarding representation in Industrial Disease cases, training regarding Industrial Disease from members of the Industrial Disease Group, or any other enquiries.
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He also maintains a website regarding Industrial Disease matters with Updates which people can sign up for at, **www.jimhester.me**

Online Speech and Language Therapy Assessments During Lockdown

Just before the lockdown in March, I was instructed to undertake an assessment for a claimant living in the north of England, but with travel restrictions in place this became almost impossible. The only possible solution was to modify my clinical practice and follow the 'online' trend that was sweeping the nation.

With experience of running online clinics for patients living in different countries, I was confident that using video conferencing and online platforms was a method I could adopt successfully in my medico-legal work. I have found that the outcomes have been positive. In fact, the outcomes have been better than I had expected, and I continue to use online methods as my main avenue of assessments during these sensitive times whilst the Covid-19 pandemic continues.

Nevertheless, I understood that this was a new way of working for experts and some solicitors had raised valid questions and concerns, including:

- Will the findings of the expert assessment be compromised by video conferencing and online methods?
- Are the outcomes of online assessments reliable?
- Will the claimants have, and be able to use, the technology required for assessments?
- How will the claimant's respond to online assessments?

At Somek, as experts we came together to discuss ways to overcome these issues and find solutions to ensure expert assessments could continue with the same level of quality assurances. I would like to share my experience and top tips, which have helped me engage claimants, manage technology barriers, and ensure a smooth assessment with reliable findings to form a valid expert opinion.

Pre-assessment preparation has been key to all successful online assessments. The purpose of which has been to prepare the claimant and family prior to the online assessment.

In the case of NX (initials have been changed to protect the identity of the claimant), a claimant who had suffered a severe brain injury resulting in communication and swallowing difficulties, an online assessment was tailored to his specific needs. His wife was instrumental in supporting the assessment, which to me felt no different to when partners support during face-to-face home visits.

NX had never used online platforms, albeit, like most people, he owned a tablet device. With some basic instructions and help from NX's teenage son, it was possible for NX's wife to download Skype and set up a username. My reason for choosing Skype was based on it being one of the most familiar online platforms, which is simple to download, easy to navigate and has accessible symbols like those on a smart phone.

The pre-assessment phone call was also used to gauge NX's clinical history and his current situation. From the information gathered, I was able to work out which assessments would be suitable and how NX was likely to respond. We also went through what would be needed from NX and what they would expect from me, to ensure that we met the instructions and the assessment went as smoothly as possible. To facilitate logistics and NX's comfort, we went through factors such as the length of the assessment, lighting, positioning of the tablet, sound and toilet breaks.

The most important element of the pre-assessment discussion was to use it as an opportunity to gain the claimant's confidence and to reassure him that we would be able to complete an online assessment with the same, if not similar, outcomes as a face-to-face visit. Environment factors had to be considered before the assessment took place and these included reducing background noise, using headsets for good sound, comfortable seating, good natural lighting, and access to a table or desk to position devices.

Equipment needs were also met on both sides of the screen to support the assessment. In NX's case, his swallow and communication were examined, the latter required formal testing of his reading, writing and speaking skills. NX had a pen and paper available and different textured foods for the swallow assessment.

At my end, I had all paper assessment booklets within easy reach and used a document camera to be able to provide good 'life-like' images. It was important to ensure that NX had a full view of all the documents and that I could manipulate the images to make them larger/smaller where needed.

NX and the device positioning was imperative, as well as being prepared to alter this as necessary during examination. NX was, at times, required to prop up the tablet on a table near to him and during mouth and swallow inspection he moved it closer to his face.

The assessment commenced on time, with some general conversation, followed by a clinical interview, and then proceeded to an oral motor assessment and clinical swallow examination. A swallow analysis took place through observations of NX eating a biscuit and

drinking juice. He had the option to wear a microphone to allow the swallow to be audible and to apply some tape to his throat to examine the lift of his throat during the swallow. This was followed by paper-based assessments to analyse his cognitive and communication skills. Using a document camera, I was able to manipulate images and zoom in and highlight areas of the assessment that were most pertinent, which is something that is not possible when using a booklet in person.

As we got through the first part of the assessment, NX requested a 15-minute break as he was feeling fatigued, and this allowed me to regroup and prepare for the next half of the assessment. We resumed to complete the rest of the assessment and continued talking throughout with little interruption. By the end, I certainly felt that I had obtained reasonable data, which was no less valid than a face-to-face assessment.

Throughout the Skype call, there were occasional periods of low connectivity, but I prompted NX to give me continuous feedback on whether he heard the task instructions and whether he was able to access all the material when we shared screens, as well as how comfortable he was feeling.

Regardless of using an online platform, I felt I was able to build a rapport with NX, that his non-verbal expression was prevalent and that we conversed as we would have if we had met in person. If anything, I would say the assessment allowed me to attend to details, which sometimes are missed in the midst of a busy or rushed home visit. NX himself reported that he felt comfortable with me being on the screen as there was less pressure for him to perform and that he benefitted from having breaks in the comfort of his home.

In addition, NX and his wife reported that the experience had given him the confidence to arrange much needed online therapy sessions, which had been stopped five weeks ago in response to the corona-virus restrictions.

All in all, I found that using an online platform has had benefits, including keeping the claimant comfortable. In response to the concerns raised at the beginning of the article, I can confidently say that my online expert assessments have not been compromised by the use of video conferencing methods. I have found the outcomes of the assessment similar to face-to-face visits. And with regards to issues concerning technology, well most people have access to a smart device and wifi, and the accessibility of online platforms is growing for us all to be able to set them up and use with ease.

About the author

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Sadia is a specialist who works with swallow and communication difficulties arising from brain injury, stroke and spinal injuries. She is bilingual Urdu/Punjabi speaking and has an interest in treating individuals from culturally diverse backgrounds.

Somek & Associates is one of the largest providers of Expert Witness services in the UK, and has over two hundred experts, which include occupational therapists (care experts), nurses, midwives, physiotherapists, speech and language therapists, and other allied health professions.

For more information about Somek & Associates' Speech and Language experts - and all their other healthcare professional experts please contact **admin@somek.com** or visit their website - **www.somek.com.**

MRI Scan Used for Heart Disease Could also Pick out Aggressive Cancers

A type of smart MRI scan used in people with heart disease could help assess whether children's cancers are especially aggressive and spot early signs that targeted treatments are working, a new study suggests.

Researchers showed that the MRI imaging technique, known as T1-mapping, could offer crucial insights into the biology of childhood cancers and give an early warning of how effective targeted treatments were likely to be.

T1 mapping scans measure how water molecules interact at a microscopic level inside cells to understand the cellular make-up of tissue, and are used in heart disease to assess damage to heart muscle tissue.

Now scientists at The Institute of Cancer Research, London, have shown that the non-invasive scanning technique has the potential to pick out children with high-risk forms of neuroblastoma, a type of childhood tumour.

The researchers believe T1 mapping scans could improve the use of precision medicine in children with neuroblastoma and potentially in cancer patients more widely, by ensuring treatments are tailored for each patient, and rapidly stopped when they are not working.

Insights into the biology of neuroblastoma

The study was published in the journal Cancer Research and funded by Children with Cancer UK, Cancer Research UK and The Rosetrees Trust.

Researchers studied T1 mapping in mice with an aggressive form of neuroblastoma to get a clear picture of the microscopic and physical characteristics of the tumour.

The team at The Institute of Cancer Research (ICR) used artificial intelligence to map the different cell populations in tumours and compared these maps with those created using non-invasive T1 mapping MRI scans.

The researchers found that regions with high T1 values – where water molecules can behave 'more freely' – corresponded to hotspots of more aggressive cancer cells, which spread and grow faster. Meanwhile, areas with low T1 values corresponded to more benign or dead tissue, which is less harmful.

Assessing response to targeted drugs

The researchers also looked at whether the imaging technique could help assess how mice with neuroblastoma would respond to two targeted drugs, alisertib and vistusertib, which target MYCN, a key protein linked to aggressive forms of the disease.

They found that when alisertib and vistusertib successfully stopped the growth of tumours in mice, there was a decrease in T1 measures – reflecting the death of aggressive cancer cells. This suggests T1 measures could be used as a biomarker – a measurable indicator which can guide treatment by indicating whether a drug is working or not.

The researchers believe aggressive cancer cells have high T1 values because they tend to be small, but have large nuclei – the control centres within each cell containing our DNA, near which water can behave 'more freely'.

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By evaluating tumours' cellular make-up with T1 MRI scans, clinicians would be able to get an accurate understanding of the stage and aggressiveness of the disease in children with neuroblastoma.

Next, researchers at the ICR – a charity and research institute – plan to assess the clinical benefit of T1 mapping as part of a clinical study involving children.

The new research is the first to assess the benefit of the MRI technique as a 'smart' cancer biopsy – and researchers believe the results could be replicated more widely in other cancer types in children and adults.

We are building a new state-of-the-art drug discovery centre to create more and better drugs for cancer patients. The centre is a £75m project – and we now have less than £2m to raise. Help us finish and equip the building to get our research off to the best possible start.

Guiding precision medicine for children

Study leader Dr Yann Jamin, Children with Cancer UK Research Fellow at The Institute of Cancer Research, London, said: "Our findings show that an imaging technique readily available on most MRI scanners has the potential to pick out children with aggressive cancer and give us early signs of whether a treatment is working. We've shown in mice that this technique can give us detailed insights into the biology of neuroblastoma tumours and help guide use of precision medicine, and next we want to assess its effectiveness in children with cancer.

"It is easy to perform and analyse T1 MRI scans, and they could be used to provide insights into many aspects of cancer biology – and help doctors to design tailored treatments based on how aggressive a tumour appears to be."

Professor Paul Workman, Chief Executive of The Institute of Cancer Research, London, said: "It's exciting that we've shown that a scan widely used to image the heart has the potential to greatly improve our understanding and treatment of cancer too. There is already a lot of experience in using this technique in NHS hospitals, and I hope we can rapidly move to assessing its use in clinical trials of cancer patients.

"It's vital that we find ways to improve treatments for aggressive childhood cancers like neuroblastoma – and also that we spare children unnecessary side effects by minimising exposure to drugs that do not seem to be working."

Mark Brider, Chief Executive Officer, Children with Cancer UK said: "Neuroblastoma is one of the most common childhood tumours with around 100 children, mostly under five years old, diagnosed every year in the UK. Yet it also has one of the lowest survival rates and in its high-risk form is one of the most difficult childhood cancers to cure.

"It is crucial that we find more effective and personalised treatments for children with neuroblastoma. The findings of Dr Jamin and his team represent an important step towards the development of new and kinder treatments that reduce the burden of toxicity for young cancer patients and improve survival rates in this aggressive and hard-to-treat cancer."

Engrained Exaggeration Results in Costs Reduction

by Jonathan Shaw, Legal Director - Jonathan heads the Manchester costs team at Clyde & Co

Brian John Morrow v Shrewsbury Rugby Union Football Club LTD [2020] EWHC 999 (QB)

In a recent case, the High Court used its discretion to reduce the costs of an honest but misleading claimant. Finding exaggeration to be '*engrained*' in the claim for loss of earnings, Mrs Justice Farley reduced the costs of the successful Claimant by 15% after the damages for loss of income had been reduced by 75%. The Court found '*it was not disproportionate of the Defendant to seek a reduction*'.

Background

In 2016 the Claimant, an independent financial adviser, was injured by a fallen rugby post while watching a game played on the Defendant's rugby pitch. He alleged the injury rendered him unfit for his work and reduced his working capacity to only minimum wage jobs.

The Claimant made a claim for general damages and loss of earnings until the age of retirement, which together amounted to more than £1 million.

Before trial, each party had made a Part 36 offer which was rejected. The Claimant's offer of £800,000 was made close to the trial date and was over seven times the amount of Defendant's offer of £110,000.

The Defendant admitted liability but contested the severity of the injury and the subsequent damages. With no suggestion of dishonesty, the Defendant pointed out the Claimant had made particular use of experts to omit pre-accident psychological conditions which was misleading. In order to rebut the Claimant's unreliable witness evidence, the Defendant carried out further investigation which substantially increased the time and costs in the case.

At trial, the claim was successful but the damages were significantly reduced.

The court concluded that the Claimant could have continued work as an IFA but not until the age of retirement as he had suggested. The awarded damages for loss of earnings made up a quarter of those claimed and less than a third of the Claimant's Part 36 offer. However, because the total damages were higher than the Defendant's pre-trial offer, the Defendant was denied the costs protection from Part 36.

The Defendant requested a 30% reduction of the Claimant's costs owing to the claim's exaggeration and subsequent time-wasting.

Decision

Mrs Justice Farley departed from the usual rules of costs following the event and found '*the balance lies in favour of reducing the award of costs*'. She reduced the successful Claimant's costs by 15%.

Her decision was split into two parts:

1. Are there are any reasons for departing from the general rule that costs follow the event?

Referring to *Widlake v BAA Ltd*, the Judge recognised that usually the '*primary protection for defendants against paying the costs of exaggerated claims is CPR Part 36*'. However this case fell outside of the scope of this protection.

Pointing out that although the success of a claimant on some issues and loss on others '*is not normally a reason for reducing an award of costs*', she found that the Claimant had incurred unnecessary expense.

In making this finding, she had given considerable weight to the exaggeration 'engrained' in the claim and some to the '*unrealistic*' Part 36 offer by the Claimant.

Considering the exaggeration of the claim, the Judge paid attention to the features of:

- The Claimant's '*capacity to instruct and take advice from his lawyers*' and choice '*to put an exaggerated claim to the court*';
- The lack of realistic intent to settle as shown by the late timing and high value of the Part 36 offer;
- '*The gulf between damages awarded and claimed*'; and
- The claim's foundations in the exaggeration: exaggeration was so thoroughly woven into the claim that it was '*built into the structure of the Claimant's presentation of his claim*'.

2. To what extent should a deduction be made?

A reduction of 15% was considered '*meaningful*' (*Welsh v Walsall Healthcare* NHS Trust [2018]) and appropriate when taking into account the facts of the case:

- The high overall costs of the lengthy trial;
- The Defendant's own contribution to prolonging the trial; and
- The intent to discourage future litigants to seek similar cost reductions.

What can we learn

- Defendants may be able to rely on CPR 44.2 to reduce a successful claimant's costs where, fundamental dishonesty has not been found, but exaggeration is a prominent structural feature of a claim and results in significant increase to the costs of proceedings.

- Defendants should consider whether a claim is rooted in exaggeration before considering making a request for a reduction in costs. However, defendants do not have a green light to dispute costs to the minute detail where a claimant has exaggerated his claim. The protection this case delivers is not intended as a universal relief from a successful claimant's costs.

- The 15% reduction was fact specific, with the court conducting a balancing exercise taking into accounts the circumstances of the case including parties' offers and general conduct. More generally, exaggeration without a finding of dishonesty is unlikely to produce a significant costs reduction finding under CPR 44.2.

- The courts are reluctant to stray from CPR 36's protection of defendants. Mrs Justice Farley pointed out that the Defendant in this case could have been protected by Part 36 had they listened to the opinion of its own expert on whose assessment the court based the damages decision. It is best practice for defendants to continue to carry out a proper investigation to be able to make a realistic Part 36 offer that provides adequate costs protection

Birds in the Legal Environment - The Expert's Role

by Peter Robinson, Expert Witness Regarding Wild & Captive Birds

Ask the average person is there any structure or order to what goes on amongst birds in the natural environment, and most will suggest it is nothing but chaos. The reality being that most people have little understanding of the important biological place these feathered creatures have in the world that we and numerous other animals and plants share.

It perhaps comes as a surprise then to discover that the UK has some of the most rigorous and all-embracing bird protection legislation in the world, most present EU legislation being based upon the UK original. Did you know, for example, that in the event of possession of any bird, egg or derivative, it is for the person involved to prove that possession is lawful (Kirkland v Robinson). That same legislation empowering the courts to impose either a fine, custodial sentence, or both and prohibit individuals from any further keeping of birds.

So then, are we protecting birds as individuals, or as a biological unit, and if the latter then how much do we already know about them. Well we know an awful lot actually, and in considerable and often intimate detail. Commencing with the various fossil periods on into more recent history, the early literature being littered with references to their activities. However, by around the mid-1700s two distinct branches of zoology were emerging, one regarding the all-important international scientific names attached to plants, birds and other animals, the other increasingly focused on fieldwork.

The still ongoing argument over species' names and their position in the list focuses primarily upon often obscure biological relationships, being made easier and at the same time more difficult by the recent introduction of DNA sampling into the equation. However, that very much remains a 'committee' matter.

Not so though questions like where precisely in the world do the ten thousand or so known bird species occur, and more interestingly why? Or where, when and how do they breed, and are they always successful, or if not then why? Plus, numerous other seemingly impossible questions, like why only some species migrate and even more interestingly, how do they navigate – there and back. The bottom line being that we now either know all this, at least in broad terms, or are on the edge of discovery, literally in a world context. Certainly, within the Western Palearctic (from Britain, France and Spain east to central Russia) you probably cannot find one single bird species that has not been the subject of some level of specific study.

As just one quick example of what is going on worldwide, experienced field workers conduct monthly waterfowl counts at dedicated sites throughout the UK and Ireland. Consequently, we know that in winter 2017/18, 12.8 million 'waterfowl' comprised 4.9 wading birds, 3.8 million gulls, 2.1 million ducks, 1.1. million geese, 5000,000 rails, 170,000 cormorants, 70,000 swans, 60,0000 herons, 30,000 divers and 30,000 grebes. A substantial proportion of which in summer breed over vast areas elsewhere in Northern Europe and beyond, which we know from either ringing recoveries or satellite tracking data.

In the wider avian context this is supported by broader, all-species all-activities studies allowing us to unravel the life histories of birds and many other animals in intimate detail. Enabling us to know that in just my lifetime many former common UK and European bird species suffered population declines of up to 90%, and just for the record I helped thousands of other fieldworkers gather those data. Even more worryingly these declines continue, further significant levels of reduction applying to each subsequent survey period. And so too in North America, where a reported three billion fewer birds exist than in 1970, including a 53% decline in grassland birds. All of this raising some seriously important questions about our own part in both the cause and of course its ultimate effect upon all of us.

The important point being that internationally we now use pretty much all our wild bird populations as biological sampling tools; as with the canaries once used down coal mines – when they drop of their perch then it's time for us to start worrying.

UK legislation seeks to address these now very concerning bird reductions from two directions; firstly, by protecting birds as individuals, including their nests, eggs and young and in addition such things as international movements, and secondly by protecting their habitats. The first of these largely via criminal statutes, unlike habitats, which involve generally far more complex issue, particularly in the agricultural community, which in turn are tied to human population growth.

As a former sixteen-year RSPB prosecutor and investigator and a subsequent courtroom expert, my professional experience involves both of these two legislative options. My specialty lying in examining any alleged unlawful or damaging human activities and comparing them against an absolute wealth of biological and behavioral information. Importantly, though, in the neutral and unbiased manner now de-

manded of all courtroom experts, being required to critically examine the evidence offered up by both sides, regardless of who employs me.

I can perhaps best demonstrate how this works by quoting a few such cases.

Captive Bred Goshawks.
One form of legislative abuse involves the theft of eggs from nests of wild birds in order to hatch them and falsely claim the resultant young were lawfully 'captive bred'. A situation frequently involving specially protected biologically valuable birds of prey e.g. Peregrine Falcon, or Northern Goshawk, and made more worrying by much evidence of eggs being unlawfully moved between countries on a world scale. The above-mentioned Kirkland enquiry commenced with four Goshawk eggs in an incubator; eggs that clearly were from a Goshawk, but not supported by the 'breeders' otherwise detailed written records. It was a protracted and complex investigation spread over eighteen months, involving the eggs hatching and the subsequent young going to Kirkland and being falsely registered with the then DoE as captive bred, before selling them to other bird keepers.

Northern Goshawk is specially protected in the UK by its inclusion in Schedule 1 to the Wildlife and Countryside Act 1981. It is a forest predator occurring throughout the northern hemisphere, from Britain east through Russia to Japan and across Canada, south as far as Corsica, Sardinia and Mexico, involving ten or so biologically recognizable subspecies. Within the Western Palearctic Goshawks tend to be shorter winged and darker-plumaged travelling from north-west to south-east, wing length having much to do with the fact that northern populations are necessarily migratory (the northern forests freeze in winter). In addition, DNA and other studies show we might reasonably expect the progeny of any one pair of birds to demonstrate the same biometric and plumage features as their parents. The two alleged parent Goshawks in our investigation showed all the features of northern Scandinavian Goshawks; very pale-grey plumage, with extremely long (top-of-the-range) primaries (the longest wing feathers). But not so the four incubated young, which unlike their alleged parents clearly demonstrated dark, mid- to southern-European plumage, plus shorter wing lengths falling within that same geographical range.

The 'breeder' plus his wife were convicted of the possession of wild birds, contrary to Section 1 of the Act; which had recently very much changed the ground rules by making any possession an absolute offence. Both appealed their convictions, only the wife's being quashed; the implications of that being that the breeder could no longer keep birds, but his wife could. Kirkland was charged with both possessing and selling the four young Goshawks, offering little evidence in the lower court and appealing his case directly to the High Court in a challenge to the reverse burden of proof. The appeal was finally heard in December 1986, two and half years after we first found the four Goshawk eggs. What the Kirkland case did of course was finally prove that Section 1 of the 1981 Act means exactly what it says, the wording of the High Court's judgement leaving no doubt what Parliament and the Courts think of the need to protect our wildlife.

To a considerable extent the outcome of the Kirkland investigation revolved around an ability to (i) correctly identify both the two birds (including their racial features) and the eggs involved, (ii) understand and correctly interpret the defendant's notes and dates on breeding behavior, (iii) understand crucial species' geographic size and plumage differences, and (iv) be able to both catch up and handle two aggressive and valuable large birds without damage to either the birds or ourselves and reliably obtain the necessary measurements. Obviously, evidence like that could be used to either prove or disprove such an allegation.

Cruelty to Captive Birds.
I was the recent defense expert in a cruelty accusation relating to two Harris's Hawks (Buzzard-sized hawks from Central and South America) kept tethered indoors. The suggestion being, (i) that the birds had no permanent access to drinking water, (ii) two ferrets in a nearby cage suffered mentally from being able to see the predatory birds, and (iii) the two birds suffered a health risk owing to accumulations of their own feaces. I pointed out that although both I and those in court might not tolerate the fecal accumulations and that I accepted there might be a human health risk, there was nothing in the photographs outside my normal experience as far as the way the two birds were being kept. And that in any event unlike birds in general, most birds-of-prey normally drink very rarely, perhaps due to the level of moisture present in their wholly flesh diet.

However, it was the allegation that ferrets might suffer mental cruelty from the mere visual presence of live birds of prey that interested me most. There is a long-standing UK prohibition on the use of live birds and other animals as bait when catching other birds. Presumably to prevent harm to those same captive birds or other animals, unlike in South Africa where such use is lawful. I recently spent time in that country helping catch various eagles and other large predatory bird species to both take valuable data and attach metal leg rings for future identification. We accomplished that via a portable, small-mesh wire-covered cage containing two live mice or gerbils, the trap being covered outside with nylon nooses that catch the eagle by the feet; note though that the eagle cannot get at the animals inside. I was particularly struck by the behavior of these small animals inside the trap, who routinely ran towards large predatory birds like African Hawk Eagle (birds we ourselves handled with great caution) as they landed next to the trap. It was perfectly obvious that the mice or gerbils had absolutely no idea of the danger these eagles presented, regardless that this was perhaps the second or third time the same two animals had been in the trap when

Above, Snake Eagle

eagles were caught. For certain there was no suggestion animals in the trap suffered any visually obvious form of mental stress. But if you were a mouse born in captivity from generations of mice from a similar background, then why would you?

When Was the Bird Hatched?

In a similar vein, I was recently asked by the defense to comment on the evidence in a case where a bird of prey keeper was found to have an obviously less then twelve month old Peregrine Falcon, but nevertheless wearing a closed metal ring issued in a previous year. A ring showing no visual evidence of having been fitted illegally, the only obvious possibility being that it had been fitted to the bird that year whilst it was still at the 'nestling' stage. It could also be shown that the ring in question had previously been registered with the now DEFRA as having been fitted to a bird in the defendant's possession in a previous year, but that was now dead; a bird that would by now very obviously have been in full adult plumage.

Much of the discussion revolved around who might have fitted that ring to the bird. All I was able to say in evidence was that if the facts as I understood them were correct, then the ring had to have been fitted within a period of mid-June to mid-July, regardless of where the bird originated from or who fitted it.

Possession of Small 'Passerine' Birds.

Most small finches and songbirds belong to what we call the *passerines* or perching group of birds. Large numbers of people keep either various canary types, e.g. borders or lizards, or the smaller and commoner British and European finches, e.g. Goldfinch, Greenfinch. A big part of that interest has to do with the skill and care involved in getting the birds to breed in captivity, or an even greater skill in obtaining hybrid young from mixed-species pairs.

One enforcement problem comes from the fact that it is possible to catch these British birds from the wild and illegally sell or exchange them as genuinely

captive-bred individuals. And it does happen. Given the change in the offence of possession brought about by the 1981 Act, you might think that from an investigator's viewpoint the situation is greatly improved, but what if the bird is claimed as a 'foreign' species. Or really is a hybrid between two different species, given the minimal chance of such a bird occurring in the wild.

Another concern here is the statutory requirement that bird species of the kind we are discussing cannot be sold alive unless they were both lawfully bred in captivity and have on one leg an official close-fitting metal ring of the correct size and type. Meaning that in cases of sale or intended sale we need to address at least four issues for each and every bird involved; (i) is it a wild bird within the meaning of the Act, (ii) is it a species that can be sold, (iii) are there any indications that it was not bred in captivity, and (iv) does it have on a close-ring and if so, are there any suggestions it may have been fitted unlawfully?

I already mentioned one possible pitfall in identifying captive birds, but what about physical features? Or ring condition? In an ideal world everyone keeps their captive birds in top physical condition, with no feather out of place. So, in that same ideal world it should be possible to readily identify birds with broken feathers or soiled plumage as perhaps taken from the wild. However, we need to be extremely careful in trying to broaden any 'poor bird-keeping situations' into those indicative of birds having recently come from the wild. Plus, we perhaps need to take into account the fact that we have probably just spent thirty minutes, as a stranger to the birds, chasing them around a wire-netted aviary in order to catch them for examination, and be extremely cautious about where to attribute any feather damage or physical injuries.

Close-rings and their condition are a subject on their own. The small metal close-rings fitted to the kinds of birds we are discussing here come with carefully manufactured internal diameters and need fitting to one leg of nestling birds whilst they are still around half grown (around day seven of an average fourteen-day fledging period). Beyond that time the ring cannot be fitted without likely visible damage to the bird's leg, and neither can it be removed without showing similar evidence. Unlawful methods of getting around that problem include either fitting an incorrect ring of a greater diameter or using a suitable lubricant to force the ring onto the leg, both of which should be detectable via expert examination.

Frequently, though, rings are forced on to trapped wild adult birds with little regard for any damage to the bird, often accompanied by obvious attempts to increase the internal ring diameter. Resulting in another example of where an understanding of aging according to plumage phases might assist the evidence - as with a bird very obviously hatched last year or before, but wearing a ring issued during only the current year.

Possession of Birds' Eggs.

Another legal minefield demanding a particular type of expert. Take for example a collection of eggs found during a police raid, say for drugs. On the face of it there is already an offence of possession, but only if the eggs involved are from bird species occurring naturally in Britain or Europe. So then, what might our man say in response to the obvious questions? Well he might suggest they are not the eggs of British or European birds, and to be fair there are numerous 'look-alike' species out there; Stone Curlew is specially protected and breeds scarcely in both Eastern England and throughout southern Europe and beyond. However, its eggs closely resemble those of Senegal Thick-knee and several related African and Australian species. A problem that also occurs commonly amongst ducks, geese, herons, birds-of-prey and the numerous parrot species, again worldwide and to name just a few.

In this type of case the investigator is not so much interested in the eggs as in any notebooks, paperwork, maps and diaries, plus whatever we might find on the computer. But I suggest there are two things above all else to look at in this situation, starting with the bookshelf. I have heard it suggested that the contents of a person's book collection present a shortcut into their mind; as with numerous books on nests and eggs where the owner claims no interest in birds.

What we really need to unearth and examine, though, are either data cards or some other recording method detailing when and where these eggs were collected, and hopefully by whom? Most illegal

collectors maintain such records, so find these and further discussion may be unnecessary, though the absence of such records does not necessarily work to the suspects advantage, nor does it prove they are non-existent. However, in the absence of any other evidence, just charging the man with possession of eggs may be inviting him to come up with a range of answers it takes an expert to respond to. And even if it does seem that any eggs involved are from those non-European species, we should not dismiss the possibility of the defendant being guilty of import offences.

Peter Robinson

Profile: After leaving school Peter Robinson worked for a time with a company importing live wild birds from just about all corners of the Earth; before we all realized the extent of the damage we were doing to the planet. He then spent eleven years in the London Fire Brigade, rising to the rank of Station Officer and becoming a Graduate Member of the Institute of Fire Engineers. However, his continuing background interest in birds resulted in him making the change to Head of Investigations with the Royal Society for the Protection of Birds. A position he held for sixteen years, also acting as the Society's prosecutor and successfully taking several cases to the High Court on appeal, including the Kirkland case already referred to. Early retirement over fire service pension issues saw him switch to Courtroom Expert Witness, having now given evidence in all four UK countries, plus High Courts in both England and Northern Ireland. Peter is a Fellow, Honorary Life Member and former Principal of the Institute of Professional Investigators and a former member of the World Working Group on Birds of Prey.

He is author of the books Bird Detective and The Birds of the Isles of Scilly, plus the recent fictional (related to bird smuggling) The Consequences of Finding Daniel Morgan. Peter has 'bird-watched' in some forty countries on six continents and has personally seen around one quarter of the World's bird species in the wild.

On behalf of the British Trust for Ornithology he has captured and ringed some 50,000 live birds and submitted records for 30,000 nests of over one hundred UK species.

His personal fears include snakes and 'big cats'.

How can you Mediate Without Meeting?

Litigation is inevitable in the current economic climate. However, the perception is that settlement might be more difficult to achieve without face to face meetings or access to ADR. Mediation is one way that disputes can still be settled even if the traditional style mediation in the same location is not possible.

What form does mediation take?
Traditionally mediation involves instructing a mediator, who will be given position statements (a summary of either side's view of the dispute) by both parties prior to the mediation. At the mediation itself, the parties will meet in one room for an initial meeting with the mediator, then retire to separate rooms and make offers in attempt to settle a dispute. The mediator will work with the parties in order to help them resolve their dispute. If a settlement is concluded, the parties will often sign a settlement agreement at the end of the mediation.

Can I mediate during lockdown?
Although social distancing requirements prohibit parties from meeting in person, a number of UK based mediation companies are offering online or telephone-based mediation. This in itself could have a number of benefits – cutting down the costs of travel and renting mediation rooms, and potentially giving the parties more dates for mediation (especially when clients are based in foreign jurisdictions, and allowing individuals to attend the mediation for only part of it). Documents can also be provided electronically, reducing the need for hard copy bundles of case documents to be provided.

As with a physical mediation, settlement on a virtual mediation can be concluded by emailing drafts of a document and then signing the document (which can be signed electronically, or even signed as a 'wet' copy and then scanned and emailed).

When should we use mediation?
The pre-action protocol (in the Civil Procedure Rules, which govern litigation) requires parties to consider a form of alternative dispute resolution (such as mediation), to assist with settlement. Therefore, from the outset of a dispute, parties should consider using this in order to try and settle a dispute. However, there is no set time when parties should consider this, and it may be appropriate to propose mediation in the following circumstances;

- From the outset of a matter even before issuing (for example after a claim letter has been sent), mediation could be an effective way to achieve aims that would otherwise only be possible through proceeding with litigation (for example a party agreeing to cease using a trade mark, or take a licence for a patent)
- As above, if you are in the middle of litigation and find that due to the pandemic you need to reserve cash, it could be a good idea to propose mediation in an attempt to bring litigation to a close
- If you are the defendant in a matter, proposing mediation may be welcomed by another party who no longer wishes to proceed with litigation

Are there any other uses for mediation?
Given the broad situations where mediation can be used, as well as using it to bring matters to a close, save money and reach a settlement with another party, it could also be used for the following;

- As a way to open a dialogue with an opposing party. Correspondence in itself may not always get to the heart of a matter, and mediation can be an effective way to establish the real motivations behind litigation, and while it may not lead to settlement at the mediation, it could help bring about a settlement further down the line
- Issuing proceedings with a view to mediating straight away can be a useful tactic to save the costs of lengthy litigation and settle with a party currently infringing your IP rights
- Getting the parties face to face (even virtually) may even allow them to settle a dispute and actually move forward in terms of working co-operatively with a competitor in a market place. Some settlements concluded at mediation have included licensing agreements between parties, or agreements to work together on future product development, or even litigating against other third parties in a market place, in order to protect market share

Mediation is an extremely versatile settlement tool that can be used in a variety of different settings regardless of how far an IP dispute has progressed. Our experiences have shown us that it can be an effective way to bring matters to a close and achieve a result that is welcomed by clients. The ability to mediate remotely will allow clients to undertake this even during the Pandemic, potentially at a reduced cost.

This article was prepared by HGF Senior IP Solicitor **Chris Robinson**. If you would like further advice on this, or any other matter, please contact Chris at crobinson@hgf-law.com

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