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THE EXPERT WITNESS

THE JOURNAL FOR INSTRUCTING PROFESSIONALS & EXPERT WITNESSES

BOND SOLON CONFERENCE EDITION

LEAD ARTICLE 'THE 39 STEPS' BY RODNEY PEYTON OBE MD

An interview in relation to his extensive experience of acting as an expert witness, and in particular about his '39 Steps' of learning from over 30 years of practice.

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Welcome to the Expert Witness Journal

Hello and welcome to the 33rd edition of the Expert Witness Journal. I hope you have all been keeping safe and well during the last few months.

As most of us have experienced this year, remote video working has become part of our working practices. Although many experts have previously worked 'remote' preparing reports it has meant that new ways of working and new skills have been developed.

All of the conferences and courses that would be taking place this year are now available online including the Annual Bond Solon Expert Witness Conference on Friday 6th November, which will this year be run as a fully virtual event. We are the lead sponsor of this event and look forward to virtually welcoming you there.

In this issue we feature articles on 'The 39 Steps' with regard to medico-legal issues by Rodney Peyton OBE. 'The Expert Witness 2020 and beyond' by Nick Deal and articles on 'Gross Negligence Manslaughter' by Surash Surash, 'Maternal Mortality' by Professor Ronnie Lamont and 'Expert Statistical Evidence' by Stephanie Clarke.

The Expert Witness Journal will now be published 6 times a year, this will include our International edition, with this we aim to cover more areas of expertise. We are now collating articles for the winter 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

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Some of the highlights of this issue

Events

Inspire MediLaw

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.

Below are a sample of our latest on-line courses

Medico-Legal issues in Cardiovascular Medicine and Surgery
2 October 2020
Virtual attendance
This medico-legal conference for clinical negligence lawyers will cover a range of issues relevant to investigating allegations of negligence in Cardiology, and the subsequent management and valuation of such claims.

The conference will provide medical knowledge for legal professionals, in the form of presentations by leading medical experts, lively discussion and debate, and the latest case studies.

We have a range of speakers lined up and are confident that this conference will be of interest to both claimant and defendant practitioners. It is a great opportunity to meet and build relationships with your counterparts in the sector.

Introduction to Inquests (clinicians as factual witnesses)
16 November 2020
Virtual via live stream (Zoom)
This event is designed to provide an overview of the Inquest process. It is aimed at clinicians who have little or no experience of the Coroner's Court, but who are likely to be called as a factual witness.

The training, delivered by Isabel Bathurst (Inquest lawyer) and Dr Chris Danbury (Consultant in Anaesthetics and Intensive Care Medicine) comprises an overview of the scope and processes of an Inquest; guidance and practical tips on writing a factual witness statement for the Coroner; giving evidence at the Inquest; and the possible next steps following a verdict.

"*It was an great overview of the background and practical advice on how to prepare and answer questions at inquests.*" ~ January 2020 delegate

Expert Witness Training for Medical Professionals (Clinical Negligence)
26 November 2020
Oxford Spires Hotel
Inspire's Expert Witness training is designed specifically to guide and prepare medical professionals for acting as expert witnesses in clinical negligence litigation.

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

Annual Medico-Legal Expert Witness Conference & Networking 2020
4 December 2020
Oxford Thames Hotel
Our 2020 Annual Conference for expert witnesses in clinical negligence litigation will include panel discussion and workshops, as well as networking with fellow delegates & invited guests after the conference.

The day will include presentations on giving expert evidence to the Coroner: who's really responsible for making sure you are CPR Part 35 compliant; how should you go about obtaining & implementing feedback; what's the position on recording consultations with the claimant?

We look forward to seeing you there and hope you will join us after the event for networking!

Conversations On Consent Oxford
4 December 2020
Venue TBC, Oxford
Consent in theory vs Consent in practice - it's a contentious topic for many in the medicolegal sector.

This event is the last in our 2020 series of our panel and discussion sessions for lawyers and medics on the topic of Consent. It takes place at the close of our Annual Medicolegal Expert Witness Conference in Oxford, and tickets can be booked for the whole day, or this event only.

Please stay for refreshments after the Conversation closes, network with your contemporaries in the medical and legal professionals, and take the opportunity to chat with the panel.

Expert Witness Training for Medical Professionals (Scotland)
14 December 2020
The Royal College of Physicians, Glasgow
Inspire's Expert Witness training is designed specifically to guide and prepare medical professionals for acting as expert witnesses in clinical negligence litigation.

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

Recent delegates said:

"It was very helpful and so nice to have someone to talk to at the end of a virtual course."

"Invaluable."

"I found the discussion afterwards very useful and helpful. Having completing this module I will be revising the way I write my reports."

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Expert Witness Courses
Excellence in Report Writing
This course provides expert witnesses with the key skills to produce court compliant reports. Experts will learn how to produce quickly and consistently reports that are both court compliant and will withstand cross-examination. - Duration: 1 Day

Starting 05 Oct 2020 09:30 in Virtual Classroom
Starting 09 Nov 2020 09:30 in Virtual Classroom
Starting 01 Dec 2020 09:30 in Virtual Classroom
Starting 07 Dec 2020 09:30 in Virtual Classroom

Courtroom Skills
This one day course will provide expert witnesses with the core skills to effectively present opinion based evidence in court under cross-examination.
Starting 10 Nov 2020 09:30 in Virtual Classroom
Starting 02 Dec 2020 09:30 in Virtual Classroom
Starting 08 Dec 2020 09:30 in Virtual Classroom
Starting 05 Jan 2021 09:30 in Virtual Classroom

Cross-Examination Day
A follow on day to the Courtroom Skills Training, this course enables expert witnesses to refine and enhance their skills in presenting evidence in court.
Starting 07 Oct 2020 09:30 in Virtual Classroom
Starting 11 Nov 2020 09:30 in Virtual Classroom
Starting 03 Dec 2020 09:30 in Virtual Classroom
Starting 09 Dec 2020 09:30 in Virtual Classroom

Civil Law and Procedure
This course provides civil court experts with a comprehensive understanding of their requirements of CPR Part 35, Practice Direction 35, the Protocol for the Instruction of Experts and practice direction on pre-action conduct.
Starting 10 Dec 2020 09:30 in Virtual Classroom

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.
Starting 10 Dec 2020 09:30 in Virtual Classroom

Family Law and Procedure
This course provides family court expert witnesses with a comprehensive understanding of their requirements under Part 25 and 25A.
Starting 15 Oct 2020 09:30 in Virtual Classroom

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The 39 Steps

by Rodney Peyton OBE

Mr Peyton is a leading medico-legal expert, who has been called the world's number one surgical coach for his global delivery of medical and legal training in all five continents and more than twenty-five countries including the United States, throughout Europe, the Middle East, the Far East as well as in Australia and New Zealand.

Specifically, in regards to Medico-legal issues, our reporter interviewed him in relation to his extensive experience of acting as an expert witness, and in particular about his "39 Steps" of learning from over 30 years of practice.

His comments are divided into five major areas:

- Medicolegal practice
- Accepting instructions
- Writing reports
- Court procedures
- Continuous professional development

These steps provide a useful guide, not only to those starting out in medico-legal practice but also as an aide-memoire for more experienced practitioners.

MEDICO-LEGAL PRACTICE

1. Medical Expert's Credo

The basic principle of medico-legal practice is to understand the job is to help the litigant, their legal advisors and the court to clearly understand the nature of medical evidence in individual cases, allowing them to fully comprehend the issues involved so they can make better decisions. This indeed should be the "Credo" of anyone involved as an expert in the litigation process, medical or otherwise.

2. Avoid Litigation

When it is obvious there is little chance of success in a case, it is important to make sure the client and their legal advisors understand this up-front so that they can avoid expensive litigation. It is not the doctor's

duty to decide whether or not a course of action should proceed, that is a matter between the clients and their legal advisors. It can be surprising what outcome occurs in the "heat of battle" in court but a doctor would be failing in his duty if he did not give clear advice.

3. Manage Client's Expectations
Remember in medicine that bad outcomes after treatment are not necessarily due to medical negligence. The client may not understand this. Even when there has been some element of the breach of duty, this may not have had prolonged effects. For instance, a scaphoid fracture may be missed initially but then properly treated with splintage after one to two weeks. If everything heals, then an outcome after one year where a client complains they feel some weakness in the wrist, on the balance of probabilities this would be due to the fact that they fractured the wrist in the first place and not because of any delay in putting them into splintage. Again, it is important that legal advisors understand this up-front so they can manage their client's expectations particularly in regard to the value of the claim.

4. Maintain Integrity
At all times act with integrity. Remain independent and objective no matter which side instructs you. As an example, in personal injury cases such as "whiplash", do not be tempted to vary the prognosis in similar cases, dependant on whether acting for the plaintiff or the defendant.

5. Provide a bespoke CV
Your CV should be adapted so that it is appropriate to the particular case in hand. However, do not be tempted to exaggerate your qualifications and experience, as these are generally in the public domain and can easily be checked. Your reputation is your brand, so guard it jealously.

6. Network
Form professional relationships with your legal colleagues so that they learn to trust you and therefore your opinions. This can be a very personal matter. Inevitably queries will arise from claimants in relation to your reports and some may even complain if they dislike your opinion. A close professional relationship with the instructing solicitor can help to deal with such issues. Always remember your network is your net worth.

7. Educational Activities
Offer training to groups of lawyers on medico-legal issues. This allows them to talk to you face to face outside court situations and to form judgements about how you communicate and answer questions. One way of doing this is to offer one time "Learn at Lunch" seminars for small groups.

8. Form Alliances
It is important to align yourself with barristers and trial lawyers. Be available to give advice, being open and approachable. Case conferences are an excellent opportunity for them to assess you in relation to your likely strengths as an expert witness in Court and may result in them referring their instructing lawyers to you when issues arise in particular cases.

9. Terms of Business
Have a clear business contract. Instructions should form a contract so that expectations are clear on both sides. In particular, be clear about who is responsible for your fees and the timeframes involved for the production of reports and for payment.

10. Cost of Reports
Set your rates at the outset and these should not vary depending on the strength or otherwise of a particular claim. At times you will be asked to forgo your fees in particular circumstances. Make this very much an exception rather than the rule.

11. Stand Out from the Crowd
Be timely in your response to any queries from lawyers, in your production of reports and in the quality of your advice. In order to increase you practice, you must be perceived as faster, better and most efficient than your colleagues.

ACCEPTING INSTRUCTIONS
12. Be Clear on Instructions
Always read your instructions carefully. Most of the time these are quite general, particularly in Personal Injury cases. In medical negligence, they are usually much more detailed and give an outline of the case as perceived by the lawyer. Whenever possible, obtain a detailed statement from the claimant in relation to their specific complaint and the timeline. Determine whether this is a general screening report, and therefore not for court purposes, a liability/causation report or a condition/prognosis report as they have different requirements and attract different costs. Make it a rule to obtain your costs prior to sending out your report or at least make sure that the lawyer is in funds. This is important in order to get paid whether or not the claimant agrees with the content. It is not unheard of for claimants to refuse to pay if the report does not favour their case and then go to another lawyer to try and obtain more favourable comments.

13. Screening Reports
In medical negligence cases, always offer a screening report in the first instance. This is less detailed than either of the others and the goal is to advise whether:
- there is likely to be a case
- not likely to be a case or
- it is not possible to determine on the basis of the evidence which has been made available.

14. Accepting Records
Unless there are only a few notes, around 20-24 pages, it is best to get them in hard copy as it is easy to miss information in cases which can sometimes have more than 1000 pages. It is vitally important to have all notes paginated. There are two good reasons for this, firstly is so that you can refer to specific pages in your report and secondly occasionally, for many reasons, some pages are not contained within the notes you receive. When your copy is paginated it is clear what you have received and what you did not as extra pages will not be paginated in chronological order or be paginated separately. This may become an issue in court as to whether the expert has or has not been provided in their pack with a particular piece of information.

15. General Data Protection Regulations (GDPR)
All notes must be kept securely. They should not be left lying around an office but locked in a filing cabinet when not in use. It is equally important to keep them securely when they are being transported, for instance to or from Court as well as ensuring that they are securely parcelled when being sent through the post. Only keep notes for as long as necessary and either destroy them or send them back to the lawyer at the earliest possible opportunity. When sending reports digitally, ensure that they are properly encrypted.

WRITING REPORTS
16. All Written Communications are Discoverable
Any oral discussions or written opinions may be discoverable and may be used in Court proceedings. Be careful about sharing initial opinions before all facts are gathered as you may have to explain any difference of opinion between what may be an initial thought and the definitive report.

17. Keep Contemporaneous Notes
Always keep any original notes so that you have a contemporaneous record of any interviews and discussions. Without notes you have limited chance to recall what exactly was said in the event of any dispute when a case comes to Court.

18. Separate Fact and Opinion
Make clear in your report what are facts, what is an opinion and your reasoning process as to how you came to any specific conclusion.

19. Range of Opinion
Remember, if the case gets to Court, there is usually a medical expert who does not fully agree, if at all, with your opinion. Understand, on most medical matters, there is a range of opinion as to the correct procedures, management of a case and the nature of informed consent. You will obviously favour your own method of working. That does not mean that others cannot reasonably disagree and manage a case differently.

20. Evidence Base
Almost always use an evidence base for your opinions. Evidence from textbooks or high quality, peer reviewed literature can easily overshadow experts who simply state "in my practice", "my experience" or "in my opinion"

21. Counter Arguments
When coming to a conclusion, always consider what counter arguments may be raised and be comfortable about how you could address them. Indeed, it is best if you can anticipate differing opinions in your original report and answer them at that time. This shows that you have considered the case from many angles, adding power and creditability to your opinion.

22. Personal Bias
Take time to reflect on your own biases. We all believe that how we set out to manage a case is the correct course of action and there is a tendency to re-inforce our thoughts by surrounding ourselves with like-minded individuals or deliberately look for an evidence base which supports our feelings, ignoring those which run counter. Be careful and critical when reading papers and journals and particularly those purporting to be a meta-analysis of a number of papers. If authors in these papers do not point out differences of opinion, they have either not cast the net wide enough on the subject or are displaying their own bias.

23. Logical Reasoning
Three mains types of logical reasoning are deductive, inductive and abductive. Deduction argues from the general to a specific and if the generality is correct then the specific is likely to be correct. For instance, if I have a jar of white marbles and I take marbles from the jar then those marbles are liable to white. In Court terms this is res ipsa loquitur.

Inductive logic starts from the specific and works back to the general, for instance if I have five white marbles in my hand, and they came from a specific jar, then therefore all marbles in the jar are liable to be white. Of course, this may not be true and is the basis of the null hypothesis in statistical research. Be careful of papers which state the results were "nearly reached significance" they either did reach it or they did not.

Finally, there is abductive reasoning. If I have five white marbles in my hand, and there are white marbles in the jar then the marbles in my hand came from the jar. This is a very big step and yet is one of the major causes of medical mistakes where a set of symptoms are assumed to indicate a particular disease process.

24. Changing Reports
There may be occasions when you are asked to change and modify your report once presented. Be clear why you have given your opinion in the first place and, unless there is new evidence, do not alter your report. If facts emerge which do materially influence what you have said, be transparent about the situation and produce an addendum indicating why you have altered your opinion. Occasionally, if such new information has not been shared beforehand, you may be ambushed in the witness box. Should that happen, ask for a recess to consider new evidence and never try to maintain a stance which new evidence renders unlikely or even untenable.

COURT PROCEDURE
25. First Impressions
Always behave professionally and that includes dressing appropriately for the Court. No matter what your feelings are on the matter, you are there to represent your point of view as an assistant to the Court. First impressions count and your goal is to present as a professional, creditable expert.

26. Remain Neutral
Do not blatantly takes sides, always accepting that you will hold particular opinion as to the merits of the case at hand. Remember, at all times your duty is an officer of the Court and as far as possible to provide transparent, unbiased evidence.

27. Servant/Leader
When in the witness box, you are in fact educating. You should see yourself as a servant/leader and as any good teacher you must do so from the point of view of those who are learning ie the Court and other lay

people. Remember, you may be senior in your profession but, unless highly experienced in Court, you are relatively junior in relation to the Court process. It is important not to come across as overbearing.

28. Address the Bench
When giving evidence, always speak directly to the judge and therefore, whether sitting or standing, tend to face the bench. Turn your head to face the barrister/trial lawyer when being asked questions or when you are asking for clarification but then turn to face the judge again in order to answer. All judges take notes, some use computers and others will wish to write. Be courteous and match your pace with the speed of the judge in recording the evidence.

29. Get Your Message Across
There will be multiple different personality types among the judges, barristers and solicitors. Some want quick, short answers, others a more detailed and factually orientated response while yet others are more focused on the social and emotional aspects of the case. Try to gauge and mirror these personalities when dealing directly with them by listening carefully to their questions and matching their speed of language. Such rapport will help you get your message across and remember the decision maker is the judge.

30. Dealing with Cross-Examination
Barristers and trial lawyers are trained to be adversarial in order to test the evidence on behalf of their respective clients. Their questioning, therefore, may raise the level of emotion, particularly when conducting cross-examinations and specifically with the use of the word "why". We all hate to have to justify everything we say but you must speak slowly and do not take anything personally. Answer the judge and do not get involved in a face off with a legal team. Keep calm, considering your thoughts and speak clearly and slowly to avoid any hint at being argumentative.

31. Keeping Emotions Under Control
Be empathetic but not sympathetic ie understand other's emotions but do not side with them. A lot depends on the skill of the lawyers, barristers and on the attitude of the judge on the day, all of whom will have their own biases. The best way to get your opinion across is to be professional, deliberate and evidence based. Present yourself as reasonable and thoughtful, being respectful to the Court and the Court process, setting out your argument against the relevant legal tests..

32. Three Start Up Questions
You may be cross-examined on absolutely everything, not just on your opinion. This can include your knowledge of the legal process. Remember the three questions which every barrister/trial lawyer utilises frequently at the beginning of an examination.

They are:-
• Do you know your duty to the Court, including your knowledge of the relevant legal tests?

• Are you an expert on all points on which you have given an opinion?

• Is there a range of opinion which reasonable and respectable doctors may hold?

Ensure you are clear on your answers to these before getting into the witness box.

33. Questions to Avoid
Stay away from specific legal, technical and ethical issues are far as possible. Stick to your report, your stated opinions and the reasoning behind them.

34. Lack of Immunity
Remember, as a medical expert you do not have immunity when giving evidence. Adverse criticism in public can have a marked effect on your personal, private and financial life. A number of experts have found themselves on the receiving end of severe public criticism which have led to orders for costs against them, whilst others have had prison sentences imposed for perverting the course of justice, for instance by changing their report and its conclusions without reasonable cause.

CONTINUING PROFESSIONAL DEVELOPMENT
35. Professional Recognition
Make sure you have the relevant professional recognition in your specific area of expertise. In UK medical terms this will require annual appraisal and five yearly revalidation, so that your name stays on the professional register held by the General Medical Council (GMC). This can be checked at any time by both the plaintiff's and the defendant's lawyers.

36. Court Etiquette
As well as keeping up to date in your own field, you must similarly be cognisant of the requirements of the Court process in any jurisdiction in which you appear as an expert witness. This can be more arduous than it appears, for instance in the British Isles there are at least seven different jurisdictions with sometimes obvious, and at others subtle, differences in procedure. This can even include how you address the judge. Check procedures with the instructing lawyers and the barrister/trial lawyer at the earliest opportunity.

37. CPD Training
Participate in specific training in medico-legal issues at least on an annual basis. There are online courses, conferences and indeed University degrees related to both medical and legal practice. Further, a medico-legal practice is a business and at least some of the CPD should be directed towards business acumen.

38. Presentation Skills
Constantly improve your presentation skills and not just in the Court situation. Offer to give talks in general and on medico-legal issues particularly from stage. Having to stand up and deliver content is one of the best methods of learning, particularly when being asked unprepared questions by members of the audience.

Writing up the salient points of anonymised medico-legal cases as case reports or blogs is another useful way of communicating with others and at the same time clarifying issues for yourself. The same is true of writing articles for magazines or editorials for appropriate journals.

39. Reflect on the Outcome
Do not become emotionally attached to the outcome of a case, but do consider it in the light of the evidence you gave, why it was preferred or not preferred by the Court and reflect to see if there are any further learnings for yourself. As Stuart Emery states, "the path to mastery in any subject is to correct not protect". Be open and honest with yourself and always seek to improve your practice, both in your reporting and in delivery of your reports.

These are the standards/disciplines that have proved most valuable to me in providing a large medico-legal practice covering both personal injury and medical negligence cases. Helping the legal profession, insurers and Courts to make fully informed decisions which impact on a client's physical and emotional wellbeing has proved very fulfilling and rewarding.

Finally, a successfully run medico-legal practice is not a one-person operation. It is a business which requires good administrative back-up with skilled and experienced secretarial staff and the services of a competent accountant to run the practice successfully. No matter how good you are as an individual expert, it is the back-up team which leads to a successful and a prosperous business.

Rodney Peyton
15 April 2020

Counselling in Obstetric Claims - What Constitutes Valid Consent When a Large Baby is Predicted?

When should women be counselled about the risks of vaginal delivery versus caesarean section when having a baby that is predicted to be larger than average?

Background

The above issue was explored in a case in which Clyde & Co LLP were instructed by NHS Resolution to represent the East and North Hertfordshire NHS Trust.

The claimant alleged that in 2015 she was not properly consented for a Vaginal Birth After Caesarean Section (VBAC). In summary it was said that:-

- There was a failure to provide information concerning the risks of requiring instrumental delivery; and
- There was a failure to provide information about the increased risks of failing to deliver vaginally with a baby weighing over 4kg.

The issues narrowed after exchange of expert evidence and it was apparent that the only real issue between the parties on breach of duty was whether there was any evidence of fetal macrosomia which in turn mandated discussions about the risks and benefits of different modes of delivery.

Fetal macrosomia

The claimant asserted that fetal macrosomia was defined as a predicted birth weight in excess of 4kg and relied upon the following factors to say that it was present in the index case:-

- A private scan performed at 27 weeks when extrapolated to term showed an estimated fetal weight of over 4.2kg;
- There were 3 plots on the NHS GROW chart which noted that fundal height was around the 90th centile; and
- The 32 week NHS scan showed an estimated fetal weight on the 70th centile.

The positon of the Trust in response to the above was:-

❖ There was no evidence that the Trust saw the results from the private scan performed at 27 weeks. They were however informed that there was some concern about fetal weight and thus organised the ultrasound scan at 32 weeks. This was reasonable practice;

❖ Fundal height is not an indictor used to predict fetal macrosomia. It is a very imprecise assessment of growth and in any event, the measurements denoted normal growth; and

❖ A baby on the 70th centile has a normal birth weight. The evidence of the claimant would imply any measurement above the 50th centile is larger than normal and so presumably any measurement below the 50th centile is smaller than normal. This would confine "normal" to 1% of the population.

In short, the evidence from the Trust was that information concerning fetal macrosomia was only imparted to patients in 2015 when a growth scan predicted an estimated fetal weight over the 90th centile or when there were risk factors present for the condition. i.e. an abnormal BMI, gestational diabetes or a family history of fetal macrosomia.

When considering the breach of duty issues the claimant also faced the added difficulties of (a) various RCOG and NICE guidance referring to fetal macrosomia as being over 4.5kg and; (b) retrospectively it was calculated that the 32 week scan predicated a birth weight of 3.7kg.

In fact, the claimant's baby weighed 4.1kg at birth and she sustained a fourth degree vaginal tear. It was contended that in the absence of the negligence the claimant would have opted for caesarean section and thus avoided her injury. This aspect of the case was also in dispute as records from the claimant's first pregnancy and the index VBAC pregnancy indicated that she wanted a natural birth.

Outcome

The case was due to go to trial at the High Court in July 2020 but the claimant discontinued 1 week prior to the hearing. As a consequence of the successful defence the NHS Trust saved significant financial sums in respect of damages and costs.

Learning

As indicated above the case not only turned upon whether the Trust should have counselled the claimant about the risks of fetal macrosomia but also whether the claimant would have elected a caesarean section had different information been provided. Factual evidence from the Trust was key in responding to these points and the case again underlined the importance of the clinician's input in consent cases.

If you have an article you wish to be featured, contact Expert Witness at admin@expertwitness.co.uk

The Expert Witness 2020 and Beyond

Expert witnesses are facing four main challenges: firstly, an ever-increasing scrutiny of the performance of their role by the judges; secondly, the arrival of remote hearings; thirdly, funding; fourthly, further reforms under a radical new Head of Civil Justice.

Judicial Scrutiny

The duty of the expert has been clear for many years now and the civil, family and criminal procedure rules all state that the expert owes a duty to the court, to help the court on matters within their expertise; what the courts demand is impartiality, independence and honesty.

There have been a number of cases in which the expert witness did not meet those demands.

In Arksey v Cambridge University Hospitals NHS Trust [2019] EWHC 1276 (QB), the claimant's consultant neurosurgeon's report "did not stand up to a moment's scrutiny" having been prepared "on a false or wholly incomplete basis"; as a result, his evidence fell far below the standards of a reasonable, competent expert witness, according to the judge, Mr.Justice Martin Spencer.

The judge went on to say: "How is it in 2019 … that we can have an expert witness who does not even begin to understand his duties as an expert?"

The case which sent shockwaves through the expert witness community was Liverpool Victoria Insurance Co. Ltd v Zafar [2019] EWCA Civ 392. Zafar had written a report following his examination of the claimant, following a road traffic accident. In that report, he stated that, on examination, he found no pain on movement of head, neck and shoulders and that the claimant had told him that all pain had resolved within 1 week of the accident.

The instructing solicitor contacted him to say that the claimant was in fact still in pain and suggested recovery in 6 – 8 months. Zafar produced another report in those terms, back dated to the date of the first report, contrary to his own findings. That report had the (then) standard form Statement of Truth.

LV issued proceedings for contempt of court and proved 10 out of 16 allegations of contempt. The Court of Appeal ruled that if any expert either deliberately or recklessly makes a false statement in a document verified by a statement of truth, that conduct is so serious that committal for contempt "will usually be inevitable"; the expert witness will be committed to prison for 1 year.

Serious, indeed. It is founded on the reliance placed by the courts on the honesty of the expert witness and the duty owed by the expert to the courts. As the master of the Rolls, Sir Terence Etherton, said: "breach of the trust placed in an expert witness by the court must be expected to result in a severe sanction".

The ripples from that case continue to effect change today: as from 1st October, the mandatory Statement of Truth in an expert witness' report has changed, to include the understanding of the contempt consequences.

No wonder, then, that, for some time various professional bodies have been encouraging their members to make sure they know what is expected of them as expert witnesses. The Royal College of Surgeons, for example, in their guidance document "The Surgeon as an expert witness", states: "it is hard to overestimate the value of prior training in the required etiquette, formalities and survival techniques when faced with counsel".

In their report, "Acting as an expert or professional witness", issued in May 2019, the Academy of Medical Royal Colleges states that healthcare professionals "should undertake specific training for being an expert witness and the expectations and responsibilities of this role".

Anyone undertaking work as an expert witness needs to have read the rules and undertaken training to help them to understand and apply them; the judges are watching.

Remote hearings

Long-discussed and piloted in various tribunals, in 2020 remote hearings suddenly became a necessity. It is too early yet for a full review of the results but there are signs that, at least for expert witnesses, this has proved useful; the results for witnesses of fact have been more mixed.

There are obvious and immediate savings in travel and accommodation costs and in the amount of documentation included in the trial bundle. The process of giving evidence, and of being cross examined, slows down, much to the advantage of the witness. Almost certainly most professionals have found them-

selves on one of the remote platforms since March, but the experience of giving evidence remotely needs to be carefully planned for and practised before the hearing

It is likely that, in future, any hearing will be a mixture of physical and remote evidence-taking.

Funding

From the recent Bond Solon Survey, it is clear that the issue of getting paid remains a live one for many experts. A significant number find themselves either getting paid late or having to write off bad debt.

The Legal Aid Agency published its Guidance on rates for Expert Witnesses in September 2020, including guidance on how to apply for enhanced rates.

The President of the Family Division set up a working group in 2018, to review the issues of instructing medical experts in family cases. The final report, published in November 2019, noted that there were fewer experts willing to undertake this work and identified several barriers, including the rates of pay, delays in payment, the complexity of the payment system, as well as fear of judicial criticism, the inflexibility of the court system and the volume of material which they can be required to work through.

Further reforms

In the light of all of the above, further reforms are clearly needed.

Enter Sir Geoffrey Vos, the incoming Master of the Rolls, who takes up his post on 11th January 2021.

In 2019, he expressed the view that the Woolf reforms of the 1990s were "inadequately revolutionary" – clearly, this is a Head of Civil Justice who wants to make changes during his time in office.

In thinking about technology, he has said that it is no use to "take the old system and replicate it technologically"; rather, justice should be delivered in a manner "consistent with those born 20 years ago, not 70".

Turning specifically to expert evidence, his view is that it probably needed a much more radical shake up, even 1999; particular targets for reform are likely to be experts' reports, which he describes as having "never stopped growing" and the time spent by the judges in reading them has "increased exponentially".

It remains to be seen exactly what the new Master of the Rolls has in mind. What is clear, though, is that the duty is only going to be more closely observed and policed by the courts and that the whole process of dispute revolution is going to go through further radical scrutiny and reform.

Nick Deal
Barrister
Head of Expert Witness Training, Bond Solon
www.bondsolon.co.uk

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Our online training programme for medical experts provides comprehensive, tailored medicolegal CPD. Module content includes lectures, practical examples, written exercises, MCQs, and interactive feedback sessions.

The feedback from those who have undertaken these modules speaks volumes as to the quality and benefit of using this method of learning.

I really enjoyed the modules and found it to be very interactive taking the same case through from report writing to trial with simulated meeting of experts and conference with counsel. The option to get face to face feedback on my report was hugely beneficial along with the ability to 'ask an expert' on other practicalities around becoming a medicolegal expert. I found the speakers very good and their expertise in the field was evident, making my understanding of the more complex legal bits easier than I had thought it would be!

Dr Gavin Tunnard,
Emergency Medicine Consultant

I really enjoyed the course and did not feel it was less worthy for being online. The content was excellent and it has given me confidence in my fledgling medico legal practice. The session at the end with Isabel was very useful and she gave me about 40 minutes of her time which was great. Thanks again.

Mr Robert Mason,
Consultant Urologist

I booked the online Inspire MediLaw training course in report writing in order to improve my understanding of the law and my requirements in preparing medico-legal reports.

The online nature of the course allowed me to fit the modules in around my clinical practice and other commitments, and gave me the opportunity to consider the topics in detail before moving forward.

The course is a great opportunity to learn from experienced members of the legal and medical profession about the theory and practice of medico-legal work. I found the online Zoom consultation to review my report writing particularly useful.

Mr Nick Peterson,
Consultant Orthopaedic Surgeon

At Inspire MediLaw, we believe in the importance of personal interactions in building professional relationships. Conversations over coffee, and engaging in discussion around a table with peers, is a great way to build your medicolegal network and also enables us to identify, and provide support for, the specific needs of individuals undergoing our training.

Our two day Expert Witness training is facilitated by experienced medical experts and lawyers. They outline the litigation process and highlight areas where expert involvement is key. Through discussion and practical exercises, delegates get to grips with the legal tests applied in establishing a clinical negligence claim, and understand how to participate in litigation with integrity, objectivity and excellence.

Attending in person allows you to have your questions addressed immediately, in the context in which they arise, by experienced professionals. You are encouraged to share your knowledge and experiences with others on the course, and to benefit from the same. Opportunities to network over coffee or mealtimes cements that connection between you and our training faculty, and introduces you to a range of well established medicolegal practicitioners.

A recent delegate sent us his reflections on attending our two day Expert Witness Training in Oxford. Here's what he had to say:

"I had undertaken a small number of medicolegal reports throughout my 20-year consultant career, and prepared a small number of joint expert statements, but had no medicolegal court experience. I wanted to obtain more formal training in this area, to benchmark my current practice against the expected standards and to get a better

understanding of the expectations of an expert in the court situation.

The breadth of clinical and medicolegal experience among those of us attending the 2-day course made for interesting and informative exchanges during coffee breaks and meals. The relaxed setting and highly approachable team delivering the training made for an interactive learning experience that, as well as being comprehensive, was readily adaptable to meet the individual requirements of the attendees.

Paul Sankey gave a very informative overview of the legal journey of a claim, and the solicitors expectations of an expert. I picked up a number of useful pointers that were going to enhance the quality of my medicolegal reports in the future, and it was only at this point that I became aware of where in the timeline of a claim the joint experts statement is prepared. I had no idea that I had been that close to appearing in court as an expert in previous cases!

It can often be very difficult to assess the benefits of training courses such as this one, but only 2 weeks later I had to attend a County Court, as the claimant's expert in a case that I had "inherited" at a late stage in proceedings, following the retirement of the expert who had initially been instructed. I was able to approach this with a greater understanding, and much less trepidation, than would have previously been the case.

I was fortunate to be able to consolidate the knowledge and skills acquired at the training course in this manner, and strongly believe that the training has made me a better expert, equipping me with a better knowledge and understanding of my role in the process, that should enable me to produce reports that more accurately meet the requirements of the Court."

Mr Ken Woodburn,
Consultant Vascular Surgeon

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Prove it! Witness and Expert Evidence in 2020

by Lucinda Robinson
at Fenwick Elliot

Who doesn't love a good "whodunit" story, a game of Cluedo or a murder mystery party? Unscrambling the mysteries, following the clues and finding that vital piece of evidence to crack the case is all exciting stuff. Confession time: an interest in investigating and piecing together evidence might help explain why I like litigation. But, if you cannot rely on your evidence, your case is going to collapse.

Translating this into the commercial world, a case cannot be won on argument alone. It will turn on the evidence; documents, witness statements and expert reports. Recent developments relating to factual and expert witnesses demonstrate the importance of ensuring evidence is credible. These need to be understood and applied by anyone challenged to "prove it". Here are the case notes.

Witness Statements

When drafting witness statements, it is tempting to present only what is favourable and positive to the client. The recent case of *DBE Energy Ltd v Biogas Products Ltd* is an excellent demonstration of how that can backfire.

The Defendant attempted to demonstrate that the scope of its design responsibility for components design, manufactured and supplied for incorporation into DBE's new anaerobic digestion facility, was limited and that it was not in breach of its duties. Unfortunately for the Defendant, one of its witnesses was not particularly credible.

The judgment records that the witness had not dealt with various documents contradicting his evidence and had included errors in the statement that were exposed during cross-examination. Conversely, the Claimant's witness evidence was consistent with the documents. The Judge decided to test the Defendant's witness evidence against the documents and, if and where it was inconsistent, to find that it was unreliable.

Credibility was also an issue in last month's judgment in *Essex County Council v UBB Waste (Essex) Limited*. The contemporary documents of UBB's key factual witness were littered with swearwords and deception, indicating a lack of integrity and an effort to gain commercial advantage at the expense of openness and honesty. Pepperall J decided to treat this witness's evidence with caution unless it was otherwise corroborated. In contrast, the Judge identified praiseworthy traits of other witnesses including being straightforward, making proper concessions and taking time to consider documents carefully and give accurate answers under cross-examination. These were good indicators of reliability.

The courts' preference for documentary evidence over witness statements is not new. In 2013 in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* for example, it was stated that: *"the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts"*.

The message is clear. Witnesses should give evidence that is consistent with the documents. Rather than ignore unfavourable documents it can be better to acknowledge and explain them. Whilst tackling them head-on may raise some difficult issues, these are likely to be confronted in cross-examination anyway. Dealing with them in the witness statement allows the witness to present their view in a considered way without the pressure of being in the witness box and helps preserve credibility.

Expert Evidence

Impartiality

DBE v Biogas also provides a salutary lesson for experts who cross the line from providing impartial opinion to bias, advocacy and even judgment.

The Defendant's expert was found wanting because he:

1 attempted to include inadmissible material in both his report and in the experts' joint statement;

2 advocated for the Defendant in his reports by accepting its version of events without recognising the differences in the Claimant's version of the story; and

3 determined facts that were not agreed, which is the role of the court not the expert.

In doing all this the expert gave the impression that he was biased, so where the experts disagreed the Judge preferred the evidence of the other expert.

In *Essex v UBB Waste* the problem was that UBB's technical expert did not appear to be independent or impartial. He was the MD of a firm of consulting engineers who had provided significant design advice to UBB during the course of the works, was acting as expert on the proviso that a claim against his firm notified by UBB was dropped and so had a vested interest in UBB's successful defence. Pepperall J stated

that the conflict of interest should have been disclosed and, if it had been, permission to rely on him as expert may not have been granted. In addition, the expert had strayed into advocacy and put forward some arguments that were simply not credible. Overall, the Judge determined that his evidence had to be treated with caution but did not go so far as to render it inadmissible.

These indictments are consistent with the vociferous criticism of other experts overstepping the mark by Fraser J in the past two years, first in *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd* and subsequently in *Bates and others v Post Office Ltd*.

Clearly, and rightly, the TCC will not stand for experts expounding partisan positions or attempting to play judge. Expert evidence is often critical in construction cases, so it is essential that parties and their legal representatives ensure they can rely on their experts. Impartiality must be insisted upon. If the expert appears to show bias then their evidence will be discredited and material that could have been useful and persuasive will be wasted.

Independence

A challenge to the independence of expert evidence was made in *Blackpool Borough Council v Volkerfitzpatrick Ltd & Ors* in an effort to have the evidence and claim dismissed. Here the parties' respective experts agreed to use a single testing house to provide data on which they could each opine. The Claimant's expert engaged in a unilateral contact with the testing house and requested additional tests, the results of which it shared with the Defendant. The Defendant later sought to have the Claimant's expert evidence and claim struck out because of this.

The court noted that the Claimant's expert's behaviour was not best practice and it should have copied in the Defendant, but decided it was not in breach of its duties. The behaviour was not contrary to the case management order, the testing house was not a single joint expert and, whilst the parties had to be transparent, a "running commentary" was not necessary. There was no evidence of impropriety compromising the independence of the testing house and rendering the results unreliable, so the evidence and claim could stand on this occasion. It seems that there must be clear evidence of impropriety for such a challenge to succeed.

Conflict of Interest

A challenge to expert evidence on the grounds of a conflict of interest has succeeded this year. In *A Company v X, Y and Z* three defendant companies were involved, all of which belonged to one group that was engaged in providing expert consultancy services globally. Injunctions were obtained to prevent all companies from acting for a party to an arbitration because an expert from the same consultancy group was already acting for the opposition party, albeit in a different but related arbitration.

On the facts, the risk of disclosing documents between the group companies had been overcome in practice, but that was not enough. A fiduciary relationship was identified between the consultancy group and the

first party for whom it had agreed to act. This prohibited the rest of the consultancy group from acting for the other party because the whole group already owed its undivided loyalty elsewhere.

This decision has significant repercussions. A fiduciary relationship, one of trust and confidence, imposes duties beyond typical contractual confidentiality responsibilities and is not one that most consultancy firms would have expected they were taking on with the role of expert. Previously, experts were not on the recognised list of fiduciaries. Whilst this case was determined on its own facts and particular retainer, the situation described is fairly typical and so the principle appears to have wide application.

Further, as the larger, international and multidisciplinary consultancy firms increasingly expand to swallow up smaller outfits, the number of options for a party seeking expert support reduces. This decision may restrict those options even more because once an instruction is accepted by one expert, in one discipline, in one group company and in one country, that prevents any other expert in the same group from acting for another party on a related matter, even if the discipline, legal entity and country are different and an information barrier could be put in place.

Experts need to exercise caution in their actual and potential conflict checks and be ready to turn down instructions they may previously have accepted. If an existing conflict is suspected, then parties to existing litigation and arbitrations may have grounds to challenge their opponent's expert.

Case Closed

A case cannot be proven without evidence, so the credibility of that evidence must be preserved. Parties must take care to ensure their expert has no conflict of interest and remains independent and impartial. They must also remember that the place for argument is in pleadings or submissions. Factual witnesses should stick to the facts and experts should stick to impartial technical opinion. It does not take a supersleuth to work out that when witnesses stray beyond their territory, they risk compromising the integrity and effectiveness of their evidence.

Many thanks to Lucinda Robinson and Fenwick Elliott for permission to reprint this article.

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Dermal Fillers: Lack of Regulation Poses a Real Threat to Patient Safety

by Dr MJ Rowland-Warmann

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Non-surgical treatments such as Botox and fillers account for nine out of 10 procedures and are worth £2.7billion [1].

Whilst cosmetic surgery numbers are static, there has been an explosive increase in the UK's non-surgical treatment market, with Botox and Filler treatments becoming ever more popular. This has coincided with the rise of social media and many younger patients are now seeking non-surgical procedures, seeing these as inexpensive and quick fixes added to their beauty regimes. Botox and dermal fillers have become the social norm and whilst a wide range of ages are seeking treatment, there are serious risks to patients due to the almost completely unregulated nature of the non-surgical aesthetic industry [2].

The main problems in aesthetic medicine leading to litigation include failure to adequately consent the patient including warning the patient of the possible risks, dissatisfaction with the cosmetic outcome, and complications arising from treatment [3]. However, due to lax regulations surrounding the type of practitioner who can inject, in addition to the broad range of products on the UK market today, patients are at increasing risk of coming to harm.

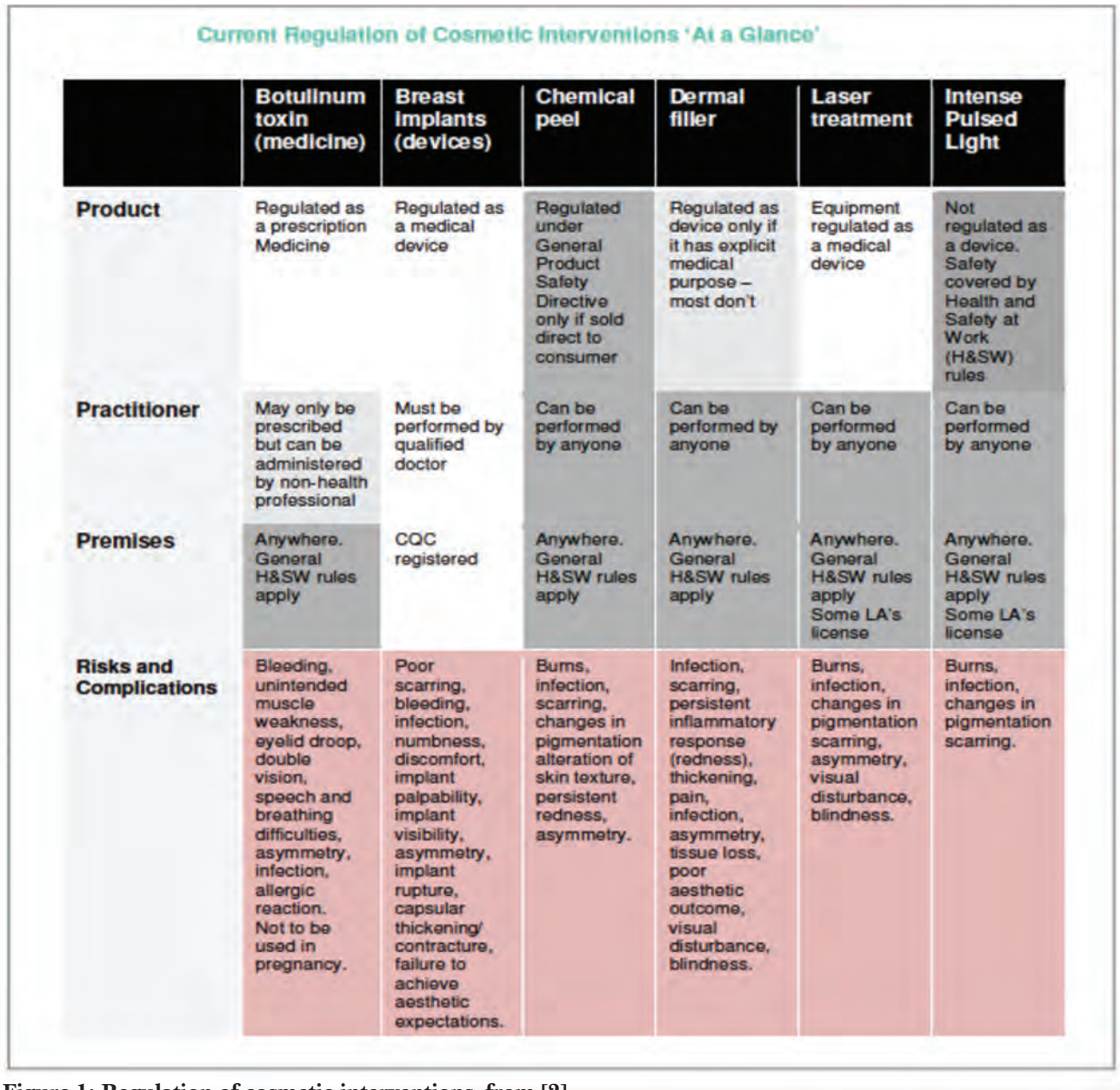
Regulation in the UK

The HEE and Keogh reports into non-surgical cosmetic practice found that in 5 key areas, namely Botulinum toxin, dermal fillers, peels, laser and IPL there is almost no regulation, leaving patients vulnerable, but also that there has been varying standards of care in key elements such as practitioner competence, consenting and complication management in cosmetic treatments [2, 4]. Figure 1 illustrates the various procedures. Neither product, practitioner nor premises have a requirement to be proven safe.

Reform has been suggested. Public opinion is that non-surgical procedures must be less dangerous, but serious complications can occur in either surgical and non-surgical treatments, and current legislation is not protecting patients effectively as it is based largely on guidance rather than concrete regulation [2].

There are worrying parallels between the state of the regulation with regard to non-surgical treatments using dermal filler products and the PIP scandal. This brought to light concerns about how the cosmetic surgery industry is regulated, but unfortunately at a stage when many thousands of patients had already suffered injury. Approximately 47,000 women in the UK, and 400,000 worldwide, were affected by faulty breast implants with a rupture rate of around 15.9-33.8% [5, 6]. Post-2000 PIP devices were shown to contain a non-approved industrial-grade silicone and were immediately removed from the market after an MHRA warning. However, their low cost meant they were used long after concerns had been voiced some years earlier [6, 7].

Whilst the MHRA did not advise imminent health risks, women in other countries such as Germany, Netherlands and France were advised PIP implants should be removed. This sparked a debate over cost versus care: some UK surgical providers simply changed their company name or refused to offer assistance to patients, loading the burden of cost onto the NHS [7]. It is most likely no accident that in the UK, with healthcare free at the point of delivery and a corporate veil to protect CEOs, moral and legal responsibility have been largely evaded with corporate preoccupation with profits acting against patient care. With more patients being injured by dermal fillers each year, there are worrying similarities in the management of complications when these patients attend NHS institutions, with the chasm between



Current Regulation of Cosmetic Interventions 'At a Glance'

	Botulinum toxin (medicine)	Breast implants (devices)	Chemical peel	Dermal filler	Laser treatment	Intense Pulsed Light
Product	Regulated as a prescription Medicine	Regulated as a medical device	Regulated under General Product Safety Directive only if sold direct to consumer	Regulated as device only if it has explicit medical purpose – most don't	Equipment regulated as a medical device	Not regulated as a device. Safety covered by Health and Safety at Work (H&SW) rules
Practitioner	May only be prescribed but can be administered by non-health professional	Must be performed by qualified doctor	Can be performed by anyone	Can be performed by anyone	Can be performed by anyone	Can be performed by anyone
Premises	Anywhere. General H&SW rules apply	CQC registered	Anywhere. General H&SW rules apply	Anywhere. General H&SW rules apply	Anywhere. General H&SW rules apply Some LA's license	Anywhere. General H&SW rules apply Some LA's license
Risks and Complications	Bleeding, unintended muscle weakness, eyelid droop, double vision, speech and breathing difficulties, asymmetry, infection, allergic reaction. Not to be used in pregnancy.	Poor scarring, bleeding, infection, numbness, discomfort, implant palpability, implant visibility, asymmetry, implant rupture, capsular thickening/ contracture, failure to achieve aesthetic expectations.	Burns, infection, scarring, changes in pigmentation alteration of skin texture, persistent redness, asymmetry.	Infection, scarring, persistent inflammatory response (redness), thickening, pain, infection, asymmetry, tissue loss, poor aesthetic outcome, visual disturbance, blindness.	Burns, infection, changes in pigmentation scarring, asymmetry, visual disturbance, blindness.	Burns, infection, changes in pigmentation scarring.

Figure 1: Regulation of cosmetic interventions, from [2].

privately conducted procedures and state-funded healthcare opening. I am also witnessing a lack of knowledge and helplessness of those working in the NHS in dealing with dermal filler complications they are presented with.

Currently, some dermal fillers are exempt from EU Product Safety Directives as they can be used as part of a professional service and those not claiming a medical purpose are exempt from EU Medical Device Regulations entirely. There are over 250 dermal fillers in the UK market and patients currently rely on the manufacturer's declaration of safety and the practitioner's assessment of the product to ensure treatment success. This in turn results in practitioners often being swayed to purchasing products on the basis of cost, and products that would be deemed unsuitable for use by medical professionals are often seen being used by non-healthcare providers with little knowledge of what makes a good product safe, or a safe product good. This is clearly dangerous, and it is argued that all cosmetic implants, including dermal fillers, should be reclassified as prescription-only medical devices (POM) and subject to CE marking under the EU Medical Device Directive [2]. The practicalities of this proposal are difficult, with MHRA clearance required for every single product under this scenario and reclassification under POM terms may be a challenge. Prescription medications do not carry VAT, and the cynic in me wonders whether the intransigence towards regulating dermal fillers stems from the millions of pounds the government currently receives in taxes each year from the sale of dermal filler products.

Complications caused by non-healthcare practitioners are on the rise

Not a month goes by when there isn't an article in the press or investigative feature on a news programme about non-healthcare practitioners causing harm with dermal fillers.

"Botched dermal fillers" is a common occurrence, with the highest rate of complaints in the 18-25 age group [8]. Whilst all articles highlight the lack of

regulation surrounding the provision of non-surgical treatments, very little is done to protect vulnerable patients from dangerously unqualified practitioners.

"Botched" procedures may include instances where filler is placed badly, resulting in an unaesthetic result. However, many more serious complications can be caused by incorrectly placed dermal fillers. Instances of serious infections due to patients having treatment in unclean and unsuitable environments are rising. More worryingly, "dermal filler emergencies" are occurring more frequently. These are potentially catastrophic events such as severe allergic reactions or inadvertent injection of dermal filler into an artery which can lead to tissue necrosis (death of the tissue), blindness or even stroke. It cannot be disputed that non-healthcare practitioners are ill-positioned to identify and treat any medical complications of aesthetic treatment, let alone those that require swift emergency management

Save Face is a national, government approved register of accredited healthcare practitioners who provide non-surgical cosmetic treatments such as dermal fillers and anti-wrinkle injections. According to their Consumer Complaints Audit Report of 2018, 83% of complications that were reported to SaveFace were carried out by non-medical practitioners such as beauticians, hairdressers and laypeople [9]. The figures for 2019 show an alarming 73% increase in the number of complaints received by Save Face in one year, a worrying trend that is getting out of control [10].

The Save Face complications report found that 62% of patients who suffered complications found their practitioner on social media, with a staggering 64% choosing them based on price [9].

33% of complications that arose were treated in a domestic setting, and it is not uncommon, especially when presented with a complication, to be told that the patient in question had their treatment performed at their own home [9].

Both of these statistics illustrate a dysfunctional industry and are a far cry from the well-regulated and safe environments that patients should come to expect when having any medical procedure performed on them.

Due to there being very little legislation governing who should be able to treat patients, and the lack of standards surrounding those that perform non-surgical treatments, complaints against non-healthcare practitioners often remain unresolved. Practitioners who are non-healthcare are not accountable to a professional register, often untraceable and frequently uninsured, leaving the patient with no opportunity for redress when something has gone wrong – and in almost a quarter of the complaints received by Save Face the patients were ignored by the person who treated them [9].

The increase in the rate of referrals for complications that I have seen in my practice is astonishing. Whilst I received around 2-3 referrals of poorly placed lip fillers per year when I set up in practice in 2013, by the end of 2019 I was receiving 2-3 enquiries per day. It is not only the rate of complications from dermal fillers that is increasing, but also the severity. More than three-quarters of the complications that I see that require intervention to resolve have been caused by non-healthcare practitioners who often refuse their patients help after being informed of the complication. Unable due to lacking medical education – or unwilling – to help those they have injured by poorly performed aesthetic procedures, these patients end up shouldering additional costs to have problems with their treatments corrected by medical professionals, or burdening the already overloaded National Health Service.

Ability to obtain products

Obtaining products for use in non-surgical procedures in the UK is as easy as shopping on Amazon. A Google search reveals that purchasing dermal fillers online is not only simple, but also requires nothing in the way of certification in order to complete the transaction and receive the products directly to your door.

A myriad of products, most of which I have never heard of (or would dare to use) greets me on one of the major sites. Some of the prices advertised for "genuine" products seem too good to be true.

Likely, this is because they are.

I am spammed daily on social media by accounts touting products for non-surgical rejuvenation. My inbox sometimes looks more like a bazaar than the direct messages of a medical professional. I am offered "low cost" dermal filler "genuine dermal filler products", promising me "top brands at rock bottom prices". Often the accounts are based overseas, offering me apparently reputable products at prices that I would never get here in the UK. It is easy to see how those with limited medical knowledge or insight would be attracted by these proposals.

As at 2018, the MHRA had seized over £10.9 million in counterfeit drugs and made close to 900 arrests [11]. Counterfeit products, those that are designed to deceive the purchaser into thinking they are buying an original product, are different from fake products, which are often differently named yet claiming to be similar in terms of efficacy, purity and use [12]. Many counterfeit products originate in Asia, and their potency may be varied, some being wholly ineffective but others possessing dangerously high quantities of potentially harmful ingredients, such as has been found in cases of counterfeit Botulinum Toxin [13]. The danger to patients is vast.

These websites are not aimed at responsible medical professionals who source their dermal filler products from pharmacies or the manufacturers direct. These online sellers prey on the fact that reputable pharmacies will not sell to non-healthcare providers but due to the government leaving open this loophole whereby non-healthcare practitioners are legally allowed to inject, inferior quality, counterfeit and fake

products are flooding the market and being used on unsuspecting patients.

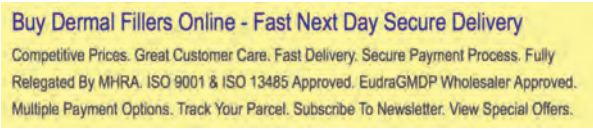


Figure 2: Copy of a Google advert. The glaring error on line two gives a clear indication of the level of care that goes into the industry distributing filler to non-medical professionals.

It is not only poor quality and counterfeit products being sold to practitioners in the UK. Products like botulinum toxins, a POM, are often obtained by beauticians and other non-healthcare providers through a legal loophole that enables them to practice in the "grey zone", sourcing them from registered medical practitioners acting as their "prescriber". The law dictates that a POM must be prescribed by a qualified and licensed medical practitioner after a consultation with the patient to assess their need and suitability for the treatment. Whilst this in theory should mean that all patients who receive botulinum toxin have been seen by a medical professional, in practice this is vastly different. An overwhelming proportion of patients who have botulinum toxin treatment by beauticians report never to have seen a prescribing doctor, dentist or nurse for the initial consultation, are rarely informed of the risks and benefits involved in the procedure, and are never subjected to anything that could be interpreted as a consent process. This is a clear breach of the law and potentially puts patients at significant risk.

Current Regulation in Practice

In the eyes of Keogh, "fillers are a crisis waiting to happen" and the outcomes of several reports in the PIP aftermath included assessment of product safety, practitioner training, public information and options for redress as key elements, highlighting them for improvement in safety in cosmetic procedures [2, 4, 14].

Products and Practitioners

With the exception of Botulinum Toxin which is a POM, non-surgical cosmetic interventions can be performed by anyone, and anyone can set up training courses. There are no guidelines regarding what constitutes adequate training or verification of courses at present. The responsibility is the practitioners to decide whether they are performing safely and to a high standard following training which, itself is of a varied standard and usually short (hours or a day), leaving practitioners ill-equipped to deal with adverse events [2].

Worryingly, training courses for beauticians are often poorly structured, lack specific aims or learning outcomes, and are conducted by unqualified persons. Researching for a report some months ago, I found a well-advertised and popular training academy for non-medical providers of dermal fillers. The "trainers" were a motley crew of an ex-boxer with no medical qualifications and a doctor who was erased from the General Medical Council register in 2014. Considering medical professionals are subject to stringent regulation often not only in their professional lives but also have their personal lives examined by regulators, it is difficult to see how current regulations are adequately protecting the public from rogue practitioners without any medical knowledge.

Anyone can buy dermal fillers and practise on patients, without any training in anatomy, physiology, complication management or risk awareness. Often these practitioners use misleading titles which can further confuse the public, such as "aesthetic therapist", which mean very little. Non-healthcare providers are endangering the public by practising singularly without support from clinicians and without the knowledge to diagnose or treat the patient if something were to go awry [2].

Currently there is no specialty register for cosmetic surgery, meaning surgeons are often not directly qualified in the cosmetic field. It is expected that a practitioner should act within their competence, which will increase with experience. It is however the luxury of experience that defines competence and the knowledge of when to refer that currently affords this, rather than a set of rules followed by surgical and non-surgical cosmetic practitioners. Many surgical teams do not perform procedures often enough to be competent and some consultations are not carried out by surgeons, inhibiting successful outcomes [15]. Regulators have attempted to improve standards by introducing revalidation (GMC) and CPD records (GDC) but the standards set for cosmetic practice are often vague and undefined [2]. This is all well and good when we are talking about cosmetic procedures that require medical professionals and a controlled surgical environment to carry out. However, it seems that the problem in non-surgical practice is out of control, dangerous and the government are legislating the wrong providers, focusing their efforts on registered medical practitioners rather than those with a propensity to cause serious damage.

Regulation of non-surgical practice has been attempted by government initiatives such as IHAS (Treatments You Can Trust) and companies such as Save Face; they are optional and have contributed little to eliminating the thousands of unqualified practitioners treating patients. The nature of this self-regulatory industry means that subscription is low, and it is only those who are already performing at an acceptable level who sign up, not those under performing in all aspects outlined in the Keogh report and who would arguably need it most [2]. Regulation of the most dangerous group performing dermal fillers – beauticians and other non-healthcare practitioners – is entirely absent.

Informed public

Consent is a process rather than just a document and patients must be consented adequately in order to consider their options and information available to

them. Often patients have little understanding of the procedure, or the product they are being treated with and this makes it very difficult to make an informed choice [2].

Marketing messages are confusing patients. Marketing is rarely honest or responsible, with financial inducements, discounts and time-limited deals being used to coerce patients into treatments, whilst misleading statements about practitioners and clinics and unrealistic claims about surgery outcome are equally reprehensible [14]. Many practices advertise prescription-only medicine, which is illegal and may conflict with the health needs of the patient. Compliance with advertising standards is poor, at only 41% [16], and is leaving vulnerable patients exposed to ruthless marketing tactics [16, 17]. Enforcing advertising guidelines has been reactive, with offenders only occasionally getting a slap on the wrist and legislation being produced in a piecemeal fashion.

On January 31st 2020 the Advertising Standards Agency (ASA) and Medicines and Healthcare products Regulatory Agency (MHRA) issued an enforcement notice relating to the advertisement of botulinum toxin. Although it is already illegal to advertise prescription-only medicines in the UK, recent rises in breaches of this law by companies on social media resulted in a clamp-down on paid-for advertisements, non-paid for posts and influencer marketing which has seen an explosive increase [18]. Whilst it is a step in the right direction and in favour of tighter regulation in non-surgical cosmetic treatments, non-healthcare practitioners are not accountable to a regulator and despite the recent threat of enforcement action have changed very little about their advertising strategies of botulinum toxin on social media. Once more tighter regulation has been applied to the lower risk groups with the high-risk providers of treatment being allowed to carry on as before.

Accessible solution and redress

Due to substandard regulation, non-surgical providers are not necessarily location-bound, do not need complaints procedures, and are ill-equipped for emergencies. For non-healthcare providers, there is no requirement for insurance. Professional bodies require indemnity for registration to protect both patients and practitioners and non-healthcare practitioners seem to fly below the radar [2, 17]. It is unacceptable to conduct medical procedures at home, such as at "Botox parties", which display a total disregard for patient safety in venues that are incompatible with standards set down by any regulator – yet they are still commonplace [14].

A key issue is the provision of emergency care - often the provider contracts out of care when things go wrong, letting the NHS foot the bill or simply expecting the patient to carry additional financial responsibility [4, 14]. NHS hospitals are often not the site of private interventions in surgery yet are used to shoulder the cost when re-admission is necessary [15].

The way forward.

A regulatory framework that is realistic, achievable and appropriate is needed. Products must be safe, practitioners have appropriate skills, and treat patients with respect. It is important that expectations of the service users are met, in terms of outcome and the process by which the treatment is conducted, and for there to be continuity of care [2].

A regulator that ensures accountability of practitioners for surgical and non-surgical interventions should be established to ensure the necessary knowledge, skills and values of the providers.

Non-healthcare providers conducting medical procedures is subject of much debate. Most clinicians including me would welcome the withdrawal of privileges from these individuals by means of legislation. However, in the absence of this, non-healthcare providers should be supervised by a clinical professional. This should include being professionally accountable and holding an indemnity and a complaints procedure in place; whilst de rigueur for those from a healthcare background, this must be enforced for other providers. A register of indemnified practitioners would further improve patient awareness [2].

Safe premises mean that infection control and patient welfare is of paramount importance in order to be equipped to deal with adverse event management and medical emergencies. Whilst already regulating surgical practices, non-surgical providers should be required to register with the CQC and be subject to more stringent regulation. Whether dermal fillers become POMs or not, a mandatory registration for non-surgical providers with the CQC would subtract a lot of the rogue operators from the industry whilst simultaneously raising funds for the Department of Health with registration subscriptions.

In line with ethical marketing, time-limited deals and financial inducements should be banned and the advertising of POM should be restricted. This is currently not enforced widely enough. Regulators are not perceived to take a tough enough stance on breaches in the law, fines being limited and often not being sufficiently punitive to change the behavior of those in contravention of the laws.

Legislation has developed in a reactive fashion. Both minor and major interventions are not well regulated and self-regulation has failed due to the diverse nature of the industry and optional compliance, especially in non-surgical practice. Voluntary codes do not regulate unscrupulous practitioners [15]. Patients wrongly assume that because they are committing to a medical procedure it must be adequately regulated [2, 17].

The Keogh report, HEE document and the RCS Standards for Cosmetic Practice have illustrated grave problems in the way that the cosmetic industry operates. Legislation does not seem to adequately protect the public, especially with regard to non-healthcare providers conducting medical procedures without clear licensing.

The pillars of these reports are Competency, Consent and Complications. Competency is the training and the appropriateness of the service, taking into consideration the practitioner and products. Consent is a process, including the agreement to treat but also the information needed to make this decision. Complication management is essential, both when things go wrong in the immediate and long term, affected by the method of complaint resolution and the level of practitioner indemnity. In a well-functioning responsible practice, these key elements are a matter of routine.

Cosmetic interventions are an evolution of medicine in line with the needs of the patient population. Even though elective, it does not mean that cosmetic medicine needs to be any less regulated and attempts must be made to regulate it for the protection of its users.

There has been repeated failures in protecting patients despite a history of well-documented problems - first Meme, then PIP, and possibly soon to be dermal fillers [7]. Regulatory processes have failed patients and the system cannot be fixed without a complete overhaul. There is a discord between device regulation and the regulation of professionals. Without consistent professional standards, product safety improvements and patient care safeguards in a clearly structured manner, the dangers to the public will not be remedied and will have serious consequences.

This article originally appeared in our Spring issue, it was not credited to its author **Dr MJ Rowland-Warmann.** We apologise for this omission and reprint the article with the correct credit here.

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Cosmetic Surgery Trends: Reduction in overall numbers as industry associations campaign for education and tighter regulation

The British Association of Aesthetic Plastic Surgeons (BAAPS); the only organisation solely dedicated to advancing safety, innovation and excellence in cosmetic surgery; has released its annual audit. According to the new figures, nearly 27,000 procedures took place in 2019, a decrease of 7.5% from the previous year.

As with past years, women underwent 92% of all cosmetic procedures recorded in 2019. The three most popular procedures for women were breast augmentation (down 11%), breast reduction (down 2%) and abdominoplasty also known as the tummy tuck (up 7%).

Former BAAPS President Rajiv Grover, who compiles the audit on an annual basis, commented: "The 2019 BAAPS audit is very positive from our point of view as it shows that whilst the overall number of procedures has dropped, the work we've been doing to educate about the life-changing implications of cosmetic surgery and the need to reflect carefully before taking this route is working. We're seeing greater emphasis from surgeons on psychological assessment, as mental health awareness has taken centre stage both politically and in the news agenda which is so important when putting patient's interests first."

Grover continues "In previous years we've seen popular culture heavily influence the type of procedures that are most in-demand. Reality TV, and social media in particular, are powerful influences, but are a double-edged sword when it comes to Aesthetic Surgery. As patients strive for the 'filter perfect' look that is plastered all over our smartphones and TVs, many turn to surgery for a 'quick fix' - which is a concerning theme that we've noticed. BAAPS members have seen a rise in patients seeking inappropriate cosmetic treatments and we have been advising more patients against surgery than ever before."

Male cosmetic surgery accounted for 8% of the 2019 total. The Lower Body Lift proved to be more popular with men than it was last year, with 88% more men opting to undertake the procedure than last year. Overall, the audit revealed that male cosmetic surgery dipped by 9.2% compared to the previous year.

This may in part be tracked back to the growing awareness of mental health issues. Particularly men's mental health which has gained momentum in the past 12 months, with major public figures like Prince William and Prince Harry promoting campaigns to remove associated stigmas and urge a more open dialogue.

Grover concludes "There is evidence that suggests people who struggle with their psychological health can feel pressured to turn to 'quick fix' procedures to improve their appearance. A thorough assessment of the psychological welfare of patients before they commit to surgery is crucial. We've recently introduced a BAAPS's psychology course to guide surgeons through these sensitive conversations and to underline the need, whenever necessary, to advise against having surgery."

According to BAAPS President and consultant plastic surgeon Paul Harris, the small dip in cosmetic surgery procedures could also be linked to the general decrease in consumer spending.

Harris comments "Economic uncertainty and decrease in overall consumer spending could be contributing factors to the dip in the number of procedures, as shown by the BAAPS data. Year on year the cosmetic surgery industry continues to bloom, and we're noticing that our patient's confidence in their decision making is stronger"

Harris concluded: "Undergoing a cosmetic procedure is never a decision to take lightly – that's why the BAAPS always advocates that any procedure should be preceded by a robust assessment of the patient's physical and psychological wellbeing, something all BAAPS surgeons do as standard."

The BAAPS is the only surgical association to mandate of its members that they collect such data and is the only source of reliable data available in a completely unregulated market.

Policy Statement from The British Association of Aesthetic Plastic Surgeons (BAAPS)

The BAAPS has created a policy statement to provide guidance to surgeon members in response to the challenge of COVID-19.

At this time, it is clear that the United Kingdom is facing an unprecedented healthcare crisis which is likely to affect all sectors of society over the coming months. COVID-19 will inevitably impact on the delivery of emergency and routine surgery due to physical and human resource limitations. This is likely to lead to the suspension of all non-essential surgery including aesthetic surgery. We are therefore facing a very difficult challenge in the months to come, particularly for those who only work in the private sector.

As evidenced by developments over the last few days, it is likely that our NHS will have to manage increasing numbers of COVID-19 cases and clinical services will become stretched. This will be aggravated by staff shortages due to sickness, imposed isolation and caring responsibilities. Circumstances will vary depending upon the local NHS requirement to request support from private providers, but in order to save lives, both private sector facilities and staff may be sequestered to bolster the NHS. Our members should support this need where possible. Whilst many patients will still want to be operated on and there maybe facilities willing and able to carry out such surgery, we urge members to consider the impact of each case performed on the wider healthcare system. It is also vital to realise the importance of using our own skills as doctors to support patients outside aesthetic surgery and to consider taking up supportive roles within the NHS.

In order to limit patient travel, each member should consider reducing outpatient treatments and clinic appointments to only those that are deemed necessary.

Whilst adhering to general advice on travel, the BAAPS also advise that all non-essential travel both within the UK and abroad should be cancelled. This is to ensure that our members are available to help health services cope with COVID-19. A second aim is to minimize any risk, however small, of transmitting the virus to other groups of surgeons and/or patients, and to avoid the potential need for self-isolation for two weeks on return to the UK. Our priority is to look after our members so they can protect patients.

This means that from Monday 16th March, the BAAPS recommends that all conferences and training courses that require travel should be postponed unless they can be delivered by video call or webinar. Events within hospitals and private care facilities may continue if local circumstances allow. These arrangements should remain in place until advised otherwise.

We will continue to monitor and advise as required over the coming weeks and months.

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My private work encompasses a wide spectrum of minimally invasive and surgical procedures for reconstructive and aesthetic indications with special focus on burn care, scar management and body contouring. My practice at the London Scar Clinic is bolstered by a rich multidisciplinary environment, capable of addressing the multifaceted needs pertinent to scar management including physical therapy and psychological support. I also have a specialist interest in laser and light based devices for the treatment of a wide range of skin conditions (traumatic and age related).

I lecture nationally and internationally on burn care and scar management and help promote better education and awareness on skin diseases through my role as a British Skin Foundation spokesperson and full membership of the Global Scar Society.

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Edinburgh Scientists Study How Covid-19 Affects the Heart

BHF-funded researchers are supporting global efforts to combat Covid-19 and better understand how it affects the heart and circulatory system.

Heart and circulatory diseases are often associated with severe Covid-19, and people with these conditions who are infected with the virus are at greater risk of complications, which can seriously affect patient outcomes.

A number of projects are currently underway involving scientists from our Centre of Research Excellence at the University of Edinburgh.

Assessing damage to the heart

Professor David Newby, Professor Marc Dweck and their team are using scanning techniques to assess the impact of Covid-19 on the heart. Following discharge from hospital, the participating patients have undergone a series of different scans to check the structure and function of the heart and the coronary arteries.

These images show doctors if they have had inflammation of the heart muscle, weakening of the heart muscle due to a stress response, or a heart attack linked to Covid-19. So far, the majority of patients have not had significant damage to their heart muscle. This suggests that any damage linked to the virus seen in other studies while patients are in hospital is likely to be short term.

In another study led by Professor Nicholas Mills, the researchers are aiming to evaluate the direct effects of Covid-19 on the heart by using routine healthcare information and blood test analysis to investigate damage to the heart muscle in patients with confirmed infection. They hope that these studies will provide insight into the indirect consequences of this pandemic to ensure that improved survival rate for heart patients are not undermined.

Viruses, including Covid-19, can cause damage to the heart even with no prior heart disease. Professor Andrew Baker's study compares heart cells from patients with Covid-19, with and without heart injury. They will examine the heart's responses, which could help with the management and treatment of patients with Covid-19 and other viral infections.

Our Associate Medical Director, Professor James Leiper, said: "Covid-19 presents an unprecedented challenge for the cardiovascular research community. However, we also have a huge opportunity to harness the expertise of our scientists in Scotland and existing research infrastructure to better understand and tackle this new disease.

"Supporting people living with heart and circulatory diseases is our top priority. A better understanding of how Covid-19 affects the heart and circulatory system – in the short and longer term – may reveal key areas to help fight this devastating disease and ultimately save lives."

Jim's story

Jim Cowan from Edinburgh took part in the heart scanning clinical trial after becoming ill with Covid-19 after a trip to Portugal in March, just when lock-down restrictions began to be imposed there. As he travelled back from his holiday, Jim started to feel unwell and after he arrived home his symptoms were worse. Jim called his doctor and he was admitted to hospital with suspected Covid-19 on 23 March. He spent the next six weeks in Edinburgh Royal Infirmary, including ten days in intensive care.

Jim says: "It was all quite a scary experience to realise that I was so unwell, but I kept looking ahead to the point when I could actually walk out of there. All the hospital staff were fantastic."

Jim was asked if he would participate in the research following his discharge. He explains: "I was happy to take part in the scanning trial – it certainly wasn't going to do me any harm and I felt it would be better to know if there was any damage to my heart. I also wanted to help build up more knowledge about the virus and how it affects people.

"The scanning process was very straightforward and I was reassured to find out that the results didn't show any problems with my heart. I'm now feeling in good health and back to full fitness, enjoying my walking and bowling and looking forward to my next holiday."

Maternal Mortality and Morbidity from Sepsis

By Professor Ronnie Lamont BSc MB ChB DM FRCOG. Consultant in Obstetrics and Gynaecology

Introduction

Maternal sepsis accounts for ~11% of maternal deaths worldwide and is the third most common direct cause of maternal death, and also contributes to other common causes of maternal death, such as haemorrhage and thromboembolism. Despite this, maternal sepsis has not attracted the same attention and research as other leading causes of maternal death. Failure to recognise sepsis early is a significant cause of preventable morbidity and mortality, resulting in delayed treatment and escalated care, which are critical to save lives. Our understanding of the pathophysiology of sepsis has markedly improved, and there is a greater appreciation of the interplay between maternal physiology and sepsis, which has important implications for the diagnosis of sepsis throughout pregnancy and the puerperium. This overview is a summary of a recently published review on recent advances in the diagnosis and management of sepsis in pregnancy (1).

The global burden of maternal sepsis

While sepsis is estimated to cause 9.7%, 11.6% and 7.7% of maternal deaths in Africa, Asia and Latin America/Caribbean respectively, maternal death from sepsis is also increasing in high-income countries. Investigators have suggested various factors, including increased antibiotic resistance, maternal age, co-morbidities and microbiological factors such as an increased incidence of E. coli and group A streptococcal infections. In 2014, the UK Obstetric Surveillance System reported a prospective case control study of 365 confirmed cases of severe maternal sepsis and 757 controls from all UK obstetrician-led maternity units. The incidence of severe sepsis was 4.7 of 10,000 maternities, and five women died (1.4%). Genital tract infection (31.0%) and the presence of E. coli (21.1%) were the commonest causes of sepsis. Women had statistically significantly increased risks of severe sepsis if they were from ethnic minority groups or had co-morbidities. The study concluded that the rapid progression to severe sepsis highlights the importance of early administration of high-dose intravenous (IV) antibiotics within 1 hour of hospital admission for anyone with suspected sepsis. Maternal sepsis can be caused directly by genital tract infections or indirectly by systemic infections such as pneumonia. In the UK, direct infection was the leading cause of maternal death between 2006 and 2008 (1.13 out of 100,000 maternities [26 individuals], having risen from 0.85 out of 100,000 maternities [18 individuals] in the previous triennium). The triennial report of the Confidential Enquiry into Maternal Deaths (2014–2016) revealed a lower incidence of direct infection-related mortality of 0.48 out of 100,000 maternities (11 individuals). This is thought to be due to increased awareness of sepsis among UK obstetricians as a result of the Royal College of Obstetricians and Gynaecologists (RCOG) Green Top Guidelines and the nationwide implementation of the International Surviving Sepsis Campaign. However, these figures do not include indirect causes of infection, such as pneumonia or influenza, nor do they account for deaths from major obstetric haemorrhage, secondary to uterine atony or disseminated intravascular coagulation caused by sepsis, which claimed four lives in the UK from 2014 to 2016.

Risk factors for maternal sepsis and septic shock

There are a number of risk factors associated with sepsis and progression to septic shock, which can be categorized as obstetric-related or patient-related risk factors.

Obstetric-related risk factors

The largest independent obstetric risk factor for postpartum maternal sepsis is operative intervention, and caesarean section (CS) is associated with a 5-20% increase in infectious morbidity compared with vaginal birth. CS after the onset of labour poses the greatest risk, followed by elective CS and then operative vaginal delivery, albeit that antibiotic prophylaxis and sterility are standard practice for CS in the UK. Other obstetric related risk factors include cervical cerclage, prolonged rupture of the membranes, a history of pelvic infection, a history of group B streptococcal infection or group A streptococcus in close contacts or family members, vaginal discharge, multiple pregnancy, retained products of conception, preterm prelabour rupture of membranes (PPROM) and amniocentesis or other invasive procedures.

Patient-related risk factors

According to the UK Obstetric Surveillance System report, patient-related risk factors for maternal sepsis include primiparity, pre-existing medical conditions, ethnic minority status, febrile illness or antibiotic use in the 2-weeks prior to presentation. Co-morbidities, which have an independent association with maternal sepsis include congestive heart failure, chronic liver or renal failure, HIV infection, autoimmune dis-

eases such as systemic lupus erythematosus and diabetes. The incidence of maternal sepsis is also a prime example of health inequality. There is a strong social gradient associated with maternal sepsis, and the incidence of maternal sepsis is significantly and progressively associated with lower socioeconomic status. In the US, reliance on healthcare through Medicaid is independently associated with development of maternal sepsis. Furthermore, socioeconomic deprivation is associated with a higher incidence of CS, which in itself is an independent risk factor for developing maternal sepsis.

Sources of infection and causative microorganisms

The most common source of maternal infection in the UK is pneumonia, followed by genital tract sepsis. Pneumonia is more common in the intrapartum period, and genital tract sepsis, in association with vaginal birth and obstetric interventions, is more common in the postpartum period.

Escherichia coli

A prospective review of 150,043 pregnancies between 2005 and 2012 identified that E. coli was the most common pathogen, accounting for 37% of maternal sepsis cases, and was the predominant pathogen in the antenatal period. A further analysis highlighted that E. coli infection was most common in the third trimester, and 55% of cases were urinary tract infections and 45% of cases were genital tract infections. In that study, 27% of E. coli infections resulted in fetal death, which was due mainly to chorioamnionitis following PPROM, demonstrating the severe impact that bacteraemia has on fetal outcomes.

Group A streptococcal genital tract infections

In the UK, the spike in maternal mortality from sepsis during the 2006–2008 triennium was attributed to an increase in group A streptococcal (Streptococcus pyogenes) genital tract infections, which were responsible for 50% of direct maternal deaths. Group A streptococcus is a common cause of bacterial throat infections in children, and all 13 pregnant women who died from group A streptococcal genital tract infections from 2006 to 2008 in the UK either had worked or were working closely with young children. In addition, streptococcal pharyngitis is most common between December and April, which corresponds to the peak timing of maternal deaths. The UK Obstetric Surveillance System identified that group A streptococcal genital tract infections were strongly associated with progression to septic shock and were associated with worse outcomes than E. coli infections, although E. coli is the most common cause of genital tract infections. About 50% of patients with proven group A streptococcal infections progress to septic shock with a greater rapidity in deterioration compared with infections by other organisms. Since postpartum women are 20 times more likely than non-pregnant women to develop a group A streptococcal infection, awareness of the infection is essential to reduce maternal mortality from sepsis.

Influenza

Influenza virus infections contribute significantly to the incidence of maternal sepsis, particularly during pandemic years. Influenza symptoms are more severe in pregnancy and result in a four- to five-fold increase in serious illness and the need for hospitalization. Influenza infection during pregnancy is most common in the second and third trimesters and in the early postpartum period and is associated with higher rates of preterm birth and poor fetal growth. The novel H1N1 strain of influenza A resulted in the swine flu pandemic which reached its peak in 2009 and, according to the Centers for Disease Control and Prevention, claimed the lives of 30 women, which was 5% of total deaths from H1N1 in the US in 2009. The Mothers and Babies: Reducing Risk through Audits and Confidential Enquiries across the UK report from 2009 to 2012, which coincided with the swine flu pandemic, found that 1 in 11 maternal deaths was due to influenza infections in the UK and Ireland. Accordingly, influenza vaccination is recommended for all pregnant women at any stage of pregnancy, and pregnant women are listed as a high priority for influenza vaccination by the WHO. Uptake of the influenza vaccine by pregnant women has been suboptimal. The percentage of pregnant women who received the vaccine in the UK in 2017/18 was 47%, which is far below the WHO recommended uptake of 75%. The antiviral oseltamivir, is recommended as first-line therapy for pregnant women infected with influenza and, given within the first 48 hours of infection, can reduce the severity of symptoms and the length of illness.

Diagnosing maternal sepsis

The diagnosis of maternal sepsis has changed from the systemic inflammatory response syndrome (SIRS) criteria and in 2016, the international definition of sepsis was changed by the Third International Consensus Definitions for Sepsis and Septic Shock (Sepsis-3) Committee. A summary of the change in the definitions and approach to patients with suspected sepsis have been reviewed elsewhere (1).

The challenges of diagnosing maternal sepsis

The physiological adaptations of pregnancy can make the clinical signs of sepsis more insidious in pregnant women. Pregnancy is associated with a hyperdynamic circulation, and there is a 30 to 50% increase in circulating volume by 28 weeks of gestation. This hyperdynamic circulation can mask cardiovascular signs of sepsis, when, owing to vasodilation, pregnant women experience a drop in systolic and diastolic blood pressure, particularly in the first trimester, and a compensatory sinus tachycardia. Tachypnoea caused by sepsis can be confused with the physiological tachypnoea in pregnancy caused inter alia by elevated progesterone levels. Maternal physiological parameters overlap with current SIRS criteria, so modifications to SIRS criteria are required to identify maternal sepsis. Apart from temperature, all other components of the SIRS criteria overlap with the physiological parameters of healthy pregnant women

during the second and third trimesters and intrapartum. In addition, the quick sequential organ failure assessment (qSOFA) score includes components that may overlap with maternal physiology. The lack of a rapid screening tool that incorporates physiological changes in pregnancy has been blamed for delays in the diagnosis of maternal sepsis. This was a common and avoidable contributing factor in many of the cases during the spike in deaths from maternal sepsis in the UK between 2006 and 2008. In the UK, the RCOG recommends the use of the Modified Early Obstetric Warning System (MEOWS) to detect signs of sepsis and to trigger escalation to senior review of patients with features of concern, as it has been demonstrated to have 89% sensitivity and 79% specificity in identifying maternal morbidity when validated amongst 676 patients in a UK hospital. The parameters included in MEOWS have been outlined in a separate review (1). Many other obstetric early-warning systems, such as the Maternal Early Warning Score (MEWS) and the Maternal Early Warning Trigger Tool (MEWT), are available. These tools, particularly the MEWT tool, which is aimed at early identification and treatment of the four commonest causes of maternal morbidity (sepsis, haemorrhage, cardiopulmonary dysfunction, and hypertension), have shown promise. When first introduced, this reduced severe maternal morbidity by 18%. However, the positive predictive value (PPV) of these tools for sepsis is low. The MEWT has a 7% PPV for sepsis, and six other early warning scores have a sensitivity of between <2 and 15% for sepsis in women with chorioamnionitis. This emphasises that the identification of sepsis cannot be provided by a single tool, but requires an individual, holistic approach.

Management of maternal sepsis

Identification of maternal sepsis

Since 2004, the SSC (Surviving Sepsis Campaign) has published protocols for the initial management of patients with sepsis. The latest 2018 "Hour-1 bundle" consists of five elements of care, which should be initiated within the first hour of the recognition of sepsis. The elements are lactate measurement, blood cultures prior to antibiotics, administration of broad-spectrum antibiotics, administration of a 30-mL/kg crystalloid fluid bolus in cases of hypotension or high serum lactate levels (hyperlactataemia) of at least 4 mmol/L, and administration of vasopressors to maintain a mean arterial pressure of at least 65 mm Hg. The UK Sepsis Trust has adapted the SSC bundle to include six elements known as the "Sepsis Six", which also include administration of high-flow oxygen and monitoring of urine output within the first hour of recognition of sepsis. Simplified pathways, such as the Sepsis Six, have been shown to increase delivery of all elements of the SSC bundle and to reduce mortality by up to 50%. Measurement of serum lactate is advocated in sepsis, as hyperlactataemia is a marker for anaerobic metabolism subsequent to tissue hypoperfusion, although other factors such as mitochondrial dysfunction, microcirculatory failure, reduced oxygen extraction, increased glycolytic flux due to an endogenous catecholamine surge during sepsis, and hepato-renal dysfunction (70% of lactate is eliminated by the liver), resulting in decreased lactate elimination, have been implicated. Elevated lactate has been positively associated with the need for ICU admission in obstetric patients, and every 1-mmol/L increase in lactate is associated with a 2.34-fold increased risk in the need for ICU admission. Accordingly, lactate may permit early identification of pregnant women with sepsis, who need immediate critical care.

Antibiotics in maternal sepsis

The use of early, appropriate antibiotics is crucial in the management of maternal sepsis. Accordingly, they play an important role in the SSC guidelines. The importance of early antibiotics is highlighted by a retrospective analysis of 2731 ICU admissions for septic shock, which showed a 7.6% decrease in survival for every hour of delay in antibiotic administration after the onset of hypotension. Early involvement of infectious disease specialists is also recommended when making decisions about antimicrobial therapy. Initial antibiotics administered in sepsis should be broad spectrum, administered within one hour of suspected sepsis, after blood for culture has been taken. Genital tract infections are often polymicrobial, and group A streptococcus and E. coli are commonly associated with severe infections, hence the need for empirical broad spectrum antibiotics that cover Gram-positive, Gram-negative and anaerobic organisms before culture results are available. The exotoxins produced by group A streptococcus can cause rapid deterioration and streptococcal toxic shock syndrome. Clindamycin has been shown to inhibit exotoxin production by group A streptococcus and should be administered with broad-spectrum antibiotics to improve clinical outcome. Administration of IV immunoglobulin to neutralize exotoxins may improve outcomes from toxic shock syndrome and is recommended by the RCOG. Prophylactic antibiotics prior to operative obstetric intervention should be considered mandatory, and prophylaxis with IV azithromycin in addition to IV cefazolin, compared with the use of IV cefazolin alone, results in a significant reduction in the incidence of postoperative infections, endometritis and wound infection.

Ventilation strategies in the management of pregnant women with severe sepsis

Ventilation strategies for septic pregnant women may have to be adapted from the general population with sepsis. Prone ventilation in pregnancy (widely used during the COVID pandemic) is associated with significant improvements in oxygenation of pregnant women with severe acute respiratory distress syndrome (ARDS). Extracorporeal membrane oxygenation (ECMO) has also been used increasingly during pregnancy, particularly during the H1N1 epidemic of 2009. There were fears of potential fetal harm and bleeding with ECMO, but outcomes were comparable to those of the non-pregnant population. For a more comprehensive account of ventilation strategies the reader is directed to the full review, which is an open access publication (1).

Case studies

I present summaries of two case studies of maternal deaths from sepsis from 2018. Both cases were reviewed by me to produce medicolegal reports, one of which was requested by a hospital in preparation for a Coroner's Court Enquiry.

Case 1: Septic shock following preterm prelabour rupture of membranes

A multiparous, 38-year-old woman at 15+3 gestation presented to Accident and Emergency complaining of pink vaginal discharge and pelvic pressure. A speculum examination confirmed the diagnosis of preterm prelabour rupture of the membranes (PPROM). Oral erythromycin was administered, and initial vital signs were within the normal range. Blood results revealed a leucocytosis with a white cell count (WCC) of 13.1, an elevated C-reactive protein (CRP) of 25 mg/L and anaemia (haemoglobin of 107 g/L). Ultrasound revealed a live fetus and oligohydramnios. The patient was admitted to hospital for observation.

On day 3 post-admission, due to the low probability of a good outcome to the pregnancy, the patient agreed to a medical termination of pregnancy but before this could be initiated, she deteriorated and complained of rigors, nausea, lower abdominal pain, frontal headaches and generalised pain. She was tachypnoeic, and her lowest systolic and diastolic blood pressures recorded during this period were 89 and 53 mmHg respectively. She was pyrexial (38.9o C), and the Sepsis Six protocol was commenced. Bloods, a high vaginal swab and a midstream specimen of urine were sent off to microbiology, and a fluid bolus and IV co-amoxiclav were administered. The blood tests revealed a rise in CRP to 47 mg/mL, a WCC of 7.3, an elevated serum lactate of 2.2 mmol/L and a normal pH of 7.4. The lower abdomen was tender, and a vaginal speculum examination revealed that the cervical os was open and that fetal parts were visible, confirming that a spontaneous abortion was in progress. The obstetric team decided to continue with conservative management with a plan to administer the uterotonic misoprostol in 4 to 6 hours' time if the patient had not delivered by that time.

Overnight, the patient complained of worsening abdominal pain. Her heart rate was 96 and her blood pressure was 87/40 mm Hg. The cervix was dilated 1 cm on vaginal examination, and there was no progression of the miscarriage. Various medical and surgical opinions were sought which resulted in a delay of action. At 3 a.m. on day 4 of admission, the patient continued to deteriorate and had signs of multi-organ failure. Her latest venous blood gas showed a profound metabolic acidosis with a pH of 7.13, a base excess of – 16.3 mEq/L and a serum lactate level of 12 mmol/L. The patient was hypoxic in room air, required 3 L of oxygen via nasal cannulae to reach an oxygen saturation of 96%, and had a respiratory rate of 32. Her blood pressure at this stage was 80/47 mm Hg, and her heart rate was 108. A positive fluid balance of 2215 mL was recorded on the fluid chart. Misoprostol was prescribed, and an ICU referral was made.

By 5:30 a.m., the patient was bleeding from her urinary catheter site while in the ICU, and her platelet count was 17/μL, indicating disseminated intravascular coagulation (DIC). Her blood pressure was now 79/57 mm Hg.

At 6:30 a.m., for advice on antibiotic therapy, a decision was made to contact the microbiologist, who recommended changing from IV co-amoxiclav to IV tazocin. In addition, blood transfusions were commenced to address the DIC, and over the next 3 hours, 5 units of fresh frozen plasma, 2 units of cryoprecipitate and 2 units of platelets were transfused. An evacuation of retained products of conception (ERPC) was scheduled for when the patient had been stabilised.

At 8:09 a.m., the ERPC was commenced. The fetus was partially in the vagina and was removed manually, the products of conception were malodorous and the uterus was evacuated by suction curette. The patient returned to the ICU intubated and ventilated, IV gentamycin was added to her antimicrobial therapy, and haemodialysis for acute renal failure was initiated. She remained hypotensive and peripherally shut down for the remainder of the day in spite of inotropic support.

On day 5 of admission, the blood cultures reported a growth of E. coli. In the afternoon, the patient became bradycardic and then asystolic and she could not be resuscitated in spite of of 20 cycles of cardiopulmonary resuscitation.

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Professor Lamont worked in the NHS for 40 years and now works solely in Private, Academic and Medicolegal Practice. He qualified at the University of Edinburgh (1977) and trained in Edinburgh, London, Southampton and Winchester. He became Consultant in Obstetrics and Gynaecology at Northwick Park Hospital in London (1988), obtained his Doctorate Degree (1989) and has published over 300 research papers.

He is the author/editor of two books and has written 30 chapters in books edited by others. He is also Editor-in-Chief of a Major Reference Work: The Reference Textbook on Preterm Labour and Preterm Birth published by Springer, the biggest publishers of Medical Textbooks Worldwide. He holds or has held Professorships or other Faculty appointments at Southampton University, Imperial College London, University College London, The Perinatology Research Branch, NICHD/NIH/ DHHS, Department of Obstetrics and Gynaecology, Wayne State University, Michigan, USA and Institute of Clinical Research, University of Southern Denmark. He has an international reputation in his field of research and is the Royal College of Obstetricians and Gynaecologists' Official Spokesman to the media on Gynaecological Infections.

Professor Lamont is on the Editorial board of a number of peer reviewed journals, and referees for a number of Grant-awarding bodies and more than 30 UK and overseas journals. He has given over 180 lectures by invitation in 44 countries worldwide including the Americas, East and West Europe, Africa, Middle East, Far East, Oceania and South-east Asia and has acted as internal and external examiner in Undergraduate and Postgraduate examinations both in the UK and overseas.

Professor Lamont provides about 30 Medicolegal reports each year on Breach of Duty as well as Personal Injury. He has also acted as an Expert Witness for the GMC's Medical Practitioner's Tribunal, formerly the Fitness to Practice Committee. He has acted as an Expert Witness in Civil Courts in Scotland and England, and in Criminal and Coroner's courts in England. He has also been asked to provide External Reports on Breach of Duty cases for Hospitals in the UK, USA and Singapore.

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Discussion and lessons learned

This patient had obstetric risk factors for maternal sepsis, including PPROM and retained products of conception, as well as patient risk factors such as ethnic minority status. The causative organism for her septic shock was E. coli, the most common cause of maternal genital tract infections in the UK. The first sign of sepsis was in the afternoon of day 3 post-admission, when the patient would have scored 2 on the qSOFA scale because of hypotension and tachypnoea, which signifies a high mortality risk. In addition, she had an elevated serum lactate of 2.2 mmol/L, which would indicate sepsis and the need for escalation to intensive care. As stated above, as well as early recognition of signs and symptoms of infection and early intervention, identification of the source of infection is also very important and in this case the source of infection was clearly uterine, and it was deemed that the delay in source control (ERPC) that was performed 19 hours after the initial deterioration, and the request for opinions from other medical and surgical specialities, resulted in a missed opportunity to save the patient's life. There was also a delay in seeking expert advice from an infectious disease specialist as advocated by the RCOG, and the switch to IV tazocin and gentamicin occurred only after DIC had been diagnosed on day 4 post-admission.

Case 2: Septic shock following postpartum pyelonephritis

A 28-year-old, primigravida of South Asian ethnicity with type 2 diabetes had an elective CS at 37 weeks' gestation for a persistent breech presentation. During pregnancy, the patient was treated for three confirmed E. coli urinary tract infections. She was discharged from hospital on day 2 postoperatively.

On the morning of day 4, the patient developed rigors. Her husband called the hospital's midwifery team but was unable to get through. In the evening, the husband spoke to a midwife by phone and was asked to record his wife's temperature, which was normal. The husband expressed concern that this may have been due to the regular use of paracetamol but was advised by the midwife not to bring the patient into hospital and that the symptoms were probably pain-related.

On the morning of day 5, the patient felt nauseous and had two episodes of vomiting and rigors. A midwife arrived at midday for a routine appointment and checked the wound site but was not carrying a thermometer and therefore could not take the patient's temperature. At the husband's request, the midwife booked a GP appointment for that afternoon.

When the patient was assessed by the GP at 4:45 p.m., she was found to be tachycardic, hypotensive, tachypnoeic and pyrexial. The GP arranged for an ambulance to make an emergency transfer to A&E, where the patient arrived at 6:38 p.m. In A&E, she was found to be hypoxic on room air and had an elevated lactate. The Sepsis Six protocol was immediately instituted, and on the advice of a microbiologist, IV tazocin was administered. The patient continued to deteriorate, and she was admitted to the ICU, where she was intubated and placed on inotropic support. Despite this, she suffered from seven pulseless electrical activity (PEA) cardiac arrests and was pronounced dead at 3 a.m. on day 6 postnatally. Post-mortem results demonstrated E. coli isolation from the abdominal wound, the uterine incision, the bladder, the right lung and blood.

Discussion and lessons learned

The patient had multiple obstetric and patient risk factors for sepsis, including nulliparity, diabetes, ethnic minority status, antibiotic use within the preceding 2-weeks prior to hospital admission, and CS. The causative organism for her septic shock was E. coli. This case highlights the rapid progression to septic shock, and the patient died just over 24 hours after initial symptoms of infection. Accordingly, prompt identification and aggressive intervention are crucial in the management of sepsis. The patient faced a delay of 14 hours from symptoms of infection to diagnosis of sepsis by the GP. It was deemed that the assessments made by midwives prior to admission to hospital were inadequate and resulted in a delay in identification and management of sepsis with IV antibiotics. The patient's risk factors, combined with her infective symptoms, should have prompted the suspicion of sepsis, which would possibly have saved her life.

Conclusions

Following maternal sepsis, early diagnosis and early intervention are critical to save lives and prevent long-term adverse sequelae. Maternal sepsis remains a significant cause of morbidity and mortality in pregnancy. The terminology of sepsis has recently changed, and it is important from both a clinical and research viewpoint to remain up to date and understand this change. Further research into risk factors for maternal sepsis is required to reduce the incidence and to facilitate early identification and treatments that were previously considered not feasible in pregnant women. Interventions such as ECMO and prone ventilation have gained increasing support and require larger studies to assess their role in the management of maternal sepsis.

About the author

Prof. Lamont is a registered Medical Practitioner, Bachelor of Science (1974), Bachelor of Medicine (1977) and Bachelor of Surgery (1977) from the University of Edinburgh, Doctorate in Medicine from the University of Southampton (1989), Member (1983) and Fellow (1996) of the Royal College of Obstetricians and Gynaecologists (RCOG). He has held University Faculty appointments as Reader (Associate Professor) in Obstetrics and Gynaecology at Imperial College, London (2000-2009) and University College London (2009-2011), and Full Professor at Wayne State University, Detroit, MI, USA (2009-2011). As part of the Perinatal Research Branch of the NICHD/NIH/DHHS/USA, he set up the Longitudinal Vaginal Microbiome Project in Pregnancy as part of the Human Microbiome Project. Since May 2011, he has been Full Professor at the University of South-

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Expert Witnesses: The ALT Bares its Teeth, and Bites

Tribunal attacks independence of expert witness and imposes severe costs penalty

In a striking decision in Carr v Evelyn, the First Tier Tribunal (which is the name now given to the body that is still universally called the Agricultural Land Tribunal) has very heavily criticised the landlords and their main expert witness in a contested succession application.

Many agricultural professionals carry out some expert witness work. This decision will make them wince. The expert witness was described as 'a 'hired gun' put forward by the [landlords] to make their case and with evidence tailored to this purpose.'

The Tribunal refused to accept his evidence: 'he was a member of the [landlords'] team and not, therefore, a witness upon whose impartiality and independent expertise the Tribunal could rely' and 'his supposed expert evidence is not and cannot be seen to be an independent and uninfluenced product and for that reason cannot be admitted in evidence, or relied upon, by the Tribunal.'

The way in which instructions were given to the expert to clearly lead him to a particular conclusion meant that he had 'not been acting in any independent fashion is respect of these Proceedings, but is and, in the view of the Tribunal always has been, an active member of the [landlords'] litigation team.'

Judgments are normally quite moderate in their criticism of parties and witnesses. This judgment was brutal. It emphasises the risks that expert witnesses can run if things go wrong for them, and surely prompts a re-evaluation of the steps to be taken not only for an expert to be comfortable that they are acting independently, but in being able to show that they have acted independently. That will impact not just on experts, but on the lawyers instructing them, who do not emerge from this case in a good light.

Giving expert evidence can be difficult at the best of times. Over the coming months, resulting from this case, we will publish some more items about how it is supposed to be done, and the issues that arise.

The Consequences

Apart from giving the landlords' expert and lawyers one of their less good days, the Tribunal's decision also bit hard.

One of the features of the Tribunal is that costs do not usually follow the event. This means that the parties will usually be expecting to bear their own costs, even if they are successful. The normal approach among practitioners has been to consider that the Tribunal will only award costs against another party if they have been vexatious, abusive or frivolous, and these are not easy concepts to prove.

This is different from most disputes, where the loser is usually expected to pay the winner's costs. In practice that does not mean all of the winner's costs, but a healthy chunk of them (often around two thirds). At the start of a case, this can sound like an incidental point, but by the time a case has got to a hearing over several days, with thousands of documents and hundreds of hours spent working on it, these amounts can be very large.

In Carr v Evelyn the Tribunal addressed the general principle of costs in this jurisdiction, holding that whilst adverse costs could be awarded for incidents of vexatious, abusive or frivolous behaviour, the ability to order costs was not limited to those situations only.

It took an aggressive stance to the losing landlords, based upon how it said they had acted, and hit them in their pockets, ordering that they pay 80 per cent of the Appellant's costs. It also said that those costs would be paid on the indemnity basis (which means that doubt will be resolved in favour of the tenant when costs are being assessed, and tends to lead to a party getting more money back) based on their disapproval of the landlords' approach.

As there was a five day hearing in this case, with multiple expert witnesses, the costs will be very high. That may tempt the landlords to consider whether they should appeal.

There is no question that agricultural professionals called upon to provide expert evidence to the Tribunal by a party should be looking at this judgment carefully, and checking that they can demonstrate that they have maintained their independence.

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The impact of COVID-19 on Ophthalmology Clinical Research in the UK and support via the NIHR RESTART Framework

Prior to COVID, approximately 80% of Trusts were engaged with at least one study, with on average 15,000 patients recruited to Ophthalmology studies per year. The NIHR's Ophthalmology Specialty Group (OSG) for the Clinical Research Network has been working closely with its regional leads across the UK to support the sites where 41% of portfolio studies have been paused because of COVID.

Professor Rupert Bourne, who chairs the OSG, has been working with other National Specialty Leads in developing the NIHR's RESTART Framework. Currently, 58% of Ophthalmology studies nationally are open to recruitment, following decisions by each study's triad of sponsor/CI/funder to re-open post-COVID and in some cases continue without pausing during the lockdown. The overwhelming response from site Principal Investigators in Ophthalmology is that they wish to continue recruitment to the paused studies given that most hospitals have restarted seeing 'routine' Ophthalmology outpatients but with social distancing arrangements. Where site PIs are having difficulty doing this because of local issues, they are encouraged to contact their OSG Regional Leads, who can provide guidance and support.

To encourage continued patient participation in ophthalmology clinical research, Christiana Dinah, lead for Patient and Public Involvement in the OSG, has worked with NIHR Communications to produce an excellent short video for patients. The NIHR OSG is encouraging ophthalmologists, optometrists, patient support groups and eye charities in the UK to watch this and disseminate widely. The short video can be played in waiting areas, shared via Trust websites and social media channels.

RCOphth statement: NICE rapid guideline on Covid-19 testing and the potential adverse effect on the return to routine cataract surgery

The Royal College of Ophthalmologists is responding to the NICE rapid guideline on Covid-19 testing and the potential adverse effect on the return to routine cataract surgery..

Guidance regarding, the need for and timing of testing for COVID-19 for patients undergoing elective surgery patients, has been evolving as cataract surgery resumes in the UK. Infection prevention and control guidance is likely to continue to develop in line with better understanding of the virus and its behaviour.

The incidence of Covid-19 in the community has generally fallen considerably in most but not all areas and this incidence has a direct effect on the risk of a patient attending hospital with the disease (either symptomatic or asymptomatic). This continues to be a dynamic situation.

The most recent NICE COVID-19 rapid guideline on arranging planned care in hospitals and diagnostic services states that, in order to minimise the risk of COVID-19 transmission to other patients and healthcare workers, people having planned care involving any form of anaesthesia or sedation should:

- follow comprehensive social distancing and handhygiene measures for 14 days before admission and
- have a test for SARS-CoV-2 within 3 days before admission and self-isolate from the day of the test until the day of admission

The RCOphth is concerned that the current wording of the NICE guidance will lead providers to mandate COVID-19 pre-operative testing for cataract patients. This can significantly limit the restoration of routine services in some areas whilst the benefit of this guidance in asymptomatic patients remains unclear.

We are in discussion with NICE to address this concern and with recommendations to provide clearer guidance. The preferred guidance should allow ophthalmologists and providers to locally determine the safest, most reliable and efficient pathway for patients undergoing cataract surgery. The guidance must provide safe but practical recommendations for similar short local anaesthetic procedures whilst not restricting access to care.

- Some eye units are not testing all cataract surgery patients (topical anaesthesia) with no reported adverse effects on patients and staff of COVID-19 transmission
- Patient symptoms – no symptomatic patient should undergo elective surgery of any description
- Patient's age, sex and whether they are from a black, Asian or other minority ethnic group, or have any underlying conditions that could increase their risk of getting COVID-19 and of having a severe illness
- Local community Covid-19 rates
- Individual surgeon's and surgical team's characteristics and risk profile
- Local availability of, and patient access to, testing
- Likely patient journey time ie time spent in the hospital
- Whether the unit utilises a green site/ green pathway; standalone theatres or a very clear blue/ green separation reduces the risk to patients

Surgeons Perform Heart Procedure with Aid of Remote Support Glasses

Surgeons have performed the UK's first medical procedure using a pair of glasses fitted with cameras that allow experts anywhere in the world to provide support remotely.

The smart glasses are equipped with multiple cameras, a torch and earpiece, and share live video, audio and still photos – which can then be viewed in real-time and annotated remotely via a laptop.

They were used for the first time during a heart operation at Royal Papworth Hospital in Cambridge on Wednesday.

Patient John Constable, from Lincolnshire, was fitted with a state-of-the-art implant used to treat heart failure. The 65-year-old said afterwards: *"I've been very well looked after today and very impressed with the professionalism across the hospital.*

"I've felt completely safe and would encourage anyone else needing to come to hospital to not delay their treatment."

The smart glasses mean doctors and their teams can collaborate with experts, including product technicians for the heart implant's manufacturer, and access highly specialist and technical support that may otherwise have been unavailable during the Covid-19 pandemic.

Alaina Yardley, lead cardiac physiologist at Royal Papworth Hospital, said: *"The medical technology we use to treat heart failure and arrythmias is increasingly sophisticated, using complex algorithms that need specialist programming to match the patient's symptoms."*

"Traditionally we would have to wait for a technical expert to attend procedures, but Covid-19 has forced us to find new ways to perform procedures and reduce the number of people in catheter labs."

Eilish Midlane, chief operating officer at Royal Papworth, said: *"This is a fantastic innovation which supports teaching, training and remote engineering.*

"In the context of a global pandemic, we are working hard to keep patients, staff and visitors to our hospital safe at all times and technology like this reduces footfall through the hospital and reduces the number of people in our catheter labs during procedures.

"It couldn't have come at a better time."

The Surgery Assistance smart glasses, developed by Amsterdam-based company Rods&Cones, were used during the implant of a Medtronic Cobalt XT CRTD heart implant.

The procedure involved implanting a cardiac resynchronisation therapy (CRT) device into the chest, which is connected to the heart via leads.

The device uses complex algorithms to identify irregular heartbeats and respond with small electrical impulses that correct the heart's electrical signals and reduce patient symptoms of heart failure.

Consultant cardiologist Dr Patrick Heck said: *"We are trialling this in our cardiac units, specifically for the implant of the Medtronic cardiac devices where we need technical support to programme the device to match the needs of the patient."*

"However, we see this as just the start and there could be many other opportunities for use of the smart glasses, from dialling-in other doctors around the world to support on complex cases to training the next generation of cardiologists."

Previously used in precision manufacturing, such as the aeronautical industry, the glasses have been adapted for safe use in hospitals with hands-free technology to prevent contamination and revisions to the camera technology to accommodate for the specific lighting and conditions found in a catheter lab or operating room.

Jackie Fielding, vice president of Medtronic UK & Ireland, said: *"Due to Covid-19, like so many organisations, we needed to find a new way of working so that our clinical product experts could continue to provide doctors with technical support, without having to be physically in the catheter lab or operating theatres."*

"Partnering with Rods&Cones and using the Surgery Assistance smart glasses, we are able to provide very best technical support to the doctors implanting our devices, while avoiding potential delays associated with needing a technical expert physically at the hospital."

"This could be the new normal in many cases, and we're excited about exploring other possibilities with the technology."

Bruno Dheedene, Rods&Cones co-founder and CEO, said: "We are thrilled to make this significant step with Medtronic to make remote clinical support an option for UK doctors.

"Perhaps most importantly, we're delighted we can help healthcare professionals continue their work despite the current Covid-19 restrictions, so that more lives can be saved."

High-resolution Intravascular Imaging in Neurointervention

High-frequency optical coherence imaging can guide neurointerventional surgery to achieve optimal deployment of flow diverters, stents and intrasaccular devices, write Matthew Gounis and Ajit Puri. Here, they discuss the evolution of the technology, and detail their institution's experience developing the novel modality, which they have designed specifically for application to the neurovasculature.

In a recently published article Nature Communications volume 11, article number: 2851 (2020), we have introduced a technology designed for high-resolution intravascular imaging of the cerebrovasculature. The foundational technology is optical coherence tomography (OCT), which uses nearinfrared light to interrogate the arterial lumen and reconstruct cross-sectional images of the blood vessel from the backscattered light.

More than a decade has passed since this technology was introduced to image coronary artery disease, providing detailed information about atherosclerotic plaques with approximately 18μm spatial resolution, allowing precise sizing of stents during treatment.

As clinical evidence has mounted, OCT has been shown to affect clinical decisions in nearly 50% of coronary interventions, as well as reduce major in-hospital cardiac adverse events and mortality. However, the existing platform cannot reliably be used in the intracranial circulation.

Although there are scattered case reports that describe OCT in neurovascular applications, the design of the system is not optimised to allow routine use in the highly tortuous intracranial vasculature due to the large profile of the device, relatively rigid construction with transitions at the wrong locations, and most importantly— nonuniform rotation of the lens due to contact friction of the torque wire with the encasing catheter, which can cause image distortion or, more commonly, catastrophic failure of the device.

In collaboration with Gentuity LLC (Sudbury, Middlesex County, USA), the University of Massachusetts Medical School (Worcester, USA) has engaged in a National Institutes of Health funded programme to develop a novel highfrequency optical coherence imaging (HF-OCT) technology designed specifically for application to the neurovasculature.

With a profile of 0.0155" (1.2 Fr), the HF-OCT imaging catheter has similar performance characteristics as a microguidewire, including a shapable coil spring tip. The described experiments entailed patient-specific, whole circle of Willis vascular phantom testing to ensure that contrast flushing protocols deployed would not differ from standard protocols used for rotational angiography.

In order to image the arterial lumen, blood has to be momentarily cleared so as not to attenuate the laser. Since the device acquires images at 250 frames per second, it is possible to acquire 8cm of vascular imaging within approximately 2–3 seconds. We found that the standard contrast injection protocols deployed clinically for rotational angiography provided sufficient blood clearance for optimal imaging. Subsequently, in vivo modelling in a porcine brachial artery with elevated tortuosity demonstrated that imaging with uniform illumination was possible and the individual layers of the arterial wall could be reliably visualised.

Neurovascular devices, such as flow diverters and stents were deployed in the animal model and interrogated with HF-OCT at a resolution approaching 10μm, standard digital subtraction angiography, as well as high-resolution cone-beam CT. We found that inter-rater reliability to assess flow diverters and stent malapposition or acute thrombus formation along the surface

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Dr Pablo Garcia Reitboeck is a Consultant Neurologist, at St. George's Hospital, London, and Honorary Senior Lecturer, St. George's University, London.

He is part of the Acute Neurology service and runs a Motor Neuron Disease and Myasthenia Gravis clinic. He has significant experience in the assessment of patients with different forms of dementia, including Alzheimer's Disease, Lewy Body Dementia and Frontotemporal Dementia.

Dr Garcia Reitboeck has medico-legal expertise in:

General neurology including disorders of and injuries to the nervous system, i.e. brain, spinal cord, nerves, muscles,
Acute/Emergency Neurology,
Stroke,
Headache,
Parkinson's disease,
Disorders affecting memory or thinking,
Dementia,
Capacity assessments,
Neuromuscular Disorders including Motor Neuron Disease and Myasthenia Gravis

Dr Garcia Reitboeck has undertaken medico-legal training and has been writing medico-legal reports regularly since April 2019, with a Claimant/Defendant ratio of 80%-20%. He is a principal investigator for several clinical studies in Motor Neuron Disease, Myasthenia Gravis and Acute Neurology.

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of the device was significantly superior with HFOCT as compared to the other imaging modalities.

Finally, cadaveric intracranial atherosclerosis specimens were imaged with HF-OCT and compared with histological analysis from a blinded pathologist. Agreement on plaque characterisation (fibrotic, necrotic lipid core, or micro-calcifications) was concordant between HF-OCT and histopathological analysis.

Unlike the coronary and peripheral circulations, in situ analysis to study vascular disease is currently not possible for the intracranial circulation. Thus, longitudinal data for plaque development, vasculopathies, or degeneration of the wall in aneurysms does not exist. This technology, which is nearing clinical introduction, can shine light on cerebrovascular pathology.

With sizing of devices for specific lesions approaching the resolution of our angiography equipment, highresolution intra-vascular imaging can provide precise sizing for personalised intervention. HF-OCT can guide neurointerventional surgery to achieve optimal deployment of flow diverters, stents and intrasaccular devices, and provide clinically viable information to prevent complications and potentially prognosticate clinical/angiographic outcomes. Mirroring the role of OCT in coronary artery interventions, clinical research exploring novel devices will certainly benefit with HF-OCT.

Matthew Gounis is the director of the New England Center for Stroke Research

Ajit Puri serves as co-director of the New England Center for Stroke Research.

Court Rejects Application for Expert Statistical Evidence of Life Expectancy in Traumatic Brain Injury Case

The judgment this week in the case of Chaplin v Pistol (1) and Allianz PLC (2)[2020] EWHC 1543 (QB) is an important one for personal injury lawyers as it deals with the issue as to whether parties can introduce life expectancy evidence from statisticians in cases involving shortened lives as a result of injury.

***Stephanie Clarke,** Partner and solicitor for the claimant, reviews the outcome of the second interlocutory judgment in this case. The first, reported in February 2019, related to lost years claims in calculating loss of earnings in catastrophic injury claims for interim payment applications.*

Background
In October 2016, the claimant, Mr Chaplin, sustained catastrophic injuries in a road traffic accident caused by the negligent driving of the first defendant (who was insured by the second defendant). Mr Chaplin, who was aged 28 at the time, suffered a severe traumatic brain injury with tetraplegia and is wholly dependent on others for his care needs. His life expectancy has been considerably reduced. The case is of significant value both in terms of care and loss of earnings. Before the accident, the claimant earned a six-figure salary.

Procedural background
At the time of the defendants' application, medical evidence had already been exchanged, and joint statements were due one day after the defendant's application, on 11 June. A joint settlement meeting date had been agreed July, and the case was listed for a 10-day trial with a window starting on 12 October 2020.

The issue of statistical life expectancy evidence had previously come before Master Eastman at the second case management conference in July 2019. At that stage, the defendant applied for permission to rely on expert evidence in the field of medical statistics in the form of a report dated 28 June 2019 co-authored by Professor Strauss and Dr Jordan Brookes. Master Eastman refused that application, and there was no appeal.

The defendants' current application for permission for further expert evidence
On 21 May 2020, the defendants applied for permission to rely on evidence of two further experts, namely:

1, Mr Gary Derwent (an expert on assistive technology), and
2, Professor David Strauss (a statistician on life expectancy).

The application in relation to Mr Derwent's evidence was not opposed.

The hearing proceeded in relation to whether the defendants should have permission to rely on Professor Strauss's proposed evidence as to the claimant's life expectancy, using data from three publications written by members of the Californian Life Project:

- 'Life expectancy of children in a vegetative and minimally conscious state' – Strauss, et al (2000)
- 'Life expectancy' – Shavelle, et al (2007), and
- 'Long-term survival after traumatic brain injury' – Brookes, et al (2015).

The judgment
This judgment is highly relevant to all personal injury lawyers. Mr Justice Jay rejected the defendants' application and in doing so firmly endorsed the view of Master Davidson in the case of Dodds v Arif [2019] EWHC 1512QB about the use of statistical evidence in relation to life expectancy. He also found that they had failed to demonstrate a relevant and sufficient change since their last application when they failed to appeal a decision they did not like and discussed the timing of applications of this kind and the overriding principle.

In that case, after hearing arguments from the defendants in relation to the introduction of bespoke life expectancy evidence, Master Davidson stated as follows:

For these reasons it seems to me that bespoke life expectancy evidence from an expert in that field should be confined to cases where the relevant clinical experts cannot offer an opinion at all or state that they require specific input from a life expectancy expert (see e.g. Mays v Drive Force (UK) Ltd [2019] EWHC5), or where they deploy or wish to deploy statistical material that does agree on the correct approach to it. This case does not, or does not yet fall into any of categories."

In the Chaplin case, both medical experts in the field of neurology/neuro-rehabilitation are highly regarded and well established in their field. Dr Clarence Liu was instructed on behalf of Mr Chaplin and Professor Christine Collin was instructed on behalf of the defendants. In his judgment, Mr Justice Jay gives a helpful summary and discussion regarding the statistical data in relation to life expectancy on those with a severe traumatic brain injury.

Mr Justice Jay stated that both parties' neurological experts had expressed themselves as able without qualification or equivocation to proffer evidence on life expectancy in this case. In addition, there was a relatively narrow gap between them as to the claimant's future life expectancy. This had been explained, in the main, by the different clinical assessments of the claimant.

Mr Justice Jay confirmed that while there was a difference between the experts, courts are well used to deciding cases on the basis of evidence that is adequate but not optimal. Mr Justice Jay accepted that a seven-figure sum was in issue over the extent of the diminution in the claimant's life expectancy. Robert Weir QC, for the claimant, asserted that both medical experts essentially had not changed their position since the matter was last heard, which is relevant as set out below.

Use of statistical evidence

It was noted that the defendants' expert had been aware of the existence of the unpublished data referred to in the Strauss/Brookes June 2019 report and at the time of the last Case Management Conference, she had not indicated that she required the assistance of the medical statisticians on this issue.

The report prepared by Strauss/Brookes in July 2019 was also criticised for drawing attention to further unpublished material not being peer reviewed.

Mr Justice Jay's judgment sets out the following points:-

❖ If a party is dissatisfied with the direction of the master, it must comply with Civil Procedure Rule 29 PD6. This provides, in relation to a variation of directions, that a party who disagrees with a court order must either appeal it or demonstrate a change in circumstances since it was made. In this case, Mr Robert Weir QC for the claimant submitted it was incumbent upon the defendants to show a "relevant and sufficient" change in circumstances since July 2019 when the matter was last before Master Eastman.

❖ Mr Justice Jay indicated that there was no good reason to overturn or criticise Master Eastman for analysing issues between the neurological experts and concluding that the differences between them were largely explicable in terms of different clinical judgment.

❖ He said that even if the matter had come before him "shorn of any antecedent judicial decisions", he would still have concluded that evidence from Professor Strauss was not reasonably required for the purposes of Civil Procedure Rule 35.1.

❖ In reaching this conclusion, he made the following observations:

❖ Although evidence from a medical statistician is, in principle, admissible, ordinarily it should be seen as a starting point for clinical judgments made by medical witnesses (see the Royal Victoria Infirmary and Associated Hospitals NHS Trust v B (a child) 2002 EWCA7348 at paragraphs 20 and 39).In particular, he confirmed that medical experts are usually well able to apply and interpret quite complex statistical evidence. This can be admitted as hearsay if set out in a published paper that has been peer reviewed, without the need to call purposeful explanatory evidence.The defendants' expert did not say that specific input was required from medical statisticians for her to assess the claimant's life expectancy, although she did say that input would be desirable because it would give the court greater confidence in it's conclusion. Mr Justice Jay found that courts are very used to deciding cases on the basis of evidence which is adequate but not optimal.If the defendants wished to introduce statistical evidence, they should have done so much earlier in the litigation so that both experts could address this before committing themselves to their conclusions.He drew attention to the fact that Professor Strauss did not appear to be prepared to disclose his group's unpublished data and that this data has not been peer reviewed. Furthermore, Counsel for the defendants argued that the claimant would be bound to accept it as "authoritative and reliable". There is an obvious unfairness inherent in one party's expert relying on data which the opposing party is unable to examine.The defendants' submission that the neurologists were not in agreement as to the correct approach to the statistical evidence was found to be unpersuasive. The judge found that there was substantial agreement provided one excludes from consideration the unpublished data referred to in the 2019 report.

❖ Finally, Mr Justice Jay considered whether the evidence of Professor Strauss should, in any event, be excluded in exercise of his discretion as coming too late in the day. He referred to the case of Taleb v Imperial College Healthcare NHS Trust [2020] EWHC 1147, which confirms that applications of this nature fall to be determined in line with the overriding objective. He rejected the defendants' submission that the introduction of statistical evidence was unlikely to delay the trial. He referred to the claimant and claimant's family situation and agreed it would be intolerable to adjourn the trial even if he found that there was a sufficient change in circumstances, which he had not, since directions were made in July 2019.

Conclusions
The defendants are unlikely to have raised this issue had it not been for the high value of loss of earnings together with the parties' differing views of life expectancy and its impact on the future multiplier.

Hopefully the issue of Defendants arguing for the introduction of life expectancy evidence from Professor Strauss and Dr Brooks, who rely in part on unpublished data which has not been peer reviewed, will now be limited to a very small proportion of cases.

While care and case management will likely be dealt with by Periodical Payment Orders, the claimant was a highly paid banking employee at the time of his accident, and the multiplier in relation to life expectancy for loss of earnings will have a significant impact on his future loss of earnings claim.

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You can find further information regarding our expertise, experience and team on our Personal Injury pages at **www.stewartslaw.com**

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Gross Negligence Manslaughter: Could a Special Argument be Made for the Medical Profession?

by Mr Surash Surash
Consultant Neurosurgeon
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The difficulty for medical professionals is the work they deal with involves patients who have the potential to die from an error. Compounding this risk are certain procedures and operations that can have significant morbidity and mortality associated with it. But consider for a moment the impact of not proceeding with high risk operations that would result in a definite chance of death. As Merry and Brookbanks explains, these dilemmas can often be 'fraught with risk and considerable uncertainty[1].' Could it then be argued, that a special case can then be made for doctors, thereby giving them a privileged status in Law?

We must consider the actions of other professionals such as accountants or lawyers, whose professional negligence would not result in the death of a client, and as Brazier quite rightly argues, would not necessarily attract the same degree of media publicity[2]. But a solicitor or an accountant that intentionally defrauds a client would be accountable to criminal proceedings. However, in medicine, negligence that results in the death of a patient, thereby resulting in criminal proceedings, does not necessarily mean that an intent to cause harm exists.

Teachers and managers of youth adventure holidays have been prosecuted for GNM for children in their care who have died[3]. Brazier gives the analogy of the teacher who has the choice of not letting his pupils 'jump into a mountain stream[4].' However, does a doctor faced with life-threatening diseases have that same choice?

The support for a conviction of GNM in medicine comes from many different academic directions, and there are those that see it as a driver for improving standards[5]. However, does the threat of criminal sanction actually make us into better doctors?[6]

So could criminal liability act as a deterrent to further deaths? To do this, would be in some way to stop intent to murder. However, as evidenced in case law over the last 20 years, intent to cause death has not been proven in the vast majority of cases.

Any decision to therefore pursue criminal prosecution must be based on gross recklessness rather than making a common mistake due to 'system failures and inadequate training[7].' Again, a distinction must be made between 'wilful disregard to human life' compared to death as a result of an 'unforeseen complication[8].'

Even a competent experienced doctor is vulnerable to mistakes, but it is at what stage should the CPS become involved[9]? For a lacuna exists between negligence that does not result in death and one that does. For why would the death of a patient give rise to criminal prosecution whereas permanently disabling a patient from someone's negligence does not? This forms the underlying principle of 'moral luck.'

It is important to remember that not all medical errors are the same[10]. Ferner and McDowell have classified errors as; slips/lapses, mistakes, technical errors and violations[11]. A slip/lapse occurs when there is an error in the execution of an action (momentary loss of concentration[12]). Mistakes occur where there is an error in the planning of an action. And technical errors occur where there was a failure to carry out a plan of action successfully. Whereas 'violations' occur when there was a 'deliberate deviation from safe practice[13].'

Ferner and McDowell make the point that where 'mistakes and slips (lapses)' have occurred, the prosecutions in these situations were 'unlikely to improve patient outcome[14].' Whereas, as Hubbeling explains, there is far less controversy over the 'violations' group in GNM cases[15].

This can be better explained by the analogy given by Hubbeling of the driver that hits a tree out of bad luck[16]. But should a child get in the way, and the driver has a brief lapse in attention and kills the child, then a conviction becomes problematic, as the driver may not have been able to stop in time anyway. It is therefore for the Courts to decide if the driver could have stopped the car in time, or could have foreseen the child running in front of them. And is the error of not stopping of sufficient 'criminal severity' to pursue prosecution[17]? However, if there was a clear rule violation, such as the driver being drunk at that time, then the pursuit of conviction becomes clear. So as Hubbeling explains[18], prosecution should only happen in situations where there has been a clear violation of rules (drink driving, etc.) and not just for errors.

In which case, in medicine, can clear violations be defined so we can rule out errors as a basis for crimi-

nal prosecution? Intoxication, or the use of drugs whilst working, could both be counted here. But where unintentional errors occur, in the absence of any violation of the law (objective rules) or conscious deviation from recognised clinical guidelines, then the basis of criminal prosecution must come into doubt?[19]

Add to this, is how much control do people have over the situation that goes wrong? And how much of that is personal (human factors), or indeed systemic failures?

Once we can exclude exogenous causes, we must then concentrate on the endogenous factors; the doctor at the end of the bedside. We must also consider how a Court can distinguish between the actions taken by a competent versus an incompetent doctor at the same stage of training. It is the ability to separate out the actions of a doctor acting with criminal intent (mens rea) compared to the actions of an incompetent doctor[20]. As argued in the Rose case, can there be a clear separation between the competent doctor making a choice compared to a doctor that was not competent? And how does a jury discern between the doctor that 'cares and fail[21]', or the doctor that demonstrates recklessness? As Lord Atkin states, the accused must be proved to have had 'criminal disregard for the safety of others' or 'the grossest ignorance or the most criminal inattention[22].'

What the Sellu[23], Misra[24] and Rose[25] cases showed, was that for a safe conviction of GNM to be established, there must be a 'serious and obvious risk of death to be present[26].' The Rose case showed that if the defendant was unaware of what that risk was, then there was no grounds for a conviction of GNM to be found[27]. So there must be 'risk appreciation' and 'foresight of death[28].' A distinction as Mullock argues[29], must exist between the knowledge and actions of a reasonably competent individual had they been placed in the same situation. But would a competent person then have the same degree of negligent ignorance, i.e.; would the foresight of death been apparent with the competent practitioner? So does this mean, that if the defendant who has appreciated the risk is culpable compared to the defendant who has not appreciated/assessed the risk who is therefore no longer culpable (as was the case with Rose)? Would this then create a lacuna in the law where competent practitioners who can see risk will face GNM and those who are not competent to assess risk, will not face criminal proceedings? As Mullock argues, what the Rose case did was to change the threshold for GNM to determine if the 'defendant knowingly take [took] a risk with the victim's life[30].'

Earlier, we discussed the benefit of maintaining a threat of a GNM conviction would be that doctors would be averse to criminal prosecution and therefore be more careful in their decision-making. However, as Vaughan argues, criminal investigations could impact negatively on a culture of learning and development in healthcare[31].

There is a risk that doctors would decline working in departments that are already understaffed, unsupported with an over-stretched workforce that are vulnerable to making mistakes. Could this instead be the natural outcome that a threat of criminal conviction would have? And by doing so, does this then further drive the mistakes that happen by already understaffed and under-resourced wards and in so doing, damage health care delivery further?

Will GNM make doctors more conscious about their own state of mind, whether they are exhausted from a night shift or travelled the night before a shift at work? And what impact would this have on doctors taking up shifts when covering poorly staffed rota's?

Brazer puts forward two possible consequences that the fear of criminal prosecution would have on doctors; first it would make doctors leave, not take up high risk specialties or perhaps not take up medicine in the first place, and secondly, a move towards a greater 'defensive medicine[32]' which in itself could negatively impact on medical developments and patient care.

Even before careers in medicine begin, Elias-Jones predicts that an increasing risk of GNM convictions would reduce recruitment and therefore exposure to high-calibre staff, and affect the way medical students wish to pursue front-line high-risk specialities[33].

A criminal prosecution for medical errors may only achieve the need for retribution by family members or the media, however, singling out doctors in the presence of an imperfect NHS system, may result in great difficulties to 'foster an open culture' which would only serve to keep 'faults in the system … remain hidden, and more patients will die[34].'

Beyond this are the families of those that have died as a result of medical negligence. How would a non-criminal action meet their needs of redress for the loss they have suffered[35]? And in the same way, would the public consider financial compensation for medical errors resulting in death to be appropriate and would this serve to maintain the confidence that the general public have in the medical profession and its regulators?

Could one way of supporting public confidence be to put responsibility on the employing NHS Trusts? Could the threat of GNM force NHS organisations to change what they do? In the current climate where NHS organisations are not held accountable in GNM convictions, what incentives are there for NHS organisations to ever change or address their failings? Surely a conviction of GNM must come hand in hand with any identifiable systemic failings and a conviction of corporate manslaughter too? Could the risk of this prompt employing Trusts to change their practice's and the way their workforce is employed and educated?

In the case of Dr Daniel Ubani[36], there are two very significant factors that must be considered; the doctor with personal exhaustion (having flown from Germany with only 3 hours of sleep), and the limitation in being able to speak English (German speaking). You then must also consider the employer; the NHS

organisation that is prepared to employ someone flying in from Germany, with limited communication skills and unfamiliar with UK medical systems. As Brazier argues, should it then be the employing organisation that should actually be held accountable (for corporate manslaughter)[37]?

It must therefore be recognised that both human and systemic factors influence cases of GNM, in keeping with Lord Mackay's original description of GNM in the Adomako case, where a 'breach of duty committed by the defendant in ***all*** the circumstances in which the defendant was placed when it occurred[38].' And thereby supporting the view, that a special case in medicine must be made when the Courts opine on a conviction of gross negligence manslaughter.

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Dr Rob Hendry: Six Reforms Will Make Real Difference to Management of Clinical Negligence Cases

Dr Rob Hendry, medical director of the Medical Protection Society (MPS), sets out the medical profession's perspective on Mr Justice Charles Meenan's expert group on tort reform and the management of clinical negligence claims.

In 2018 the State Claims Agency paid out nearly €270 million in compensation following clinical negligence claims – an increase of 7.5 per cent from 2017. A further €39.1 million was paid out for plaintiff legal costs.

High legal fees are the norm in Ireland, in fact they are higher than all the other countries around the world where the Medical Protection Society (MPS) supports members. Significant delays in resolving claims are often responsible for inflating legal costs, and the current court rules can be easily exploited to accommodate delays.

Civil justice reform – particularly in respect of clinical negligence claims – has long been acknowledged as being ripe for reform in Ireland and this is a debate not just about rising costs and how sustainable this is for society. Is it also about how the current process affects those at the heart of it; notably patients and clinicians.

For patients, too many find themselves involved in unnecessarily protracted court cases at a time when they may need financial help to pay their mortgage or access care. They may have to wait many years to achieve closure. For the clinician, at MPS we know too well that it can be an all-consuming process, with negative effects on their health and career.

We need to reduce the delays in resolving claims by creating a more efficient and predictable legal process.

The establishment of an Expert Group, led by Mr Justice Meenan, to review the current framework for managing clinical negligence claims and explore alternative mechanisms to the court process for resolving such claims, was warmly welcomed by MPS.

The ability to resolve claims without going to court would save unnecessary expense and would benefit all parties, particularly patients who could receive compensation at a far earlier stage in the process. Importantly, it could allow some vital funds to be invested back into healthcare.

We have engaged fully with Mr Justice Meenan's evidence gathering and we are championing six reforms that will make a real difference to the way clinical negligence cases are managed – and that can also be implemented swiftly:

Formal written offers:
Parties should be allowed to make formal written offers – similar to other jurisdictions – where they are made in a prescribed form with the aim of encouraging early resolution. In the right type of case, this would serve everyone's interests.

Alternative dispute resolution:
The Mediation Act 2017 was a welcome piece of legislation, aimed at achieving fair but swift resolution in what can be complex disputes between parties. For this Act to have teeth, the court should have the power to impose cost sanctions against any party that unreasonably refuses to engage in the mediation process.

E-litigation:
MPS believes that the increased use of technology, where appropriate, would have a positive impact for all parties involved in court actions and the court system itself. Increased use of e-litigation would reduce the need for parties to travel to court thereby reducing costs, saving time, preventing unnecessary procedural delays and increasing access to justice.

Introduction of judicial guidelines:
The introduction of an equivalent to Judicial College Guidelines – for the Assessment of General Damages in Personal Injury Cases – would be a welcome development. The purpose of the Guidelines is to provide a clear and logical framework for the assessment of damages in personal injury cases, and to achieve consistency.

Expert evidence:
Too often, our efforts to resolve claims early are frustrated by the claimant refusing to disclose expert evidence, or agree to a meeting of the experts, to limit the issues in dispute. MPS wants to see the court taking a proactive approach to determining the appropriateness of expert witness instructions in clinical negligence cases. The court should have the authority to order experts to meet before the trial.

Specialist courts with specialist judges:
We would welcome the introduction of a specialist personal injury/clinical negligence court with specialist judges and procedural rules designed to ensure early engagement of both parties, alongside proper case management. This has proved successful in Scotland, following the introduction of the All-Scotland Personal Injury Court.

We have been encouraged by the Government's proactive approach to resolving the current issues, through the Expert Group. And the Minister for Health Simon Harris' hopes for a mechanism that is more "person-centred and fair to all parties" is promising.

The final conclusions and recommendations of the Expert Group are now eagerly anticipated by all.

Dr Rob Hendry is medical director of the Medical Protection Society (MPS).

www.medicalprotection.org

This blog was originally published in **Irish legal News.**

Travel law team secures £14.5 million settlement on behalf of client with catastrophic injuries

by Mark Lee at Penningtons Manches Cooper - www.penningtonslaw.com

The High Court has approved a settlement of £14.5 million, secured on behalf of an anonymous protected party, for catastrophic injuries caused by a road accident in France. The settlement was agreed in line with French law principles in accordance with the Rome II Regulation (EC 864/2007) and is thought to be one of the highest ever French law awards approved by an English court.

Although liability was conceded in the pre-action stages, the severity and complexity of the protected party's injuries resulted in the team securing permission to rely upon expert evidence in over 20 disciplines.

The case also raised novel questions on the treatment of third-party payments to UK resident injured parties under French law assessment principles. The parties negotiated a compromise on French law regarding special accommodation damages claims and loss of earnings as well as non-pecuniary losses. Damages under French law for the family's indirect moral damages and direct injury claims were also agreed in separate settlements.

Mark Lee, partner and head of the travel law team at Penningtons Manches Cooper, was introduced to the family shortly after the accident by their travel insurers whilst they were still in France. Since that time, he and his team have worked closely with highly experienced counsel Sarah Crowther QC and Chloe Bell of Outer Temple Chambers, the French law experts Paul and Thomas Ricard and a host of other experts. In addition, partner Daniel Toop in the firm's Court of Protection team continues to manage the client's funds in his role as the appointed Deputy.

Mark Lee commented: "This case involved a teenage boy who suffered catastrophic and life changing injuries. Ever since the accident, the family have shown incredible bravery and resilience and it has been our privilege to act for them.

"Mindful of the Rehabilitation Code, we were able to establish a collaborative approach with the defendant's solicitors, enabling us to secure substantial interim payments to fund 24 hour care, treatment and rehabilitation. Over time, this continued rehabilitation has enabled our client to make remarkable progress and means he is now able to enjoy a much better quality of life. He also has the necessary funds to purchase suitably adapted accommodation to house him and his family and his care team in the years ahead."

He continued: "The case has required a multi-disciplinary approach, primarily involving our Court of Protection team but also requiring input from our residential conveyancing, immigration and employment teams and even our lawyers in Singapore. We also benefitted greatly from expert guidance and advice from Sarah Crowther QC and Chloe Bell and Paul and Thomas Ricard on the intricacies of French law.

"Finally, credit must be given to other members of the travel law team, to include associate Joanna Wylie who successfully negotiated settlement of the claims involving the other family members and also for the hard work put in by our supporting paralegals and trainees, Jessica Francis, Emma Tallick, Ellie Aitken and Camilla Payen."

The protected party's mother commented: "The accident changed the course of our lives forever; there are no words to describe the physical, practical and emotional impact it has had. The magnitude of our son's injuries has been a lot to bear at times but we are forever grateful to Mark and his team for everything they have done for us which has helped improve his quality of life and will ensure he is provided for in the future."

What lawyers wish their experts knew… and what frustrates experts about lawyers!

As we launch our 2020 surveys for medicolegal experts and lawyers, here's a reminder of what we learned from the 2019 surveys. You can complete the 2020 surveys online now.

Lawyers working with Experts

We asked how lawyers identify an expert to instruct

Most said their first port of call is to approach someone that they have used before, or to contact an expert who had impressed them when they had engaged with them or heard them speak at a medicolegal conference.

Failing this, lawyers say they will ask a colleague; search their firm's existing expert witness database; or contact an external expert witness agency, such as Inspire MediLaw, for a recommendation.

We asked what characteristics lawyers are looking for in an expert

The expert's current clinical role was a top priority for a lawyer seeking the right expert to instruct. This is a good reminder that you are being instructed on the basis of your clinical expertise and knowledge, and not for your knowledge of the litigation process.

The reputation of the expert within the medical profession, regardless of their previous medicolegal experience, was rated highly. It is notable that the number of past expert witness reports did not feature high up the list of characteristics.

Some 50% of replies included Courtroom experience in their wishlist, and some also check for judicial comment before instructing an expert. As many cases settle prior to reaching trial, it can be useful for an expert to undergo training on cross examination and Courtroom techniques by way of practice.

We asked lawyers to highlight good experiences of working with experts, and to offer advice on any recurring issues they felt were relevant.

The main thread of responses centred around communication, as well as best practice in terms of reaching and delivering an expert opinion.

"Please read the letter of instruction closely. Regularly we instruct a condition and prognosis report, yet receive liability or causation comments which have not been requested."

"Keep your report in draft until it needs to be finalised – easier for everyone if it can be revised rather than lodging supplementary reports."

"Be honest from the start, don't try and be over helpful – that is not in anyone's interests."

"Talk to your instructing solicitor if you have any concerns, whether about the client, case or costs."

Experts working with Lawyers

Over 70% of experts who responded were aware of the importance of their current clinical role and reputation in terms of their appointment as an expert witness. Most also appreciated the importance of verbal recommendations in marketing their practice.

We asked what encourages experts to accept repeat instructions from lawyers

You told us that a good relationship, characterised by clear communication was really important. Many place a high value on having a good working relationship with their instructing solicitors, and some commented on the importance of knowing the solicitor also maintained good relationships with their clients and other experts.

Just over 50% of experts said that prompt payment, or good communication about a payment structure or delays, is a factor in considering whether to accept repeat instructions.

There were many comments praising lawyers who provided a clear letter of instruction at the outset, with all relevant documentation attached, including paginated medical records. It is clear that experts have a preference for working with lawyers who have good systems, are well organised, and keep them informed as to the progress of a case.

We asked what would cause an expert to turn down repeat instructions.

There is a clear message that experts (rightly!) do not wish to work with solicitors who will not accept their independent opinion, and/or who lean on them to alter their view. Over 10% of respondents said that they had experienced pressure from the legal team to change their opinion; something which should never happen.

Once again, payment featured. 63% reported having to chase for payment previously, with some finding that the lawyers shut off communication to avoid paying, whilst others tried to renegotiate the fee after receiving the expert's report. Several also mentioned frustration with lawyers coming back to them with new information and expecting the expert to review and address this without further payment.

Communication was the third main theme. Experts felt that confused instructions, little grasp of the issues in the case, or apparently chaotic administration leading to last minute requests for work or attendance at Conference or Court were unacceptable practice.

We asked experts to offer advice on any recurring issues they felt were relevant.
Unsurprisingly, these focussed on the familiar themes of payment, pressure to change opinion, and communication generally.

"Keep me in the loop, as there is such a long time between instruction and outcome/payment."

"Keep the expert informed and pay them promptly."

"Remember, the expertise you need is in current clinical practice – so most will be practising clinicians who have many demands on their time alongside medicolegal work. Try and give as much notice as possible."

"We are experts in our own field, not yours, so remember to explain the process."

"Give ample notice of deadlines."

"Pick up the phone to resolve issues…keep communication open, honest and clear."

"Lawyers should remember that medicine is an imprecise art, and the retrospectoscope is a very powerful tool."

Conclusion
Inspire MediLaw strive to improve communication and relationships between the professionals involved in medicolegal work. The results of the 2019 survey are helpful in highlighting that both the lawyers and the medics see the need for good communication in building positive working relationships.

We are building on this by educating experts on litigation processes, identifying the areas in which they play a key role and equipping them to discharge their duty effectively. Our online and in-person expert witness training incorporates interactive sessions on report writing skills, to help experts understand how to go about formulating their opinion in response to a set of comprehensive instructions.

We also encourage lawyers to remember that, in instructing a medical expert, they are likely to be instructing a busy professional with clinical commitments. They should be respectful of this, both by timely notice of deadlines, and by payment of invoices in line with agreed terms.

The Inspire MediLaw 2020 surveys are now open. We look forward to hearing what you've got to say, what the current burning issues are, and whether anything has improved in the sector since last year!

Medicolegal experts: please visit
www.surveymonkey.co.uk/r/83H2DKS
Lawyers: please visit
www.surveymonkey.co.uk/r/MMHVS2S

Inspire MediLaw

Dr Stephen Wimbush
Consultant in Anaesthesia & Intensive Care Medicine
MBChB, FRCA, DICM, CertMedEd, FFICM

Dr Wimbush is a Consultant Anaesthetist with specialist interests in Paediatric Anaesthesia and Intensive Care Medicine. He was appointed as a Consultant at the Royal Hampshire County Hospital in 2007, where he is currently the Clinical Lead for Critical Care and chairman of the trust's Transfusion Committee.

Dr Wimbush completed his undergraduate medical training at the University of Cape Town in 1995, before moving to the UK in 1998. He worked in Truro and Exeter before completing his postgraduate training in Anaesthesia and Intensive Care Medicine in Bristol. He has advanced training in both Intensive Care Medicine and Paediatric Anaesthesia and in 2005 obtained his Diploma in Intensive Care Medicine. He obtained a Certificate in Medical Education from Bristol University in 2006 and is currently an Honorary Clinical Senior Lecturer at the University of Southampton and Clinical Lead for the BM4 programme at the University of Southampton.

He maintains an active involvement in critical care research and has a full anaesthetic and critical care commitment, both in the NHS and the private sector. His main academic interest outside anaesthesia is in medical education.

He has provided regular expert evidence and advice since 2013, predominantly to the General Medical Council, but also to coroners, hospital trusts and legal firms throughout the UK.

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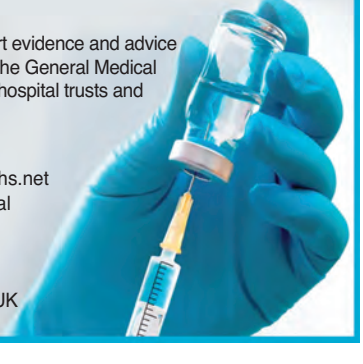

Dr Yohan Samarasinghe
Consultant in Acute Medicine, Diabetes and Clinical Pharmacology
Bsc(Hons), MBBS, FRCP, MD

I work in a busy, 720 bed, successful district general hospital in Surrey. My principal role is that of an Acute Physician dealing with all medical admissions either via casualty or directly via general practitioners in the community.

Most of my work is on the shop floor of the ward and the emergency department, but I also do clinics, which primarily are in the field of diabetes, as well as general medicine and hypertension.

In addition to the above fields I also trained in Clinical Pharmacology, giving me an expertise in the management of patients with hypertension and lipid disorders.

I also have a great interest in drug safety. I Chair the Frimley Health Area Prescribing Committee and I am Clinical Governance Lead for the Medical Directorate at Frimley Park Hospital.

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The Challenge of Complex Regional Pain Syndrome

Complex Regional Pain Syndrome (CRPS) is a rare pain syndrome of unknown cause that usually develops following a trauma to the affected limb (a hand or foot). It is characterised by the development of severe pain (often in clinical practice described as "burning") that is out of proportion to the original injury.

Typically symptoms of CRPS include an increase in swelling which affects an area beyond that of the original injury. Excessive swelling can lead to stiffness of joints and a reduction in movement of the affected hand or foot. Some patients present with an increase in hair growth and/or nail growth on the affected side. Allodynia is common (where touching or stroking the skin provokes a painful response), as are abnormal sensations, colour changes (typically the skin is mottled, redder or bluer than usual) and changes in temperature. Sometimes there is difficulty in initiating movement, with weakness or a tremor in the affected hand/foot. Patients will often remark that the hand or foot "does not feel like it belongs to me".

CRPS is subdivided into two categories: CRPS type I (the more common presentation) refers to injuries in which there is no nerve injury present (for example, a wrist fracture) and CRPS type II refers to injuries in which a nerve injury is present. CRPS can be diagnosed using The Budapest criteria, a standardised assessment developed by the International Association for the Study of Pain (IASP).

The Royal College of Physician's guidelines of 2018 state that the incidence of CRPS in Europe is around 20-26 per 100,000 person-years. The majority recover, but 15% are left with ongoing disability (persisting pain and/or hand stiffness and a reduction in function). In some cases (around 7%) CRPS symptoms spread to involve other limbs [1].

Early treatment is crucial to help facilitate a successful recovery

The hand, for example, is a complex structure, so intricate in its design that it enables us to carry out a wide range of work and leisure tasks; from typists to mechanics, musicians to chefs, we can even use it as a substitute when we cannot see. We rely on our hands in every aspect of our daily life.

As a hand therapist, I am alert to the signs of CRPS and act quickly with a *"four pillars"* approach in the early stages following injury; physical and vocational rehabilitation, psychological intervention, pain relief and patient education to help support self-management. Early intensive rehabilitation is key (to include desensitisation, managing swelling and normalising use of the affected limb), along with considerable support. I facilitate onward referral for suitable pain management from the GP, pain clinic or specialist centres (such as the Royal United Hospital in Bath) and seek psychological support where needed. In a few cases however, the level of pain experienced is so unrelenting that individuals fear that there must be some other cause and they stop moving or using the affected hand.

Even with the most dedicated and compliant individual and the most determined therapist, some symptoms are so severe that patients do not recover full function. Typically within my medicolegal casework, claimants are at the severe end of the spectrum. Avenues of treatment (hand therapy/ physiotherapy, pain management) have failed and they live with long term disuse of the affected hand or foot. Most report ongoing debilitating pain and have developed psychological distress and poor sleep patterns. Many demonstrate abnormal posturing, which can lead to

the development of other musculoskeletal problems such as stiffness in the shoulder.

I have assessed and written a number of reports detailing the care and occupational therapy needs of claimants with CRPS. Often the initial clinical signs seen in my acute caseload are less obvious or have resolved, leading to differences in opinion of opposing medical, psychiatric and pain experts. The majority of claimants have not returned to their previous occupational roles as a result of their symptoms and have considerable care needs.

Assessing the individual care needs of the claimant can be challenging

The case studies below provide two brief examples of the different challenges I have faced when assessing claimant's future care, equipment and therapy needs.

Mrs M was a 32 year old woman reported to have developed CRPS in her right hand following a fall at work. Her medical records detailed a typical history of injury, with excessive pain, swelling and sensory symptoms. She had been through pain management clinic and was taking high doses of pain-relieving medications. At the time of my assessment, some three years following the inciting event, she advised that her symptoms continued to be so severe that she lay in bed for much of the day with her hand raised above the covers so as not to touch or stimulate it. This was obviously an extreme reaction and it was questioned by the medical and psychiatric experts as to whether this truly was CRPS or a psychiatric condition (causation being out of my scope of practice).

Carrying out an objective assessment in this case was challenging. Usually I carry out a full hand examination; measuring range of movement using goniometry (a little like a protractor) and assessing restrictions to joint movement by touch. I also observe swelling and changes in colour/temperature of the skin. I use standardised equipment such as a Dynamometer if relevant (which tests grip strength when squeezed) and Semmes Weinstein monofilaments (which gives a reading as to the threshold level of sensation in the palmar skin).

Observing how a claimant uses their hands is so important in formulating a picture of someone's ability; I usually ask claimants to carry out a range of light bilateral tasks (such as making a sandwich and a hot drink, peeling vegetables or taking clothing on and off) so that I can observe abnormal patterns of movement or avoidance. I observe their mannerisms throughout the assessment. In this case Mrs M lay in bed and would not use her hand at all. She did not permit me to touch it. She was able to demonstrate some limited active movements of her upper limbs but as these were pain restricted, they were less objective.

It was difficult to get a reliable sense of her ability in this circumstance. There were no skin or colour changes and no swelling evident. This is not the only CRPS case in which the claimant has advised they are in too much pain to participate and I had to lean heavily on my understanding of the condition and clinical experience here. Mrs M accepted a settlement soon after; unfortunately the outcome is not known.

Every aspect of the Claimant's daily activities needs to be taken into account when assessing costs

The second case study involves Mrs Q, who developed CRPS in her right dominant hand after sustaining a nerve injury during surgery. She demonstrated restricted movement and use of her right dominant hand but was able to demonstrate that she could compensate and function reasonably well using her left hand. She had some ongoing heavier domestic care needs which I considered reasonable and I recommended that these be best met through paid domestic support. Liability had been admitted by the Defendant and ordinarily this would not have been a high cost case.

Mrs Q however owned a horse and could no longer ride or look after it. My counterpart, instructed by the claimant, had produced a detailed report, sourcing local costs to care for the horse, to include assistance with feeding, riding, caring and alternatives to transportation. This produced rather a large Head of Claim and for this reason we ended up going to trial. I am used to assessing hands but do not have experience in caring for horses, therefore I needed to undertake some research into this area and thoroughly analyse the activities she needed to complete. Given the restrictions in her right hand function I agreed that she was unable to carry out the necessary bilateral, manual tasks required to look after a horse as a result of her symptoms. I researched my counterpart's costs thoroughly, looking at alternative local providers and concluded that the majority sourced were reasonable.

The Claimant's evidence in court was convincing. Her Facebook photographs were used to demonstrate her commitment to her horses, highlighting appearances at several horse shows. Given that my counterpart and I were mostly in agreement, arguments centred on how much her daughters contributed to the care of the horse and the rate at which domestic support should be provided. The judge concluded that a day aggregate rate was reasonable and Mrs Q had sole responsibility for the horse. She was awarded considerable costs.

In summary, CRPS is rare, but in my role, a frequently encountered condition. Whilst in my experience individuals follow a predictable pattern of physical symptoms, their response to injury is unique, as is the effect of the symptoms on their previous occupational and leisure roles. No two cases are the same and the impact of developing CRPS in both disability and monetary terms cannot be underestimated.

Reference:

(1) Goebel A, Barker CH, Turner-Stokes L et al. Complex regional pain syndrome in adults: UK guidelines for diagnosis, referral and management in primary and secondary care. London: RCP, 2018.

About the author

Fiona Powell qualified in 1994 and has an MSc (Hand therapy) and BSc in Occupational Therapy. She is an accredited hand therapist.

She currently works at the Bristol Royal Infirmary as a Senior Occupational Therapist specialising in upper limb/hand injuries. Fiona also works for Somek & Associates as an Expert Witness specialising in upper limb/ hand assessment and pain/CRPS. She is also an Associate Trainer with Somek.

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' occupational therapy and care experts – and all their other healthcare professional experts – please contact **admin@somek.com** or visit their website **www.somek.com**

How to get Paid: Strategies for Receiving Timely Payments for Your Medicolegal Work

One topic that inevitably comes up whenever medicolegal experts congregate is payment. In fact, surveys show that most experts are concerned about payment to some extent. Concerns range from not receiving timely payment, to payment of fees being made conditional on a specific outcome of the final report, something that is specifically not allowed under the Civil Procedure Rules. This article will provide some ideas for safeguards you can implement for your practice to ensure that you get paid for the services rendered and that payments are delivered in a timely manner.

The results of the 2019 Bond Solon Annual Expert Witness Survey indicate that issues regarding payment continue to be top of the mind for medicolegal experts. For example, 73% of the experts surveyed indicated that they would not continue working in legal aid cases if expert witness fees were further reduced. Moreover, at least one respondent referenced a legal agency withholding payment in exchange for altering a report.

The 2019 surveys for experts and lawyers, conducted by Inspire MediLaw, provide an even clearer illustration of the concerns and worries experts experience in relation to collecting payment. Of those surveyed, 63% reported having to chase payment at some point. In some cases, lawyers ceased communications to avoid paying, in others, experts were met with attempts to re-negotiate the fees after the work had been completed or lawyers attempted to add on services at no additional cost.

While there is no foolproof way to guarantee timely payment for every case, there are strategies that a medicolegal expert can follow to make the process less stressful. Below are some approaches I have found helpful in my own practice:

- Have clear terms and conditions (T&C) in place that are agreed upon before a case is accepted. T&C's can always be negotiated, but this should be done at the beginning of the process with payment amounts and conditions clearly outlined and agreed to before work starts.

- Carefully consider payment timelines. In some cases, it may make sense to accept terms with long deferral periods, or to defer payment until the end of the case, although I would never recommend this as this means waiting for a number of years in Clinical Negligence cases, or schedule that some of the work must be paid for before further work is done at specific stages of the litigation. Remember that your payment of tax owed on your invoices may be required before you have received payment of the invoice if your payment deferral is too long.

- Once you have set up clear T&C's, make sure to regularly follow up with clients. Invoicing for completed work in a timely manner, using case references from the instructing solicitor, will help both you and the client stay on track with the payments.

- Control your credit to prevent concentration of debt in a small number of debtors (especially agencies). Assess your risk carefully. Do not repeatedly take on cases from slow payers without significant debt reduction.

- If fees become past due, follow up promptly. In some cases, the delay may be an oversight or the client having not received the invoice or the work done. Following up will resolve at least some of these issues and help you stay within the memory of the client. It is important to regularly follow up until payment is received.
- Chasing payment can be one of the most difficult and time-consuming parts of administrating a medico-legal practice. For some practices, it may make sense to use a professional billing agency although this will add to your costs and will lose the personal interacton between you and your client.
- If all else fails, some strategies for collecting payments owed include debt collection agencies, invoice factoring and legal redress.

If you have a question that you need assistance with, please consider contacting me for a free conversation about all aspects of running a medico-legal business.

About the Author, Mr C J Holburn
Consultant in Accident & Emergency
MB ChB (Edinburgh University) 1981
Fellow Royal College of Surgeons (Edinburgh) 1986
Fellow of the Royal College of Emergency Medicine 1993

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Building your Medicolegal Practice

As a dedicated practitioner, you are committed to delivering a first-class, quality service to your patients and, for this reason, you undertake continuous professional development. As part of this process, you have now qualified as an Expert Witness and are ready to offer your expertise to assist decision – making and judgements within the legal system.

You have trained at a reputable institution, such as Bond Solon. You understand the Civil Procedure Rules Part 35. You know how to write a report. You are prepared for the cross-examination process. The next step is to gain the experience that will establish your reputation as a witness of integrity, accuracy and impartiality, and you achieve this via a proven track record.

Building your Medicolegal Practice

The work of the Expert Witness is, of course, subsidiary to your main business which is running a busy consultancy. Your Medicolegal practice relies on the successful running of your existing clinic if it is to succeed. A well-established, thriving consultancy is your greatest endorsement. The challenge you face now is to fulfil the demands of both.

So how do you balance the demands of both roles? How do you ensure that your private clinics are running efficiently, without fail, and especially on those occasions when you can't be there, when, for example, you need to be in court? And how will you manage the extra demands on your time when you need to study case notes or prepare a report, in addition to seeing patients in clinic?

This is where we at MPM can help. Our experienced Medicolegal PAs can support you in one or both roles – you decide. Our dedicated team can assist with all aspects of practice management, from vigilant phone answering and responding to emails, diary management, transcribing your clinic letters and complex medico-legal reports to overseeing billing and accounts. Through discussion with you and by understanding your specific requirements, we provide flexible bespoke packages, which can be customised to meet your needs.

Our experienced Medicolegal PAs can help you to build your Expert Witness practice. We can help to promote the specific service you offer – wherever you would like us to. We have an established healthcare marketing specialist on hand if you need advice in this area, or your PA can continue keeping your current visibility alive. We can, if you wish, create your own promotional website, maintain it and of course deal with the enquiries that this publicity will generate, promptly and efficiently.

Report writing and transcription

We provide PAs with specialised Medicolegal experience. Our team understand that a Medicolegal report is a key document that will come under intense scrutiny from a wide range of professionals – solicitors, the jury and of course the judge, all of whom will be searching for any inconsistencies or inaccuracies they can find. So, it is essential that this document is flawlessly presented in every aspect, from well organised content that conforms to the conventional report format to perfect spelling, punctuation and grammar. It needs to be clear, precise, factual and objective. The report is a crucial element in establishing your reputation as an Expert Witness.

Our team of Medicolegal PAs understand this and are experienced in assisting with the transcribing and formatting of these documents. They will take your

handwritten (sometimes difficult to read!) notes, GP notes and inserts alongside your audio files and transform them into a working document as well as proof-reading your drafts until the document is of impeccable courtroom standard.

A word from an existing client

Dr Dominic Paviour Phd FRCP, Consultant Neurologist is one of our many very happy clients. Dr Paviour runs a well-established clinical and medicolegal practice. We work in partnership with him providing PAs for both. Dr Paviour is well established in his field with over seven years of experience in working as a Medicolegal practitioner. When referring to our service he stated:

'I have relied on MPM for nearly two years. Annabel was able to provide a bespoke solution to my practice needs when my long-standing PA wished to go part-time. She is extremely conscientious and has developed an affordable service particularly for those starting out in private practice. I have been very satisfied with the service to date'.

Dedicated support from experienced Medicolegal PAs.

The majority of our consultants are based in London and the surrounding areas, (although we do have practices nationwide) and our services are used by consultants in a range of private clinic settings in and around Harley Street. We provide practice management and medical PA support to consultants with practices based within HCA and BMI sites, as well as Phoenix Group, Nuffield independent health- care settings and more. We offer support to new, start- up practices in addition to well-established consultancies. We have been asked on many an occasion to step in when an existing PA is leaving or retiring and our team work to provide a seamless handover allowing the practice to continue running smoothly.

Every package is individually tailored to your practice and its needs and we take pride in delivering a cost effective, efficient, flexible service that will enable you to grow your practice and build your reputation for excellence.

The flexibility of our 4 weekly rolling packages have been even more relevant throughout this current climate. We have had some consultants reducing the volume of support they need due to NHS or other commitments but still keeping their dedicated PA answering the phones and emails. Their PAs are now taking the reins again at very short notice as the volume of support needed is increasing once again.

If you feel you would benefit from the support of an experienced Medicolegal PA, do call us on 020 8088 3036 and we can discuss your needs and work out a package that you can use on a trial basis, if you wish. We are confident that you will find our support invaluable to the growth of your business.

We look forward to talking to you.

The Risks of Claims Against Solicitors Regarding Expert Evidence

by Andrew Jones and Joe Bryant at International Construction and Insurance Law Specialists - www.beale-law.com

Expert evidence can make or break a party's case at trial. Andrew Jonesand Joe Bryantlook at three recent Court decisions where the parties got it wrongand consider the risks to solicitors acting in litigation regarding expert evidence.

Experts have an unusual dual role in litigation, in that they owe:

◆ A duty of care to their instructing party. This is a duty to provide expert opinion within a reasonable range; and

◆ A duty to the Court to provide objective, unbiased, impartial and independent evidence. This duty overrides the above duty to their instructing party. Experts should follow the requirements set out in Part 35 of the Civil procedure Rules and the Civil Justice Council's *"Guidance for the instruction of experts in civil claims"*.

Three recent decisions of the Court show the potentially catastrophic consequences of experts and the parties getting it wrong.

Essex County Council v UBB Waste (2020)[1]
In this case, the Council entered into a 25 year £800m contract with UBB for the design, construction and operation of a biological waste treatment facility to process household waste. The Council sought to terminate the contract on the grounds the waste treatment facility failed various tests. UBB denied any default and alleged any problem was due to the composition of the waste provided by the Council.

- The Court found that UBB made a number of serious design errors and found in favour of the Council.UBB relied upon one expert on all the design and technical issues. The Judge found that there were "obvious and serious conflicts of interest" in UBB's expert's evidence, given;

- The expert and his company had in fact been retained by UBB on the project and had extensive involvement in the design of the facility. The expert was therefore effectively giving expert evidence on his own designs;

- UBB's sister company had previously served a pre-action letter on the expert's company alleging its designs were negligent;

- The expert requested that UBB withdraw its potential claim against his company before agreeing to provide expert evidence. Full assurance against future claims was not given and it was therefore in the expert's interests for his instructing party, UBB, to defeat the Council's claim; and

- The Judge went on to find that the expert also failed to distinguish between advocating for UBB and providing independent opinion when giving his evidence.

Whilst the Judge declined to exclude the expert's evidence altogether as inadmissible, the Judge stated he treated it with caution, and it can be seen generally preferred the evidence of the other experts.

De Sena v Notaro (2020)[2]
Whilst one party felt the wrath of the Court in Essex County Council, it was both parties and their lawyers in the firing line in De Sena. The claim involved the demerger of a family business between two brothers, with the allegation that one had procured the demerger by undue influence on the other. There was also a claim against the accountants who had been retained to act on the demerger. Both parties relied upon expert accountancy evidence on demergers.

The Judge found:

- Neither expert accountant had sufficient expertise in advising on demergers. The Judge criticised the parties for assuming that, because accountants regularly advise clients on demergers, therefore any accountant, whether he has the experience of advising clients on demergers or not, is qualified as an expert witness in this field; and

- The questions posed to the experts for their reports by their instructing solicitors were largely irrelevant or questions of law or fact for the Court and not the experts to decide. Indeed, the Judge described one question as "one of the most egregious and naked usurpation of the functions of the court that I have ever seen" and said he had "never before seen such an extraordinary set of questions" put to an expert witness.

The Court therefore went one further than in *Essex County Council* and disregarded both parties' expert reports in full.

A Company v X, Y and Z (2020)[3]
The anonymisation of the parties in this case reflected that it involved two ongoing confidential arbitrations of disputes relating to delays in the construction of a petrochemical plant. The claimant was the developer who had retained both a contractor to construct the works and a third party to issue construction drawings and supervise the contractor. The defendants were an international group of companies which provided various expert services.

The contractor commenced arbitration against the claimant for additional sums allegedly due arising out of delays to its works caused by the claimant, which included the late issue of certain drawings. The claimant argued that if it were responsible to the contactor for any delays caused by the late issue of drawings,it would pass on liability to the third party who issued the drawings. The claimant retained "K" of one of the defendant group of companies for expert advice in the arbitration.

A few months later, the third party in question also commenced arbitration proceedings against the claimant for sums owing. The claimant counterclaimed for delays caused by the third party. The third party sought to retain "M" of one of the other defendant group of companies for expert advice.

The Court found that:

- Experts owe their instructing party a fiduciary duty of loyalty, which went beyond the individual expert to also include their company or group of companies; and
- The two arbitrations concerned the same delays and there was a significant overlap in the issues. There was therefore plainly a conflict of interest for the defendants in acting for the claimant in the first arbitration and against the claimant in the second arbitration, in breach of their fiduciary duty of loyalty. The Court therefore granted an injunction against the defendants acting for the third party in the second arbitration.

Risks to solicitors with expert evidence

Since *Jones v Kaney*(2011), experts no longer benefit from immunity from suit and there have been a number of claims against experts for breaching their duties owed to their instructing parties.

However, it is not just the expert who may be in the firing line in the event of problems with expert evidence. The solicitors involved in the three cases above may well have been sitting uncomfortably as the expert's evidence unravelled. Solicitors have a duty to act with reasonable skill and case in handling litigation, which includes in relation to evidence. Solicitors generally have conduct of identifying suitable experts, instructing them, asking the relevant questions for the expert's reports and "directing" the expert throughout the litigation. And so if they get it wrong and the case unravels because of a poor choice of expert, the solicitors can expect to find themselves firmly in their disgruntled client's sights.

There may be various reasons why clients may wish to pursue a negligence claim against their solicitors instead of the expert if litigation goes wrong. The failings may be more identifiable as those of the solicitor, such as failings in the questions asked to the expert in the solicitor's instructions or failing to appreciate that the expert may not be seen as having sufficient expertise (even if the expert has acted as best they could as in De Sena). Further, given negligence claims against experts are still a relatively new concept, there is a more established body of caselaw for claims against solicitors than experts. Solicitors may also be seen to have deeper pockets and better PI insurance cover.

If a party's expert evidence ends up being criticised or found inadmissible, it could leave that party with tainted or even no witness evidence to rely upon at trial and with no opportunity to obtain better alternative evidence instead –as happened in the Essex County Council and De Sena cases. If this is a result of negligence of the instructing solicitor, the losses that parties could claim from the solicitor as a result may include:

- The wasted costs of the expert evidence, particularly if it is found inadmissible (as in De Sena)or in conflict of interest (as in A Company v X, Y and Z) and cannot be used at all; and
- The lost chance of obtaining a better result at trial had the client had the benefit of satisfactory expert evidence.

Dangers for solicitors to avoid

Solicitors therefore need to think very carefully when identifying, instructing and directing experts. There can sometimes be a tendency for solicitors to instruct someone as an expert who:

1.Is already involved in the project. Parties often do this with a view to saving costs given that person will already have detailed knowledge of the project and should therefore already be "up to speed". This is not uncommon on construction disputes, where a new consultant is appointed to remedy problems caused by a negligent professional, and the claimant may wish to appoint that new consultant as their expert.

The risk here is that the expert may not be seen as independent and impartial and even in conflict of interests, particularly if there is any criticism of their own work or they otherwise may benefit from their client's case succeeding (as in *Essex County Counciland A Company v X, Y and Z*).

2.Has proved a worthy expert previously. There is sometimes a risk in such a case of not properly considering whether the expert may have sufficient expertise on the new matter even if they did on the previous matter and, even if they do, failing to properly reiterate the requirements for expert evidence again. The lack of the expert's expertise in De Sena resulted in the party being unable to rely on any expert evidence at all.

3. Has agreed favourable rates with the solicitors and/or is on a panel.

4. Is a friend or a contract of the solicitor (less common but we have seen this).

Each of the above scenarios carry dangers, both in terms of the expert's evidence ultimately being up to scratch and acceptable to a Court, and also in terms of opening up the solicitor to criticism over the underlying motives for their expert selection which

could taint their client's case and provide grounds for a subsequent negligence claim.

The outcomes in the three cases discussed above should be a salutary reminder of the need to be fully objective when identifying and instructing experts on cases, including properly considering potential conflicts and sufficient expertise. Whilst it is good to have costs in mind, first and foremost the expert needs to have the necessary expertise and the appointment stand up to scrutiny. If solicitors are having difficulty finding a suitable expert that fits the necessary expertise/budget, or the client wishes to instruct someone who the solicitor has concerns about, then the solicitor should advise their client accordingly and document that advice to minimise the risk of later claims if there are subsequently problems with that expert evidence.

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What if I Don't Agree With the Single Expert Report?

When a single expert is appointed
The first step towards resolving a property settlement is identifying and valuing the assets.

If a couple negotiating their financial deal cannot agree upon the value of an asset that one or both wish to retain, the Australian family law system requires them to obtain independent, expert evidence about the value – for example, of a real property or business.

The Rules mandate that, at least at first, they must agree upon, or the court may order, the appointment of a single expert to value the asset.

This process replaces the old system where each party traditionally instructed their own valuer; often resulting in a protracted, futile and expensive competition between the valuers.

Now instead, the parties write a joint letter to the expert setting out what property is to be valued and providing any history or materials necessary to inform the valuer.

The expert will then prepare and release a valuation report.

When the single expert releases their valuation report, it is common that one party is happy with the valuation and the other is not. Naturally, whichever party wants to retain the asset being valued will prefer that it be valued as low as possible, and vice versa.

So what can be done if a party does not agree with the single expert's valuation?

Convene a conference with the single expert
Within 21 days of receipt of the expert's report, the parties can agree to convene a conference with the expert to clarify the report.

If the parties are unable to agree about conferring with the expert, the court may, on an application by a party, order that a conference be held in accordance with any conditions the court determines.

The conference, whether agreed to by the parties or ordered by the court, could involve the attendance of a further expert or provision of a supplementary report.

Unless the court orders otherwise, if both parties attend the conference, they jointly pay the expert's costs to convene the conference but, if only one party attends, then that party will pay the single expert's costs.

Ask the single expert written questions
A party may ask the single expert questions to clarify their report within 7 days of a conference being convened with the expert or within 21 days of receipt of the expert's report.
The questions must be in writing, be only for the purpose of clarifying the report, and not be vexatious or oppressive, or require the expert to undertake an unreasonable amount of work to answer.

If a party asks the valuer questions, those questions must be given to each other party.

Once questions are put to the expert, they have 21 days to respond.

The party asking the questions must also pay the expert's costs to answer those questions, unless the court otherwise directs.

Engage a shadow expert
Once the approaches outlined above have been explored (often parties do both), a party can retain their own expert (known as a shadow expert) to:

- assist in preparing questions to ask the single expert to clarify their report or to use by way of cross-examination at a hearing in the family law courts
- attend a conference with the single expert to clarify their report
- prepare a further valuation report.

If, however, a party wishes to rely upon a further valuation report prepared by their shadow expert on the same issue already dealt with by the single expert, that party will need the leave of the court to rely upon the shadow expert's report.

Where the purpose of engaging a single expert is to limit the issues in dispute and avoid the costs arising from the appointment of more than one expert, the court is very mindful that, where permission to

introduce a shadow expert's evidence is given, both the costs and the issues between the parties generally increase.

Therefore, in granting leave the court must be satisfied that:

- there is a substantial body of opinion contrary to any opinion given by the single expert and the contrary opinion is or may be necessary for determining the issue
- another expert knows of matters, not known to the single expert, that may be necessary for determining the issue
- there is another special reason for adducing evidence from another expert.

Cross-examine the single expert

Cross examination of the single expert is where a party or their lawyer asks the single expert questions at a court hearing, usually in order to expose deficiencies or inconsistencies in their valuation report.

A shadow expert can be essential in assisting preparing questions for cross-examination.

If a party wishes to cross-examine the single expert, they must arrange for the expert to attend court on the hearing date and, unless the court otherwise directs, pay their reasonable expenses of attendance.

Things to think about when engaging a single expert

Given that it can be difficult to challenge a single expert's report (with a conference and written questions put to the expert only to be for the purposes of clarifying their report) and adduce evidence of a shadow expert, it is important to ensure when engaging a single expert that:

- the expert is reputable and specialises in the area
- the instructions given to the expert are clear and the expert is given all relevant documents and information
- the expert is given a reasonable time frame within which to consider the issues and complete their report
- where possible and applicable, the expert is given permission to talk to each of the parties and their accountants about the issues before completing their report
- the expert be requested to release a draft of their report so the parties can identify any issues with the valuation methodology before the report is finalised.

I didn't read it all - Johnny Depp shows the problem of witness statements

by Catherine Penny, Partner and Laura Beagrie, PSL at Stevens & Bolton

In his libel trial about The Sun headline which called him a "wife-beater", Johnny Depp was asked about why he hadn't included details of what he said was an "accidental" headbutt during an incident with his ex-wife Amber Heard. He reportedly replied: "Had I read the entire statement after the lawyers had drafted it, I would have found that missing piece. I am sure that I read some of it. I do not know that I read it all. I am sorry, I trusted my attorneys."

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His comment neatly illustrates the first of the two key problems identified by the courts in the Report of the Witness Evidence Working Group: over-lawyered statements which do not reflect the witness's evidence; and statements that are too long, argumentative or contain irrelevant material such as the extensive recitation of documents.

As we reported in February 2020 in Changes in the rules on witness evidence – watch this space, the report made a number of recommendations for change. These recommendations are to be considered further at a remote seminar being held on 7 September 2020 as part of the Commercial Court's 125th anniversary programme, with a view to implementation afterwards.

One recommendation is already underway however – that the courts should more readily apply costs sanctions and express judicial criticism of non-compliance with the court rules on witness statements. The report acknowledged that many court users felt that the existing rules on witness statements were in fact broadly fit for purpose, it was just that the courts took no action in respect of non-compliant witness statements, barely commenting on them let alone imposing any penalty. Since then, we have had a couple of judgments which have contained strong criticisms of witness statements and imposed penalties:

◆ In PCP Capital Partners LLP and PCP International Finance Limited v Barclays Bank plc [2020] EWHC 646 (Comm), Mr Justice Waksman complained that witness statements contained legal argument when they should only contain factual evidence, and that they referred to documents to which the witness was not a party. The judge ordered the parties to remove the offending passages.

◆ In Skatteforvaltningen (The Danish Customs And Tax Administration) v Solo Capital Partners LLP & Ors [2020] EWHC 1624 (Comm), Mr Justice Baker also explained that because much of the witness statements were legal submissions, he had required the parties to provide further copies with passages to be relied on as factual evidence, which reduced the length of statements by almost half.

We have yet to see whether the judge in the Johnny Depp libel case will make any judicial criticism on witness statements, but we can certainly expect further judgments to contain them in appropriate cases as the courts signal their determination to enforce compliance with the court rules on witness statements.

About the Author
Catherine Penny
Catherine studied law at Cambridge University and the University of Poitiers, France, before completing her LPC at the Oxford Institute of Legal Practice and starting her training contract at Mundays LLP. She qualified as a dispute resolution solicitor in September 2009 and became a partner in 2020.

In June 2013 Catherine joined Stevens & Bolton LLP as an associate in the dispute resolution team specialising in international arbitration and commercial litigation. In May 2015 she became a senior associate.

Catherine has experience advising clients on a broad range of commercial disputes. Her work has involved litigation, arbitration and other forms of alternative dispute resolution as well as general advisory work. In 2015 she enjoyed a 3 month secondment as part of a client's in-house legal team which gave her the experience to see it from the 'other side'.

She has been a member of the Chartered Institute of Arbitrators since June 2012 and is a member of YIAG (a group for younger arbitration practitioners which is sponsored by the LCIA).

As a reflection of her interest in the sector, Catherine is part of Stevens & Bolton's Life Sciences group.

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Foreign Claims and UK Jurisdiction

Syed Rahman of Rahman Ravelli assesses the doctrine of forum (non) conveniens and a court's decision regarding jurisdiction on a foreign claim.

In the context of civil litigation, forum conveniens is a commonly-considered principle wherein the court decides whether to permit the service of proceedings outside the jurisdiction through the English courts, or to acknowledge that another forum would be more appropriate.

The recent judgment in Traxys Europe SA v Sodexmines Nigeria Ltd [2020] EWHC 2195 (Comm) considered whether the Commercial Court of England and Wales could exercise its jurisdiction over a claim in Nigeria. As a case, it is a useful illustration of the factors a court will consider when deciding whether a case should be heard in the UK.

Background

The claim concerns the sale of products by the first defendant, Sodexmines Nigeria Limited (Sodexmines), to the claimant, Traxys Europe S.A. (Traxys), in Nigeria. The second defendant, Mr Ali, is the beneficial owner of Sodexmines. It was alleged that the first defendant dishonestly substituted the purchased products with products described as "worthless" which were then provided to the claimant. The claimant then brought claims in contract/restitution against Sodexmines and in tort against the two defendants.

The contract between the parties provides for English law and jurisdiction. Therefore, permission to serve outside the jurisdiction (i.e. Nigeria) was granted. In this case, Mr Ali applied to the court to stay the proceedings against him on the grounds that Nigeria is the forum conveniens and so this English court should not exercise its jurisdiction.

The Burden of Proof

In an application to stay the exercise of the court's jurisdiction, the burden would lie with the defendant to show there is a more appropriate forum.

However, the judge in this case said that, on the facts and notwithstanding that Mr Ali was seeking a stay, this case falls into a second class of cases regarding the court's exercise of its discretionary power to allow service outside of the jurisdiction. In this latter class, the burden would fall on the claimant (as in Spiliada Maritime Corp. v Cansulex Ltd. [1987] 1 AC 460). It was, therefore, decided that the burden of proof lay upon the claimant to establish that the appropriate forum, in this case, was England, rather than Nigeria.

The Claimant's Argument

The claimant put forward the following factors in support of the submission that England is the appropriate forum:

1 - Sodexmines agreed to an exclusive English jurisdiction clause in the disputed contract.

2 - As per the contract, Sodexmines agreed for English law to govern its relationship with Traxys.

3 - The claim against Sodexmines is proceeding in England, and will continue to do so, even if the court stays the claim against Mr Ali.

4 - The evidence and the relevant documents will be in English.

5 - Mr Ali is a British citizen, and the English court is likely to be a convenient venue for both parties. By contrast, Mr Ali has fled and is avoiding entry to Nigeria.

6 - Mr Ali has repeatedly and continually told the Nigerian courts, in sworn evidence, that the civil dispute ought to be litigated in England and Wales.

7 - There is an accusation of evidence that Mr Ali interfered with a witness - so the claimant seeks to have the case heard in the UK under the "intense scrutiny" of an English court.

The Court's Response

Having studied each of the points made by the claimant, the court considered that:

1 and 2 - The first and second Defendants are legally separate and distinct persons - and so Mr Ali has not agreed to English law and jurisdiction for claims against him;

3 - The court held that it is unlikely the claim in tort will go ahead against the first defendant in England.

4 - The fact that the evidence and documents are in English is not a reason for the forum conveniens to be England.

5 - Mr Ali is likely to give evidence by video link, whether in Nigeria or England;

6 - It is true Mr Ali submitted before the Nigerian Courts that the civil claim was a matter for the English court.

7 - The point regarding alleged witness interference could not be resolved in this hearing as it needed to be scrutinised by the court (in the forum conveniens) with care.

Judgment

The judgment held that the claimant's factors, as outlined above, were "lacking in cogency" and that the claimant had failed to establish that England is the forum where the case should more appropriately be tried in the interests of the parties. The "centre of gravity" of the case is in Nigeria, not England.

The judge agreed with Mr Ali's supporting points that Nigeria was the appropriate forum because the tortious events took place in Nigeria and the witnesses are in Nigeria. The judge, therefore, granted Mr Ali's application for a stay of proceedings in this jurisdiction. However, it was judged that the worldwide freezing order (WFO) in place against Mr Ali - that was imposed by the English court - could and should remain until the claimant secures similar relief in Nigeria, at which point this court will set the WFO aside.

The details of this case, especially its outcome, will be useful to anyone considering bringing a claim in the UK, where the fundamental focus of the litigation may be abroad. It will also be of use to those who have to defend such a claim. It outlines some valuable factors concerning the circumstances that the court will deem appropriate for a case to be heard in the UK, where that case has a foreign jurisdictional anchor.

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FibroGen & Astellas v Akebia & Otsuka – Lord Justice Arnold Addresses Questions Concerning Expert Evidence in Patent Cases

By William Jensen – Marks & Clerk Law LLP.

Expert witnesses play a crucial role in patent litigation. They assist the Court in understanding the relevant technology and, when assessing the validity of a patent, in understanding what the hypothetical "skilled person" of the patent in question would have understood the patent and prior art to mean at a particular point in the past. The parties and the Court will ask the parties' expert witnesses to opine on these issues whilst refraining from applying post-patent acquired knowledge and hindsight. It is not an easy task for the expert witness or indeed for the lawyers instructing them. The expert witness must work closely and intensively with a party's lawyers in preparing evidence whilst staying at arm's length, remembering that their duty is to the Court and not to the lawyers or the party paying their fees. The lawyers must instruct the expert very carefully, taking care not to expose the expert witness to information at too early a stage of the process that might lead to allegations of hindsight. It was issues such as these that required Lord Justice Arnold to issue a stark warning to patent practitioners in April in *FibroGen & Astellas v Akebia & Otsuka* [2020] EWHC 866 (Pat).

Judgments in patent trials don't get much more complex than *FibroGen*. The trial involved six granted patents from two patent families. Although a first instance trial in the High Court, the trial was heard by Lord Justice Arnold, returning from the Court of Appeal following his appointment in 2019.

The patents concerned the use of inhibitors (referred to as HIF-PHIs) of an enzyme called hypoxia inducible factor-prolyl hydroxylase (HIF-PH) for treating various types of anaemia and related conditions. Akebia and Otsuka had sought to revoke six patents belonging to FibroGen to clear the way for their product vadadustat. Astellas, as the exclusive licensee under the six patents, brought a cross-claim for threatened infringement. In a very technical and necessarily detailed judgment running to 640 paragraphs, Lord Justice Arnold found that of all the claims in issue across all six patents, only one claim survived in an amended form and even then, that claim was not infringed.

There were several points of interest for ardent followers of patent law, but it was Lord Justice Arnold's comments on expert evidence in patent cases that are particularly noteworthy for expert witnesses and those who instruct them. Lord Justice Arnold has been a key figure in developing UK patent law and practice as a High Court Judge since 2008 and as a Deputy High Court Judge before that, hearing many of the most significant cases in this time. His comments will have a significant impact on the patent profession. He has previously commented on expert evidence in patent cases in previous judgments. These comments had already come to govern the way lawyers and expert witnesses work together in preparing evidence for trial. The expert evidence heard in *FibroGen* brought several issues to light in relation to how the evidence had been prepared, how the experts were exposed to the relevant documents and how the experts were dealt with at trial.

First, in response to criticisms made about a party's lawyers and expert failing to disclose and address the expert's relevant publications, the Judge considered the preparation of expert reports, and referred to a passage in *MedImmune Ltd v Novartis Pharmaceuticals UK Ltd* [2011] EWHC 1669 (Pat) at [99]-[114]. This passage has become part of the "standard" materials provided to an expert witness by the instructing lawyers when preparing evidence, to assist in explaining the duties of the expert. Lord Justice Arnold referred on this occasion to the key point made: *"the lawyers who instruct expert witnesses bear a heavy responsibility for ensuring that an expert witness is not put in a position where he can be made to appear to have failed in his duty to the court even though he conscientiously believes that he has complied with that duty".*

Second, in response to an improper line of questioning during cross-examination and attacks made on the expert in closing, the Judge referred to a passage in another of his own judgments: *Merck Sharp and Dome Ltd v Shionogi & Co Ltd* [2016] EWHC 2989 (Pat) at [87]-[93]. The key point he made here was that *"too much time is spent by cross-examiners in patent cases on ad hominem attacks that are unfair to the witness, unhelpful to the court and waste expensive time".*

Third, after it became clear that the first document an expert was shown disclosed a key feature of the patents in suit, the Judge considered an approach to be adopted in instructing experts that he has previously recommended in his judgment, once again

in *Medimmune* at paragraph [118]. As mentioned, expert witnesses in patent cases must try to consider documents from the point of view of a hypothetical skilled person at a particular date in the past. To do this, the instructing lawyers must be careful in how they "reveal" the relevant documents in the case. If opinions on what a prior art document discloses can be given without having seen the patent, the risk of the expert applying hindsight to his opinions can be reduced. As Lord Justice Arnold states, this is a procedure known as "sequential unmasking", the purpose being to reduce hindsight. Patent lawyers have long known this approach for instructing experts, but it can be time-consuming and expensive. Asking experts for comments on lengthy documents when there are really only one or two paragraphs of interest leads to good evidence, but costs money.

However, whilst endorsing the "sequential unmasking" procedure, Lord Justice Arnold did recognise its difficulties – some of which are unavoidable: for example, commenting on new prior art introduced late in the proceedings after the patent has been read.

FibroGen demonstrates how important it is that experts are instructed correctly from the outset and helped to understand their duties at the earliest opportunity. It is often tempting for instructing lawyers and experts to shortcut these early steps, especially with tight timetables and costs considerations (and indeed in the current climate of only ever meeting remotely). Although Lord Justice Arnold recognises the difficulties with the "sequential unmasking" approach, *FibroGen* reaffirms that it should be followed wherever possible. His tone suggests that lawyers should depart from this approach in limited circumstances only. During the trial itself, Lord Justice Arnold's comments on how experts are cross-examined may well mean that lawyers shy away from attacks that hitherto may have been the norm. Although the lessons of this judgment are aimed more at patent lawyers (the burden is of course on the lawyers to ensure that the correct process is followed), it can only help if expert witnesses are made aware of how the process works at the earliest possible stage. It may even be advantageous for lawyers to share extracts of *FibroGen* with their expert witnesses in future to assist in explaining the duties of the expert witness in patent litigation.

The full judgment can be seen here.
www.bailii.org/ew/cases/EWHC/Patents/2020/866.pdf

Court Considers Contributory Negligence, Capacity and Consent

In an interesting case for practitioners, the High Court considered issues of capacity, consent and contributory negligence following an RTA in which the Claimant was a passenger driven by his intoxicated friend. The judge found the Claimant had capacity to consent to being driven by the drunk driver but his failure to wear a seatbelt did not make a difference to his injuries. The appropriate reduction for contributory negligence was found to be 20%.

Campbell v Advantage Insurance Company [2020] EWHC 2210 (QB)

Background

The Claimant was being driven from a nightclub by his intoxicated friend when the car drove headlong into an articulated lorry. Earlier that evening the Claimant had become so intoxicated that his two friends sat him in the front seat of the car, where he fell asleep. The Claimant's friends went back into the club. When they returned later the Claimant was still in the front passenger seat. The driver, Dean, drove off with the Claimant. Aaron had returned to the club and was not in the car. Dean was killed outright. The Claimant had somehow moved from the front passenger seat into the rear of the car, and sustained extremely serious injuries.

At trial His Honour Judge Robinson found it was Dean's decision to move the Claimant into the back of the car (before they set off) and he had assisted the Claimant (who was then awake) out of the front seat and into the back.

The Defendant admitted primary liability but alleged contributory negligence.

The Defendant alleged:
The Claimant allowed himself to be driven by Dean, and he knew or ought to have known Dean was intoxicated and not fit to drive.

The Claimant did not wear a seatbelt.

Due to his injuries the Claimant was unable to give evidence on his own behalf. Aaron committed suicide before the trial began but had provided written statements.

Alcohol

There were some inconsistencies in Aaron's evidence, as to how much was drunk at the club, but HHJ Robinson found "it was clearly a lot, comprising, at the very least, champagne and numerous shots." When the Claimant was put into the front seat of the car he must have been aware that Dean "had drunk a great deal of alcohol." The judge further found that the Claimant "was aware that Dean had consumed so much alcohol that his ability to drive safely was impaired."

The judge specifically referred to Section 3 of the Mental Capacity Act 2005 and found the Claimant had capacity to consent to being moved from the front seat to the back of Dean's car. He found the Claimant would have been able to understand he was being moved from the front of the car to the back; it was a continuous process so there would be no difficulty retaining the information and the Claimant was probably aware of what was happening; and the Claimant changed position in the car which indicated assent.

The judge then considered that if the Claimant had capacity to consent to changing position in the car then "he also had capacity to consent to being driven in the car." He continued that if the Claimant's "intention had been to leave the car, before it was driven off, he would surely not have got into the back of it."

Seatbelt

It was argued on behalf of the Claimant that he was so incapacitated through alcohol that he could not properly decide whether to enter the car, let alone decide to activate a seatbelt. It was submitted that it was the responsibility of Dean to ensure the Claimant was wearing a seatbelt before driving off.

HHJ Robinson said the issue was whether the Claimant had capacity to decide whether or not to wear a seatbelt. As he had found the Claimant had capacity to decide to move from the front of the car to the back, it therefore meant the Claimant had capacity to decide whether or not to wear a seatbelt. HHJ Robinson found the Claimant chose not to wear one.

Based upon the expert evidence the judge had "no hesitation in finding that even if the Claimant had been wearing a seat belt in the rear near side passenger seat, his head would have struck the front passenger seat." There was no reduction in damages for this failure as the judge was "unable to find that wearing a seatbelt would have made any difference in outcome".

Contributory negligence

The judge noted there was no evidence to suggest an earlier agreement that Dean would drive the Claimant away from the pub. It is possible the Claimant would have gone home by taxi if he had not been put into the front seat of Dean's car. Further, whilst the Claimant "must have known" how much alcohol Dean had drank before he was walked to the car, he could not have known how much more alcohol Dean consumed beyond this point.

The judge found that the appropriate degree of contributory fault on the part of the Claimant was 20%.

What can we learn

The judge concluded that as the Claimant was "physically able to move from the front into the rear of the car, even with assistance" he was physically able "to accomplish the fairly simple task of putting a seatbelt on." It was the Claimant's responsibility to ensure he was wearing a seatbelt and it would be "unnecessarily paternalistic" to find that Dean owed a duty to the Claimant to help him, or encourage him, to fasten his seatbelt.

In relation to the level of contributory negligence, the Defendant pointed the judge to two cases – Meah v Mc Creamer [1985] and Stinton v Stinton and The Motor Insurer's Bureau [1993]. HHJ Robinson found that it was "implicit in the judgment" of both of these cases that the claimants had intended to be driven home by the drivers. There was never such an agreement between the Claimant and Dean. As such the level of contributory negligence was lower than Meah (25%) and Stinton (one third).

Had the judge found that the Claimant was unable to assess Dean's fitness to drive the case of Booth v White [2003] would be relevant. In this case the Court of Appeal determined that a claimant cannot "rely on his own drunkenness" and the test in determining whether a claimant had failed to take reasonable care for his own safety was to assess what a reasonable man in the claimant's shoes would have done.

About the author

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Low Carb Program ranked #1 for Type 2 Diabetes Prevention in The Times' Best Health Apps 2020

Low Carb Program was ranked #1 in the category of Type 2 Diabetes Prevention in the Best Health Apps 2020 List. Published on July 7, 2020 in The Times, the Best Health Apps 2020 List highlighted the highest ranked apps under a range of health categories.

Low Carb Program is a multi-award-winning, evidence-based structured education and behaviour change self-management platform supporting patients living with obesity, prediabetes, type 2 diabetes, non-alcoholic fatty liver disease (NAFLD) and polycystic ovary syndrome (PCOS) to achieve their selected health goals. User experience (education, resources, support) is tailored to goal, disease profile, ethnicity, age, gender, and location and provides:

Education: NHS-approved nutrition streams with meal plans and resources tailored to disease, budget, dietary preferences, cultural and social norms. Users and/or healthcare professionals can choose the most appropriate education stream: low carb, Mediterranean, ketogenic, balanced, or intermittent fasting (sometimes known as restricted eating).

Coaching: unlimited support from Health Coaches to keep accountable, weekly virtual meetups and check-ins.

Community: speak to peers and join meetups.

Classes: on-demand workouts, yoga flows and relaxation exercises tailored to fitness level.

Health tracking: track weight, activity, sleep, mood, blood glucose, medications and more with data-led feedback to support behaviours.

Wearables: sync and connect with FitBit, Apple Health, Google Fit, Samsung and Withings.

Recipes: over 1,300 recipes, updated weekly, tailored to allergies, and dietary preferences.

Food diary: scan barcodes, search for foods or add recipes from an in-app Recipes library.

Daily support: fresh tips, news, Q&A, expert opinion, and live classes.

Patients are supported to maintain long term health improvements through continued access to the platform, education and program features, coaching, and health tracking facilities.

Charlotte Summers, Founding Chief Operations Officer of DDM said: "The Times' Best Health Apps 2020 List is a great way to recognise clinically-validated innovation. Ensuring digital innovation is rigorously evaluated ensures patients access clinically safe and effective services."

Researchers call for a national diabetes screening programme

A national type 2 diabetes screening programme should be introduced to help diagnose people earlier and prevent complications, researchers have said.A team from the University of Exeter say they have discovered that people may have type 2 diabetes without any symptoms for many years before theyare diagnosed.

A national type 2 diabetes screening programme should be introduced to help diagnose people earlier and prevent complications, researchers have said.

A team from the University of Exeter say they have discovered that people may have type 2 diabetes without any symptoms for many years before they are diagnosed.

When people do develop symptoms, which can include excess toilet trips, extreme thirst and tiredness, they are very often overlooked.

The research team took a series of blood samples from 200,000 people aged between 40 and 70 using the UK Biobank database. They found there were more than 2,000 undiagnosed cases of type 2 diabetes among those people.

The team presented their findings at this year's Annual Meeting of the European Association for the Study of Diabetes (EASD).

Lead researcher Dr Katherine Young said: "As people can have type 2 diabetes for many years without symptoms, diagnosis may be delayed, increasing the risk of complications. Our study shows that population-level screening could identify cases of type 2 diabetes far earlier and potentially reduce complications.

"The identification of these patients for whom primary care records are available in UK Biobank gives us a unique opportunity to study the impact of this delay on the risk of developing complications in the future.

"While preliminary results suggest that delays in receiving a diagnosis for those with undiagnosed diabetes did not significantly impact diabetes-related complications in this group of people, further research is required to ascertain whether screening for diabetes in this age group would reduce diabetes-related complications."

Improving Standards of Expert Witness Evidence in Scotland

In September, the University of Aberdeen Bond Solon (UABS) Expert Witness Certificate was launched. It is the first university certificated expert witness training programme of its kind in Scotland.

The law and the courts system in Scotland are markedly different to other jurisdictions. It is therefore essential that expert witnesses who are instructed to act in Scottish proceedings possess the requisite knowledge to comply with the rules and procedures affecting their work.

Mark Solon, Solicitor, and founder of Bond Solon says: "Courts, lawyers and the public need expert witnesses who are competent to provide truly independent opinion evidence on the technical issues that frequently arise in litigation. Until now, there has been no formal certified training for experts who give evidence in the Scottish legal system. The new University of Aberdeen Bond Solon Expert Witness Certificate programme now provides such training."

Bond Solon has been training expert witnesses for over 25 years. To date over 1,500 experts from a wide variety of professions have completed the Cardiff University Bond Solon (CUBS) Expert Witness Certificate, a corresponding certificate for expert witnesses who act in English and Welsh jurisdiction.

The UABS Certificate will enable expert witnesses to demonstrate, to both instructing lawyers and the courts, that they have been appropriately trained, assessed and hold the core and requisite competencies to act as an expert witness in Scotland.

The first public courses for the UABS Certificate are being held virtually in early 2021.

Find out more about the certificate on www.bondsolon.com/expert-witness/certificate-scotland/

Courtroom Video Links, Benefits and Limitations

by Dr. Stephanie Sharp. M.Sci, PhD

Video links to Court are currently used in certain specific circumstances such as evidence from young and vulnerable witnesses and for individuals incarcerated in distant locations and for short hearings. The reasons given are to protect the vulnerable and shield them from the intense pressure of the courtroom and, in the case of incarcerated individuals to save time and money transporting them to the relevant Court to state their name.

The current restrictions put on travel and personal contact has added a new impetus to look at the ways in which Courts can continue to function efficiently whilst not breaking the guidelines on social distancing. Official guidelines and advice have been published (referenced below) giving ways in which this is to be implemented in the various Courts and jurisdictions and recently certain Courts have been allowed to conduct business remotely where appropriate – one such example in Scotland is the new Court Centre in Inverness.

I have given evidence via video link on a number of occasions, but not as much as I would wish, largely due to difficulties in setting up equipment for some Courts and, particularly, the different systems used in England and Scotland which do not allow easy linking and require a few days' notice to patch together.

It has been an exercise in learning in the early examples, for example, while it is a good idea to uphold Courtroom standards and etiquette, it is not advisable to stand up as you would normally during the oath or affirmation. This seems painfully obvious as soon as you've done so, and realise you appear to just be wandering off. In short, always remember where the camera is pointing!

On top of this,the requirement for excellent (not just adequate or good) IT equipment and links is essential. Wide bandwidth and excellent hardware and software is a necessity – high resolution cameras at each end of the link, functional resilient and secure hardware and software are the minimum required. On one occasion, whilst giving evidence to a family Court, the link kept dropping out and I could not ascertain who was talking and asking the questions. This is very frustrating to the Court as well as to the witness. There are methodologies out there that allow the camera to zoom automatically to the actual

speaker (as well as give an overview of the Courtroom) and, therefore, give a better idea of what is happening in the Court. It is also possible with this technology to have visual material (including animations) to display to Court to allow a better understanding for the decision maker(s) of the relevant science and evidence and, therefore, for a fairer outcome for the case. These technical problems have been highlighted over the Summer with this becoming the major obstacle to full implementation of virtual Courts. There have been many descriptions of virtual trials being posted on the internet with many very positive comments but with clear technical problems (try setting up a Webex® or Microsoft® Teams® meeting or taking part in one!). These technical problems are often as a result of the participants not being fully trained on the system being used – only 2 of 5 participants in a recent meeting of mine managed to log in!

In terms of preparation from the Courts' aspect, equipment aside, it may be the case that copies of Religious texts be accessible in the video link vicinity if you take the oath rather than affirm. On one occasion, I was asked to state the oath (I personally use the affirmation), and the sitting Judge was quite adamant a bible was located. This proved to be impossible and led me to recite the affirmation while the attendant was frantically running in and out looking for a bible. These all seem reasonable steps to take in advance, as although they are simple requirements, not having them in place can result in delays. Full sets of papers are also a minimum requirement for everyone – correctly paginated and the same for all!

So, given the extra preparation that may need to be implemented, why bother at all?

If like us (and many other expert witnesses), you travel across the entire UK and the Republic of Ireland, travel can become quite complicated, particularly when several cases are running together. My least favourite example was receiving a call when I had just completed evidence in Inverness. I had stepped wearily into the train station in Inverness to return to Glasgow when I received a call from a Detective on another case- was it possible to be at the Old Bailey the following morning at 9am? I almost wept. I was fairly bedraggled checking into the Hotel in London very late that evening.

That raises the further question of Court costs. Extensive travel, particularly last-minute travel and accommodation can be expensive, and in the current economy, it may be an attractive option for law enforcement, as well as private clients to reduce their expenses. Hundreds of pounds in getting a last minute ticket from Inverness to London and an overnight at a reasonable hotel in London (as well as the unused portion of the Inverness-Glasgow ticket and the fee for time spent in travelling and sitting in Court) could have been reduced to a fee for a few hours videolink from our offices.

There are, in my opinion, some downsides to video links, particularly in terms of 'court presence'. Many legal professionals may prefer to have a witness there in person, particularly if other questions arise during proceedings or to give weight to the evidence being given and, the "atmosphere" of the Court cannot easily be felt through a videolink.Some expert witnesses have expressed the view that the gravitas of the expert and their evidence has been diminished by not being present in person in Court. It has also been suggested that it is easier to decide on the veracity of evidence if the witness is present in Court – a recent article by a senior Judge gives the opinion that the ability to assess the truthfulness of the witness is not diminished by evidence being given by videolink.

It is perhaps a question of 'cost-benefit' for all involved parties. For example, I suffer with somewhat unpredictable mobility issues, which can cause a good deal of discomfort when I am required to travel or sit waiting for an extended period. The prospect of standing, carrying bags and cases (and your stick) can be daunting on long or convoluted trips, as is standing for extended periods of time, in warm surroundings in Court with no water. These may seem trivial issues, but it makes a lot of difference when you do have to battle with them. I am sure I am not the only expert witness who suffers from these problems.

A final consideration, and possibly one of the most important in the great scheme of things, is the emergence of the novel coronavirus and COVID-19. With social distancing likely to be in place for a significant length of time when lockdown is finally lifted, we have to ask how practical this is in the Court setting of waiting rooms, public galleries and Jury deliberation areas. It has been an interesting adjustment already, with people asked to stay indoors to 'flatten the curve', of viral infections and deaths, we are bombarded with news footage of people flouting the rules that have been put in place to protect public health due to some rare sunny weather. If the public cannot follow one guideline without becoming too bored to avoid sunbathing and trips to the Peak District, add that to the increasingly reported mental health crises and domestic violence reports and deaths, there is sadly little chance of people sticking more closely to the law during this time.

We have certainly not ground to a halt at the Glasgow Expert Witness Service by any means–requests for reports in criminal, civil and family cases continue to come in with a similar frequency as before the "lockdown". How this evidence is to be delivered to Court is, however, a matter yet to be resolved. We cannot expose ourselves to possible infection if social distancing is not implemented and adhered to in travel and Court settings

With the virus expected to come in unknown and currently unpredictable waves for some time to come, it may be time to think very hard about implementing video links across the Courts in the whole country with a unified IT system in place so that evidence

can be given in English Courts from a location in Scotland, or we may also experience increasing waves of criminal offences while the country weathers the storm of coronavirus. The Family Courts in England have already implemented remote evidence (see guidelines below) and some civil cases are proceeding with remote access in Scotland but this needs to be widened to include all Courts and all evidence.

Let us grasp this opportunity to modernise our Courts and bring them into the 21st century – high quality, high capacity links into all Courts in the UK on a single platform with expert training given to all staff. The advantages of this, in my opinion, by far outweigh the loss of "court presence" and should be implemented without delay.

Reading List

www.newlawjournal.co.uk/content/camera-shy-top-online-tips-for-expert-witnesses Excellent article by Mark Solon

www.judiciary.uk/wp-content/uploads/2020/03/Civil-court-guidance-on-how-to-conduct-remote-hearings.pdf Civil Justice guidelines for remote hearings

www.judiciary.uk/wp-content/uploads/2020/03/The-Remote-Access-Family-Court.pdf
The Remote Access Family Court

www.cps.gov.uk/covid-19-crown-prosecution-service-planning-and-preparation
CPS guidance for criminal trials

Bringing Latent Personal Injury Claims on Behalf of Minors in the ACT

by Bill McCarthy Special Counsel
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Personal injury claims, particularly those arising from exposure to Asbestos, dust disease, and lead poisoning, are not always easily identifiable and health complications can take considerable time to manifest and evolve, specifically in minors.

Minors, under the age of five, are at a greater health risk, if exposed to a metal such as lead. Lead can be hazardous, especially if swallowed or breathed in, though is still a common feature in old ACT buildings. In an air-borne state, lead exposure can permanently lead to intellectual impairment or brain damage in young children who are still in the developmental stages of their life[1].

Injuries that occur in a public place, such as a school or community hall, may arise as a result of negligence of either a person or an entity responsible for the facility. If that is the case, and a breach of duty can be established, then a claim for damages can be brought in either the ACT Magistrates or ACT Supreme Court, depending on the severity of the injury sustained. The monetary threshold for litigating a claim in the ACT Magistrates Court is up to $250,000, anything over that threshold is litigated in the ACT Supreme Court.

The main piece of legislation that governs public liability and product liability claims in the ACT is the Civil Law (Wrongs) Act 2002 ACT (the Wrongs Act). Chapter 5 of the Wrongs Act specifically requires certain pre-court procedures for bringing personal injuries claims to be complied with, though some complications can arise if a potential claimant is exposed to a potentially harmful substance, though its consequences may take years to materialise. This can be especially the case for children, when bodies are still developing.

A claim for damages, arising from a personal injury, normally needs to be commenced within three years from the date of injury, in accordance with section 16B of the Limitation Act 1985 ACT (the Limitation Act). However, in the case of injured minors, special provisions apply pursuant to section 30A of the Limitation Act. Specifically, if the injury is, or includes, a disease or disorder, the relevant period for bringing a claim is six years after the day the minor's (plaintiff's) parent or guardian first knows that the child has suffered an injury, or that the injury is related to someone else's act or omission. In any other case, it is six years after the day the accident giving rise to the injury occurred. The limitation period for which a

claim is statute barred is three years after a minor reaches its majority, being 18 years of age. It is therefore important to be aware of the limitation period, as when it expires, the claim may become statute barred.

As discussed above, personal injury claims in minors arising from exposure to chemicals or other toxic or hazardous materials are not immediately ascertainable. However, that does not mean that precautionary steps cannot be taken early on by either a concerned parent or litigation guardian if their child has been exposed to a hazardous substance such as lead.

The preliminary steps to be taken are as follows:
1, Notify the owner or occupier of the premises, as soon as possible, of the injury and complete a notification of injury form, if one is available.

2, Complete an ACT Law Society Personal Injury Claim Notification Form, which can be found on the ACT Law Society website and provide it to the respondent or the respondent's insurer, if known. For example, in case of a public school in the ACT, the respondent would be the Territory, thus the Form can be sent for the attention of the ACT Government Solicitor.

3, Obtain details of any witnesses to an alleged injury and take photographs and records of the premises or place of injury.

4, If you notice symptoms develop in your child, then seek immediate medical attention and keep records of all your medical appointments, as well as receipts for any treatment obtained and medication purchased, so that in due course reimbursement can be sought from the relevant insurer, once proceedings are commenced.

The taking of such steps, at the earliest occasion, can mean that should there be a need to carry through with a claim in later years, the necessary evidence for a claimant to succeed on his or her claim will not have been lost later with the passing of time.

If you have any questions in respect of this article, or require any legal assistance, please contact Bill McCarthy, Special Counsel, within the Litigation Team at BAL Lawyers.

*[1] "Lead exposure and your health", Betterhealth.vic.gov.a*u

Covid-19: Has it Flipped the Script on Rehabilitation in Serious Injury Cases?

by Kirsty O'Donnell, Associate, Digby Brown

The COVID-19 pandemic and the resulting lockdown triggered an immediate halt and re-assessment of care needs and rehabilitation packages in serious injury cases. The immediate concern for serious injury practitioners was how to ensure our clients were being looked after and supported during what became an incredibly difficult time for injured parties and their families. Innovative thinking and collaboration between parties was the first step towards finding a solution.

At Digby Brown LLP, we were fortunate to be in the position to transition smoothly into working from home and still support our clients in whatever way we could. There was no delay in addressing the individual needs of clients when the decision to lockdown was taken.

Rehabilitation is key in serious injury cases and the aim was, and still is, to ensure continuity of rehabilitation and care where possible. Many of our clients are already very vulnerable and rely heavily on the support that comes from their case managers and the packages put in place around them. Inevitably, these were stopped in the initial period after lockdown and family members often had to step in, which added pressure to the family unit, during what was already an anxious time. We were conscious to address this as quickly as possible.

We have seen service providers working hard to find safe and suitable ways and means of supporting our clients. There has been a real shift in the use of technology. Although virtual rehabilitation cannot replace face to face contact in all cases, it has been an excellent alternative during this unprecedented time. It has allowed therapies such as psychological treatment, physiotherapy and case management meetings to continue and many of our clients are very grateful for that support. It is also being administered in a way that honours social distancing and this in itself is a comfort to clients who are worried about the risk of infection or for those who are high risk patients due to their injuries. Time will tell to what extent virtual interventions will continue but it may well be the new norm going forward in appropriate cases.

A key role of the case manager is to manage the NHS input alongside private provision of services to ensure that the individual obtains maximum benefit. Given

the pressure on the NHS and the ever extending waiting lists as a result of COVID-19 and the redirection of services, it is likely that there will be more of an emphasis on accessing privately funded therapies and care as part of the claim process. The test is always reasonableness but pursuers have a right to access private treatment in personal injury cases and it is even more important when waiting lists are lengthy. Scotland has faced a longer lockdown than other areas of the UK and services are only beginning to open back up but are already under pressure. One of the key principles in serious injury cases is to ensure individuals gain access to rehabilitation in order that they have the best chance to recover. It might be that in the short to medium term, NHS services simply cannot be relied upon whilst they remain over-whelmed. Insurers may try to take issue with this but hopefully a pragmatic approach will be adopted.

As practitioners, we must be mindful of discussing the impact of lockdown on pursuers and what additional needs they might have as a consequence of it. Some clients have found the relative 'quiet' of lockdown has made their recovery a little easier, whilst others, particularly with more complex needs, have found it incredibly difficult. The knock on effect is that care and rehabilitation packages require to be re-assessed and often additional funding will be required. Medical evidence also has to be updated to ensure that the effects of lockdown and any repercussions are included within the claim. This in itself has proved to be problematic when only a face to face appointment is appropriate instead of the video platform alternative.

We find ourselves in a challenging time but as practitioners, we must look at each case individually and fully investigate and understand the consequences of lockdown and the pandemic for each client. Some clients have embraced technology and others have missed face to face contact and may require a re-assessment of the rehabilitation package in place. The use of technology is overwhelming for some and that also must be borne in mind. The likelihood is that the cost estimates that are currently in place are likely to fluctuate. Our role remains to ensure that individuals are compensated fully and all rehabilitation and care needs are properly assessed in the context of facing recovery during a pandemic.

R (on the Application of The Asbestos Victims Support Groups' Forum UK) v Lord Chancellor

by Mr Jim Hester - Parklane Plowden Chambers

Judicial review case R (on the Application of The Asbestos Victims Support Groups' Forum UK) v Lord Chancellor [2020] EWHC 2108 (Admin) is of interest to industrial disease specialists.

The complaint in this case flowed from the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). Clearly, that Act significantly affected the way personal injury claims are funded. Importantly for this case, restrictions were introduced on the recovery of conditional fee agreement uplifts and ATE insurance from defendants.

Relevant parts of section 44 and section 46 of LASPO provide that:

"Section 44…A costs order made in proceedings may not include provision requiring the payment by one party of all or part of a success fee payable by another party under a conditional fee agreement."

Section 46…A costs order made in favour of a party to proceedings who has taken out a costs insurance policy may not include provision requiring the payment of an amount in respect of all or part of the premium of the policy, unless such provision is permitted by regulations under subsection (2)."

At the time of implementation, section 48 provided that sections 44 and 46 shall not apply for mesothelioma proceedings.

In fact, section 48 provided that those sections could, in the future, be implemented in relation to mesothelioma proceedings. The steps that the Lord Chancellor would have to take were set out.

The Lord Chancellor did try to do this in 2013 but that was itself judicially reviewed in the case of R (on the application of Tony Whitston) v Secretary of State for Justice [2014] EWHC 3044 (Admin).

Accordingly, sections 44 and 46 still do not apply for mesothelioma cases. However, they do apply for claims in relation to other asbestos related diseases.

The Claim for Judicial Review

At the time of implementation of LASPO there had been much debate as to whether the exception to sections 44 and 46 would apply to all asbestos related disease cases. Ultimately, of course, only mesothelioma cases were included in the section 48 exception. Other asbestos related disease claims are treated in the same way as any other personal injury claim in those regards.

In February 2019 the Lord Chancellor published a Post Implementation Review (PIR) of LASPO. This sought to assess the impact of the reforms and the effectiveness of the legislation.

It was the Claimant's assertion that the PIR should have carried out a thorough and detailed impact assessment of the reforms with regard to asbestos related disease sufferers, but that the PIR did not in fact do so.

The Basis of the Claim

The substance of the Judgment is heavily seated in judicial review law, which I do not seek to set out. However, it was noted along the way that a number of features of asbestos related diseases are inconsistent with the aims of the LASPO reforms.

It was said that one of the aims of LASPO was to reduce unmeritorious claims. However, it was conceded that asbestos related disease cases were not the type of unmeritorious claims that were sought to be reduced.

It was further noted that with the exception of mesothelioma, other asbestos related diseases are considered divisible. Therefore a claimant may need to bring claims against a number of defendants. Not all those defendants may have insurance cover or be a going concern.

Further, owing to the decision in *Cartwright v Venduct Engineering*, a claimant may end up paying the costs of those defendants against which he was unsuccessful out of any damages he was awarded. Although not unique to asbestos related disease cases, it was noted that it was a common in these cases.

Other features were noted which are not specific to asbestos related disease, including: solicitors taking a more risk adverse approach since costs are reduced; fewer solicitors specialising in the area for the same reason; claimants now potentially being liable for defendants' costs; and that there was an effect on the development of the common law owing to only straightforward cases being taken on.

The Judgment

The Judgment is lengthy, but for present purposes it can be set out only briefly. The claim for judicial review was dismissed.

The court found that there was no legitimate expectation of a more thorough assessment in relation to asbestos related diseases within the PIR as had been claimed. The failure to conduct a more thorough assessment could not be described as an unfairness amounting to an abuse of power.

The court also found that the Lord Chancellor had not failed to engage consciously with the issues raised in the consultation.

The court found that the PIR was a broad-brush document to address the Justice Select Committee dealing with some of the major themes of LASPO. Any failure to go into further detail which was not so unfair as to be unlawful.

Conclusion

For now there is no change, therefore, in relation to non-mesothelioma asbestos claims. There does not appear to be any aspiration to extend the section 48 exception to all asbestos related disease cases. Conversely, there was no indication that the exception in relation to mesothelioma is likely to be removed.

About the author

Mr Jim Hester

Jim specialises in Personal Injury litigation. The majority of his practice involves Industrial Disease, whilst he also maintains a very busy Employer's Liability practice.

His work also includes niche personal injury areas such as accidents involving military personnel and accidents which take place at sea. Jim draws upon his 10-years of experience in the Royal Marines Commandos prior to joining the Bar for practical experience of each.

Jim has been appointed to the Attorney General's 'B Panel' of Counsel and is regularly instructed to advise and appear on behalf of public bodies particularly in relation to Industrial Disease and military matters.

Jim is the Parklane Plowden Chambers Industrial Disease Group co-ordinator.

Jim also maintains an Industrial Disease website, practitioners can sign up and receive the latest updates: **www. jimhester.me**

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Give Me Your Watch and I'll Tell you the Time, but Does Your Watch Actually Work?

Authored by Tim Parker, CEng BSc, Director at FEC.

Many operators develop a wealth of knowledge about their plant, its configuration and its operation which is second to none. In most cases when there is an issue it is dealt with quickly and efficiently. However, it is not these types of cases that cause headaches to the facility, the known knowns can be planned for and proactively resolved but when a failure occurs in anything other than a straight forward fault of a known component it is normally because of something out of the ordinary happening or as a result of change. These are often outside of the comfort zone or at a different level of complexity, needing third party support.

The only asset that a pure consultancy firm has is its knowledge, it has no equipment, building or spare parts but the inventory that it does carry is its knowledge; often developed from a background in operations, witnessing a variety of processes, multiple locations and diverse cultural experiences.

Consultants are often dismissed on the assumption they will tell you what you already know, but what if what you know is based on opinion fixed over time, maybe as a result of someone else's decision making or blinkered by single source experience.The failure of a plant from a technical aspect could be due to a change in operation from the technical configuration which will be unique to that particular plant for a single reason and the resultant causes of failure may not be anything the operational teams have faced before.

The breadth of experience that comes from a global consultancy working with various multinational companies has benefits over long serving single plant experience. Clearly both sets of expertise have benefits,

but an independent breadth of view in a courtroom setting is critical. Experience across a variety of plant configurations leads to a topic expert in the sector. Continuous experience at one company, plant or even location can result in a one track view of how best to do things - "Traditionally we have always done this" which does not demonstrate expertise in the technology as a whole, just that you know the history of this particular setting and the success and failure of changes to its environment over time.

Returning to independence, this is a critical element which is often undervalued. Obvious, maybe, but independence from the facility, independence from equipment suppliers, independence from the decisions that have gone into the development of the facility in question. So maybe the client has a very strong position in the court, but technical statements from within the company ranks can hardly be considered as zero conflict of interest.

The number of clients the average top tier consultant has had over their career directly equates to variety of experience, which is critical in understanding the rationale behind both technical and commercial aspects within any operating facility. Within the metals sector there are so many variables to a production route that means no single recipe of raw materials, process equipment configuration and choice of consumables is correct for any single situation. A change to any one of these may upset the balance of the operation and be the cause of loss of revenue (sub prime product), damage to the facility, and given the type of operations within the metals sector, the potential to take a life.

The commercial situation is also a major factor, it is not uncommon for technically "acceptable" solutions to be approved when "cheap" alternatives (materials, consumables and spare parts) become available, considered by the procurement department as opportunities that are "too good to miss". In most large organisations, procurement is commercially driven by price but the real cost to the operation is only partially investigated.

Process flows within a facility can vary significantly, this can be due to:

- Organic growth over years of operation with detailed and considered expansion
- Capabilities enhanced for a particular product mix which may or may not be a current target market
- Commercial deals for pre-engineered (built before) solutions but may be a compromised technical solution
- Backward integration with different generations of technological solutions.

No two plants are ever the same; a carbon copy design will have subtle alterations in the 'as built' construction, alternative locations offer unique climatic conditions, raw material blends will never be 100% consistent and staff, however trained, will react differently when faced with an instantaneous decision making situation. For the Metals sector, even minor power quality fluctuations from the supply network will change the operation ever so slightly.

The wide range of potential configurations with multiple process stages can have a profound impact on what the traditional solution maybe. The root cause could well be upstream of the perceived fault. The knock-on effects may only be detected downstream, the real issue could be a few process steps removed from a failure (Problem in process Step 1 but not detected and only then revealed after Step 2 or 3), so a holistic view is needed. In some cases this maybe be procured materials or consumables from outside the company. A good example of this was a re-rolling facility that further processed flat rolled stainless steel in coils. The facility in this example used a cold rolling mill to reduce the gauge of the material, then bright annealed and finally temper rolled for the finished surface quality. A mark was appearing on the finished product, identified by the QA team after the temper mill, while nothing was found wrong with the coil quality checks after the previous cold rolling stage. The investigation was thorough and nothing could be found at fault with the temper mill. The fault was finally traced to the third-party supplier of the work rolls fitted to the cold rolling mill that apply the rolling force to the uncoiled stainless steel, two stages before the temper mill. There was a microscopic fault in the surface of some of the work rolls supplied, which damaged the strip but was not detected in the cold rolling process. Only after the heat treatment of the stainless steel on the bright annealing line and further rolling on the temper mill did the fault become visible.

Of course the benefits of variety in experience is not unique to the Metals consultancy sector, it is across all fields of expertise. Legal expertise does not come by just defending one type of case in a career but from cross pollination of experience of different clients and critically the use of case studies of other historic events, which when applied to the technical matters may lead to a better understanding of the root cause.

Variety of experience provides a balanced perspective, the rationale for one may not be the same for another. Choices are made for unique reasons and these have to be understood in the detail to be replicated elsewhere. It is unfortunate when an issue is escalated to litigation, but when it does, a perspective from a step removed will often facilitate a level of comfort that ensures the watch you have is working as it should, before you challenge someone about the time.

Tim Parker is a Director at Farnborough Engineering Consultants (FEC) Limited. FEC is an international consultancy based in the United Kingdom, which specialises in the metals and building materials sectors.

Going Virtual – The Use of Technology in International Arbitration

The flexibility afforded by institutional rules, such as the ICC and LCIA, makes international arbitrations well suited for the use of technology in a myriad of ways in arbitral proceedings. Parties can be faced with responding to dozens and sometimes hundreds of Redfern requests (i.e. documentary production requests), the need to call witnesses and experts based in various parts of the world and an arbitral panel that can be made up of arbitrators who are also based in different jurisdictions. Confronted with these challenges, the use of technology is crucial to international arbitration living up to some of its central pillars - being that it is faster and less expensive than court proceedings, can be tailored to the nature of the dispute and, of course, gives parties the benefit of confidentiality.

At the outset of proceedings, parties to an international arbitration ought to consider how technology can assist them throughout the course of the proceeding. Importantly, how such technology will be employed by the parties should be recorded in the first procedural order or the terms of reference for the arbitration to help avoid any future disputes.

Parties may contemplate using technology in the following ways and/or at the following stages of a proceeding:

(a) Responding to Redfern Requests: employing technology assisted review, such as continuous active learning, allows lawyers who are very familiar with the issues in the case to review a smaller subset of documents for the purpose of "training" the system. Technology can use that coding for the purpose of identifying other potentially relevant documents with a view to avoiding the sometimes cumbersome process of agreeing on search terms and/or reviewing large numbers of irrelevant documents.

(b) Calling Witnesses: where factual witnesses and experts are based in various jurisdictions, enabling them to testify using video conference will reduce travel time and costs. The IBA Rules on the Taking of Evidence in International Arbitration contemplate that the Tribunal may permit the parties to give evidence in this way. The issue of presenting evidence remotely has been contemplated recently by most arbitration centres as a result of the COVID-19 internationally imposed travel restrictions.

(c) Electronic Document Briefs: The parties can agree to have an electronic hearing brief / bundle. There are numerous third party vendors that can assist parties in facilitating an electronic hearing. Those vendors can host any arbitral documents such as pleadings, witness statements and expert reports, and contemporaneous documents on a secure site that can be accessed by the parties and the Tribunal. Ideally the parties would engage the vendor at an early stage so that documents on which each party intends to rely on can be added throughout the life of the arbitration and be used during any procedural hearings.

Ultimately, proceeding electronically, means that parties can reduce or entirely avoid the costs incurred in photocopying and binding hearing briefs / bundles which can be voluminous where there are large numbers of contemporaneous documents being relied on by the parties.

(d) Virtual Hearings: Parties may decide that the nature of the arbitration is such that any hearing (procedural or substantive) can be conducted virtually. Parties may have different appetites as to whether they wish to conduct hearings virtually but in a post COVID-19 world, it is likely that parties may be more amenable to proceeding in this way.

When thinking about how to employ technology in an arbitration, there are some more practical considerations to bear in mind. These include:

(a) Whether there are any data protection issues that need to be addressed before deciding on the nature of the document review to be undertaken and whether documents can be hosted on a third party server.

(b) Whether the arbitration concerns issues where IT security is a paramount concern.

(c) Whether any witness will require the assistance of an interpreter and how interpretation would work if video evidence is employed.

(d) Whether the parties have compatible software / hardware and an internet connection which will allow them to use technology in a way contemplated in the procedural order or terms of reference.

(e) If the parties agree to use an electronic hearing brief / bundle, how the process of creating that brief / bundle will be managed.

(f) Whether any special training is required for the parties and/or the Tribunal to ensure that any technology employed is used effectively and efficiently.

The use of technology in an arbitration should be a help and not a hindrance to parties and the Tribunal. It can be used for some or all of the proceeding. Simply put, it should be used in a manner to make proceedings more efficient and cost effective. International arbitration affords parties the flexibility to use technology in a way that helps them meet these objectives taking into account the nature and complexity of the dispute. Parties who have arbitration clauses in their contracts or ultimately decide to proceed by way of arbitration would be well served in the longer term to pause and think about how technology may be used in their arbitral proceedings.

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Embrace the Technology

by Dr M D Marsden BSc PhD
SEBC Reg Senior Consultant

I have been around horses all my life, specialising in solving behaviour problems and doing Equestrian Expert Witness work for 20 years. Much to the amusement of my students, I still recall with fondness the 'good old days' when everything got done safely and efficiently without mobile phones or email, and somehow we found out all we needed to know without Google! I have often joked that 'when horses go digital I will have to retire'! Joking aside we still teach emergency procedure in the event of those involved being 'off the grid' as gadgets and signals can fail and I am definitely more e-challenged then e-junky.

However I do have to admit that we have all benefited greatly from technological advances, not least in recent months from online working using video, Zoom and Teams. On behalf of my Professional body, the Society of Equine Behaviour Consultants, I was already delivering our Professional Training Programme by Zoom when we became aware of Covid 19 and associated challenges, which made supporting students throughout so much easier and allowed AGM and Committee meetings to go ahead. I saw top scientists giving evidence to a televised Select Committee by Zoom, where it was comforting to see that they too occasionally had to be reminded to turn off their 'mute' when speaking!

Video has always been particularly useful for Equine Behaviour work, allowing the Consultant to assess behaviour in great detail via slow motion and of course to analyse a piece of behaviour again and again, noting different elements each time without having the horse repeat what is often a dangerous and stressful event. With Whats App and other free programmes such as 'we transfer', large videos can be shared very easily. This has been very useful when behaviour assessments in person were not possible. For Expert work I am often asked to comment on a video as the horse may no longer be with us, and of course behaviour can change rapidly over time and with further experience or training. Similarly video or photographs taken at the time of riders, damaged items or key elements of premises can be just as useful, if not more so, than an inspection visit many years later.

Hence pre-Covid 19, much of my Expert Witness work was office based at home anyway, so for me, adapting to remote online working was straightforward. I now much prefer a telecon or Zoom meeting for discussion with Counsel, saving not only a lot of time but also the risks, hassle and costs of travelling, savings directly benefiting all involved. Comfy shoes off camera under the desk - lovely! Telephone chat and email ettiquette still allows for some 'office banter', although networking is indeed easier in person and I do appreciate some of my colleagues miss 'the social side' very much.

I have not yet given evidence in Court by video link or Zoom. My only concern would be losing the internet link during proceedings (which should be unlikely, but could happen) and of course I am aware that people may 'come across' differently on screen than in person. I am nonetheless looking forward to my first session, again appreciating the convenience of not having to travel and the associated cost effectiveness.

So, I would encourage my colleagues to embrace the technology and future developments and very much hope that continued use of more remote and online working becomes one of the good things to come out of the current crisis.

Dr Marsden, a Fellow of the University of Edinburgh, Royal Dick School of Veterinary Studies on the Royal College of Veterinary Surgeons Sub-Committee for Inspection of Riding Establishments for many years, with a traditional equestrian background, Dr Marsden offers a particularly powerful combination of top level academic and professional qualifications, with lifelong practical experience of the horse industry.

She has over 20 years experience of expert witness work and is also a BHS qualified Riding Instructor, BHS Accredited Professional Coach and Ride Safe Trainer. Through regular teaching and equine behaviour consultancy work in a huge variety of stables is fully up-to-date with industry standard guidelines and common practices.

Lawyers are welcome to call Dr Marsden for an informal chat to discuss any potential instructions without obligation and she does not charge for informal telephone chat with instructing solicitors throughout.

British-made Surgical PPE Device Rolls out Free to NHS

Newly-developed SNAP device that protects surgeons performing nasal endoscopies rolling out free to NHS after rapid design and manufacture

Device clips onto face masks to stop patients accidentally spreading Covid-19 during 500,000 sensitive procedures carried out each year

Duo of working NHS surgeons conceived the idea as lockdown and social distancing measures hampered routine hospital work

Design team used 3D printers to create 2,000 prototypes before large-scale production in UK factory and free distribution to NHS

An innovative device designed to stop patients accidentally spreading coronavirus to ear, nose and throat surgeons is rolling out free to NHS clinics across the UK.

The SNAP device – the brainchild of two Midlands surgeons, Ajith George and Chris Coulson – was developed in a matter of months thanks to a collaboration with engineers at Aston University and specialist UK-based manufacturing firms.

The need for better PPE for ear, nose and throat (ENT) surgeons was thrown into sharp focus shortly after lockdown in March, when Amged El-Hawrani, 55, an ENT specialist, became the first UK doctor to die after contracting Covid-19.

ENT surgeons performing nasendoscopies – where a small flexible tube fitted with a camera is inserted into the nose – are at risk of contracting the virus because the procedure can make patients cough and sneeze. Until now, patients have had to remove their own face masks for the endoscope to be inserted, leaving surgeons reliant only on their own PPE gear.

As a result, many hospitals have had to dramatically scale back the number of nasendoscopies they can perform. In normal times, around 500,000 procedures are performed in the NHS each year, typically to diagnose and treat diseases affecting the nose and throat including cancer and serious infections. The technique is also used in speech and language therapy, in which patients are often required to practise speaking with a tube inserted.

Currently, the NHS is only able to perform around 10% of procedures due to the risk of patients spreading coronavirus droplets around clinics, requiring deep cleaning between appointments.

The SNAP device – comprising a two-part valve and speculum – clips onto either side of a standard surgical face mask, creating a hole for an endoscope to be inserted and for patients to keep their nose and mouth completely covered. On withdrawal of the endoscope, a one-way valve closes the hole. Any coughs, splutters or sneezes during the procedure are caught within the mask, which is disposed of at the end.

In tests, the SNAP device has been shown to dramatically reduce the spread of particles when a patient coughs, compared to either no mask or a mask with a hole cut in it. This reduction in particulate spread will reduce the likelihood of Covid-19 being transferred to clinicians.

The SNAP device was developed as a practical response to the Covid-19 crisis by doctors Ajith George and Chris Coulson, working ENT surgeons at Midlands hospitals who co-founded their spin-out company, Endoscope-i, in 2012. The firm specialises in making endoscopic adapters for smartphones that allow clinicians to carry out complex imaging work.

Mr Coulson, who works at the Queen Elizabeth Hospital in Birmingham, said: "As surgeons ourselves, we were concerned about the safety of doctors but also about the risk of missed diagnoses and opportunities for treatment of patients. So our aim has been to produce an easy-to-use, cheap device that would allow clinicians to return to their routine practice, while minimising the risk to themselves and other staff."

The pair won a £50,000 grant from Innovate UK to help develop their device as part of the government agency's support for innovations designed to alleviate the impact of Covid-19.

Mr George, who is based at the Royal Stoke University Hospital in Stoke-on-Trent, added: "It's incredibly exciting to see this device going from concept to reality so quickly. As working surgeons, our innovation work is driven by creating things we would want to use ourselves. Covid-19 has led to heightened awareness about the spread of disease in clinical environments, so we see the SNAP device having practical applications during the pandemic and beyond."

Dr Mark Prince, a 3D printing expert from Aston University's College of Engineering and Physical Sciences, was seconded to Endoscope-i earlier this year and has led the design work. Using an industrial-grade 3D printer borrowed from the university during the lockdown period, he created around 2,000 prototype versions of the device from his home in Kidderminster.

He said: "It sounds disproportionate for something that is effectively such a simple idea, but each prototype had to be produced in multiples so they could be tested in clinics. With something so important, it has to be exactly right. If it helps get the NHS back to a more normal service, even in just this one specialism, it will all have been worth it."

The final design received a CE mark approval from the Medicines and Healthcare products Regulation Agency (MHRA) and was then sent to Haverhill (Essex)-based injection-moulding specialists Form Moulds and Tooling for manufacture, before the finished SNAP products were passed on to DTR Medical in Swansea for medical sterilisation. The initial batch of 30,000 devices will be dispatched in the coming weeks, with 5,000 going out free to NHS ENT clinics nationwide.

Interest in the device has also come in from as far afield as the USA, Australia, Japan, the Netherlands and the Philippines.

Find out more about Inspire MediLaw…

*Meet **Caren Scott**, founder and Managing Director of Inspire MediLaw; an outstanding medicolegal training provider.*

Her vision for Inspire MediLaw is to grow a community of clinicians and lawyers who can support one another and foster a better understanding of the medicolegal issues they face in their professional environment.

We asked Caren what inspired her to set up Inspire MediLaw at the outset. She said:

Some time ago, my husband was very ill. He suffered a brain injury during his hospital stay because, we believe, mistakes were made in his care and treatment.

After serious consideration, we contacted a local law firm with a clinical negligence practice to see if we had a case. We never met our lawyer, dealing with her primarily by email. She forwarded us the expert opinion on breach of duty when it was completed. The report was about four pages long, and was unsupportive of the claim. However, I knew once I read the report that he hadn't read our statements, and could not have reviewed the notes thoroughly. Yet that was the end of the line for us.

It upsets me to this day that the expert did not address the issues, and the lawyer did not revert to the expert on this, despite our concerns. Instead, we still feel as though we have no answers as to what went wrong.

At our Expert Witness Training, both the lawyers and the experts emphasise the importance of the expert reading the client's witness statement and addressing their concerns, where appropriate. This is good practice and ensures the client knows that their concerns have been heard.

I now also know that it is good practice for a clinical negligence lawyer to meet their client in person. Our clinical negligence solicitors explain that they build a rapport with clients, and they take great care when talking them through what the expert has said in their report. In our case, the report was simply sent without comment.

It seemed to me that poor communication in clinical negligence practice needed to be addressed. I wanted to encourage lawyers to relate to their clients better, especially because the clients involved are often vulnerable and have had difficult or traumatic experiences.

I wanted to emphasise to experts just how crucial their role is in the litigation process, and help them to discharge their duty to the best of their ability. I felt that clearer communication and expectations between lawyers and experts would help them work better together.

With this in mind, I came up with a vision for building a community for lawyers and medical experts, where each profession would share their skills, knowledge and perspectives with the other, with an overall aim of improving access to justice and enhancing clinical practice.

Inspire MediLaw primarily provides training for medicolegal experts, delivered by experienced experts and lawyers. You also run training for lawyers with a clinical negligence or personal injury practice, delivered by practising clinicians.

Why choose this niche, rather than set out to train expert witnesses more generally?

Yes, it's really a result of my personal and professional experience in healthcare. I felt that our lawyer had not understood the medical issues in our case. This made me consider how I could help lawyers get to grips with the complexities of medicine specifically, so that they could better serve their clients.

But now I know many clinical negligence lawyers who are really well versed in the medicine, some even have a clinical background, and are extremely knowledgeable. They really impress me and I know they impress the medics they work with too. It gives me hope that our experience was not the norm and that, in fact, there are great clinical negligence lawyers in practice.

At the time of my husband's illness, I was managing a busy private practice for a group of neurosurgeons. All of them were regularly accepting instructions to provide expert opinions, and I observed their varying approaches to the role.

I was struck, when typing medicolegal reports, that they sometimes sat on the fence. Given our personal experience, I knew that this would not help the clin-

ical negligence investigation either way. I believe that experienced, knowledgeable clinicians should not be afraid to give a reasoned, definitive opinion. That is what they are being paid to do when they accept instructions to act as an expert, and so much of the case management depends on their evidence.

Reflecting on that, it seemed that the obvious thing to do was to train medical experts on the legal tests they need to apply, and to train lawyers to better understand the medical issues. To do both would encourage excellence right across the medicolegal sector, and facilitate better networking and communication between those two professions.

What are the key themes of your medicolegal expert witness training?

A key driving force for me is to train experts thoroughly, and to equip and support them to do medicolegal work well, because there is so much involved in getting it right.

So our Expert Witness Training focuses on helping medical experts to understand how important their role is in the litigation process. Our comprehensive Expert Witness Training can be accessed online in the form of four modules, or at our two day face to face training conference. Both types of training incorporate tuition by way of presentation, and practical exercises and feedback to help consolidate learning.

We explain the legal issues, and teach experts how to communicate their opinions clearly, whether that is in the written report, or when participating in Expert Meetings, or when giving evidence in Court.

Paul Sankey is a clinical negligence solicitor, and a Partner at Enable Law. He is regularly involved in training medical experts, in particular on the legal tests they need to address, and their duties to the Court. He expresses the purpose of our expert witness training brilliantly:

Doing expert witness work well is crucially important in clinical negligence claims: the system relies on experts giving careful, considered, reasoned and truthful evidence. Without that, courts will reach the wrong results.

Our justice system should enable people who suffer harm from avoidable negligence to make good their loss but prevent claims with no merit succeeding.

What lawyers and courts need is reliable expert evidence to guide them. No one benefits if patients are encouraged to bring claims which will ultimately fail. This not only wastes time and money, but adds to the pain of people who have already suffered from a serious medical condition or the loss of someone close to them. On other hand a decent society should enable deserving claimants to recover damages where they have suffered loss.

For the right result we need expert evidence of real quality from trained specialists who understand their role.

How do you identify the right professionals to deliver Inspire MediLaw training?

Having the right people involved at the right time has really made a difference. Inspire MediLaw is not a faceless organisation, so the individuals involved really matter.

The people involved with our training are absolutely passionate about justice and having good experts. They have a firm understanding of how a case progresses and they understand the importance of a good expert, and what the characteristics of such a person are.

We work with medicolegal professionals who are experienced and established in their practice as they understand the issues that our delegates are facing. They are up to date with their knowledge and are actually dealing with cases on a day to day basis, so these are the people I think practising experts and lawyers want to learn from.

Thinking about our training faculty as a whole, they all appreciate having the opportunity to be involved in effective two way communication between lawyers and clinicians. I am confident that they all share a common desire to showcase and encourage excellence in medicolegal practice. It makes me proud to have such an outstanding group of professionals delivering training, giving insights and sharing knowledge from Inspire MediLaw's platform.

What's your vision for the future of Inspire MediLaw?

It's entirely to encourage excellence in the medicolegal sector! There are fantastic clinicians out there who would make great experts. However, perhaps it is not on their radar or they don't want to do it because they don't want to come in to conflict with a colleague.

I would say to them:

Please consider becoming an expert witness because good experts are hard to find. When you have so much good clinical experience and knowledge that you can use, this is a great way to make a difference.

Don't be intimidated by others, your opinion is valid and important. It is about being able to understand the case, the law, and being able to put your opinion down on paper in a report in a reasoned, well explained way. We can offer support and help to those starting out, if you need to talk through with another expert who has been in the same position – that is what Inspire is about.

The role of a medicolegal expert can be very isolated and I feel it is positive to provide a network where knowledge sharing and practical support is available.

My vision is that we will continue to develop our community of clinicians and lawyers who can refer to each other, support each other, foster a better understanding between the professions, and ultimately improve the patient experience.

Family Court's Function Is Not To Micro-Manage Disputes

by Sarah Higgins - Charles Russell Speechlys LLP

In a recent case involving a child and a mother's medical records, the judge made it clear that the court both could not and should not be involved with what he described as "micro-managing". In this case, there was an appeal against an order which should not have been made for the disclosure of five years' worth of a mother's medical records in a case in which it was accepted by both parents that the child would be spending a lot of time with the mother.

The judge went on to say that by January 2021 he expected that there would be double the number of outstanding private law cases than January 2020 in the relevant court. Delays in the court system as a result of the pandemic have obviously been playing a significant part. The judges have an unprecedented case load and cannot provide the public with the legal service they need if their lists are clogged up with unnecessary high conflict private law litigation.

Examples which the judge gave of micro-management were a decision on which junction of the M4 should a child be handed over for contact, or how should contact be arranged to take place on a Sunday afternoon? Parties and their lawyers are enjoined not to bring their private law litigation to the family court unless it is necessary to do so.

The judge concluded that "if you do bring unnecessary cases to this court, you will be criticised, and sanctions may be imposed upon you". This appears to be directed both at parties and lawyers.

What are the alternatives?

1. Mediation, which requires both parties' consent, but can be a quick and cost effective way of resolving disputes.

2. Arbitration is another out of court solution which involves a third party making a decision.

3. Instruct a robust family lawyer who will advise their own client to take a long term view and to consider when concessions should be made, and who will resolutely attempt to have a constructive dialogue with the other party's lawyer.

Access to Court Documents in the Family Court: Whose Privacy Rights Prevail?

The High Court has handed down the first recorded judgment on journalistic access to court documents in family proceedings, balancing the right to freedom of expression against the privacy rights of the child as distinct from those of its mother or the family unit.
In this article, Associate in our Divorce and Family team Ellie Hampson-Jones, Partner Emily Cox and Paralegal Palomi Kotecha in our Media Disputes team, jointly consider the judgment.

In Newman v Southampton City Council, Melanie Newman, a freelance journalist, applied to the High Court to view documents relating to care proceedings which had concluded in 2018. Those proceedings concerned a child, M, who was removed from her mother's care by the local authority when two years of age following two instances where her mother had (in the court's initial view) administered an EpiPen unnecessarily. M was made subject to a care order and a year later to a placement order for adoption. The girl's mother appealed, and the Court of Appeal overturned the placement order. M was returned to her mother's care after more than three years in foster care. The Court of Appeal observed that the decision to remove M from her mother had been made on "the slimmest of evidence".

The application
Ms Newman became interested in the case following the Court of Appeal decision. She applied for permission to view (not publish) the majority of the court file and material, which had informed the earlier decision-making of the local authority and the court. She had a long-standing interest in the workings of the family court and during her wider investigation had become interested in what she perceived to be an unusually high percentage of adoption orders made by the local authority in question.

In support of her application, Ms Newman contended that the public interest raised by the case justified further press inspection so that a decision could be made as to whether to report on it. In addition, a large amount of information about M was already in the public domain, including the family's ethnic origins, immigration history, religion and socio-economic status, as well as some details of M's medical history. The proceedings had also been the subject of a report by the BBC.

Further, M's mother had given her consent to the release of her own and M's personal information on the basis that "the Family Court Division has published documents currently available in the public domain that contains [sic] unique private information, leading to her identification. Hence the matter of protecting [M's] privacy and human rights is now beyond repair." Finally, M's mother stated that M herself (now seven and a half years of age) had given permission.

Ms Newman's application was opposed by the local authority and by the guardian appointed for M due to the content and scope of the documents sought. In their view, the application went beyond what was already in the public domain and was for the entire set of documents relating to the proceedings. Counsel for the local authority argued that "merely having access to a private document for the purposes of reading it, can represent an intrusion of privacy" and the court must look for proper justification to allow that intrusion.

The ultimate balancing act
In considering the application, Mrs Justice Roberts undertook what she called "the ultimate balancing act" of the competing right to privacy under Article 8 of the European Convention on Human Rights (enshrined in the Human Rights Act 1998) and the right to freedom of expression under Article 10. In so doing, the judge referred to the 2004 House of Lords family law judgment in Re S (A Child) in which it was held that:

"First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each."

While the court acknowledged the importance of the press as a watchdog of the justice system and systems of the state, Mrs Justice Roberts made it clear that this role is not one without limits. She considered that while weight must be given to M's mother's support of the application as one who has parental responsibility for M, M has her own individual privacy rights separate from her mother's rights. "Each of M and her mother has rights to a private family life and those rights are engaged together, as a family unit, and separately as individual human beings," she said.

Mrs Justice Roberts rejected the proposition that M's privacy was damaged "beyond repair" due to previous press publication. She further highlighted the importance of children's privacy rights in the internet age when information about people can be accessed quickly and, once released, is available to all for all time. As such, any disclosure made about M now might come to affect her in the future.

Accordingly, Mrs Justice Roberts decided that M's privacy rights prevailed over the need for transparency in the family court. She ordered that Ms Newman be

granted access to a narrow set of court documents but would not be given access to the entire file:

"It seems to me that the overarching factor which I have to weigh in the balance is whether it is in M's overall best interests to release to a journalist the most intimate details of her own and her mother's medical records even if the dissemination goes no further than that. Such a step would represent a clear court-directed intrusion of this child's most basic and fundamental rights to a private family life. If those rights are to be the subject of court-sanctioned interference, there has to be a proper justification."

Comment

This judgment reiterates that there is a strong public interest in maintaining the privacy afforded to family proceedings which concern proceedings under the Children Act or which relate wholly or mainly to the upbringing of a minor. This is particularly so in the internet age. The case is interesting not only for its discussion of transparency versus privacy in the family courts but also in its acknowledgement of a child's privacy rights distinct from the privacy rights of their parents and the family unit. This distinction may rear its head in different contexts going forwards, not least where parents put photographs of and information about their child on social media without the child's permission.

You can find further information regarding our expertise, experience and team on our Divorce and Family and Media Disputes pages.
www.stewartslaw.com/expertise/divorce-and-family/

The effects of PTSD if symptoms are ignored

The term "shell shock" rose to prominence after an officer in the Royal Army Medical Corps studied the symptoms of three traumatised soldiers on the Western Front. By the end of the First World War, the army had identified 80,000 individual cases and war neuroses accounted for 1 in 7 men being discharged from service.

What was first recognised as shell shock in 1917 is now commonly referred to as PTSD (post-traumatic stress disorder), although the condition as we know is not only restricted to war zones. PTSD is a delayed and often devastating response to trauma that can provoke behavioural change, suicidal tendencies and recurring distressing memories, nightmares and flashbacks.

Researchers at John Hopkins University School of Medicine in Baltimore performed autopsies on U.S. combat veterans who survived improvised explosive device (IED) blasts in Iraq and Afghanistan but died later of other causes. Each had suffered brain injuries and what was believed to be fragmented nerve fibres caused by bomb blasts. Those hidden brain injuries appeared to play a significant role in the psychological problems many face after leaving the military and entering civilian life.

Since the first court award for PTSD was secured (New v MOD), Slater and Gordon have built up many years' experience acting for those who've suffered as a result of negligent delays in the diagnosis and treatment of PTSD and who would have gone on to serve full careers but for the "combat stress".

Most recently, we acted for a former 1 Rifles Infantry soldier who, for the purpose of anonymity, we'll call Steve. Steve suffered as a result of events that occurred during deployment to Afghanistan (Op Herrick 14). He was not referred for assessment or treatment during his time in service, despite his symptoms and requests for help, and he was discharged in 2013 on the grounds of 'Service No Longer Required'.

Steve's condition worsened following discharge and he struggled to find and adapt to civilian employment. In 2014 he was referred to his local NHS Mental Health team who diagnosed his PTSD and subsequently treated. Earlier intervention would, on the balance of probabilities, have led to a full, or at least accelerated partial, recovery.

The alleged mis-management, and that it caused prolonged suffering, was robustly denied for a number of years, but with expert evidence, Slater and Gordon's Military Team successfully achieved an out of court settlement for Steve.

Rachel Seddon, experienced military lawyer at Slater and Gordon, who represented Steve said, "Mental health issues caused by traumatic combat experiences can become worse over time and often don't surface until many years later. Thousands of personnel will need on-going specialist mental healthcare. The treatment and recognition of such issues in the military has come a long way since the dark days when conditions like depression were widely seen as a sign of weakness, but there's always room for improvement. It's vitally important the UK Government and MOD continues to support soldiers with mental health issues as they move from active service into retirement."

If you've suffered from PTSD or any other injury whilst in the military, and would like legal advice, talk to one of our military experts on 0330 107 5007.

Slater and Gordon is one of the UK's leading consumer law firms with lawyers based locally around the country.
www.slatergordon.co.uk

Addiction services not equipped to treat the 8 million people drinking at high risk during pandemic, warns Royal College

New analysis finds nearly 8.5 million adults drinking at high risk, while number of people addicted to opiates seeking help in April at highest level since 2015

Years of cuts mean addiction services are ill-equipped to cope with post-pandemic surge

College calling for multi-million-pound funding package in upcoming spending review

Addiction services in England are not equipped to treat the soaring numbers of people drinking at high risk during the pandemic and must receive a multi-million-pound funding boost in the upcoming spending review, says the Royal College of Psychiatrists.

The College's new analysis of Public Health England's latest data on the indirect effects of Covid-19 found that over 8.4 million people are now drinking at higher risk, up from just 4.8 million in February.

This surge in higher risk drinking comes at a time when more people addicted to opiates are seeking help from addiction services. Statistics from the National Drug Treatment Monitoring System (NDTMS) show 3,459 new adult cases in April 2020 - up 20% from 2,947 in the same month last year - the highest numbers in April since 2015.

But the deep cuts made to addiction services since 2013/14 mean the estimated 8.4 million higher risk drinkers and the hundreds of additional people with an opiate addiction needing help could miss out on life-saving treatment.

Psychiatrists are calling for the Government to use the upcoming Comprehensive Spending Review to reverse the cuts and enable local authorities to work towards investing £374 million into adult services so they can cope with the increased need for treatment.

Dr Adrian James, President of the Royal College of Psychiatrists, said: "Addiction services have been starved of funding in recent years meaning many are not able to treat and care for the huge numbers of people who are drinking at high risk.

"More lives will be needlessly lost to addiction unless the Government acts now and commits to substantial investment in public health, including adult addiction services, in the Spending Review.

"I urge the government to implement the recommendations in our report which would see mental health services expand to be the biggest in Europe, with a much-needed focus on tackling inequalities."

The College's recently published Next Steps for Funding Mental Health Care in England: Prevention report also makes the case for an additional £43m for children's drug and alcohol services and £30m for new buildings and updates to existing ones - also known as capital projects.

Latest data shows there were 4,359 drug-related deaths in England and Wales in 2018, the highest on record, while the 1.26 million alcohol-related hospital admissions in 2018/19 were also the highest on record.

Prof Julia Sinclair, Chair of the College's Addictions Faculty, said: "Covid-19 has shown just how stretched, under-resourced and ill-equipped addiction services are to treat the growing numbers of vulnerable people living with this complex illness.

"There are now only 5 NHS inpatient units in the country and no resource anywhere in my region to admit people who are alcohol dependent with co-existing mental illness.

Drug-related deaths and alcohol-related hospital admissions were already at all-time highs before Covid-19. I fear that unless the government acts quickly we will see these numbers rise exponentially."

The report warns that people with alcohol use disorder are more likely to develop serious complications if they catch Covid-19, including acute respiratory distress syndrome. People using drugs such as heroin and benzodiazepines are also more vulnerable to the virus.

Responsibility for the delivery and funding of addiction services was taken out of the NHS and given to local authorities following legislative changes in 2012.

Following the move to local authorities, funding for addiction services in England for adults and young people combined fell by £234 million (25%) in real terms from 2013/14 to 2018/19.

Rachel, whose addictions resurfaced during lockdown, said: "I'd been free from tranquilisers and used alcohol responsibly for a few years, but I've really struggled during the pandemic, particularly lockdown.

"The stresses of caring for my daughter, alongside work-related anxiety, led to me slipping back into old ways of behaving.

"Taking tranquilisers and daily drinking became the norm and I know of many people, people you wouldn't think have a problem, who have swapped their afternoon tea for gin and tonics.

"I'm back on the road to recovery now, but addiction services are key to giving people the support they need to get their lives back on track."

The most recent data from Public Health England on the wider impacts of Covid-19 shows nearly 1 in 5 (19%) adults drinking at higher risk in June, up from 1 in 10 (10.8%) in February. The College calculates that when applied to the population of England some 8,410,045 people are now drinking at higher risk.

Denise, a 52-year-old retired nurse from Bristol, said: "In the evenings anxiety about my breathing problems and the fear of a medical emergency kicks in. I keep having visions of not being able to breathe and healthcare staff in PPE suits coming to take me to hospital.

"I drink to manage these feelings, but it disrupts my sleep and has ruined my days. I am struggling but I'm not confident that I can get the help I need to stop."

PHE defines higher risk drinking as those people scoring 8 or more on the AUDIT, a 10-question clinical questionnaire that assesses the amount of alcohol consumed and frequency, and levels of harm and dependence.

Next steps for funding mental healthcare in England

This paper focusing on prevention is the second in a series of papers covering these four areas. It considers the next steps for funding mental healthcare in England, with a specific focus on public health and prevention, promoting resilience in social care and budgeting for workforce growth, education and training.

Huntingdonshire Council uses fingerprint device for drug screening

Huntingdonshire District Council has begun to use a fingerprint device in a drug screening process for frontline workers.

It has put the system from Intelligent Fingerprinting into use over the past few weeks as part of its drug testing and alcohol policy, managing it in-house in replacement of a urine testing service provided by an external agency.

The device is a drug screening cartridge onto which 10 fingerprint sweat samples are collected in a process that takes less than a minute. A portable analysis unit then reads the cartridge and provides a positive or negative result on-screen in 10 minutes.

It has been introduced for staff including refuse collection drivers, ground teams and those in street maintenance.

Andrew Rogan, operations manager for Huntingdonshire, said: "We are using the Intelligent Fingerprinting system to test all new permanent employees or agency staff for frontline services. These employees work in safety-critical roles, often work around machinery, and in a constantly changing environment so it is critical that they are alert and fit for duty.

"The fingerprint drug screening system is fantastic as it's saving the council a huge amount of time and cost as we're now able to conduct the tests in-house rather than using an external provider. Having the system available for use whenever it's needed also gives us the flexibility to carry out tests at other times too, such as 'for cause' testing if we have reason to suspect drug use by an existing employee."

He added that the council has implemented a remote training system to enable managers to carry out the tests themselves.

The system was adopted last year by neighbouring Peterborough City Council in its social care service.

Parental Alienation - A Summary

Parental Alienation describes actions that a parent takes to intentionally, or unintentionally, distance a child (or children) from the other parent (Darnell, 1998). Some researchers state that the impact of parental alienation is a form of child abuse because the Diagnostic and Statistics Manual (APA, 2013) defines child abuse as non-accidental verbal or symbolic acts by a child's parent or caregiver that result, or have a reasonable potential to result, in significant psychological harm to the child.

Gardner introduced the Parental Alienation Syndrome (PAS) concept in 1985 and distinguished Parental Alienation (PA) from PAS (Nicholls,2014). PA is defined as the wide variety of symptoms that may result from or be associated with a child's alienation from a parent, with potential causes including, but not limited to, physical or emotional abuse, abandonment, ongoing acrimony within the family, impaired parenting, or denunciations by one parent toward the other (Lowenstein,2013).

Gardner further stated that when relationships break down leading to divorce, some parents become overly critical or demean each another in front of the children. The children may believe these denunciations which influence their relationship with the alienated parent. These denunciations may serve as the foundation for the Parental Alienation Syndrome (PAS), particularly if the parent is prepared to escalate the denigrations to the point of complete exclusion. When true parental abuse and/or neglect is present, the child's animosity may be justified and the parental alienation syndrome explanation for the child's hostility is not applicable (Lowenstein,2013).

Other experts including attorneys and judges have used the terms PA and PAS interchangeably. Other authors have used the terms Parental Alienation Disorder (PAD), parental alienation (without the word syndrome), Medea syndrome, divorce related malicious mother syndrome, parental alignments, programmed and brainwashed children, overburdened child (Rand, 2011), and a mild form of folie `a deux or "folie a trois" (Bruch, 2001) to describe PAS. Lowenstein (2013) state that Judges prefer the term implacable hostility.

Parental alienation affects 1% in the USA (Rand, 2011), and it has been recognised in other countries including the United Kingdom (Lowenstein,2003; Timms, 2003).

Since the 1990s, research has been conducted in different continents such as North America, South America, Europe, Africa, Australia, and Asia that describe the features of parental alienation and identified similar behavioural patterns in children of parents involved in high-conflict divorces (Rand, 2011). Rand further says that psychologists, psychiatrists, family counsellors, and other mental health professionals who evaluate and treat children of high-conflict divorces have described individual cases and small groups of divorcing families that show patterns of parental alienation.

Evidence from this research indicates that there are consequences associated with parental alienation on children ranging from the development of mental health disorders (e.g., depression, anxiety, substance abuse, and conduct disorders), decline in academic performance and suicide ideation (Baker, 2007; Harman & Biringen, 2016) and suicide (Sher,2015). In addition, Raso (2004) stated that the more severe the PA, the more likely the child will develop externalizing problems such as becoming addicted to drugs and alcohol and early and promiscuous sexual activity. Other identified difficulties include lacking the ability to trust, to enjoy intimacy in later life, and to demonstrate commitment to another person. Frequently, in their adult life, their relationships end up in divorce and they become alienators themselves. Baker (2007) estimated that 40% to 80% of all divorcing families exhibited PA tactics leading to such long-term effects. Lowenstein (2013) said in adulthood, the children often suffer serious mental health issues.

Confirmation from the Minnesota Multiphasic Personality Inventory -2 psychometric measure, mainly K and F scales indicate that when assessed, PAS parents are more likely to complete MMPI-2 questions in a defensive manner, striving to appear as flawless as possible. Therefore, parents who engage in alienating behaviours are more likely than other parents to use the psychological defences of denial and projection, which are associated with K and F validity scale pattern (Siegel and Langford, 1998).

Despite the global acceptance of the PA concept, there are controversies around the PAS (Bernet, et al.,2011; Rand,2011). Many members of the judiciary do not yet accept the concept of parental alienation or parental alienation syndrome, and it has not been included in the Diagnostic and Statistical Manual of Mental Disorders–5 (DSM-V) or International Classification of Diseases -11 (ICD-11) (Lowenstein, 2013; Nichols, 2014). Cafcass Cymru (2018) do not accept that PA is a syndrome but consider it to be a set of behaviours that may influence a child's opinion about a parent.

Some of the critiques of the PA and PAS concepts come from the scientific community which has stated that there is no scientific evidence of a clinical syndrome concerning parental alienation, and that PAS is not a mental disorder (Meier, 2009; Nichols, 2014). For this reason, the PA and PAS concepts did not meet the set criteria for the American court system interpreted in the Rule 702 which incorporate the Frye test (Nichols, 2014). These standards ensure that courts use objectively valid scientific testimony. In addition, the theory and empirical research around the PA and PAS remains questionable and does not meet the Daubert standards. For example, among others, there were problems identified on the inter-rater reliability of the concepts, and that the available research is not published in peer reviewed journals (Rand, 2011; Nichols, 2014).

Treatment considerations

There are relatively few studies that have focused on treatment (Lowenstein, 2013). Lowenstein further states that many of the decisions or recommendations depend on the expert's relationship with the courts and whether the courts will accept the PAS label and accept the conclusions reached by the expert as well as the recommended therapeutic input that follows investigation.

Deters (2003) emphasised the importance of helping parents to communicate in a constructive manner and reducing conflict.

Baker (2007) emphasised the importance of diagnosing PA, which leads to custody evaluations and the making of a recommendation for custody. For instance, consideration may be given to changing the custody of the child to the alienated parent or removing the child from their alienator and placing the child in a neutral environment.

Lowenstein (2013) emphasised getting the concerned child's or children's views. Currently, there are still ongoing debates in the mental health and legal literature about the PA concepts and the most appropriate mental health intervention to offer (Fidler, Bala, Birnbaum, & Kavassalis, 2008; Reay, (2015).

Woodall (2019) suggests that 'splitting' occurs in which the child's feelings come from a maladaptive position in which the authentic feelings held by the child are hidden by a defensive split. This defensive split arises when the child faces an impossible dilemma caused by pressure placed upon him or her in the family system via a pathological alignment with a parent.

Successful therapies are those in which a child is supported to encounter the rejected parent as early as possible in the process. This is done by enabling the child to spend time with the rejected parent in such a way as to allow the child and parent to have proximity to each other. It is considered that traditional models of family therapy may serve to entrench the alienation that the child exhibits

Woodall (2019a) suggests a model of therapy which is based upon 'doing rather than talking'. Woodall considers that if the child does things with the alienated parent this will awaken a previous positive attachment relationship between the child and alienated parent. This does assume that a previous secure attachment relationship existed between the child and the alienated parent, and that there was no direct or indirect abuse in the relationship between the alienated parent and the child.

Any activity that the child/young person shares with the alienated parent must be in the context of a therapeutic framework that has as a goal, the re-establishment of a secure relationship between the child and the alienated parent.

The objective of adopting a therapeutic context for both the parents and the chidren/young people is to enable positive relationships to develop between the child/young person and both parents, without exposing the child to any

additional Adverse Childhood Experiences. This approach throws into relief the extent to which both parents are prepared to put the needs of their children before their own emotional needs.

A Critical Review

Nielson (2018) reviewed over 300 cases of 'parental alienation' that had been through the Canadian courts during a two-year period. It was found that approximately 65% of allegations were made against mothers, and 35% of allegations were made against fathers. In approximately 75% of cases in which there were issues of domestic or child abuse, allegations of parental alienation were made by the perpetrator of domestic or child abuse. In relationships that are characterised by Intimate Partner Abuse, in

88% of cases the abuse continues for at least 3 years following separation, often occurring around issues associated with contact (Women's Aid, 2016). Before embarking upon a therapeutic process that encourages the 'alienated' child to develop a relationship with the alienated parent, it is essential to confirm that Intimate Partner Abuse was not a characteristic of the parental relationship before the parents separated, and harassment and abuse are not a feature of the parental relationship following separation.

Nielson considered that in addition to gender bias, parental alienation cases demonstrate limited attention to scientifically documented child development factors and limited understanding of the effects of domestic abuse on parents or children. Allegations of parental alienation may mask domestic abuse issues that the child has experienced as a consequence of the parental relationship.

Trauma affects demeanour, disclosure, fear, and protective responses. Nielson (2018) concludes that reliance on single controversial theories can be replaced by detailed scrutiny of child best interest factors and by reliance upon accepted and scientific child development principles that have broad professional and academic acceptance. The concept of Parental Alienation has yet to gain this acceptance.

Adult and child trauma knowledge informed practice can replace victim blame in order to ensure safe and effective decisions for children and their families. 'Draconian' orders that remove children from a stable parenting relationship who have become 'alienated' from the non-resident parent can be replaced by supportive and compassionate orders.

PA marginalises or may even invalidate a child's wishes and feelings. Coercing a resident parent into enforcing contact on children who are resistant to contact and who may be afraid of their non-resident parent can have a detrimental effect on the parent-child relationship with a resident parent having to cope with angry, defiant, and distressed children.

PA may lead to outcomes in individual cases that are harmful to children, including enforced removal of children from their primary carer (Barnet, 2020). In some cases where residence has been transferred to fathers, there are indications of paternal violent and/or abusive behaviour which have never been tested.

Clinical experience indicates that courts have some difficulty accepting that a mother may have been the primary perpetrator of intimate partner abuse. Research indicates that there is a lack of sex differences when considering the use of controlling behaviour in intimate relationships. In intimate relationships that are characterised by violence, community studies suggest that in 13% of these relationships the perpetrators are men and in 28% of these relationships the women are perpetrators. However, in 58% of these relationships' violence is mutual (Bates & Graham-Kevan, 2016).

Meier (2020) in a study that reviewed 4388 custody cases over a 10-year period considered the use of parental alienation claims to discredit a mother alleging that the father has been abusive or is unsafe for the children. The findings confirmed that the mother's allegations of abuse, especially allegations of sexual or physical abuse perpetrated by the father, increases the mother's risk of losing custody, and if the father cross claims alienation, this virtually doubles that risk. Alienation's impact is gender specific; fathers alleging that mothers are abusive are not similarly undermined when mother cross claim alienation. In non-abuse cases the data suggest that alienation has a more gender-neutral impact.

Conclusion

There is significant debate in the literature about Parental Alienation. It would appear that allegations of PA can distract investigation away from allegations of parental abuse, can lead to young people experiencing significant disruptions in their relationship with their primary carer, and the application of therapeutic approaches that do not reflect broadly accepted child development principles. There is a growing concern that there may be a developing gender bias in the way that PA is applied in the Family Courts.

Those that embrace the concept of PA should be mindful of the growing body of literature that is critical of the way the concept is applied, and may find that when PA has come under the scrutiny of peer reviewed research at best it may be considered what Cafcass Cymru describe it to be 'a set of behaviours that may influence a child's opinion about a parent'.

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Balanced Decision-Making in Forensic Risk Assessment

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Risk assessment is the critical tool for making decisions about perpetrators of crime within court, parole and tribunal settings. It is also utilised within many secure and community services to decide on the placement, needs and resources required for risk-management. It is a complex process that can have far-reaching consequences for the individual assessed, for example, determining their liberty, or whether they can live with their family. It can also have significant implications for the public, as a misjudged risk assessment can lead to future harm and victimisation.

The risk assessment process has traditionally focussed upon the identification of risk factors; those features of a perpetrator's history or functioning that have been shown through research to be indicators of increased future risk. For example, historical (static) factors such as the number of prior convictions, age, and level of harm caused have been demonstrated to increase the likelihood of further offending. Risk factors can also incorporate aspects of the perpetrator's functioning or lifestyle that increase the likelihood that they will commit a future offence. These are often considered dynamic factors, as they are changeable. They include characteristics such as mental health diagnosis, attitudes and peer group.

Risk assessment is not a precise process, but the extensive scientific study of what causes criminal offences has helped develop risk assessment tools that guide judgement and improve accuracy. They guide the assessor to look for known risk factors. One such example is the Historical Clinical Risk-Management-20 (HCR-20[1]), which guides the assessment of 20 risk factors commonly associated with risk of future violence. However, one of the criticisms of the modern risk assessment process is that it has traditionally only focussed on identifying risks, problems and disorders.

Within Psychology, the study of heuristics, the cognitive 'short-cuts' and assumptions we make when trying to solve a problem, tell us that only focussing on the risks, problems and disorders can skew our judgement. A negative bias, which can shape our interactions and overall evaluation of the person we are assessing can be created. A little like Darth Vader in the first Star Wars movie, we only see the scary suit, uncaring attitude and aggressive behaviour. By the end of the movie, the information we are presented with helps us form the picture of an evil man. However, it is only in later movies, when presented with different information about his past that our assessment of Darth Vader changes.

Referring back to the risk assessment process, if we only seek and collate negative behaviours about a person, we have formed biased opinions about their behaviour and future risk. Most human beings have negative aspects of their life and functioning that they would prefer not to reveal to others. Now imagine that the person you were talking to was only interested in finding out about these.

A similar bias that can impact upon judgement within risk assessment is the confirmation bias in human thinking. Research into this concept has revealed how we can search for, interpret and favour information that confirms or strengthens our judgement. Within

the risk assessment process, if we go in search of the risks, problems and disorders, we may be more likely to find them. Some practitioners argue that referring to the assessment process as 'risk assessment' instantly creates a confirmation bias where the assessor needs to look for (and find) risk.

The above biases in human thinking can create what is sometimes referred to as a 'false positive' in risk assessment. A false positive involves viewing a person as riskier than they may be. Within the Criminal Justice System, this can lead to people being detained in secure settings for longer, receiving more stringent restrictions, or fewer privileges.

In more recent years, some risk assessors have developed a greater appreciation for protective factors. These are characteristics that can protect against future re-offending. For example, having a supportive family is often identified as a decisive protective factor. Stable accommodation is another, as is having a job and leisure interests. Protective factors not only mediate against the risk of re-offending but help the perpetrator to build a more positive and successful future.

Much like the scientific research into risk factors, there is a growing body of knowledge indicating which protective factors are most helpful at preventing further offending. Parallel to the development of tools to assess risk, we now have tools such as the Structured Assessment of Protective Factors (SAPROF[2]) to help us assess protective factors. These tools, alongside our developing knowledge of protective factors, allow for a more balanced assessment of risk and overcome some of the biases that skew the judgement of risk.

Many practitioners now incorporate protective factors into the assessment process. However, as the appreciation of them is relatively new, they can sometimes be undervalued. It is not uncommon to read a risk-assessment report that attributes 90% of content identifying and discussing risk factors, and 10% discussing protective factors. They are sometimes viewed as a token gesture.

The factors that are relevant to protect against risk for one person will not be the same for another. One person may respond well to having a job; for another, it may be less important for their future success. One person may need close support from a family, whilst another is entirely happy living a more independent lifestyle. Assessors not only need to attribute space within the assessment process to consider protective factors, but also the time and energy to explore the person's goals, values and strengths. All of which will help create a picture of the factors that will help them lead a positive future life. Only with this balanced appreciation of risk and protection can we make sound judgements about the likelihood of offending.

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Resolving Evidential Differences Between Experts: The UK Way

by Professor Hugh Koch – Visiting Professor in Law and Psychology, Birmingham City University and Director, Hugh Koch Associates, Cheltenham
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Introduction

The UK has successfully developed a variety of civil procedural rules (CPR) over the past 2-3 decades to complement and develop the efficiency and effectiveness of the adversarial approach used in civil, criminal and family courts. This has encouraged the refinement of initially divergent opinions and evidence into comprehensively more convergent evidence through which judicial decisions can be made. A fundamental building block of this procedural approach is the obtaining and analysis of expert witness evidence. In the 1998/99 Civil Procedure Rules (CPR), the facility of the court ordering a meeting of opposing experts to produce a Joint Statement was made explicit. The considerable experience in the UK Courts since then has made this a key component of UK legal and evidential conflict resolution. It has also been adopted as part of the Western Australia State Administrative Tribunal and some parts of Canada.

In recent years, the process of 'Hot Tubbing,' has also been practiced. This is where opposing experts meet with the judicial panel or judge to debate and be specifically questioned on their evidence and have the differences and agreements debated

This paper clarifies and reinforces the excellent efficiency and effectiveness that has emerged via practice in the UK model of conflict resolution via expert statement production.

Personal Injury and Clinical Negligence: Assessing Trauma

The unifying factor in many debates between experts, barristers and the judiciary about psychological diagnosis of trauma is that 'something traumatic or stressful' in the claimant's history has been partly or wholly responsible for the cluster of psychological symptoms that have allegedly developed. (Koch, Nokling, Browne, Nolan and Davies, 2020).

Whatever diagnosis is arrived at, the key questions for the Court are: -

1. Did the claimant at any time develop a recognised psychological disorder? That is, was there a cluster of valid and reliably presented psychological symptoms which were disruptive socially, psychologically and/or occupationally, and which met the criteria for one (or more) diagnoses in either of the two main classification schemes, DSM-5 (APA,2013) and ICD-10 WHO,1992).

2. Can this disorder be attributed to a given index event, or did it pre-date or post-date the index event? For a practitioner this is the crucial issue. Given the "all of nothing" approach as to the proof of causation, the onus is to prove, on a balance of probabilities, that the index event caused the disorder if this cannot be established, then the case fails. Therefore, there is a requirement to demonstrate that the Claimant's symptoms did or did not meet the relevant diagnostic criteria before and after index incident period.

The group of diagnoses typically considered in civil cases where there has been a significant single event, with or without physical injury, include the following: -

Post-Traumatic Stress Disorder (DSM-V 309.81)

Acute Stress Disorder (DSM-V 308.3)

Adjustment Disorder (DSM-V 309.28)

Other Specified Trauma or Stressors – related disorders (DSM-V 309.89)

Somatic Symptoms Disorder (DSMV 300.82)

Specific Phobia (DSMV 300.29)

Generalised Anxiety Disorder (DSMV 300.02)

Medico-Legal Postulates

The diagnosis of trauma-related psychological symptoms is multi-faceted; obtaining reliable and valid evidence to produce a robust clinical opinion, using various assessment methods including an analysis of self-report, contemporaneous independent information, medical records and behavioural indications of level of disruption, and includes the 'but for' test of causation. These are embodied in the medico-legal postulates (Koch, 2016, 2018) summarised below and amended for the context of trauma assessment.

Assessing trauma requires a logical and impartial approach to understanding what the claimant has experienced. It must also investigate whether the claimant was already suffering a pre-existing psychological disorder or had a vulnerability to developing a trauma-related disorder, which affected their reaction or recovery following a traumatic index accident. For the purpose of a joint statement, there are several of these issues that individual experts need to clarify and, when meeting, have to discuss and decide what they can agree on.

Civil Procedure and Court Direction to experts

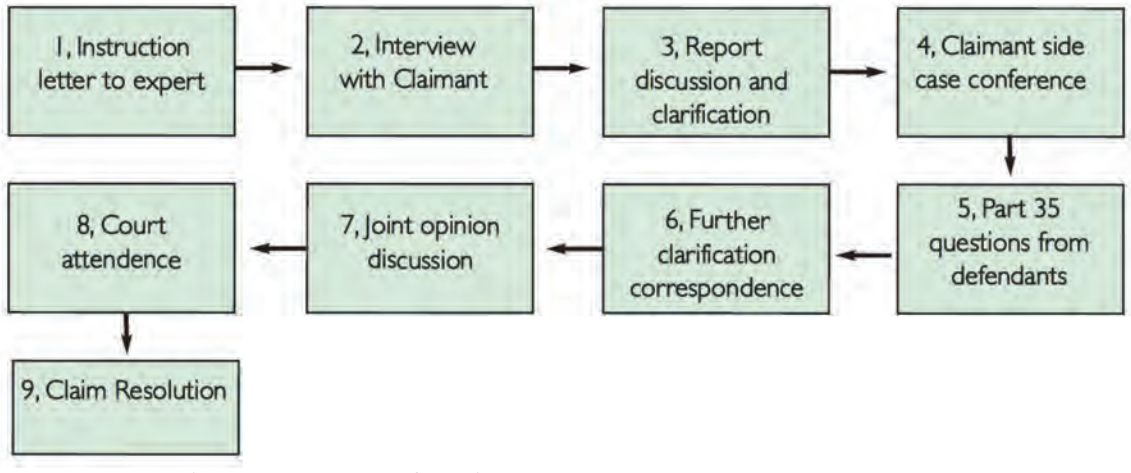
The search for evidential certainty, summarised in Figure 1 below, involves the collection of evidence and the use of expert witnesses to arrive at the 'best fit'

opinion and judgment. This requires the use of expert witnesses, typically medical experts, to sift through varying types of data (e.g. claimant self report; witness statements; medical and occupational records) to arrive at a robust, reliable and valid opinion.

Figure 1.

When there are two opposing experts the typical medico-legal trail, as shown in Figure 2 below, will involve the court direction for the two experts to 'meet' (typically by telephone and email), discuss their respective views and state how they agree and disagree on the available evidence.

Figure 2.



By inspection of several recent cases, cited in the British and Irish Legal Information Institute (BAILII), a number of issues arise in medical evidence before they reach the Joint Statement (JS) level pertaining to reliability and validity. They involve:

1. Narrative coherence (e.g. poorly explained index event; logical inconsistencies in claimant presentation)
2. Variable credibility of claimant narrative
3. Variable logic and causality hypotheses
4. Complexity and uncertainty of available opinions, both legal and medico-legal.

As a result, there is a level of judicial and legal uncertainty which prolongs litigation and reduces efficiency and effectiveness of the litigation process (Koch, Crowther-Green and Nokling, 2019); Ward,1999). This results in a greater risk of unbalanced and misleading expert evidence (Koch, Medley and Pelser, 2020).

The typical agenda for discussion and areas of evidential conflict resolution in Joint Statements

When considering a Personal Injury or Medical Negligence case involving trauma or stress, the key areas which the Court require the opposing experts to consider involve Diagnosis, Causation, Attribution and Prognosis. In addition, the Court is helped by the experts' views on the reliability and validity of the claimants' evidence, falling just short of making a judgment on truthfulness which is typically seen as the final judgment of the Judge.

A recent paper citing relevant case law (Koch, Milner and McFadyen, 2020) documented and described the several areas of evidential conflict in trauma cases. These include: -

a. Range of diagnostic opinion:

Road traffic accidents can result in a range of psychological disorders which reflect the fear, anxiety and trauma of the index event. Trauma can be experienced variably by individuals depending on factors such as severity of physical impact, associated physical injuries, sense of liability, pre-existing predisposition or vulnerability to psychological injury. As stated in section 2 of this paper, the range of diagnoses include PTSD (DSM.309.81), Acute Stress Disorder (DSM 308.3), Adjustment Disorders (DSM 309.89) or a generic label of "other specified trauma – and stressor-related disorder," where the criteria for the above three trauma disorders are not specifically met, but a significant disruptive traumatic reaction occurred. Examples of this are delayed onset of symptoms, prolonged duration or persistent complex bereavement disorder.

In addition to the trauma-related diagnoses available, a common disorder found is of Specific Phobia (DMS

300.29) where there is a marked fear about a specific object, e.g., motorcycling (and more generally, high speeds, motorways), provoking high anxiety, avoidance and disruption.

b. Duration, severity and residual symptoms

Where no medico-legal or civil litigation process is involved, the natural course of trauma-related symptoms in road traffic accidents is for a gradual decrease and resolution of symptoms where the individual gradually re-exposes him/herself to the travelling circumstances, e.g. motorcycling. Where persistent avoidance occurs, the duration and resolution of psychological symptoms will be lengthened and less optimistic.

In most cases, there is a gradual resolving of the majority of symptoms with some residual and/or intermittent symptoms remaining.

Understandably, the ongoing process of the litigation with recurrent medical assessments and legal correspondence and discussion act as a reminder of the index event and associated distress, making fuller resolution of recovery problematic.

c. Therapy and rehabilitation

In the eventuality that specifically traumatic and other associated psychological symptoms do not abate, then psychological therapy interventions can be highly effective. In the most typical circumstances where an individual has some level of recurrent anxiety about road travel (even with associated sleep disturbance and anticipating anxiety prior to journeys), then cognitive-behavioural therapy (CBT) on an individual basis is typically the treatment of choice.

Trauma-focused CBT and Eye Movement Desensitization and Reprocessing (EMDR) are also considered when acute trauma-symptoms predominate.

An alternative to CBT when the psychological focus is more sleep disturbance, nightmares, flashbacks and emotional detachments or dissociation then an alternative to CBT, Eye Movement Desensitisation and Re-Processing (EMDR), is considered.

A behavioural/practical adjunct to CBT is refresher motorbike (or driving) lessons whereby an instructor can reinforce the claimant's skills and build up confidence to re-expose him/herself to the travel activity again incrementally.

Lessons from recent case law

In a recent Legal Mind Case and Commentary (Koch, Davies and Laraway, 2020), five UK cases were reviewed for issues pertaining to Experts Joint Statements (Mays v. CMS Olswang [2018] EWHC 3669; BDW Trading v. Geotechnique [2018] EWHC 1915 (TCC); Saunders v. Central Manchester University Hospital [2018] EWHC 343; Jones v. Kaney [2011] UKSC1 and Igloo Regeneration v. Powell Williams [2013] EWHC 1718 (TCC).

From these cases and Sharp's excellent review the following substantive issues emerged for the experts conducting a joint discussion:

1. The crucial importance of the two experts fully understanding their duties to the court and the relevant CPR rules pertaining to joint discussions.

2. The need to read and fully understand each other's reports.

3. Their ability to precis and clarify their opinions and reduce issues to the key pertinent areas.

4. To maximise the level of logical agreement.

5. To only change their opinion in extremis; on the basis of newly presented valid information (this does not mean 'in the face of opposing expert's assertiveness'!)

6. To explain carefully and fully why an opinion has been altered, if this is the case

Experts who embark on the Joint Statement process need to use highly logical and effective communication skills and be willing to consider a range of opinions and contributory factors based on the evidence. For example, in the context of psychological injury cases, the two experts would need to consider the following: -

1) Different time scale of interviews - if the experts interviewed the claimant 1-2 years apart this inevitably would explain some differences in symptom self-report by the claimant, plus the passage of time had resulted in significant improvement, which in turn affected recall.

2) PTSD-type symptomatology – the life-threatening nature of the index event and overall PTSD diagnosis could be interpreted differently.

3) Diagnostic Agreement: The experts agreed on the diagnosis of a recognised psychological disorder attributable to the index accident, even though they may disagree about diagnostic label.

4) Pre-existing vulnerability: The experts may not agree on the existence of earlier predisposition to mood disturbance, or lack of active symptoms in the 12-month period prior to the index accident.

5) Duration: The experts may agree on a short duration with one expert opining a longer duration of symptoms.

6) The expert communication skills needed are illustrated in the micro skill hierarchy shown in figure 3 below. (Ivey, 1972).

Figure 3.

The key practical factors that could adversely affect the case and effectiveness of conducting a joint opinion are: -

a. Personality and style of expert: Most experts who had been working for many years attested to their colleagues being easier to get on with and debate differing opinions with. However, the communication style and personality of the other expert could still be a factor contributing to difficulty in producing a useful joint opinion.

b. Accessibility and efficiency of other experts: "Sometimes making contact with other experts was very difficult". When responding to tight time constraints either imposed by the Court, instructing solicitor or one's own competing, often clinical, commitments, the ability to make easy, rapid and 'one stop' contact with the other expert makes life considerably easier, or adversely if absent, very difficult and time consuming.

c. As a result of discussion, a statement is prepared, agreed and signed by both experts at the conclusion of the discussion and copies provided to each party. This can involve several exchanges of email with minor amendments. The efficient internet-based contact is a key factor in completing the joint opinion within the required time limit.

A balance is always necessary to maintain between individual professional opinion (clinical and medico-legal) and increasing consistency on interpretation of evidence and multi-sourced data. The Court requires that the appropriate range of opinions has been considered by both experts in their initial report and subsequently when they undertake the joint opinion direction.

Further areas of enquiry might usefully cover:

1. The range of opinion (diagnostic, causation, or prognosis) within the key professions.

2. Structure of joint opinion with/without a provided initial agenda.

3. The expert needs, when presenting his/her evidence in the initial report(s).

4. The subsequent joint statement(s)

5. When in appearing in Court, how to present an impartial and concise approach (Koch, Sorrell and Fernandez-Ford, 2018).

6. When to alter, change or modify opinion; only after being presented with significant new or confounding evidence (Koch and Thorns, 2016).

One aspect of considerable relevance is the issue of how claimant's experience and symptom presentation is taken on board and considered by the expert before then being 'pigeonholed' into the 'best fit' diagnosis. The difference in diagnosis between the two experts did not necessarily have to indicate a fundamental difference between them except that in the case of Dr F, the defendant expert, her diagnosis reflected a significant difference in causation.

The psychological formulation and psychological conceptualisation of the claimant's symptoms and their origin could be useful to delineate prior to any proposed diagnosis. Such as approach facilitates a more meaningful and rigorous framework within which to propose attribution, as well as the opportunity to elaborate within a theoretical paradigm causative factors. This would also allow for the identification of any pertinent predisposing vulnerabilities.

Further to other discussions about the use of joint statements (Koch 2016, 2018), it would appear from experience that the success of joint statements can be particularly affected by personality and logical/use of language skills.

Conclusion

For a joint statement to be of use to the Court, and the judge's deliberations, it needs to be more concise and logically acute than the two original expert reports, otherwise it offers no additional value over and above the original reports.

For the summarising process to stand a chance of succeeding, the experts need to collaborate on a working agenda, or alternatively the two parties need to do this collaboratively and provide the experts with a single agenda, albeit with some additional issues or questions from each side. The role of the judge is crucial in ensuring the joint statement takes place within an efficient time scale.

Within the joint statement, if and when, the experts are questioned in Court, the experts need to argue their corner and be open to discussing the merits of alternative views, in a concise and logical manner.

The Joint Statement process is unique to England and Wales and occasional use in Northern Ireland and Scotland and it is not used extensively elsewhere (although occasionally in Australia and Canada). The Courts in the above jurisdictions lead the way in the use of Joint Statements in legal conflict resolution.

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Court of Appeal Gives Guidance On Digital Records Held on Electronic Devices in Criminal Proceedings

by Michelle George at Taylor Wessing

The issue of electronic evidence is not a new one. Since the disastrous and well publicised case of Liam Allen in 2017, the courts have been grappling with the issue of relevance and reviewing/disclosing evidence from the digital devices of witnesses in a case.

In Allen's case, he was on bail for over a year before being charged with several counts of rape. During the trial, his barrister obtained a copy of the complainant's text messages, including several which directly conflicted with her witness statement decimating her credibility, and ultimately the Crown's case.

In recent criminal cases of R v CB and R v Sultan Mohammed, the Court of Appeal has given guidance on the use of digital records held on electronic devices (such as mobile phones) by prosecution witnesses.

In both cases, the defence sought to adduce digital records evidence – including from social media and mobile phone messages – but were ultimately unsuccessful. Although both cases related to sexual assault, the issues of principle considered in the respective judgments are relevant to a wide variety of circumstances.

The Court set out the following guidance for investigators seeking to disclose details of a witness' digital communications:

- Any request to inspect must have a "reasonable foundation" – ie there must be reasonable grounds to believe that an inspection will reveal relevant material; it mustn't be a fishing expedition. There is no presumption that a complainant's device will be inspected.
- Any review of a witness's electronic communications should be proportionate, and where possible cause the least inconvenience to the witness. Investigators should consider whether the review can be undertaken remotely without requiring the device and whether it would be sufficient to view limited areas (such as a particular conversation or set of social media posts).
- Investigators should also note that if a more detailed review is needed, the device should be returned without unnecessary delay, that searches of large amounts of material should be limited with data parameters (such as search terms), and that irrelevant personal information should be redacted.

Complainants and witnesses should be kept informed and reassured regarding disclosure of any records

Complainants and witnesses should be told that:

- they will be informed of disclosure decisions, how long the device(s) will be retained and what information is being extracted and examined
- content will only be copied or inspected if no other method of discharging disclosure obligations is available, and
- material will only be provided to the defence if it meets the strict test for disclosure and is suitably redacted.

What are the consequences if the complainant deletes or refuses to permit access to relevant digital records?

The reasons for refusal should be carefully considered and reassurance regarding the disclosure procedure should be provided. If a stay of proceedings is suggested on the basis that a fair trial is not possible, this should be considered along with the adequacy of the trial process.

The court should not make guesses about the content and significance of the unavailable material but should assess the impact of its absence. A witness summons may be sought so that a device may be provided and, in the case of deletions, cross-examination or directions could be sought. If the trial were to proceed, the lack of cooperation from the complainant/witness would be an important consideration for the jury.

It will be interesting to see in practice how investigators will approach cases where a complainant or witness' phone is required. How much pressure will the defence apply to ensure phones are interrogated? How much push back might there be from complainants and witnesses? Will this finally encourage those accused of offences to put some meat on their bare bones defence statement to justify their disclosure application? After all, in this digital age, surely it's not right to only hear one side of the story?

About the author

Michelle advises on criminal and regulatory investigations, including complex fraud, professional negligence, bribery and financial services enforcement. She also has a wealth of experience in advising in interviews under caution, and specialises in investigations with the SFO, FCA, HMRC and NCA. Michelle is considered by her clients to be a great tactician who is warm and approachable. She quickly builds rapport with clients. In court, she has been described as exceptionally bright and unflappable under pressure.
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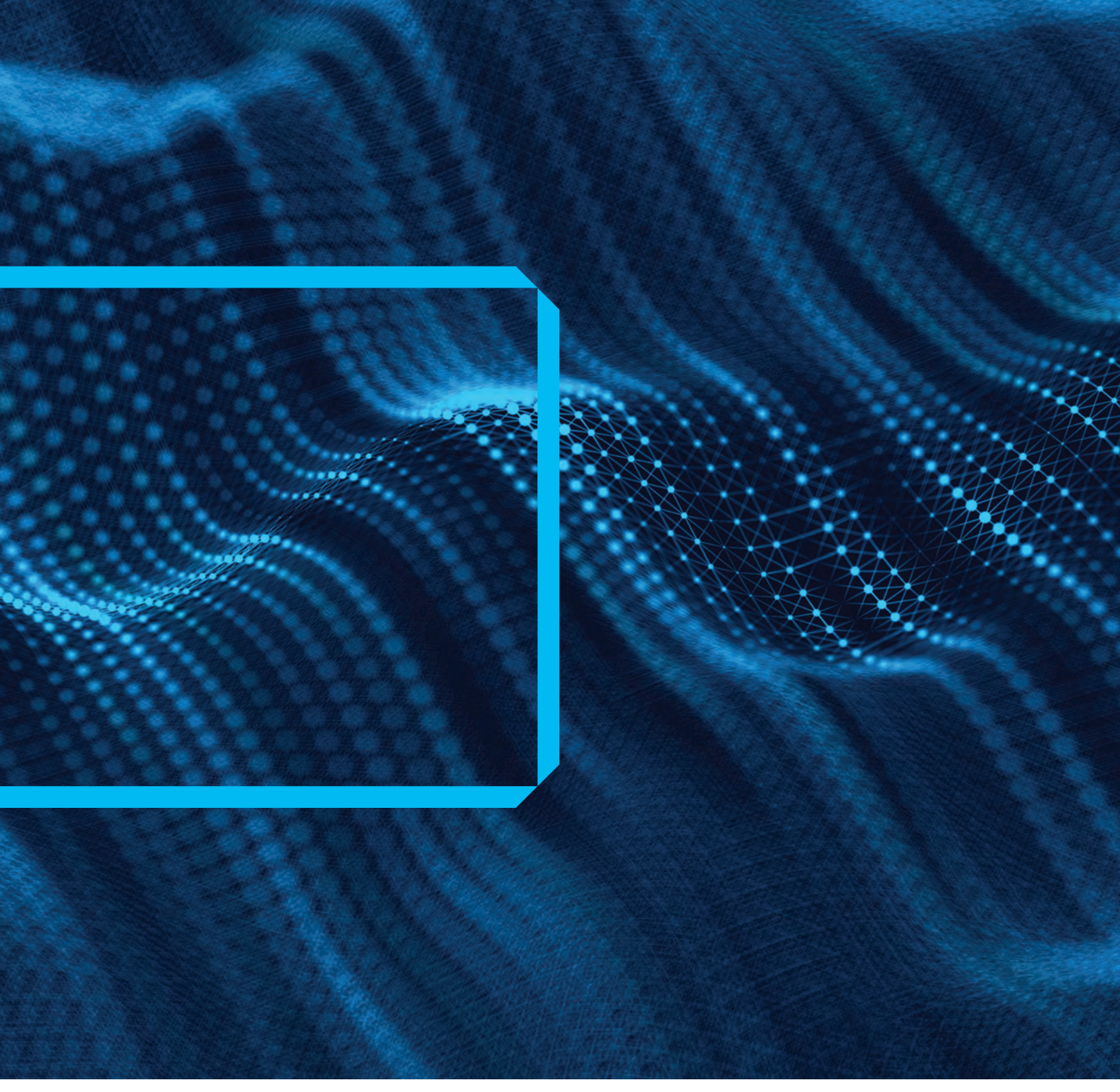

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A Phone Without a SIM is Not Game Over for Digital Forensic Examiners

Cellsite data provided by digital forensics can be valuable in a case, however there's a growing trend for defendants to have 'SIM-less' phones – claiming that they only use their phone on wifi hotspots.

Does this mean their movements can't be tracked? Can valuable information still be retrieved by the phone relevant to the case?

At one of our seminars last year a barrister mentioned the distinct lack of cell site data being presented in trials. Whilst we enjoyed our Cornish yarg and glass of red we pondered collectively over why this might be.

For some time cell site analysis played a huge part in a variety of cases but has proven particularly fruitful for the Crown in county lines cases. Now it appears that defendants are becoming more aware of the information their mobile phones hold and what it can tell the police about where they may have been.

As a result, they are either leaving their mobile phones at home or removing the sim card and only using public wifi hotspots to communicate. Other times they are destroying sim cards prior to arrest to try and prevent the police being able to track their locations or attribute the phone to them.

This means that it is much harder for the investigation team to track down information on calls, texts or data usage, used to co-locate them with other suspects.

But not all data is held on the SIM card…
Our Digital Forensic Examiner, Chris Watts, reminds us that *"the handset itself holds most of the retrievable data"*. This includes details of the wifi connections the phone has made, GPS information if location services or bluetooth have been left on, or if the phone has a fitness app that records the daily number of steps made by its owner.

Digital forensic investigators and cell site experts can use this data to provide the potential locations and movements of the handset just as they would with call data records.

In some cases, the phone itself has been destroyed, leading the suspect to believe that no data can be recovered. In these cases, all is not lost. *"Provided the IMEI number of the phone is still visible, it is possible to contact the service provider to request the phone number(s) it has been used with"* explains Chris Watts. A further request can be made for all call data records for the numbers associated with that handset. In practice this may require a court order for the company to release the information to you unless your client agrees.

All this is well and good, but what benefits does it provide to the defence?

Remember that adage *'knowledge is power'?* No one likes to be caught unawares of potential evidence in a case. Chris Watts states *"if your client discloses that they have destroyed their SIM to thwart police investigations; be very cautious"*.

As I have outlined above, there are many ways that a suitably experienced cell site expert can generate data that can be used exactly for this purpose.

As a Forensic Access customer and newsletter subscriber, we provide you with key insights into all disciplines of forensics, including digital forensics like this information about cell site. We provide free consultations with either our casework management team or with our experts about your particular case to ensure you are fully aware of all the potential evidence that may be presented against your client. Whether that's looking over areas to challenge on a streamline forensic report (SFR), raising areas of potential examination, or ensuring that the evidence presented in the case is done so in a fair and honest way.

A couple of tips from our cell site expert Chris Watts to make sure you get the most out of your case: *"By involving us in an advisory capacity at an early stage in your case and providing us with as much information as you can, means we will be able to help you and your client much more effectively."*

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Forensic Research Proves that Textile Fibres can be Transferred Without Contact

Breakthrough forensic research at Northumbria University, Newcastle, has revealed for the first time that textile fibres can, under certain circumstances, be transferred between clothing in the absence of contact.

This new forensic discovery has not been demonstrated before and could have a major implication for fibre evidence in certain criminal cases.

Researchers within Northumbria University's Department of Applied Sciences have proved that contactless transfer of fibres between garments can be possible through airborne travel.

Because it has largely been assumed that fibre transfer only occurs when two surfaces touch, it is generally accepted in a case that two surfaces have, at some point, been in contact with each other. However, researchers at Northumbria University have revealed that under certain conditions, this is not necessarily always the case.

Dr Kelly Sheridan, who led the research at Northumbria University, said: "Our experiment was simple but efficient. We used fluorescently tagged fibres to track their airborne transfer between clothing. Everyday tagged clothes – jumpers, long sleeved tops and fleeces - were worn by two people who stood in opposite corners of an elevator.

"The elevator operated as normal and non-participants of the study entered and exited as usual. Following the experiment, the surfaces of the recipient's clothing were photographed using UV-imagery techniques to determine the number of fibres that were transferred from one person to the other.The results of the study were remarkable. It not only proved that textile fibres can transfer between garments in the absence of contact, but they can do so in relatively high numbers."

In this study, the potential of fibre transfer between different items of sheddable clothing through airborne travel has been assessed for small, compact and semi-enclosed spaces, such as elevators.

The results of this study demonstrate that when certain strict conditions are met (i.e. time, sheddability of garment, proximity and confined space), airborne transfer of fibres can occur in forensic scenarios, and that these could be in potentially significant numbers for fibre types, such as cotton and polyester.

Textile fibres are one of forensic sciences' fundamental evidence types and have been pivotal in solving some of the UK's most notorious crimes; for example, the murders of Stephen Lawrence and Joanna Yeates, as well as the Ipswich serial killings.

Establishing textile fibre links, however, is only half the battle, according to fellow Northumbria researcher, and co-author on the paper, Dr Matteo Gallidabino.

"What is equally, if not more, important, is how that fibre was transferred from one surface to another," he said. "This research shows that airborne transfer is viable in a number of case scenarios despite previous beliefs and could explain the presence of fibres on a variety of surfaces."

Dr Ray Palmer, a visiting academic and former senior lecturer in forensics at Northumbria University and co-author on this research paper, has given evidence at numerous high-profile trials, including that of the so-called Suffolk Strangler in England and the Claremont serial killings in Western Australia.

He said: "This study was designed so that the experimental parameters were as conducive to contactless transfer as possible, whilst still maintaining a real-life scenario. Since there is a paucity of published studies relating to contactless transfer, the results obtained from this study will be useful to forensic practitioners as a 'baseline', in evaluating how likely it is that a proposed activity or case circumstance has resulted in contactless transfer."

Investing in Supporting Police Procurement

How Leica Geosystems has built up a deep understanding of collision and crime-scene investigation work

- *Between 2010 and 2019, UK police budgets were cut by 19% – but crime figures didn't drop accordingly*
- *Leica Geosystems is working closely with the FCIN and the Chartered Society of Forensic Sciences (CSFS) to support police forces in meeting the challenge of achieving this accreditation.*
- *Leica Geosystems free two-day policing conference is a chance to get hands-on with the latest Leica equipment.*

Between 2010 and 2019, UK police budgets were cut by 19% – but crime figures didn't drop accordingly. So although new technology continually emerges to help police forces collect, preserve and present evidence, they're continually being asked to do more with less. That's why we've created a package of support designed to help police forces access data capture equipment, and to get up to speed with it as quickly and cost-effectively as possible.

"We all depend on the police to be able to do the best possible job – whether that's solving crimes or dealing with road traffic collisions," said Mike Skicko, our UK public safety lead for forensics and collision investigation. "These are tough jobs, so we want to make it as easy as possible to achieve the right outcomes by delivering accurate 3D reality-capture information which can be relied upon in court."

Today, Leica Geosystems works closely with multiple agencies involved in crime-scene and collision investigations, including police forces across the UK, the NPCC, the Institute of Traffic Accident Investigators, the Chartered Institute of Forensic Sciences, the Forensic Collision Investigation Network, and various third-party technology providers. The support we offer includes:

"Leica Geosystems give us excellent service – and their support has genuinely been exemplary. They respond quickly to any problems and have been able to provide next-day loan equipment when ours has been away or out of action." – Inspector Richard Auty, Metropolitan Police Road & Transport Policing Command

A deep understanding of policing needs
Besides working closely with policing organisations, our team includes former police officers and consultants from around the world. Our ongoing dialogue with police forces ensures we understand their evolving needs.

"The police need to complete very specific tasks quickly but thoroughly, so we focus on speed and simplicity," said César Almeida, one of our reality-capture specialists. "The RTC360 scanner has a single button, for example, and we strip anything out of the workflow and training which the police force doesn't need. And our experience means we can suggest applications that they may not have considered, helping them get the best possible value from our technology."

Pre-sales support
When a force gets in touch, we take the time to really understand their needs and challenges and we'll send a team of three people with demo equipment for a full day, so we can answer all their questions. The team includes Mike Skicko, César Almeida, and geomatics market segment manager Mark Francis.

Knowledge-sharing and networking
Our free annual two-day policing conference is a chance to get hands-on with the latest Leica equipment, listen to guest speakers, and hear the innovative ways in which police forces use our equipment to crack cases and respond to incidents. In 2020, the event attracted 104 people from 30 policing organisations, providing a forum for sharing knowledge, ideas and best practice.

"We've stayed with Leica Geosystems because they give us cracking customer support." – Iain Took, West Midlands Police

Support with ISO/IEC 17020 & 17025 validation
Leica Geosystems is working closely with the FCIN and the Chartered Society of Forensic Sciences (CSFS) to support police forces in meeting the challenge of achieving this accreditation. Dr Anya Hunt, CEO of the CSFS, commented that "Leica Geosystems very much appears to be ahead of the curve at the moment in their understanding of the need for validation and verification."

"Leica Geosystems is one of the main suppliers of scanning technology to policing… They have lots of technology and people who really understand the process. They can guide the police through some of the difficult areas where we perhaps don't have the expertise. They've been very generous and hugely supportive with the method validation work that we're undertaking." – Frances Senior, NPCC capability manager for forensic collision investigation

Training and technical support

We pride ourselves on building a rapport with policing customers, and do our best to ensure officers can deal with the same person when they call. "When you're already stressed out about a problem, there's nothing worse than having to tell your story three times to three different people. Policing is tough enough; we're here to make things a little easier," says Nicolette Beggache, technical specialist and trainer at Leica Geosystems.

"By getting to know each force's unique workflow, we can recommend the simplest, fastest way to get things done. We create a process that's fit for purpose for each force, then follow it up with training that exactly matches it. This means officers can go from scene to screen in the shortest time possible."

Sponsoring the ITAI collision event

Each year, Leica Geosystems sponsors the Institute of Traffic Accident Investigators' ITAI Crash Test and Research Day. In 2019, over 420 delegates attended – including collision and crime-scene investigators, fire and ambulance services, private investigators, insurers and salvage companies. This means we're helping them to better understand what happens in a crash, which in turn influences the understanding of the evidence collected afterwards.

Going the extra mile

Because we're committed to supporting UK policing, we're willing to put in that bit extra. When Guernsey Police wanted to explore our RTC360 laser scanning solution, for example, there was no hesitation in flying down there to show it to them. If necessary, we'll do training at force HQ instead of our own headquarters, as we did for Nottinghamshire Police. And in certain circumstances, we can lend equipment, too.

Leica Geosystems began with the founding of Kern & Co in 1819. In 2005, it was acquired by Swedish company Hexagon AB, a global leader in sensor, software and autonomous solutions. Today, Leica Geosystems has 4,500 employees in 33 countries, delivering geospatial surveying solutions for industries such as surveying, mining, transportation, utilities, safety and

How to get the most from your instructions to Experts

by Susan Dearden and Dr Richard Brown at Finch Consulting

In May 2019, the discrediting of an unsuitable expert caused a fraud trial against 8 defendants to collapse in spectacular fashion. Ensuring the suitability of an expert is just one of the issues facing those involved in the instruction of experts. In this article, Health and Safety Solicitor Sue Dearden and expert Dr. Richard Brown from Finch Consulting provide insights and tips on how to select and get the most from your instructions to experts which include;

- Why use an expert at all
- What to do before instructing an expert
- What evidence and materials should you provide with instructions to an expert
- What technical information and guidance should be given.

Why use an expert at all?
Experts have a useful role to perform in a range of situations.

Often forgotten is that they can really help to resolve disputes before they become litigious. Would be litigants in civil cases can agree to seek a view from an expert on a joint instruction and be bound by their decision which can help to resolve and shut down specific issues early.

An informed strategic decision on whether to litigate or to defend can also be made by seeking an expert opinion pre litigation. Want to keep a preliminary view confidential? Ask for the view to be delivered in a call or at a meeting – you can always move to a written report later if the preliminary view is helpful.

During litigation, in civil cases experts can be helpful to opine on issues within their expertise to help the Court in determining key issues. In an injury claim for example this could be views relevant to liability and/or causation and/or value.

In criminal cases an expert's opinion can help in a health and safety context for example, on the often thorny issue of whether, and if so, how far short of expected standards did the Defendant fall, and the likelihood of injury (high, medium or low) both of which issues are very relevant to guilt and sentence. Accounting experts can also help with context to turnover and profitability shown in a defendant's accounts which can help to mitigate sentence.

In all litigated cases whether criminal or civil, it is important to remember that an expert is for the Court's assistance and the expert's duties are owed to the Court and not to the party instructing him or her. In litigation, with the Court's permission, experts can be instructed by a party to litigation or jointly, but in either case, the expert's duty in the evidence provided, is to the Court.

An expert can also be appointed to advise, suggesting pertinent cross examination questions for example within their area of expertise rather than giving evidence themselves. This is particularly common at inquests where decisions about which witnesses are heard from are a matter solely for the Coroner. An expert can assist with informed specialist questions for experts which the Coroner calls in those circumstances.

Before instructing an expert
Think about what skills and expertise you need. Don't be afraid to ask for CVs, details of relevant work and publications, and for references if you are using someone you don't know. At this stage you will need to provide your proposed expert with a brief overview of what has happened and of the issues on which they may be asked for a view so that they can consider and confirm whether the issues are matters on which they are expert. Challenge them and ask questions – the burden is on whoever is issuing the instructions to ensure that the expert is suitably skilled. Try to avoid jack of all trades experts – generalists whose experience doesn't tally with what they claim to be expert in. Check qualifications, currency of knowledge, and court experience, particularly if you are likely to need your expert in a witness box. Speak to them before committing – are they friendly and engaging, and good communicators?

Ensure you know if your proposed expert generally acts for one side or the other (which, particularly in a civil case, might indicate bias if heavily skewed and diminish their credibility as an independent expert). Conversely, in criminal cases prosecutors rarely go outside their own experts (the HSL in particular) which does not seem to diminish their credibility in the same way, and limits the experience of other experts for the prosecution with a result that balance in the source of instructions is less of an issue.

Check hourly rates. At this stage it is probably unfair to ask what the fees might be as the expert will have no idea of the volume of materials they will need to consider and whether a site visit is necessary (unless they are being asked for a view on a very limited point) but are you happy with the rate suggested given their experience and qualifications, and that the

expert has a system for time recording their work in suitable time units. Some do appear very vague about time recording concepts.

There are a number of courses available in both civil and criminal expert work, some of which are accredited. Courses typically cover report writing, relevant legal information for experts and giving oral evidence, including cross examination. If your expert might ultimately be needed to give evidence in Court it is worth checking if they hold any such accreditation. Formal training and competence in being an expert can, in the witness box on occasions, end up being as important as the expert's subject knowledge.

Check availability. Are you working to a timescale and can the expert meet that timescale not just for the next step, but until the likely end of a matter? They may be free now but communicate about what is likely to be needed going forwards, so that you are factored into the expert's longer term work pipeline.

Check conflicts and anything that might undermine credibility and impartiality. Explain to the expert who you are acting for, who is on the other side or may be on the other side, who is representing everyone involved (Solicitors and Barristers), what other experts are involved, and ask if there is any potential conflict in relation to those involved or subject matter, that might create a perception of bias, which might preclude them from accepting an instruction, or which might cause you embarrassment later on. You need this information now, not when the expense of a report has been incurred. Having to change experts causes delay and additional cost at best, and at worst can lead to your opponent's position becoming entrenched as they will assume a switch in expert is due to an unhelpful decision.

If the case is a criminal one, a party introducing expert evidence is required to give notice of anything of which that party is aware which might reasonably be thought capable of undermining the reliability of the opinion, or detracting from the credibility or impartiality of an expert, and under Criminal Procedure Rule 19.2(3)(d) the expert is required to disclose to that party any such matter of which the expert is aware. Examples of matters that must be disclosed are listed in the practice direction and include for example lack of an accreditation or other commitment to prescribed standards where that might be expected, and past adverse judicial comment about their expertise and evidence.

What evidence and materials should you provide with instructions to an expert?

When you are satisfied you have a suitable expert and proceed with an instruction, the expert will then be able to assess how long he or she needs to review materials and deliver what you need (review of materials/site visit/report or oral advice). Be upfront about asking for a clear indication of costs for review and approval BEFORE they start work. Don't be shy about insisting that this is agreed before the expert proceeds. Think about capping costs to control spend if the expert is reluctant to commit. An experienced expert though should be able to provide an acceptable cost range based on the volume of material.

Think about what the expert needs to see when putting your instructions together. They may need statements of case or a copy of charges to understand context and issues, but be careful about what evidence is sent to your expert. Don't waste money by sending documents that are irrelevant or which your expert does not need (but would need to read to determine that), and remember that the other party will be entitled to see anything you send to your expert so don't waive privilege over documents that you want to protect for the time being (such as witness statements or other evidence not yet disclosed). A way of protecting statements may be to extrapolate from them without referring to the written statement in the instructions and asking for a view on "hypothetical" positions which you know is supported from the evidence you hold. Think about whether a site inspection should be arranged – it can be a much quicker and surer way of helping an expert understand the circumstances.

Your instruction letter may also become disclosable to the other side, so keep the language objective and neutral and say nothing that acknowledges vulnerabilities that you do not want others to know about (at least for the time being) or indicates admissions which have not yet been made.

Be clear about what issues you want the expert to consider and ask them to acknowledge any areas in which there is a known range of views, with their view on that range supported by evidence. Be clear about burdens of proof and how certain your expert needs to be in his views. The burden may not be the same for a civil case (which would normally require certainty only on the balance of probability) as it would for a criminal case (where the burden is normally beyond all reasonable doubt, though the civil not criminal standard is relevant to establishing a section 40 defence of reasonable practicability).

Avoid the temptation to simply throw your file of information and evidence in the direction of an expert and ask for a view. Tell them (normally through questions) what you want them to consider and what questions you have in relation to which issues.

Ask for any opinions to be supported by evidence with full referencing of any authoritative material relied on.

A good expert familiar with his or her duties to the Court will list the information seen which has been relevant to their view but ask that this is done in any event. It is a requirement of the Court rules. Additionally, in criminal cases a prosecution expert witness must, and it is good practice for a defence expert witness to, provide an appendix or separate index of material seen but not used in formulating an opinion – in other words a list of unused material.

Be clear with your expert about what you anticipate will happen next. Even an approximate timescale helps the expert in ensuring space is retained to build in his or he ability to handle any further instruction.

Think about asking for a call to discuss the report in draft form before it is finalised. Whilst rarely sought, when a final report is presented, another party can insist on sight of drafts, so you want to avoid significant changes and any suggestion that the final views expressed have in any way been influenced. A call to discuss a draft before it is finalised can ensure all questions are answered and points are clarified.

Ask the expert to be mindful of his or her duty to the Court in Civil or Criminal cases and to be mindful of their duty to advise you if anything changes.

Be courteous and keep your retained experts advised of progress with the case so that they know if they are likely to be needed again as the case evolves.

What technical information and guidance should be given to an expert?

Professional and experienced experts will normally be aware of their obligations of impartiality and duties to the Court, but instructions ought to provide a link to the rules and guidance for the expert to review, or set them out (e.g. in an accompanying appendix) so that there is no scope for misunderstanding..

Be clear in your instructions which Court Rules are relevant.

In Civil Cases (e.g. compensation claims) this will be Civil Procedure Rules Part 35. Rule 35.10 sets out the requirements of an expert report, supported by Practice Direction 35 which identifies a number of requirements with which an expert must comply. The civil rules prescribe verbatim the wording to be used at the end of an expert report and, from October 2020 this will change to read:

"I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth."

In the Criminal Courts (e.g. health and safety prosecutions) the relevant rules are contained in Part 19 of the Criminal Procedure Rules supplemented by Criminal Practice Direction V Evidence 19A. The CPS Guidance for Experts on Disclosure, Unused Material and Case Management, whilst directed at prosecution experts, is also essential reading for experts on both sides in criminal cases.

Rule 19.4 sets out what an expert's report in criminal cases must contain. Requirements include a statement and declaration in substantially the same terms as the Practice Direction which says (at 19B.1)

"I [name] DECLARE THAT

I understand that my duty is to help the court to achieve the overriding objective by giving independent assistance by way of objective, unbiased opinion on matters within my expertise, both in preparing reports and giving oral evidence. I understand that this duty overrides any obligation to the party by whom I am engaged or the person who has paid or is liable to pay me. I confirm that I have complied with and will continue to comply with that duty.

I confirm that I have not entered into any arrangement where the amount or payment of my fees is in any way dependent on the outcome of the case.

I know of no conflict of interest of any kind, other than any which I have disclosed in my report.

I do not consider that any interest which I have disclosed affects my suitability as an expert witness on any issues on which I have given evidence.

I will advise the party by whom I am instructed if, between the date of my report and the trial, there is any change in circumstances which affect my answers to points 3 and 4 above.

I have shown the sources of all information I have used.

I have exercised reasonable care and skill in order to be accurate and complete in preparing this report.

I have endeavoured to include in my report those matters, of which I have knowledge or of which I have been made aware, that might adversely affect the validity of my opinion. I have clearly stated any qualifications to my opinion.

I have not, without forming an independent view, included, or excluded anything which has been suggested to me by others including my instructing lawyers.

I will notify those instructing me immediately and confirm in writing if for any reason my existing report requires any correction or qualification.

I understand that:

(a) my report will form the evidence to be given under oath or affirmation;

(b) the court may at any stage direct a discussion to take place between experts;

(c) the court may direct that, following a discussion between the experts, a statement should be prepared showing those issues which are agreed and those issues which are not agreed, together with the reasons;

(d) I may be required to attend court to be cross-examined on my report by a cross-examiner assisted by an expert.

(e) I am likely to be the subject of public adverse criticism by the judge if the Court concludes that I have

not taken reasonable care in trying to meet the standards set out above.

I have read Part 19 of the Criminal Procedure Rules and I have complied with its requirements.

I confirm that I have acted in accordance with the code of practice or conduct for experts of my discipline, namely [identify the code].

[For Experts instructed by the Prosecution only] I confirm that I have read guidance contained in a booklet known as Disclosure: Experts' Evidence and Unused Material which details my role and documents my responsibilities, in relation to revelation as an expert witness. I have followed the guidance and recognise the continuing nature of my responsibilities of disclosure. In accordance with my duties of disclosure, as documented in the guidance booklet, I confirm that:

(a) I have complied with my duties to record, retain and reveal material in accordance with the Criminal Procedure and Investigations Act 1996, as amended;

(b) I have compiled an Index of all material. I will ensure that the Index is updated in the event I am provided with or generate additional material;

(c) in the event my opinion changes on any material issue, I will inform the investigating officer, as soon as reasonably practicable and give reasons.

I confirm that the contents of this report are true to the best of my knowledge and belief and that I make this report knowing that, if it is tendered in evidence, I would be liable to prosecution if I have wilfully stated anything which I know to be false or that I do not believe to be true."

Summary
First:
- Check credentials and expertise
- Check conflicts and any issue that might undermine credibility
- Check availability for what is needed
- Check cost rates

Second:
- Provide clear instructions about what is needed and relevant evidence (but be aware that other parties will be entitled to see what your expert has seen)
- Think about obtaining and agreeing a cost estimate before work begins
- Ensure your expert is aware of the relevant Court rules and duties and is aware of the declaration that is needed at the end of his or her report
- Keep your expert updated as the case progresses, particularly if dates and deadlines changed

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The Cost of Evidence Spoliation to Insurers

Spoliation is the destruction or alteration of evidence, whether intentional or unintentional, and the spoliation of evidence in property insurance claims can pose significant and adverse effects on the rights of the insurer providing coverage. It's important to note what types of evidence play a role in spoliation and how spoliation may be viewed differently among court systems internationally.

There are a number of ways evidence can be spoliated, but most commonly happens through the destruction, misplacement, alteration, or discard of evidence by one of the parties involved in the claim. Documents can be shredded, computer files can be erased, physical items can be disassembled, destroyed, or otherwise disposed, modifications can be made to the evidence, and evidence can even be altered or destroyed to create other types of evidence. It can also be sold or transferred to a third party and thereby rendered unavailable for discovery or trial.

Duhaime's Law Dictionary defines spoliation as, *"The intentional destruction* of relevant evidence when litigation is existing or pending." This definition infers that unintentional destruction may not be spoliation. However, spoliation generally includes unintentional actions as well. While ASTM E 860-07 and NFPA 921 both define spoliation as, "The loss, destruction, or material alteration of an object or document that is evidence or potential evidence in a legal proceeding by one who has the responsibility for its preservation." (1)(2)

In different areas of the world, there are differing interpretations of spoliation, which is why it is important to note what types of evidence play a role in spoliation and how spoliation may be viewed differently among court systems internationally. In Singapore it is generally accepted by the forensic community that spoliation includes intentional and unintentional actions.

Physical Evidence
What is it?
Physical evidence is any material object that plays an actual role in the matter that gave rise to the litigation introduced in a trial intended to prove a fact in issue based on the object's demonstrable physical characteristics. Physical evidence is used to prove or disprove a fact or issue.

Examples in a fire claim can include wiring, electrical plugs and sockets, electrical safety devices (e.g. fuse and circuit breakers), appliances, machinery, thermally damaged or burnt items that display burn patterns, or a multitude of other physical items that help to identify the origin, cause and/or those responsible in regard to the loss.

Who owns it?
The question of who actually owns the evidence can be incredibly important and arises at nearly every insurance claim site investigation. Generally, the owner of the specific item of physical evidence is just that. If an owner has been determined, the expert representing the owner will usually become the first in custody of the evidence.

Ownership becomes more complicated when the claim involves leased or rented premises and equipment. In a tenanted building, evidence could either be owned by the building owner or the tenant. In a multi-tenanted strata title building with rented units, the evidence may be the tenant's, the landlord's, or the body corporate. For example, in a tenant-occupied unit, if an electrical extension cord and an electric appliance were desired as physical evidence, the expert representing the tenant would become the custodian. In the same situation, if a length of electrical fixed wiring and its associated circuit breaker in a distribution panel were desired as physical evidence, the expert representing the building owner would become the custodian.

It can become further complicated if governmental agencies are involved in an investigation. In many countries, such as Singapore, governmental organisations have jurisdiction to take possession of evidence and to carry out destructive testing on that evidence. If the evidence is not returned to the owner or is returned in a damaged or destroyed condition, then this is spoliation of evidence and can easily jeopardise the ability of an insurer to make decisions regarding coverage, subrogation and defence of a possible liability claim.

Spoliation
The Consequences
In the U.S., spoliation of evidence is taken extremely seriously. Courts may issue monetary, evidentiary, or even terminating sanctions to punish and deter to litigation. Criminal and disciplinary penalties have been developed to punish those involved in spoliation.

Some jurisdictions recognise spoliation as an independent offense. It is subject to judicial punishment when someone, involved or not, intentionally destroys evidence. In addition, courts have recently held that a cause of action may be stated against someone who only negligently causes the spoliation of evidence. The negligent loss or destruction of elec-

tronic evidence, in addition to physical and documentary evidence, has become widely punishable. [3]

Widespread Spoliation in Singapore

It is very clear that in the U.S. spoliation is taken very seriously and can come with serious consequences. When carrying out a forensic investigation on behalf of an insurance company, it is standard practice in the U.S. to put all potentially interested parties on notice very early on and to allow their representatives to participate in onsite inspections, evidence examination and laboratory analysis. The objective being, fairness to all parties and avoiding any risk of spoliation.

On the other hand, Singapore has a much more laissez-faire approach in relation to the investigation of property insurance claims and investigations carried out by other parties (e.g. governmental entities), where significant insured interests are present. Some experts feel that ownership of evidence belongs to whomever secures it first and that testing does not need to involve any other interested parties.

Singapore authorities have jurisdiction to take possession of and destructively test evidence without involving other parties such as insurers, loss adjusters or experts. Undoubtedly, this jeopardises an insurer's interest in the claim concerning coverage determination and subrogation that ultimately could cost the insurance industry significant amounts of money. Evidence is made available to insurers only once the authority has concluded the investigation, which could be months or even years later. At this point, the evidence will have likely already been destructively tested and therefore, have been spoliated.

The Effects on Insurance Coverage

When an insurer receives a property insurance claim, one of their first tasks will be to determine whether the claim is covered under the policy or not, requiring investigation of the origin and cause of the loss. Although, if crucial evidence to determining the origin and cause of the loss has been spoliated, the investigators ability to accurately determine the origin and cause will be compromised and may result in an undetermined report.

This puts the insurer in a tough position when having to make a coverage decision. The insurer has the decision to either admit the claim knowing there could be a risk from not excluding the claim and adding the risk of possibly having to pay the claim, when perhaps it should not have been paid, or exclude the claim and not pay out, knowing there is a risk that it might have been a legitimate claim.

If the claim is covered and ultimately paid, the insurer may seek to recover the amount paid from a third party. If there are grounds to indicate a third-party may have been responsible for the loss under the insurer's right of subrogation, they may seek payment from that third party. However, the ability of the insurer to be successful could be severely jeopardised if relevant evidence has been spoliated. Spoliation may restrict the ability of an insurer to defend a third-party liability claim, even if the defendant may have a strong case.

8 Ways to Avoid Spoliation

Potential evidence can be difficult to determine early on, so it is hard to know what to preserve, and what not to, in order to avoid spoliation. There are no simple rules to follow to assist with this.

However, one can use the subsequent steps to help minimise or remove the risk of spoliation:

1. Ensure the investigation is carried out by suitably qualified and experienced personnel.

2. Conduct the investigation onsite in a manner that preserves not only the evidence that may have caused the loss but also items that you may initially consider did not.

3. Allow potentially adverse parties ("the other side") to also investigate the site as well; preferably, carry out a joint inspection.

4. Save and preserve all physical evidence identified by other parties, as this evidence is likely to be relevant.

5. Label all evidence onsite and ensure that a documented chain of custody is followed when removing evidence from the site.

6. All evidence should be well wrapped and protected from deterioration caused by impact damage, moisture and dust contamination, vermin and insects and corrosion.

7. Document and preserve the chain of custody if there is an agreement to change the possession of evidence.

8. Avoid destructive testing of evidence unless all parties are present and agree upon the test procedure. If destructive testing is carried out when other interested parties are not present, document and photograph the testing process and retain and preserve all tested samples.

Spoliation of evidence can be a very real issue for insurers, as it can restrict accurate determination of coverage, the pursuit of recovery through subrogation rights and defence of a liability claim. Certain countries, such as the U.S., take spoliation of evidence very seriously with harsh penalties meted out by the Courts. Other countries, such as Singapore, the approach to spoliation is more relaxed and occurs relatively regularly, and significantly costing the Singapore insurance industry.

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RICS Submission to the HM Treasury Fundamental Business Rates Review Call for Evidence

Andrew West, Rating Director at Cooke & Arkwright, outlines the RICS Submission to the HM Treasury Fundamental Business Rates Review Call for Evidence

Cooke & Arkwright's Rating Director, Andrew West, sits on the RICS (Royal Institution of Chartered Surveyors) Rating and Local Taxation Policy Group whose remit is to provide impartial, balanced advice to the Government.The Westminster Government has asked for views on various aspects of the business rates system in England which is currently subject to a fundamental review. This is one of many reviews conducted by the UK Government over many years which have led to very little change in the fundamentals of the system.

One of the very few positive outcomes of the Covid-19 pandemic is that it could initiate a real drive to reform the system for the better.

The principal recommendations to Government made by the RICS are as follows:
Government must commit to fixing the multiplier and to removing the requirement for revaluations to be revenue neutral.

Government should reduce its uniform business rate to 35p where it was originally set when introduced in 1990. A tax of around 1/3 of properties' market rental value is a fair and reasonable contribution for businesses to make towards the cost of local government services. This compares with the current rate for larger properties in England of 0.512p.

Government must undertake a thorough review of relief and exemptions to ensure they are each fit for purpose and set at an appropriate level. Some reliefs currently in place may no longer be necessary following significant cut in the UBR.

Government must remove downwards phasing for 2021/22 and any future revaluations.

Government must commit to shorter revaluation periods from April 2023 and reduce the gap between the antecedent valuation date and the revaluation from two years to one year, thereby maintaining a close link with current economic conditions and property values.

In the short term:
Government must provide an early indication to businesses as to whether the expanded retail relief scheme is to be extended for 2021/22 to assist businesses to recover following the upheaval caused by the Covid-19 pandemic and its aftermath.

Government should examine extending the rates holiday to other sectors which have also been severely impacted by the Covid-19 pandemic and its aftermath, but have thus far been excluded from any form of business rate relief, for example, the aviation industry.

The Government has invited responses to the fundamental review in two parts and this is the first with the second following next month.

An outcome of the COVID emergency is that Online ADR is now looking like it will be the future

But first, the telecoms industry must resolve its own disputes and deliver the technology infrastructure that is needed to make it happen.

by Martin Burns, RICS, Head of ADR Research and Development

About 15 years ago, I attended a conference in central London where numerous evangelists gave presentations in support of mediation and other forms of ADR. I confess that I recall little of the details of what was said by the various speakers, except for one thing.

In the audience that day, sitting in the front row, was the recently appointed Master of the Rolls, Sir Anthony Clarke. During the morning session, he was invited by a speaker to take the microphone and say a few words. Sir Anthony spoke for a few minutes about his support for alternative dispute resolution (ADR). I recall he said (and I paraphrase this bit) that after a long career as a practicing barrister and a judge in the civil courts, he had yet to come across a case that could not have been resolved using ADR.

ADR offers several key advantages, most notably, it can be used for virtually any type or size of dispute. It is a cost-effective method for dealing with complex disputes involving large amounts of money. It is also affordable for small businesses and consumers who would otherwise be frustrated by the fact that the costs of litigation would probably be greater than the amount of money that is in dispute. While some bigger enterprises may be able to employ in-house lawyers, many businesses do not have the resources available for significant legal spend. Commercial managers and consumers alike are not normally schooled in either pursuing claims through formal litigation or responding to and defending claims in court.

I have spent most of my working life encouraging people who are involved in disputes in the built environment to avoid ending up in court and to use mediation and other forms of ADR instead. Over the

years I have seen an increasing growth in the use of a wide range of conflict avoidance and dispute resolution procedures, each of which is designed to manage and resolve conflicts earlier, quicker and cheaper than litigation. What I have also seen is incremental improvements in the way ADR procedures are structured and delivered. In particular, more and more parties have been prepared to use technology to access ADR.

The economic and social impact of the COVID emergency is giving rise to real and potential disputes across many areas of the built environment. Commercial landlords and tenants are at loggerheads about rents and other matters relating to their long-term relationships. The construction industry is facing up to the potential for a tidal wave of disputes as it encounters the challenges of the post lockdown recovery. These disputes could have a profound effect on the financial health of individual businesses and the wider economy. Expedient and cost-effective conflict management and dispute resolution are becoming critically important to businesses of all sizes.

Traditional ADR procedures often involve parties meeting each other and their third-party dispute resolvers face-to-face. This is particularly so with mediation, where the energy of the mediator is focussed on listening and talking to the parties. But the COVID lockdown has stymied the ability of disputing parties to engage in any form of procedure that involves travel to an office or other venue, and meeting people who are not part of the same household.

Parties are thus exploring new ways to access ADR. The COVID emergency seems to be driving greater sophistication and a rapid expansion of ADR via online platforms and video channels. We seem to be at the point in our evolution where most people are, or can be, sufficiently "tech savvy" to the extent that online ADR is easy for them to access and use. In the latter part of 2020, online ADR is providing viable options for both businesses and consumers to manage and resolve conflict from a desktop, or laptop.

The prevalence in the latter part of 2020 of Zoom, MS Teams, Skype and other communications platforms has set the scene for the future of ADR. Mediation meetings via video links are increasing in number. Parties and mediators can be much more flexible about when they meet, simply because no one has to travel. Preliminary consultations and hearings with parties in arbitrations and adjudications are also easily facilitated online, thus reducing the time and costs associated with travel and venue hire. But if online and video ADR procedures are to be successful and become the normal in the future, the technology needs to be reliable.

Forgive me, but here is another anecdote. I recently attended an online webinar, which was on the subject of the future of technology in business transactions. The key point that the host was trying to get across was that the COVID emergency had given rise to a leap forward in the use of webinars and other electronic communication platforms as a way to do business. I say he was "trying" because the presentation webinar came to an early halt when the host's internet connection failed completely. So, while the potential future for online ADR looks promising, it seems it will only happen if the technology needed to deliver it is in place and is working properly.

Recently, I discovered a genuine irony. It looks like the telecoms business sector, which is crucial to the growth of online ADR, is itself, in dire need of ADR.

Key to ensuring the success of telecoms and online ADR platforms is the effective management of relationships between those who install and manage networks and infrastructure (a.k.a operators) and the owners of land on which telecoms installations are built. It seems relationships between operators and landowners have historically been strained. Delays and disputes, some of which have led to inordinately long and costly legal action, have caused immense problems for the sector for years, and continue to do so despite recent improvements to legislation governing the sector, and the introduction of the Electronic Communications Code (ECC) in December 2017.

The aims of government and regulators have been to simplify and speed up the process for installing and maintaining electronic communications networks. But it would seem that, thus far, the ECC has not improved the situation. The government, and the judiciary which deal with slow and costly disputes, would probably welcome an ADR solution for the industry that has real potential to reduce conflict and speed up the development and growth of the telecoms industry.

To be viable, a bespoke ADR solution must be a simple and flexible process that can be adapted to suit matters of varying size and complexity. It must also be a process that both operators and landowners engage with. To help ensure this happens, the ADR solution must be actively supported by Government and the Courts.

In my view, online ADR is the future, but only if the telecoms industry succeeds in constructing the technology and services that will enable face-to-face ADR meetings and consultations to take place without fear of the technology breaking down. The irony is that the telecoms industry is itself embroiled in constant disputes, many of which could be resolved using online ADR.

Recently, RICS and stakeholders who represent the various interests in the telecoms sector have started to explore ways to improve co-operation between landowners and operators and underpin this with a bespoke form of ADR. One idea is to ensure that an ADR solution is not simply imposed on the industry, but is a product of consultation with stakeholders, who would have a say in how it is designed and delivered. We will also sound out the Lands Chamber and the Department for Digital, Culture, Media and Sport (DCMS) and seek official support and encouragement for online ADR in the sector.

Martin Burns
RICS, Head of ADR Research and Development

Experts Assess Empire's Mark on Key Buildings

Researchers are reappraising Scotland's built heritage to form a fuller picture of the British Empire's impact on the country's historical architecture.

Experts will take a fresh look at key buildings and landscapes to better understand the legacy of imperialism and its belief in the racial superiority of white people – particularly in relation to the transatlantic slave economy.

The research network, which includes architecture and heritage specialists from the University of Edinburgh, will facilitate discussions on how those influences are recognised and acknowledged.

Researchers will assess the geographical range – and architectural scope - of the Empire's influences on Scotland's built environment.

Forgotten voices

They will consider how imperialism, white superiority and the beneficiaries of slavery are referenced in the stories of many 18th and 19th century buildings and landscapes.

The team will explore how voices that have previously been hidden in these narratives can be recognised and heard.

A key strand of the project will be to ensure that Black minority ethnic communities are able to recognise and take ownership of their narratives within Scotland's built heritage.

Wide ranging

Managing Imperial Legacies brings together heritage specialists, public bodies and third sector organisations, as well as the wider public.

The two-year project, funded by the Royal Society of Edinburgh, involves the University of Edinburgh, Historic Environment Scotland (HES) and the Coalition for Racial Equality and Rights (CRER). It will draw on the experience of organisations outside of Scotland who have already engaged with similar questions in their own countries.

Historic sites that will be initially explored include Glasgow Cathedral, Stanley Mills in Perthshire – both of which are in the care of HES – and the Royal Northern Infirmary in Inverness.

'The current focus on the material legacies of Empire means it's vitally important that we continue the exploration of the significant role Scotland played in Britain's imperial past and how we understand these narratives within the context of the present day.' **Dr Kirsten Carter McKee** Edinburgh School of Architecture and Landscape Architecture

Clearer picture

Researchers will also seek to understand how widely the legacies of Empire are known, and engaged with, in Scotland.

There are plans to hold a series of workshops, talks, screenings and outreach events. A quarterly newsletter will also be produced.

A dedicated website and Facebook page will highlight new research, stream virtual workshops and lectures and feature podcasts.

'We're pleased to be partnering with the University of Edinburgh and CRER on this important project. Our historic environment is the story of Scotland – it tells us about our past, and can help us understand our future. Our built environment shows us how Scotland has been shaped by its role in empire, and this project will further examine, explore and uncover that legacy.' **Alison Turnbull,** Director of Development & Partnership at HES.

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Construction Contract Execution During COVID-19 and Beyond

Electronic signatures, data rooms, Mercury execution? Evolving working arrangements mean we should all double check exactly how to executeconstruction documents

In a previous article we discussed how the UKJT's vision for smart contracts might be realised. Whilst smart contracts and digital signatures are still very much the immediate future, for most people they did not arrive in time to help with the complexities of contract execution created by the COVID-19 lockdown. Suddenly the traditional way of contract execution became almost impossible and old questions on remote Mercury compliant execution procedures, such as 'Can my spouse witness my signature?' resurfaced. These issues are particularly relevant to construction contracts, which often give rise to the additional logistical headache of ensuring huge appendices are legally incorporated while offices are shut and signatories locked down at home.

The easing of lockdown may mean that some of us are returning to a semblance of working normality. However, the risk of future lockdowns and an increased acceptance of remote working as the 'new norm' means that a good understanding of remote execution is likely to be required for some time to come. This article explores some of the key considerations.

Electronic signatures

Before we look at traditional 'wet-ink' signatures, it should be noted that electronic signatures, where acceptable to both parties, are a great option for 'simple' contracts (i.e. not deeds) in the current circumstances. Both parties can sign at once, there is no need for hard copies and no reliance on the post, courier or home printing. An electronic signature provider with appropriate cyber-security credentials can help to ensure the contract is executed securely, reliably and to provide resilience to fraud. It will be helpful to include wording in the contract that records the parties' intention to execute by electronic signature and that such execution is evidence of their intention that it will have the same legal effect as a wet-ink signature.

COVID-19 practicalities

For deeds, where the execution requirements are more stringent, it may be more practical in the current circumstances for documents to be executed by two directors (or one director and the company secretary) rather than a director and witness. This is because the witness must be physically present at the time that the director signs. There are valid, socially distanced, ways around this potential problem, including the witness being the other side of a window or screen, but witnessing via video link is not acceptable.

If either of the parties insists on execution using a director and witness then the identity of the witness needs to be considered. Where an independent witness isn't available (because the relevant signatory is in lockdown or self-isolation at home) the Companies Act does not technically prohibit a family member acting as a witness. While this is not considered to be best practice (and is prohibited in certain specific circumstances) it can be used as a last resort where no other witness is available. It would be a matter of general law as to competence of the witness and the veracity of any evidence they may give if the execution of the deed was ever called into question. As with remote executions (see below) it is key to dispel any suggestion that fraud may be involved in the execution of deeds.

Remote execution

With many sections of the construction industry remaining very active during COVID-19 lockdown, and with those sectors experiencing significant disruption needing to maintain momentum on key projects, the need to master remote execution has never been greater. Construction contracts, often being a complex package of standard terms, amendments to

standard terms, technical schedules and lengthy appendices bring their own unique problems to remote execution. Here are some key points to remember:

◆ Don't forget to include a counterpart clause in the contract. This records that all signed and delivered counterparts constitute one and the same agreement.

◆ A virtual data room may be the most efficient way of collating and sharing all the technical schedules and appendices. The data room and all the documents in it need to be incorporated into the contract by reference and supported by an index which identifies what they are.

◆ The documents in the data room and those set out in the index in the contract need to be agreed in advance and should be checked to ensure that they match before the contract is executed. It may be appropriate to list document version numbers or use unique document ID numbers to avoid arguments at a later date about what was and wasn't incorporated into the contract when it was signed.

◆ Will the data room be accessible in the future? It's all well and good including a reference to the data room and an index in the contract but will it still be accessible in the same form two years later if the parties are in a dispute? It can be helpful to take a screenshot of the contents of the data room just in case.

◆ Get all counterparties to agree the procedure for and method of execution well in advance. Make sure all parties will have the necessary facilities to print, sign and scan/photograph the signed pages of the contract.

◆ With remote executions comes the need to dispel any suspicion of fraud as highlighted in the infamous Mercury case[i]. When agreeing the procedure that underpins a Mercury style execution, the parties need to:

◆ clearly set out in their communications what is the agreed version of the contract that is being signed;

◆ what their signature is being appended to; and

◆ importantly, expressing clear confirmation that they give permission for their signature to be appended to the contract and for one party to collate a final copy.

COVID-19 and lockdown may increase the number of hurdles to be overcome to effectively create new construction contracts. But as long as both parties follow established procedures and clearly document their intentions there is no reason for execution to be added to the list of unprecedented challenges currently facing the industry.

If you have any queries relating to the content of this article, please contact **Marcus Harling**, a partner in the Construction and Engineering team at Burges Salmon. **www.burges-salmon.com**

This article was written by **Alistair Russell** and **Norris Riley.**

[i] R (on the application of Mercury Tax Group and another) v HMRC [2008] EWHC 2721

When Experts Miss the Mark

by Fiona Sasan, Partner at Morton Fraser

A recent decision on business valuation shows the importance of an expert witness being seen to be independent, both on instruction and during proof

The recent decision of Lady Wise in *SMA v MMA* [2020] CSOH 54 (28 May 2020) highlights the importance of getting the instruction of your expert witness right and ensuring they are provided with all the salient information before they give evidence. This was a particularly complex case because of how the assets were held, which meant that expert evidence was central to the dispute.

Mr and Mrs A had been married for 29 years. Throughout their marriage Mr A operated a number of restaurants and invested in commercial property, such that at separation the matrimonial property was worth in excess of £10 million, the vast majority of which he owned. Mr A held his assets in shares in a holding company, as an individual/sole trader, and as part of a partnership with his elderly father. He operated each restaurant through a limited company, each company's shares being owned by the holding company. Money was freely moved around by way of inter-company loans on Mr A's instruction as and when cash flow dictated a need.

Mr A argued that each business had to be valued within that structure, including valuing some restaurants on the basis that they were merely tenants even though Mr A was the landlord. Mrs A led evidence from C, an expert surveyor, specialising in the restaurant and licensed premises trade, and argued that Mr A was the "controlling mind" of all the businesses and therefore the court should collapse the corporate structure, combining Mr A's interest in the heritage business assets into one as that was within Mr A's power, apart from one property owned with his father as trustees for the partnership with him and leased to one business. In respect of that property, it was argued that the father would likely agree to a sale on a willing seller-willing buyer basis as he would be unlikely to stand in his son's way if he wanted to sell. Mr A senior's share would be accounted for in the valuation.

Independent expert?

Mr A led evidence from his own expert surveyor R, who did not assess the group of businesses as a whole but valued them as individual going concerns on leasehold at lower values and the heritage separately. During the proof, R accepted that he had issued terms of engagement to Mr A in the format of agent/client and not as a professional expert witness whose primary duty was to the court. R's report was absent the usual statement about being independent with a duty to the court, and his letter set out a client complaints process for his firm, which would not apply to a surveyor acting as an expert witness. R had also accepted instruction to conduct a valuation for Mr A's bankers after the proof for the purpose of raising capital to pay Mrs A, which he had factored into his quote for his services.

After C's evidence had been led, R had met with Mr A and his representatives and subsequently reviewed downwards the multiplier he had used, saying he had been further convinced of Mr A's "remarkable contribution" to the business and that it had been understated in his valuation, even though R accepted he had never come across such a concept in any previous valuation and that account had already been taken in valuing the fair maintainable operating profit under a reasonably efficient operator (REO) on the assumption that Mr A left the business on sale. R was seeking to factor in something on the basis that Mr A's contribution was so stellar that the REO assumption was simply not adequate to reflect the impact of Mr A's departure on profit.

For Mrs A it was argued, under reference to the approach in *Kennedy v Cordia (Services)* 2016 SC (UKSC) 59, that R's evidence could not be described as impartial and that he had effectively acted as an advocate for Mr A.

No reliance

Rejecting R's evidence and accepting C's, Lady Wise decided: "In light of the unsatisfactory nature of [R's] change of heart on valuation, the backdrop of the absence in his report to his duties to the court and the other errors mentioned take on more significance than they might have otherwise. I do not doubt [R's] general motivation of course, but in light of the evidence about how his views developed I consider that he has allowed himself to be influenced by [Mr A's] views on the matter. As a result, he departed from the necessary position of impartiality of a witness giving opinion evidence and appeared to promote the defender's cause on valuation… I am effectively left with no definitive valuation by [R]. For all these reasons I have concluded that I cannot rely on his evidence at all and so cannot use any of his figures for the purpose of valuing the various business interests."

It further transpired that Mr A's expert forensic accountant, valuing the shares in the corporate entities, had relied on R's valuations, was unaware of certain figures which had since been agreed between experts during proof and had not considered all the other reports, and so his evidence had to be disregarded also.

This case illustrates the importance of demonstrating the independence of your expert witness at proof. It is also notable for the application of an unequal sharing of the value of the net matrimonial property, based on a 58:42% split to account for source of funds arguments. That will be seen as a shift from the more recent reported cases which have evaluated source of funds more forensically and deducted from the net value to be shared.

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Does an Expert Owe a Fiduciary Duty when Providing Expert Services?

A Company v XYZ [2020] EWHC 809 (TCC)
This was an application by the Claimant for the continuation of the injunction granted by the Court on 23rd March 2020, restraining the Defendants from acting as experts for a third party in ICC arbitration proceedings against the Claimant.

Background
The Claimant is the developer of a petrochemical plant ("the Project"). In 2012, the Claimant entered into contracts with the third party for engineering, procurement and construction management ("EPCM") services in connection with the Project. In 2013, the Claimant also entered into contracts with a contractor for the construction of facilities in connection with the Project. The contractor commenced ICC arbitration proceedings against the Claimant based on a dispute concerning delays to the works ("the Works Package Arbitration").

In the Works Package Arbitration, the contractor claims additional costs incurred by reason of delays to its works, including the late release of Issued For Construction ("IFC") drawings. The IFC drawings were produced by the third party pursuant to its EPCM agreements with the Claimant. The Claimant's position is that if, and to the extent that, it is liable to pay additional sums to the contractor under the Package A and Package B contracts as a result of the third party's late issue of the IFC drawings, the Claimant will seek to pass on those claims to the third party.

The Claimant approached the first Defendant with a view to engaging it to provide expert services and on 15 March 2019 the first Defendant signed a confidentiality agreement. By letter dated 13 May 2019 the Claimant engaged the first Defendant to provide expert services in connection with the Works Package Arbitration.

In the summer of 2019, the third party commenced ICC arbitration proceedings against the Claimant for sums due and owing under the EPCM agreements ("the EPCM Arbitration"). The Claimant brought counterclaims against the third party in respect of delay and disruption to the Project, including any additional sums payable by the Claimant to the contractor caused by the third party's alleged failure to manage and supervise the contractor. In October 2019 the Defendants were approached by the third party to provide quantum and delay expert services in connection with the EPCM Arbitration.

Upon learning that the third party sought to instruct the Defendants for expert services, the Claimant made an ex parte application for an injunction to stop the defendants acting for the third party. This application was made on the ground that the provision by the Defendants of services to the third party (in relation to the EPCM Arbitration) is a breach of the rule that a party owing a duty of loyalty to a client must not, absent informed consent, agree to act or actually act for a second client in a manner which is inconsistent with the interests of the first.

Interim relief was granted until 31st March 2020, where another hearing could take place, allowing for formal notice to be served to the Defendants and further evidence to be filed to the Court.

Issue
The central issue to the continuation of the injunction was whether experts who are engaged by a client to provide advice and support in arbitration or legal proceedings owe a fiduciary duty of loyalty to their clients; and if so, has it been breached in the circumstances.

The Claimant's case was that the engagement of the Defendants to provide expert services gave rise to a fiduciary duty of loyalty. The defendants have breached that duty of loyalty by agreeing to provide expert services to the third party in circumstances where there is a conflict, or potential conflict, of interest.

The Defendants oppose continuation of the interim injunction on the grounds that independent experts do not owe a fiduciary duty of loyalty to their clients. Even if a duty was owed, there is no conflict of interest because the fiduciary duty to the client was excluded by the expert's overriding duty to the tribunal.
Law

The definition of a fiduciary is set out in Bristol & West Building Society v Mothew [1998] Ch 1 (CA), a case concerning the fiduciary obligations owed by a solicitor acting for both parties to a property transaction. As Lord Justice Millett stated at page 18 of Bristol:

"A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary."

In Jones v Kaney [2011] 2 AC 398 (SC) Lord Phillips explained that there is no conflict between the duty that an expert owes to his client and the duty that he owes to the court when giving evidence. His Lordship compared the responsibilities of an expert and advocate when at court: "The advocate must disclose

to the court authorities that are unfavourable to his client. [Similarly] [t]he expert witness must give his evidence honestly, even if this involves concessions that are contrary to his client's interests."

Decision

In light of the expert services provided for the Claimant in connection with the Works Package Arbitration, the Court held that 'there was a clear relationship of trust and confidence, such as to give rise to a fiduciary duty of loyalty' [para 54].

Applying Jones v Kanes, as there is no conflict between the duty that the expert owes to his client and the duty that he owes to the court, the duty to the court cannot preclude the fiduciary duty the expert owed to a client in the interests of another.

Therefore, the Defendants were in breach of their fiduciary duty by agreeing to work for the third party and against the claimant in the EPCM Arbitration whilst also acting for the Claimant in the Works Package Arbitration.

The Court stipulated that the 'fiduciary obligation of loyalty is not satisfied simply by putting in place measures to preserve confidentiality and privilege' [para 60]. Thus, despite the Defendants signing a confidentiality agreement with the Claimant, acting for the third party against the claimant breaches defendant's fiduciary duty because the defendants would place themselves in a position where their duty and interest may conflict.

The Court emphasised, as explained in Zockoll v Mercury [1998] FSR 354 at pp.364-366, that it should only grant the injunction if it is likely that the claimant will succeed at trial. The court has a discretion whether or not to issue the injunction based on where the balance of justice lies. As the cases relied on by the Defendants in opposition to the application do not support their position, the Court considered that the Claimant is likely to succeed at trial and the balance of justice lies in continuing the injunction.

Commentary

This case emphasises that once in a position where a fiduciary duty is owed, one cannot simply create a contract or promise to not breach one's obligations in order to act for another. An expert cannot bypass their fiduciary obligation by signing a confidentiality agreement, even with the terms stating there is no conflict of interest. The fiduciary obligation still persists, and the expert would be in breach if agreeing to provide expert services for opposing clients. As stated at paragraph 60 of A Company v XYZ, 'such a fiduciary must not place himself in a position where his duty and his interest may conflict.' It is this single-minded loyalty owed to a principle that is paramount for a fiduciary and underpinning the rationale for the strict liability against a fiduciary. There cannot be the potential for a conflict of interest and experts must be aware of a potential conflict before providing their services to clients.

The Court stressed that where a fiduciary duty of loyalty arises, it is not limited to the individual concerned and extends to the firm or company, and may extend to the wider group: Marks & Spencer Group plc v Freshfields Bruckhaus Deringer [2004] EWCA Civ 741; Georgian American Alloys v White & Case [2014] EWHC 94 (Comm). Therefore, considering the incorporation of umbrella or subsidiary companies, it is even more important that experts actively seek to ensure there is no conflict.

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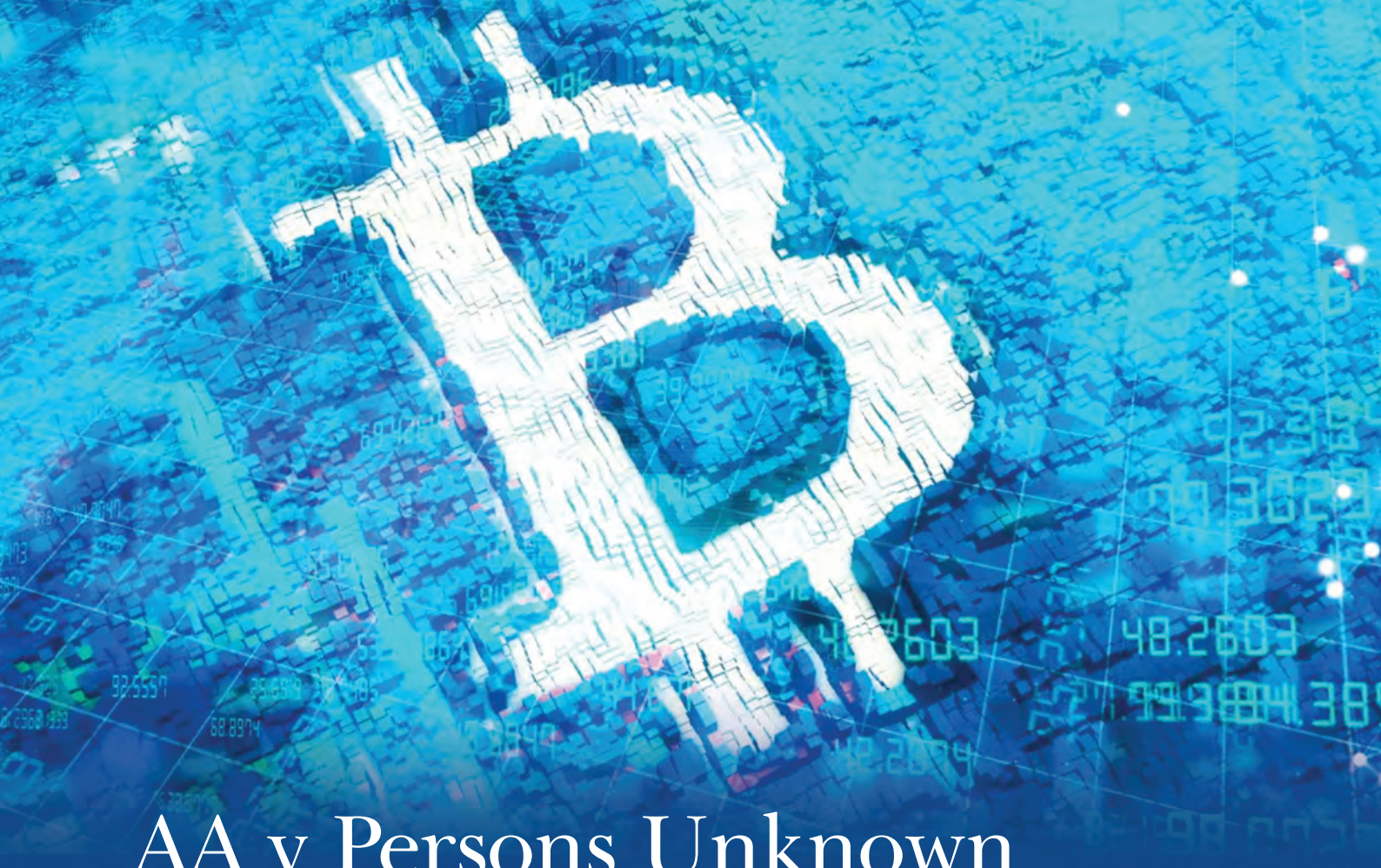

AA v Persons Unknown and Others, Re Bitcoin

When is property not property? This case is interesting as it confirms and moves the definition of what can be considered "property" (and thereby be made subject to a proprietary court injunction), into the 21st century..

The case concerns a Canadian insurance company whose computer systems were hacked and encrypted with malware meaning that the company could not access any of its own or clients' data. The company was sent notes by the first defendant (person or persons unknown) in October 2019 demanding a ransom:

"Hello, to get your data back you have to pay $1,200,000 (one million two hundred thousand). You have to make the payment in Bitcoin."

The company was itself insured against cybercrime with an English insurance company ('AA'). AA subrogated the claim and proceeded to carry out negotiations with the hackers.

Subrogation is a legal term which means that a party (often an insurance company) can be substituted to assume their insured's right to an insurance or debt. A sum of $950,000 was agreed to be paid in Bitcoin in return for the decryption tool. The sum (109.25 Bitcoin) was paid despite AA being unable to identify the recipient (the second defendant). The decryption tool was put to work and it took 5 days for the insured company to decrypt and reinstate its 20 servers and a further 10 business days to decrypt its 1000 desktop computers.

AA hired a specialist company Chainalysis Inc. to track the ransom payment. This they did successfully and confirmed that 96 Bitcoin had been traced to a specific address linked to the cryptoasset exchange Bitfinex. Bitfinex was operated by iFinex and BFXWW Inc., the third and fourth defendants. The remainder had been transferred into fiat currency and dissipated. AA sought a proprietary injunction over the Bitcoin as a first step in recovering the ransom. AA commenced proceedings against four defendants based on claims of restitution and/or constructive trust. Two of the defendants operated the Bitfinex exchange on which the Bitcoins were being held, whilst the other defendants had made the ransom demand and now held some of the Bitcoin at the Bitfinex exchange address.

Nothing ever becomes real till it is experienced." - John Keats

The fundamental issue facing the court was whether Cryptoassets could be defined as "property" and therefore capable of being the subject of a proprietary injunction. The English law has traditionally treated property as falling into two classes- either a "choses in

possession" ie capable of tangible possession, or a "choses in action" ie a right capable of being enforced by a legal action. Cryptocurrencies are virtual and intangible assets which cannot be possessed, nor do they carry any rights capable of enforcement by legal action. Mr. Justice Bryan, hearing the application in the High Court, reviewed all previous case law in this area and noted that even though there had been two previous decisions in the English courts in 2018 and 2019 where cryptocurrency had been defined as property in order to obtain a worldwide freezing order and an asset preservation order, the court had not considered the issue in depth. He referred to the UK Jurisdictional Task Force (UKJT) Legal Statement on Cryptoassets and Smart Contracts, published in November 2019. This discussed the definition of property in detail including its evolution over time. Although not binding on the court, the Judge considered it to be "an accurate statement as to the position under English law" and "compelling". He referred to two other previous cases "where the courts found no difficulty in treating novel kinds of intangible assets as property". These were a finding that a milk quota could be the subject of a trust and an EU carbon emissions allowance be the subject of a tracing claim. These were neither a "thing in possession" nor a "thing in action". He concluded that "the fact that a cryptoasset might not be a thing in action on a narrower definition of that term does not in itself mean that it cannot be treated as property." They met the four criteria set out in Lord Wilberforce's definition of property in NPB v Ainsworth 1965 in that they were definable identifiable by third parties, capable in their nature of assumption by third parties, and having some degree of permanence. Bryan J said it would be "fallacious to proceed on the basis that the English law of property recognises no forms of property other than choses in possession or choses in action".

In granting the interim injunction, Mr. Justice Bryan also consented to ancillary orders to support the effectiveness and speed of the injunction. The court gave anonymity to the parties, heard the case in private and allowed service to be by email. All these concessions ensured that the risk of copycat crimes was reduced and that the defendants were not tipped off enabling them to dispose of the remaining Bitcoin.

Soon after the judgement, HMRC updated its guide "Cryptoassets: tax for individuals". It includes a new section on the legal status of cryptocurrency exchange tokens and how they will be treated in relation to Inheritance and Capital Gains tax. Anyone holding these assets should ensure that their wills are drafted to reflect this new guidance.

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

Pension Cash Equivalents - Are they a Public Sector Rip off?

Since the 2015 pension freedoms public sector employees have been made an exception to the law which now allows transfers of their Defined Benefit rights into money purchase schemes, they may not take advantage of those freedoms. Many saw this as unfair. However, transfer to another Defined Benefit scheme, on change of employment, is still allowed. This appears to often be a poor deal - due to low public sector cash equivalents. Is this actually the case?

In the private sector, Cash Equivalents (CEs) for pensions must be calculated according to rules set down by the Pensions Regulator – the statutory body responsible for ensuring fairness and solvency. The rules include the following:

• Cash equivalents must represent at least the expected cost to the scheme of providing the benefits earned.

• The value of member options cannot be charged against the cash equivalent if by doing so they would reduce.

• Reductions in the cash equivalent may only be made if the Scheme Actuary formally certifies they are necessary to protect other members due to an assets shortfall

See https://www.thepensionsregulator.gov.uk/en/document-library/regulatory-guidance/transfer-values

Our investigations indicated that, when compared with market annuity rates, the CE values of private sector schemes were about 62% of that annuity value – i.e., the annuity value was some 60% higher than the CE.

However, for public sector schemes, this could reduce to as low as 33%, i.e., around a third of the annuity value, especially for some of the newer public sector schemes. This looked odd, and we find difficult to justify.

If public sector employees transfer between public sector schemes, there is a "public sector club" available, allowing transfers of benefits on a more equitable basis. For some such schemes where members leave and rejoin regularly, earlier benefits may be linked back to final salary (e.g., for the NHS Schemes, with service breaks under a year in duration). On sharing public sector pensions on divorce, members may not generally move part of their cash equivalents into external arrangements in the name of their spouse, (as is most common with private sector schemes), but the spouse is granted an internal share within the same scheme. Other than in those instances, transferring members seem to get a poor deal.

Public Sector CEs are calculated according to factors produced by the Government Actuaries Department (GAD), in conjunction with HM Treasury. The Treasury is tasked with managing public money, and is frequently in conflict over finance with what they refer to as "The Spending Departments". Accordingly, the Treasury always seeks to minimise payments from any department to the public. For an example of this, the guidance for calculating compensation for those suffering serious injury, or the relatives of those suffering premature death, either being due to the negligence of another party, (Ogden Table figures) were undercompensated for a number of years, by using an artificially high discount rate, until the position was rectified with an substantial step-change in the rate of over 3% in February 2017.

https://www.gov.uk/government/news/new-discount-rate-for-personal-injury-claims-announced

The original fixed rate of 2.5% per annum was set in 2001, and has resulted in the under compensation of, arguably, the very weakest in society, (most severely in recent years) a deplorable state of affairs. The motives for this behaviour are not hard to discover - a significant proportion of the NHS budget is used to pay compensation claims for those suffering from the effects of, e.g., botched operations, and medical and living costs may involve substantial payments extending into several decades. Reducing the pressure on the public purse from this source would have appealed strongly to the Treasury, as the following quotation shows:

"Suppose the subject turned to whether to legalize (sic) drugs. The Foreign Office mandarin would expound learnedly on the role of opium in the history of the Far East in the nineteenth century. The Home Office official would worry about the dangers to public morality, and the difficulties of political management of liberalization. The Treasury official would ask how much we could raise by taxing them? Would the savings on the police outweigh the extra cost to the health service? Would it make it harder or easier to move druggies from welfare to work?" *

Undercompensating the severely disabled and prematurely bereaved would, accordingly, be seen as a necessary evil.

Turning our attention back to cash equivalents, these come under focus when pensions on divorce are considered. In HHLT3[1], all cash equivalents are criticized:

"4.11 In summary, the (pensions on divorce) practitioner has to be aware that CEs are inconsistent between schemes, and can be a poor or misleading representation of the true value of the benefits".

"True Value" is, of course, a Shangri La – a perfect solution which no-one ever defines, but we all talk about. However, are some CEs truer than others?

Complementing the above is the PAG report,(2) which expands on public sector CEs:

Valuation and discount rate
I.32 Cash Equivalents for public sector pensions are calculated on a basis and tables provided by the Government Actuary's Department (GAD). However, the Treasury prescribes the discount rate for the calculations. The rate is higher than most actuaries use for calculations in the private sector schemes. This means that the CEs are lower in the public sector than in the private sector for the same type of benefits.

I.33 For this reason, practitioners should be very cautious before comparing public sector CEs with private sector ones on an equal basis. Currently, the benefits from a public sector scheme are likely to be higher for a given CE than in a private sector scheme with the same CE. "

* *The Secret Treasury – Lord David Lipsey, Viking Press, 2000*

My firm's own experience over a number of years verifies this.

What might justification be for public sector CEs to be lower?

If benefits are otherwise identical, the only other factor to consider should be the security of those benefits. Here matters become more interesting!

For a private sector scheme, the security of the pension depends on, in order of effect:

• The degree to which the scheme is funded – is there enough money in it?

• The strength and attitude of the sponsoring employer – how strong are the balance sheet and profit and loss accounts? What contributions do they make to the scheme, and is there scope for increasing them if necessary? Are they supportive of the schemes requirements? Are there any contracts in place offering extra support for the scheme

• The Pension Protection Fund (PPF) – is the scheme a member? Note, the PPF covers under 100% of benefits for most members.

This is all unnecessary for the public sector, as there are no funds held in their pension schemes – everything is on a pay as you go basis. If there is a shortage of short-term funds, the government can simply raise taxation (or borrow – noting that the Treasury's tax raising privilege supports both funding and servicing the government's past borrowing activity, and its pension payment requirements).

Accordingly, pound for pound, public sector pensions are more secure, accordingly worth more, and hence the cash equivalents should be higher, not lower.

Baroness Ros Altmann, former pensions minister, describes the public sector as the "pensions aristocracy". She had a major role in setting up the PPF.

https://www.thisismoney.co.uk/money/markets/article-8093327/Public-sector-workers-pensions-aristocrats.html

So what is the justification in lower CEs?

A useful authority on the calculation of cash equivalents, albeit somewhat dated, is the following 1970's Institute paper by Messrs. Pomery and Jones:

https://www.actuaries.org.uk/system/files/documents/pdf/0161-0216.pdf

This describes the elements used for a transfer value basis, namely:
• Best estimate of demographic factors

• Best estimate of economic factors

• Best estimate of expenses to be incurred (for a Cash Equivalent, these are restricted to immediate costs, as there is no longer any need to allow for subsequent

• Margins in all of the above.

The margins protect the interests of the non-transferring members. All pension schemes may be tempted to pay out unfairly low CE's – arguing that the margin against risk should be high, but over-penalising those who leave and transfer benefits. TPR's rules work against this and for the benefit of the transferor.

The public sector generally publish the actuarial bases for their cash equivalents, which is very useful. The elements generally seem reasonable, when compared with the private sector, apart from, arguably, the discount rate.

Our task is made easier by the publication of the basis of the discount rate, a major element in calculating cash equivalents, in the following:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/755674/basis_for_setting_the_discount_rate_for_cetv.pdf

"The Treasury continues to believe that the primary objectives of the SCAPE discount rate are consistent with the objectives for the CETV discount rates and the transfer value regulations."

The "SCAPE" rate was derived for deriving notional contributions, to illustrate more realistically the cost of public sector pensions. However, as we know

public sector pensions are funded on a "Pay as You Go" basis, these notional contributions are not really comparable with what is paid into a private sector scheme.

What is not notional, however, is the level of Cash Equivalents paid out, for which the Treasury uses the same discount rate. This is (for various benefit types):

- in respect of a benefit which will be increased under the Pensions (Increase) Act 1971, a discount rate of 2.4% per annum net of benefit increases
- in respect of a guaranteed minimum pension which will be in payment and of which part is attributable to earnings factors in any of the tax years 1988-1989 and following, a discount rate of 2.6% per annum net of benefit increases
- in respect of a non-increasing benefit, a discount rate of 4.448% per annum

If we look at the simplest first – the 4.448% per annum in respect of level benefits – the best comparisons for benefits with such high guarantee levels are gilts – also issued by the Treasury. However, the yields on these securities are now close to zero – and often, recently, negative. Ignoring the technical aspects of a negative yield, that means the Treasury are demanding a margin of about 4½% below market rate.

The other rates above show the same characteristics. To those unfamiliar with interest rates, this may not sound a lot, but in practice, it is enormous. In addition, the lower that a rate is, the greater the capital effect of a fall – for example, a fall from 6% to 5% is less severe than one from 2% to 1%. Accordingly, the Treasury are taking avery substantial margin here.

If a truer valuation of a Public Sector pension is required, (say, for divorce, or compensation on injury), this can be achieved by replacing the rate used with a gilt based rate. This can be achieved by using a proprietary package, such as Act-fx, – either from scratch, or by adjusting the quoted value accordingly.

The upshot of this is that public sector pension scheme members would be very unwise to transfer their benefits to a non-club defined benefit scheme – or to try and convert them to cash, if this becomes feasible. In the former case, the effects would show up as poor added years, or fixed pension in the new scheme. Better to keep one's benefits preserved within the original scheme – remember, the Government can always be relied on to pay its pension bills!

References

(1) Pensions on Divorce: A Practitioner's Handbook Third Edition - 26 Jun. 2018 by Fiona Hay, His Honour Judge Edward Hess, David Lockett and Rhys Taylor

(2) Guide to the Treatment of Pensions on Divorce by The Report of the Pensions Advisory Group - July 2019

W v H (Divorce Financial Remedies) [2020] EWFC B10

Jack Rundall considers the case of W v H (divorce financial remedies) [2020] EWFC B10 in relation to the treatment of pensions on divorce, a case which he suggests is being under-reported amongst the concerns surrounding Covid 19.

Amongst the flurry of guidance, and guidance on guidance, bouncing about between the courts and practitioners, W v H (divorce financial remedies) [2020] EWFC B10 is a case which is not necessarily getting the attention it deserves. The judgement is welcome because it sets out, with admirable clarity, the approach the courts and practitioners should (and very frequently don't) take in relation to the distribution of pensions on divorce in needs cases.

In short, whilst acknowledging that there is no "one size fits all" approach HHJ Hess concluded that:

- In a needs case, where the parties are nearing retirement and defined benefit schemes are involved, equal sharing of pension income is more likely to be appropriate than equal sharing of pension capital;
- It may not be appropriate to exclude pension accrued prior to the marriage in needs cases;
- Offsetting should be avoided where possible.

The pensions under consideration consisted of two schemes held by the husband (one defined benefit plan worth £2,155,475 and another defined contribution plan worth £58,653) and two schemes held by the wife (one defined benefit plan worth £138,939 and a defined contribution plan worth £13,798). The judgement considers the following three key issues in relation to these pensions, all of which arise frequently in practice:

- Should the pensions be divided so as to produce equality of income or of capital values?
- In dividing pensions with a view to promoting equality, should the court exclude a proportion of the pensions if they were earned prior to the parties' marriage (including seamless pre-marital cohabitation)?
- Should the court offset some the wife's pension claims against an enhanced share of the proceeds of sale of the former matrimonial home?

The judgment quotes extensively from the 2019 report of the Pension Advisory Group ('PAG') which, in the words of McFarlane P, represents "formal guidance to be applied when any issue regarding a pension falls to be determined in Financial Remedy proceedings".

Equality of income or capital?

The wife sought an order providing for equality of income, the husband argued for equality of capital. HHJ Hess found that the pensions should be shared so as to produce equal income in retirement. In reaching this conclusion the court noted that, whilst there are a number of scenarios where the fair solution is to divide pensions by capital value (including where they are relatively small as a proportion of the overall assets and/or where the parties are young and projections about future pension income are meaningless), there are a number of common situations where doing so will not provide a fair outcome. These include cases where the pensions are significant within the overall assets but where considerations of needs still predominate, where one or more of the pensions involved is a defined benefit scheme and/or cases where retirement is "on the horizon".

The judgement quotes a particularly persuasive passage of the PAG report (from page 31)

Given that the object of the pension fund is usually to provide income in retirement, it will often be fair (where the pension asset is accrued during the marriage) to implement a pension share that provides equal incomes from that pension asset. This is particularly the case where the parties are closer to retirement. Where they are further from retirement, it is arguable that the number of assumptions made in an "equal income" calculation will render a calculation less reliable…. A division that pays little or no attention to income-yield may have the effect of reducing the standard of living of the less well-off party significantly.

Whilst each case turns on its own facts there must be merit in the argument that, given that the purpose of a pension is to provide income in retirement rather than to store capital, and given that the search for fairness most often begins and ends with the consideration of need, an order for equality of income is likely to be the fair outcome in a significant number of cases.

Should the court exclude the pre-marital elements of the pensions?

The judgment (correctly) notes that there is "an established practice in some courts" to make a straight-line deduction from the CE of a relevant pension to reflect the fact that some element of it was accrued outside the marriage. In finding that such an approach is inconsistent with the authorities dealing with non-matrimonial property, the judge again quoted the PAG repot; "it is important to appreciate in needs-based cases, just as is the case with non-pension assets, the timing and the source of the pension saving is not necessarily relevant…it is clear from authority that in a needs case, the court can have resort

to any assets, whenever acquired, in order to ensure the parties' needs are appropriately met".

The court also noted the potential for unfairness in using a straight-line discount giving the example of a defined benefit scheme where the member spouse starts work in a particular business at a junior level and is promoted over time meaning that more (potentially much more) value will be accrued in the pension in later years.

Again, it is suggested that the judge's approach here must be correct; how can it be fair to treat pensions differently to other property, particularly after the "pension freedoms" introduced by the Taxation of Pensions Act 2014.

Offsetting

Whilst accepting that many litigants choose to engage in offsetting, the judge noted the potential for unfairness where one party is left with non-realisable assets and the other with the liquid capital. He also referred himself to "the orthodox view" encouraged by Thorpe LJ in Martin-Dye v Martin-Dye [2006] 2 FLR 901 that pensions should be dealt with discretely to other capital. The PAG reached a similar conclusion that parties and courts should "try if possible, to deal with each asset class in isolation and avoid offsetting". The court did not therefore find favour with the wife's argument that she should forgo some of her claim on the husband's pensions in return for receiving all of the net proceeds of sale of the former matrimonial home.

As an aside, the PAG report's comments in relation to offsetting are particularly significant not least because it notes that the "overwhelming majority" of negligence claims made against family lawyers in relation to pensions involve offsetting. In short, an expert's (or PODE as they are now known) report should be a prerequisite in any case where offsetting is to be carried out.

Conclusions

This judgment is rare in that the facts it deals with apply in many "everyday" needs cases. As such it rewards careful reading, if only to provide a welcome break from yet another round of guidance on remote working.

This article on W v H (divorce financial remedies) was written by **Jack Rundall,** for further information on his practice or please contact our clerks.

Jack Rundall's practice focuses on family finance, private law children and trusts of land disputes. He regularly appears in all levels within the Family Court and County Court and provides written advice in all areas of family law, whether domestic or with an international element.

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Living with Wildlife - Who's World is this?

Cirl (pronounced Sirl) buntings are beautiful in themselves. In his article below our bird expert witness, Peter Robinson, discusses the litigation involving this species and his role as a bird expert witness. During the past 25 years, through the provision of RSPB advice, support from agri-environment funding and the enthusiastic response from farmers, the cirl bunting population has increased nine-fold. However, this species remains vulnerable in the UK, particularly from development pressure and certainty around the future of agri-environment funding.

A near neighbour recently asked me what did I think about woodpigeons?

It turns out my neighbour's complaint had a lot to do with the fact that during their annual moult pigeons leave untidy feathers all over the garden. He wanted to know could he shoot them? Similarly, my sister-in-law constantly recounts the 'problem' she has with house sparrows. My sister-in-law feels particularly aggrieved, having both woodpigeons, and being awakened each morning by the colonial cheeping of house sparrows

In simple terms woodpigeon is a widespread species that recognizes the fact that many of us have tidy gardens full of bushes and trees for nesting in, plus we often put out food for them. Subject to certain controls it is a species you can shoot, providing you are the landowner. Though not in suburban gardens unless you want to both upset the neighbours and get a visit from the police.

House sparrow is different. They are a highly social species spending a great deal of apparently biologically necessary time gathering together in dense bushes, whilst chirping away to each other. The upside being that each spring they are all over your rose bushes in search of green fly to feed their young. Importantly it is an IUCN Red Listed species following a 70% and still not fully understood UK-wide popu lation decline since the 1970s.

For my sister-in-law there is no obvious sparrow solutions. She might consider getting rid of them, but the fact is it does not work like that, if only because more sparrows will arrive. The important point is why are they there? The answer being that the bush provides them with what they are biologically programmed to seek out, and that is something we cannot change. We can easily and simply solve the problem by removing the bush, but then both sides lose so where is the sense in that.

The real 'conflict' issues comes with species' that (a) are rare to the point of being threatened at the population level, (b) are what biologists' call 'habitat specific', and (c) occupy land under consideration for development. Take for example the cirl bunting. Until around 1970 it was widespread across England south of a line from the Thames to Severn estuaries. It is now confined to a few coastal farmland valleys in south Devon and adjacent Cornwall, much of the population being sustained by direct habitat intervention - largely through the supported management of farming activities. Importantly, this is not management in an attempt to attract new birds, but rather a last-ditch effort to prevent the total loss of yet another UK bird species.

Inevitably plans to develop farmland in areas where cirl buntings are known or thought likely to be present are firstly subject to an on-site survey to determine the bird's presence or absence, numbers and distribution being carefully mapped by someone suitably qualified. I have carried out several such Devon cirl bunting surveys under contract, the building proposal presumably being at least partly agreed or rejected on the basis of those findings. Obviously, it can get controversial in cases where the species is present and the planning authority nevertheless agrees to the

development, as in the recent matter of the proposed Yannon Farm development site and Torbay Council's approval for 187 new homes. The Councils compromise, presumably following objections from Natural England, was for the allocation of 2.5 hectares of the area to be left untouched for the continued occupation of cirl buntings. This came at a cost to the developers of £435,000 to cover the work of environmentally monitoring that area for twenty-five years. The developers were also required to set aside an adjacent ten-meter buffer zone as a flight corridor for greater horseshoe bats.

All of which of course amounts to a compromise, which by definition tends to fall between two stools. No small part of the weakness being that birds and other animals just do not understand the concept of compromise; in wildlife terms that kind of mental adjustment takes effect over thousands of years. You just cannot allocate a piece of land to say, cirl buntings, and expect them to move in, even where the habitat appears to suit their needs. And if in twenty-five years' time the buntings have still not occupied the piece of land that has been faithfully monitored, what then? It has also been my experience that any marginal land set aside by planning authorities as a form of buffer zone between original farmland and the new development, automatically becomes an amenity area inhabited in equal proportions by children, dogs, and cats. All of which then encroach into the adjoining farmland containing the buntings.

My professional bird legal involvement mainly concerns the Criminal Courts, these Civil bird-conflict matters tending to turn on issues such as those cirl buntings and proposed housing developments, with me usually subcontracted to partnerships dealing with the whole range of animal and plant issues. Similar past field development work ranges from numbers of seabirds using a coastal area proposed as an off-shore windfarm, through breeding pairs of little ringed plovers utilizing riverine gravel beds, to the straightforward question of which of all bird species breed within the survey area, and in what numbers. This ability stemming from my experience in submitting some 30,000 nest records to the British Trust for Ornithology, in the main regarding nest site description, laying and hatching dates, plus outcome and causes of failure. Similarly submitting ongoing BTO data at National and County level regarding bird presence and behaviour. In my experience, courtroom success or failure in these usually complex environmental arguments has a great deal to do with the lawyers' understanding of what is going on at a specific species and environmental level, which I guess has much to do with how well, or badly they are briefed. Far too many, in my view, being programmed to accept that gaining any sort of 'compensatory' ground equals success, which at the specific level is probably not the case. The real issue, surely, is to get everyone in court to understand that few if any species occur everywhere, quite the opposite in most cases.

Much of the current pressure on wildlife habitat has to do with the human population explosion, an explosion now showing a provable down-turn, though mostly in the 'developed' countries. Such that the UK population is set to commence falling sometime soon, in theory driving a reduction in the number of new homes needing to be built, and with a corresponding drop in the demand for fresh building land. Though the possibility remains that individuals will simply demand more of any space that becomes available. Plus of course how will these large building companies react to the possibility of incurring a substantial financial loss?

Returning to that matter of what birds we like or dislike, Tim Halliday had something to say on the subject. "We can no longer regard animals (including birds) as having been specially made for our convenience and comfort by a generous creator." Further pointing out that any apparent improvement "is only partly due to a change in our ethical values but is more a result of a realization that the world does not contain infinite resources and that our survival and that of other species are intimately associated."

Hilliday. T. Vanishing Birds – Their Natural History and Conservation; 1978.

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