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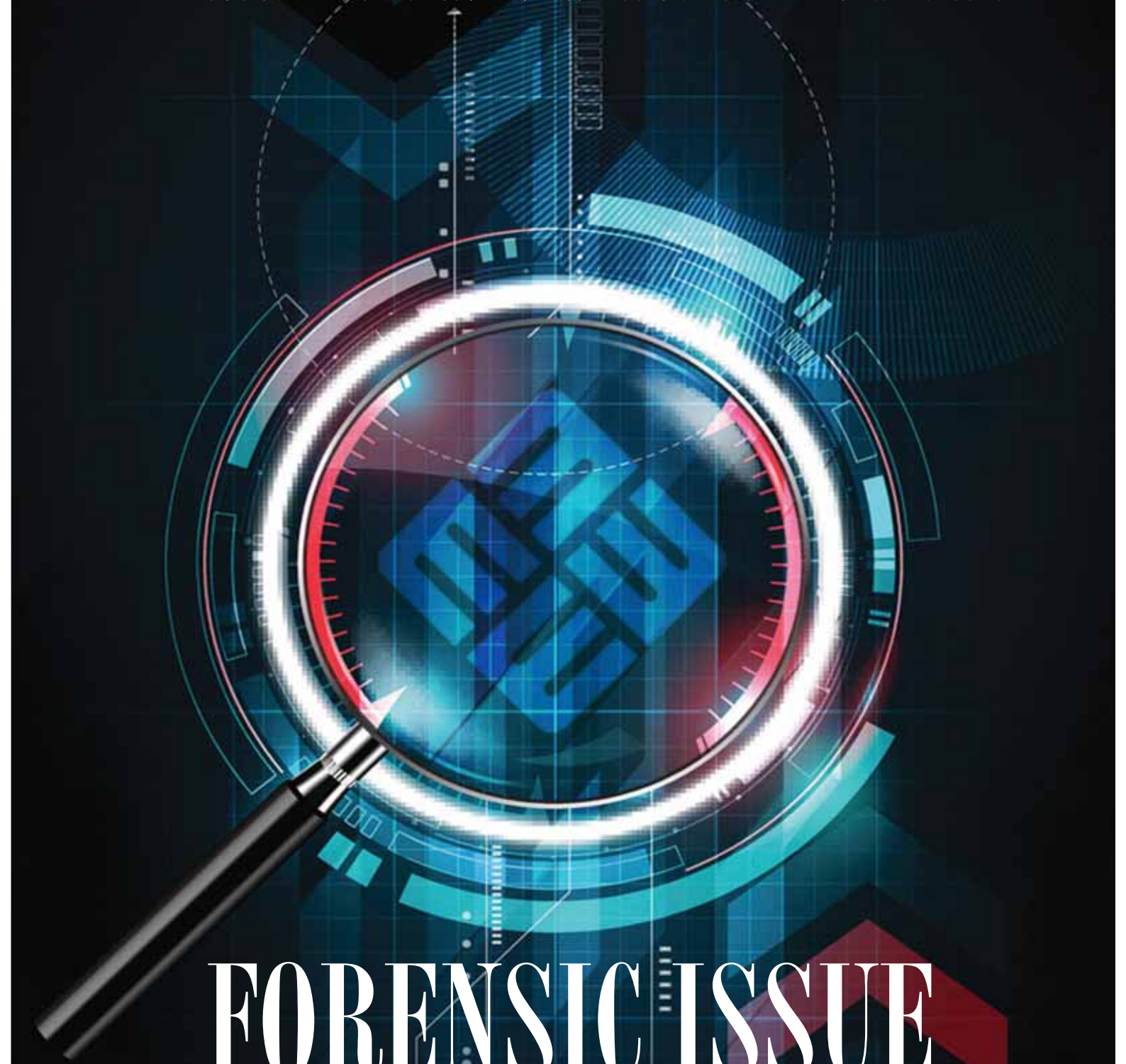
THE EXPERT WITNESS

THE JOURNAL FOR INSTRUCTING PROFESSIONALS & EXPERT WITNESSES



FORENSIC ISSUE

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Issue 35 February 2021 - £5.00 €6.00

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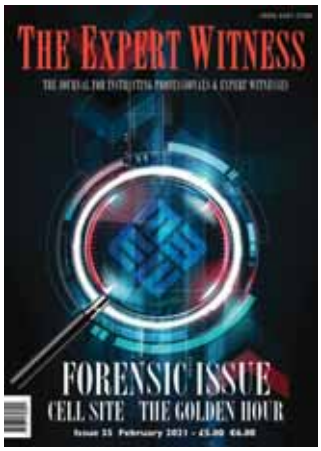

Welcome to the Expert Witness Journal

Hello and welcome to the 35th edition of the Expert Witness Journal. I hope you have all been keeping safe and well during the last few months.

The main focus of this issue is Forensics and we have aimed to cover as many areas as possible including; digital forensics, probate and heir searching, cell site evidence, data, terrorism, DNA, financial forensics, forensic imaging and many more.

Of particular interest is DNA Gets Around by Consultant Forensic Scientist, Sue Carney of Ethos forensics and, Possession of Illegal Images of Children (IIOC) by Edgar Blazier of Sytech Forensics. Plus Crime Scene Investigation - The Golden Hour by Robert Green OBE, JP and The Camera Can Lie, Forensic Imagery Analysis by. Clive Evans, Director, Videnda Imagery Analysis Ltd. All excellent articles.

Also featured is a review of 'The Reliable Expert Witness' by Mark Tottenham, an essential read for experts of all areas and levels of experience.

Our next issue will be available in April and will have an International flavour featuring, articles on marine, banking and mediation. Plus our usual focus on psychology, personal injury and developments in the expert witness world.

Many thanks for your continued support.

Chris Connelly

Editor
Email:chris.connelly@expertwitness.co.uk

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Inspire MediLaw

All courses can be viewed & booked at
www.inspiremedilaw.co.uk

Our medicolegal CPD training is accredited by the Royal College of Surgeons England.

Online resources
Modular Expert Witness Training
Our online expert witness training can be undertaken in stand alone CPD modules, or as a package programme, leading to Inspire MediLaw Expert Witness Accreditation. The modules include Report Writing; Conference with Counsel; Meeting of Experts; and Giving Evidence in Court. All four courses include teaching via webinar and a practical exercise, and feedback is available from our medicolegal panel.

Conversations on Consent Webinar
You'll hear from Nadine Montgomery, whose landmark case changed the law on informed consent in the UK, and Lauren Sutherland, who was a member of the legal team who took the case to the Supreme Court. This is followed by a discussion on best practice in informed consent amongst our panel of senior doctors and leading medical negligence lawyers.

Demystifying Consent Free Webinar
This 30 minute panel discussion is designed to help medical practitioners understand the updated GMC guidance on consent and decision making. The themes and advice in this free webinar will be developed further during our Mastering Conversations on Consent event on 21 April.

New online CPD content
Bite-size medicolegal webinar series
(discount available for multiple purchases)

The law, the medicine and the expert witness -
Mr David Sellu (Consultant Colorectal Surgeon)

Case law update - Paul Sankey (Enable Law)

Providing expert evidence, Hillsborough -
Professor Jerry Nolan (Consultant in Anaesthesia & Intensive Care Medicine)

Report writing for medicolegal experts –
Isabel Bathurst (Consultant Lawyer)

Conversations on Consent -
Paul Sankey (Enable Law)

How to be a better expert (Panel discussion) -
Helen Mulholland (Kings Chambers),
Helen Pagett (Crown Office),
Paul Sankey (Enable Law), and
Isabel Bathurst (Consultant Lawyer)

Understanding what the law expects of you -
Helen Pagett (Crown Office)

Coronavirus & Clinical Negligence -
Helen Mulholland (Kings Chambers)

In person events
Expert Witness Training – 11-12 March & 13-14 May
Develop your expert witness skills, keep up to date with CPD requirements, learn from our eminent team of medical and legal professionals and get more instructions. Our bespoke training is exclusively for medical professionals and offers continued support to grow your medico-legal practice.

Mastering Conversations on Consent - 26 April
Reduce the risk of litigation by learning best practice techniques when consenting your patients, learn from leading lawyers who share their insights from recent cases and share tips and pitfalls from other medical professionals. Through our role play session you will get the opportunity to see how you communicate and inform your patients so you can improve your clinical practice.

Introduction to Inquests - 23 April
Taught by a leading Inquest lawyer and experienced Intensive Care Physician our Introduction to Inquest training helps you to prepare for a potential inquest, gives helpful tips for writing your witness statement and ensures you know what to expect when giving evidence.

Medico-Legal Practice Management - 7 May
A practical day on how to build a successful medico-legal practice with valuable insights into what lawyers want from their experts, developing relationships and writing excellent reports. Also covered are the business aspects of developing a successful medico-legal practice: what to charge, the importance of good terms and conditions and a medico-legal CV, gaining instructions, marketing your expertise giving you the tools to successfully develop your medico-legal practice.

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Starting 01 Feb 2021 09:30 in Virtual Classroom
Starting 08 Mar 2021 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 02 Feb 2021 09:30 in Virtual Classroom
Starting 09 Mar 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 17 Feb 2021 09:30 in Virtual Classroom
Starting 10 Mar 2021 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 18 Feb 2021 09:30 in Virtual Classroom
Starting 22 Apr 2021 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 13 May 2021 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 17 Jun 2021 09:30 in London

Excellence in Report Writing SCOTLAND
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 19 Jan 2021 09:30 in Virtual Classroom
Starting 23 Feb 2021 09:30 in Virtual Classroom

Courtroom Skills SCOTLAND
This one day course will provide expert witnesses with the core skills to effectively present opinion based evidence in court under cross-examination.
Starting 16 Feb 2021 09:30 in Virtual Classroom

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"A Poor Quality Expert Can Cause Serious Damage…"

~ Delegate, Inspire MediLaw Annual Expert Witness Conference, December 2020

Inspire MediLaw were honoured to have Mr David Sellu address our Annual Expert Witness Conference in Oxford, which was also livestreamed. He spoke about his case, detailing the events leading up to his conviction and imprisonment for gross negligence manslaughter, and his successful appeal in 2016. He noted that he was comprehensively cleared of all allegations by the Medical Practitioners Tribunal Service (MPTS) in 2018, leaving him free to return to practice once again.

This experienced, well respected surgeon should have been able to trust that the legal processes to which he was subjected were fair and faultless. The family of the patient who died were entitled to expect full and proper investigations into the death of their loved one would take place.

Mr Sellu shares his experience to encourage medical experts to understand why their role is so important. He explains that their testimony has life changing implications. The role of the expert should be taken seriously, and medical professionals should undergo medicolegal training before first accepting instructions to provide an expert opinion. For this reason, he was involved in developing the *The Surgeon as an Expert Witness guidance* published by the Royal College of Surgeons (England) in 2019.

The expert witness plays a key role in legal proceedings, be it coronial, criminal or civil. Experts should know and understand the different processes of these courts, and the possible outcomes of a case. For example, while a Coroner will carry out an investigation into a death; the Civil Court will hear a claim for compensation; and Criminal proceedings could result in a conviction and, potentially, a prison sentence for the defendant. In each Court, different legal tests are applied and the medicolegal expert should be clear on what is expected of them in this regard.

Mr Sellu warns that cases such as his make the medical profession nervous. People become frightened by what might happen, and begin to practise defensively. He pointed out that there are instances where doctors have taken their own lives due to professional pressures, and highlighted the huge emotional burden on a doctor who feels they have let their patient down.

Paul Sankey, Partner and experienced solicitor in medical negligence at Enable Law, comments:

David Sellu's story should bring home to experts the importance of their role in court proceedings.

The courts rely on them for guidance and will only be able to do justice if experts fulfil their duties. In civil cases this is a matter of ensuring the right people - those who have suffered harm from negligent care - are able to receive damages and others do not. In criminal cases, someone's liberty and livelihood may be at stake.

David Sellu lost both and it was not until after he had served a prison sentence that his conviction was quashed. It was quashed because the judge misdirected the jury but also because the experts gave inadequate evidence, evidence which was criticised by the Court of Appeal.

How might medical professionals as expert witnesses contribute to the proper function of our justice system?

Anyone can hold themselves out as an expert witness, regardless of their experience. Mr Sellu advocates a programme of training, accreditation and regulation for medicolegal experts, to ensure that individuals not only grasp the importance of their duty to the Court, but understand how to carry it out.

The role of the expert is to set out the realistic, reasonable boundaries of what should have happened and what would be expected of the medical professional in the case. Expert witnesses should only comment on areas within their expertise, and should ensure that they express their opinion in plain English.

At Inspire MediLaw's Expert Witness Training we emphasise this in relation to both giving evidence in Court, and in report writing. Mr Sellu told delegates that when his conviction was overturned, there was criticism of the experts and their testimony in his initial trial. The experts used terms that were too complex for a lay jury, and probably also for the Judge, explained their views badly, and commented on issues that were outside their area of expertise.

Expert witnesses are critical to delivering justice and it is right that they should be well trained, and supported to carry out their duty to the Court to the highest standard.

Our recording of Mr David Sellu's session is available, with 1 accredited CPD point. To find out more about this, or any of our other short CPD webinars, contact caren.scott@inspiremedilaw.co.uk and mention this article for a discounted rate.

We are an RCS (Eng) Accredited Centre and provide Expert Witness Training, specifically tailored to medicolegal experts giving evidence in clinical negligence litigation, leading to Inspire MediLaw's Expert Witness Accreditation. The course is modular, available online, and includes opportunities for one-to-one feedback with members of our medicolegal training faculty.

To find out more, contact us or visit our website **www.inspiremedilaw.co.uk/accreditation.**

Book Review

The Reliable Expert Witness

Mark Tottenham, an experienced barrister and mediator, has written this short but concise guide to the workings and duties of expert witnesses. It covers what you would expect concerning the duties of an expert witness, how to prepare to give evidence in court, the requirements of a report and single joint experts.

It is very well written, easy to follow and undertand, it answers many questions that seem simple but are often left unsaid such as, 'how to maintain a professional detachment from the client and instructing a legal team.'

All experts wether new to the industry or with over 40 years experience should consider this book esssential. Solicitors, chambers staff and all legal professionals would also be well served by this book. It is particularly useful to instructing solicitors with chapters on 'Enforcement of Experts Duties' and 'Accepting Instructions.'

It also covers many basic elements that all experts should be reminded of, such as, 'The Nature of Expertise' 'Notes on Common law and Civil law' and the 'Duties of an Expert.' It is a book that will educate and can be used as a reference point for many years.

The Reliable Expert Witness comprehensively covers mediations, inquests and public inquiries.

A full list of chapters are listed below.
Types of Expert and Professional Witness
The Duties of Expert and Professional Witnesses
Enforcement of Experts' Duties.
Accepting Instructions
Factual Investigations
Conducting Professional Research
Reaching a Conclusion
Preparing and Writing an Expert Report
Communication and Consultation Between the Experts and the Instructing Legal Team
Meetings With Other Experts
Pleadings, Affidavits and 'Scott Schedules'
Oral Evidence at Hearing
Alternative Dispute Resolution
Other Hearings or Inquiries
plus Appendixes

Published by Calrus Press, ISBN: 978-1-911611-33-2
Price: Euro 20 | $25 USD | £19stg

For more information on this title please visit
www.claruspress.ie/shop/the-reliableexpert-witness

Why I wrote The Reliable Expert Witness

*For a number of years, I (**Mark Tottenham**) have taught a course entitled "Report Writing for Court". This has been attended by professionals from a number of different backgrounds, including nurses, architects, engineers,medical specialists, accountants and social workers. Early in the course, I would introduce them to the concept of the 'expert witness'. Although they all had specialist training and experience, I was surprised to find how many of them did not consider that the term 'expert witness' would apply to them.*

Not only is every professional an 'expert' in the sense that they are assisting the court with specialist knowledge, in most cases the expertise could have a profound bearing on the outcome of the case.

So I have long believed that better guidance was required for professionals who have a role in court proceedings, and I took advantage of the first Covid lockdown to write The Reliable Expert Witness: A guide to professional reports and expert evidence for courts, arbitrations and other tribunals.

Another reason that I felt a book of this sort was needed was that I thought that the standard list of 'duties' of an expert witness needed to be reformulated for the professionals themselves. The 1993 list as set out by Mr Justice Cresswell in the Ikarian Reefer borrowed from a number of earlier cases, but was not intended to be systematic or exhaustive. The duties were restated in the 2000 case of Anglo Group PLC v. Winther Brown, but are still replete with caveats and subclauses. With respect to the learned judges, the duties are not written in a manner that is useful for a professional who is unfamiliar with the court process.

In 2019, I co-wrote a legal textbook entitled *A Guide to Expert Witness Evidence*, which was the first Irish textbook on the topic. In that book, we reformulated the list of duties in a more structured manner for the Irish legal profession, and in The Reliable Expert Witness I have presented a list of duties that I hope will be helpful for all professionals writing reports or giving evidence in litigation or arbitration.

Because evidence from professionals is so central to the determination of many cases, it is also central to many miscarriages of justice. The Dreyfus case in the 1890s relied on faulty evidence from handwriting 'experts'. The Birmingham Six and Guildford Four cases in the 1970s relied on faulty forensic evidence. The tragic case of DPP v. Clark relied on faulty evidence from a pathologist and a high-profile paediatrician.

But miscarriages of justice are not limited to the criminal sphere. If a parent loses access to a child because of faulty evidence by a social worker or psychologist, or if a property interest is lost because of incorrect evidence by a mapper or architect, the losing parties also have reason to be aggrieved at the court system. I do not believe that many professionals deliberately mislead the court, but there is no doubt that many fall into the role of the 'hired gun', putting forward their client's case, despite the many warnings from the courts that this is entirely inappropriate.

In 1993, when the High Court judgment was delivered in The Ikarian Reefer, there was limited case law on the subject of expert evidence. Since then, the subject has been extensively reviewed in many common law countries, both in case law and rules of court, and the courts have relied on each others' decisions in developing the area. This is an example of the common law at its best. For example, in the 2016 case of Kennedy v. Cordia, the UK Supreme Court reviewed the law on admissibility of expert evidence from a number of common law jurisdictions, including the US, Australia and South Africa.

So, when writing *The Reliable Expert Witness*, I decided not to limit it to the law of the UK or Ireland, but to outline the underlying legal principles that apply to expert witnesses in most common law jurisdictions, or - for that matter - international arbitrations. While each country has its own procedural rules, there is a common understanding of what is required from expert witnesses, and the book relies on statements of legal principle from many English-speaking countries, including Hong Kong, Kenya, New Zealand and Canada.

As someone who writes on legal matters, I enjoy finding oddities in judgments, and I often feel these deserve a wider audience. Many judgments contain 'cautionary tales' - accounts of conduct that have led a party to expensive litigation they did not deserve. Many others recount conduct by experts who did not understand what the court required of them, and I have included many of these in the book.

My favourite discovery in the research for this book, however, was the realisation that the UK Supreme Court had, in the above-mentioned case of *Kennedy v. Cordia*, relied on an obsolete rule of the US Federal

Rules of Evidence and applied it to the law of Scotland. Not only had the rule been amended in 2000, sixteen years before the court's decision, it had been amended again in 2011! Even the mighty judges of the UK Supreme Court are fallible.

My final reason for writing this book was that, while there are other books of this sort, I did not think they met the requirements of a professional seeking guidance on a particular issue. Many of them are over-technical or rather dry. In The Reliable Expert Witness, I have tried to provide professionals with a readable account of what they may expect at each stage of the court process, together with an explanation of other connected issues, such as mediation, inquests and Scott Schedules.

My hope is that any professional person asked to write a report for a court or arbitration will find that the book assists them to understand their task, and that they will not be deterred by the daunting term 'expert witness'.

Mark Tottenham is a barrister and mediator. He is the founding editor of **Decisis.ie**, a law reporting service, and the author of The Reliable Expert Witness (Clarus Press, 2021), and A Guide to Expert Witness Evidence (Bloomsbury Professional, 2019), the winner of the Dublin Solicitors' Bar Association Practical Law Book of the Year award.

Why Putting Costs Over Quality is Asking for Trouble in Forensics

*Professor **Angela Gallop** Group CEO at Forensic Access explains why forensic science evidence should never be accepted at face value, but routinely challenged by qualified experts working within a Quality assurance framework, and being properly paid for the job.*

A balance of arms between prosecution and defence is essential for justice

Forensic Access was set up in 1986 by qualified and experienced forensic scientists primarily to help ensure that defence legal teams had access to the same level of forensic science expertise as their counterparts in prosecution.

This equality of arms is very important in cases reliant on forensic evidence because, without it, potential weaknesses in the evidence may not be exposed. Similarly strengths in evidence may be given more weight than they rightfully should. It is then just a short step to miscarriages of justice.

For many years the need for this balance wasn't recognised, probably because of the popular misconception that science produces black and white answers leaving little scope for debate, with weaknesses or room for reasonable doubt hidden behind a façade of scientific precision.

However, in reality different forensic scientists presented with the same data can and do come to different views and express different opinions based on them. Moreover, the interpretation of their results and significance they attach to these will depend on the quality and extent of information they have received about the case. It can be especially challenging for prosecution scientists who are engaged at the start of an investigation and conduct much of their work before the full 'facts' are known.

Example defence cases where equality of forensic evidence proved invaluable

One illustrative case we worked on involved a man accused of robbing a newsagent and on whose clothing glass fragments had been identified which were thought to have come from the broken window of the getaway van. However, after a thorough investigation, we were able to suggest that these fragments could have been innocently transferred from the hands and/or clothing of police officers who had examined the van shortly before they arrested the defendant. The prosecution dropped the charge.

In a rape case we worked on, DNA profiling of semen on a bed sheet at the alleged crime scene was shown to match the defendant; apparently unassailable proof of guilt. However, we examined evidence surrounding claims that the defendant had been sleeping in the bed for the previous few days and found the seminal staining revealed none of the common signs to suggest that it had resulted from intercourse. Again, the case was abandoned.

Conversely sometimes forensic scrutiny indicates that the evidence is much stronger than previously supposed. One case we worked on involved a man charged with kicking in a car door who was linked to the crime through footwear impressions in superficial dirt on the door. In this case the impression left by the boots was unique because of a manufacturing defect in one of the soles. The soles were moulded and one contained some twine which must have been accidentally dropped into the mould during manufacture. As the sole wore away, more and more of the twine was exposed and it showed up in impressions left by the sole, rendering them unique. This time the defendant pleaded guilty and saved valuable court time.

Why defence scrutiny of evidence is more important than ever

While defence scrutiny of the prosecution's scientific evidence has always been important, it's now more important than ever owing to some significant changes in the way the work is commissioned, conducted and reported by the prosecution. Most notably:

• Less forensic work is being commissioned which impoverishes contextual understanding of individual cases and our ability to assess the significance of findings.

• What work is done tends to focus on checking investigative 'hunches' thereby increasing the risk of 'self-fulfilling prophesies' where you only find what you are looking for.

• Work is often fragmented between different laboratories, meaning that no single scientist gets the full picture, making it difficult to interpret findings in the wider context of the case. At Forensic Access we are proud to have a multidisciplinary team of inhouse scientists, but we are something of a rarity.

• Significantly more forensic work is conducted within police laboratories than in independent laboratories, where Quality standards vary and there is an increased risk confirmatory bias which we now understand much more about.

• Today reports are often streamlined, making it more difficult for legal teams to understand and challenge the evidence. Streamlined reports risk confusion between potential sources of evidence and activities which might have given rise to it, which are critical in interpreting its likely significance.

Additional challenges facing defence scrutiny of evidence

However, the challenges for the defence don't end there, for firms like Forensic Access, they also include difficulties associated with:

• Covering the costs of in-house scientists who undertake this critical case review and second opinion work

• Attracting and retaining the most appropriate external experts which allow us to provide a much greater breadth and depth, and more integrated level of technical support for our clients and ultimately the Criminal Justice System, and our ability to deploy such experts

A good proportion of the work Forensic Access undertakes for defence legal teams is legally aided and conducted by in-house scientists. Critically, these scientists work in fully accredited, Quality assured laboratories so they are more than a match for any scientists whose work they may review. Such accreditation is expensive to achieve and maintain, especially with requirements to demonstrate compliance with rigorous Quality standards and evidence of continuing improvement.

While this is extremely important in terms of the Quality of our work, it obviously puts us at a competitive disadvantage when compared to other organisations or 'one-man-bands' who are not accredited. Put simply: they don't have the associated expense and can therefore afford to sell their services more cheaply.

To make matters worse some of them have also developed ingenious ways of circumventing the system, such as putting in artificially low quotes to win work, only to raise them incrementally afterwards on the back of requirements which should have been obvious at the outset.

However, courts need and expect to have confidence in the Quality of forensic science results and analysis; so it's a false economy to overlook Quality and only consider cost when choosing one expert over another. It's a slippery slope whereby so-called experts will increasingly dominate the courts and will fail to provide the critical safety net against miscarriage of justice, with all the potential repercussions that may entail.

A telling example of the importance of the Quality is illustrated in a recent case involving the 'glassing' of someone after an argument broke out in a nightclub. The prosecution scientist suggested that part of the attack appeared to have involved kicking and stamping on the victim, making it a more serious offence despite no allegation of kicking. However, one of our scientists was able to demonstrate that the blood pattern the prosecution scientist had been relying on was not blood spatter from blows with a shod foot, but simply back spatter from blood dripping passively into a pool of wet blood. This completely changed the complexion of the evidence.

Expert witnesses who accept legally aided work (including our in-house scientists) are often motivated by a strong desire to use their expertise to assist the criminal justice system to produce fairer trial outcomes. However, many are put off by low remuneration rates relative to any of their other work and late payment of court expenses.

These challenges faced by expert witnesses are exacerbated by challenging deadlines for reports, late service of critical information and short notice for court appearances.

A recent Bond Solon report revealed that over 90% of survey respondents had experienced late payment, and even more worrying; over a third had been refused payment. When many experts are in full time work, and can 'pick and choose' any extra commitments, it's hardly surprising that supporting defence work relies as much on passion as remuneration.

At Forensic Access we pride ourselves on our unique case management service which provides a thoroughly professional interface between expert and client. It ensures only the most appropriate of our large pool of carefully selected forensic and medical experts are selected for individual cases, and that they are deployed in the most timely and cost effective way.

In the light of all the above, this is challenging enough, but our efforts can be further undermined by a Legal Aid Agency who may not understand the complexities of the requirement, and is prepared to sacrifice critical expertise for lowest cost.

In one recent case, for example, an experienced neurosurgeon was required. We identified someone with precisely the right qualifications and background for the job, but they were passed over in favour of someone with much less expertise but who had put in a lower quote.

Feedback afterwards from the solicitor confirmed how "disappointing and frustrating" it was "when it is not possible to secure the services of a particular expert because the rates authorised by the Legal Aid Agency fall below what the expert reasonably seeks" and that "it is not unusual for the defence to have to instruct the expert who provided the lowest quote as opposed to who may be the best placed expert to comment in the case". In these situations it is the solicitor who takes the risk of faulty opinions and our courts for delivering sub-standard 'justice'.

Lessons learned for the future of forensics

There are important lessons to be learned here and they can be summed up in the following piece of advice: *Where forensic science evidence is important to the prosecution's case, it should always be checked by a properly qualified and experienced expert. This means choosing the most appropriate expert, who provides their services through an accredited organisation, and paying them properly for doing the job.*

Anything less is asking for trouble.

To find out more about the range of forensic services and expert witnesses provided by **Forensic Access** email science@forensic-access.co.uk
or Tel: 01235 774870 to speak with our team.

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."*

Vigilante Justice: Is Evidence Obtained by 'Paedophile Hunter' Groups Admissible in Criminal Proceedings?

by Hannah Thomas at 2 Hare Court

On 15 July 2020 the Supreme Court handed down its findings in ***Sutherland (Appellant) v Her Majesty's Advocate (Respondent) (Scotland)*** *[2020] UKSC 32.*

The appeal concerned the use of evidence gathered by 'paedophile hunter' groups in public prosecutions (ie. group members posing as underage children online to 'trap' paedophiles) and whether the use of that evidence is compatible with an accused's right to private life under Article 8 of the European Convention on Human Rights ('ECHR').

The facts

In summary, the facts of the case were that a member of a paedophile hunter group created a fake profile on the Grindr dating application using a photograph of a 13-year-old boy. The Appellant entered into communication with the 'boy' who confirmed he was 13 years old. The Appellant sent him a photograph of his erect penis and arranged a meeting with him. When he arrived he was confronted by members of the vigilante group who contacted the police.

The Appellant was arrested and subsequently prosecuted for attempting to cause an older child to look at a sexual image for the purposes of obtaining sexual gratification, attempting to communicate indecently with an older child and attempting to meet a child for the purpose of engaging in unlawful sexual activity (these are all 'attempts' because no child was actually involved).

At his trial, the Appellant argued that the evidence had been obtained unlawfully and that its use breached his Article 8 ECHR rights. This was rejected and he was convicted after trial.

The Appellant appealed against his conviction to the High Court of Justiciary where his appeal was dismissed. The High Court found that since the individual who obtained the evidence was a private individual, and not a 'State' authority there had been no interference with the Appellant's Article 8 rights. The High Court accepted that the communications could engage Article 8 but that the Appellant could have had no reasonable expectation of privacy in relation to them given he was communicating with a stranger who was a child. It was also held that even if the Appellant's Article 8 rights had been interfered with, the interference was justified and in any event he had received a fair trial pursuant to Article 6 ECHR and his conviction was safe.

The case was certified as fit for appeal to the Supreme Court on the human rights issues – whether the use of the paedophile hunter evidence in any way infringed upon or was incompatible with the Appellant's right to private life under Article 8.

Article 8

Article 8 of the ECHR holds as follows:

1, *Everyone has the right to respect for his private and family life, his home and his correspondence.*

2, *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

The Appeal

The appeal to the Supreme Court concerned two questions:

1, Given the type of communications in question, were the Appellant's Article 8 rights infringed by using the communications as evidence in a public prosecution?

2, To what extent is the State's obligation to provide adequate protection for Article 8 rights incompatible with the use by state prosecutors of material supplied by paedophile hunter groups in investigating and prosecuting crime?

In a judgement delivered by Lord Sales, the Supreme Court unanimously dismissed the appeal, finding as below.

1 – Did using the evidence in question infringe the Appellant's Article 8 ECHR rights?

On the first question, the Court found that there had been no infringement of the Appellant's Article 8 rights for two reasons:

1, The communications themselves were not worthy of respect under Article 8 ECHR given their reprehensible nature.

2, The Appellant could not have had a reasonable expectation of privacy in relation to the communications.

Communications not worthy of respect

The question of whether the communications were worthy of respect under Article 8 was a pivotal question. The evidence in this case had been gathered by a private individual. The communications involved no question of state surveillance or interception and all that was in issue was the balance of the interests of a paedophile and the intended recipient of the communications – a child. By virtue of the reprehensible nature of the communications the Supreme Court held that they did not attract protection under Article 8.

Support for this conclusion was drawn in three ways:

First, the contact was criminal in nature and was capable of having a serious impact on any child receiving it – this engaged the child's rights under the ECHR.

Second, Article 8 imposes a positive obligation on States to ensure that the criminal law can be applied effectively to deter the commission of sexual offences against children. The interests of children take priority over the interest of any paedophile being allowed to engage in criminal conduct in this regard.

Third, Article 17 protects the ECHR from being abused. It provides that nothing in the ECHR may be interpreted as permitting anybody to engage in activity: *"aimed at the destruction of any of the rights and freedoms"* protected by it. Applying this to the present case, the Court concluded that this type of criminal conduct destroyed the rights and freedoms of children who must be protected from sexual crime.

No reasonable expectation of privacy

The second important question when considering Article 8 rights relates to whether the Appellant could have had a reasonable expectation of privacy in respect of the communications.

The Court held that what amounts to a reasonable expectation of privacy is an objective test and that, despite the Appellant's pleas to the 'boy' to keep their communications private, he could not have had a reasonable expectation of privacy.

In reaching this conclusion, the Court found as follows:

1, There was no pre-existing relationship between the Appellant and the child. The contact came "out of the blue" and so he was not owed any duty of privacy.

2, The child (as the Appellant thought) was 13 years old and it could reasonably be expected he may share the worrying communications with an adult.

3, The Appellant was engaging in criminal conduct and could not have had a reasonable expectation of privacy in relation to such conduct. This was not the kind of activity Article 8 sought to protect.

4, The Appellant could not have had a reasonable expectation that the communications, once in existence, would not be given to the police and the prosecuting authorities and thereafter used in a criminal prosecution against him.

Therefore, the Appellant's Article 8 rights had not been infringed.

2 – To what extent is the State's obligation to protect Article 8 rights incompatible with using the evidence of paedophile hunter groups to investigate and prosecute crime?

In respect of the Appellant, the Court found that his Article 8 ECHR rights had not been infringed and so the question was moot. However, had Article 8 been engaged the State's obligation to protect the Appellant's rights under Article 8 was not incompatible with using the evidence obtained to investigate and prosecute his crimes.

Lord Sales noted that States must perform a balancing exercise between public and private interests, and are afforded a margin of appreciation in doing so.

In the present case there was a positive obligation on the State to apply the criminal law effectively so as to deter and punish those who threaten to harm young children. There was also no question that the offences with which the Appellant was charged were compatible with Article 8 in themselves.

Balancing the interest of the public and the protection of children with the interests of a paedophile wishing to engage in criminal conduct, it was clear where the balance lay. Lord Sales even went as far as to say that States are entitled – and perhaps even obliged – to make use of such evidence when prosecuting defendants.

Other issues

The appeal related solely to the human rights issues and thus the Court did not consider any other issues in the appeal to the lower court. However, Lord Sales observed that he could find no fault in the reasoning of the High Court in finding that any interference with the Appellant's Article 8 rights in this case would have been justified in any event, and that his conviction was safe.

Conclusion

In conclusion, the use of the evidence obtained by the paedophile hunters in the prosecution of the Appellant did not infringe his Article 8 rights nor was the use of such evidence in prosecuting him incompatible with his Article 8 rights.

There is a need to protect children from sexual offences and where it comes down to it, the balance of competing rights will not fall in favour of a paedophile engaging in criminal conduct.

This decision is unsurprising, and although fact-specific it is clear that the principles are capable of

broader application to other cases involving 'paedophile hunters' and sexual offences committed against children.

About the author
Hannah Thomas
Hannah is a junior tenant at 2 Hare Court chambers in London. She has a busy practice spanning criminal law, inquiries, inquests and professional discipline.

Hannah has particular expertise in crime, having worked in the crime team at a City solicitors' firm prior to coming to the Bar. She both prosecutes and defends, and when defending she is often chosen to represent clients with vulnerabilities due to her excellent client care and communication skills. Hannah's prosecution work covers both public and private prosecutions.

Hannah is also a sought after junior in inquiries and related work. During her time in Chambers she has been instructed to work on the Inquiry into Child Sexual Abuse and the Manchester Arena Bombing Inquiry, and has most recently been instructed as one of a team of counsel on the Levitt QC boohoo Group plc Independent Review.

Hannah also represents regulatory bodies and clients across a range of regulators including the Medical Practitioners Tribunal Service, General Medical Council, General Optical Council, Nursing and Midwifery Council.

www.2harecourt.com

The Importance of Using a Technical Expert for Due Diligence in the Plastics Industry

by Dr Paul Shipton, Author and Suzanne Johnson MBA, co-author.
The goal of due diligence is to objectively assess the operational situation of a company and is a key element of any business purchase, acquisition, merger or takeover.

Employing the services of a technical expert can be vital support for the law professional in checking the health of a business, understanding its technologies and identifying the risks and opportunities affecting the value of the company.

The plastics industry is a complex one and polymer science and technology is a vast subject area. The value of a company is dependent on their product design(s), manufacturing and processing technologies, material documentation, intellectual property and employee skill set.

When carrying out due diligence on companies within the plastics sector, areas to target include:
Company/Organisation: Companies within the plastics supply chain can have significant health, safety and environmental risks associated with their operation. Therefore it is important to understand the performance of the business in relation to these areas with a thorough assessment of their effectiveness. Is the quality management system simply a tick-box exercise or is it used to continually improve operations and increase value to customers and other stakeholders.

Manufacturing Technology: Manufacturing plant is often the largest capital investment a plastics processing company makes and the productivity of the plan and quality of products is dependent on it.
What are the strengths and weaknesses of the equipment and technology in place? What is the remaining life-span of the machinery and when will it need to be updated? There is a growing public demand for the plastics industry to be more sustainable in its production, processes and materials which also needs to be considered as part of your due diligence.

Employees: In any business the skills, productivity and motivation of employees is of upmost importance. With the plastics industry facing a skills shortage evaluating the proficiencies and knowledge of the employees and how it is safeguarded, valued and updated is vital.

Intellectual Property: By seeking the opinion of a qualified technical expert with knowledge of the plastics industry, you can get support for clearly understanding the technical value in the intellectual property held. This could be in the manufacturing process, the process conditions or in the material formulation.

Production Effectiveness and Product Quality: Profit margins are easily lost in plastics manufacturing through high scrappage rates, ineffective equipment set up and poor housekeeping. A technical expert can examine the operational costs and compare them to industry norms as well as understand where waste occurs and its impact in the manufacturing process.

The market reputation of a manufacturer relies on quality and consistency. Suitable equipment, training and quality control measures are relied on to defend this reputation therefore it is important to recognise what is in place to maintain and manage this process.

The Supply Chain: The success of a business can be linked to the efficiency of its supply chain. How a business manages its supply chain impacts its expenses and resources as well as its ability to meet customer demand. An expert with technical knowledge of the plastics industry can assess the robustness of the supply chain particularly in relation of critical materials and services to ensure the business is prepared for disruption risks and opportunities.

Product Development: New products provide the opportunity for businesses to grow and produce profitable returns but careful planning is needed to minimise the risk of costly mistakes. Does the business being assessed have a product development strategy? Is it feasible and have technical assessment stages in place to avoid failure in delivery?

The plastics industry is under increasing scrutiny to reduce its environmental impact. With the introduction of new legislation, regulations and directives specifically focused on the use of plastics has the business considered this impact and how to adapt for the future?

The consequences of inadequate due diligence can be overvaluation resulting in financial loss. To avoid surprises when assessing a company within the plastic industry, it is important to form a professionally experienced team. PS Partnerships & Consultancy can save you time and money by ensuring you avert potential problems associated with unasked or misunderstood questions.

Poor due diligence, plastic product failure or the unfair use of intellectual property related to a plastic article can be more than concern or inconvenience.

The consequences can be significant; disputes arise, and legal processes start. It is at this stage you may need to appoint a Technical Expert or Expert Witness to help you understand the complex technical issues at stake. Selecting the right person can be pivotal to your case and is often the difference between success and failure.

As independent, technical experts with over 25-years' experience of working with the plastics industry, PS Partnerships has a strong track record of supporting companies and the legal profession in due diligence and plastic failure disputes. We have wide commercial and criminal case experience within the medical and pharma device, packaging, construction and material recycling cases. With global and national coverage, PS Partnerships can support you with due diligence within the plastics industry as well as plastic failure disputes which are often technically complex and difficult.

Authors
Dr Paul Shipton and **Suzanne Johnson MBA**
To find out more, visit:
www.ps-partnerships.com/technical-support/
or download Seven things to consider when appointing an Expert Witness to help you navigate this important decision,
www.ps-partnerships.com/seven-things-to-consider-when-appointing-an-expert-witness/.

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Q&A: Expert Evidence, Then and Now …

by Janet McKelvey, Holly Stephanos, Zelie Heger and Kate Lindeman

Four barristers give their insights into how the role of the expert has changed, and what makes a good expert.

Question 1: What changes have you seen recently in the way experts have been providing evidence?

Janet McKelvey:I have been really surprised by how seamlessly the move to online hearings has been for most expert witnesses. In my experience, the online format has changed the way the evidence is given in that the experts tend to appear more relaxed when giving evidence. This is largely because the expert will be in a familiar space (such as their home or office) or in an office within a law firm. The effect on a witness of the design of a court room, which can be a little intimidating, has diminished. Also, the expert is able to better organise their materials in advance of giving evidence so there is less shuffling of papers than there is when in the confined space of the witness box. I have also found that the giving of concurrent evidence has been a much more polite affair. It is simply not possible for more than one person to speak at a time in an online hearing. Therefore, experts wait until the end of a question before answering. They also wait until their counterpart has finished speaking before they begin. This has led to the process being generally more orderly. I have had feedback from some witnesses that they prefer the online hearing format.

Zelie Heger: Courts are referring questions out to referees for inquiry and report with increasing regularity. The referee will have been appointed because of their expertise on the topic, but can then take evidence from other experts without being bound by the rules of evidence. A recent notable example is the appointment of a toxicology expert as referee in the PFAS litigation. While there is occasionally reluctance to what some perceive as a delegation of the judicial role, when used appropriately the referral procedure can be a way of minimising cost and delay.

Holly Stephanos: The key change in the way experts have been providing evidence recently, which arises as a consequence of COVID, is that it is far more common for experts to be giving evidence remotely by way of either videolink or phone. This requires a lot of forward thought by both the parties and the experts to ensure that the experts have, for example:

- set up and tested their visual and audio equipment before the time of their evidence, so they are not delaying the progress of the hearing while fixing any technical issues;
- downloaded or printed all of the key documents that they may require for their evidence, before their evidence starts; and
- the ability to receive electronic copies of documents that may be emailed to them during cross examination – just because the expert is giving evidence remotely does not mean they can avoid the element of surprise during cross examination, when a party wants to put a new document to them.

Kate Lindeman: In largescale litigation, I have recently observed a shift towards the appointment of facilitators to assist experts in preparing joint reports. Such facilitators are often former judges or senior barristers, and the parameters of their role are usually outlined in orders made by the Court. In my view, this is a welcome development. A well-written joint report that narrows the issues in a dispute is of great assistance to parties and the Court, and if a facilitator is able to assist the experts in producing such a report, the facilitator's appointment seems likely to ultimately produce cost savings through reduced time being devoted to expert evidence at trial, and a reduced need to consult experts' earlier reports.

Question 2: What makes a "good" expert? Can you provide some examples?

Janet McKelvey: A good expert witness is confident in their opinion but also has done the work in terms of research to support and explain their opinion. The best expert witnesses are across the detail of their own evidence as well as their counterpart's. The ability to immediately recall where something has been said and to understand how all of the elements of the evidence of a case fit together is an especially valuable skill. I also find the ability to communicate complex or technical evidence in a plain English way is a rare but useful attribute of an expert witness. No matter how skilled and experienced a witness may be, if their point cannot be fully understood by the decision maker, their evidence will be wasted.

Zelie Heger: A good expert is across the details of their brief; identifies the assumptions on which their opinion is based; asks for clarification and further information if needed; makes necessary and appropriate concessions; and is willing to acknowledge when an issue is outside their area of expertise.

Holly Stephanos: A good expert is one who is:

- thorough – they are familiar with all of the material

in the proceeding relating to their expertise area and ensure that they properly understand the issues in dispute that are relevant to them;

- able to effectively communicate and provide well-reasoned opinions – the Court cannot simply accept a bald assertion, even from the most qualified of experts. The expert must be able to clearly identify the process of reasoning that they followed to reach their conclusions and explain why they hold a particular opinion, which is a critical skill that is sometimes lacking; and
- able to consider the issues relevant to their area of expertise in a balanced and impartial way, rather than simply attempting to "advocate" for their client's position – during cross examination, the most impressive expert witnesses are those that are able to make reasonable concessions where appropriate. This doesn't mean they should concede their position, but aggressively maintaining an opinion that has been demonstrated to be unreasonable can undermine the value of all of the evidence otherwise given by that expert.

Kate Lindeman: In my opinion, a "good" expert is able to articulate their views clearly and succinctly, takes care to avoid moving beyond their expertise, and is able to identify when to make appropriate concessions, and when to maintain their position. An expert who produces a well written report but then is unable to explain their opinions in a clear and compelling manner when giving oral evidence quickly loses credibility. The same is true of an expert who is unwilling to make appropriate concessions under cross-examination, as such experts often appear to be advocates for their client's position, rather than an impartial expert aiming to assist the Court.

Question 3: What are some mistakes that experts make? How can they be avoided?

Janet McKelvey: I find the most costly mistake an expert can make when giving evidence is not conceding on an issue when a concession is appropriate. If an additional fact or circumstance would change an expert's opinion, they should say so. A proper concession does not necessarily undermine the witness's evidence – rather it can give comfort to the decision maker that an independent view is being expressed and that the witness can be generally trusted. On the other hand, a dogged adherence to a particular opinion, even in the face of overwhelming contrary evidence, has the effect of undermining the whole of the expert's evidence. It demonstrates that the expert does not understand their role as an expert witness (especially their obligations under the Expert Witness Code of Conduct) and may lead to adverse comments about the expert in a judgment, which can be personally and professionally devastating.

It is worth noting that an expert witness, while independent, still forms part of one party's team. The expert can seek guidance from the lawyers about their obligations and they should certainly consider any feedback given by the lawyers in the team in terms of the style of their written evidence. If the lawyers in the team cannot understand a report, chances are the decision maker will also have difficulty!

Zelie Heger: Never assume the reader has background knowledge in your area of expertise. It is best to explain everything – even the most basic concepts – and to do so in language that a non-expert will understand.

Holly Stephanos: Two things spring to mind. The first is when experts fail to fully explain all sides of an issue to their legal team. An expert may have formed an opinion about a matter, but the legal team will be best assisted if the expert can also explain to them the key assumptions they have made, whether the opinion might change if the assumptions are wrong, and any other weaknesses that the team ought to be forewarned about. These matters should be raised early so that the opinions can be properly tested before their client advances (at a great expense) too far into the litigation.

The second mistake occurs during cross examination, when an expert tries to guess where the cross examiner is taking them and mould their answers accordingly. An expert should simply answer honestly based on their expert views, without second guessing how their answers might be used.

Kate Lindeman: Examples of common mistakes made by experts include over-reaching as to their expertise, being overly reliant on assistants in preparing to give evidence and slipping into the role of an advocate. Expert evidence should be prepared with the end goal in mind – the expert giving compelling evidence in the witness box, likely in the context of a hot tub. In my view, if that end goal borne in mind, the expert will be less likely to over-reach as to their expertise, as this will be readily apparent when they come to give evidence. Similarly, over-reliance on assistants may be avoided if the expert keeps in mind that it will ultimately be them personally giving evidence before the Court. Finally, an expert may be less minded to act as an advocate if they are mindful of the fact that their views will need to be defended in a witness box in front of their peers.

Question 4: Do you have any tips for effectively presenting expert evidence remotely (eg. by videolink)?
Janet McKelvey: Be organised! Make sure any documents that might be needed are marked or already open on screen so that there are no delays while documents are found or opened electronically. An expert should know where everything they may need is. Also, notwithstanding that the evidence may be being given from home, rules of Court attire should be observed so it is best to dress in a suit. Other court room etiquette such as only drinking water from a glass (no drink bottles!) and not drinking tea or coffee while giving evidence should also be observed. It is also best to try to have a neutral/professional looking background so as to not distract the decision maker from the substance of the evidence.

It is also important to remember that the Court (and the other party's counsel) will have a close up view of a witness's face when evidence is being given virtually. Be conscious of, and avoid if possible, facial responses to a counterpart's evidence – a roll of the eyes or a smirk will be able to be clearly seen!

Zelie Heger: Given the inevitable technical difficulties involved in remote hearings, it is even more important than usual that cross-examiners and experts are clear and concise in their questions and answers. Pre-hearing conferences with the expert should be conducted using the platform the Court will be using, including any file sharing technology that will be used to display documents in Court.

Holly Stephanos: My top tips are listed in response to question 1. To that, I would add that an expert should also think about their surroundings and ensure that their background is appropriate. Also, as anyone attending meetings remotely will now appreciate, a quality set of headphones are invaluable to minimise audio feedback.

Kate Lindeman: In addition to providing experts with training in the software to be utilised in giving evidence remotely, I would recommend impressing upon experts that evidence given remotely must be treated with the same degree of formality as evidence given in person. Justice Ball's recent observations in Blackmores Ltd v Jestins Enterprises Pty Ltd [2020] NSWSC 1177 at [98] are apposite in this context, and may be useful to pass on to experts:

"[The expert] as is usual these days, gave his evidence by videolink. He was wearing a sweatshirt. More significantly, when he was not giving evidence himself he appeared on occasions to be attending to text messages or emails on his mobile telephone. No doubt, as hearings by videolink have become standard practice in response to the pandemic a degree of informality has crept into the processes followed by the Court and it has become easier for witnesses to overlook the fact that they are still giving evidence in Court proceedings. Nonetheless, a degree of formality remains important. … [The expert's] conduct was not what I would have expected of an expert witness; and there may be a question whether it is appropriate for him to charge for the time he spent giving evidence when he used some of that time to attend to other tasks as well."

About the authors

Janet McKelvey specialises in planning, environmental, valuation and compulsory acquisition law. She regularly appears in all classes of the Land and Environment Court and the NSW Court of Appeal for local councils, NSW State agencies and developers.

Holly Stephanos is a barrister specialising in planning and Land and Environment Court matters, regularly appearing in merits appeals, enforcement proceedings and prosecutions, declaratory proceedings, and land acquisition and compensation disputes.

Zelie Heger practises in public and commercial law. She is currently acting for Commonwealth and State governments and private entities in a range of constitutional, administrative and planning law matters and tort and contract disputes.

Kate Lindeman has a wide-ranging commercial law and public law practice. In commercial law, she is experienced in matters ranging from large-scale class actions and significant appeals through to small first-instance matters. Her public law practice includes constitutional law, administrative law and statutory construction, and she regularly appears in planning and professional disciplinary matters.

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

Post-Brexit will EU Data Protection Law Still Impact on Police Investigations into Terrorism and Organised Crime?

by Dr David Lowe

Introduction

January 2021 saw a total break of the UK from the European Union (EU). In post-Brexit UK terrorism and organised crime investigations two factors changed. One is the UK is no longer part of the EU's policing agency Europol and consequently has no access to the terrorism/crime intelligence data, along with the fact that the UK no longer can access the European Arrest Warrant (EAW). Secondly the Court of Justice of the European Union CJEU no longer has jurisdiction over UK policing investigations to determine if their actions or the legislation they rely upon violates the EU's Charter of Fundamental Rights and Freedoms (CFRF), or do they? Terrorists and organised crime gangs do not recognise or respect geographical borders and with the UK still being part of continental Europe, a degree of co-operation will still have to exist with EU member states. Focusing primarily on the police gathering of evidence via their powers related to the surveillance of electronic communications, this article will examine the legal implications of intelligence and evidence sharing between UK and EU member states' policing agencies.

The Current Operational Situation Between the UK and the EU

While an EU member state, UK policing agencies had access to EU's policing agency Europol, including its European Counter Terrorism Centre that focuses on:

1. Providing operational support upon a request from an EU member state for investigations;
2. Tackling foreign fighters;
3. Sharing intelligence and expertise on terrorism financing;
4. Dealing with terrorist propaganda and extremism;
5. Dealing with illegal arms trafficking;
6. International co-operation among counter-terrorism authorities.

Due to the UK's Joint Terrorism Analysis Centre (JTAC), this does not mean the UK suffered a major loss in its ability to investigate counter terrorist activity. Established in 2003 and based at MI5's headquarters at Thames House (although not part of MI5), JTAC analyses and assess all intelligence relating to terrorist activity. It brings together counter-terrorism expertise from the police, the security services and governmental departments and agencies so information is analysed and processed in a shared basis to assess the nature and extent of the terrorist threat to the UK. Using this system, between 2017-2020 UK counter-terrorism agencies foiled 25 terrorism plots in the UK and this included passing on intelligence that foiled four terrorist plots in other EU member states in 2018. Although the UK would now come under working with the European Counter Terrorism Centre under international co-operation, this is not the same as being part of it, especially in relation to immediacy in intelligence sharing and support.

Also, as an EU member state, the UK had access to the EU's database Schengen Information System II (SIS) where, under law enforcement co-operation, SIS allows member states' policing agencies to:

1. Share biometric information such as DNA, facial images and fingerprints;
2. Share information on persons and objects involved in terrorism related activities;
3. Share information related to organised crime.

Perhaps one of the biggest losses of the UK becoming a 'third country' post-Brexit is losing access to the EAW. The EU's EAW is a rapid form of extradition that takes on average between 14 to 17 days compared to the average of just over a year with traditional extradition treaties. The UK was a prolific user of EAW's and it was not just one-way usage. In relation to the EAW, the UK assisted many EU member states' investigations, a process that was beneficial to both UK and EU member states policing agencies. At the time of writing (January 2021) there is a degree of optimism that a separate agreement will be made producing a variant of the EAW for use between the UK and the EU. While Brexit has created new trade agreements and borders, Brexit means little to terrorists and criminals, who as stated, do not recognise state borders and the UK will still have to work with their EU member state partners, none more so than between the UK and the Republic of Ireland were An Garda Siochana constantly work closely with the Police Service of Northern Ireland. This is an important issue as post-Brexit UK policing agencies will still have to co-operate with EU member state policing agencies.

Intelligence and Evidence Gathering via Surveillance of Communications

In the UK intelligence and evidence gathering during police investigations is acquired through various methods ranging from the traditional static and mobile surveillance, which is governed as directed surveillance and intrusive surveillance under sections 27 and 32 of the Regulation of Investigatory Powers Act 2000 (RIPA) respectively. Another method is in the use of covert human intelligence sources, commonly referred to as informants, which is governed

by section 29 RIPA. Currently the law in the use of informants is changing with the introduction of the Covert Human Intelligence Resources (Criminal Conduct) Bill that at the time of writing is at its third reading in the House of Lords. When reading the law governing the use of these powers one can see the influence of the European Convention on Human Rights (ECHR) as serious consideration is given to various human rights when granting authorities to the police.

Similar consideration is seen in the UK's Investigatory Powers Act 2016 that grants the police and security services (and where applicable the military, Her Majesty's Revenue and Customs, and, Border Agency) powers to obtain targeted interceptions warrants, warrants to obtain and retain communications data, bulk interception warrants and bulk interference warrants (lawful hacking of communications devices). Globally the use of electronic communications in society has grown exponentially, more so during the COVID-19 pandemic with the expansion in the use of online meetings facilities such as Zoom and Microsoft Teams, shopping and banking online. It is not just legitimate use of the various forms of communication that has expanded, both terrorists and organised crime gangs use and exploit electronic communications, especially in the use of deeply encrypted forms of communication. As such, powers granting policing agencies (including the security services) access to unlawful use of electronic communications is necessary, provided those powers are balanced with consideration of the protection of human rights such as rights to privacy and data protection. In the 2016 Act again we see the ECHR influence in the granting of these intrusive powers provided they are balanced with protecting relevant human rights. The authorities to interfere with these rights are only granted on the grounds of necessity, that is where it is under an act prescribed by law and necessary in a democratic society under certain grounds. These grounds include:

1. the interests of national security (this ground is certainly relevant to terrorism investigations);
2. the prevention of disorder or crime;
3. public safety; and
4. the protection of rights and freedom of others.

In relation to terrorist investigations the protection of the rights and freedom of others will include the right to life (article 2 ECHR), hence why intrusive investigative powers into the lives of citizens are necessary in order to prevent attacks from taking place. It is not only ECHR provisions we see in relation to the protection of rights, there is consideration of the EU's CFRF and two important CJEU case decisions influenced the drafting of the statutes. The relevance of this is with the UK being a third country, its law must be adequate in relation to the protection of human rights, as legislation like the Investigatory Powers Act was introduced while an EU member state, this Act will meet that criteria.

Digital Rights and Tele 2 Cases

Digital Rights: The 2006 Directive on Retention and Access to Communications Data and the Data Retention and Investigatory Powers Act 2015

In *Digital Rights* ([2014] 3 WLR 1607) the CJEU examined the now repealed Directive 2006/24/EC that laid down an obligation on publicly available electronic communications services or public communications networks to retain certain data generated or processed by them. As the Directive allowed EU member states' intelligence and policing agencies to collect bulk data, the CJEU examined the acceptable limits of mass surveillance and the function of data protection in relation to compatibility with articles 7 (respect for private and family life) and 8 (protection of personal data) CFRF. The CJEU declared that the 2006 Directive was invalid on two important legal issues saying to ensure personal data is protected:

1. EU legislation must lay down clear and precise rules governing the scope and application of the measure in question;
2. Minimum safeguards are imposed to provide sufficient guarantees effectively protecting personal data against the risk of abuse and against unlawful access and use.

Under the 2006 Directive member states could retain bulk and personal data only when it was necessary and proportionate to do so. The CJEU held this phrase lacked the required specificity to allow lawful interference with that data and did not place a high enough level of protection of personal data, nor did it ensure there was an irreversible destruction of the data at the end of the data retention period. In *Digital Rights* the CJEU acknowledged data retention is an important strand in terrorism and serious crime investigations to ensure public safety and stated these specific grounds could be a justification. Article 52 allows for limitations in the exercise of CFRF rights where, subject to proportionality, limitations can only be made where they are necessary and genuinely meet the objectives of general interest recognised by the EU. The CJEU held the retention of telecommunications data to allow competent national authorities to have possible access must satisfy an objective of general interest under article 52 CFRF but added in doing so it is necessary to verify the proportionality of the interference found to exist.

It was the latter point on proportionality where the 2006 Directive failed as the CJEU found it was too broad as to the conditions and requirements as to why telecommunications data had to be retained and regarding access to it by competent authorities. As the retention included persons' personal data who had not nor were suspected of being involved in any form of criminal or terrorist activity, the retention of the data was being carried out in an indiscriminate manner. The requirement under member state law that telecommunications data be retained by communications and internet service providers, it is essential the requirement to do so has to be for specific reasons, that includes defining what is meant by

serious crime and disclosure/access to the data has to be necessary to assist in achieving the aim of an investigation and it must be proportionate. As a result of *Digital Rights* many member states repealed their domestic legislation governing the surveillance of electronic communications and retention of telecommunications data. This included the UK. It repealed the provisions in RIPA and introduced the Data Retention and Investigatory Powers Act 2015 (DRIPA) that was drafted with consideration to the *Digital Rights* decision, but in R *(on the application of Davis and others) v Secretary of State for the Home Department and others* ([2015] EWHC 2092 (Admin)) the UK's High Court held that DRIPA did not comply with the decision in *Digital Rights*. The Court held that DRIPA did not lay down clear and precise rules regarding the access and use of communications data, and, on safeguards, the Court held that judicial approval was important to ensure surveillance authorities are not abused in order to protect citizens' rights.

Tele2 and Directive on Privacy and Electronic Communication 2002/58/EC

In *Tele2 Sverige AB*, now referred to as *Tele2* (2016] All ER (D) 107) the CJEU were requested to provide a primary ruling on the interpretation of Article 15(1) Electronic Communications Directive 2002/58/EC concerning e-privacy and electronic communications and its compatibility with Member States' national law regarding the retention and access to telecommunications data. In the full title of the case it included the Davis case heard at the High Court mentioned above that was referred to the CJEU. In *Tele 2* the CJEU examined citizens' rights under the CFRF, mainly articles 7, 8, and 52.

The aim of the 2002 e-Privacy Directive is to protect fundamental rights and freedom in relation to privacy when processing personal data in electronic communications, thereby ensuring the free movement of that data and electronic communications and services in the EU, especially in relation to the protection of subscribers to communications companies' services because in EU law subscribers are legal persons. The Directive is clear that its provisions shall not apply to activities concerning:

> '…public security, defence, State security (including the economic well-being of the State when the activities relate to State security matters) and the activities of the State in areas of criminal law.'

Article 5 states that member states must ensure the confidentiality of communications, including related traffic data by means of a public communications network and publicly available electronic services through their national legislation. This includes the prohibition of listening, tapping, storage or other kinds of interception or surveillance of communications and related traffic data by persons other than the users without the consent of the users concerned. Article 5 contains an exception to this where such activity is legally authorised in accordance with article 15(1) of the 2002 Directive. Article 15(1) allows member states to legislate to restrict the privacy, rights and freedoms related to electronic communications when it is a:

> '…necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. state security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences…'

In *Tele2* the CJEU pointed out these restrictions laid down in member states' national legislation to privacy only apply only if the member states adopt and meet all the conditions laid down in the Directive. Although recognising that fighting serious crime, especially organised crime and terrorism, depends to a great extent on the use of modern investigation techniques where telecommunications data evidence can be effective, the CJEU added:

> '…such an objective of general interest, however fundamental it may be, cannot in itself justify that national legislation providing for the general interest and indiscriminate retention of all traffic and location data should be considered to be necessary for the purposes of that fight.'

While acknowledging the importance the role the retention of telecommunications data plays in the fight against serious crime, the CJEU's guidance in relation to this matter is it should be read in light of articles 7, 8, 11 and 52(1) CFRF by adopting legislation permitting as a preventative measure targeted retention of traffic and location data for the purpose of fighting crime. The important points in article 52(1) that must be considered are:

1. The limitation of the exercise of rights and freedoms must be provided for by law; and
2. The limitations must be subject to the principles of proportionality; and
3. The limitations must be necessary; and
4. The limitations must meet the general interest recognised by the EU.

The CJEU added the retention of the data must be limited to the categories for data to be retained, the means of communication affected, the persons concerned, and the retention period adopted, with all limitations being strictly necessary.

Conclusion: Current Impact of CJEU Decisions and EU Law on the UK

In relation to the surveillance of electronic communications, the UK's Investigatory Powers Act 2016 took cognizance of the CJEU's decisions in both *Digital Rights* and *Tele2,* as well as the High Court decision in R (*on the application of Davis and others)*. Throughout the Act it consistently states the granting of authorities must be proportionate and necessary with the general interest being to allow relevant state agencies to interfere with those rights on the grounds:

1. of the interests of national security;
2. to prevent or detect serious crime; or,

3. in the interests of the economic well-being of the UK when those interests are relevant to the interests of national security.

It is clear the general interest covered in the Act relates to serious criminal and terrorist activity. Being a third country, this is important as in *Maximillian Schrems v Data Protection Commissioner* ([2014] IEHC 310) the CJEU held when dealing with third countries the EU must ensure there are adequate levels of data protection and privacy rights. The CJEU added this is an ongoing obligation to ensure there are no changes made by the third country and the EU Commission has a duty to regularly review a third country's level of protection. Unlike many other third countries the EU deal with, like the EU's member states, the UK is a signatory to the ECHR that is enshrined into UK law through the Human Rights Act 1998. Under this Act the UK public authorities must act in a way and its statutes are compatible with the ECHR, thereby ensuring another adequate level of protection of human rights.

In relation to intelligence and evidence gathering this is important as on matters of serious organised crime and terrorism, the UK will still have to work in co-operation with EU member states. While it is submitted that the UK's current legislation relating to investigations into these activities provide more than adequate levels of human rights protection, in fact they could be seen as comparable, it will be future legislation introduced by the UK Parliament that could be a cause for concern. This returns us to the question raised at the beginning of this article, would CJEU have jurisdiction on UK law? While the CJEU would not have jurisdiction, its decisions could have an impact on future UK/EU policing agencies co-operation as seen in the *Schrems* decision that brought an end to the EU-US Harbour Agreement (although following that decision a new agreement was quickly drafted and agreed on). Returning to the point that organised crime gangs and terrorists have no respect for borders, the UK is a major player in investigations into this activity and it is not one-way activity with the UK solely benefiting from the EU, the 27 EU member states also benefit from UK co-operation. It is on this point there is optimism an agreement will be made in relation policing co-operation and that on these matters the UK Parliament will ensure that any future legislation governing policing activity will provide adequate protection of rights acceptable to the EU.

About the author

Dr David Lowe is a retired police officer and now a senior research fellow at Leeds Law School, Leeds Beckett University where he researches terrorism & security, policing and criminal law. His research has been widely published in books and journals, including his book Terrorism: Law and Policy published by Routledge in 2018 (a comparative study between the law in Australia, Canada, the EU, New Zealand, the UK and the US), 'Data Protection and Rights to Privacy Involved in Intelligence Gathering and International Intelligence Exchange' in Roberson (editor) Routledge Handbook on Social Justice published in 2018, 'Surveillance of Electronic Communications and the Law' in Morley, Turner, Corteen and Taylor (editors) A companion to state power, liberties and rights, published by Policy Press in 2017 and 'Surveillance and International Terrorism Intelligence Exchange: Balancing the Interests of National Security and Individual Liberty', published in Terrorism & Political Violence in 2016. He has provided expert witness services on several occasions to prosecution and defence teams on police investigations, including the surveillance of electronic communications.

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Crime Scene Investigation - The Golden Hour

by Robert Green OBE, JP

I was recently contacted by a media company who are researching material for a documentary programme. Specifically, they were focusing on (what is sometimes referred to as) the 'golden hour',researching the need for speedy processing of crime scenes.Specifically, they asked if there is a 'golden hour'after the crime took place in which the data and evidence should be collected.It was this question which got me thinking.

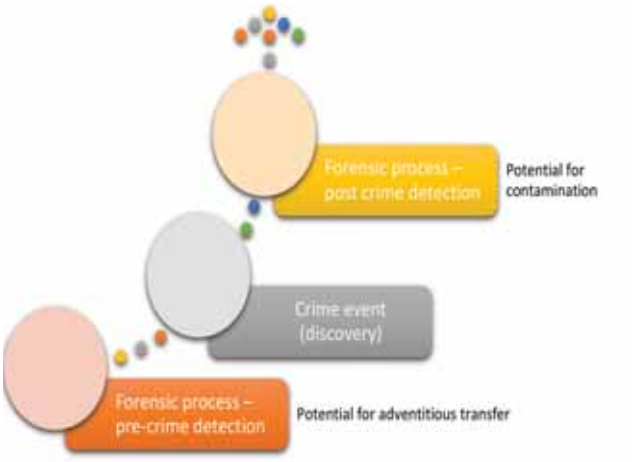
Although I hadn't necessarily considered the 'golden hour' the concept did prompt me to both reflect and research a few ideas which I thought might be of interest to some readers.Without necessarily suggesting 'blue light' attendance –there is perhaps a case to be made for the speedy response and processing of these scenes. This is particularly so in respect of the emergency,care and 'damage'control due to the security and managementof the crime scene. I still recall one of my latter (whodunit) murder scenes which, according to the log, had been entered by eighteen police officers prior to the scene being secured and processing beginning! I recall others where items had been moved by the first officers attending which subsequently caused confusion, embarrassment and litigation against the force concerned. Acceptingof course this was some time ago now - nevertheless I wouldn't necessarily be surprised if this 'practice' may still exist from time to timedespite the years of guidance by the NPIA, College of Policing et cetera.And so,I got to reflect a little on this and thought it might be of interest to share some of this.

The forensic process

Many of us will appreciate that the 'forensic process' commences at the crime scene and continues until the evidential results are presented in court. In realityof course it begins sometimes before we have necessarily understood that a crime has actually taken place. In this sense, it may actually begin with the initial 'call for service' and focusing upon what witnesses saw and said. Sometimes it appears more obvious than not that crime has occurred although, of course we to guard against preconceptions and drawing premature conclusions. It is, perhaps this 'pre-crime' (awareness)phase can very often lend itself to the problems of 'adventitious transfer' of material in the very early stages of the forensic process.More simply put, where potential evidence is destroyed by accident or carelessness in the very early stages of the enquiry.It seems that this is most likely to occur if thecrime is not I carefully managed or speedily attended and controlled by those who have specific training and skills in this topic.

Thinking a little more deeply, it might be useful to reflect upon theinvestigative process and consider the effects of speed. After all, investigators have told us repeatedly that speedy processing is paramount. As a consequence, we are aware that some DNA profiles can now be processed in the order of around 80 minutes using the Rapid Hit DNA technology. Clearly the need for speedy scientific processing has been identified by various stakeholders in the criminal justice process. Furthermore,we have seen the effects

of rapid fingerprint turnaround during a number of projects, mostnotably those operations whereby fingerprints are transmitted from the crime scene and processed quickly. Repeatedly we've seen the effects of this speedy processing in the arrest of individuals who, from time to time, had the stolen property within their possession. We know however that the potential for contamination runs all the way through and will include police, crime scene investigators, pathologists and forensic scientists. In this sense, there is seems to be a need to balance both speed and efficiency/effectiveness.



Adapted with grateful thanks to the Principal Forensic Scientist Group

Many of us appreciate that the'forensic process' can be thought of as a continuum or timeline between the (pre) crime event; the transfer of material; subsequent analysis and reporting of results. It might appear logical to appreciate that the potential for contamination would exist between either end of this continuum. More and more we are made aware of interpretational issues associated with the detection thresholds of DNA; isolation thresholds; multiple donors and contamination. It might be fair to assert that (a) some of this contamination/adventitious transfer would begin prior to the isolation of DNA. Likewise (b) we know that some extraneous substances cause DNA to degrade and likewise the need to (c) isolate and clean DNA as expeditiously as possible.And so, it WithoutWe should also draw attention to differentiating between contamination and adventitious transfer. Generally speaking, (and with all evidence types) we know that the possibility of a forensic recovery diminishes over time. This doesn't mean to say that things would necessarily be lost immediately as it would depend upon the evidence type and the environment. Depending on the crime and the evidence type –some material can be lost due to inclement weather. For example, a footwear mark left in the open (say on the clothing of a deceased person) would be susceptible to bad weather. For example, rain would limit the ability to collect this type of material.

Naturally, there is sometimes little we can do to prevent the potential for adventitious transfer either before the crime or when the crime is discovered. Nevertheless, what is clear is that the potential for adventitious transfer would seem to increase with the passing of time. Likewise, we know that the extent to which contamination affects the results will depend upon the amount (and presumably) opportunity for contamination.

Sensitivity

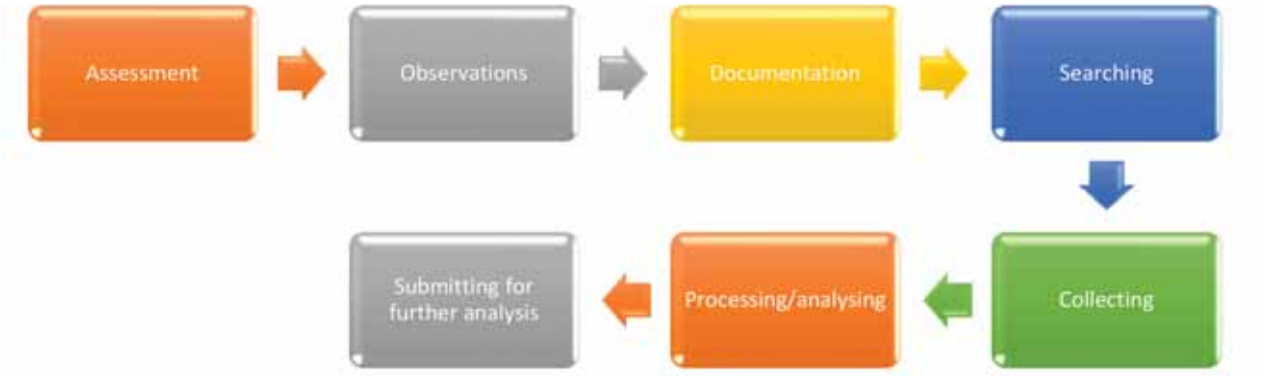
Specifically focusing on the advances in DNA we recall that those early DNA tests required a crime sample somewhere, the size of a 50p piece. The DNA 17 test is many times more sensitive and requires the harvesting of only around eighty cells to begin the process. This is in the order of around 500 pg of material required in order to generate a standard result. I'm led to believe that DNA profiles may be obtained from as few as 15 cells depending upon the condition. So what might this mean for those undertaking scientific investigations in, what is sometimes referred to as, the investigative phase of the forensic process. To give you some ideas of the level of starting material –a single sugar crystal is in the in the order of 1 µg. Dividing this single crystal by 1,000 gives us somewhere in the order of 1 nanogram. Further dividing this by 1,000 gives us 1 pg and, as said previously our current tests require around 80 cells, in the order of 500 pg.

It almost goes without saying that the potential for adventitious transfer and/or contamination will increase proportionately to the sensitivity of DNA techniques. Likewise, the passing of time may well increase the possibility of adventitious transfer. Recently, there is much commentary in the international press concerning difficulties associated with interpreting mixed DNA profiles. Likewise, we know that any mishandling of evidential material or mismanagement of the crime scene may very well change a single source sample intoa mixture. This of course makes things many times more difficult for the DNA analyst to interpret. Likewise,it may turn a sample which may have given no result into a false positive. Whatever the case, and depending upon the level of contamination this may manifest itself as a major or minor constituent.

The potential for recovery

Those who have 'actually' examined and managed major crime incidents and, for that matter, the volume crimes of burglary et ceterawill appreciate –what is sometimes referred to as the evidence funnel. This is a primary consideration when examining these incidents. We also must appreciate that the evidence which is collected, analysed, submitted and ultimately used in court will be a fraction of that which is collected. We knowfrom experience and from our own reading that the basic activities of scene processing (Gardner 2004) can be summarised by the process diagram (on the next page.)

In this sense, one might conclude the importance of making an accurate and valid assessment based on the professional observations of the Crime Scene Investigator. So, of course we will need to act without delay but also bearing in mind the need to maximise the contribution of evidence recovery.Likewise, we



know that some evidence typesare transitory or fleeting. To quote Conan Doyle (A Case of Identity, 1891) it is the little things that are infinitely the most important. It is these little things that are sometimes most transient and yet so important in coming to a sound judgement.By way of illustration, fibre evidence can at times be easily lost if it is not handled and managed appropriately.

And so, whilst these incidents must be processed carefully and rationally, it led me to wonder how the effects of speedy, yet careful processing might best support the criminal justice process. You will note here that I don't specifically cite the prosecution as, in my view, these incidents and the subsequent analysis must be examined with both the prosecution and defence hypotheses firmly in one's mind.

Its very clear from the outset that crime scenes are examined for two particular reasons. First and foremost –based on the likelihood and potential of forensic recovery and (where appropriate) subsequent loading of biometric material to our forensic databases. Secondly (and as importantly) is the service to victims of crimeand to justice. For example, it is, in my mind unacceptable to leave the victim of a burglary offence waiting several hours for the crime to be examined.Logically of course the chances of recovery would diminish in proportion to the time elapsed although this is perhaps not always the case.

Transfer and persistence

One of the key areas of debate in forensic science nowadays is the issue of evidence transfer and how longvarious evidence types persist. We are dealing with ever smaller DNA material which, although is a really big step forward –it does mean that these small amounts are sometimes difficult to interpret – particularly if its been mishandled early in the enquiry and the consequent to become mixed or contaminated.

By way of illustration (and dealing with DNA alone) starting threshold to deal with DNA crime samples is just 500 pg. The previous multiplex double this. At around six cells per picogram needed just around 80 cells for the standard DNA test. Also (under the new multiplex) PCR cycles have increased which makes the system more sensitive and in to give better profiles fromsmall and degraded samples. Again –all of this is very good but does increase the possibility of contamination.

To conclude

Perhaps somewhat unwisely reflecting on past experiences and the custom and practice of the time where a mantra of "... we are not rushing to get this wrong"was more commonplace the crime scene examiner of today is likely to be faced with the dilemma of speed,whilst at the same time ensuring that all of the physical evidence both macroscopic and microscopic are identified and recovered appropriately.Accepting the need for a sequential and systematic approach to research, recovery and submission of items –nevertheless parts of the forensic process now operate rather speedily. Likewise,we know that crime scene investigations are, inthemselves a process (Horeswell 2004) comprising of an initial assessment and taking control of the incident. It does make sense that these steps, in particular are carried out as quickly as possible if we are not to encounter significant amounts of advantages transfer or contamination. The crime scene and investigative process continues with the examination, interpretation of items, pre-submission and post submission. It would seem logical to suggest that these should be speedy and efficient processes if the true value of the evidence is to be realised. The dilemma facing those who are, in this century, examining crime scenes is the requirement for a speedy result. Major enquiries/incident rooms have daily costs of many thousands of pounds. Combining this with the austerity measures facing several investigative authorities can perhaps appreciate the need to progress this quickly as possible. Nevertheless, we are aware of the dangers associated with the inadequate collection of physical evidence at the scene. In short, if it's not found then this can seriously undermine the course of justice. We know that potential evidence can be destroyed by carelessness or by examining these incidents with too much speed.

Possession of Illegal Images of Children (IIOC) Are you being asked to agree to evidence presented in a SFR1?

by Edgar Blazier, Practice Manager SYTECH Forensics

There is no justification for use of the internet leading to possession of illegal images. Successful prosecution of the guilty is important in the interests of the protection of children from sexual abuse.[1] This article is concerned only with the few cases where the evidence presented may be insufficient to withstand detailed expert scrutiny.

In cases regarding illegal images of children, Stage 1 Streamline Forensic Reports (SFR1) are now in regular use for suspects deemed to be of low risk.[2] Their use is designed to reduce unnecessary costs and delay in the criminal justice system by the preparation of a short report that details the key forensic evidence the prosecution seeks to rely upon as agreed facts.

Each SFR1 (MG22b) includes the following detail for each device examined and illegal material identified:

➢ A table giving the total number of recognised illegal images in each category[3] for both accessible and non-accessible material. A summary of the numbers identified as images and as video is also provided. In many cases these have been categorised by matching against the Police Child Abuse Image Database (CAID) created over time by Police analysts.

➢ Up to three representative image examples are provided from each category, moving and still images, with a description including the apparent age of the victim together with image reference and location details to allow for any cross-referencing. The most important aggravating and mitigating features may also be included.

On the basis of the information provided, the defence is required to either accept the findings as fact or notify the prosecution of contested issues. Concerns may relate to the evidence of images reported and / or to matters likely to affect the sentence. Where there are genuine concerns, it is important that these are identified, so that decisions can be taken on further actions.

The grading of IIOC is not a scientific activity but relies upon the judgement of persons carrying out the grading. As such, it can be adversely affected by cognitive bias.[4] Grading relates to both whether the image is indecent and whether it involves a person under the age of 18. Under-estimation of a subject's age may occur.

In deciding whether an image of a child is indecent, age of the subject is a material factor.

In 2014, the CPS provided guidance in the form of a presentation[5] on the principles to apply when categorising indecent photographs of children for the National Hash Set Database Project. An overriding principle applied throughout is the need to use a threshold of judgement that is "beyond reasonable doubt".

The guidance also includes the following instructions:

- Evaluate each photograph on its merits.
- Do not take into account any suspicions you have on the motivation of the suspect.
- In circumstances where there are uncertainties as to the correct category avoid exaggeration and act in favour of the suspect. This is further clarified by the statement that the "categoriser must be sure of their determination".

In addressing issues relating to whether the image is of a child, the guidance requires categorisers to "be sure beyond reasonable doubt" that the person shown is under 18. The CPS presentation acknowledges the dangers of the under estimation of the subject's age. Attention was also given to the dangers of exaggeration of indecency saying that categorisers must be sure that most people would consider the photograph indecent.

To highlight dangers in the categorisation of age, examples are provided in the CPS presentation of images reported to the Internet Watch Foundation suspected to be of children that are in fact photographs of adults. If such images of an indecent nature had originated from a pornographic site, it would be important to establish how they came into the possession of the accused.

Do images meet the beyond reasonable doubt test as to age and indecency?

In relation to indecency the guidance states that any photograph that the categoriser considers borderline should be categorised as indicative/borderline/other notable. Although the photograph may not be illegal in itself, it may be indicative of an interest in children and on a case-by-case basis may be the subject of a charge,

Guidance published by the Home Office funded Forensic Capability Network (FCN) in July 2020[6] emphasises the need for clear, succinct language, to enable the parties to understand the significance of the findings and the defendant to understand what it is they are being asked to agree. The prosecution evidence does not include sight of any of the images categorised as illegal. The defence is limited to the description provided.

Perhaps the most obvious point arising from this guidance, is the risk of a miscarriage of justice if the prosecution grading is incorrect. There is also the possibility that evidence exists helpful to a defence that has not been identified and reported upon in the SFR1.

Scope of the SFR1 can result in evidence helpful to the defence being absent.

The onus of responsibility to challenge evidence presented by the Prosecution falls on the legal representation of the accused. Questions concerning specific matters of detail in the contemplation of the defence may be put to the prosecution who will address the specific points raised in a further report (SFR2).
A response is required of the defence to state which, if any, of the expert's conclusions are admitted.

If the Defence cannot consent to agreeing the contents of the SFR1 by way of admission, they are required to identify the contested issues. This requirement also involves the defendant explaining why he or she does not accept the conclusions.

It may be difficult to interpret the prosecution's report and identify relevant questions without being presented with all the facts in relation to the images referenced in the indictment. It may also be significant to the defence to know how the images came to be on the device. In such circumstances the assistance may be required of an independent expert who can advise on challenges and outline the results that your challenge hopes to achieve.

In these instances, this can only be addressed either by the involvement of an independent expert, with fee approved by the LAA or by agreement with the CPS to view the images at Police premises.

If appropriate, arrangements may be made for the images to be viewed independently and/or that an independent expert should re-examine the exhibit(s) during which process other matters relevant to the defence may be identified.

The interests of justice are well served by an awareness of the limitations of the evidence presented in SFR1 statements. Opportunities and processes exist to address any concerns before deciding to accept the evidence as agreed facts.

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The Law Commission's Consultation on Reform of the Confiscation Regime

Nicola Sharp of Rahman Ravelli details the Commission's proposals for reform of Part 2 of POCA

In 2018, the Home Office commissioned a Law Commission project with the aim of reforming Part 2 of the Proceeds of Crime Act 2002 (POCA).

The aim of the project was to clarify, simplify and modernise the post-conviction confiscation regime contained within Part 2 of POCA. The review was intended to address problems such as the irregular compensation of victims in confiscation proceedings, the imposition of unrealistic confiscation orders, the confiscation regime's ineffective incentives and sanctions, the complexity of relevant legislative provisions and courts' insufficient enforcement powers.

The Law Commission's consultation is now underway. It has begun at a time when the existing confiscation regime is viewed by some as ineffective. At 31 March 2019, the total value owed on outstanding confiscation orders was £2,065,303,000.

The Commission has stated that a desire for change has been prompted by the perceived complexity of the legislation. Its consultation paper considers how the current statutory framework could be changed to:

❖ improve the process by which confiscation orders are made

❖ ensure the fairness of the confiscation regime

❖ optimise the enforcement of confiscation orders

The consultation paper suggests ways in which reforms could be introduced to:

❖ prevent assets from being dissipated before a confiscation order is made

❖ ensure that when confiscation orders are made they are a realistic reflection of what a defendant gained from crime

❖ improve the enforcement of confiscation orders.

Its proposals include:

❖ Introducing new, clearer processes in legislation, procedure rules and guidance about how courts should approach confiscation.
Examples include:
Setting out express statutory objectives of the confiscation regime of depriving a criminal of their proceeds of crime, deterring and disrupting crime and compensating victims.

Removing "punishment" from the objectives of confiscation, so that punitive sentencing and restorative confiscation are clear and distinct parts of the criminal justice process.

Clarifying that sentencing should take place before confiscation proceedings are resolved unless the court directs otherwise.

Improving the process' efficiency by establishing standard timetables for confiscation and introducing a six-month maximum period between sentencing and a confiscation order coming into effect.

❖ Giving the Crown Court the discretion to impose contingent orders when making the confiscation order. If a defendant then fails to pay the confiscation order, the contingent order would allow assets to be claimed in a timely way.

❖ Giving the court discretion to impose financial penalties and forfeiture orders before confiscation proceedings have been resolved, in order for compensation to be awarded earlier in the process than at present.

❖ Having defendants who are sent to prison for failing to pay their confiscation order released on licence (rather than unconditionally) when automatically released half way through their sentence, so they can be returned to prison for continued refusal to pay the order.

❖ Making defendants appearing before magistrates in enforcement hearings provide clearer and more detailed evidence of their financial position if they claim they cannot pay their order.

❖ Creating flexible ways of enforcing orders, such as a judge deciding to pause or reduce the accrual of interest as an incentive for a defendant to keep complying with the order.

Those wishing to submit responses as part of the consultation can do so online or by email or post. A series of consultation events is being held by the Commission until the end of November. The consultation will continue until 18 December 2020. When the consultation period ends, the Commission will examine the responses. It aims to publish its final report, which will include its recommendations to government, in spring 2021.

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Digital Forensics in Employee Wrongdoing Cases

by Alistair Ewing

If data can get in, then data can get out. The explosion of digital technology and innovation has been incredible, and yet has also opened us up to a number of threats - and they aren't always outside our organization.

With the accessibility of so much information, and the ease and ability of moving that data in and out, comes a myriad of challenges. This is the very reason we are seeing so many issues related to cyber breaches of personal health, financial, and identifying information being lost by major entities all over the world. The total damage from these incidents is almost always a matter of how prepared and secure an organization is, but even with the best security, the ethos has changed. Whether the organization is public or private, small or large, it is now understood that when it comes to a data breach by a malicious actor, it is not a matter of if a breach happens, but when.

Exfiltration by Employees has Become Easier

As with data breaches, the same can be said for employee wrongdoing; if data can get in, then data can also get out. Our experts have worked on thousands of cases in which organizations have allowed employees to use their own external hard drives, thumb drives, and cell phone, and it's still relatively common. But we are well past the days of BYOD (Bring Your Own Device) being the only feasible method of malicious data extraction out of an organization. Even if personal devices are not allowed by an organization, and the IT department has safeguards against any foreign device being plugged into a computer or server at the company, there are still a plethora of ways data can be exfiltrated from inside an organization.

Confidential customer lists, proprietary information, and executive strategy documents are now being transferred out of an organization maliciously by employees, or former employees, using filesharing applications, cloud-based services, messaging applications, videos taken of the computer screen right on a cell phone, and personal email accounts.

Every time an application introduces methods to transfer files using a computer, cell phone, or tablet, they increase their potential customer base. Subsequently, the danger of data theft by an employee is greater than ever, if only because the means to do so is so easily accessible and requires such a low level of technical sophistication.

Non-Sophisticated Technology Users on the Attack

Examples abound from the case we have worked that play out this scenario. As a digital forensics firm, we've seen employees steal data by transferring files from a work Skype account to their personal Skype account. We've also seen thousands of emails sent from work email accounts to secret personal email accounts, and even sensitive company data transferred via messaging application by a disgruntled employee to the cell phones of their children to obfuscate the activity.

Employees can even deploy remote access capabilities to computers after their termination date. They can go in and harvest the data they want well after walking out of the building, which, believe it or not, is relatively simple even for a technology novice with modern software applications.

All of the aforementioned methods are at the fingertips of a non-sophisticated technology user. The

ways a technocrat can nefariously extract data are so convoluted and multiplicious that they are truly limited only by ability and imagination. We have seen employees create backups of their entire computer in proprietary software formats so they are essentially hidden from non-forensic review, and then they subsequently delete all of the sensitive information from their machine so it appears "clean." On the surface the employee's computer would not flag any concerns, and the employee could walk right out the door; but that story can quickly change once the company starts seeing their customers being solicited and poached.

Make no mistake, the ability to create a backup like this is possible using any device, including a cell phone. What is preventing an employee from simply creating a backup of all their data, including emails, contacts, and confidential files before turning the phone over to be wiped by the IT department? In almost every instance, nothing.

Why Time is so Important

In many cyber breaches, an organization that is having sensitive data stolen by hackers usually doesn't know it is occurring until weeks or months after the initial breach occurred. The same is true in employee wrongdoing cases. An employee has stolen data and the organization doesn't know until weeks or months have passed. The damage is already done, and that employee is at their new job opportunistically wielding their previous employer's data.

The passage of time harms data. For example, let's play out a common scenario. The computer used to steal data by a previous employee has been given to a new hire. Every moment that computer is in operation it is overwriting unallocated space, often called "deleted space" with new data, truly deleting the forensic artifacts and evidence of wrongdoing that lived there. Without this evidence, the chances of successful litigation are compromised.

Truly, this is a too common scenario that we see. For an organization, it is in their own best interest to preserve the computers, cell phones, and other digital devices. This could mean simply placing those items into secure storage and leaving them untouched for a period of time. Or preferably forensically imaged (copied) so that these devices can be verified in accordance with forensic best practices. This is especially helpful if litigation ensues and expert testimony may be required. Another benefit is that the devices can then be wiped and put back into circulation.

After a Breach or Employee Wrongdoing Incident Occurs

Obtaining the devices and computer is just the first step. If you choose to work with a digital forensics examiner, make sure you understand how they store those devices, because those items are the only true evidence you have and if they get tampered with, hacked or destroyed, your case is gone. Make sure you understand the software and storage options, the costs, and have a good feeling about the examiner. They need to be able to present clearly and easily the technical data found to not only you—to a possible judge or jury.

Gaps in the Law

As it pertains to the scope of criminal law protection for trade secrets there are inherent gaps, of which are about to be amended to provide additional protection for trade secrets. The enhancement to this law is a direct result of the Canada, US, Mexico (CUSMA) free trade agreement. Implemented in a new bill, (Bill C-4) in Canada's Parliament, a trade secret is any information that:

- is not generally known in the trade or business that uses or may use that information;
- has economic value from not being generally known; and
- is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

By law, this definition is quite similar to the federal Security of Information Act which is targeted at preventing foreign espionage. Section 19 of that Act defines a trade secret as any information, including a formula, pattern, compilation, program, method, technique, process, negotiation position or strategy or any information contained or embodied in a product, device or mechanism that:

- is or may be used in a trade or business;
- is not generally known in that trade or business;
- has economic value from not being generally known; and
- is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

When an employee is aware of the rules and understands how to go around them to capitalize on the information they seek, rules will be broken. Especially if that information is accessible, to some degree, for them to obtain and copy. When theft occurs, having a case and being able to prove your case are two different things. Spoliation of evidence happens every day, which is why working with third-party experts can be so useful to walk through the process of what's needed for litigation or potential litigation.

Never underestimate the human imagination. Even with the most elite of internal information technology experts on staff, where there is a will, there is a way, and employees will, and do, take advantage of company data.

Alistair Ewing
Technical Lead in London, UK
Alistair Ewing has over eight years of experience in Digital Forensic Analysis, Data Recovery, Mobile Phone Forensics, Litigation Support, and has served as an Expert Witness in criminal and civil cases in the UK. Qualified as an expert witness for some years he have presented evidence in tribunals, civil and criminal courts in the UK.
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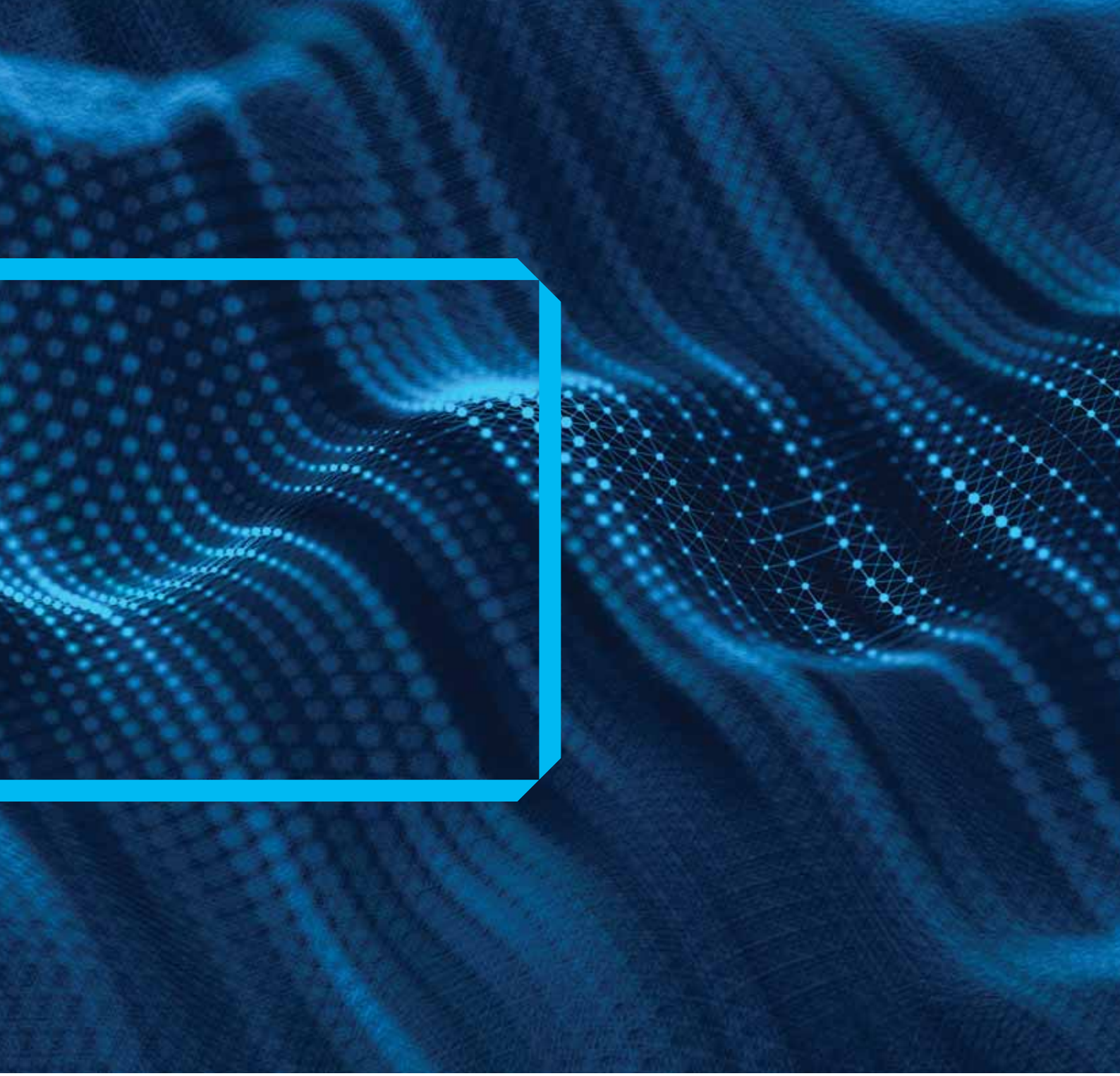

When complexity needs clarity.

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DNA Gets Around

How much do we really know about what is happening when a person handles an object and transfers DNA? Consultant Forensic Scientist, ***Sue Carney****, takes a look at the current state of scientific knowledge and explains what that means for DNA evidence in criminal casework*

I am frequently instructed by the defence in criminal cases in which the prosecution intends to rely on "Touch DNA" evidence. Much has previously been written on the limitations of this type of DNA evidence, and I will inevitably reiterate some of those points here. In writing this article though, I intend to examine the "Touch" aspect of this type of evidence in more detail; the origins of the term, the associated science, and whether touch is an appropriate word to use at all.

In the early days of Short Tandem Repeat DNA profiling,[1] only DNA-rich samples consistently produced useful results. These included reasonably-sized (think 10 pence coin or larger) DNA-rich body fluid stains; and not every body fluid either. Blood, saliva, and semen are amongst the richest DNA sources, and for that reason, were the most commonly tested sample types. Sweat and urine incidentally, are amongst the relatively DNA-poor body fluids. Tissue samples, such as skin fragments, and the material associated with the roots of pulled hairs can also be considered DNA-rich and were amongst the usual sample-type repertoire of that period.

In addition to the obvious question of the source of a particular sample, higher questions considering modes of transfer of DNA can also be addressed. Whether a piece of DNA evidence can assist in addressing these activity level issues depends on the type of sample and the case circumstances. Results from blood samples, for example, might be useful in addressing whether specific violent actions resulted in the transfer of particular patterns of blood. A DNA profile from semen might provide significant evidence in a case seeking to address whether particular sexual acts were performed. If specific actions cannot be addressed, the presence of body fluids might support the suggestion of contact, or at the very least, a close association with or presence at, a location. This simplified summary does not begin to scratch the surface of the complex considerations of identification, attribution, distribution, persistence, and the framework of circumstances specific to the case that are also involved in the formulation of an expert opinion in such cases.

These types of questions continue to be addressed using current STR DNA profiling systems. However, the evolution of the technique, resulting in the emergence of highly sensitive systems, has prompted the introduction of a new type of question that DNA evidence is increasingly requested to address. Welcome to the realm of "Touch DNA".

Prior to the introduction of today's highly sensitive STR system, generically known as DNA 17, the former Forensic Science Service had been using a technique known as *Low Copy Number* throughout the early 2000s to achieve levels of sensitivity sufficient to obtain DNA profiles from handled items. This was considered a specialist technique, with a price tag to match. It was used only in carefully considered cases; usually serious crimes such as rape and murder, or in cold cases where all other DNA opportunities had been exhausted. The interpretation of these results was carried out only after specialist training and competency testing of LCN-reporting scientists

additional to that of the reporter of standard DNA profiling evidence.

Both specialist LCN and routine DNA profiling techniques use the same chemical processes and examine the same regions of DNA, and in these respects, are comparable. LCN and other Low Template DNA profiles differ from routine DNA profiles only in the additional factors that must be considered in interpreting this type of result. Low template profiles are affected by a variety of artefacts that can be collectively described as 'stochastic effects'. The main problems are firstly, a general difficulty in determining which are real components within such profiles, due to the possible presence of 'rogue components' that did not originate from the tested sample. Secondly, the frequent and random absence of components from a profile, despite their presence in the sample, can also prove problematic and may render some results of limited or no value. Finally, uncertainty as to whether a DNA profile represents DNA from one, or more than one person, is common. And, if a mixture of DNA *is* indicated, the first two issues mean it will likely be impossible to determine how many people's DNA is represented.

If, on consideration of these factors, a result is considered suitable for comparison to a reference sample, then a match must still be considered with some caution. Attribution of a low level DNA profile to a particular body fluid is not usually possible. This has implications for any activity level interpretation of such a DNA match in this context. Generally, it is not possible to determine specifically how or when matching low level DNA has been deposited. Further, if there are indications of multiple sources of DNA, then it is not possible to say how or when each individual contribution came to be present on the sampled item. In my experience as an LCN reporter, a large proportion of these results proved inconclusive due to these complex considerations. These complexities did not, however, prevent activity level considerations in some circumstances, and on occasions when activity level conclusions with any probative value were reached, then these were presented with caution, accompanied by multiple caveats. The value in other LCN cases was often in the provision of considered intelligence information in the form of investigative conclusions, delivered on the understanding that should they lead to the identification of any suspect, the DNA result itself has little evidential significance and has served only as an investigative lead.

Given its limitations, the validity of LCN was challenged in the early 2000s, resulting in temporary suspension of the technique within the FSS for the duration of a review of the method. Professor Brian Caddy's 2008 report[2] confirmed the validity of LCN DNA profiling and its admissibility as expert evidence, provided that evaluations considered appropriate limitations and conclusions were presented with appropriate caveats.
Over time, cases requesting DNA profiling to address a person's alleged handling or contact with an item became commonplace. Improvements to the *SGM Plus* chemistry meant that these cases began to be tested via standard DNA profiling, rather than specialist routes, which risked low level profiles, often at the limits of detection, being reported in support of actions such as handling, but without proper consideration of the limitations previously mentioned. It had become clear that the sensitivity of routine DNA profiling was rapidly catching up to the enhanced sensitivity of LCN and similar techniques, and there was no stopping the tide of "Touch DNA" requests. An FSS-wide review of reporting meant that training was rolled out for all DNA reporting scientists, preventing any overenthusiastic interpretation of low level matches.

The implementation of DNA 17 in 2014 sealed the fate of low template techniques. By then, LCN was already redundant following closure of the FSS between 2011 and 2012, and other low template techniques have now been largely superceded by the superior sensitivity of the various DNA 17 systems[3]. Low template-type profiles are now regularly produced during routine DNA casework and often used to address such issues as handling or contact. Indeed the increased sensitivity of DNA 17 has resulted in an increased incidence of low level, complex mixtures of DNA, reflecting an increased detection of what could be described as background DNA. In other words, the small amounts of DNA quietly existing on surfaces in areas populated by people. Indeed, research has demonstrated a gradual build up of owner's DNA on a regularly used or handled object. Further, when ownership changes, the predominant DNA soon switches over too and eventually the original owner's DNA is replaced by that of the new owner.
In 2014, the DNA reporting community was ready for the changes brought by DNA 17 and by then, the vast majority of reporting officers was able to identify low template profiles and was aware of their limitations. Police continue to request "Touch DNA", despite failed attempts to promote alternative names or to lose this label altogether. The trouble is police and lawyers seem to increasingly assume that "Touch DNA" is a particular type of DNA that can be specifically identified. This wouldn't be a problem if this assumption was true, but it is not.

There is an added complication. DNA can easily be moved around from one surface to another via a vector such as some other object, surface or person. The suggestion of indirect transfer of DNA was first proposed in the scientific literature in 1997[4], has since been confirmed in other studies, and is an additional factor for consideration in activity level interpretations of DNA profiles. This is a huge spanner in the metaphorical works when it comes to the "Touch DNA" label. It turns out then, that "Touch DNA" might not have been deposited by touch at all.

Indirect transfer was initially thought to happen infrequently and it was assumed that direct contact would always result in deposition of a greater amount of a person's own DNA than the DNA of anyone else

that might be present on their hands. This was partly based on the concept of "shedder status"; the idea that a person has an inherent ability to deposit DNA to a particular extent — 'good shedders' depositing DNA in greater quantity than 'poor shedders.' Scientific knowledge is not static, and studies have refuted these assumptions. Shedder status, if it exists at all, has now been shown to be a transient quality, altering over time, such that there may be no such thing as a 'good shedder'. In what is being referred to as "contributor inversion", some studies now demonstrate that when handling an item, a person can deposit more of somebody else's DNA than their own. How frequently this happens or why, have yet to be clearly established.

What does all this tell us then, about what is happening when a person touches an object and transfers DNA from their hand? Where is the DNA coming from? The non-expert often imagines the process as a transfer of skin cells or sweat. Sweat itself contains relatively little DNA and cells from the outer layers of the skin have been keratinised — a process in which the contents of the cell, including its DNA, are replaced with keratin, the same protein comprising hair and nails — which renders the skin waterproof.

If sweat and skin cells are not the main sources of DNA transferred from the hands, then what else might be happening? Numerous studies over the last twenty years or so provide suggestions.

Sebaceous fluid, excreted from sebaceous glands present in high numbers on the face, is looking like a good candidate for involvement in this process. The suggestion is that people frequently and unconsciously touch their face, picking up sebaceous fluid which carries DNA within it. Cell free nucleic acids (CNAs), shown to be present in the circulation, and suggested to originate from the destruction of old cells during normal growth, are also thought to be involved. It may be that free fragments of DNA find their way into the sebaceous fluid and are transferred as described. Body fluids, such as saliva, might also play a part in these complex processes. How often do people bite their fingernails or chew their fingers? Saliva might be on the hands more often than is realised.

Many of the studies investigating transfer of DNA from the hands have sought to mimic real-life conditions as closely as possible. Variables including hand washing interval, the sex of participants, and even the use of dominant versus non-dominant hand have been shown to affect results.

In trying to evaluate a matching low level DNA profile in addressing an activity level issue, context is everything. Forensic scientists refer to conditioning information as a term for the framework of case circumstances and conditions that will impact the extent of DNA transfer in that situation. For a balanced evaluation, one must also consider opportunities within the framework of circumstances, for innocent transfer of DNA. In discussing these, the expert must acknowledge the distinction between situations that are possible and those that are probable.

I was once highly critical of a prosecution-instructed expert's interpretation during review of a DNA case at the post-conviction stage. He had stated that a particular DNA profile was as he "expected from a body fluid." The profile in question was low level, at the extreme limits of detection and comprised only three components considered reportable. This was not the type of result usually expected from a source of abundant DNA such as body fluid and in my opinion, the comment had had a particularly misleading effect on the presentation of the DNA evidence at the original trial.

There are dangers to a lack of context. Some years ago, whilst still FSS-employed and prosecution-instructed, I was allocated the case of a pair of adult knickers that had been found in apparently suspicious circumstances in a children's clothing store changing room. As an 'undetected' case with no named suspect, the item had been examined by an FSS team devoted to intelligence-type cases, where the main aim was to find a source of DNA, generate a DNA profile and load this to The National DNA Database to identify the source of the DNA. This was usually the extent of the strategy in such cases.

The knickers in the case has been screened for body fluids, semen found in the crotch, a DNA profile obtained and this was about to be loaded to the NDNAD with the assumption that the profile might identify a sex offender whose behaviour included masturbating in children's changing rooms. Nobody had considered the wider context of the exhibit. Why had it been left in a changing room? And, how had the semen been deposited?

An additional examination at my instruction, of extracts from the crotch revealed large quantities of cells in addition to the sperm that had already been found. Further DNA profiling identified a female DNA profile attributable to these cells, suggesting that the detected semen had likely drained into the crotch from the vagina of a woman wearing the knickers at some point following sexual intercourse with a man who had likely never entered the children's changing room, nor even knew of its existence. This case could have ended very differently without this consideration of context.

Given the difficulties described here in dealing with allegations of touch or handling, and the associated limitations of low level DNA results, prosecution-instructed experts sometimes decide not to address the overriding activity-level issue at all, leaving it for the court to make their own decision, based only on a statistic but with little other context. In my opinion, this is simply not on! It leaves the court in an impossible situation and risks their over-reliance on a piece of evidence that might hold limited or no significance if its true context were revealed.

When prosecution instructed experts do address the issue of how DNA might have been deposited, then I have observed a number of issues.

If the accused has maintained a "no comment" stance, it is generally not wise to attribute a particular scenario to the defence. Prosecution-instructed experts will often state that they cannot fully evaluate a DNA match in the context of "no comment", yet they can make an observation, usually along the lines that the matching profile is "as expected", if the accused handled the exhibit and deposited their DNA. Might this be misleading if the court fails to consider any other scenarios and take this as the expert's bottom line on the matter? Might the expert's statement in this format, imply to the lay-reader that handling is the most likely explanation for this type of evidence?

Solicitors faced with the prospect of expert DNA evidence in a case should seek initial advice. Most defence-instructed experts offer a free assessment of your case along with an estimate of their costs, which may inform you of whether there might be merit in instructing a review of the DNA evidence, or whether any review is unlikely to be useful to your client's case. Generally, it is unwise, (read risky), to rely solely on a DNA match result presented in a Streamlined Forensic Report, SFR1, since these provide only source level conclusions, offer no advice on activity-related issues, such as how the DNA might have been deposited, and are not intended for evidential use. A DNA statistic with no other context is not suitable evidence upon which a prosecution case should rely without additional context.

About the author

Sue Carney has been an expert in DNA and body fluids evidence for the past 20 years. She was employed by the former Forensic Science Service until closure of their Chorley laboratory in March 2011. Since then, she has been the proprietor of Ethos Forensics, offering forensic biology consultancy and training. Sue is frequently instructed by the defence in criminal casework, and has given expert testimony at court on many occasions. She is a member of the Chartered Society of Forensic Sciences, was awarded Chartered Forensic Practitioner status in 2019, and teaches forensic science at the University of Central Lancashire.

Sue can be instructed in all casework matters relating to DNA and body fluids evidence.
For a no cost, no obligation quotation, contact her at **sue.carney@ethosforensics.com**

References

1, 1994 saw use of 'Quad', an early STR DNA profiling system, superceded by Second Generation Multiplex (SGM) in 1995, along with creation of The National DNA Database. SGM Plus followed in 1998/9. All were superceded by the introduction of DNA 17 in England and Wales in 2014.

2, https://www.gov.uk/government/publications/review-of-the-science-of-low-template-dna-analysis

3, Two DNA 17 systems are in routine use by police-instructed forensic service providers in England and Wales, ESI 17 manufactured by Promega, and AmpFLSTR™ NGM SElect™, manufacture by Applied Biosystems

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How to Become a Digital Forensic Investigator in 2021

Computer forensics, especially digital forensics, is a budding domain of cybersecurity. The professionals working in computer forensics are usually known as computer forensic investigators, computer forensics specialists, cyber forensics experts, or digital forensics analysts. They have the responsibility of uncovering the procedure behind a security incident. A digital forensic investigator backtracks the footprints of the lawbreaker to extract digital artifacts. These pieces of evidence then help in retrieving useful data to support the legal proceedings. Usually, digital artifacts consist of computer files, hard drives, emails, images, and other storage devices.

The digital forensics can be divided into several sub-domains which deals with database forensics, malware forensics, network forensics, mobile forensics, cloud forensics, and others. The cyber forensic experts are required in multiple types of organizations, including government agencies (local, state, and federal), accounting firms, law firms, banks, and software development enterprises. In general, organizations having computer systems need a digital forensic investigator.

All you need to know about Digital Forensic Investigators

Cyber forensic expert

A cyber forensic specialist is a professional responsible for examining a cybercrime. The expert collects and analyzes evidence from the targeted and suspected digital information assets. Notably, they usually deal with the aftermath of a security incident.

Responsibilities of a Forensics Expert

The key responsibilities of a forensics expert include:

- Investigates a security incident or data breach
- Recovers data from digital storage media
- Reconstructs deleted and damaged files and data
- Identifies the digital information assets targeted during the attack
- Evaluates the scope of the attack
- Extracts digital evidence for legal proceedings
- Reports findings to superior authority
- Documents all the findings

Computer Forensic Expert Salaries

As per PayScale, the average salary of a forensic computer analyst is £55.000 ($72,869) as per 2020 figures.

Requirements to Become a Forensic Expert

The eligibility criteria for a cyber forensic expert can vary widely. Private firms would love to hire a candidate with a relevant bachelor's degree, while law enforcement agencies would prefer someone with hands-on experience.

Degree Requirements

- Bachelor's degree in Computer Science or Engineering
- Bachelor of Science in Cyber Security (preferred)
- Master of Science in Cyber Security with Digital Forensic specialization (preferred)

Work Experience

- For internship no experience required
- For entry-level forensic analysts – 1 to 2 years of experience is required
- For Senior Forensic Analyst – 2 to 3 years of experience is the norm
- For Managerial level – more than 5 years of experience

Hard Skills

- Knowledge of computer networks – network protocols, topologies, etc.
- Knowledge of various operating systems – Unix, Linux, Windows, etc.
- Familiarity with different computer programming languages – Java, Python, etc.
- Understanding of computer hardware and software systems
- Expertise in digital forensic tools – Xplico, EnCase, FTK Imager, and hundreds of others
- Cloud computing

Soft Skills

Forensic experts must have report writing skills and critical thinking.

How to Become a Digital Forensic Investigator?

EC-Council's Computer Hacking Forensic Investigator (C|HFI) helps the participants to develop skills needed to become a digital forensic investigator. This ANSI accredited program imparts all the skills stated in the table. Apart from that, the attendee will be able to perform data acquisition, data duplication, analysis of hard disks and file systems, dealing with anti-forensics techniques, and many other important tasks after the completion of the training. It is a hands-on program, which ensures that the trainee develops the practical skills over theoretical knowledge. Join the C|HFI program today!

Faqs

What is a digital forensic investigator?

A digital forensic investigator is a skilled professional who works with private corporations and law enforcement agencies to retrieve evidence from a crime scene, i.e., after a security incident.

Forensic Imagery Analysis - The Camera Can Lie

by Clive Evans - Director, Videnda Imagery Analysis Ltd

Whilst modern life bombards our eyes with various sources of imagery, whether it be television, advertising or social media, there is an inherent danger in taking these images at face value. Within the legal framework this familiarity with recorded imagery may lead to barristers and jury members coming to unsafe conclusions in respect to the imagery evidence brought before them. All may not be quite as it seems and it is the role of the trained and experienced imagery analyst to assist the Court in understanding what can be reasonably learned from the imagery evidence and to provide an objective, informed and impartial assessment.

One of the most significant challenges in relation to imagery evidence is to educate Courts and the legal community in general as to the complexity of digital image data. Each stage of the process, from initial data acquisition to presentation at Court, requires the careful attention of properly trained and experienced personnel. In simple terms, the difference between getting the process right and getting it wrong is that data of genuine evidential value can be lost.

The old adage of "a camera never lies" needs to be treated with caution. There is real danger in considering an image at face value rather than giving due consideration to the complex reality of how images are created. It is important to remember that any recorded image, whether it be derived from a satellite, mobile phone, CCTV camera or indeed any other device, is simply the best attempt by that imaging device to record a three dimensional world in a two dimensional form. The extent to which that image accurately represents the detail of the recorded scene is dependent on a complex amalgam of factors that have to be considered by the imagery analyst. Some of these factors are fundamental principles that can be taught. However, there is no academic shortcut to experience and in the world of imagery analysis there is no substitute for the invaluable experience of years of exposure to different forms of imagery and different types of subject matter. Over and above the necessary training and experience, there are also some other important factors that are key to making a successful imagery analyst, namely natural aptitude and, that most important of qualities, an enquiring mind. These two factors cannot be taught. It is evident that some people are simply not able to view images in anything other than a holistic fashion rather than looking into the detail and being able to break an object or scene down to its component parts. As for the enquiring mind, curiosity is a vital ingredient in the pursuit of the story being told by an image. What is that feature? Is it consistently presented on multiple images? Why does the tone of the object vary? Why is that feature there? Is it a genuine item within the scene or is it simply a digital artefact? It's important to be curious.

In today's society we are all familiar with the fact that any given image can be viewed in a variety of ways such as a television screen, a computer monitor or perhaps as a printed image. Whilst all these forms of media are able to present the same basic image, the level of detail and the extent to which features are accurately represented can be dramatically different. From a forensic point of view this is not just important, it is vital in ensuring that the authenticity of an image can be determined. The key phrase is Original Data. In the specific case of CCTV evidence, best practice stipulates that the data should be recovered from the scene in its original, or native, format. However, given the vast array of different CCTV system manufacturers and the bewildering range of file formats and playback software employed by these systems, it is not practical or indeed feasible for solicitors, barristers and Courts to view the evidence in its original form. For this reason it is common practice for the police to supply the Defence with a DVD playable copy of the CCTV imagery. Whilst the imagery in this format is adequate for the purposes of general orientation, there are inherent dangers in making any detailed interpretation of the presented detail for the following reasons:

Aspect Ratio – The aspect ratio is the relationship of the width and height of an image. If an image is not displayed with the correct aspect ratio then the proportions of objects will be distorted. As an example, there are an increasing number of High Definition (HD) CCTV systems available that correctly display the imagery with a 16:9 widescreen type display. When this data is transcoded into a DVD playable format, the aspect ratio may be altered to a 4:3 display. In this scenario, the effects of the distortion can misrepresent a person's build or perhaps the shape of their face.

Resolution – The resolution of an image refers to the number of Picture Elements (Pixels) in an image. As a pixel is the smallest component part of a digital image, the level of detail presented is therefore dependent on the size and number of available pixels.

Transcoding to DVD format results in a significant reduction in resolution.

Compression - CCTV systems are not generally designed with forensic analysis in mind. Whilst the cameras connected to the system may be perfectly capable of providing very high quality, highly detailed imagery, the actual quality of the recording is largely determined by the data storage capacity of the Digital Video Recorder (DVR) and the fact that the system will be recording 24 hours a day, 7 days a week. In order to manage the high levels of data involved, a data reduction process is applied to the recording which is known as compression. There are various methods of compression that can be employed and some are more aggressive than others. The end result is an approximation of the image initially captured by the camera. Over and above any compression applied to the original data, the process of transcoding to DVD playable format incurs a further degree of compression.

DVD playable copy – 720 x 576 resolution

In this example (above) the spatial proportions have been distorted by an incorrect aspect ratio and the level of presented detail suffers from reduced resolution and compression.

Compared to the original HD recording (below), 83% of the data has been lost by the conversion to DVD playable format.

Original Data – HD 1920 x 1080 resolution

Faces are intentionally pixelated.

The determination of colours on a recorded image can also be problematic. For this reason, a forensic imagery analyst will often talk in terms of objects being light toned, mid toned or dark toned. Colour rendition can be affected by a variety of factors including the colour calibration of the camera, the extent of compression applied to the recording, the ambient lighting conditions and the particular form of energy being recorded.

The human eye relies on the optical band within the electromagnetic spectrum. Visible light, extending from Violet to Red, allows us to perceive the world in the colours that are familiar to us. In daylight conditions, or areas of strong artificial lighting, a CCTV camera will generally record conventional, optical, colour video imagery. However, when light levels reduce, the camera will be unable to function as an optical sensor but instead will record the band of energy that sits beyond the red wavelengths known as Near Infrared (Near IR). Near IR does not contain any colour information and an imagery analyst must be aware that this particular form of imagery operates to a different rule book in terms of presenting tonal values.

The following example (below) shows an image that is purely Near IR. The image is monochrome (black and white) and the tonal variation relates to differing levels of reflected Near IR energy. In simple terms, the jacket worn by the subject in the scene can be described as being light toned overall.

In the next image (below), the same subject can be seen seated at the left of the image and his jacket now presents as a shade of green. It's interesting to note that the police officer's uniforms also appear green. As we know that UK police officers do not wear green uniforms, we have an indication that the colour values in this image are unreliable. This is an example of an image that records a combination of colour/optical data and also an element of Near IR that skews the colour presentation.

The final image (above) is a conventional colour video (optical) image and the same subject is recorded being led away by the police. We can now see the "true" appearance of his jacket and it appears to be a wax jacket similar to the Barbour style.

In all three images we see the same subject wearing the same jacket but the presentation of that garment is dramatically different. In Near IR conditions it is common for dark toned materials to present as having a complete tonal reverse. However, this is not the case for all dark toned garments as the Near IR response is dependent on various factors including the type of material and the dyes used.

This is an example of the potential dangers in supplying a Jury with an image of the offender and an image of the suspect and expecting those Jury members to make an accurate assessment of the imagery evidence. Based on this example, it would be tempting for the Jury to say that the police had arrested the wrong man because the offender's jacket was white!

Imagery evidence is an ever increasing aspect of the judicial process as more and more potential sources of imagery become available. But, as we have just seen, in the complex world of forensic imagery analysis there are a vast number of considerations that have to be made in order to determine the extent to which any image can be considered as a reliable, faithful and authentic record of that which it purports to represent. In most cases, if imagery evidence is put before the Court, regardless of the subject matter, it is fundamentally important that the Court is given the opportunity to hear the opinion of a qualified and experienced imagery analyst. Because the camera can lie.

Clive Evans
Director, Videnda Imagery Analysis Ltd

Cell Site Evidence: Expert or Not?

In R v Andrew Turner [2020] EWCA Crim 1241 the Court of Appeal considered the issue of when a professional witness crosses the line and gives expert evidence, in the context of mobile telephone analysis. The appeal concerned a conspiracy to supply class A drugs, the prosecution relied on mobile telephone and surveillance evidence. The appellant was said to be a driving force behind the conspiracy and that various incriminating mobile telephone numbers could be attributed to him.

Routinely police officers are called upon to give expert evidence as to the nature of drugs supply, terms associated with supply, valuations of drugs and so on. Increasingly the defence is met with professional witnesses who act as mobile telephone analysts for police departments. Care should be given by those who defend as to the exact nature of the evidence given by such witnesses, are they just analysing data or do they trespass into expert evidence and provide opinions on matters they are not qualified to do so?

In this appeal, at the trial the defence accepted attribution of some relevant mobile numbers but denied others, details as to which numbers were accepted were provided to the prosecution at the outset of the trial. The analyst witness then conducted co-location analysis to demonstrate the frequency with which accepted numbers and disputed numbers were in the same or similar places at the same or similar times. She also performed correlation analysis of the location of masts used by disputed numbers compared with surveillance sightings of the appellant. A second report was prepared by the analyst within the trial, supporting the attribution of certain numbers to the defendant. The defence objected to the introduction of such evidence, an objection being that it was expert opinion evidence, by somebody who is not an expert. The trial judge allowed the evidence, on the basis that it was not expert evidence; it was merely the collection and analysis of call data, including co-location and correlation analysis.

The analyst in evidence went beyond simply presenting analysis of call data on a particular phone and the location of the relevant telephone mast/cell involved. The analyst strayed into giving evidence as to coverage of a possible mast, in relevant diagrams prepared by her she used terms such as "serving mast." Evidence of a mast that might or did serve a particular location, eg a defendant's home address, is giving evidence of coverage of a particular mast, and is as such expert opinion evidence. The Court of Appeal found these were terms of art in the context of cell coverage and the use of such terms was to be restricted to a mast, which had been confirmed as a mast covering a specific location such as a house by, for example, a radio frequency survey. It was conceded that her use of those terms was wrong and, if and insofar as, by using them, she had conveyed the view that she could and did confirm that the appellant's address was certainly covered by a particular mast that was evidence she was not entitled to give.

However, in cross examination, when she was asked questions which might have required her to express an opinion about cell sites, she declined to do so – in-

dicating that these were matters for Miss Mounsey (a radio propagation survey expert). The analyst also said in cross examination that unless it had been confirmed by someone else (such as Miss Mounsey), it could not be said that a particular mast served a particular location. The analyst made it clear in cross examination that any reference in her evidence in chief to coverage was confined to whether there was coverage or not, rather than particular masts covering particular locations. The Court of Appeal concluded that the trial judge had not erred in holding that the analyst's evidence was not expert evidence and, insofar as she referred to "home serving masts", the jury could not have been in any doubt about the fact that she could not give any expert evidence about coverage of a particular location.

When confronted with evidence from analysts, thought should be given as to whether the analyst simply assembles and portrays call data evidence for the purposes of supporting the attribution of a phone to a specific person. Or whether they stray further into interpretation of such analysis, or venture into areas such as mast coverage. Clues to look for are terms used by an analyst such as 'serving mast', 'home mast', 'covering mast'.

About the author
Rajinder Gill, Barrister
Rajinder Gill is an experienced specialist in serious crime and regulatory law who is regularly involved in high profile and complex cases attracting both national and local media coverage. He has been instructed in a wide range of cases including murder, multi million pound frauds and, organised criminal activity. A committed, forceful but measured jury advocate, he is dedicated in his preparation but also prides himself on being friendly and approachable. As well as serious crime and fraud, he has experience in professional discipline matters having represented a number of nurses, social workers and, other professionals before their regulatory bodies.

Areas of expertise include cases involving children and vulnerable witnesses, cases involving serious organised crime including cell site and mobile telephone evidence. Rajinder often appears alone against leading and junior prosecution counsel together.

Instructions in 2020 include two multi handed county line drug conspiracies each involving around 180 000 pages of evidence, a multi handed firearms conspiracy and, a historic sex case involving multiple allegations of buggery and indecent assault.

Contributory Negligence of a Passenger - Seatbelts and Alcohol

by Andy MacDonald, Solicitor for Digby Brown in Glasgow

*The recent case of **Campbell v Advantage Insurance Co Ltd** [2020] EWHC 2210 (QB) has highlighted and discussed these two key areas where contributory negligence may apply against passengers who have been injured in a road traffic collision.*

In *Campbell*, a rear seat passenger was seriously injured following a high speed head on collision. The claimant had been driven to a nightclub by the defendant, whose brother was also in the vehicle. All three had been drinking prior and continued to drink at the nightclub together. After a time, the claimant required to be assisted out of the club and was placed in the defendant's front passenger seat. His seatbelt was fastened by the defendant's brother, he vomited out of the car door, and then he fell asleep. The defendant and his brother went back into the club. They continued drinking for a further hour, at which point they returned to the claimant. He was still asleep in the car. The brother went back into the club and when he returned, the car was gone. At 03:53, the car was involved in a head on collision with an articulated lorry. The defendant was killed outright and the claimant was discovered in the rear of the car. He had survived, but had suffered serious head injuries.

Primary liability was admitted, however contributory negligence was alleged against the claimant on two bases:
(i) The claimant allowed himself to be driven by the defendant, whom the claimant knew or ought to have known was intoxicated and unfit to drive.

(ii) The claimant had failed to wear a seatbelt.

The accepted position in law is that the burden of proof shifts to a defendant where contributory negligence is pled against a claimant.

A Drunk Driver's Passenger

The defendant in Campbell had been using both cannabis and alcohol. At the moment of impact, neither the claimant nor the defendant was wearing a seatbelt. Collision Reconstruction experts agreed that the claimant was likely to have been lying across the rear seats at the time of the collision.

Judge Robinson required to assess how the claimant had arrived in the rear seat of the car from the front. He determined it was most likely that the defendant had assisted the claimant into the rear seat. This led to the issue of capacity arising:
(i) Did the claimant have capacity to consent to removing his seatbelt and moving into the back seat?

(ii) Did the claimant have capacity to consent to being driven by the defendant?

Judge Robinson noted that the starting point is the presumption of having capacity (Mental Capacity Act 2005, Section 1(2)). Thereafter, the process must be time and issue specific. In his view, the evidence showed that the claimant was aware that the defendant had been drinking. They had been drinking together in large quantities for some time. He concludes, following Section 3 of the 2005 Act, that the claimant had capacity to consent to moving from the front to the rear seat of the car and, therefore, "he also had capacity to consent to being driven in the car." Judge Robinson ultimately concludes that the claimant *"was aware that the defendant had consumed so much alcohol that his ability to drive safely was impaired."*

The leading authority in this area is *Owens v Brimmell* [1977 QB] 859. Watkins J states at pages 866G-876A: *"a passenger may be guilty of contributory negligence if he rides with the driver of a car whom he knows has consumed alcohol in such quantities as is likely to impair to a dangerous degree that driver's capacity to drive properly and safely. So too may a passenger be guilty of contributory negligence if he, knowing that he is going to be driven in a car by his companion later, accompanies him upon a bout of drinking which has the effect […] of robbing the passenger of clear thought and perception and diminishes the driver's capacity to drive properly and carefully."*

Judge Robinson considered the Court of Appeal's judgement in Booth v White [2003] EWCA Civ 1708 where it was *"accepted that Mr Booth could not rely on his own drunkenness."* This matter was treated as an objective test in Booth: *"he should approach the case by assessing what a reasonable man in Mr Booth's shoes would have done."* This application led to no finding of contributory negligence in Booth, as the wife of the claimant stated that the defendant seemed *"normal, fine"* at the time.

Applying this principal to *Campbell,* Judge Robinson considered that a reasonable man would have concluded that the defendant had consumed so much alcohol that his ability to drive safely was impaired, and that the claimant was contributorily negligent.

Senior Counsel for the claimant attempted to counter this with reference to the recent case of *Spearman v Royal United Bath Hospitals NHS Foundation Trust* [2017] EWHC 3027, which was distinguished by Judge Robinson. In his view, accepting Spearman as a relative comparator of Campbell would result in the unreasonable position that *"a mildly drunk person might be guilty of contributory fault for making an unwise decision whereas a person who had deliberately consumed so much alcohol that they are unable to appreciate the foolishness of their decision is in a better position in law."*

Wearing a Seatbelt

The primary authority in this area is *Froom v Butcher* [1976] QB 276 in which Lord Denning states at pages 295G to 296F: *"in so far as the damage might have been avoided or lessened by wearing a seat belt, the injured person must bear some share. […] a driver may have a duty to invite his passenger to fasten his seat belt; but adult passengers possessed of their faculties should not need telling […] If such passengers do not fasten their seat belts, their own lack of care for their own safety may be the cause of their injuries."*

Whilst *Froom* indicates that the failure to wear a seatbelt may be a factor in determining contributory negligence, an important question must be answered: would it have made a difference? Lord Denning offers a suggestion of applicable deductions:

- Where a seat belt would have entirely prevented by the wearing of a seatbelt, a reasonable contributory negligence deduction would be 25%.
- Where an injury could have been reduced, a 15% deduction would be appropriate.
- Where the wearing of a seatbelt would have no bearing on the nature and extent of an injury, no reduction in damages would be appropriate.

It must be remembered, however, that these are not prescriptive and that a Judge or Sheriff may determine a different deduction base on the facts and circumstances of individual cases.

The claimant and defendant in *Campbell* had each instructed experts to consider the matter and they did not agree on whether a seatbelt would have improved the claimant's chances of a lesser injury. The evidence led by experts at trial determined that the claimant would probably have struck his head on the back of the front passenger seat, even if he had been wearing a seatbelt. It is the head injury that was primarily being considered. Judge Robinson considered that the wearing of a seatbelt would not have made a difference such that the claimant's injuries would have been less severe.

Degrees of Fault

Judge Robinson lists a number of cases in assessing contributory negligence in Campbell.

- In *Owens v Brimmel*, contributory negligence was assessed at 20%.
- In *Meah v McCreamer* [1985] 1 All ER 367, contributory negligence was assessed at 25% on the basis that the plaintiff ought to have known that the defendant was not fit to drive.
- In *Stinton v Stinton* [1993] P.I.Q.R. P135, contributory negligence was assessed at 1/3. In this case, two brothers had been drinking together from 1930 until 0300. The Judge was unable to discern who had been driving during the day, but considered that the passenger ought to be considered as blameworthy as the law would allow, *"just short of direct participation in the driver's actual performance."*

In *Campbell,* Judge Robinson considered that there was no implicit evidence that the claimant intended to be driven home by the defendant from the club. The claimant must have known, however, that the defendant had drunk a considerable amount and would not be fit to drive. Ultimately, Judge Robinson determined that the claimant should be found 20% contributorily negligent.

Practice Points

Campbell highlights and affirms some key principles that must be considered where a plaintiff or pursuer has failed to wear a seatbelt or has allowed themselves to be driven by someone under the influence of alcohol or other substances.

With regard to the wearing of a seatbelt, the determining factor remains whether and to what extent the wearing of a seatbelt would have on the nature of the injuries sustained. Lord Denning's guidelines remain a useful starting point and were referred to by Senior Counsel for both parties in *Campbell*. It follows that the application of the facts against a scientific background may assist a fact-finder in determining the question of the mitigating effect (or lack thereof) of wearing a seatbelt.

Where alcohol is involved, it must be determined if the plaintiff or pursuer knew or ought to have known that their driver was intoxicated or otherwise incapable of driving safely. This was treated as an objective rather than subjective manner, following the position in Booth. The question is, would a reasonable man

have recognised that the driver was intoxicated? If so, a reasonable man would not have chosen to be their passenger. Again, expert evidence may assist in such cases. How much alcohol would be enough to affect the individual in question? Are they a regular user of alcohol or other drugs? Are they able to function in an apparently "normal" way such that a reasonable man would not consider them to be a risk to their safety on the road? It is helpful in these cases to seek the contemporaneous opinions of any witnesses who saw or spoke with a driver to determine how a reasonable man may have viewed the driver, had he been in the position of the plaintiff or pursuer.

As with most cases, the facts and circumstances of each case will determine to what extent contributory negligence ought to apply.

For discussion on causative potency and relative blameworthiness when considering parties' contribution to an accident see our article here.

Forensic Researcher Creates 'Bone Lab' in Bathroom

A Staffordshire University PhD student has turned her bathroom into a bone lab to research better ways to identify burned bodies

Emma Morgan, who works as a Specialist Trained Officer with Thames Valley Police, was motivated to embark on a part-time PhD after working with forensic recovery teams at Grenfell Tower.

Currently, bone fragments are recovered from fire scenes by manually filtering through debris. Emma is investigating whether Alternative Lighting Systems – usually used by forensic scientists to detect bodily fluids and fibres at crime scenes – can be used in identifying bodies.

The 31-year-old, who is originally from Usk in Monmouthshire, South Wales, explained: "Working at Grenfell Tower was a turning point for me. Considering technology is getting so much more advanced, we spent many hours each day sieving through the debris and I thought there must be a more efficient process. I considered whether bones fluoresce and so, I started looking into whether we could use crime lights for the purposes."

Due to coronavirus restrictions, Emma has been unable to use specialist dark rooms on campus or to access fire facilities through a collaboration with Merseyside Fire and Rescue, so created a lockdown lab in the "smallest and darkest" room in her house – her bathroom.

Working with Professor John Cassella and the supervisory team in the School of Law Policing and Forensics, Emma built relationships with suppliers of specialist forensic equipment including SceneSafe, CopperTree Forensics, ForenteQ and Attestor Forensics in Germany who have loaned her industry standard lighting systems for the project.

Emma has collected preliminary data from her experiments by creating a scoring system for how effectively different light waves fluoresce bone fragments. She said: "The whole family has been helping out. My parents have been collecting animal bones on dog walks in the woods and the local butchers have also provided bones which I burned in my fire pit in the garden. I will need to repeat the experiments in a controlled lab environment, but this has given me a good start."

Emma presented a paper at international conference Forensics Middle East & Africa 2020 and submitted a poster to the Charted Society of Forensic Science based on these results.

Ultimately, she hopes to pinpoint the most efficient wavelength for identifying burned remains so the technique could be used to quickly identify the location and number of bodies at fire scenes and help to speed up investigations.

Fire Consultancy - Expert Witness

by David Harries MEng (Hons) BEng (Hons), Divisional Director - Fire and Building Products Europe Consulting

The consequences of fire can impact on a project or within the wider built environment at any time. In fact, the longest part of the lifecycle of a building (design, construction, in-use, and demolition/re-construction) is the in-use phase.

Fire safety issues on completed projects can lead to significant claims against contractors, engineers and architects, and are a common occurrence. The most severe fire safety issues can also lead to prosecutions, injury or loss of life.

As such, it can be very beneficial for construction projects to employ the services of a fire engineer. Fire engineers can provide guidance on a range of projects, from single dwellings up to the world's tallest towers, and it is important that their expertise on fire safety and engineering issues is taken into consideration during each of these stages of the building's lifecycle. The fire engineer's role is to develop an effective fire strategy for the design, construction and occupation of the project.

However, whether fire engineers are employed on a construction project or not, it is possible that issues which can lead to claims can arise at any time within the design, construction or occupation stages of the project. For example, it is possible that a fire strategy has incorrectly specified (or even not specified) appropriate fire safety provisions. It is noteworthy, however, that a greater proportion of claims relate to fire safety construction issues, where items of fire safety provision have not been constructed correctly or in line with manufacturers' instructions.

It is during these situations that an expert in fire engineering and regulatory fire safety compliance can assist with identifying the root cause of an issue. It is recommended that where an expert opinion is necessary, it is important to appoint experts with a thorough understanding of the testing, inspection and certification of products, materials and fire systems, as well as knowledge of the legislation required to demonstrate building compliance.

Typically, fire defects on site will usually involve at least one of the following:

- All fire safety compliance issues – regulatory, contract, property protection
- Passive fire protection detailing or installation
- Cladding system design or installation
- Fire safety strategies

- Structural fire engineering design or installation
- Fire alarm design/installation
- Sprinkler design/Installation
- Cause and effects design and commissioning

Issues with fire protection installation

Buildings are usually complex and a significant number of issues can occur during the installation of passive fire protection. Passive fire systems are components designed to protect critical aspects of a building, such as pipes and ducts that go through fire rated walls; the structure of the building; the subdivision of the building; and the safety of the building's external cladding systems, to name but a few. In each case, one key aspect dominates throughout – fire protection measures should be installed as per the manufacturer's instructions, which in turn should be supported by appropriate fire test or assessment evidence.

Manufacturers will typically go to great expense to fire test their passive fire protection systems in accredited test laboratories. These tests are very specific and are representative of how the product will be used in-situ, so it should be installed to the same standard and configuration as that to which is it was tested or assessed. This is the only way to ensure that a product installed in a building will perform in the same way it did when it passed a fire test.

These products will also have approved fire test certificates, which will help to demonstrate their compliance with the building's proposed design. This is important as the building will have been designed to satisfy the regulatory regime in place for building approval.

Circumstances may arise on a construction project where fire safety systems have been installed contrary to manufacturer's instructions. This could be for a multitude of reasons; from carelessness, to complex services affecting the necessary space requirements and prohibiting installation in line with the manufacturer's instructions.

However, without a justification (which could range from a fire engineer's report on an installation, fire test certificate or an approved assessment by an accredited test house, for example), then the installations are almost certainly considered non-compliant with statutory regulations. Under most regulatory systems, the burden is on the design/construction team to demonstrate compliance. Without this being demonstrated there is always potential for a claim.

This non-demonstration of compliance does not always mean that the installations do not practically or physically comply with the applicable regulations, however. Fire protection measures installed differently from a manufacturer's guidelines can potentially perform to the required standard.

One of the key areas to understand is that if an installation is subsequently demonstrated to be compliant by a fire test or appropriate assessment, then it would usually be considered to be compliant by a building regulator. This would mean that the only abortive cost could be for the discovery of the issue and the subsequent testing or assessment. Therefore, highly litigious and costly remedial works may not be required on the site, and the site may return to a compliant status very quickly.

This is an important consideration that is often missed in litigation cases, with parties carrying out an inspection and then progressing to carrying out remedial work on items without determining if it was necessary at all. While there is an obligation on building teams to demonstrate compliance, with a bit more work and scrutiny, it is possible to resolve disputes and claims much more quickly and cost effectively by demonstrating an installed fire safety provision meets the required fire performance standard. It would also take out a lot of contention from a subject where all too often opinion is given in place of direct test evidence.

Expert witnesses in fire matters

Warringtonfire, part of the Element Materials Technology Group, specializes in providing a comprehensive range of independent fire testing, assessment, engineering, certification and expert witness services to international markets from a network of accredited sites across the globe, including Europe, the Middle East, Asia, and Australia. We exist to help our customers make certain that the materials, products and systems that they make are safe, high-quality, compliant, and ultimately fit for purpose, leveraging our 40 years of testing experience and our global testing capabilities.

We currently have a team of fire engineers based in the UK and in the US all of whom are fully qualified to take on the role of expert witness. They have

Above, Passive Fire Protection products should be installed to the same standard and configuration as that to which is it was tested or assessed smaller

expert knowledge in fire safety engineering and regulation across many types of buildings and industries. As the fire sector is very diverse, our expert witness services cover a range of complex areas, but it's worth noting that the role of the fire engineer should include a thorough understanding of the fire engineering principles and services within the built environment.

Warringtonfire provides expert witness support to our clients for a variety of issues. More than just experts in their chosen field within the fire and building products sector, they must also be experienced within the legal system and have appropriate training in legal practices, advanced report writing, expert witness meetings and court skills.

In addition to our fire engineering expert witness capabilities, we can also fire test installations. As discussed, this could prevent unnecessary large-scale remedial works, and instead test the faults to determine if they actually require remediation or whether a detailed test program could be conducted instead.

In summary, engaging a qualified and competent fire engineer helps to ensure statutory compliance and provides guidance to meet international best practice throughout the lifecycle of a building. Ensuring the correct implementation of a fire strategy minimizes the potential for a fire and its devastating consequences. However, in the event of an incident, whether a fire or an issue relating to the building design, the fire engineer can provide expert advice to deliver a satisfactory solution to an issue or support the legal process as required.

Heir Raising

Understanding the complex yet fascinating world of probate research otherwise known as "Heir Hunting"

Global heir hunter and star of the BBC's popular TV series "Heir Hunters" Danny Curran of Finders International provides insight and latest challenges from the world of probate research. Heir hunting - reuniting next of kin with inheritance they did not know they were due – provides a hugely valuable public service, yet it's an industry fraught with misunderstanding and some unscrupulous operators. Here's what to look out for before engaging with firms operating in this industry

Raising standards: How to select and instruct a probate research firm

In France and Germany Probate Research and verification of intestate estates using professional firms is considered a vital role, on a par with the legal profession and often an essential part of the estate administration process – so why is it in the UK we seem to find it harder to place the probate genealogy role fairly and squarely in estate administration process?

The fact that an industry is unregulated is not necessarily a problem. I have enquired several times about various government initiatives to see if certain bodies would include the probate research industry in their regulatory regime, but, as with many other industries, with a relatively low combined turnover, the government is reluctant to get involved.

So, we are left with self-regulation and, in many cases, this can be very useful as a guide to instructing a firm. However, self-regulation and memberships of associations also comes with caveats and conditions. Looking at the positive side, any firm who subjects themselves to any form of third party scrutiny or self-regulation, must feel a degree of confidence that they are 'doing the right thing' and my own firm has sought out numerous forms of compliance, listed below for reference, that hopefully will ease the minds of instructing solicitors and members of the public alike – the latter, remember, must feel reassured that the probate research firm are genuine and not operating a complex scam.

Inheritance features heavily in the world of bogus online emails and most of us by now will have received pleas from abroad asking us to accept several million pounds on behalf of a 'victim' of an oppressive regime abroad.

What to look for: when instructing a probate research firm

Word of mouth and reputation is of always a good starting point, but make sure you are dealing with a proper professional company.

Firms can appear to list 'offices' around the world just by placing keywords on their website "Paris, Rome, Athens, New York" and can of course use an impressive serviced office address in a large city like London. This is not unique to the world of probate research

Self-regulation	Professional Body / Association	Notes
Codes of Conduct, Ethics & Complaints Procedure.	The International Association of Professional Probate Researchers www.iappr.org	Open to all international probate research companies, subject to strict criteria & terms of admission. Strict Codes of conduct & ethics.
Codes of Conduct, Ethics & Complaints Procedure.	Association for Public Service Excellence www.apse.org.uk	Strict qualifying criteria for anyone providing services to the Public Sector.
Primary Authority Partnership	Any participating local authority trading standards dept. Vetted and approved firms feature on the government website: https://primary-authority.beis.gov.uk/par	Strict qualifying criteria and standards.
Codes of Conduct, Ethics & Complaints Procedure.	The National Association of Licensed Paralegals www.nationalparalegals.co.uk	Strict qualifying criteria and standards.
Voluntary public facing reassurance	Friends Against Scams is a National Trading Standards initiative, which aims to protect people from being victims of scams www.friendsagainstscams.org.uk	Staff training required.
Voluntary public facing reassurance	Dementia Friends – many heirs to estates are elderly and awareness of dementia is increasingly important. www.dementiafriends.org.uk	Staff training required.
Voluntary public facing reassurance	CRUSE bereavement care. We work in a sometimes sensitive field where news of a death can be upsetting. www.cruse.org.uk	Staff training required.

of course and is basic common sense, however, before we became the main provider of genealogical research services to one the country's largest estate administration firms, it was found that they were using the home office of an ex-employee to complete family trees on crucial intestacy research, often worth vast sums of money to the heirs involved. To their credit, as soon as they realised what was going on, they asked their staff to stop this practice and refer work to Finders instead. But to think that even large corporations may still be treating vital research as something an amateur can do effectively is somewhat disturbing and also puts estate administrators and their advisors at unnecessary risk.

A guide to professional standards available to probate research firms

This list is not exhaustive and by no means are these standards a requirement, they simply point solicitors in the right direction when choosing who to work with.

This table (above) shows that, even when working in the unregulated sector, it is possible to acquire some meaningful standards and training.

What can go wrong, will go wrong!

The other main pitfall I see in the UK is the reliance on family testimony without independent verification, to establish information about the devolution of an estate. There is still a degree of alarming naivety in this practice, which I see happening frequently.

I recall an intestate estate of around £400,000 we worked on many years ago, where the solicitor wanted a 'simple verification' that his client was the sole heir to the estate. The client was an elderly lady who nobody had any reason to doubt when she claimed to be her late brother's sole surviving next of kin. However, in yet another extraordinary tale (we have many), it seems that the lady in question had simply disowned her nephew many years earlier and didn't recognise him as part of her family any longer. His 'crime' in her eyes was to grow a beard to his waist and wander around his east London housing estate shouting at everyone ('bringing shame on the family'). In fact, once we had identified and located him, it was established he had for many years suffered from a mental illness. When found he was one of the gentlest and kindest middle-aged men you could imagine. In this case half the estate rightly passed to him.

I have simply lost count of the number of children, siblings and half-blood siblings that have been overlooked or forgotten by the clients when referring cases to us over the last 23 years. It's not always deliberate I should add; families do lose touch, large families forget how many relatives they have, children are born out of wedlock and to single parents and, since 1927, adoption has allowed the adoptive family to legally inherit.

Insurance – now a necessity?
I have been emphasising and endlessly stressing the importance of a 'comfort' policy against missing or unknown beneficiary claims for many years.

Whilst in Scotland 'Bond of Caution' provides a degree of comfort it is still not a replacement for missing beneficiary indemnity insurance and the clarity around this issue is still not apparent to all concerned. Perhaps 'Bond of Caution' is providing a false sense of security? It's still better than nothing though and I see vast number of estates being distributed with no insurance cover, despite my firm's quick and easy provision of policies provided (through Aviva) at modest rates. So why do people resist insurance?

Well, for a start, unless you use a recognised firm of probate researchers, the insurance company will probably not accept your genealogists' report as evidence. Using a recognised firm will often mean that an insurance policy is instantly approved, saving many hours of practitioners' time having to get the required evidence together to satisfy the insurance company or shopping around to find the right terms within the policy at the right cost.

DNA evidence as seen in more and more cases, can replace the traditional certificated evidence of kinship, making comfort policies more important than ever. My preference would be to make insurance a statutory requirement on all estates of over £15,000 or where a small estate indemnity is not being used. Of course, the basic professional indemnity insurance is a must and things may go wrong from time to time, that's life – the important thing is to be covered.

Case Study – how Finders International dealt with a difficult case with overseas heirs
An example of how co-operation between probate researchers, solicitors, the local authority and the Coroner worked to resolve the unusual case of Mary Burgess(Deceased)

We were referred this case by a Solicitor via a Coroner's Office who knew that the Deceased was a widow, but had no information about relatives.

They were told by a friend that there was a Will, however the Deceased was a hoarder and an initial search did not reveal a Will in the property.

The risk at the outset was that there may be a Will and if one was found, we may be unable to recover our costs. In any event, there was nobody to issue formal instructions or to pay us a fee. Therefore, we took on the risk on a contingency fee basis as the only viable option.

We proceeded initially to try and find someone entitled to deal with the funeral and to formally undertake a search and clearance of the property.

Family were identified and located and solicitors were instructed. The solicitor then contacted the Coroner.

The family were cousins once removed and didn't want to deal with the funeral themselves, so they instructed the solicitors to deal with this on their behalf. We reassured the potential beneficiaries that they wouldn't be liable for the funeral costs.

After thorough searches were made we found a Will, however, when we looked into this further, we found that the sole beneficiary named had pre-deceased and so the estate reverted to an Intestacy.



Hoarders
We are often referred cases where the deceased person is a hoarder and this can cause problems for Local Authorities when they try to determine whether there is a Will or next of kin, as the property may be difficult or unsafe to search.
Lengthy investigations were needed to locate every beneficiary involved, however, we were able to send an interim report to the solicitors within a few weeks of the referral, so that they could proceed with the administering the estate. This also meant that they could immediately search the property for important documents and then clear, secure and sell the house, so that it didn't become a focus of anti-social behaviour or an environmental hazard.

Overseas research
This case took us to France, Australia and America. The beneficiaries in America refused to respond to us despite contacting them via letter, phone, email and social media. In the end, we arranged for our local agent to visit them, in order to confirm their details. This personal touch was what was needed to reassure them that it was a genuine matter and the case was concluded successfully after many twists and turns. The transpired to be worth £450,000.

Probate Researcher Fees
There are four basic fee models available from most professional probate research firms and all are perfectly acceptable. Choice is imperative in order to cover a variety of situations. As in all businesses, if an untrustworthy provider is selected they may abuse any fee option chosen, so its more about which company you use than what method of charging they adopt.

The four main options are: Contingency fees (where a beneficiary signs a percentage based agreement with the probate research firm), an estate/trust

contingency fee, where the Executor agrees a percentage based fee from a named beneficiary's entitlement, a budget fee paid by the estate and a fixed fee paid by the estate. Firms may name these fees differently of course, but the basic models exist with most firms.

Contingency fees are most popular as they are seen as fairer in many circumstances, being payable only on a successful distribution, but an agreed budget or a fixed fee at the expense of the estate may be more appropriate dependent on circumstances.

When a beneficiary signs a contingency fee agreement with my firm, they are given 14 days to cancel and the name of the deceased or asset is made known to them as well as any possible value of their inheritance. In short, they make an informed choice to retain our services. I am an Associate of the Chartered Institute of Arbitrators and am comfortable negotiating to settle any concerns, whether it's about a fee or any other aspect of the process. Contingency fees are often the only option when working on an estate where there are no known next of kin at all as there is nobody authorised to pay a research fee or make advance arrangements about our fee. If a solicitor has no instructions they cannot agree a fee based on the possibility they may receive instructions once next of kin are found.

Budget or fixed fees paid by the general estate diminish the whole estate value which next of kin who knew the deceased often see as unfair ("I knew the deceased their entire life, why should I subsidise research to find long-lost family who have never even heard of the deceased?").

The watchword is 'reasonable'. There are dangers of being hooked into using a firm based on a cheap initial quote - cheap does not equal better as solicitors will know! I have encountered solicitors charging £100 per hour and others charging over £500 per hour. It is often true that you 'get what you pay for'. This is not the time to cut corners.

About the Author

Danny Curran is one of the UK's foremost authorities and renowned entrepreneurs in the field probate research. Having appeared in the mainstream national press, in print and broadcast, more than 100 times, he has shared his knowledge on genealogy, the probate industry and fascinating human-interest stories for nearly 30 years. Danny founded Finders International in 1997 as a sole trader and his company now has offices in London, Edinburgh & Dublin, employing over 100 people and has featured in Forbes Magazine in the US for his entrepreneurial feats. He founded the Probate Research industry's first international regulatory body in 2016, the International Association of Professional Probate Researchers, which now has member firms from around the world. Finders International are a main firm on the BBC1 Series 'Heir Hunters' and won 5 awards at the inaugural UK Probate Research Awards in 2019, including 'Best UK Probate Research Firm'.

Finders International can be contacted on
+44 (0)20 7490 4935
or via www.findersinternational.co.uk

The Value of Evidence From Different Perspectives?

Some thoughts on evidence by Robert Green

Experts across many disciplines are characterised, amongst other traits, by the ever present necessity to do one's best to support the effective delivery of justice. In the same way, the substantiation of facts often forms the crux of the forensic scientist/experts work. At the heart of these endeavours is the inherent attentiveness to evidence which has become our 'stock in trade'. It is the term – evidence which is often spoken of in a variety of situations and time and again features in the work of the expert. The expression, evidence, which is so familiar to many, but one which perhaps may benefit from a deeper comprehension?

During this somewhat concise commentary we would seek to focus on the topic of evidence, specifically within the context of forensic science. This is not intended to downplay wider areas of expert opinion in other fields, but rather draws upon personal experience in both a practical and teaching environment. The article sets out to inform and illustrate some of the (perhaps) more obscure opinion surrounding forensic evidence. We hope to shed a little more light on the subject and help to inform/generate some detailed and thoroughgoing insight. Mindful that, for some readers there will be a selection of topics within this paper that are well rehearsed. For others, there may well be some novel points of view or new knowledge. Whatever one's involvement, familiarity or level of agreement/disagreement, we hope that there are some ideas which may be of value. After dealing with the individual topics within the body of this article, we will encapsulate these opinions in our conclusions /summary.

The article is divided up into five topics and illustrated with case examples throughout. We begin by reflection on both direct and circumstantial evidence. Do we fully/always appreciate what is meant by this? The article then moves on to discuss the inculpatory and exculpatory view of evidence. In short, that the value of evidence and expert opinion is not viewed exclusively within the domain of the prosecution. In the third part of our discussion we will deal with evidence and how we 'frame' our propositions? This may be of particular, practical use to those who are tasked with 'case building' or setting the forensic strategy for the examination of evidence. Finally we will take a look at how the perception of evidential value may differ between the scientist and the investigator and how 'effective science' may not always provide investigative effectiveness or progress one's case. This issue in particular is rather important. After all it is often the prosecution authorities who commission forensic examination and are charged with obtaining both effectiveness and best value from the submission of the case work. And so, evidence, a word which is commonly applied but perhaps, at times not always fully appreciated; sometimes misunderstood and occasionally misapplied.

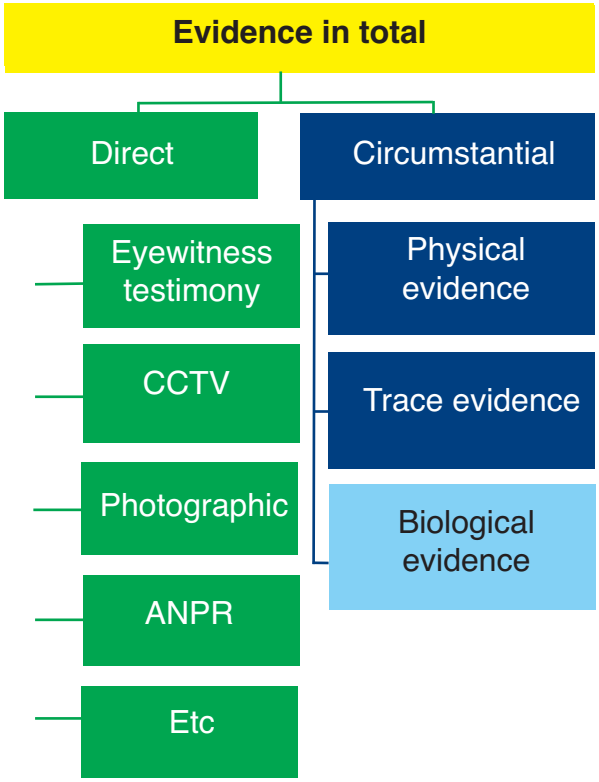
Stressing the value of evidence, some readers will for instance, have read the latest in a series of 'Primers', published by the Royal Society on the use of statistics in legal proceedings. For those who haven't come across this and who might be interested, you can find a link to the document here. You will see that reference is made to *"…those who base their assignments on their recalled experience, knowledge and on their intuition or more open to justified challenge"*. It seems therefore that those who work with evidence may be best placed to describe and understand the diverse and distinctive features of evidence and how to deal with the topic in a coherent and analytical fashion.

Above all we hope this short reflection is of interest and that it is of some benefit to many of the experts subscribing to this journal. Whilst not seeking to provide a theory of descriptions, we will nevertheless try to include a variety of issues of value. Perhaps though, I can suggest a little advice from the outset? Those who may, from time to time, be tasked with 'case building' or setting out a forensic examination strategy might draw these descriptors to mind. But ***above all, they would be well advised to consult specialists from the outset.***

Direct and circumstantial evidence

Many readers will appreciate the value of physical evidence, for sure. More than a few will have this knowledge particularly in mind when submitting items for expert examination or choosing evidence samples which are thought to be more probative (for either the prosecution or defence). For those with an eye on value, one of the first considerations will be to question whether the evidence I'm submitting will give weight to the proposition that the crime has been committed and/or does it help to establish the key elements of the crime? Equally can the evidence I am submitting be classified as unique or distinctive? For example, a footwear mark matching to a shoe with a specific pattern? Will this submission help lead investigators to the perpetrator or exonerate an innocent party? Have I considered the probability of finding this evidence by chance and equally do I understand what the 'base or background rate' for this type of evidence is? Similarly, can the evidence be combined with others to corroborate a particular line of prosecution or defence? In the same way, can the evidence I am submitting be attributed to a common source

with a degree of certainty; for example DNA, fingermarks etc? In conclusion, is this evidence of the type which can be associated with the 'group' but not with the individual source? Have I made investigators aware of some of these limitations above and accordingly hence is it likely to represent good value for money and resources?



First and foremost let us set out by making a rather philosophical observation, particularly focused on forensic evidence. That is to say, for the most part, forensic science may often produce circumstantial outcomes. An audacious statement, for sure and one which we will return to in a moment. This is not meant to imply that circumstantial evidence is any less substantial or effective than its counterpart (e.g. direct evidence). Circumstantial evidence is however sometimes referred to as indirect evidence which can provide the basis of inference about the disputed facts. From my early beginnings, it has been stressed rather vigorously that forensic science is context (or circumstance) dependent. Furthermore, this statement isn't intended to imply that direct and circumstantial evidence are to be considered as mutually exclusive. Many readers will appreciate that cases are regularly formed on a blend of circumstantial and direct evidence. By way of illustration, readers can see a summary of this in the figure above. What the illustration seeks to explain is the basic structure of where forensic evidence is positioned. Thus it would be helpful to redefine the statement above and restate this as follows. The value added by forensic evidence is conditioned upon the circumstances/context in which it is applied. Thus, scientific effectiveness and investigative benefit are sometimes not one and the same.

By way of example, perhaps we could illustrate the point with a practical case. Imagine, as the examining scientist you are asked to find, extract, analyse and interpret DNA recovered from an item in a sexual offence. You undertake this work and produce a DNA casework profile. This goes on to match a suspect in the case. Quite rightly, one would place the science at the higher end of 'value-added'. Imagine the same scenario where, this time the suspect puts forward the defence that this was a consensual act? Thus, the (a) same scientific value has rather (b) less investigative significance. Another example may help to reinforce the point further in the context of fibre evidence. Imagine the case of a young person who is violently assaulted. At the time, the offender is unknown. During the investigation, clothing and intimate samples are sent to the laboratory. In this case, a large number of red acrylic and woollen fibres are found on the clothing which were of probative value. Once again, at this point, maximum effort for the painstaking visual search, fibre recovery & interpretation in order to differentiate between individual fibres. However, as the enquiry progresses and after many hours and weeks of scientific and police investigation it is found that these fibres originated from a blanket placed around the victim by a concerned emergency worker. Once more, the same scientific effectiveness but with very different investigative outcome. So it seems that the perception of value can be different depending upon the circumstances of the case, what is submitted and how the case is managed. Most notably that scientific output and investigative utility can be different.

Inculpatory, exculpatory and wider value

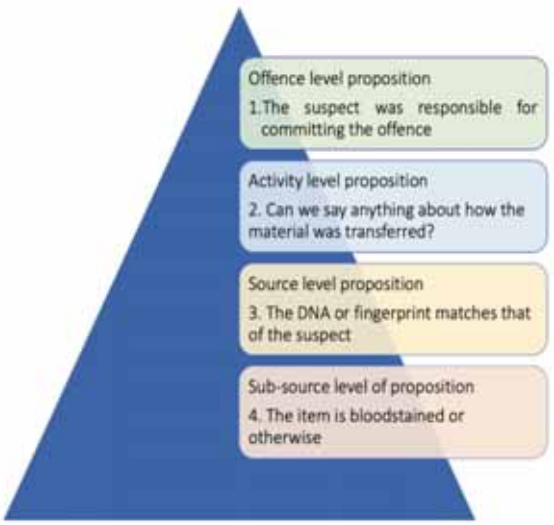
Those whose work involves the analysis and delivery of expert opinion will need little reminding that ultimately, evidence is that which is presented to the court. That is to say, in support of both the prosecution or defence hypotheses and which tends to prove an assertion (or claim). Conversely evidence can disprove or discredit a particular allegation or statement and, for this reason can take several forms. Similarly it can manifest as demonstrative evidence; by way of illustration, a chart, video recording or photographs. In addition, evidence can be documentary in the form of wills, letters, confessions or other documents. Above all, evidence can of course be provided by the direct or personal testimony provided by witnesses as well as scientific evidence; physical, trace or biological material (in a forensic science setting). For those tasked with understanding the value-added from forensic science, I hope that we can appreciate the wider facets of value. In other words, several of the attributes mentioned above do not immediately lend themselves well to the construction of metrics. Accordingly when considering value, we might well contemplate the points above. Last but by no means least is to mention the inculpatory and exculpatory value of the scientific evidence/findings. This might best be exemplified by the case example below. But then again, the belief that forensic science is fully available to both prosecution and defence is one which should not ever be ignored

Again, hypothetically speaking, take the case of a violent affray. During the commission of the offence it is said that the suspect struggled violently with the

victim for a significant period. We might be informed further that the garments worn by both parties would be of a type where two-way, fibre transference might well be expected. In building the case further, the prosecution might well set out the hypothesis (Hp) that the suspect was involved in the offence as described by the victim. In this case, some of the evidence might take the form of fibres transferred from suspect to victim and vice versa. Conversely, the defence may put forward (Hd) that the suspect had nothing to do with the offence and was not at the scene of the incident. You will, I'm sure appreciate that based on the prosecution case you might expect to find fibre evidence to support the prosecutions version of events. Similarly, if no connecting fibres are found on either victim or suspect then this would add weight to the defence case and support the defence hypothesis. It follows therefore that inferences can be drawn from the absence of evidential material to support, or call into question either account. Then again, what might happen in the case where this evidence is not collected or screened out from being submitted?

What level of proposition?

Another factor to consider when thinking about evidence is the level of proposition we are seeking to address with the submission of our items for expert examination. Explaining this in a little more detail, we should add that there are four levels of interpretation which can be fulfilled in this hierarchy of propositions. Perhaps more simply put, this is to ask what level of conclusion do we require or anticipate from our expert/evidence and how will this progress my case? Looking back over the years, how many times was I asked to "…forensicate (sic) X, or I want a full forensic on X, Y or Z? It may be that these types of asinine requests are consigned to history? Nevertheless, if they ever appear, then one would be well advised not to proceed on such ill-defined instructions.



Perhaps it would help if we explained the hierarchy of propositions a little further? To begin with, the first of these can be referred to as the (1) sub-source level proposition. To give an example of this is to ask (for example) is the red stain, found on a garment blood? Next we have an example of a (2) source level proposition where we might ask the expert to analyse an unknown powder and determine what it is. Another example of source level conjecture is where a DNA profile is said to match a suspect. Or, in the same way, a finger-mark found on an item that matches that of the (fingerprint) donor. Next we have the third level which is referred to as the (3) activity level proposition. This addresses the obvious question of how is the evidence transferred and can often add significantly to the probative value of the evidence. For the most part (although not exclusively) these three propositions set out the boundary of expert forensic opinion. The fourth (or offence) level of proposition addresses the question of (4) did the suspect commit the crime? This level of conjecture is often beyond the scope of the expert for a number of reasons. Firstly, it is uncommon for the expert to have sufficient information on which to base an offence level proposition. Furthermore, this seems to reside more in the remit of police, judge and jury.

Value from transitory evidence

Many readers will appreciate that trace evidence may he described as a form of physical evidence which is found in small amounts but which is nonetheless quantifiable. We appreciate that some evidence types are more permanent whereas others are more transient. That is to say easily changed or lost and sometimes observed only by the first responders. How many times have readers been asked to recall the temperature or particular odour within a scene? Let's perhaps illustrate the topic of transient evidence in a little more detail which I use regularly in teaching.

In this case, a group of armed men carry out a robbery at commercial premises. During the course of this robbery one of the group abandons a balaclava at the scene which is collected by police officers. The enquiry progresses rather quickly and several of the suspects are arrested a short time later. It transpires that three of these individuals reside in the same house. Two of these suspects admit to their part in the robbery but the third denies any involvement. As the scientist working in the laboratory, you are sent a DNA reference sample plus fibre tapings from the hair of the third individual. What items will you examine and which do you think will provide you with the most probative evidence? During interview, the third suspect tells police that he was at home at the time of the robbery and took no part in it. He goes on to say that he has worn the balaclava before but not for some time and suggests that the other two individuals may well have borrowed it. Enabling us to determine our examination strategy we must consider two propositions. Firstly, from the prosecution that this suspect was the man who wore the balaclava at the time of the robbery (Hp). The defence hypothesis was that this was another man and in fact the suspect wore the balaclava some time ago (Hd). Which is more likely and which pieces of evidence do you think will provide the most probative evidence? Nowadays it seems that some would instinctively favour DNA in order to help progress this case. However, given the circumstances/context of this case it would be equally likely

to find saliva/DNA matching the suspect on the balaclava as it would be to find none of this material. On the other hand though, and again given the circumstances of the case, the fibre/hair transfer may well provide more support to the case. You'll appreciate that the chance of finding matching fibres in the hair of the suspect (and his story about wearing the garment some time ago) would be very high if we adopt the prosecution hypothesis and very low if the defence account is to be believed. Hence, this goes some way to making the point of how the transient nature of some evidence types can actually work to our advantage.

Moving on, it's worth reflecting a little on what is nowadays regularly referred to as the 'gold standard' and often attributed to DNA analysis. There are however occasions where DNA will merely prove a connection between one and another. Similarly there are comparable challenges associated with fingerprint evidence. In the absence of supporting information or other evidence, scientific conclusions which are derived from these evidence types can, at times be constrained to source level interpretation. Is that sufficient for you to prove the case? For instance can you appreciate that a particular distribution of blood on an item can add more to the activity level proposition than merely submitting the DNA alone?

Scientific & investigative value – what do we mean?
As we draw towards the end of our discussion, this may be a convenient opportunity to probe the concept of evidence value a little deeper. This seems to be particularly important to ensure the best value for money. During my time, it was commonplace to view the scientific contribution of forensic evidence on a 'Likert' type scale. Typical of this was, at the conclusion of the case, to routinely assess the value of the outcome, formed upon this type of scale and grade the results based upon their value both in terms of providing (a) positive inclusion or a (b) positive exclusion. To illustrate the point a little deeper, did the scientific testing commissioned/carried out provide value to include the suspect in offence? Did it demonstrate its effectiveness in a way which excludes the suspect (both positive indicators) or did it provide evidence which was inconclusive?

Exclusion value				Inconclusive			Inclusion value			
5	4	3	2	1	0	1	2	3	4	5

Those submissions which provide inconclusive outcomes are perhaps those which can best be said to have lower scientific utility. Consequently, I hope you'll appreciate that the outcomes of forensic testing, when looked at in this way, can appear rather different in comparison with the expectations of those who commissioned the expert opinion. Accordingly, a positive exclusion is, we would assert, as valuable as a positive inclusion although this may very well not progress the case or to the expectations of those submitting the items. For those managing Evidence Submission Units or Operations (or Quality) Managers within forensic science laboratories – do we regularly infrequently or rarely undertake this type of quality audit?

Conclusion – Summary
I hope that some of this commentary has been of interest and value. It is perhaps felt that some of the issues mentioned will be more well appreciated by readers whereas others a little less so. Nevertheless, we hope there have been a number of topics which you have found of interest.

First and foremost, we would urge those involved with setting the forensic science evidence/examination strategy to obtain sound professional advice from the qualified forensic scientist and above all to appreciate that evidence has both inculpatory and exculpatory impact. Dealing with the assertion of forensic evidence being inherently circumstantial, we emphasise that the 'value added' by forensic evidence is conditioned upon the circumstances/context in which it is applied. Thus, scientific effectiveness and investigative benefit are distinct and at times dissimilar. We go on to make the point that the impression of evidential benefit may differ between the scientist and the investigator and how effective science may not always progress one's case. Once again we make the point to advise those faced with such matters to seek professional advice on some of the complex areas of submission as well as informing some decisions which may appear superficially more straightforward.

Depending upon the circumstances, it may be that inference can be drawn from the absence of evidential material when one might anticipate it to be found. The article draws attention to the transient nature of some evidence types and how, depending upon the circumstances, this can actually work to one's advantage by increasing the probative value. Several times we mention the benefits associated with evidence which will support the activity level proposition. Often times though these techniques are more interpretative and sometimes considered too costly. Within the article we provided examples of how blood pattern analysis (for example) may well support what might otherwise be a source level of proposition. Similarly fibre evidence can provide support in some instances but caution where this evidence is either not collected or is screened out from submission.

As a final point we highlight how the effectiveness of forensic science/evidence can be viewed on a continuum, producing an 'effectiveness score' which may indicate a positive inclusion; a positive exclusion or neutral value. This may differ from the investigators viewpoint of value. Have readers ever considered these types of audit? And so, evidence which is submitted unsystematically can be scientifically effective and yet progress a case very little. Similarly when the case circumstances dictate, the submission of evidence which, taken at its highest can purely provide source (or contact) level of expert opinion which the jury may find less convincing.

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Rectification - What is it and What do you need to know?

Rectification is a remedy exercised in the court's discretion to re-write mistaken wording in a legal document so that it accords with what the parties to the document had intended. In a pensions context, rectification is often, but not always, sought by the employer and the document is usually a deed or the rules of the scheme.

In this article **Ian Gordon**, Head of Pensions Disputes and **Charlotte Scholes** Principal Associate in Pensions Disputes both of Gowling WLG explain the important things for employers, trustees and representative beneficiaries to note about rectification and when the court will grant it.

A common context for a rectification claim is the discovery that, owing to a mistake in the wording of a scheme document, members' benefits, and hence the scheme's liabilities, are greater than had been intended. Rectifying the document will correct the mistake retrospectively to the date the document was executed, thereby enabling the employer and trustees to proceed on the intended basis, as if the document had always contained the correct wording.

This remedy is particularly beneficial in circumstances in which a scheme has been administered and its liabilities valued on the basis of what the parties had intended the scheme's legal documentation to say, rather than on the basis of the unintended effect of the erroneously worded documentation.

Although less common, rectification claims have also been made (including by trustees) in relation to provisions in scheme documentation dealing with matters other than benefits, for example, provisions concerning the powers of the scheme's employers and trustees.

How do you obtain rectification?
The party seeking to obtain a rectification order will need to persuade the court that it has the power to make the order. Some applications are contested, usually on behalf of the scheme's members, in which case rectification would only be ordered after a full trial, usually involving evidence from witnesses. In other cases, applications for rectification are unopposed, usually where the evidence is very clear and there is no defence to the rectification claim.

Who will be party to the application?
Pie chart showing the parties in a rectification claim: There are often three parties to the rectification claim: In appropriate cases, it may be possible to slim down the parties involved, for example, where the trustee is able to represent members in whose interests it is that rectification be refused.

When will the court grant rectification?
Before it can order rectification the court will have to be satisfied that the parties to the document had a common intention about the subject-matter of the provision to be rectified which continued up until the document was executed but which, because of a mistake, was not reflected in the document itself.

In deciding whether the parties had such a common intention the court will ask itself what the parties actually intended, in other words it will apply a subjective test.

Even if the court decides that it can rectify the document on the basis the above test has been met, the court still has a discretion as to whether it should do so (although, in most cases, once the test has been satisfied the court will go on to rectify).

Practical issues

Evidence-gathering
Given the court will need to see evidence of what the parties actually intended the document to say, the collation and presentation of evidence of what the parties intended will be critical to any rectification application.

As soon as a mistake has been identified in documentation, attempts should be made to speak to individuals who were involved in the preparation and execution of the document and who may be able to provide information as to what the parties intended.

To assist those individuals' recollection of events which may have occurred many years before, attempts should be made to obtain and review potentially relevant contemporaneous documentation, such as minutes of employer and trustee meetings, memoranda and reports, booklets and announcements, and communications with the scheme's advisers, particularly those who drafted the document in question.

Are witnesses needed?
In light of the need to establish what the parties actually intended, the recollection of individuals who were involved at the relevant time, is likely to be important, although the court will also look at the contemporaneous documentation.

Witness evidence could come from a range individuals involved in the preparation and execution of the document, including:

- Administrator
- Employer executives
- Trustees
- Individual(s) who drafted the document
- Scheme secretary
- Scheme Actuary

Is it ever too late to seek to rectify?

There have been a number of pension cases in which the courts have rectified documentation executed years, sometimes decades, before the application was made. Although the courts have the ability to decline to rectify where there has been culpable delay in making the rectification application, the passage of time itself does not usually result in an application being declined.

However, a substantial gap between when the document was executed and when the matter comes before the court can give rise to practical problems when it comes to demonstrating what the parties intended.

Can the process be streamlined?

Yes.

If the party seeking rectification has established by the evidence it has collated that there is no defence to the application, the representative beneficiary (acting on behalf of affected members and with their own legal representation), may agree not to oppose the application. If the court agrees, the application can then be granted by summary judgment, i.e., without a trial or other contested hearing.

What about costs?

The work involved in collating evidence of the parties' intentions is often costly, even if the case is ultimately resolved by means of summary judgment in the way described above - but can still be substantially less than the cost of the unintended benefit.

In most cases the costs involved in the application (including those of the representative beneficiary) will be met by the scheme's employer or, failing that, from the scheme's assets.

If, in parallel to the rectification application, there is a professional negligence claim against those responsible for the mistake, sometimes the allegedly negligent adviser will agree to fund the rectification application, in whole in part. In other cases, the costs paid by the employer or out of the scheme are sought subsequently by way of damages in the negligence claim.

We have substantial experience of rectification claims stretching back many years acting for employers, trustees and representative beneficiaries. That means we know what issues are likely to be material to all stakeholders, ensuring matters can be dealt with cost-effectively.

If you have any questions or would like more information, please contact
Ian Gordon
ian.gordon@gowlingwlg.com
or **Charlotte Scholes**
charlotte.scholes@gowlingwlg.com
www.gowlingwlg.com

Understanding De-escalation & Conflict Management to Manage Down the Use of Force - A Strategic Holistic Approach

by Joanne Caffrey

Just because a person has the right to use force, does not mean it is the right thing to do.

The failure to make reasonable attempts to avoid the use of force, could itself be a reason for the use of force being unlawful through it being unnecessary, unreasonable and disproportionate.

But why do so many organisations appear to not understand what de-escalation and conflict management is about?

Some of the expert witness cases I get involved with identify events where staff have been attracted to a service user who is displaying signs of a stress response or mental ill health episode. Staff dictate to the service user what they are required to do, such as saying "calm down". The service user does not comply with the instruction but continues with their stress response/ mental ill health behaviour. The staff member then gives the warning for them to comply with the order or force will be used on them. The staff member describes this in their report/statements as attempts to de-escalate the situation. The service user is not offering or using violence to the staff – they are merely being uncooperative to the instruction, focusing upon their own stress experience, due to their vulnerability. Force is then typically used on the service user to enforce compliance with the staff member's instruction.

Many staff, and organisations, appear to be trained in the use of force but not how to prevent its use by considering a host of other impact factors. 'Conflict management or de-escalation' can sometimes be considered a 'soft-skill' or a sign of weakness when we should be considering the ability to implement such strategies at strategic and operational levels as a holistic approach to key skills and knowledge.

You can't just 'de-escalate' someone because you tell them to calm down, or threaten them that force will be used against them if they don't.

Effective de-escalation and conflict management is a holistic approach from strategic planning through to operational delivery.

So what do we actually mean about this topic, and how useful is it to know about the topic within the secure and care sectors?
Is it all just political correctness for those who are frightened to get their hands dirty in restraints?

"Restraint by its nature restricts a person's liberty, but the frightening, overwhelming and traumatising nature of this experience can amount to degrading treatment, which is never lawful. Physical restraint can be humiliating, terrifying and even life-threatening. It should only be used as the last resort, when there is no other way of de-escalating a situation where someone may harm themselves or others (Campbell, 2018)."

"There was no issue with the drugs prescribed but we saw no evidence that staff considered or used de-escalation techniques before administering rapid tranquilisation, which should have been used only as a last resort." And "Physical restraint staff did not do enough to de-escalate the situation and behaved unprofessionally during the restraint, shouting at each other and using inappropriate language". Parliamentary and Health Service Ombudsman Investigation Report. Publication 2019.

Report to the Board of the CQC on the regulation of Whorlton Hall between 2015 and May 2019 stated: "There was often poor use of de-escalation techniques, and a high use of restraint, including prone restraint, handcuffs and belts, and frequent use of prn for rapid tranquilisation. Seclusion and segregation conditions were often used as long-term strategies, and at times were not in line with the Mental Health Act Code of Practice (e.g. they frequently did not allow access to toilets/bathrooms, outside space, and the person's own possessions). There was often poor recording of the use of restraint, segregation and seclusion, and no plan for re-integration."

So what issues do we need to take into consideration?

Environment – Never underestimate how the environment can influence a person's mood. Imagine you arrive at a hotel, having had a journey which took twice as long as it should have due to congestion, and the reception staff are effective but have no pleasantries, no smiling, and give you no 'TLC'. You enter the room expecting to rest and have a coffee and a hot shower before going to a meeting, but you find the room service has not left any full caffeinated coffee, which is what you want. You also feel that the room is not as clean as it should be, and feel disappointed regarding value for money. You ring reception and eventually someone answers and states room service will attend with coffee within the hour. You go for a shower and discover that the shower is running slow and only warm. Room service does not arrive with the coffee before you have to leave. How are you feeling after such issues? Do you think you may be triggered to some level or completely relaxed and passive? You attend your meeting and throughout the meeting you wonder if room service has attended with your coffee. You seem to give a disproportionate amount of consideration to this issue during the meeting. Upon return to the hotel room you find that room service has not been. There is still no coffee for you.

Transactional analysis – This is a concept which looks at how we communicate at different times. The phases include: Critical parent, nurturing parent, adult, free child and adapted child.

Personality and learning styles – This concept looks at how we learn and behave subject of personality styles such as activist, theorist, reflector and pragmatist.

An activist typically expects things to happen there and then, and are willing to take risks. If it fails, it fails, they try again another way. Activists are typically attracted to roles with high adrenaline rushes such as the secure custody sector, A&E, certain company management roles. An activist may also be more likely to resort to critical parent mode when stress-aroused.

With the hotel example, if the person was an activist they are likely to resort to wanting to give instant feedback, face to face, to the manager. Imagine they take themselves to the reception and demand to see the manager. The manager refuses to attend reception stating the issue is too trivial for them to deal with. How might the guest respond to such a refusal to speak to them? The benefit for the guest in this scenario is that they are somewhere of their own free-will, and they can decide to never return, or to leave and find somewhere else to stay. This guest was also of full mental capacity and holding down a professional occupation, where usually they are able to perform business and social etiquette.

Transfer these basic principles to a secure setting of a mental health unit, a secure training centre, police or prison custody. Communication is considered to be a combination of factors. Approximately 7% of communication relates to the actual words spoken. Approximately 38% is considered the vocal tone and 55% considered to be non-verbal such as body posture, proximity and facial expressions.

Any person within a secure setting is likely to be in a state of anxiety arousal. They have lost all control over their freedoms of movement, wishes and needs. In addition to this the person may be impacted by mental ill-health, learning disabilities, Adverse Childhood Experiences (ACEs) and/or personal physical and emotional needs.

Maslow's Hierarchy of Needs – This concept establishes that a person needs to achieve certain aspects, in an order, before they can concentrate on functioning within expectations. For example, a person first needs to feel their basic needs can be met such as food and water. Never underestimate how offering a drink or meal to a person upon initial reception at custody can work wonders for the stabilisation of the arousal process. Suitable food for dietary needs is essential as part of a holistic conflict management approach. If it is not possible to provide the food and drink upon reception then inform them when food and drink is available and enquire as to specific needs. Let the person know they have a voice and that 'care' is a part of the process. Shelter is also part of the first strategy and although they may have no say in which room they accommodate, ensuring the rooms are clean and tidy before taking them in is essential. Taking the per-

son to the room, and whilst they are there, removing the dirty cups and sheets does not create a feeling of calm. Recycling used sheets, which do not look dirty, should never be allowed. Body odours and contamination are still present.

The person needs to feel safe in the secure environment. Reassurance that staff are available and regularly visiting will assist, and explain how the person can call for staff in between.

Physical and medical needs must be taken into account and arrangements made for medical attention and/or reasonable adaptations as required.

Affection, affiliation and a feeling of belonging is then required. Be mindful that vulnerable people can be radicalised into groups all-ready established within the sectors. Diversion tactics may be required to ensure people receive the right form of affection and affiliation.

Understanding the age of the brain – The brain operates in an emotional or rational response. We have three brains: the large brain (the cerebrum), the small brain (the cerebellum) and the brain stem. The large brain includes the hippocampus (special awareness and memory formation) and the amygdala (fear centre). Our brains change over the course of our lives, and are not fully developed until we are in our 20s. The brain is slow to reach maturity. The pre-frontal cortex is the last part to become fully active which can be in the late 20's or early 30s. The prefrontal cortex inhibits emotion and allows for a more rational response to situations. Teenagers are, therefore, more likely to display impulsiveness and rash decision-making.

Threat and risk assessment - An accurate threat and risk assessment is the corner stone of personal safety. But what training is actually provided to staff on this subject matter? Staff need to be able to assess impact factors and profile a person's behaviour accurately. For example, three people may be saying the same words and displaying the same behaviour but one is a 10 year old child, one is an ex-military super-fit male suffering from dual diagnosis, and the other is a 70 years old female dementia patient. The threat and risk has to be person centred, but also needs to take into consideration the staff profile and location.

Closed cultures – Care Quality Commission (CQC) staff have now been trained in how to recognise closed cultures and the 'Closed Cultures' work-stream has also included use of overt and covert surveillance in detecting abuse. All work-places develop practices and procedures amongst staff. The problem in the secure sector is that staff are dealing with highly aroused people, often suffering from mental ill-health, without the support or financial means to challenge the treatment they receive. High work loads mean that staff have less time to consider a de-escalation and conflict management process.

Personal space – It is important to appreciate the intimate and personal space that a person requires. Intimate space is deemed within 0.5 meters of the person. Being in this space when not in a consensual intimate relationship is a trigger for stress arousal. Within 2 meters is a personal zone and staff should avoid this distance unless invited in. Too often staff invade the personal space of a person which can cause a visual response from them, which the staff interpret as aggression.

Stress Responses – Our previous article concerned the stress response, which all staff should be aware of as it effects the ability to hear, see, think and respond.

So how do we de-escalate a person who is in a high state of arousal? Imagine this person is in a confined area such as a mental health unit room and is suffering from dual-diagnosis.

At this point the de-escalation process is going to be much harder, as the escalation has occurred without the earlier interventions and distractions. If you are stressed at home you have the opportunity to remove yourself from the situation and allow yourself time to process and re-set. This person does not have the same opportunities. They cannot just go for a walk to calm down. This person is ill with mental ill-health and a drug/alcohol misuse and abuse condition. They are likely to be in a high emotional brain state and unable to act within expected social etiquette. This is a highly vulnerable person with medical needs, but who also poses a risk to staff, if they move in.

What you want to avoid is instantly issuing orders to 'calm down or be restrained', as this will be likely to aggravate the situation. Moving towards them within the 2 meters will also be likely to aggravate the situation and push them into fight or flight. The higher arousal the more space the person needs. Considering operational likelihoods, if the staff move towards the person a physical event / fight will occur and the risk of injury to staff and patient increases.

Staff need to 'back off' if it is safe to do so, and provide the patient with some space. Increase in staff numbers as 'assistance' arrives is likely to stimulate the patient further so reduce the amount of staff who are visible. Noise from radios will be causing stimulus and potentially pain. Too many staff speaking at the patient will cause confusion. The more staff shout at the patient, the less they will hear. The arousal of staff is increasing and their likelihood of moving into the intimate zone increases. This scenario regularly turns into a physical intervention, restraint and injury to patient and staff.

We need to take the holistic approach to de-escalation and conflict management, and review environmental factors and teach staff tactical options.

Training

Within our training we are able to consider our personal experience of dealing with such events, in addition to cases that I get involved with as an expert witness. Some events can not be avoided but many can be, if people can appreciate the principles

and practices behind de-escalation and conflict management. Since lock-down of 2020 we have been able to place on-line a 6 hours introduction to the principles and practices of de-escalation and conflict management *https://totaltrainltdeschool.thinkific.com/courses/de-escalation-and-conflict-management* Which can be used a stand-alone theory course or as part of our level 3 Managing Challenging Behaviour award.

We also offer on-line an 8 hours level 2 award course for Managing Ligature Risks in the secure sector *https://totaltrainltdeschool.thinkific.com/courses/suicide-prevention-managing-ligature-risks-in-the-secure-sector*

About the author:
Joanne Caffrey was a police officer for 23.5 years and specialised in custody duties and the use of force, safeguarding people from death or injury. She worked as a custody sergeant and she wrote national safer custody training programmes, receiving a national award in 2012 - British Association of Women in Policing: Excellence in Performance Award, which her custody work contributed to. Other awards and recognition came from the National Police Improvement Agency (NPIA) and police chief-officer awards. She was part of the national contingency planning team for prison disputes and the housing of overflow prisoners into police custody units. Over the last 7 years she has continued with training staff concerning the safer custody of clients in all sectors and the use of force, which includes several thousand school staff. Joanne has acted as an advisor and participated as a panel expert with the BBC Radio 4 File on Four programme on challenging behaviour in schools, and BBC Radio 5 Live investigations concerning inappropriate restraints. She is now registered with the National Crime Agency as an expert advisor for major crime investigation support. She has been engaged for over 100 cases, over the last 3 years, involving police, prison, immigration, SIA, mental health units and schools; for coroner, civil, criminal and discipline cases. The cases involve suicide, self harm, murder, manslaughter, assault, false imprisonment, breaches of PACE, restraint equipment injuries. Safer custody is a holistic programme which applies to all UK and Ireland custody environments: Police, prison, young offender institutes, immigration, mental health, secure children's sector, customs and military. All sectors comply with the European custody standards to prevent torture and inhumane or degrading treatment. She has received additional awards, which include: 2018 Outstanding legal services for safer custody and 2019 Specialist training provider of the year. She is a qualified instructor for a range of topics including: mental health, suicide prevention, ligature risks, physical intervention, restraint equipment, self defence, conflict management, managing use of force and challenging behaviours, close quarter combat, safeguarding children and adults, mental capacity act and deprivation of liberty, medication management, manual handling, health and safety, first aid, epilepsy, diabetes, anaphylaxis. She has completed the Bond Solon expert witness training and her training and qualifications are certified through awarding bodies including: NFPS, OCN Credit 4 Learning, CPD UK, Association of Healthcare Trainers, Trainer Quals.

Assault and the Physical Therapy Professions

by Tim Edbrooke BEd(Hons), GradDipPhys, Chartered Physiotherapist'

A small number of cases of assault by members of the physical therapy professions (Physiotherapy; Chiropractic; Osteopathy; Sports Massage etc) reach the courts or professional tribunals each year. Most commonly tribunal appearances revolve around issues regarding the removal of clothing for the purposes of examination and treatment, and of inappropriate or unnecessary touching. On rare occasions a therapist is accused in court of sexual assault by touching or by penetration.

It might be generally assumed that the public would have a clear idea of how they expect to be treated when attending a physical therapist of any sort. However this is not the case, and many victim statements centre around the victim's confusion around the actions of the therapist, not knowing whether what was happening was to be expected. In any clinical scenario the clinician is in a position of power, and patients are generally willing to accept that power dynamic, and not to question the actions and comments of the clinician, making themselves vulnerable. It is not uncommon for complaints to be raised a considerable time after the index event, often after discussion with other people or further research.

The removal of some clothing for the purposes of examination or treatment is necessary for all of the physical therapy professions. In order to carry out a meaningful examination sufficient clothing must be removed to visualise the relevant anatomical markers, and to allow unrestricted movement during the examination. However, it is never necessary for a patient to remove undergarments or to expose themselves in any way, and the need to remove any clothing must be explained. Good practice dictates that the patient's modesty must be preserved by the provision of an extra covering such as a towel should it be necessary. Unfortunately, again due to a lack of understanding, or to the power dynamic in the clinical setting, patients may remove more clothing than is necessary of their own volition, or fail to question the need to remove items of clothing unnecessarily. Allowing a patient to remain exposed unnecessarily is usually viewed by tribunals as being action below the accepted standard.

Consent must always be appropriate to the treatment or investigation being carried out. This means that the consent that has been given is right and proper and meets three tests:

❖ The patient must have the capacity to give their consent.

❖ The consent must be given voluntarily.

❖ The patient must have been given all the information they ask for in order to make their decision.

If any one of these three requirements is not met, then the consent may not be legally valid, and the intervention may be unlawful and/or negligent. The subject's consent is essential for any assessment and/or intervention that involves touching, however if it became necessary to touch an intimate part of the body the subject's explicit consent would need to be reaffirmed and recorded. An example of such a necessity would be when cauda equina compression is suspected and it is necessary to assess perianal sensation and anal sphincter tone.

On occasion consent is recorded but the patient denies having been informed and asked for their consent. It might be assumed that a patient seeking treatment understands the need for touch and is therefore consenting to any necessary examination or treatment. However, before proceeding, therapists must always seek to obtain some explicit indication that the patient understands the need for an examination or treatment, and agrees to it being carried out. Alternative approaches, including that of 'no treatment' must be offered in a manner that places no pressure on the patient.

Social norms as well as professional standards dictate that there are areas of the body (male and female genitalia; female breast tissue) that it is clearly inappropriate to touch for any reason and in any manner during treatment. More nebulous are areas such as the upper chest, inner thigh and buttocks where muscle groups integral to posture and movement quality are located, groups that are often affected by faulty movement patterns or injury. Muscle attachments are located in the crease of the groin, along the edge of the perineum, and under the buttock, as well as centrally on the chest and laterally in the axilla, and a number of manual therapy and massage techniques rely upon contact in these areas:

Trigger points, are described as hyperirritable spots in the skeletal muscle often close to the attachment. They are a topic of ongoing controversy as there is limited data to inform a scientific understanding of the phenomenon. The trigger point model states that unexplained pain frequently radiates from these points of local tenderness to broader areas, sometimes distant from the trigger point itself. The need to 'treat' trigger points is often cited by defendants to explain the need to touch patients close to intimate areas.

Effleurage is the long stroking technique used when massaging to move tissue fluid along known lines of

drainage. Strokes may be directed towards the groin in the lower limb, and towards the axilla in the trunk and upper limb. On occasion contact with the edges of a patient's genitals or intimate areas occurs when insufficient attention is paid to technique, but such contact is, at most, transitory. Persistent or intentional contact with the genitals or intimate areas would be viewed as unacceptable by a reasonable body of practitioners.

Touch is a powerful communication tool which can be used for connection; for emphasis when explaining the anatomy of an injury; to cue or guide a movement, or to reinforce an instruction. Touch is also an integral part of many physical therapy assessment and treatment techniques. The majority of cases turn upon the issue of patient understanding, consent, and upon the clinical necessity for the touch to have occurred. There is often contradictory evidence from the patient and the therapist regarding the degree to which a treatment has been explained and it is my experience that, more often than not, patients do not fully understand the proposed nature of the treatment or what they should expect, and that patients forget between 40 – 80% of the information they are given dependent upon factors such as the clinician's communication style, their own expectations, and their levels of education and mental faculty. Reports in such cases would usually compare the two versions and comment on each without making a judgment as to which was the more likely to have occurred.

It is not unusual for the therapist in cases of alleged assault to provide explanation and justification of their actions using anatomical and technical terminology. Such terminology can be confusing, even for experienced investigators, and it is often the role of the expert witness to provide the police, the court, or the tribunal with an explanation of the context and legitimacy of the claims being made.

Cursory research will show that assault by physical therapists of all professions occurs on a regular rather than a frequent basis. Being assaulted in a healthcare setting is particularly alarming because the environment places the victim in a position of vulnerability: their focus is on their health and receiving treatment for their pain, and are thus unprepared to respond to inappropriate behaviour. It is common for victims to express confusion as to whether they have actually been assaulted, whether they acted in a way that invited the assault, and whether they failed to prevent the assault taking place. The expert has a key role to play in interpreting everything that has occurred, and in advising the court or tribunal accordingly.

Tim Edbrooke
February 2021

The Periodical Payment Order: Is it right for my client?

*Ever since **Frenkel Topping** devised the very first Periodical Payment Order (PPO), then known as a Structured Settlement, in the 1989 case of Kelly v Dawes, this annual instalment-based method of receiving awards for personal injury or medical negligence has proved a popular alternative to the well-established lump sum award.*

Quite simply, a PPO is an order from the court that, rather than handing over compensation as a lump sum, the defendant should pay an annual amount, frequently in addition to a reduced initial lump sum. This payment will be made to the claimant for the duration of their natural life.

Why should I consider a PPO?
A PPO can be a great comfort to a claimant. They know that they will have a regular income for the rest of their life, and do not need to worry about running out of the money they were awarded as a lump sum.

A PPO can also be varied over time and linked to inflation or other indices, so if a claimant's needs change as a result of their injuries, or economic conditions change dramatically, they will not be adversely affected in the same way as they could be with a single, unalterable final payment.

When should I consider a PPO?
A PPO should always be considered in cases where substantial damages are awarded – awards above around £1m are frequently used as a benchmark, though this figure is by no means set in stone.

A PPO should also be considered in cases where the parties are having difficulty agreeing over a claimant's life expectancy – with lump sum awards there is a tendency for defendants to attempt to underestimate life expectancy, while claimants may naturally seek to overestimate it. PPOs can remove the wrangling.

A PPO can also be a useful tool for claimants who are risk averse, or who are simply not comfortable with the idea of investing and managing large sums of money over a long period of time. A stable income can remove significant worries for individuals who have already been through a traumatic injury and the ensuing court proceedings.

What are the advantages of a PPO?
*Regular payments rather than one lump sum make it easier for the injured party to budget and manage funds and care costs. There is no danger of the money running out.

*A lump sum award is based on the estimated life expectancy of the injured person, which can often be a point of contention between parties. Periodical payments will continue for the injured person's lifetime even if the injured person lives longer than expected. Equally, if a person dies sooner than expected the defendant will not have over-compensated.

*The Discount Rate means that a lump sum award is discounted, or actually at present enhanced, by a percentage, in order to negate the expected investment return. If the injured person receives periodical payments instead then they do not have to worry about the Discount Rate, investing the money, or the associated risks.

*Compensation received by periodical payments is not taxable. Although a lump sum received would not be taxable either, any income or growth received on the lump sum, such as through investment, would be.

*Periodical payments can be index linked which means they can move up and down with inflation. Since the decision in Tameside & Glossop Acute Services NHS Trust v Thompstone [2008], the court can use the Annual Survey of Hours and Earnings Index if the injured person is receiving on-going care and has a PPO to cover this head of damage. PPO's for other heads of damage such as Court of Protection Costs, loss of earnings or accommodation costs should also be linked to a relevant index.

*If an injured person's condition is expected to deteriorate or it is expected that they may develop an additional condition as a result of the initial injury, then they can apply to the court to have a variable PPO where it is possible to increase the payment in the future to meet an increasing need.

*Should the defendant fail to make a periodical payment where a court judgment is in place, the injured person is afforded protection under the Financial Services Compensation Scheme.

*Means-tested benefits are not affected by periodical payments. A lump sum payment could affect them now or in the future depending on how the funds are held by the claimant.

Are there any disadvantages?
*If the injured person lives a shorter life than expected then the periodical payments will stop and their estate will not benefit from a lump sum.

*A lump sum payment gives the injured person more freedom to invest, should they so choose. They can do what they want with the money and choose to invest it on a high-risk or low-risk strategy.

*Just as claimants can apply for increased payments if their condition deteriorates, so if their condition unexpectedly improves the defendant could potentially apply to the court to vary the PPO and decrease the payments.

*As already noted, periodical payments can be index linked. This means they can move down as well as up with inflation.

*Some injured parties prefer to receive a lump sum so they feel they have closure. They can then focus on recovery without being dependant on regular payments, or worried about the prospect of future court cases to vary payments.

PPOs in 2021

Two recent events have taken place which should prompt those due to receive awards and their advisors to seriously consider PPOs, if they haven't already.

Firstly, in October 2020 the Court of Appeal rectified the long-running injustice of the negative discount rate for accommodation. Ever since the Lord Chancellor had set the discount rate in negative territory to reflect low interest rates in the wider economy in 2017, the practical reality for those awarded damages following personal injury was that they were no longer entitled to any damages for the additional capital value of accommodation they need brought about by their injuries. Instead, any such needs would have to be met from their main lump sum payment, even in cases where health may deteriorate dramatically leading to the need for major adaptations or a whole new property.

It had long been argued, even before the change in the discount rate to a negative position, that the old methodology for assessing the award for the increased need in capital value of accommodation was wholly inappropriate and left claimants under compensated.

The court's conclusion in Swift v Carpenter that this did a disservice to claimants was a welcome one. We are now provided with an alternative method for calculation of damages for increased capital value of accommodation. Although in no way perfect the new approach works well for most claimants with longer life expectancy and now all but removes the need for them to ”rob” other heads of damage to fund their accommodation. This therefore removes one of the regularly seen arguments against a PPO where claimants were previously concerned that having the PPO would reduce their lump sum to such a degree they would not have the funds available to purchase the property they required post settlement.

Secondly, the publishing of the provisional results of 2020's Annual Survey of Hours and Earnings (ASHE) in November showed that those working in the care sector had bucked the trend of an annual national salary increase of just 0.1% in the year to April amidst generally slow economic conditions.

Instead, those working in the caring professions saw an increase in their median hourly rate of 5.47% over the same period, soundly outpacing not only the national average increase of just 0.1% but also the CPI of 0.9%.

This is great news for care workers, but not such great news for those who have accepted lump sum payments and are now likely to be faced with a significant increase in the cost of their care.

This upward trend in care worker salary looks likely to continue too. The latest survey was taken in April, before the full effects of covid had hit, but the care sector is one of the few not to be financially hampered by the virus. Instead, care staff have become even more crucial during the pandemic, with employers forced to acknowledge this in the packages offered in order to attract and retain staff. This seems certain to be even more essential now the UK has exited the EU, in doing so losing access to a readily available pool of workers in a care industry which has historically relied heavily on EU immigrant labour.

For those in receipt of PPOs for care, such fluctuations in care costs are not an issue. Payments are linked to ASHE so, as with the accommodation example above, these rising costs can be factored in at review.

One further consideration that could make PPOs even more attractive in a post-covid world is their tax-free status. Of course, it's impossible to entirely predict what those in Westminster may have planned for our futures, but following a year of economic turmoil, lockdowns, furlough schemes, grants to businesses and rising unemployment, tax rises are as close to inevitable as we're likely to get.

It's true that lump sum payments are also tax-free, but any interest or profits from investments made with them are taxable. PPOs, on the other hand, have been entirely tax-free since the Finance Act of 1995.

The next step

If you're thinking of taking a PPO in an upcoming settlement, or just want to know more, Frenkel Topping can offer both expert advice and free, APIL-accredited, specialist training to legal practitioners and representatives of claimants.

Since Covid put an end to our face-to-face training sessions, we have been quick to move our expert sessions onto Zoom so our legal partners can continue to use our free Knowledge Hub training to update and maintain their understanding in key areas such as Periodical Payment Orders and Pension Loss.

Our free virtual training has been well received since launch, with many participants asking for further sessions on topics such as Minor Injury Trusts, welfare benefits, and investing for vulnerable clients. In response, this year we are launching our full suite of free virtual training modules. The 2021 training schedule will include sessions on loss of earnings, pension loss, Personal Injury Trusts, welfare benefits, application of PPOs, avoiding professional negligence, Minor Injury Trusts, and investing for vulnerable clients.

Case Study- Don't ignore PPOs in short life expectancy cases

One of the things that we often encounter in shorter life expectancy cases is a belief that, due to the lower expected overall value of the claim, PPOs are not needed and are therefore not investigated. In my view this is completely wrong and leaves the claimant at risk of running out of funds during their lifetime. Claimants with shorter life expectancy often have some of the most significant needs, with potentially very high care costs but little in the way of other damages such as loss of earnings to draw upon, particularly if they are elderly.

Settlement on a lump-sum-only basis will leave the claimant exposed to a significant mortality risk. There is often disparity between the claimant and defendant positions relating to life expectancy, as mentioned earlier, and the risk for someone with limited life ahead of them is greatly enhanced. Of course settlement on a lump-sum-only basis needs to be based on an assumed date of death, but what is the risk of the claimant living longer than this?

Doris, for example, is 75 and has significant care needs. She is living in a care home but desperately wants to move into her own accommodation as she does not cope well in her current environment. The defendant's expert puts her life expectancy at 8 years whereas the claimant's suggests 12 years is more likely. An agreement has been reached to use the figure of 10 years. It is out of the question for Doris to be able to afford to purchase a property to move into, so serious consideration is being given to renting on a long-term basis and a suitable property has been found.

Were Doris to settle on a lump-sum-only basis with an agreed life expectancy of 10 years how long would she be able to fund her care and accommodation needs? That 10 year figure would spring to mind, although I would argue this is not correct. What happens if Doris survives 10 years plus an additional 3? She has therefore outlived expectation by 30% which is a significant gap that would need to be filled, with no money left to fill it.

So exceeding life expectancy by even a few years in short expectancy cases has a significant percentage increase impact with no means to fill the funding gap. There are unlikely to be significant general damages or other funds available due to the lack of a loss of earnings claim, for example. So what happens to Doris?

Another consideration that is frequently overlooked is the fact that the discount rate, even when it is in a negative position, assumes that a claimant is invested in a mixed portfolio of investments achieving a return of +3.8% per annum (before inflation and charges). As a Specialist IFA I can say with certainty that no IFA worth their salt would ordinarily be investing funds for a claimant with such a short time horizon. They certainly would not be investing all of the available funds, and a normal approach would be to hold back five years' worth of income need, plus a contingency fund, in no-risk cash assets, which at present may be achieving around 0.5% return. The knock-on impact of this is that the claimant will not achieve the 3.8% return rate required to make the damages last even through to normal life expectancy.

In my view PPOs for care and rental costs in this case are essential to ensure that the funds last for Doris's lifetime and that she is able to live out her life in relative comfort. Both PPOs should be individually linked to an appropriate index and then Doris and her family can rest easy in the knowledge that she has funds available for her lifetime, however long that may be.

About the Author
Mr Stephen Farnfield
Expert Financial Witness

Expert Financial Witness Specialising in Personal Injury and Clinical Negligence Cases where there is a loss of Earnings and Pension Loss. Stephen also regularly provide pension loss calculations for Employment cases.Over the last 5 years he has provided more than 250 Pension Loss reports, with their respective values ranging from £10,000 to over £1m.

His reports are detailed and CPR Compliant they are designed to be easy for the reader to digest and understand.

Covid-19: Making Complex Contract Disputes Even More Complex

by Neil Rudd, Manager - Forensic Accounting, Azets

With at least parts of the UK economy managing to adapt and survive in the 'new normal' in the wake of the ongoing Covid-19 pandemic and businesses taking stock of their financial situation, unsurprisingly, contract disputes are expected to be on the increase in the coming months and years. Reasons for such disputes will be wide ranging, from companies who have suffered significant inabilities to trade owing to complete collapses in their supply chains, to those looking to tighten their purse strings by terminating, for example, expensive IT contracts for minor contract infringements that would normally be ignored.

As accounting experts, we (mostly) leave it to the legal advisors to prove the sometimes complex issues surrounding whether a breach of contract has resulted in a loss to a claimant, by either a direct or proximate action, only getting involved where financial expertise is needed. This gets particularly difficult for legal advisors, when there are potentially numerous causes contributing to a company's loss in addition to a contract breach, and when you throw the complexity of the impact of the Covid-19 pandemic into the mix, this becomes a causation mine-field. The intricacies of whether a respondent can rely on a force majeure contract clause, excusing them from their contracted obligations due to non-mitigatable circumstances beyond their control, will no doubt prove to be another hard fought legal battleground. Good luck to the lawyers.

Forensic accounting instructions in contract disputes typically involve quantifying the *"but for"* scenario. This is an assessment of the financial compensation that would need to be paid to the claimant, to put them back in the position they would have been in, but for the breach of contract by the respondent. In its simplest form this is sometimes formulated as:

Loss of profits = lost revenue – costs that were avoided

It is worth noting, particularly given the struggles of some businesses during the Covid-19 pandemic, that a company does not have to be profitable in order to make a loss of profits claim under a contract dispute. A contract breach may have resulted in a company making a greater loss than it otherwise would have during the period of the breach, with the resulting claim under these circumstances being the reduced loss under the *"but for"* scenario. There may also be the potential to reclaim additional costs incurred as a result of the breach, but care must be taken to ensure no double counting of claimed amounts occurs.

In quantifying a loss of profits claim, we usually review a combination of the following information sources in order to estimate how a company would have performed, and what additional profits it would have achieved, but for the breach:

a. The company's financial performance before the breach;

b. The company's financial performance after the breach has stopped having an impact;

c. How the company had forecasted it was going to perform but for the breach (with reference to contemporaneous financial forecasts produced prior to the breach); and

d. The financial performance of comparable companies, during the period that the breach had an impact.

The challenge lies in estimating the financial impact of something that did not and now will not happen, often taking into account numerous interlinked factors, with seemingly small changes in assumptions, potentially having significant impacts on the overall quantum of loss assessed. The complexity drives the need for specialist advice.

By way of example, imagine you are CEO of Luxurious Polyester Ltd., a polyester manufacturer. You are subject to two separate contract disputes with two different customers, for failing to fulfil the minimum volumes of polyester required under the respective supply contracts, at the height of the Covid-19 pandemic. The supply contracts are identical in every respect, force majeure clauses do not apply, and a wrongful act by you has been proven and linked to the losses incurred by the customers. Despite the similarities, each claim's potential financial impact can be very different, purely as a result of how the Covid-19 pandemic has impacted each of the customers.

The first customer is PPE Pandemic Ltd., a wholesaler of personal protective equipment, recently formed right at the start of the Covid-19 pandemic. The company has no trading history and is yet to experience a significant trading period that has not been impacted by the breach of contract. As forensic accountants seeking to quantify loss, a comparison of pre and post breach financial performance is not instructive. Comparing to similar companies in the sector is a possibility, but the likelihood of having access to published financial records for such companies for the relevant period soon is unlikely. Further, the complete lack of track record for PPE Pandemic Ltd. means it is difficult to assess which other companies they would be comparable too, even if they had produced contemporaneous financial forecasts prior to the breach.

Whilst it seems likely that PPE Pandemic Ltd. would have been able to make strong sales during the Covid-19 pandemic, given the heightened demand for their products, any quantum of loss calculation under these circumstances would be a delicately balanced 'tower of assumptions'. PPE Pandemic Ltd.'s claim may face significant challenge on the basis that it is not possible to calculate a likely level of sales and associated costs avoided with any reasonable certainty.

The second customer is Super Static Shirts Ltd., a worldwide high-street clothing chain, with its roots dating back to Saville Row in the 1850's. The company has a long trading history, and although it is yet to experience 'lockdown' trading that has not been impacted by the breach, comparing performance before the breach and contemporaneous forecasts as benchmarks can be used as a starting point in a calculation of loss. It would need to be recognised that trading has been difficult for high street clothing shops during the Covid-19 pandemic. Formulating the quantum of loss for Super Static Shirts Ltd., based purely upon the historical and pre Covid-19 forecasted financial performance, would be wrong.

The financial performance of comparable companies (Super Static Shirts Ltd.'s well-known competitor Teflon Ties Ltd. springs to mind) would be relevant information in this respect. However, it may be some time before Teflon Ties Ltd.'s financial information for the relevant period becomes available, and there is often a question as to whether the comparable companies identified are indeed comparable (e.g. one might have a much better online presence than the other).

So, for you as CEO of Luxurious Polyester Ltd, there may be cause for optimism.

It is likely to be challenging for PPE Pandemic Ltd and its advisors to formulate a justifiable and evidenced opinion on its quantum of loss.

The claim by Super Static Shirts Ltd. also faces challenges, if it struggles to show how it would have been able to trade during the Covid-19 pandemic, but for the breach. It may be some time before a forensic accountant is able to formulate an evidenced opinion, as this will likely be heavily reliant on the financial performance of competitors during the relevant period, the financial results for whom are unlikely to be available yet.

Conclusion

Covid-19 is likely to make the already complex issue of contract disputes even more complex. Our hypothetical example only considers claims one step down the supply chain. The catastrophic impact of Covid-19 on some industries could result in a domino effect, with ripples of contract disputes along complex supply chains. As forensic accountants, we are experienced in dealing with complexity and presenting financial evidence in a clear and compelling way. We look forward to supporting our clients and our lawyer connections in the months ahead.

About the author

Neil Rudd

Forensic Accounting Manager at Azets

Neil is part of a highly experienced team at Azets who deliver forensic accounting and expert witness services in both civil and criminal cases as well as providing forensic advisory services. He manages the delivery of clients needs in relation to:

- Commercial, shareholder and matrimonial disputes
- Loss of profits litigation
- Fraud investigations
- Contentious and non-contentious business valuations
- Post company acquisition / sale disputes, expert determinations and breach of warranty claims

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Website: www.azets.co.uk

Pensions Floodlight and Dashboard Analysis

When developing methods for analysing pensions into groups, experience in pensions on divorce has proven useful. Divorce clients hold many types of pension, and these can usefully be analysed into a 3x3 structure as follows:

	PRIVATE SECTOR (REGULAR) VVVVVVVV	PUBLIC SECTOR (REGULAR) VVVVVVVV	IRREGULAR VVVVVVVV
FINAL SALARY >>>>>>>	1	2	3
CARE >>>>>>>	4	5	6
MONEY PURCHASE >>>>>>>>	7	8	9

The group I will start with is the one on the top left hand corner –

1 Private Sector – Final Salary
(Also denoted as "PrSFS".)

Why start with these?

There are three good reasons:

1 They contain the most value, so are the most important in divorce work.
2 They obey the rules.
3 They are the most numerous, in respect of value, so mastering their main characteristics will assist progress more.

Regarding 3, there are actually a lot more defined contributions schemes. However, as these are all pretty similar, apart from a few anomalies, they can be covered easily later.

Regarding value, Public Sector schemes, though fewer, are larger, and are broadly comparable size-wise to the private sector.

However, public sector schemes have different sorts of rules, and characteristics. This is because the legislation and regulation give them exceptions.

Moreover, some of them are very odd, in pension scheme terms. In particular, few people working in the pensions industry will have encountered the extreme benefits provided by the Armed Forces Pension Scheme 1975. Therefore, we put these schemes into an "Irregular Schemes" section.

"The Rules" relate to pensions legislation and regulation that has built up over at least a century.

Hence, we are starting with a large, well-regulated group.

The main characteristics of PrSFS schemes are as follows:

• The provision of a pension based by amount, nature, and commencement date on a predefined set of rules.

• Additional benefits, such as spouses' and childrens' pensions payable on the member's death, and lump sums payable under a variety of circumstances.

• A guarantee that benefits of the amounts promised at the time promised will be paid unless very unusual events take place. Even in this case, a large proportion of the benefits will be met by an external body (the PPF) if the scheme fails.

• Contributions are paid into the Scheme by the member, based on another rule – eg, 5% of salary, paid monthly. The employer makes regular funding payments into the scheme.

• On leaving the scheme, a pro rata benefit, payable retirement, must be offered. Inflation is allowed for to maintain the value of benefits.

• A facility to transfer accumulated pension funds (the amount determined by the Scheme Actuary and the Trustees) for a member to a different pension provider, via what is called a Cash Equivalent (CE) that represent the expected cost of providing the benefits for that scheme. The Scheme Actuary and Trustees have to follow strict rules, which are laid down and policed by the Pensions Regulator, (tPR), the competent authority for supervising UK Defined Benefit pension schemes since 2004.

A word of terminology explanation – "Defined Benefits" encompasses both Final Salary and "CARE" ("Career Average Revalued earnings") Schemes. However, as the latter are still relatively few in number, they are addressed later.

PrSFS schemes were the first sort of pension schemes ever set up, and their structure has been copied by other organizations – in particular, the old Basic State Pension had some similarities.

7 Private Sector – Money Purchase (Also denoted as "PrSMP").

Money Purchase Schemes are also called Defined Contribution Schemes, because there are rules for what the member and employer pay in – but there is no guaranteed benefit structure. Instead, the main idea is for the funds with investment returns added, to be available at retirement. The member usually has a degree of choice for how his or her funds are invested – for Final Salary schemes, there is no choice.

It is generally expected that, at retirement, 75% of the funds are used to purchase an annuity, (income for life) with the other 25% being available as a cash lump sum.

The key difference is that the primary benefit for the PrSFS plan is a guaranteed amount of pension at retirement, while for a PrSMP plan, there is no pension guarantee – what you get is what is in the pot, at the time you take it. Due to this, the funds are closely monitored on an individual basis, and it's far easier to get a quote – usually around ten days maximum. For Final Salary pension, it may take weeks to get the Cash Equivalent quote from the scheme.

Up until around 1985, pension schemes were virtually all Final Salary type (with some other relics from the past). Money Purchase schemes then started to become popular, as the risks to sponsoring companies of Final Salary schemes were becoming less and less acceptable to them. After a number of adverse events *, Money Purchase schemes began to rule the roost, and Final Salary schemes were closed and/or wound up with greater frequency. When Auto Enrolment was introduced in 2012, Money Purchase became the order of the day.

** Longevity increasing unpredictably, market volatility, the 1997 pensions dividends tax, legislation increasing costs)*

2 Public Sector Final Salary (PuSFS) Schemes

These are now mostly closed, and have given way to CARE schemes (covered next), but some large benefits have accrued in the past. The main differences between this group and the PrSFS schemes are as follows.

Some guaranteed a pension of 1/60 of FPS for each year, others guaranteed 1/80, plus a tax free lump sum of three times the pension.

The next difference is that these public sector schemes do not allow a cash equivalent on divorce (or allow a transfer to facilitate "pension freedoms"). Pension sharing MUST be done via an internal share, where the ex-spouse is granted her (or his – but it is usually a "her") benefits in the same scheme. SOME private sector schemes offer internal shares – notable ones being the USS and the LGPS (which is unusual), but most do not.

Public sector schemes have formed a "Club" between themselves, so if you move between Public Sector employers, you can automatically obtain a service credit in the new scheme. This is of no consequence to the options available on divorce – but it may affect the total benefits considered when divorcing. It is not a divorce option.

The next difference is that when they DO offer cash equivalents (which they do when the member joins another scheme), these are markedly inferior to the ones paid by the Private Sector schemes, and almost certainly would not satisfy the Pensions Regulator. This seems a strange state of affairs, as one would not expect government schemes to be short changing ex-NHS staff, for example, who leave and want to take their benefits elsewhere. It is justified by the argument that Public Sector schemes are not funded, and they can use an algorithm to generate a notional CE. Public Sector staff should therefore be extremely careful with such decisions. A number of NHS staff have received compensation for past personal pension

misselling – they are likely to lose even more than their private sector equivalents.

The upshot of this last point is that if Cash Equivalents are used as part of pension valuations, adjustments need to be made to them to generate consistency with their private sector counterparts.

Finally, Public Sector schemes publish their factors (although sometimes it takes a Freedom of Information request to get hold of them!). Calculations should therefore be quicker and easier.

4 and 5 Private and Public Sector CARE Schemes – (PrSCARE and PuSCARE)

I have lumped these together, as most of the CARE schemes are in the Public Sector. The Public and Private Sector differences are the same as above (eg, for Public Sector, poor Cash Equivalents, and insistence on internal shares on divorce.

CARE schemes give some guarantee to benefits,(see below) while being cheaper to fund than Final Salary schemes. The latter revalue EACH year with salary increases. As inflation is expected to increase at a lower rate than salaries do, these should prove cheaper.

A CARE scheme works by granting a benefit at each year of service such as 1/49 of salary (from a real life example). The benefit is then revalued, year by year, up until retirement, with inflation. Each year of service needs to be treated differently – for example, joining such a scheme aged 30 and staying to age 65 involves 35 separate calculations to determine your pension. This involves a staggered table, with, say, calendar year along the top and a different row for each year of service.

The intention to save costs was partially thwarted by the combination of low salary increases, and relatively high inflation – the example I have given, of 1/49, generates a higher cost than a 1/60 scheme - in fact, 22% higher!

Irregular Schemes (Usually Final Salary type, with some variations (3 and 6)

Most of these are of the Final Salary type – in that the benefits accrue according to years in the scheme. I have put the others into the Money Purchase category.There are no Irregular CARE schemes – perhaps because CARE is a relatively new structure, free from historic anomalies. So Group 6 is empty. Let's look at Group 3.

First we have the State Pension. Most people have earned some state pension – the rules are constantly changing, and the best thing is to get an up to date quote from the pensions service. Due to computerisation, this is very quick nowadays, and should always be.

The most noteworthy issues regarding State Pension are:

• The retirement age is between 65 and 68, depending on current age.

• It cannot be taken early, but may be taken late, in which case it will be increased.

• There is a campaign ("WASPI") to pressurize the government into reducing the State Pension Age for women to 60. Bearing in mind that Boris Johnson campaigned against this change, and that his party won a sizable majority on the 2019 election, the possibility of this seems remote. However, there is ongoing debate on this issue.

• There is no cash equivalent for a State Pension.

• Missed years can be repurchased, in certain circumstances. The Pensions Service will quote the cost. At the moment, this often represents very good value for money!

• Prior to 2016, Additional State Pension could be shared, but now all prior Additional and Basic State Pension have been rolled into one, and sharing is no longer possible, (except, perhaps in rare cases).

Irregular Schemes - Earlier Retirement Type Schemes

The most extreme example of this type of scheme is the Armed Forces Pension Scheme (1975) (or "AFPS 75"). This allows retirement as early as age 38 (for officers) if the member has served 18 years up until then. For other ranks, it requires 22 years service.

As the AFPS 75 has been superseded by not only the AFPS 2005 scheme, but also the AFPS 2015 scheme, the numbers of examples of these schemes will fall into the future. Care must be taken, however, if past guarantees under the 1975 scheme are carried through to later scheme benefits.

Other schemes with similar structures are the Police Pension Scheme (1987) and Fire Fighters Scheme (1992). These allow immediate benefits after 30 years' service, or retirement at age 50 after 25 years' service. Again, the likelihood of meeting these is falling continuously. These schemes also offer enhanced accrual after 20 years' service.

The other feature of these schemes is that, on retirement at a concessionary age, annual pension increases since retiring are suspended until the member reaches age 55. At that point, they are ALL added to the pension. For the AFPS especially, where up to 17 years increases could be involved, this can be substantial.

None of these structures are allowed in any other private sector schemes, and most public sector scheme members do not have them. They introduce idiosyncratic problems, such as finding annuity rates to value benefits where the member is under age 55, as these are not generally published. It is definitely advisable to consult an expert if you encounter one of these schemes.

It is also worth noting that, where the member is above age 55, the benefits then conform more closely to the standard "pension in payment", and become simpler to value, or consider for sharing.

Local Government Pension Scheme (LGPS)
This scheme has the following characteristics:

• Large, so many members, and likelihood of seeing benefits in divorcing parties.

• Similar to a public sector scheme in many ways, but funded, so there are assets held.

• It is not covered by the PPF. The LGPS is exempt from the PPF as it is a statutory public service pension scheme set up under powers contained in the Superannuation Act 1972.

• The scheme offers a choice on divorce of internal or external transfers on pension sharing. Factors are published. This differs from Public Sector schemes, where sharing must be internal, and Private sector, where it is virtually always external.

• In other ways, the LGPS resembles other public sector schemes.

• There are some historic oddities – the "Rule of 85" – allowing members with long service to retire early without penalty. Such cases will become rarer and rarer.

Universities Superannuation Scheme
This scheme is one of the largest in the private sector. It is only worth mentioning separately, as it offers the choice of internal and external sharing.

Unlike the LGPS, internal sharing factors are not published. However, they will quote the result for a 50% share, on payment of a fee, from which the result of any internal share can be extrapolated. Internal shares are generally a better deal for both parties than external ones.

9 Irregular Schemes – Money Purchase (ISMP)
There are two, both issued by insurance companies. which need to be understood:
1) With Profit Plans

2) Plans with an annuity guarantee (which can be either Money Purchase MP or With Profit WP).

WP, plans are issued by an insurer, and in many respects are similar to MP plans from the same source. Where they differ is that, while MP plans simply represent current fund value, which may rise or fall, WP plans involve a guaranteed fund at the end of the contract term. This amount is increased with annual bonuses, depending on the financial performance of the insurer and its funds.

The funds are only available at the end of the predetermined policy term in years, and on early withdrawal of the funds, penalties are likely to be incurred.

Annuity guarantee plans can be either MP or WP. In each case, the guarantee allows the policyholder to exchange his funds at maturity for an annuity at the guaranteed rate.

As interest rates (and annuity incomes) have fallen steadily over the last 30 years or so, ignoring these guarantees is not a good idea. Equitable Life's fate shows what happens if guarantees are ignored. An expert is needed.

That concluded the analysis, except for one pension type. It will be noticed that I have omitted "Collective Defined Contribution" schemes, otherwise known as "CDC" schemes. These appear to be defined along the lines of DC schemes, but a member's fund may be depleted to subsidise that of another member. As employer contributions are fixed, and substantial improvements in returns are promised by these schemes, further definition is waited in order to assess the group more fully.

About the author
Windsor Actuarial is an independent firm of actuarial consultants with considerable expertise in corporate pensions. Established by **Peter Crowley** in 2005, their excellent actuarial and pensions consultancy is complemented by cutting-edge software and technical support.

Peter Crowley combines a wide experience of pensions and financial products with a speciality for explaining the concepts in plain English. He has experience of most aspects of company pension schemes, from technical design, financing and reporting, to member communication and support. Peter also advises solicitors and other professionals on the individual aspects of pensions in divorce, compensation on the loss of pension rights, and reversions. He is also experienced in swaps and scheme actuarial work.

Experts' Fees - The Value of Expert Evidence

Late payment and non-payment

Eighty-seven percent of (285) experts have experienced late payment or non-payment of their fees according to a recent Bond Solon survey. Usually, the implication of non-payment of fees would be 'unsatisfactory service' but, according to the report, that is not so in this case. The reasons given are about the culture of how experts are seen and treated by some instructing parties. It is important to say at the outset that instructing parties in the main respect and treat experts very well but when the opposite is true it is both necessary, and surely reasonable, to have a sanction supported by the court system to alleviate the pain and damage caused.

Expert evidence can be the crucial turning point of determining an outcome in a court of law and that is why it is sought and, generally, valued. The duties and obligations of an expert to the courts are written in stone to ensure the standard is high and the penalties for abuse are severe. Is it not therefore reasonable that provided the expert's work and service is sound there is a case for penalizing the instructing party for wilful or reckless late, or non-payment, of fees?

This begs the question "what value does the court itself put on the status, role and responsibility of an expert?" Should it be reasonably expected that the court will protect the expert from abuse of their service by an instructing party? After all, whilst the expert is appointed by the party, or more usually by their solicitor, it is the court to whom the expert owes his or her primary duty.

The value of expert evidence

It is a requirement to get the permission of the court to introduce expert evidence and that is a good thing in itself because it avoids the blatant mis use of 'expert evidence'. It naturally follows that the court itself can be presumed to have determined, in each case, that expert evidence would be helpful to the court in understanding the underlying technical or otherwise specialist issues peculiar to the matter before it. It follows that it can reasonably be expected that the court would want the expert to be treated with the same respect by the court (and the court process) as the court expects to be treated by the expert. There is a mutual expectation of professionalism; and that should include payment for professional services.

The reasons

The reasons for late payment and non-payment of fees are too many to list although the Bond Solon report does a very good job in listing some two pages of them. The point at issue though, is that barring failure of the expert to deliver the report as agreed and to exercise reasonable skill and care in their services as an expert, there should be no excuse for non-payment; and on time, as agreed.

The abuses

There are two principal abuses of the expert that manifest themselves in the myriad ways expressed in the Bond Solon report. They are a) the reckless late payment or non-payment of fees and b) the wilful appointment of a 'hired gun'.

The expert rarely knows before actual work starts with the instructing party just what lies ahead but the selection and 'quotation' process has its own problems if the instructing party is minded to create them. 'Expert shopping' is a well-trodden path by some instructing parties wanting to find the expert that will both 'support their case' and at the lowest price. Understandable, of course, but immediately contrary to the obligation of the expert to the court.

The court would not knowingly want before it an expert that has been 'abused' by the instructing party causing the expert to be under unfair pressure or threat. That is nevertheless how it can be for a vulnerable expert, if the expert is underpaid, not paid and/or undervalued or abused by their instructing party; and that is what the Bond Solon report has made so clear.

In the beginning

Most experts are delighted to be offered a new job and eager to please the instructing party, within boundaries of professionalism but it is at this moment in the relationship that care must be taken to gauge the risks of not being fairly and properly paid. Assessing the size and nature of the job for the purposes of pricing whilst being 'tested' for suitability and cost, is a skill in itself, which is only acquired over time.

Status of the expert

Many experts are older people; with experience and expertise. They are often retired or semi -retired and

this causes some instructing parties to believe 'they do not need the money' and so can be treated with disdain. Other experts make a living, or part of it, from the work and can reasonably expect to be treated fairly as a business. In either case, if the expertise is valued, the expert surely ought to be given the respect of being properly briefed and instructed and fairly and promptly paid for their services. The courts, one could reasonably presume, would agree with that, in principle; it being in their interests that the expert is entirely sound and reliable.

Hired-Gun syndrome
All experienced experts know that from time to time, they will unknowingly accept an instruction from a party that wants simply a 'hired gun'. Whilst no self-respecting expert wants to be a hired gun it is often not evident at the outset what are the intentions of the instructing party (or their client) and once appointed as an expert there is at least a moral and professional sense of duty to not let the party down even under what sometimes turn out to be the most stressful of appointments. It can be difficult for even the most experienced experts to foresee the 'hired gun exploitation'. It is not until the report has been written and submitted that the instructing party visibly cools off and goes quiet on the expert.

It might be the instructing solicitor or perhaps their client that does not feel the report says what they want it to say and at that point comes the unspoken decision to not pay for it; in full or at all.

Poor instructions and case management
The quality of instructions varies considerably, from the excellent to the crass. The instructing party's skill in preparing documents and instructions is very often a tell-tale sign of what will become the relationship between expert and client; but not always. There is nothing much that can be done about the quality of instructions or subsequent case management received by experts except to be discerning about what one accepts and to ask for clearer or better instructions when necessary; but that in itself can cause friction. It is nevertheless a time consuming, frustrating and costly exercise to have to wade through unprepared and unlabelled documents in order to find out what a case is about because the instructions have not made it clear. This can add cost and delay which the instructing party later does not want to pay for and for that reason it is an issue in the debate about fair and prompt payment of fees.

There is a good case for encouraging instructing parties to appreciate the benefits of clarity of exhibits and well drafted instructions that make the expert's job so much more accessible and valuable in its outcome.
It is also not uncommon for the client of a solicitor not to understand the role of the expert as distinct from the role of a barrister. This misunderstanding can easily cause the client to be disappointed with the expert's report and so be disinclined to pay for it. It is surely reasonable for the experts' fees to be protected, via the court, against ignorance.

Terms and Conditions
The expert must of course also help themselves to protect against the consequence of fees disputes. There is absolutely no substitute for well-constructed and properly executed terms of business. Even now some experienced experts still do not put them in place and occasionally will come unstuck when a dispute arises. It would perhaps be unreasonable to expect even the court to protect an expert that does not take care to protect themselves but that is a not a particular bone of contention in the report.

Pay as paid - or not
It is not uncommon for solicitor firms, in particular, to delay payment to an expert until it has been received from the client. In the case of some clients, especially large corporate buyers of expert witness services they may not pay the solicitor for over a year after invoicing. There is an infinite array of fee payment arrangements between solicitor and client and the expert does not and should not have any link with these, whatsoever. Neither should the expert be deprived of fees in accordance with the agreed terms and conditions by reason of the payment arrangements between client and the expert's instructing party.

The cash flow problems experienced by most businesses from time to time, and solicitors are not immune, should not be permitted by the court to determine the payment of the experts' fees.

Protection and sanction required
It surely requires an understanding, supported by the court procedure rules, that if the permission of the court is given to present expert evidence then arrangements must be made for the prompt payment of fees in accordance with the terms and conditions agreed. Anything else is disrespectful to the court. Insurance or a security bond may be the answer.

Whether it is careless, reckless or wilful disregard for the expert's services, 'hired-gun disappointment syndrome' or the wasted cost of poorly prepared instructions it is evident from the Bond Solon report that the court expert process would be served very well if sanction of the court could be obtained to order the payment of properly and fairly incurred fees, and so uphold the principles of the experts duty to the court and the court's expectations of the expert.

Roger Flaxman ACII; MAE
Principal Consultant & Chairman
Chartered Insurance Practitioner
Academy of Experts Accr. - Expert Witness
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Not a Party? Not a Problem. The High Court Provides Some Helpful Guidance on Third Party Cost Orders...

by Elizabeth Butler, Associate and Andrew Reid, Associate at Stevens and Bolton

As experienced practitioners well know, the costs of litigation and, more importantly, who pays them, often carry as much significance to the outcome of a case as the legal arguments in play.

Whilst in the normal course of things, costs will be borne by the losing side, Rule 44 of the Civil Procedure Rules and section 51 of the Senior Courts Act 1981 grants the court a general discretion to decide who will be held liable for the costs incurred by the respective parties. CPR 46 extends the scope of that discretion and permits courts to order that the costs of litigation be paid by a person who was not a party to the litigation i.e. by a "non-party" (often referred to as a "third party").

In general, this power can only be exercised where a third party has funded and substantially controls the proceedings in question – the rationale being that such parties, who seek to benefit from the litigation, should also bear the risks that arise from it. However, the area remains a somewhat uncertain one so the recent guidance from the High Court in *Goknur Gida Maddeleri Enerji Imalat Ithalat Ihracat Ticaret Ve Sanati AS v Organic Village Ltd and another [2020] EWHC 2542 (QB)* is most welcome.

Background

In Goknur, the claim against the Defendant was struck out and the Claimant was ordered to pay the Defendant's legal costs, to be assessed, if not agreed. The parties were unable to agree upon those costs so the Claimant applied to court for an order requiring the Defendant to commence detailed assessment proceedings.

That order was granted but the Defendant failed to commence the costs proceedings in time so its own costs were disallowed and it was further ordered to pay into court the sums that it had previously received from the Claimant on account of its costs, which totalled £185,300.

The Defendant did not have the means to pay, so the Claimant applied for a non-party costs order against Mr Aytacli, the Defendant's former managing director.

Legal Implications

In dealing with such applications, the courts shall consider not only the conditions that must be satisfied for an order to be granted but also the procedural points that must be adhered to.

1, Who will hear third party costs applications?

It is a well-established principle that any application for a third party costs order should be dealt with by the trial judge, except in "rare and exceptional" circumstances.

In Goknur, the Claimant's application failed to take account of that principle and simply stated that the application should be heard by "[trial judge], if available, or any other QBD judge". As a result, a different judge was assigned to the costs hearing.

The judge raised the oversight with the parties but accepted that exceptional circumstances did exist in that instance and decided that it was in the interests of justice for him to hear the application.

Those exceptional circumstances included:

❖ The fact that a reallocation would result in lengthy delays and further costs and inconvenience to the parties

❖ The fact that neither party would suffer any prejudice as a result of a judge other than the trial judge hearing the application

❖ (Although not determinative) the fact that the parties were content for him to hear the application

In reaching his decision, the judge nonetheless conveyed his concern at the procedural error and expressed his sincere hope "that future applicants for non-party costs orders will not repeat the error made in this case".

2, The Decision

Having satisfied himself that he could hear the application, the judge proceeded to dismiss it.

He held that the mere fact that a director who controlled the company's litigation also funded the claim was not enough to justify a non-party costs order against that director. Rather, there needed to be "something more" – for example, that the claim was not being pursued for the benefit of the company but for the director's own personal gain.

The judge considered a number of other factors including the extent to which Mr Aytacli:

❖ Was in control of the litigation

❖ Was funding the litigation

❖ Stood to benefit from the litigation

but found that while Mr Aytacli had, as sole director of the Defendant, exercised a high degree of control over the litigation, his funding of the litigation was limited to providing security for the Defendant's solicitors fees, which only commenced about halfway through proceedings.

Furthermore, the judge disagreed with the Claimant's argument that the proceedings were pursued substantially for Mr Aytacli's benefit, instead finding that the company would stand to gain most, by reducing or even extinguishing its indebtedness.

Accordingly, the judge concluded that it would be unjust to make a third party costs order in all the circumstances and rejected the Claimant's application.

Comment

The judgment not only provides helpful guidance on the circumstances in which a court will grant a non-party costs orders but also highlights an important procedural point regarding the hearing of such applications.

Parties seeking such an order must ensure that their application (or supporting witness evidence):

❖ Clearly specifies that it should be heard by the trial judge, or else identifies the exceptional circumstances that allow the court to deviate from that position

❖ Demonstrates that there is a compelling reason – i.e. "something more" than the mere fact that the third party concerned funded the litigation – for a costs order to be granted against that third party

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Experts' Conflicts of Interest

by Ali Malsher at Anthony Gold Solicitors LLP

Recent reports note that the former vaccine task force chief, Ms Kate Bingham, who was also a venture capitalist, may have benefitted personally from an investment into a fund run by her private equity firm. The private equity firm was SC Health Investors, and, in May of 2020, she stepped away from that role to take on the role of chair of the vaccine task force. However, in July and August, SC Health announced a very substantial investment into one of its funds from a British organisation entirely funded by the UK government. In short, the UK government had put money into a fund with which Ms Bingham was previously involved and with which she may be involved again in the future. There is potential if not actual conflict of interest here.

Conflict of interest is an increasingly important issue in medical contracts and medico legal work, but it is often one which is not perhaps afforded the correct attention by some.

The issue of the vaccine task force and contracts during the pandemic are at a national level, but individual medical and nursing practitioners often have investments and work outside of their NHS or private practice which can present conflicts of interest but are not always readily apparent. These issues tend to arise more in commercial settings, such as in the recent case of *Essex County Council v UBB Waste (Essex) Ltd* (3) [www.bailii.org/ew/cases/EWHC/TCC/2020/2387.html] in which the expert, Dr Wetherby, had connections with the defendant, UBB, which were not declared despite the fact that there was an obvious and serious conflict of interest. In that case, the expert had not only not been independent but had actually been involved in the project that was under dispute. Because of this, the court did not give weight to his evidence.

In other cases, medical practitioners have been found in conflict when they have been involved in separate private practices developing technology or services which are then provided either to the NHS or for private medical insurance companies.

Experienced experts in whatever field are usually aware of the need to review matters in more detail and consider possible conflicts but they are not always so readily apparent. There are now within the NHS many private providers of services. Some emergency departments and minor injury departments, for example, are run by groups of GPs who set up independent practices. Some physiotherapy is outsourced to private companies with whom a practitioner may have some significant financial involvement which is not obvious at the outset of a case.

The matter is further complicated by the fact that often the case evolves and even if there is not conflict in relation to the initial defendant or trust, other organisations and groups may be brought into a claim, adding further potential areas where conflicts of interest can arise.

Lawyers are very sensitive to the issue of conflict. As a firm, our injuries and medical claims department represents claimants only. There would be an obvious conflict of interest if we also worked for defendants.

Other professionals, however, may not have such a sense of conflict of interest and indeed it is likely that they do not. For a large part of the time, unless there are significant business dealings, it is not an issue with which they need to address. People are, of course, entitled to have their own private arrangements as they see fit, both professionally and financially.

The issue comes when a potential conflict is uncovered by an opponent during a case if it has not already been declared and made apparent to the court. The court can then determine whether the conflict is material, whether there is a need for a change of expert or whether, in fact, the court is confident that the expert can still be completely independent in accordance with their obligations.

The pandemic and the provision of financial contacts in an emergency with fairly minimal review and scrutiny highlights the issues that arise out of conflicts. Ultimately, what it means is that solicitors should investigate their potential experts a little more deeply and experts should be encouraged to be more forthcoming in relation to issues and business dealings with particular medical companies or services.

It is also important to note that experts can develop a conflict of interest during the course of a case. n *The Ritz Hotel Casino Ltd -v- Al Geabury* [www.bailii.org/ew/cases/ EWHC/QB/2015/2294.html] an expert tried to assist the defendant by treating him for a short time during the case. He did not treat the defendant at the beginning or the end but was found not to have disclosed a conflict of interest.

As individuals are sent for assessment and review by experts, solicitors need to be mindful of offers to treat and assist clients however well meaning. These are often with the best of intentions but threaten the future running of the case and evaluation of the evidence. For claimants the offer of help probably at a time when they are at their most vulnerable may seem a lifeline but it can cause serious problems with the legal case.

Ultimately, in a more complex financial world where there is considerably more private medical provision of services and goods, solicitors need to be wary of expert's potential conflicts and need to investigate clearly whether there is a conflict, preferably before instruction. From time to time during the course of a case – when additional expert work is to be done, for example, it is important to remind experts of their ongoing obligations and to ensure claimants understand why this is necessary.

The awarding of contracts for PPE and other much needed equipment to companies where there may be an obvious and significant conflict of interest again highlights the complexity of the issue and the need to be ever vigilant within a legal claim.

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Uncontroverted Expert Evidence: Griffiths -v- TUI UK Limited [2020] EWHC 2268 (QB)

by Sarah Barnes - Legal Director and Jack Redrup - Trainee Solicitor at Hill Dickinson

Following a recent High Court judgment, it is now critically important for defendants to be pro-active and obtain their own expert evidence. Defendants can no longer proceed to trial and rely on criticising a claimant's expert report to succeed in defending a claim.

In a gastric-illness breach of contract claim, *Spencer J in Griffiths -v- TUI UK* Limited [2020] considered the correct approach to uncontroverted expert evidence. The court allowed an appeal against the dismissal of the claimant's claim at first instance. Spencer J held that so long as an expert report complies with CPR Part 35, and if there is no challenging expert evidence and the factual underpinning of the expert report are unshaken in cross-examination, that report must be accepted by the court.

Since the ruling in *Wood -v- TUI Travel plc* [2017], package travel gastric-related claims have generally been defended either on the basis that the factual underpinnings of the expert evidence are not made out or are false, or that the reasoning in the expert report is so deficient that, following the Court of Appeal's comments with regards to causation, it should not be accepted. While Wood remains the trite law in this area, Spencer J's judgment has initiated an important change in how these cases will now proceed.

The significance of this case extends beyond the confines of gastric-illness and package travel cases. It sets an important precedent with regard to how courts will approach expert evidence in the future.

Background

The claimant, Mr Peter Griffiths, stayed at an all-inclusive Turkish resort for a two-week holiday with his wife and son commencing on 2 August 2014. The claimant brought a claim against the tour operator TUI under the Package Travel Regulations for personal injury on the basis that he had suffered gastric-intestinal illness. He alleged that he suffered this illness due to his consumption of contaminated food and drink from the resort.

The claimant had relied on the expert report of a microbiologist and the answers his expert gave to questions put to him under CPR Part 35. It was the claimant's expert's view that the claimant had, on the balance of probabilities, contracted his illnesses through the consumption of contaminated food or fluid from the hotel.

Despite having permission, the defendant failed to obtain and serve in time an expert report from either a gastroenterologist or consultant microbiologist. After the claimant served its own microbiologist report, the defendant made an application for permission to rely on a gastroenterologist report and sought relief from sanction, both of which were refused by the court. The defendant raised CPR Part 35 questions but did not seek to cross-examine the claimant's expert at trial.

The trial judge rejected the claimant's expert report. The trial judge was of the opinion that the expert report had not gone far enough to explicitly rule out other potential sources of contamination as per the obiter comments of the Court of Appeal in Wood. Accordingly, the claim was dismissed at first instance.

On Appeal

The claimant appealed on the basis that where an expert report is uncontroverted (that is to say, the factual basis of it had not been shaken and there was no contradictory expert opinion), then subject to exceptional circumstances, it should be accepted by the court. In answering the question in relation to uncontroverted expert reports, Spencer J held:

'I take the view that a court would always be entitled to reject a report, even where uncontroverted, which was, literally, a bare ipse dixit, for example if Professor Pennington had produced a one-sentence report which simply stated: "In my opinion, on the balance of probabilities Peter Griffiths acquired his gastric illnesses following the consumption of contaminated food or fluid from the hotel". However, what the court is not entitled to do, where an expert report is uncontroverted, is subject the report to the same kind of analysis and critique as if it was evaluating a controverted or contested report, where it had to decide the weight of the report in order to decide whether it was to be preferred to other, controverting evidence such as an expert on the other side or competing factual evidence. Once a report is truly uncontroverted, that role of the court falls away. All the court needs to do is decide whether the report fulfils certain minimum standards which any expert report must satisfy if it is to be accepted at all.'

In summary, Spencer J held that if a claimant's expert report was uncontroverted, was not merely a bare assertion made by the expert without relying on any authority or proof and meets the minimum standards set out in CPR Part 35, then the report must be accepted by the court. The Court of Appeal held that although the report was 'short, indeed one

must be accepted by the court. The Court of Appeal held that although the report was 'short, indeed one could describe it as minimalist', it was not merely a bare assertion made by the claimant's expert. Despite the shortfalls of the claimant's expert report, as the defendant had failed to adduce their own expert evidence and had not cross-examined the claimant's expert at trial, the court decided it must accept the claimant's expert report.

Accordingly, the appeal succeeded. As did the claim.

Implications of the Judgment

It is clear therefore that going forward in cases, a defendant must be proactive and obtain its own expert report to contradict claimants' expert evidence. This will no doubt increase the costs of litigating and defending these claims. While the CPR allows each party to obtain its own expert report in fast-track cases, there is a risk with expert evidence from both parties, and detailed witness evidence that these claims could exceed a one-day trial causing claims to be allocated to the multi-track. This means higher claimants' costs given multi-track claims are not limited to the fixed costs which apply for package travel claims which commence on or after 7 May 2018 and remain in the fast-track.

It will be interesting to see whether the precedent set by *Griffiths* will lead to more success for gastric illness claims. Claimants may have more of an appetite to pursue claims previously considered too risky. For defendants, courts may be more willing to grant them permission to obtain expert reports than before, but if this is at the cost of a claim being allocated to the multi-track and therefore higher costs being claimed by claimants, then defendants may be less likely to obtain such evidence and to continue to defend these claims. Hence, all the more reason to curtail each expert's opinion to the salient points of the case and have these agreed in order to keep the case within the one-day fast-track trial allocation. If defendants do not have their own evidence to challenge the claimant's expert evidence, it is difficult to see how defendants can win these cases. In the same vein, defendants who have missed a deadline for submitting expert evidence may have more leverage with courts that are more likely to recognise the need to allow defendants to contradict claimant evidence in the interests of justice.

In September 2020 TUI applied for permission to appeal the decision and obtain a stay of execution.

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About the authors

Sarah Barnes - Legal Director
+44 (0)7969 917 432
sarah.barnes@hilldickinson.com
Sarah practises in marine-related (including crew and passengers) and travel personal injury and fatal accident claims. Sarah acts for a variety of UK port operators, cruise, ferry, yacht and tour operators, offshore companies and insurers.

The Importance of Expert Witnesses Being Independent and Owing their Principal Duties to the Court

by David Freeman, DAC Beachcroft Dublin

The recent High Court judgment of ***McKillen v Tynan*** *[2020] IEHC 189 dismissed judicial review proceedings on grounds including that: (i) the Applicant's two expert witnesses were not qualified to give evidence as experts in the proceedings; and (ii) even if they were, the expert witnesses were not suitably independent meaning that their evidence had* ***"no weight given their patent desire to advance a case made by Mr McKillen".***

Facts

In 2009, the Oireachtas enacted the Anglo Irish Bank Corporation Act (the "**Act**") pursuant to which all shares in Anglo Irish Bank Plc (the **"Bank"**) were transferred to the Minister for Finance including Mr McKillen's shares, valued at that time at approximately €22,000.

Section 22 of the Act required the Minister to appoint an Assessor to determine the amount of compensation (if any) payable to former shareholders in respect of the transferred shares and the associated rights extinguished by such transfer.

The process undertaken by the Assessor to determine the amount of compensation was provided for in section 25 of the Act. Mr McKillen (the **"Applicant"**) challenged this process by way of judicial review proceedings primarily on the grounds that the Assessor refused to provide the Applicant with the relevant information he needed to make submissions to the Assessor.

Expert Witnesses

In support of his application, the Applicant relied on the evidence of two expert witnesses, Mr Bernard Somers and Dr Constantine Gurdgiev (the **"Experts")**. The Experts' evidence was that the Applicant required the vast amounts of information requested from the Assessor in order for a reasonable valuation of the shareholding in the Bank to be performed. Pursuant to section 27 of the Act, before the Assessor submitted his report to the Minister, the Assessor was obliged to consider any submissions from persons entitled to do so "*in respect of the aggregate value of the transferred shares and extinguished rights*". The Experts argued that the requested information was necessary in order for the Applicant to make a meaningful submission to the Assessor.

Requirements of Expert Evidence

The Court reiterated the well-known legal principles set out in the English case of *The Ikarian Reefer* [1993] 2 Lloyd's Rep 68 (approved in this jurisdiction most recently in the Supreme Court decision of *O 'Leary v Mercy University Hospital* [2019] IESC 48), these being that experts should:

(i) be independent and uninfluenced in form or content by the exigencies of litigation;

(ii) provide independent assistance to the court by way of objective, unbiased, opinion in relation to matters within their expertise and should never act as advocates; and

(iii) make it clear when a particular question or issue is outside their expertise.

Independence

The Court made reference to the affidavits of the Experts noting that both had described the reason for their evidence as being "*for the purposes of supporting*" the Applicant's claim - a fact which the Court described as being *"not a good start in terms of independence"*.

The Court also noted that both Expert's affidavits contained a near verbatim concluding paragraph which the Court described as also not being consistent with the requirement of independence.

Experts as advocates

Another major concern the Court had was the Experts acting as advocates for the Applicant. The Court found that the use of "*denigratory language"* by Mr Somers towards the Assessor was *"more consistent with an address by a particularly acerbic Counsel than with the moderate and precise language one would expect from a witness with true expertise…"*. The Court also raised concerns about the way in which Mr Somers overreached himself in giving evidence about matters of law.

In relation to Dr Gurdgiev's evidence, the Court noted that some of the language used in his affidavit followed a "*familiar pattern… of emotive language in advancing Mr. McKillen's case"* which went beyond the scope of any stated expertise on the part of Dr. Gurdgiev. The tone of portions of Dr Gurdgiev's evidence was described as *"redolent of the peroration of a speech by Counsel rather than the considered evidence of an expert who wishes to assist the Court..."*

Expertise

The Court highlighted that a party seeking to adduce expert evidence needed in the first instance to establish that the expert had sufficient experience, training or knowledge in relation to the matter upon which he or she is to give evidence.

In considering the experience of the Experts, Mr Somers was a company director, a business consultant and had been a director of AIB and the Central Bank of Ireland. Dr Gurdgiev was an economist. However, neither had *"ever valued a shareholding in any company, let alone a bank"* and neither expert had *"qualifications which would suggest that they have the capacity to advise on the valuation of the shareholding"*.

Further, neither Expert had referred to any *"guideline, academic work, or practical paper relating to the valuation of a shareholding in a bank"* and as such there was no evidence to suggest why they as individuals were qualified to provide this evidence.

Accordingly, the Court held that that the Applicant had not discharged the burden of establishing that the Experts had the necessary experience, training or knowledge to act as an expert witness with regard to the valuation of the shareholding in the Bank. The Court further noted that even if it was wrong on this, the Court would have placed no weight on their. evidence given *"their patent desire to advance"* the Applicant's case.

Conclusion

This judgment highlights the importance of expert witnesses having the necessary expertise in the particular area they intend to give evidence on. The Courts will closely examine an expert's experience and it will not be taken as read that an expert witness has the necessary expertise. In any event, where an expert witness is found to have the necessary expertise, it is of critical importance that their evidence is independent and that they are not perceived to be a 'hired gun'. Experts owe their principal duty to the Court and *"it is only because of their expertise and assumed independence that they are entitled to offer opinion evidence on matters central to the Courts determination"* (*Emerald Meats Limited v. The Minister for Agriculture*, Ireland & The Attorney General [2012] IESC 48.)

About the author
David Freeman, DAC Beachcroft Dublin
+353 (0)1 588 2558
dfreeman@dacbeachcroft.com
www.dacbeachcroft.com

The Role of Oral Evidence: The Common Law Approach

by Sir Michael Burton GBE, a paper originally delivered at the Med-Mid XIV Annual International Conference 2020 and to be published in January 2021 in the Med-Mid reports.

I come from the point of view of one steeped in the common law, 28 years a barrister, 14 of them as QC, 18 years a High Court Judge and now arbitrator and mediator.

1. Evidence in chief and witness statements:
I prefer to have some evidence in chief orally. Otherwise either the witness is simply led into saying what he is not sure about and can be destroyed in cross-examination, or he becomes so dogmatic that the truth is obscured. The Tribunal needs to know it is his evidence and not that of his lawyers. As a Classicist, I am well familiar with the works of Lysias and Demosthenes, writing speeches for the Athenian Court as if in the persona of the defendant.

I remember a case in the early days of witness statements – 30 years ago – before they became the practice. My witnesses would not have been able to give evidence, because their memory was so poor about the events of 10 or more years before, but by careful reconstruction from documents my solicitors were able to put together witness statements for them, and in those early days were able to persuade the judge and the other side to allow the witness statements to be put in in chief and the witness was able to adopt its contents. They would never otherwise have been able to give evidence, but we were home and dry. It was a lesson I learned and I have always been sceptical about witness statements ever since, although they do save a great deal of time. There can be an enormous time-saving by witness statements which clear out of the way an account of facts which are necessary for the understanding of the case but are unlikely to be in contention – I well remember a case I handled as counsel about the manufacture of yoghurt, where screeds of necessary and uncontentious evidence were got on record, read and understood by the parties and the judge, and never referred to in the trial.

In any event, a witness needs to be eased into the witness box and made comfortable by a certain amount of oral evidence, because otherwise he feels nervous and is immediately thrown to the wolves.

If there is a discrete area which is in vigorous dispute and is central to the resolution of the issue in the case, then as a tribunal I always encourage the giving of some oral evidence in relation to that discrete area by both sides, because it is much more likely to be convincing.

2. Order of witnesses
A party's best witness should be put in first to win the tribunal round, even if not strictly chronological.

3. Number of witnesses
There is no harm in tendering witness statements from a number of witnesses all saying the same thing, because your opponent is then left in a quandary as to whether to cross examine them all.

I was, many years ago, appearing in a case as Counsel for a group of musicians who used to play in a band at a holiday camp for older people, and they were dismissed because it was alleged they could not play the music which the customers wanted in tempo. I was unable to risk giving a demonstration to the judge as they had not played together since the dismissal . They sued for damages for wrongful dismissal and the holiday camp had to go first in order to establish their case, and they called witness after witness from those who lived nearby up in Lincolnshire to allege that the band could not play the Gay Gordons or the Dashing White Sergeant or the Old Fashioned Waltz in proper tempo.

After about eight lengthy such witnesses I had run out of cross-examination to put to them, and at half time I offered my opponent that we could both walk away and bear our own costs. He would not agree, so on we went. Fortunately there was a little publicity of the case and a witness came forward to give evidence for my side who had appeared in cabaret with the band. He was R2D2 from Star Wars. When I was about to call him, I said to the judge, "After all these long witnesses your Lordship will be relieved to know that this will be a short witness": and indeed, R2D2 was short, no more than 3 feet high, as he waddled into court and had to stand on a chair in order to see the judge. I'm pleased to say that we won. Of course nowadays, with service of witness statements, it would not be possible for a surprise witness to be called but the moral is don't bore the tribunal with too many live witnesses!

4. Cross-examination
I am not a fan of coaching witnesses, and it is indeed not encouraged in the UK, short of a general exposition to a witness of what to look out for and what to avoid. It is very different in the USA, of course, where a full dress rehearsal of a witness is expected.

I vividly recall appearing for RTZ, where my witnesses were to be cross-examined by US lawyers at the US Embassy. They were all to take the Fifth Amendment (including Lord Shackleton, who came to our dress rehearsal straight from a Garter ceremony at St Paul's, with his Garter regalia in a carrier bag) in order to have a rehearsal which consisted simply of refusing to answer questions!

As for an advocate's own cross-examination:

It is vital to have an aim in the structure of the cross-examination. The advocate should work out what his closing submissions are going to be and follow them through with the witness. He should let the Tribunal follow the thrust of the questioning even if the witness doesn't.

So many advocates cross-examine by putting a document to the witness and asking if it is right, and then moving on to the next. Nothing is gained and, if anything, it gives the witness confidence. It is much better to work up a cross-examination by reference to the contents of the documents, and then ask questions which lead to the witness agreeing, or, even better, to his giving an answer inconsistent with his or her own document, which can then be shown to him.

Many poor advocates write out their questions in advance and then simply follow the script – it is sometimes possible from a raised tribunal to watch this happening, with the advocate ticking off his questions as they are asked. This leads not only to a lack of spontaneity but to losing the chance to follow up lines of questioning as they develop. Best to have notes but not a script. Some poor advocates simply ask their prearranged questions doggedly, even though they have already have the answer they want.

It is important to be ready not to pursue questions. If an advocate gets the answer he wants, it is best to leave it, whatever the temptation. You can always ask one question too many. Save your emphasis for closing submissions or perhaps a sly look at the tribunal. If you go on, the witness may retrench and rethink and you may lose the benefit of your good answer. Even if he seeks to put it right in re-examination, you have had your answer in cross-examination.

It is important for the advocate to put his case, but not, as so many inadequate advocates do, by asking the tribunal "Have I put my case sufficiently?". The advocate should know the answer to that himself.

The advocate should not be afraid to make strong allegations: to allege fraud if necessary. There used to be a sort of belief that in arbitration an advocate should not suggest fraud to a witness – that it was not gentlemanly. If that ever was so, it is not the case now and the advocate must put his case fairly and squarely in order to give the opportunity for the witness to respond, but also to give the opportunity for the tribunal to understand and accept his case.

The common law system is different from the civil one because of the concentration on oral evidence. Therefore an advocate should not feel inhibited, and unreasoned guillotines and time limits are not, in my view, appropriate. Much better for the tribunal to intervene testily by pointing out that the questions have already been asked or answered and that it would not help for them to be repeated. Even then a good advocate may still persevere – 'I am sure it is entirely my fault that I have not yet got my point over, but…' and occasionally persistence will succeed in winning the tribunal over or making it see sense!

5. Documents

I am greatly in favour of the common law system of disclosure of documents, which seems to me to be a happy medium between the US system of total discovery and the civil law system of limited disclosure of the documents relied upon. Many case are won or lost by the disclosure, often belated, of a document previously undisclosed. When big money is at stake, as in most international arbitrations or the UK Commercial Court, I believe that a Rolls Royce system can be afforded, so that the truth can be arrived at, and skilful cross-examination by an advocate in command of the documents can be the key.

6. Re-examination

This is a very important and neglected art:

Particularly in a case where there has been no oral evidence in chief, re-examination is an opportunity for the witness to impress or charm the tribunal and get their personality over.

It is important for the advocate to make sure that in re-examination the witness is enabled to knock on the head any good points that he believes his opponent has made. Very often there is an answer which the witness did not give satisfactorily or at all. Obviously it is best not to lead the witness, which would in any event gain nothing, but rather to gently massage round the points to give the opportunity for the witness to recollect and realise and correct what he said in a natural and persuasive way.

7. Expert witnesses

In the UK system, expert witnesses owe a duty to the Court or tribunal to give independent evidence, and cross- examination will often be aimed at eliciting that the expert is failing in that duty by being overly favourable to the party instructing him, or ignoring or even concealing evidence or views that are unfavourable.

Cross-examination of an expert witness is another art. It cannot be done without the advocate making himself an expert, albeit only for the one case! One way of discrediting an expert witness is for the advocate to try to push the expert into an extreme position by putting propositions based on the evidence the expert has given and then showing up their irrationality. In one case I appeared in at the Bar, I encouraged the expert to elucidate some of his more extreme theories and gave a name to them. I was then able by dignifying them in that way to lead the tribunal to appreciate that they were insupportable. A tribunal is going to want to find a simple way to reach a conclusion in favour of one expert or the other, and the advocate's strategy is for one expert to appear straightforward and the other to seem to pontificate.

8. From the point of view of the tribunal, I like oral evidence and find it useful to be able to test my own thoughts with the witnesses, usually at the end of their evidence.

9. I conclude, in these Covid days, by expressing a personal view that Zoom hearings are very successful, even in cases where there is oral evidence

even in cases where there is oral evidence and cross-examination, and I believe will have an important place in the future, particularly in saving travel costs.

About the author

Sir Michael Burton GBE (until 2016 Mr Justice Burton) sits as an arbitrator and mediator and is a Fellow of the Chartered Institute of Arbitrators and President of the Forum for International Conciliation and Arbitration (FICA). Since 2017 he has been Chairman of the Conduct and Disciplinary Tribunal of the Royal Institution of Chartered Surveyors.

Sir Michael was appointed, after 14 years as a commercial QC, latterly head of Littleton Chambers, as a High Court Judge in 1998. As a High Court Judge of the Queen's Bench Division for 18 years, he sat also in the Chancery Division, the Employment Appeal Tribunal and regularly in the Commercial Court, where he continues to sit since ceasing to be a full time High Court Judge in 2016. He was President of the Employment Appeal Tribunal from 2002 to 2005.

In 2010 to 2011 he was Chairman of the High Court Judges Association. He was Treasurer of Gray's Inn in 2012 and is a Bencher.

He was Chairman of the Central Arbitration Committee (CAC) from April 2000 to November 2017 and was President of the Investigatory Powers Tribunal until 2018 (Vice-President 2000 to 2013).

He has since 2016 been a judge of the Commercial Court of Abu Dhabi (ADGM Courts).

He was appointed in 2019 Knight Grand Cross of the Order of the British Empire for services to the rule of law.

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Wired Orthodontics - Tribunal expresses Concern about Potential Inappropriate Interference by HMRC's Solicitor with the Evidence of an Independent Expert Witness

by Rebekka Sandwell, Associate and Adam Craggs, Partner at Reynolds Porter Chamberlain LLP

In Wired Orthodontics Ltd and others v HMRC [2020] UKFTT 290 (TC), the First-tier Tribunal (FTT) refused an application for disclosure of documents and information passing between the solicitors for HMRC and their appointed expert witness. complexity, needing third party support.

Background

Wired Orthodontics Ltd (Wired) and the other two appellants, Ian Hutchinson and Susan Bessant (together the Employees), entered into a tripartite agreement with an employee benefit trust (the Trust). Pursuant to that agreement, Wired agreed to purchase an asset for the relevant Employee, subject to the Employee undertaking to pay the value of the asset to the Trust. These arrangements were challenged by HMRC and Wired and the Employees appealed to the FTT.

One of the issues in the appeal was whether Wired was entitled to a corporation tax deduction in relation to expenditure it had incurred in purchasing the assets for the Employees. In determining that issue, it was necessary to consider whether the relevant expense in Wired's profit and loss account was in accordance with generally accepted accounting principles (GAAP).

Wired and HMRC appointed independent exports to prepare reports for the benefit of the FTT. Having produced their reports, and in accordance with directions issued by the FTT, the exports were required to meet and produce a statement of areas on which they agreed and on which they disagreed, with reasons for any such disagreement (the Joint Statement).

During the course of communications between the parties' experts in relation to the Joint Statement, the experts appeared to agree the inclusion of a statement to the effect that a reasonable accountant might reach two alternative interpretations under GAAP as to whether an asset should, or should not, be recognised by Wired. However, HMRC's expert then suggested revised wording which removed this statement, apparently on the suggestion of his instructing solicitor.

Following further communications in relation to this issue, the appellants' expert sought to amend the Joint Statement to reflect the fact that HMRC's expert had amended his position after the meeting of experts. HMRC's expert objected to the inclusion of such wording in the Joint Statement, relying on 'without prejudice' privilege (WPP).

Wired made an application to the FTT, pursuant to rule 5(3), Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, for disclosure of documents and information passing between HMRC's solicitors and their appointed expert witness.

FTT decision

The application was dismissed.

Wired argued that WPP should be overridden in the circumstances of the instant case for the following principle reasons:

a) the 'Family Housing Association' exception (formulated in Family Housing Association (Manchester) Ltd v Michael Hyde and Partners et al [1993] 1 WLR 354), enables a party in litigation to reference WPP material in an interlocutory application where the purpose for which the WPP material is to be used is something other than as evidence of the content of the discussion; andb) the 'unambiguous impropriety' exception.

Wired argued, in the alternative, that if none of the general exceptions applied, it was nevertheless entitled to access the material on the grounds that the exchanges between HMRC's expert and his instructing solicitor were instructions, the material substance of which had not been disclosed. The FTT rejected the appellants' submission that all communications between the instructing solicitor and the expert, whilst the experts were endeavoring to agree the wording of the Joint Statement, were open. In the circumstances, there was no basis on which to lift the protection provided by WPP.

Comment

Although the application was ultimately unsuccessful, in dismissing the application, the FTT noted its "considerable concern" regarding the circumstances which had given rise to the application. The strength with which the learned judge expressed her concerns is striking. The judge noted that there was evidence of, at the very least, potential inappropriate interference by HMRC's solicitor with the independent evidence of an expert witness. The judge commented that the perception given is that there was a "serious transgression" and that such a perception is "seriously prejudicial to HMRC's position in cases such as these and should be avoided at all costs".

Authors

Rebekka Sandwell Associate
T: +44 20 3060 6660 M: +44 7704 189 523
E: Rebekka.Sandwell@rpc.co.uk

Adam Craggs Partner
T+44 20 3060 6421 M: +44 7545 101 656
E: Adam.Craggs@rpc.co.uk
W: www.rpc.co.uk

HANDLING A DENTAL NEGLIGENCE CASE?

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FDS RCS (Eng)

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

Lymphoedema as a Chronic Condition: the Challenges in Reporting on Prognosis

by Jane Board, MSc, RN, Lymphoedema Consultant Nurse Practitioner.

The purpose of this article is to define lymphoedema and demonstrate how treatment and the risks associated with the life - time management of the chronic condition provide challenges with the reporting on prognosis by expert witnesses specialising in lymphoedema.

What is lymphoedema?

Lymphoedema is caused by a failure of the lymphatic system. When working normally, the lymphatic system of vessels collects fluid and particles, such as protein, fat, hormones and bacteria from the interstitial spaces (subcutaneous tissues). The lymph vessels transport the lymph fluid through a filtering system of nodes to destroy the harmful particles before returning the fluid to the bloodstream (British Lymphology Society 2020).

When the lymphatic system fails, lymph fluid and some harmful substances accumulate in the affected area(s), resulting in swelling (lymphoedema). In addition to swelling, there may be skin and tissue changes and a predisposition to infection (British Lymphology Society 2020). Lymphoedema most commonly affects the limbs, but it may also affect midline structures such as the head and neck, trunk, breasts or genitalia. The condition is classified by staging, ranging from stage 0 to stage III; the higher the number, the more severe the signs and symptoms (Journal of Lymphology, 2016).

Lymphoedema will worsen over time if left untreated, increasing the risk of complications such as cellulitis (bacterial infection of the skin), dry and hardened skin, lymph blisters and leakage of lymph fluid through skin pores (lymphorrhoea). Sufferers frequently cite a continuous ache, heaviness and reduced function of the swollen, body part. Lymphoedema affecting an arm and hand can result in a reduced range of arm and shoulder movement and finger dexterity (Photograph no: 1 opposite), whereas a lymphoedema affecting the legs and feet can result in an imbalance in gait when walking and difficulty in finding adequate footwear to accommodate swollen feet (Photograph no: 2 opposite).

There are two types of lymphoedema; primary and secondary. Primary lymphoedema is due to faulty genes causing an under development of the lymphatic system. It is the secondary type of

Above, Photograph no:1

Above, Photograph no: 2

lymphoedema that usually presents in litigation because this type of swelling develops as a consequence of an external cause. In other words, the condition has occurred in a Claimant who had a normal lymphatic system that then becomes damaged by an extrinsic factor e.g. cancer or a road traffic accident (Table 1: Causes of secondary lymphoedema).

Table 1: Key causes of secondary lymphoedema	
Cancer	Lymph node removal
Radiotherapy	Immobility
Infection (cellulitis)	Obesity
Trauma	Venous disease

Regardless of the cause, lymphoedema is a chronic condition that cannot be cured. Treatment is required for life to maintain long term control. Long term management aims to reduce and control the signs and symptoms associated with the swelling, mitigate future risks, and enable the sufferer to lead as normal a life as is possible. This will involve self-management by the sufferer in conjunction with treatment from a lymphoedema practitioner.

Early recognition and treatment is always easier and more effective than interventions initiated at later stages of the condition (British Lymphology Society 2020) i.e. stages 0 – I. Reflection on my 25 years of clinical practice indicates that the more established the signs and symptoms of the lymphoedema (stages II to III), the greater the extent (and cost) of treatment need. The core treatment components for lymphoedema (Table 2), and the amount which a sufferer needs for a lifetime of control is dependent on the severity of clinical symptoms at any given time. Treatment will involve more than one component.

Table 2: Core lymphoedema treatment components	
Compression garments	Manual Lymphatic Drainage (lymphatic massage)
Multi-layer bandaging	Kinesio taping
Care of the skin	Pneumatic compression pumps

Lymphoedema prognosis

A Claimant cannot be put back into the position they were before the incident that has allegedly caused the lymphoedema because the condition is chronic and cannot be cured. Treatment is required for life. These facts provide the background for the reporting on lymphoedema prognosis. However, it is the complexity of lymphoedema as a condition, the variables in treatment and the extent of future risks and their potential for occurrence during a Claimant's lifetime that make the reporting on prognosis challenging. The complexity of the scenario subsequently hinders the defining of timescales of the risks that can occur at any time, be it short, medium or long term (1 year, 1 to 5 years or more than 5 years).

For example, a secondary lymphoedema of both legs caused by the obliteration of lymph vessels from a road traffic accident will undermine blood flow from the veins, generating a risk of leg ulceration (wounds) and an exacerbation of venous oedema caused by venous insufficiency.

A cancer related lymphoedema is likely to develop from multiple factors that collectively damage the lymphatic pathways (vessels) draining lymph fluid. For example, the development of arm lymphoedema following breast cancer treatment occurs because lymph vessels are either damaged by breast removal (mastectomy) or obliterated by the effect of radiotherapy. Lymph fluid drainage routes are also interrupted or severed by the excision of lymph nodes containing cancer cells in the adjacent axilla. Another example is the development of lower limb lymphoedema in men as a consequence of prostate gland removal (prostatectomy), radiotherapy and the excision of adjacent pelvic lymph nodes containing cancer.

Whilst there is an understanding of the pathophysiology causing lymphoedema, there are currently no diagnostics enabling identification of the exact cause and specific anatomical site of the lymphatic damage. This prevents a lymphoedema expert witness from explicitly reporting on the causation of a cancer related lymphoedema i.e. cancer infiltration into the tissues or the surgical trauma or obliteration of the lymphatic pathways from radiotherapy or the excision of lymph nodes. The lymphoedema expert witness is therefore likely to describe lymphoedema as being caused by cancer and the effects of treatment (surgery, lymph node excision and radiotherapy).
Lymphoedema progression and the extent of deterioration in the signs and symptoms is difficult to forecast because the risks may occur at any time during the Claimant`s lifetime, in isolation or as a consequence of another. For example, an increase in swelling as a consequence of the blockage of lymphatic pathways by disease infiltration (cancer recurrence) can result in a poor response to lymphoedema treatment (because oedema cannot be moved) and the subsequent development of cellulitis from stagnating oedema.

Reporting on lymphoedema prognosis therefore involves the citing of future risks, highlighting the potential for two or more to occur at any one time.

Recurrence

A lymphoedema expert witness will defer to the opinion of the Claimant`s Oncologist for the risk of cancer recurrence. Regardless of the percentage of risk of recurrence indicated by an Oncologist, there is no quantitative evidence in medical literature which a lymphoedema expert can rely upon to indicate the incidence of lymphoedema progression as a consequence of secondary disease. Future risk with lymphoedema progression in this instance will be based on the clinical experience of the lymphoedema expert writing the report and the consensus of opinion in published lymphoedema literature.

Obesity
Obesity is an identified risk for the development and or progression of lymphoedema because an increased abdominal girth causes pressure on abdominal lymphatic vessels (REF). However, determining the extent of the risk of an excess gain in weight, as a short, medium and long-term risk is challenging to forecast in a Claimant over a lifetime; be they of a healthy body weight or obese at the time of writing a report.

Cellulitis
Cellulitis (infection in the tissues) requires immediate medical attention and the administration of antibiotics. Claimants with lymphoedema are especially at risk of developing this infection because of lymph fluid congestion in the tissues and the localised impairment in the immune response caused by damage to the lymphatic system. A long- term / life-long risk of cellulitis (and repeated attacks) is therefore present for all sufferers of lymphoedema. However, it is never possible to provide a percentage measure of the risk, because succumbing to a cellulitis attack is also dependent on a Claimant`s vigilance with life-long preventative measures.

Employment
The issue of employment and a Claimant's capability to continue at work frequently features as a question of instruction from law firms. Again, challenges occur with prognosis. Consideration first needs to be given to the type of employment the Claimant undertakes. Standing or sitting for long periods of time or repetitive movements are each, more likely than not, to be detrimental to the control of lymphoedema. Work sustainability in the event of the development of risks, the Claimant's age and the anticipated date of retirement further the challenge with the reporting on prognosis. A lymphoedema expert is likely to defer to the expertise of an Occupational Therapist for an assessment of adaptations in the workplace to enhance the capability of employment for the Claimant.

Ageing
As a person ages, the risk of developing lymphoedema increases (REF). If lymphoedema already exists, the risk of progression further increases. It is not possible to report a percentage measure of the long-term risk of lymphoedema progression in Claimants who, in their 30`s, and based on a UK life expectancy of 82 years, face the prospect of living for 50 years or more with lymphoedema. Prognosis will be dependent on the control and physical capability of a Claimant to sustain daily care (e.g. compression hosiery) and their long-term access to a lymphoedema specialist practitioner.

Psychological impact
The reporting on lymphoedema prognosis also needs to consider the psychological consequence of lymphoedema for Claimants. A reduction in function, mobility and the effect on body image caused by the impact of a swollen limb is more likely than not to cause anxiety and the need for psychological therapy. Claimants can require counselling for life because of the trauma from cancer misdiagnosis and the subsequent development of a lymphoedema that cannot be cured, and that serves as a 'continual reminder' of the event. To a lesser or greater extent, Claimants will suffer from stress, anxiety or a depressive state, of a short, medium or long-term duration. The need to defer to the expertise of a counsellor should be recommended in a lymphoedema report to address the psychological issues of the Claimant. An improvement in well-being will more likely than not enhance their capability to self-manage their lymphoedema.

Treatment
Providing clarity with lymphoedema prognosis is also compounded by the type and extent of treatment required over a lifetime. Invariably, Claimants have not received any lymphoedema treatment prior to an examination by the lymphoedema expert witness, thus undermining a treatment prognosis because none has occurred for the expert to form an opinion on. Compression garments are the core component of lymphoedema treatment and are needed to be worn 7 days a week, for life, to contain the oedema within the tissues. However, courses of treatment that involve multi-layer bandaging and lymphatic massage can also be required in the event of lymphoedema deterioration (stage II – III) from the occurrence of a risk.

The extent and frequency of treatment will also be dependent on the capacity of a lymphoedema specialist practitioner to provide the treatment when deemed clinically necessary, and with a Claimant being in a position to maintain the wearing (for example) of multilayer bandaging for a period of 2 to 3 weeks.

A recent and international systematic review of lymphoedema clinical practice guidelines (that included the UK) reported a low overall quality in the guidelines currently available and with an immediate need for high quality-based guidelines (O`Donnell et al 2020). Lymphoedema expert witnesses are therefore supporting their treatment recommendations with consensus of opinion (Lymphoedema Framework 2006) and individual clinical experience from practice. Furthermore, the fact that a future need for additional treatment and an outcome that cannot be foreseen will result in a guarded reporting on prognosis.

A guarded reporting on lymphoedema prognosis is compounded by the risk of the development of other health issues not related to lymphoedema e.g. arthritis. Immobility and the loss of joint dexterity as the Claimant ages, are more likely than not to exacerbate swelling because of reduced usage of muscles to pump lymph fluid and an inability to apply compression garments.

Conclusion
In conclusion, the reporting on lymphoedema and prognosis is challenging because of the extent and complexity of factors that impose risks to the lifetime management and control of lymphoedema for a Claimant. On the one hand, a Claimant may live a near normal life because their lymphoedema is

minimal (stage I), well controlled and with no risks that occur. Alternatively, a Claimant may be debilitated by a severe lymphoedema (stage III) that significantly undermines their quality of life because of a poor response to treatment caused by multiple bouts of cellulitis and a recurrence of cancer. A lymphoedema expert witness can therefore find it challenging to provide clarity in reporting on lymphoedema prognosis because of the complexity of contributory factors and the extent of risks that remain throughout the lifetime of the Claimant.

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Chronic Periodontitis: Diagnosis, Treatment and Medicolegal Challenges

*In this article **Mr Antony Visocchi**, dental surgeon, discusses chronic periodontitis, a common disease and the cause of many clinical negligence claims involving dentists. He explores the condition and the circumstances that can lead to cases of clinical negligence arising.*

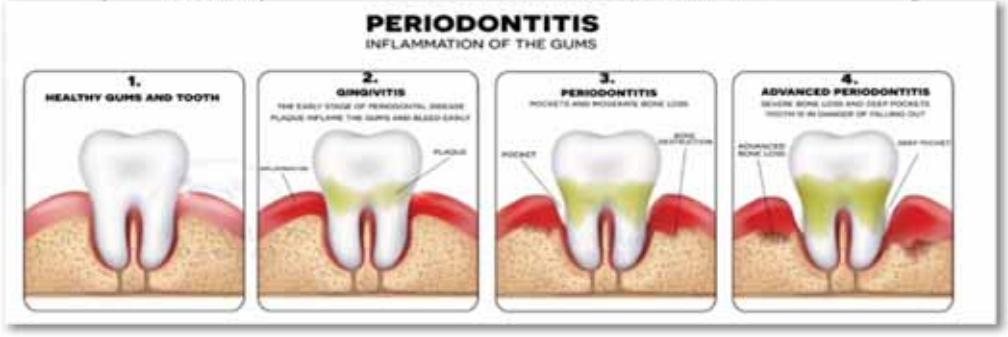
What is periodontitis?

Periodontal (gum) disease is a common condition affecting the oral cavity consisting of chronic inflammation (swelling) of the periodontal tissues (gum and bone) that is caused by the accumulation of dental plaque.

The inflammatory process begins with gingivitis, which is a common and mild form of gum disease. This causes irritation, redness and swelling of the gingiva, the part of the gum around the base of the teeth. It's important to take gingivitis seriously and treat it promptly. Importantly, gingivitis is a reversible process.

When gingivitis is left untreated, it will worsen over time and impact the integrity of the gums in a serious way. Periodontal disease occurs when plaque from the teeth builds and begins to grow underneath the gum line. Pockets form between the tooth and gum and more plaque gathers in this area due to the area being less accessible with a toothbrush. The plaque, in turn, destroys the bone around the teeth and results in reduced support. Once bone is lost, it does not grow back. This is periodontal disease and is irreversible.

Fig 1: Either of the next two images as they are both essentially the same. Which ever is simpler.



As part of routine care in general dental practice, a Basic Periodontal Examination (BPE) should form part of clinical examinations and should be completed at least annually. The purpose of these assessments is to provide a simple and rapid screening tool that is used to indicate the level of further examination needed and to provide basic guidance on treatment need.

The Basic Periodontal Examination (BPE) was first developed by the British Society of Periodontology in 1986 (BSP). Initially, it was known as Community Periodontal Index of Treatment Needs (CPITN). Since then there have been four updated versions with the most recent, relevant to this period, being in 2011.

The treatment suggested for the BPE scores are as follows;

0	No need for periodontal treatment
1	Oral hygiene instruction (OHI)
2	OHI, removal of plaque retentive factors, including all supra- and subgingival calculus
3	OHI, root surface debridement (RSD)
4	OHI, RSD. Assess the need for more complex treatment; referral to a specialist may be indicated.
*	OHI, RSD. Assess the need for more complex treatment; referral to a specialist may be indicated.

What are the limitations of the BPE scoring system?
Mr Visocchi believes it cannot be overstated that the BPE is a very general and crude tool to screen for periodontal status. This is a 'one-size-fits-all' tool for quick assessment only.

One of the inherent problems in using the BPE is the poor reproducibility between clinicians as well as by the same clinician on different occasions. Furthermore, he believes that the individual clinical judgement of a competent clinician needs to be incorporated into the overall periodontal care and implementation of the BPE treatment guidance for individual patient needs.

Despite the possibility of irregular and inconsistent scores, the BPE still provides the dentist with a good basis on which to base the assessments and treatment plan. Any repeated scores of 3 and 4 should alert the practitioner to a significant periodontal problem which requires a more focused treatment plan and a maintenance programme.

How is Periodontal Disease Treated?
Periodontal disease is a chronic and life-long inflammatory condition, which affects the majority of the adult population to a varying degree. The key to successful prevention and treatment of periodontal diseases is effective oral hygiene. Preventive care, customised to the individual, is also necessary for the patient to maintain healthy gingival tissues, including regular professional cleaning and reinforcement of the importance of effective plaque removal. Smoking is a major contributory factor to periodontal disease therefore smoking cessation advice should be provided as necessary

Long-term periodontal assessment and monitoring is the assessment of the bone levels which support the tooth. The end result of periodontal disease is that the supporting bone is 'eaten away'. Once bone loss occurs through periodontal disease, no regrowth will occur. Successful treatment of periodontal disease is indicated by the resolution of the inflammation of the gum tissues to prevent further bone loss.

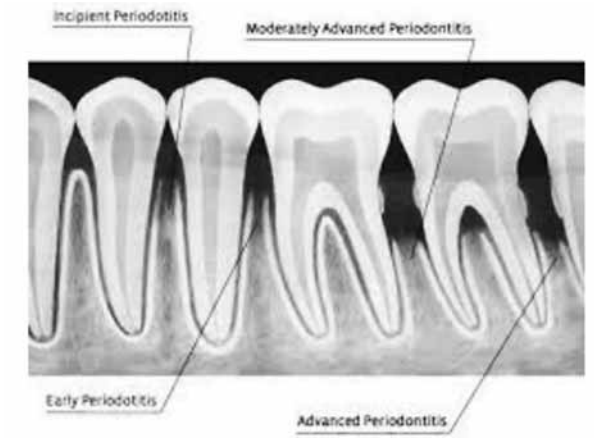
Fig 2: Radiograph showing Severe Bone caused by periodontal disease

In addition to clinical examinations, regular radiographic examinations should be undertaken. Best practice includes standard bitewing radiographs being carried out every 2 years for a patient with a low risk of caries (decay). As well as assessing the teeth for decay, these radiographs give a very good overview of all the tissues surrounding the back teeth. The tip of the bone surrounding the tooth can usually be seen and therefore the bone level assessed. If this bone is not visible, further radiographs should be taken to investigate the extent of bone loss.

Fig 3: Radiograph showing Healthy Bone Levels

Radiographic investigations will give an accurate assessment of the levels of bone supporting individual teeth and the amount of periodontal disease that has affected the teeth in the past. This can be a very accurate assessment of previous disease levels, although it cannot reflect when the bone loss happened. The assessment of the bone levels can be compared to looking at the rings of trees to calculate their age as they allow the assessment of historical damage

Fig 4: Radiographic Stages of Bone loss due to Periodontal Disease



One of the main reasons for periodontal disease being missed or left untreated, is that the condition is relatively painless. Unless pain prompts a patient to seek treatment, it is very much up to the skill of the dental professional to identify, advise, educate and treat periodontal disease. Furthermore, the nature of the disease means there is no end to the treatment or to the patient's responsibilities at home.

Good periodontal health requires a long-term commitment to prevention and maintenance from both the dental professional and the patient. Associ-

ated, exacerbating factors should also be factored into the management programme by the dental professional. These range from poor fillings that have 'plaque traps', underlying systemic disease e.g. diabetes, patient dexterity, and some medication e.g. for high blood pressure

How Does Clinical Negligence Arise?
A clinical negligence claim can arise if the treating dentist breaches their duty by failing to examine, investigate, diagnose and treat periodontal disease.

The result of a failure to treat this condition properly can lead to advanced chronic periodontitis, severe bone loss and, ultimately, tooth loss. If teeth are lost due to periodontal disease, the restorative options can be limited or can involve extensive reconstructive treatment (bone grafts) to allow implant placement.

Identifying Clinical Negligence
From a clinical negligence perspective, the bone levels shown on a radiograph can confirm causation and lead to a claim of breach of duty due to undiagnosed and untreated periodontal disease. As periodontal disease is irreversible, the stage at which the diagnosis occurs and when treatment commences is critical to the long-term prognosis of the teeth affected.

Progression of the disease can occur even when it has been identified and treated. Increased bone loss results in more challenging oral hygiene practices for both the patient and the professional. This, in turn, will have a direct effect on the prognosis of the teeth and consequently, needs to be included in any recommendations when damages in tort are assessed.

Case Study
Mr K, a gentleman in his mid-fifties, regularly attended the dentist at six month intervals. He had been seeing the same dentist for 12½ years and his clinical records showed that a scale and polish had been performed at each appointment. His clinical records showed that the dentist had noted concerns about 'mobile teeth', although no radiographs were taken and the dentist decided to take a 'wait and see' approach.

Unaware that there may have been an issue with his teeth, Mr K discovered he had an abscess which caused a tooth to require extraction. Over the next 10 months he lost a further 8 teeth, at which point he decided to get a second opinion on the underlying cause of this rapid tooth loose. He was advised that he had severe, chronic adult periodontal disease affecting all the remaining teeth and that most of his teeth had 75%-80% bone loss.

Mr K has undergone extensive treatment to stabilise the disease. However, he now only has 6 teeth left and wears a denture. He will also lose at least 2 further teeth in the next 12 months. Mr K now finds it hard to leave his house due to the loss of confidence caused by losing so many of his teeth. The case is ongoing, however the claim for restorative treatment alone will be £25,000 - £40,000 due to the extent of the disease and damage caused over such a long period.

About the Author
Antony M. Visocchi
BDS, MFDS RCS Ed, MJDF, RCS Eng, FDS RCPS Glas, FFGDP(UK), AFHEA, Post Grad Dip Med Law.

Mr Visocchi is a highly skilled dental practitioner who provides expert opinion to the General Dental Council Fitness to Practice Panel in respect of the GDC's fitness to practice process, as well as being an independent expert for negligence, personal injury and indemnity solicitors. The remainder of his time is split between being a dental practice inspector for NHS Forth Valley, serves on the panel of Expert Advisers for the National Institute of Health & Care Excellence (NICE) Centre for Guidelines and is a clinical lecturer at Aberdeen Institute of Dentistry. Most recently, Mr. Visocchi has been appointed as Dental Practice Adviser to NHS Forth Valley.

Mr Visocchi is available for instruction via Medicolegal Partners. He is able to accept instructions in all aspects of general dental practice including, but not limited to;
- Examination and diagnosis
- Consent
- Emergency care
- Treatment routinely undertaken in general dental practice
- General dental practice regulation & compliance
- Scope of practice

If you have a dental negligence case that you would like to discuss with him, please get in touch.
Tel: 07866 157909
Email: antony.visocchi@btopenworld.com

How Will COVID-19 Change the Personal Injury Landscape?

by Kelvin Farmaner and David Wilson.

Personal Injury

A downward trend is expected with millions of workers having been furloughed or working from home throughout lockdown which will have impacted on traffic volumes and therefore accidents. In addition to reduced volumes there have been fewer passengers in any given vehicle, with public transport in particular impacted in this way. It may be that accident volumes have not dropped quite as sharply as the number of claims presented as the latter will have been impacted in part by the ability of solicitors and claims management companies to take instructions and action new claims. There is also anecdotal evidence that there have been more serious accidents. There is a sense that many drivers have started returning to work after some months and are as a result rather "rusty". There have been reports of incidents involving pedestrians who have been injured whilst walking on the road to maintain social distancing from other pedestrians. There have been more cyclists on the roads due to the increase in leisure time for some and some police forces have reported substantial increases in issued speeding fines as driving standards may have been relaxed due to emptier roads.

In the short term there is likely to be a backlog of issued claims to work their way through the court system. Whilst the courts have made laudable attempts to switch to remote hearings where possible, the courts have not been fully staffed so some delays are inevitable. Many firms have dealt with remote JSMs and mediations but again there is a sense that these are less successful than their pre COVID face to face counterparts with a party being less likely to invest in settlement if they remain sat on their sofa throughout rather than physically making a journey. There have also been delays to the progress of some pre and post issue claims due to Claimants who may have been shielding having been unable to avail themselves of treatment or to attend medico legal appointments. Again whilst some medical and medico legal practitioners have continued to operate with some form of remote treatment and examinations this is not always feasible. There may be little point in agreeing to fund remote treatment and medico legal examinations if face to face appointments are inevitable in a given case as this will only lead to duplicated costs and no time saving. Other heads of loss will also be impacted including loss of earnings claims where people may have been out of work for some time due to injuries but where the evidence suggests that their work would have been disrupted by COVID-19 in any event. Inevitably the costs of claims could also rise and this is something to look out for in the cost budgeting process and when any applications are made to vary budgets. It seems unlikely that COVID alone will amount to a significant development so as to justify amendment.

Vehicle Repair and Credit Hire

Many personal injury cases are pursued alongside vehicle repair and credit hire cases. There are likely to be discrete impacts on these claims. COVID-19 is thought to have caused disruption to the supply of vehicle parts with production levels down. This together with a reduction in labour supply will mean increased repair times and therefore increased hire duration. It will be as important as ever to be pro active with these claims to minimise delays and to analyse claims by going back to basics and considering for example whether a hire vehicle was needed at all if a Claimant was furloughed and with limited socialising possible. Rates surveyors are still operating so their evidence can still be used to challenge rates in the usual way.

Fraud

There are inevitable concerns that an economic downturn will result in more fraudulent claims. Insurers will need to be increasingly vigilant to look out for the signs of staged accidents and exaggerated claims that otherwise give genuine Claimants a bad name. It is unfortunate that forecasts of a downturn

may coincide with the delayed whiplash reforms and litigant in person portal. There were already fears pre COVID-19 that the encouragement of litigants in person could lead to an increase in fraudulent claims and therefore undermine the hoped for cost reductions achieved by the removal of lawyers from some lower value cases. This may be exacerbated by a recession and it remains to be seen whether the reforms will be delayed further or even abandoned. Some tools used in the fight against fraud such as social media checks may remain useful, but others such as surveillance are less likely to be productive whilst many people remain locked down. As well as fraudulent and exaggerated claims insurers should expect a resurfacing of older claims which had already been repudiated.

Generally speaking parties are likely to be more amenable to commercial settlements in appropriate cases as any recession bites on finances whether those of an individual Claimant, a CHO, a self insuring business or an insurer.

However these issues develop it is clear that there will be an impact from COVID-19 and insurers and practitioners alike will need to be mindful of the changing landscape.

This article was written by Kelvin Farmaner and David Wilson.
Kelvin Farmaner is a Partner with Trethowans LLP and Head of the Insurance & Regulatory Team.
David Wilson is the Managing Director of Van Ameyde UK Limited.

Post Traumatic Embitterment Disorder (PTED): A Proposed New Diagnosis

by Professor Hugh Koch, Clinical Psychologist, Visiting Professor in Law and Psychology. Birmingham, City University

Professor Dr. Michael Linden, Charité University Berlin, Leader of Psychosomatic Rehabilitation.

Dr Friso J Jansen, Senior Lecturer, Birmingham City University, UK

Dr Matthew Dicks, Clinical Psychologist with HK Associates, Cheltenham, UK

Dr Joe Grace, Clinical Psychologist with HK Associates, Cheltenham UK

Clinicians, health statisticians, expert witnesses, and the courts throughout the world are obliged or used to encode clinical diagnoses and designations of illnesses according to the *"International Statistical Classification of Diseases and Related Health Problems (ICD),"* which is state authorized and published by the World Health Organisation (WHO, 1992), or alternatively in some countries limited to psychological problems, according to the "*Diagnostic and Statistical Manual of Mental Disorders (DSM)"*, which is a publication of the American Psychiatric Association. These systems give numbers which can be used, as their names say, for statistical reports, in the communication between clinicians and other health institutions, for reimbursement purposes or to certify a pathological condition. There are many more illnesses than codes, while in all sections additional codes are given for "other specified disorders and illnesses". In this regard we will discuss in this paper the problem of embitterment reactions.

Periodically, research and clinical experiences will address the need and relevance for new codes, as it has been shown, that clinicians and organizations narrow in their view on conditions with separate ICD codes. Such new codes are included, when it has been shown that a disorder covers a defined set of symptoms, provides concepts of etiology and course, is well operationalized, allows a separation from other disorders, and has epidemiological and clinical importance. [Brand, et al. (2020)].

In the field of trauma and personal injury, there has been recent interest in how trauma victims feel irritable, angry and experience a sense of injustice alongside feelings of stress, low mood and anxiety. This can be equally distressing and destructive to being actively interested in clinical treatment and/or civil compensation litigation. ((Koch 2018); Koch et al (2017)).

It is well documented (Koch et al (2017)) that being involved in any traumatic incident results in stress of varying intensity both at the time, immediately afterwards and over a period of weeks and months thereafter. Terms 'stress', 'trauma', 'depression' and 'anxiety' are typically used both clinically and legally when discussing and describing these unpleasant and distressing experiences. It has been suggested that traumatic stress becomes persistent when individuals develop a sense or belief of serious current and ongoing threat, as a result of excessively negative thoughts about the index trauma and its aftereffects. A clinical diagnosis and code in ICD is "Posttraumatic Stress Disorder" which is an anxiety disorder in the aftermath of a life threatening or horrifying experience, characterized by avoidance and intrusions. The is another reactive code for adjustment disorder, a transient and mostly mild disorder. In clinical practice there are also "social stressors" (different from life threatening) which also end up in severe and persistent pathological and impairing disorders with embitterment rather than anxiety as the prevailing symptom. It has been extensively described since the time of Kraepelin, the forefather of psychiatric classification [Kraepelin, 1915; Linden, 2003, 2020a, 2020b], but i soften non-recognized and not adequately treated, as a separate code in ICD is missing. This is also of relevance for expert witnesses in legal disputes. This paper summarises and extends ideas discussed on civil claimant embitterment (Koch et al, 2017).

States of embitterment involve anger, irritability, blame, phobic reactions, social withdrawal, and multiple psychosomatic symptoms. This emotion arises from a reaction to a personal injury, injustice, humiliation or breach of trust, afflicted by another person. This is a social and interactional trauma. Blame towards the wrongdoer is often associated with psychological stress (Ehlers & Clark (2000)) and needs to be recognised and at times treated as a legitimate part of the claims process. It has been found that blame is associated with greater health-care utilisation. A key element of feelings of blame centres on the perception of injustice – the adverse impact on the claimant or aggrieved party that occurs as a consequence of being hurt or 'failed' by one or more other parties. Injustice is a special psychological dimension as all humans hold the inborn "belief in a just word", which may be called a "fundamental delusion" [Lerner, 1980], but still is essential for social life. Injustice is experienced as aggression and answered by counter-aggression, or embitterment, if there is no rational or promising way out [Hafer et al, 2016]; [Dolinski, 1996]; [You, 2020]; [Sensky, 2010]. Chances to complain and assert individuals' rights through the pursuit of claims and grievances form part and parcel of a customer responsive culture can also reinforce the 'embittered' behaviour of vexatious litigants and unusually persistent complaints during the claims process and ultimate litigation.

A recent study by the Parliamentary and Health Service Ombudsman in the UK developed a typology of injustice consisting of four main categories of injustice, Emotional Injustice, Material Injustice, Psychological Injustice and Bereavement injustice.

Emotional Injustice is the impact of maladministration or service failure on the aggrieved person's feelings. This is typified by, but not limited to, feelings of upset, anger, worry or uncertainty.

Material Injustice arises where there is a negative impact on the aggrieved's material existence. This may involve money or property, but also non-physical entities such as rights, relationships, opportunities, quality of life and loss of employment, job role or career. Physiological Injustice is the impact on the aggrieved's physical or mental health or wellbeing. This includes all aspects of pain, injury and illness, and any worsening (or worsened prognosis) of the aggrieved's physical or mental health.

Bereavement injustice may arise in any situation where service failure is a direct or contributory cause of death; or where failures in care, service or administration either before or after death exacerbate the grief suffered by the deceased person's spouse, partner or close family. The Bereavement category recognises that the impact of a death will be different to, and usually greater than, most forms of emotional injustice. Each category was further subdivided into a number of types of injustice in (Koch et al (2017)).
The actions of vexatious litigants resulting in unusually persistent complaints and practitioners consume a large amount of time and organisational resources in the pursuit of grievances that, in and of themselves, seem, if not trivial, at least lacking in appropriate complexity or importance. The anomalies found frequently in written communications from the 'embittered' include rambling discourse characterised by repetition, repeated misuse of legal, medical and other technical terms, ultimatums and threats of violence to self, others or organisations.

Four case studies are summarised below which reflect, three clinical presentations of anger and blame of increasing severity. They are adapted from those presented in Koch et al, (2017).

Case Study A: Well-Adjusted Claimant Experiencing Litigation Stress

Case Study A: Feelings of irritability, and injustice centred on:

1. The driver whose careless actions had caused the accident.

2. The delayed and poor care she received on attending her local hospital.

3. Her employers unsympathetic attitude and impractical approach to her return to work.

The mild feelings of injustice exemplified in Case Study A are typically short lived and get resolved within a reasonably finite length of time.

Case Study B: Claimant Preoccupied with Sense of Injustice

Mrs. A (79) was admitted to hospital for a routine hip operation but unfortunately slipped, when

unattended, on a wet floor and then had post-surgical infection complications due to negligent post-operative care (admitted by team). She had multiple feelings of anger and injustice as follows: -

1. Pain and distress on admission and post-operatively

2. Anxiety and pre-occupation with her impaired mobility

3. Failings in care and treatment on the surgical ward including lack of care planning, incidents of constipation and incontinence, malnutrition and, lack of proper assessment to use a hoist

Subsequently, on being discharged, she was advised to bring a medical negligence claim. She then experienced two further sources of irritability.

4. Poor communication with legal firm undertaking her case and

5. Poor interviewing behaviours from orthopaedic expert who prepared her medico-legal evidence.

Case Study C: Abnormal Psychological Presentation of Embitterment, Oversensitivity and Paranoia

An individual may have significant pre-existing personality disturbance which then becomes exacerbated by a traumatic incident and he/she then displays significant cognitive, emotional and behavioural difficulties to the lawyer, experts and the court. This often makes sensible and logical resolution of any claim very difficult.

Mr J (47), a previously unemployed administrator due to many years of psychiatric disturbance, was involved in an unusual accident whilst shopping. A piece of ceiling fell in a shop knocking him unconscious momentarily. He was admitted to hospital for ten days with a head injury and cognitive impairment. He also developed low mood due to his inability to concentrate and poor recall.

He displayed significant and pervasive irritability and anger. He distrusted those around him at home, medical personnel in the hospital and his legal and medico-legal team. He believed, inaccurately, that people's motives were to harm him. He had intermittent explosive episodes acting out verbally and physically. His presentation was consistent with him having a Paranoid Personality Disorder (DSM V 301.0).

As a result of his vexatiousness, his relationships deteriorated. He had a series of lawyers but failed to sustain relations with any of these. He accrued significant debts in relation to the litigation and general finances. He felt disconnected, became increasingly fixated on his grievances.

More details of these three case studies can be found in Koch et al, (2017).

Further details of the spectrum "embitterment reactions" can be found in Linden and Rotter (2018).

A case study of Post Traumatic Embitterment Disorder is illustrated here.

Case Study D: Posttraumatic Embitterment Disorder.

Ms. Kali (37) was married for eight years with her husband, whom she loved deeply and who promised every single day that he also loved her. She was competent in her life. She worked hard to allow him to work as an artist. And then he left her for another woman, but returned after 4 months, promising he had made a mistake, that he loved only her, and he wanted them to be together. Then three weeks later she learned that he had been sleeping with both women on alternate nights. He shrugged and said that he "just didn't feel anything anymore", on their 8-year anniversary. After that confrontation, she was so devastated that she took a bottle of pills and attempted suicide in various ways, ending up in the hospital. She had to pay for, and write up the divorce. She found a new job although with a severe pay cut compared to her former job. During the day she looked seemingly positive and upbeat, but in her heart, she was full of rage and pain because of the injustice that her ex had gotten away with everything, had destroyed her trust in love, her hopes, her finances, her resume, and was rewarded with a gorgeous 21-year-old who posted pictures of them blissfully living the life she was promised. When she met him by accident in a bar one night, she walked directly up to him and punched him right in the face. And then 2 days later police came to her work, and she learned he was pressing charges for "domestic battery", and she was sent to jail for the night. She lost her job, was sentenced to a year and a half probation, had to pay the court fees, and had to spend 6 months in "domestic violence counselling" which she felt to be nonsense. He clearly pressed the charges to play the victim and paint her as a terrible wife. She is angry on the judge and her lawyer, who advised her not to speak or say anything in her defence and just take the plea, because if she pleaded not guilty and was found guilty she would have a permanent record with no hope of expungement. She has been on unemployment afterwards. It is nearly 3 years and she still cries herself to sleep and has terrible nightmares. She sends him death threats via email on a fairly regular basis. She could be giggling with the waitresses, flirting with her customers as she bartends, pause to stop, and send an email via iPhone that says, "I can't wait to hear your screams when I slice your throat you fucking whore" and she will grin and hit send! and pour a mojito and laugh with my customers. She doesn't tell anybody anymore about this. It is like she is consumed with rage and no one knows it but she herself. She has detailed fantasies of how to kill him and his new girlfriend. She even thought about killing his mother, just to hurt him, even though she was always kind to her. And so, she constantly dreams of revenge. She says that she is tired of being consumed with rage but cannot see a life free of it. She has been talking to therapists, but it did nothing for her. She is hopeless as she has no idea what she can do to stop being consumed with fear, inability to trust, inability to hope and the overpowering constant wishes for vengeance.

In some cases like this the outcome is severe acting out up to the point of murder suicide. This is a severe mental condition where the afflicted person is no longer in control of his own thoughts, emotions, impulses, and actions.

In addition to experiencing anxiety and depression after a traumatic event, one very common undiagnosed and unrecognised symptom is anger, because the individual rightly or wrongly perceive that they have or had been treated badly (e.g., by the other driver or their employer), are not getting better, are being poorly assessed by doctors or lawyers or misunderstood by family members. This tends to be trivialized, or ignored partly perhaps due to it not being explicitly recognised as a DSM V or ICD 10 disorder. The closest diagnoses available in DSM V include – Intermittent Explosive Disorder (312.34), Adjustment Disorder Unspecified (309.9) or Paranoid Personality Disorder (301.0).

Perceptions of injustice may not simply be 'understandable' non-significant reactions to experiencing a non-fault debilitating injury. Research and clinical experience indicate that perceived injustice, after an injury, can impede successful recovery from that injury and associated psychological and physiological changes which compromise recovery.

Post-Traumatic Embitterment Disorder (PTED) in need of a separate ICD code?

Overview of anger-based disorders (ICD-10 & DSM-V)

A concise overview of the reconfirmed disorders which include some aspects of anger and frustration in their symptoms, either in ICD-1- or DSM-V include the following:

ICD-10

Behavioural Disorder
Borderline Personality Disorder
Conduct Disorder
Delinquency
Anxiety Disorder
Oppositional Defiant Disorder
Intermittent Explosive Disorder
Antisocial Personality Disorder

DSM-V

Oppositional Defiant Disorder
Intermittent Explosive Disorder
Conduct Disorder
Antisocial Personality Disorder
Other Specialised Disruptive, Impulse Control, Conduct Disorder

Anger and irritability can also, of course, be one of several symptoms listed as part of other recognised disorders such as depressive disorders, traumatic disorders, substance misuse disorders and other mental disorders/illnesses.

A new term – Post-Traumatic Embitterment (PTED) – has been recently proposed and discussed (Yamada, 2015). PTED is a collection of symptoms originally proposed by the second author, (Linden, 2003). Many individuals may become so entrenched in their anger and feel so embittered by a negative life event, not of their making, that normal everyday functioning occupationally and/or socially may be impaired. The elements of PTE(D) are defined as:

- A single exceptional negative life event precipitates the onset of the illness,
- The present negative state developed in the direct context of this event,
- The emotional response is embitterment and feelings of injustice,
- Repeated intrusive memories of the event,
- Emotional modulation is unimpaired, patients can even smile when engaged in thoughts of revenge, and,
- No obvious other mental disorder that can explain the reaction

PTED does not currently have a separate code in DSM-V or ICD-10. Although the term 'embittered' can carry negative connotation and both experts and the court can discount disruption and distress by a simplistic view of someone's anger, a more considered approach acknowledges that, for some individuals, deeply felt anger is an understandable and disruptive response to unjust actions and behaviours that threaten or adversely affect someone's occupational, social and psychological wellbeing.

The cognitive style of the querulous is that of seeking confirmation of their viewpoint, rejecting or minimising all counter-examples. Cognitive distortions include the following:

- Those who do not fully support their cause are disliked, rejected as 'enemies'
- Any lack of progress is the product of malevolent interferences from someone
- Any compromise is unwelcome
- The grievance is a defining moment of their life

Providing effective therapy for severe post-trauma anger requires, summarising Koch et al (2017), a comprehensive assessment of which aspects of thinking and behaviour are causing difficulties and preventing a natural resolution of trauma-related stress, and addressing the specific claim-related focus of the anger.

Given the research indicating that perceived injustice and anger are predictors of ongoing disability, interventions that can modify extreme perceptions of injustice are likely to be associated with reduction in chronic pain, depression and anxiety, and other psychological symptoms. This could also be addressed in mediation discussions.

Clearer understanding of cognitive, emotional and behavioural aspects of anger-generating trauma and

behavioural aspects of anger-generating trauma and stress experience help the lawyer and the expert arrive at a more robust opinion of diagnosis, causation and prognosis and also aid the therapist in focusing on interventions which are beneficial and accelerate recovery, and reduce or limit disability.

Experts should consider whether the level of anger and frustration experienced by a claimant meets the criterion for a recognised psychological disorder or is a normal, time-limited reaction, aided by conclusion of litigation. Traditionally if anger has been focused only on the claim process itself, clinicians have been reluctant to nominate one of the 'general' psychological diagnoses.

Treatment by others which is construed as 'unfair' is a 'healthy' understandable response but it is the severe and entrenched nature of the anger and PTED symptoms which prolong or entrench psychological and physiological symptoms. Unless this is correctly diagnosed by the expert or therapist and if left unaddressed this can sabotage recovery in therapy. Long term prognosis for this type of presentation is poor. Claimants who suffer from this disorder often remain affected with prominent symptoms throughout their lifetime.

Lawyers are likely to meet clients who fall into one of the three case study scenarios given above. These clients, especially case studies C and D, will take up disproportionate levels of time and energy handling their cases. The level of positive lawyer-client interaction will be a predictor of how well their case runs and its resolution.

Whereas mild everyday frustration can be managed successfully by skilled and empathic communication by lawyers and experts and the court, embittered behaviour imposes significant burdens of the courts lawyers and experts included. The querulous complainant suffers displays significant damage to their personal, social and psychological functioning and frequently require or would benefit from psychological treatment to ameliorate their distress and reduce the disruption they create for themselves and others.

Reasons for a separate code in ICD-11

Reasons and justification (Linden, 2020) for a separate code in ICD-11 (category 6B46, Posttraumatic Embitterment Disorder) for this disorder are discussed below.

Embitterment is a distinct emotion in response to social stressors like injustice, humiliation, and breach of trust. The emotion embitterment can and must be discriminated from anxiety, depression, etc., because of its special features. Social stressors like injustice, humiliation, and breach of trust are more common than life threatening stressors, why embitterment in its different manifestations is regularly seen in clinical practice. There is almost no therapist who does not know this kind of patients and the difficulties to give help [Linden (2007); Maercker (2011); Yun (2018)]. The base rate in the general population is estimated to be at minimum 2% which is more than other mental disorders [You, (2020)].

There is a tendency for PTED to take a chronic course. There are impulses of revenge and aggression, which can make PTED a potentially dangerous condition to the person and others. PTED is difficult to treat and in need of special therapeutic interventions.

Many PTED patients end up in early retirement why some insurances e.g., the German Federal pension Insurance has been leading during the last twenty years in supporting research in this area.

Many PTED patients are diagnosed as depressive disorder, anxiety disorder, personality disorder, and are treated with multiple medications and other not indicated treatments, or refused treatment at all, because of their aggressiveness. The diagnosis PTED can help to open adequate ways of treatment. A separate code for PTED is especially needed to help that PTSD is not used indiscriminately, as it happens in daily clinical practice. This improper expansion in the use of the PTSD term can hinder specific treatment and harm patients. An additional category for PTED, as a disorder specifically associated with severe social stressors, can help to demarcate at least some patients. A diagnostic code for PTED does not pathologize everyday-life behaviour, as these individuals are, in most cases, already int therapy, have several other diagnoses, and have been treated with different therapeutic measures.

The code in ICD (or DSM) is needed for the following reasons: 1) for more research; 2) to better diagnose without misusing PTSD and 3) for better patient care, the most compelling reason. The lack of a specific category in the ICD is a major obstacle to proper diagnosis and treatment, as in many clinical settings, mental health conditions are only diagnosed and treated if they fall within the DSM or ICD classifications.

There is an increasing international awareness and research on embitterment and PTED across many disciplines, including psychiatry, psychosomatic medicine, psychotherapy, clinical psychology, occupational psychology, sociology, epidemiology.

A separate code for PTED is needed to support more research in this area. Even reviewers of international journals hesitate to accept empirical data on PTED, because this disorder "does not exist", as it is not listed in the ICD as yet, this is despite considerable scientific evidence. Sensky (2010) argues that the diagnosis of PTED brings with it a special clinical and scientific utility. It remains to be seen whether PTED is given a separate code in ICD or DSM classifications in the future, or whether it is subsumed in codes for other disorders, like in ICD-11 under adjustment disorder, or whether as hitherto codes for "other specified disorders and illnesses" should be used. A special separate code would gain considerable support for embitterment reactions from the medico-legal world for its clinical and medico-legal utility.

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Expert Witness Psychologists and Remote Working

by Professor Leam A. Craig
Forensic Psychology Practice Ltd, The Willows Clinic, UK. Centre for Applied Psychology, University of Birmingham, UK. Faculty of Business, Law and Social Sciences, Birmingham City University, UK, School of Psychology. University of Lincoln, UK
&
Professor Hugh C. H. Koch
Hugh Koch Associates Ltd, UK. Faculty of Business, Law and Social Sciences, Birmingham City University, UK

Introduction

The Covid-19 pandemic which has gripped the world has forced changes in the way we work across all spheres of the economy. New legislation allows for emergency powers under the Coronavirus Act (2020) to ensure suitable social distancing restrictions are adhered to as well as restricted movement between areas of the country. This is perhaps felt most acutely in circumstances which often rely on the face-to-face assessment of individuals including the court system and the use of expert witnesses, including psychologist expert witnesses, with remote hearings and remote psychological assessment being conducted.

It has been acknowledged that the reality is that remote hearings will continue for the foreseeable future (Mr Justice MacDonald, 2020), and by implication, remote psychological assessments within judicial proceedings will likely become the norm, at least for the foreseeable future, which have been recognised as an acceptable method of assessment and sanctioned as such by HM Courts & Tribunal Service.

At the time of the Covid-19 outbreak, there was little by way of formally published guidance for psychologists on how to conduct remote psychological assessment in the preparation for court assessments in any of the main legal jurisdictions (criminal, civil and

family). The British Psychological Society guidance, Psychologists as expert witnesses in the Family Courts in England and Wales: Standards, Competencies and Expectations (January 2016), made provision for indirect assessments, "Completion of psychological assessment generally involves direct assessment and contact with the individual and one or more members of the family. Indirect assessment (relying on documentation and other sources such as video evidence) may be appropriate" (BPS, 2016. p 5).

There have now been several published guidance documents specifically for psychologist expert witnesses on how to conduct remote psychological assessments for court (British Psychological Society 2020a/b). In this article we will briefly outline some of this guidance saved to main discussion points.

Literature Review on Video-Link Psychological Assessment and Intervention

The methodology of using video-link technology (VT) in the assessment and treatment of psychological conditions is not new. However, although VT is comprehensively supportive of forensic assessment (Brett & Blumberg, 2006; Saleem & Stankard, 2006), from a clinical perspective, the pressing and lingering question is whether VT generated assessment reports produced for the courts are comparable to or could supersede the traditional face-to-face medium. It was found in a review of the published literature in regard to what is and is not effective related to telemental health found that telemental health is effective for diagnosis and assessment across many populations (adults, child, geriatrics, and ethnic groups) and for disorders in many settings (emergency, home health) and is comparable to in-person care (Hilty et al., 2013).

The National Prisoner Healthcare Network (2016) provided some guidance and direction on the access of psychological therapies for prisoners detained in Scottish prisons. Briefly, this guidance outlines that health services are encouraged to provide services (assessment, diagnosis and interventions) at a distance via digital and mobile technologies. This includes capturing and relaying physiological measurements from home/community to clinical review. It also includes 'teleconsultations' where technology such as video conferencing is used for consultations between clinicians and patients. The Scottish Centre for Telehealth & Telecare (SCTT: HCP049 report) has been working with two of Scotland's prisons to establish the use of VT as a way of improving the prisoners' access to forensic psychiatry services.

There is a substantial body of evidence for the delivery and efficacy of remote / online psychological assessment and interventions. Several forms of technology-enabled psychotherapy now exist. As an alternative to 'therapist delivered' CBT, in February 2006, the National Institute for Health and Care Excellence (NICE) published a Technology Appraisal (TA097) on the use of computerised delivery of cognitive behaviour therapy (cCBT). Supported by the Department of Health document, Improving Access to Psychological Therapies (IAPT) programme: Computerised Cognitive Behavioural Therapy (cCBT) implementation guidance (2007), the technology appraisal provided background information on cCBT and the management of people with common mental health conditions for whom this type of intervention is appropriate and a number of computerised software packages were recommended.

Videoconferencing has been identified to have been used in a variety of therapeutic formats and with diverse populations, is associated with good user satisfaction, and is found to have similar outcomes to traditional face-to-face psychotherapy (Backhaus et al., 2012). Other forms of interventions range from psychoeducational static webpages and complex, personalised, interactive cognitive-behavioural-based self-help programmes, to videoconferencing, self-help support groups, blogging, and professional-led online therapy. A meta-analysis by Barak et al. (2008) found a medium effect size (a number measuring the strength of the relationship between two variables in a statistical population) for online therapy and found the effect to be long lasting. They also found no significant difference between the use of a human therapist or a web-based therapy intervention.

Assessment Considerations

Assessments undertaken by psychologists include diagnostic assessments supporting legal or statutory processes and recommendations of important medical treatment. The use of VT presents a number of challenges on psychological assessments which would ordinarily be easily overcome during face-to-face assessments (e.g., environmental control and the management of distractions). In some circumstances, the recording and observation of non-verbal behavioural cues (e.g., avoidant eye gaze) may be compromised when using video-link technologies.

Preliminary findings such as a diagnosis, formulation or judgement, based on explicitly acknowledged compromises or constraints on the assessment process should be acknowledged when using VT. The use of VT in the assessment and diagnosis of certain conditions may also prove challenging. Assessments of individuals with complex psychiatric conditions, such as Autism Spectrum Disorder (ASD), Attention Deficit Hyperactivity Disorder (ADHD), assessments of cognitive decline/dementia, some neuropsychological assessments, or assessments of major mental illness (e.g., delusional disorder, schizophrenia), may be more challenging via video-link, particularly where the person is required to sit still for a prolonged period of time or where the assessment of behavioural cues and nuances (eye contact, interpersonal exchange) are central to the assessment and diagnosis, which may be lost due to the video-link. Such assessments, and subsequent diagnoses, will likely be as equally as reliant upon collateral information as the clinical interview itself. Video-link assessments and subsequent diagnoses of major mental illness is likely to be particularly problematic. Similarly, assessments of the impact of trauma (sexual

abuse, exploitation, violence) will also need careful consideration, and may require the additional interview of friends and family to corroborate symptoms. However, several of these issues pertain to face-to-face assessments too.

Practical Considerations

Other issues of importance when using VT to complete psychological court assessments is the safety of the person during remote assessment sessions and to have a safety plan in place (Luxton, O'Brien, McCann, & Mishkind, 2012). Some people may find interviews demanding and distressing and the support available at the end might be severely limited due to the social distancing restrictions. However, clinical experience where undertaking entire interviews indicates support, reassurance and empathy can still be determined in remote interviewing to good effect.

A principal concern involves what to do if a person becomes distressed or has a medical emergency during a remote assessment session. Safety plans should include procedures for contacting emergency services in the person's locale, alternate contact methods in case the synchronous telehealth connection is lost (e.g., backup phone contact), and plans for resolving technical problems. Participants may be vulnerable due to pre-existing mental or physical health conditions or by the stressful nature of proceedings. Interviews can be demanding and distressing and the support available at the end might be severely limited given the social distancing. Consideration should be given to the provision of support after the interview is concluded. Again, these are considerations which are similar to when face-to-face interviews are undertaken.

Cultural factors may also adversely impact on a video-link assessment, including the person's age, technological familiarity, and culture-specific norms to assure valid and reliable assessments. For example, the remote physical presence inherent may create a barrier that reduces a person's engagement in the assessment process, especially among members of cultures or groups that emphasize inter-personal connectedness or that rely heavily on nonverbal interactions. Those who are less comfortable or have less experience with technology, such as elderly or very young children, may display a more drastic discrepancy between in-person and video-link assessments (Rohland, Saleh, Rohrer, & Romitti, 2000). Person's with a history of adverse reactions during treatment (e.g., severe panic attacks), or those who are at high risk of harm to self or others may not be appropriate candidates for telehealth services provided to clinically unsupervised settings (Luxton, O'Brien et al., 2012). These issues should also be considered when conducting remote assessments, especially when providing assessment results. Again, individuals who find face-to-face interviews too intrusive may find remote interviews less stressful and hence advantageous.

Within family law proceedings, there may be the requirement to observe contact or family interactions. Observing contact between parents/ care givers and children using video mediated technology is likely to be problematic as it would be difficult for the clinician to see everything, and it would be difficult to understand what maybe actually happening in the room. As an observer, the clinician may miss/be less observant of things happening in a room, when compared to observing contact whilst being physically present in the room. Addressing this at an early stage of the assessment process is important as it may not be receiving much attention. Careful placement of the camera during a contact family session will determine how much is visible to ensure that all interactions are captured. Extra effort should be made to access previous contact records to help inform the assessment. When engaging children and young people in an assessment for court it is recommended that the British Psychological Society guidance considerations for psychologists working with children and young people using online video platforms (2020c) is considered.

In some circumstances, it may be appropriate to label findings as 'preliminary' or 'provisional' and explicitly acknowledge the compromises or constraints on the assessment process. Psychologists should be clear when reporting diagnoses, judgements or other findings about the inherent risks, and include recommendations for review and further assessment in future where appropriate. Those with communication and/or known learning difficulties may not be easily or appropriately engaged online. An attempt should be made, and if insurmountable, discussions are needed with the instructing party as to how these difficulties can be overcome. It may lead to an initial report being filed to be followed up with an addendum later. Extra attention needs to be given to engaging children as well as vulnerable adults during video-link assessments. However, in this circumstance, the time and cost implications of a further assessment, remote or face-to-face, needs to be discussed and agreed with the instructing party.

Methodological Limitations

There have been concerns that VT used in forensic settings presents additional challenges that may negatively affect the accuracy and the validity of the assessment results (Adjorlolo & Chan, 2015). These include: issues of confidentiality, the competencies of the practitioner using the technology, the use of certain psychometric tests and assessments of individuals with mental disorders being more resistant to telehealth than those with affective disorders.

The use of online based assessments and interventions are open to obvious criticism such as: the lack of nonverbal cues and difficulty in establishing a therapeutic alliance which are important to the counselling process (Rochlen, Zack, & Speyer, 2004). The ability of the expert to build rapport, particularly when assessing complex or challenging conditions, may be challenging when using VT. Being able to judge subtle behavioural changes in the individual may well be missed when using video-link. Similarly, it may be problematic to determine the qualitative aspects of a person's presentation using video-link methods. However, patient satisfaction is almost always high

and is similar to the satisfaction levels of patients receiving face-to-face care (Brown et al., 2014; Richardson et al. 2009). Most studies found that therapeutic alliance between the patients and clinician did not differ, however, there has been exceptions (Backhaus et al., 2012). Studies examining the quality of therapeutic alliance in videoconference therapy and face-to-face therapy when treating PTSD using CBT found that the therapeutic alliance still develops very well in both treatment conditions and that there is no significant difference between the two (Germain et al., 2010; Olden et al., 2017). This is consistent with the second author's (HCHK) extensive experience carrying out assessments in a personal injury (civil) context.

Oral Testimony via Video-Link

As with remote psychological assessments, expert witness psychologists are increasingly being asked to provide oral testimony via VT. The use VT used in court in hearing oral testimony is not new. The Civil Procedure Rules: Practice Directions Part 35 Experts and Assessors (2010) make provision for video-link oral testimony where those instructing experts should, "…give consideration, where appropriate, to experts giving evidence via a video-link (Section 19.2, subsection C). Section 51 of the Criminal Justice Act 2003 enables the court to allow witnesses (other than the defendant) in the United Kingdom to give evidence by live link if the court is satisfied that giving evidence in this way is in the interests of the efficient or effective administration of justice. As Lord Slynn of Hadley observed in Polanski v Condé Nast Publications Ltd [2005] UKHL10, "…It seems to [me]...that as a starting point it is important to recall that although evidence given in court is still often the best as well as the normal way of giving oral evidence, in view of technological developments, evidence by video link is both an efficient and an effective way of providing oral evidence both in chief and in cross examination." More recently, R (Kairie and Byndloss) v Home Secretary [2017] UKSC 42 [2017] 1 WLR 2380, observed there is "…no reason in principle why use of modern video facilities should not provide an effective means of providing oral evidence and participation from abroad, so long as the necessary facilities and resources are available" (paragraph 103, page 37).

A recent survey indicated that 37% of the experts surveyed believe that giving evidence via video-link is as effective as experts giving evidence in court (The Times and Bond Solon Expert Witness Survey, 2017). Response to this by expert witnesses was mixed. Some suggested that video-link oral testimony is effective and time efficient whereas others have suggested that behavioural nuances are lost, and it is difficult to convey evidence. Some have indicated a witness's credibility is partly established through interaction with counsel, which is to some extent 'sanitised' by a video link. Others observed that, "video links fail to convey the full attitude of the witness which involves body language, and immediate reactions to questions. It is not as easy to question the witness repeatedly on video link." It is now widely held that demeanour and social behaviour, including non-verbal cues, can be reliably observed and assessed during remote interviews and can validly complement the expert's review of verbal report and consistency with documentation and other available evidence in the remote context.
Opposition to the use of video conferencing is usually focussed on the perceived inability of a party effectively to cross-examine the witness and to judge their demeanour, although this was rejected in McGlinn v Waltham Contractors Ltd [2007] EWHC 149 (TCC) (21 February 2007). Similarly, in United States v. Gigante (1999), the court stated that "videoconferencing preserved all of the characteristics of in-court testimony because the witness was sworn, subject to cross, testified in view of the jury and the court, and testified in front of the defendant himself."

VT is currently the only available medium through which experts, including psychologists, can testify remotely during court proceedings. In the present pandemic, where parties, counsel, judiciary and court staff all face the same Covid-19 restrictions and limitations, the use of VT may be adopted consensually, or by direction of the court, as the only practical option to ensure that hearings can proceed. Indeed, recent guidance to Parole Board members is to take a flexible approach when determining the requirement of a hearing as "many cases can be decided fairly without a face-to-face oral hearing" (Parole Board Member Guidance, 2020, p.10).

The issue of deciding when remote interviewing is permitted and face-to-face is not is also affected in the UK by the Government's Covid-related recommendations and guidelines reflecting social distancing and allowed interaction. Like other professionals, experts and instructing parties are ethically bound by these guidelines.

Conclusions

Face-to-face assessment is generally considered the gold standard when conducting psychological assessments for court. However, where face-to-face assessments present challenges due to Covid-19 restrictions, specialist video interviews are, not only justifiable, but are also a clinically valid methodology. Remote psychological assessments can be completed in lieu of in-person assessments and should be the option of choice rather than delaying potentially important findings for the court. There are a number of potential advantages of technology based psychological assessment and interventions over face-to-face assessments and treatments as well as some drawbacks. There is enough available evidence for those instructing expert witness psychologists to acknowledge the clinical utility and accuracy of video-link psychological assessments while at the same time managing practical issues without redirection in effectiveness.
For the period while social distancing restrictions are in place, it is likely psychologists working as expert witnesses will continue to complete psychological assessments for courts using VT. Psychologist expert witnesses will need to use their clinical judgement as to how they apply these practical and clinical consid-

erations when completing remote psychological assessments in judicial settings and ensure full recognition of any potential reliability-related issues is fully and explicitly acknowledged in the body of any written document.

It is clear that Covid-19 has brought an acceleration towards using remote working in all areas of legal processes and litigation. Lockdown and enforced remote working has shown that experts can trust their ability to carry out interviews at home or remotely, and also address cyber security issues responsibly. Remote working allows assessments to continue in a reliable and effective manner. This medium of working has presented experts and the legal sector with a big challenge to enable them to provide both access to justice and ensure experts evidence delivered remotely is both reliable and valid. Despite challenges, the courts recognise the positives that have arisen in obtaining and providing psychological assessment within a high-quality service context, accommodating the important unique issues raised in this article.

Authors:
Professor Leam A. Craig
BA(Hons) MSc PhD MAE FBPsS FAcSS CPsychol CSci EuroPsy
Consultant Forensic and Clinical Psychologist
Director, Forensic Psychology Practice Ltd
Chair, British Psychological Society, Expert Witness Advisory Group
Email: leamcraig@forensicpsychology.co.uk

Professor Hugh C. H. Koch
BSc (Hons), Dip ClinPsy, Ph.D. C.Psychol
Consultant Clinical Psychologist
Director, Hugh Koch Associates Ltd
Member, British Psychological Society, Expert Witness Advisory Group
Email: hugh@hughkochassociates.co.uk

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"In the Middle of Difficulty Lies Opportunity"; Mediating Child Law Disputes

by Garry Sturrock, Associate at Brodies LLP, Aberdeen

November marked the beginning of International Mediation Awareness Week. It provides an opportunity to highlight that mediation can be an effective tool in resolving family law disputes, including issues concerning children. Many clients are unaware of mediation as an option or have preconceived notions of the process and effectiveness.So, what is mediation, what can it be used for and what are its benefits in relation to child law disputes?

What is mediation?

Mediation is a voluntary process by which parents can negotiate the resolution of future arrangements affecting their children with the assistance of a professionally trained and neutral mediator. The mediator does not tell parties what to do. Instead, the process places the parties firmly at the centre of decision making. The mediator encourages parents to focus on constructive communication, mutual understanding and information gathering to identify common ground and navigate the best way forward for them and for their children. Each mediation is bespoke, taking account of the parties and their circumstances. Who acts as a mediator?

There are a number of organisations that offer family mediation services in Scotland. CALM (Comprehensive Accredited Lawyer Mediators) Scotland is an organisation which assists individuals in Scotland access accredited family law mediation from mediators who also practise as lawyers/solicitors.

What issues can we mediate?

It is common to find that two parents, whether living together or apart, will have different views about what is best for their children on a variety of matters. Communication between parents can be strained. Mediation can assist in resolving all child related disputes, with a focus on better communication between parents. This can include child care arrangements, relocation of children (in Scotland, the rest of the UK or abroad), removal of a child from the UK for the purposes of a holiday, education (including school placements and fees), child maintenance payments and other financial matters affecting children, the relationships between children and wider family members and all other issues which affect the welfare of children.

Why should we mediate child law issues?

There are a number of advantages to mediation, when compared to other forms of dispute resolution.

- Mediation assists the parties to stay firmly in control of the process and outcome. There are no imposed decisions and the parties set the agenda of what they wish to cover in mediation. The parties can decide the dates, duration and venue for mediation sessions, which can allow flexibility around parents' work arrangements and childcare commitments.
- The focus is on working together, rather than the parties being adversaries.
- Mediation is a private and confidential process.
- Mediation allows parties to look more deeply at issues affecting their children when compared to other forms of dispute resolution.
- The cost of the process is usually cheaper than litigation.
- The process is usually less stressful than litigation.
- Mediation can allow expeditious resolution of disputes.
- The process is well designed to allow parties to explore the views of the child.
- Mediation can be an effective means of improving relations and communications between parties, which can lead to more successful future co-parenting.
- Mediation can result in creative, tailored and lasting solutions to child law issues. The parties are more likely to be content with decisions made by them together in mediation are more likely to adhere to them. Arrangements can be reviewed and changed more quickly and easily than in other forms of dispute resolution.
- The parties can participate in mediation virtually, which is particularly advantageous to parents who live far apart geographically. This can also allow parties a means of resolving disputes whilst still feeling safe during the current situation caused by the outbreak of COVID-19.

How can I find out more?

If you are in a dispute with your partner or ex-partner about matters involving your child or children, **Brodies LLP** boasts a number of Family Law Mediators across Scotland who would be pleased to assist you navigate towards a positive solution. Please do not hesitate to contact any member of our team in offices throughout Scotland by accessing their profile on our dedicated Divorce and Family Law page.

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Disablity Accomodation Remains a Serious Issue, Post Swift V Carpenter Appeal and Final Ruling

After a proliferation of articles on the Swift v Carpenter Appeal , our seasoned expert witness and Accomodation Needs Specialist, Andrew Skerratt, LLB, MRICS, MEWI, CUEW, now asks for insurance companies and mortgage and equity release bodies to play their part in what still remains a serious issue.'

'*It appears that the legal system has done what it can to offer some form of solution, albeit for cases of long-life expectancy, but cases of short life-expectancy remain a problem that is being avoided.*' **A. Skerratt.**

Providing 'accommodation needs' evidence has always been challenging. The Lords Chancellor's decision to look into this in 2017 and 2019, has certainly affected the evidence we provided. Some people may have thought that the Swift decision this year would offer a way forward to end the ongoing saga. Between 1989 and 2017, the Courts wrestled with how to suitably compensate an injured party while avoiding an unwarranted financial gain from an increase in a property value. The Lord Chancellor's attempts to meet the reasonable needs of Claimants by altering the discount rate caused lengthy debates, especially after 2017, when he effectively denied an injured party any funds to purchase a suitable property.

I believe the Swift has been positive for disabled individuals with long life expectancies. However, what is not clear is how to define what is a long-life expectancy and what is a short life expectancy? I have for example come across many cases of profoundly injured children who have resultant short life expectancies of ten years or so. I have also come across instances of only one parent looking after the/a child, and them living in council owned accommodation and relying on the local authority for help. In most instances, what the local authority has offered and provided, falls far short of meeting what Courts recognise as reasonable provisions. For example, a wheelchair bound child provided with a bedroom which they cannot use their wheelchair in, and an en-suite poorly laid out and too small for a wheelchair with water pooling in areas where it cannot drain properly.

Over recent years, accommodation experts have been asked to comment on the possibility of renting a property. The idea of renting a property over the long-term of a Claimant's life has many pitfalls.

For example, if a child with cerebral palsy were expected to rent a property for the remainder of their life, say 40 to 50 years, it would mean that a landlord would be expected to allow significant changes to their property and be expected to let it out for very long periods of time. The child would also be at risk of eviction if they or their family members breached their tenancy agreement. While the example could be said to be an extreme one, I have seen the same problems faced in less complicated cases, and in each case have concluded that the approach was unviable in most instances as a long-term solution.

I have also been asked to comment on how a Claimant's damages could be used to secure a property by other means, such as a mortgages and equity

release in which the claimant would be releasing equity to exhaustion in a property in later life to avoid the risk of a windfall left to the claimant's estate. was considered in this case.However, Nicola Davies LJ has made it clear that it would undermine the principle of full and fair compensation to expect an injured and vulnerable person, who could be in old age, to accept this approach.

Some years ago, I was made aware that some insurance companies were considering the possibility of keeping a record of housing stock that have been adapted for injured parties, but nothing came of this. Given the increasing numbers of properties in the country that have now been adapted for disabled individuals, perhaps now is the time to think again of whether a joint approach would help.

As for mortgage companies and equity release companies, while Nicola Davies LJ has made clear her views, I wonder whether the businesses could still come up with an approach that the Courts might find more acceptable?

It appears that the legal system has done what it can to offer some form of solution, albeit for cases of long-life expectancy, but cases of short life-expectancy remain a problem avoided. For now, I can see me continuing to prepare my reports in the same way as before the decision, I just wonder whether insurance companies and mortgage and equity release bodies will offer something to what is a serious issue.

They are constantly tinkering with their products for customers, surely they can put their heads together again to come up with something now?

About the author.
Andrew Skerratt runs **SPS Consulting (UK) Limited** which advises on the accommodation needs of disabled people. He is a seasoned expert witness and his work involves preparing Claimant, Defendant and Joint Accommodation Needs Reports on personal injury and medical negligence claims. Each report is individually researched and tailored for a client's specific needs. We identify suitable properties, prepare designs with estimates of costs, and administer the work. We also calculate the furnishing costs and additional maintenance and running costs.

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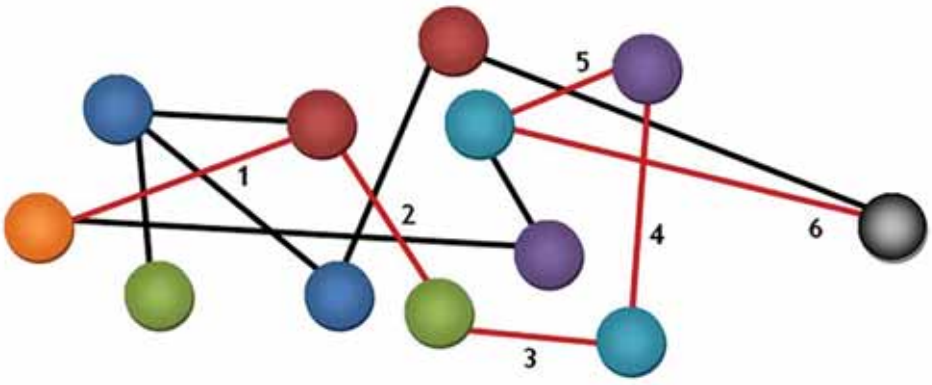

An Uneasy Situation or a Conflict of Interest?

by Robert Dale, Senior Partner at Daniel Connal Partnership

Think of this scenario for a moment: an instruction lands in the inbox, asking you to act as an expert witness in a case where the opposing party is represented by a solicitor well-known to you. So well-known in fact, you are actively working on another case for them! Should you take it on?

Perhaps you might feel a little uneasy, but there is not necessarily a conflict of interest preventing you taking on the case.

You open another email, this time from a solicitor who has instructed you at least a dozen times already this year. You have developed a close working relationship and enjoy each other's company at working lunches, you even attended a charity golf day together on the same team earlier in the year. Is there a conflict of interest here?

Whilst you may be confident that you can fulfil your role impartially, a challenge in court, or a suggestion that you are too close to the instructing party, that your evidence is being prepared solely for the benefit of that instructing party might be uncomfortable - even tricky - to defend.

It is a well understood principle that one's duty as an expert witness is to the court or tribunal not to the instructing party or the person paying your fees. For over a quarter of a century, since the seminal case of the Ikarian Reefer there have been various codes of conduct and ethical rules published that confirm that the overriding and primary duty of an expert witness is to be independent and impartial.

But it is not enough just to be independent and impartial. Remember that an expert witness needs to be seen to be independent and impartial, making sure they clearly declare any potential conflict of interest. So how does the expert determine that he or she has a potential conflict of interest? A conflict of interest is clear when the expert has a personal or pecuniary interest in the outcome of the case, but it becomes less clear where personal relationships are concerned.

After all, most experts have gone around the block a fair bit. In gaining their required experience they will have worked with countless individuals and a multitude of companies. Acquiring this expert knowledge will be the result of being widely active in their industry. Over time an expert will have naturally developed and indeed nurtured a significant professional network in their own field.

Even expert witnesses have a life outside work; so professional work networks can expand into friendships, wider memberships of clubs and societies, support for charities, etc.. As an analogy, Atticus Finch in "To Kill a Mockingbird", did not rely on an expert witness when acting in court, but if he had perhaps his lasting quote might have been; "You can choose your friends but you can't choose your network."

What about the Six Degrees of Separation rule?

If there are only six degrees of separation between us all, it is no surprise that connections exist. Visualise the Venn diagram created when choosing an expert witness purely from a small pool of specialism and local geography, connections are virtually inevitable. So, when does having worked with, or even knowing well outside work, one of the parties to a case create a conflict of interest? In our global economy, what about multi-national companies with lots of subsidiaries and potential connections around the world, how does that sit with conflict of interests? What about a relationship between the expert and the representative of one of the parties? Or the fact that the expert witness' portfolio of shares might include those of one of the companies involved in the dispute?

Guidance updates for 2021

An updated publication by the Royal Institution of Chartered Surveyors (RICS) this year, will help a surveyor faced with these and other scenarios. Due to come into force this month (the beginning of February 2021) RICS published a second edition of the guidance note in Autumn 2020 about Conflicts of Interest for Members acting as Dispute Resolvers. This guidance provides a very useful traffic light system that experts as well as dispute resolvers, might adopt when considering whether a conflict of interest might exist or be perceived to exist.

The traffic light system considers various situations giving guidance on when an involvement should be disclosed and may amount to a conflict of interest:

Red: Situations where it would be inappropriate to accept an instruction because of a clear conflict of interest.

Orange: Situations that might amount to a conflict of interest and should be disclosed.

Green: Situations where conflicts of interest do not exist.

Inevitably this guidance will not cover every situation. Please also remember that, due to a limited pool of suitable experts in a specific industry or geographical location, having a conflict of interest might not necessarily make an expert's evidence inadmissible. The expert will, however, want to be certain they have openly disclosed any possible conflict of interest. The RICS revised guidance note for our particular industry will be a valuable reference tool to guide us with making such disclosures.

Robert Dale is a RICS Registered Expert and Senior Partner at Daniel Connal Partnership, where many senior surveyors are certified and experienced in providing expert opinion. DCP is an award-winning multi-disciplinary construction consultancy with offices in London, Colchester and Norwich, which this year celebrates its 75th anniversary. All of our Expert Reports and working practices comply with 'Surveyors acting as Expert Witnesses' RICS. To find out more visit our website at **www.danielconnal.co.uk**

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Looks like I Picked the Wrong Week to Quit Sniffing Glue - Covid 19 and the Construction Industry

by Jane Hughes, Senior Associate, Stevens & Bolton LLP

This legendary quote from "Airplane" probably sums up 2020 for many of us, and at the time of writing 2021 is showing early signs of being just as unpredictable. As Covid 19 has swept across the world, it has had a huge impact on various industry sectors. This article will look at the impact of the pandemic on the construction industry in the UK, focussing on England, and how the industry, and government, have reacted to keep projects going. I shall also attempt some predictions, and look at how expert witnesses might be affected.

Construction Industry Staying Open

The construction industry has, by and large, stayed open and operating throughout the pandemic, with express government backing and support. While the particular rules governing construction sites have been different in the 4 nations of the UK, as a general rule sites have been allowed to remain open, with Scotland imposing stricter rules in some instances. Many sites did close during the first lockdown, but re-opened, and there has (or should have) been a dramatic impact on how sites are run and operated to reflect new working practices required by the pandemic. The effect of these has been, in many cases to slow progress. Activity levels across the industry sustained a dramatic reduction as a consequence of Covid 19.

The Secretaries of State for Business, Energy and Industrial Strategy have written a series of open letters to everyone working in the UK's construction sector confirming that firms and tradespeople in the construction sector and its supply chain, including merchants, suppliers and product manufacturers, should continue to operate during the national lockdowns.

Industry representative bodies, particularly Build UK and the Construction Leadership Council, have been extremely proactive in pushing forward initiatives to enable projects to continue, if not at full capacity, than at least at a reasonable pace.

In many instances, work had to continue for safety reasons, to complete hazardous works perhaps or to make a site safer, but do not forget too that some construction work involved remedying dangerous situations. The prime example of this latter situation is work to remove and remediate flammable cladding on high rise buildings. There was a difficult balance to be struck between the risks of stopping work and the risks of continuing with it.

An extraordinary amount of guidance, practice notes, and information has been produced to help the industry carry on working as safely as possible, with trade and industry bodies setting up coronavirus hubs on their websites, and issuing their own guidance and resources as well as collating what has been published by others. Build UK is an extremely important part of this effort, collating guidance and issuing regular bulletins. The government has also intervened to ensure that construction continues to operate, with half an eye on a way to regenerate the economy once the pandemic is under control.

I shall look at some of the most interesting guidance.

Site Operating Procedures

Key to the government's confidence in the industry, and its ability to keep operating, has been the rapid publication of Site Operating Procedures by the Construction Leadership Council. The first version was published on 23 March 2020. The Site Operating Procedures supplement the government's more general construction sector guidance for working safely during the pandemic.

The Site Operating Procedures have been updated as the pandemic has progressed, and as at 15 January 2021 have reached Version 7.

They set out sensible, pragmatic and practical steps to take on site, such as planning work to avoid crowding and close working, holding meetings and site inductions outdoors or in open areas and enhancing cleaning and sanitary facilities.

Unite, the trade union, has also produced a much more detailed Covid 19 guide for the construction sector, which I recommend, although the Construction Leadership Council's Procedures have largely been adopted as the industry norm.

Government Guidance on Construction Contracts

Undoubtedly the pandemic and the lockdowns and other measures introduced to control it have had a huge impact on construction activity, with some reporting a fall of 41% in output in March 2020, although activity levels are now returning to something near normality. And where work is delayed or stopped, in an industry notorious for its disputatiousness, claims will inevitably follow.

Claims are expensive, time consuming, absorb resources best spent elsewhere on something productive, and can affect and slow progress on projects.

In May 2020, the Cabinet Office published "Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid 19 emergency" exhorting individuals, businesses (including funders) and public authorities to act responsibly and fairly, support the response to Covid 19 ad to protect jobs and the economy. The guidance was updated in June 2020.

The guidance is a plea to deal with the impact of Covid 19 fairly and reasonably, to act collaboratively, to pay promptly, to allow extensions of time and to avoid disputes, or at the least seek to resolve them responsibly and swiftly using ADR methods. It is difficult to disagree with any of it, but it has little or no legal effect.

The Construction Leadership Council has also published guidance on contractual best practice which is designed to complement the Cabinet Office's guidance. This also advises parties to adopt a collaborative approach towards project delivery and dealing with the difficulties posed by Covid 19. It is very practical and is accompanied by pro forma letters for the parties to use.

Old habits die hard and, as welcome as this guidance is, it is unlikely to have much of an effect on behaviour.

Whether existing contracts should be amended to deal with Covid 19, and how to amend future contracts, has been a hot topic of discussion amongst lawyers, and the Construction Leadership Council has issued a draft set of amendments for JCT and NEC contracts. Most law firms have drafting to deal with Covid 19 or future pandemics which is being used, but the issue of existing pre-pandemic contracts remains.

For these contracts, the concept of force majeure will be significant.

The concept of force majeure is much discussed, but little understood. It has been the subject of many learned articles and discussions amongst lawyers nationally and internationally since the beginning of the pandemic. Unhelpfully, different legal systems take a different view of what force majeure is and what effect it has.

In the UK, which is a common law jurisdiction, force majeure has no defined meaning.

As a very brief summary, in the UK, if an event, which is unforeseen, occurs which disrupts the performance of a contract, the parties' rights and liabilities will depend on what the contract says. So, usually, a construction contract will list a series of events which might disrupt a contract, and set out the consequences if these events occur. These clauses are commonly known as force majeure clauses. Some standard clauses and contracts include pandemic or epidemic, some do not. Some standard clauses are amended by the parties to add or delete events, and there is often a sweep up clause which refers to events beyond the control of the contractor, or a force majeure event, or similar. Whether or not the pandemic amounts to a force majeure event may differ from contract to contract.

In my view, it is only a matter of time before the courts are asked to consider the definition of force majeure. The sooner they do it, and we have greater clarity, the better.

Construction Leadership Council's cost assessment toolkit

Covid 19 has caused, and is continuing to cause, huge disruption to construction projects. How to assess the cost of that disruption, and how to assess what the cost of future disruption will be and how to build it into project budgets and estimating, is going to be an ongoing challenge. The Construction Leadership Council has published a methodology to help in assessing the costs of the disruption, to help all parties in the construction chain and to help with investment decisions on viability. It is a really useful guide to how to approach assessing the cost of the impact of Covid 19 on a project.

The Roadmap to Recovery

The Construction Leadership Council has published a Roadmap to Recovery, a 3 part strategy to drive the recovery of the industry after Covid.

Phase 1 is Restart, restarting work on all projects and programmes and increasing work to the highest level possible in accordance with government guidelines. Employment is to be maximised, and disruption minimised.

Phase 2 is Reset, developing demand and supply to increase a robust pipeline of work and workload across the industry, finding ways to increase productivity despite ongoing government restrictions, and investing in training, collaborative business models, fairer contracts and payment.

Phase 3 is Reinvent, creating and developing stronger partnerships, adopting new technologies and sustainability objectives to sustain economic growth and adopting better procurement models to deliver better value and whole life performance.

The aim is to rebuild the industry so it operates in a more efficient, fairer, and productive manner and helps to drive the economic recovery.

The Future

At the time of writing we are in lockdown 3 with no prospect of it being lifted for the moment. The construction industry continues to operate, although there are increasing calls in the media for it to be closed down.

Two of the most common predictions I have seen for 2021 are that there will be a huge number of disputes, and what I have heard described as a

"tsunami" of insolvencies. I find it hard to argue with either prediction.

Laudable as the government's guidance is, construction has never been the most collaborative of industries and has an unenviable record of claims and disputes.

What I do see however is that parties will want to avoid the enormous cost of litigation and that they are likely to utilise adjudication and ADR more extensively, and also arbitration. Arbitration is attractive because you can choose the rules and procedures you use, so you can have an arbitration conducted solely using documents, or to a short timetable, if that is what the parties want.

Over the past year, new lower cost dispute resolution models have been produced in increasing numbers. One example of this is the Chartered Institute of Arbitrators and CEDR's Pandemic Dispute Service, which offers a staged procedure for resolving disputes, working through conciliation, mediation and finally arbitration. Another is the RICS Low Value Adjudication procedure, or the new RICS Summary Adjudication procedure, both designed for low value disputes where the cost of engaging legal advice or external consultants is disproportionate.

Using ADR methods does not abolish the need for expert witness support and advice. It will still be key, but will need to be deployed in a more flexible way.

A likely increase in insolvencies will also have serious effects on projects. Because of the way construction projects are structured, with chains of developers, employers, contractors, sub-contractors, sub-sub-contractors and suppliers, a single insolvency will ripple out through this chain triggering knock on insolvencies.

For expert witnesses, the key issues in 2021 will be flexibility and awareness of their role in ADR.

Experts in the field of delay and also quantum are likely to be in high demand.

We are all hoping that 2021 will be less of a rollercoaster ride than 2020. Fingers crossed!

About the author
Jane Hughes
Senior Associate
Jane advises a wide range of clients, large and small, on contentious and non-contentious construction issues.

Jane joined Stevens & Bolton in 2019 after a career break, having previously been a partner at a City law firm. Jane acts for a wide range of clients, from private individuals to developers and contractors.

Jane advises on building contracts, professional appointments and the construction aspects of property transactions including development agreements and agreements for lease. She also handles adjudications, arbitrations and litigation, and is a firm believer in the imaginative use of ADR to resolve disputes.

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