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THE EXPERT WITNESS

THE JOURNAL FOR INSTRUCTING PROFESSIONALS & EXPERT WITNESSES

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Welcome to the Expert Witness Journal

Hello and welcome to the 39th edition of the Expert Witness Journal.

The focus of this issue is varied, with Covid related matters featured including, A Reflection on Life as an Expert Witness during the COVID-19 Pandemic by Jessica Thurston, Somek & Associates. Also UK Legal Protection for Workers with Long COVID by Verity Buckingham.

We also focus on general expert witness matters with an article on the Future of the Personal Injury Expert Witness in 2021, by Dr. Mark Burgin. We are always proud to feature Mark Solon, his insight into the expert witness world is titled 'Don't be a Slack Witness'

More general topics are excellently covered in 'Where Does the Expert Fit into the Litigation Process', The Impact of Expert Evidence by Karen Wilsher and Claire Devine, How to Write Excellent Reports by Michael Young and 'A Truly Expert Witness' by Flora McCabe.

We are excited to be attending the Bond Solon Expert Witness conference in November,. It has been a long time since we met up with experts face to face. Of interest to all will be keynote speaker Sir Geoffrey Vos, the new Master of the Rolls, has vowed to "radically rethink" civil justice . We will be attending in person in addition to having an online presence, please pop by and say hello.

Our next issue will be published in December 2021.

If you wish to contribute please mail us.

Many thanks for your continued support.

Chris Connelly

Editor
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Some of the highlights of this issue

Events

Inspire MediLaw

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Upcoming conferences & events

Expert Witness Training
for Medical Professionals (England)
CPD accreditation: 6 hours per day
(from the Royal College of Surgeons of England)
Oxford Spires Hotel, Oxford
Next Dates
2 - 3 December 2021

Expert Witness Training
for Medical Professionals (Scotland)
13 – 14 December 2021
Start: 13 Dec 8.30am
End: 14 Dec 5pm
Kimpton Charlotte Square, Edinburgh

Witness Familiarisation training
Available on demand
(please contact us for details)
Oxford Moot Court
CPD accreditation: 5 hours

Inspire MediLaw Annual Conference for Medico-legal Experts
3 December – Oxford

Online resources

Online Expert Witness Training
Expert Witness Report Writing
Conference with Counsel
Meeting of Experts
Giving Evidence in Court
Full Expert Witness Training Package
Full Expert Witness Training Package and Accreditation Inquiry & Injury Solicitor

RICS

Expert Witness Certificate
Venue: RICS, Online
CPD: 26 hours formal CPD
Mon 17 Jan 2022 - Thu 28 Apr 2022
Time: 08:30 - 17:00

This course is suitable for professionals working within the built environment who want to gain the theoretical knowledge and practical competencies required to act as an Expert Witness.

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Expert Witness Courses

Excellence in Report Writing - England and Wales (1 Day)
Starting 08 Nov 2021 09:30 in Virtual Classroom
Starting 06 Dec 2021 09:30 in Virtual Classroom

Courtroom Skills - England and Wales (1 Day)
Starting 09 Nov 2021 09:30 in Virtual Classroom
Starting 02 Dec 2021 09:30 in Virtual Classroom
Starting 07 Dec 2021 09:30 in Virtual Classroom

Cross Examination Day - England and Wales (1 Day)
Starting 10 Nov 2021 09:30 in Virtual Classroom
Starting 08 Dec 2021 09:30 in Virtual Classroom
Starting 12 Jan 2022 09:30 in Virtual Classroom

Criminal Law and Procedure (2 Days)
Starting 09 Dec 2021 09:30 in Virtual Classroom

Civil Law and Procedure -(2 Days)
Starting 07 Oct 2021 09:30 in Virtual Classroom
Starting 11 Nov 2021 09:30 in Virtual Classroom
Starting 13 Jan 2022 09:30 in Virtual Classroom

Family Law and Procedure - England and Wales (1 Day)
Starting 17 Mar 2022 09:30 in Virtual Classroom

Annual Expert Witness Conference
Our Expert Witness Conference, the UK's largest expert witness gathering, will be back on Friday 5th November 2021. This year we will be running it as a hybrid event and you will have the option of either attending in person at Church House, in Westminster, or joining remotely.

Annual Expert Witness Conference - Virtual
see: www.bondsolon.com/courses/virtual-annual-expert-witness-conference/

Discussions between Experts
In-house course: call for details
Duration: Half day
Starting 11 Oct 2021 13:30 in Virtual Classroom

GDPR for Expert Witnesses Toolkit
Course Type: Online
Starting 05 Oct 2021 00:00 in Online
See: www.bondsolon.com/courses/gdpr-for-expert-witnesses-toolkit/

Concurrent Delay

As defined in the SCL Delay and Disruption Protocol 2017, *"a true concurrent delay is the occurrence of two or more delay events at the same time, one an Employer Risk Event, the other a Contractor Risk Event, and the effects of which are felt at the same time".*

Types of concurrent delays
Based on the occurrences of the delay events and Parties responsible for the delays, the Concurrent delays can be classified in two categories

- Two delays, attributable to the *same party* and are concurrent to each other. When these delays are impacted on programme for delay analysis, the software (Microsoft Project, Primavera etc) will negate the parallel impact of the delays and will provide impact of only the predominant of two delays.
- Two delays, attributable to the *different parties* and are concurrent to each other. The effect of such concurrency is explained in the upcoming paragraph.

Effects of concurrent delay
Based on the occurrences of the delay events and Parties responsible for the delays, following are the effects of the concurrent delays that determine the contractor's entitlement of additional time and cost;

- Excusable – Delays attributable to the Employer
  - Compensable Delays – Contractor is entitled for additional time and cost as the Employer was solely responsible for the delay and there is no concurrent delay that is attributable to the Contractor.
  - Non-compensable Delays - Contractor is entitled for additional time but cost as there are certain delays that are attributable to the Contractor and are concurrent to the Employer's delays.
- Non-Excusable Delays - Delays attributable to the Contractor and there are no concurrent delays attributable to Employer, on account of which, the Contractor is not entitled for time and cost.

Contracts on the concurrent delays
The construction contracts have been seen to have dealt with the concept of concurrency in different fashion for different projects. Some contracts grant extension of time to the Contractor on account of concurrent delays but no cost. At the same time, some other contracts are not provisioned to grant time as well as cost for the concurrent delay. So, there are different schools of thought when it comes to application of the concept of concurrent delays.

Conversely, some contractors also plead for additional cost on account of entire excusable delay without deducting the excusable non-compensable delays. There may be incidents of contractors getting compensated if, pleaded in saleable manner.

Various guidelines for analyzing impact of concurrent delays on schedule and entitlement thereof
As we all know that there is a spread of definitions and application of the concept of concurrent delays in the industry. Therefore, in the attempt to formulate and propagate the common understanding on this concept in absence of any law, there are few guidelines / protocols that are commonly used and referred to by the industry experts to support their claims such as;

- SCL Delay and Disruption Protocol, 2nd Edition, February 2017
- AACE International Recommended Practices (RPs)

Opinion
Concurrent delay has consistently been a great and interesting topic of debate and argument between the Employer and the Contractor. The arguments over this range, right from the definition of concurrent delay to the analysis of the same in determining additional time and cost for the Contractor and levy of damages by the Employer. However, the Parties have been seen grasping the concept in a manner most

suitable to them and thus, spreading more than one definition of concurrent delay.

Though, SCL Delay and Disruption Protocol 2017 grants EOT to the Contractor for its delay being concurrent with the Employer's delay, the benefit or responsibility of the concurrent delay to the Parties should be ascertained by analyzing its impact on the critical path of the Schedule.

For example; If the Employer's delay in handing over of site is concurrent with the Contractor's delay in mobilization of its resources, then, the Employer's delay should be considered predominant and critical and the Contractor should be entitled for extension of time as mobilization of resources may be of no use in absence of site.

On the other hand, if the Contractor's delay in mobilization of its resources is concurrent with the Employer's delays in approval of various drawings then, the Contractor's delay should be considered as predominant and critical to the Project as in absence of resources, an approved drawing would not have helped.

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Don't be a Slack Witness

by Mark Solon, Solicitor and Founder of Bond Solon

There are several lessons for experts in the case of *Mark Simon Reynolds (As Liquidator of CSB 123 Limited) and Caroline Stanbury,* before ICC Judge Barber. The judgment is worth reading just to have an insight into the world of the super rich, where the latest Ugg boots are essential to be chosen and bought and available to be flown to Aspen at a day's notice, or how a rare Hermes Kelly bag at £70,000 is sourced.

Caroline Stanbury was a highly regarded fashion stylist who had become the personal fashion stylist for a small select group of extremely high net worth individuals, including Tamara and Petra Ecclestone, Kirsty Bertarelli and Dorothee de Pauw (whoever they are). Unlike many experts, she did not advertise her business at all as she did not need to; her clients were either friends or introduced through mutual acquaintances and they came to her. She said: *"I never publicised or marketed my personal styling business, as I did not want nor have time for any more clients."*

Perhaps more familiar to experts, her clients, as the Judge said, *"…were very particular, very busy clients with very exacting standards… They didn't want to use anyone else as they trusted her to know what they wanted and what looked good; they didn't want to waste time speaking to someone else when the advice that mattered to them was Caroline's….It was a highly personalised service. The Respondent's clients expected her to be available at the drop of a hat."*

Part of the matter concerned valuation of a private company, that had been formed after Stanbury had worked as a sole trader for some time and company valuation required expert evidence. As is often the case, there was an expert for both parties and each came up with different opinions. Mr Trevor Slack of Griffins appeared for the Applicant and Mr Ben Hobby of Baker Tilly appeared for the Respondent.

The judge said: "*Mr Slack did not fare well in the witness box. His report did not stand up to close scrutiny and he had no persuasive answer to a number of key questions put to him in cross-examination. There were also points in his oral testimony at which he failed to comply with his overriding duty to assist the court. One of his responses in cross examination was so astonishing that he had to be reminded by the court that he was giving evidence under oath and that the court process was 'not a game'. He twice apologised to the court for his answer after that intervention."*

"…Did not fare well in the witness box." is legal language for *"grilling."*

In contrast, in the view of the judge, Mr Hobby presented as an entirely credible expert witness with a keen awareness of his oath and his duty to assist the court. His report was extremely thorough. In cross examination, he very properly stayed within the bounds of his report and research. He said: *"I am satisfied that Mr Hobby did his best to assist the court to the best of his ability."*

Let's look at some of the problems arising from Mr Slack's evidence and see what lessons can be learned.

Mr Slack struggled to defend his report in the witness box. When asked whether his report was '*accurate and complete*', he stressed that it was a valuation done '*at a high level*' adding '*I didn't go into extensive detail given my instructions and budget.*' His report stated: '*Due to time restrictions and in the interests of proportionality and an upcoming mediation between the parties, the valuation/s have been done at a 'high-level'. This means that there has not been an in-depth analysis of various valuation metrics and evaluation model/s are not detailed or comprehensive.*'

Proportionality and time constraints are clearly important factors. A "high level" report can be worse than useless if the expert hasn't done a proper investigation or considered relevant evidence. Solicitors must be clear in the instructions to the expert as to what should be looked at. If an expert considers they cannot produce an adequate report in the expected time frame or within a reasonable budget, they should say so and even refuse the instructions. As Einstein said: *"Everything should be made as simple as possible, but no simpler."*

So several lessons here for experts including:

- Don't accept or continue with instructions if there is insufficient time to budget or do a proper investigation. Tell the lawyer as soon this becomes apparent. The court may allow an increase in the budget if still proportionate to the amount in dispute.
- Remember your primary duty to the court not to the instructing party.
- Don't oversimplify the matter if greater detail is required.
- Prepare carefully for cross examination and think about what the questioning lawyer may ask.

Mr Slack admitted that he had not looked at any of Stanbury's prior earnings figures as a sole trader, before forming a limited company and knew nothing about them. This sort of omission is damning and an expert must think about the obvious lines of enquiry to be followed. Similarly, Mr Slack accepted that when valuing a private company, earnings multiples are best suited for sectors that have relatively stable earnings and that, if historical earnings are not stable, they will not be a good basis for future projections. He struggled to explain how two years' trading in a small company provided a sound basis for projected earnings in the future. He had no persuasive explanation for using a multiple of 5x. When asked why he had not used comparables when preparing his report and considering the multiple to apply, he said that he

didn't consider it 'proportionate' and that he 'had a feel' for the multiple. Whilst accepting that, in a 'detailed valuation', it is a common or useful practice to use comparables, he said that 'because of the nature of my instructions, my experience, and the fact that the company sold for £1.4m, I felt that a multiple of 5 was appropriate."

All experts should watch out for in effect saying: "My opinion is right because I say so". It's just too pleasurable for the cross examining lawyer to hear this, as they know the statement is unsustainable if there has not been a proper examination of all the evidence. The expert should ask the instructing lawyer to provide all the evidence needed.

If an expert has not dealt with important issues, the solicitor should press the expert but really the expert should have thought such things through before completing the report. It really doesn't help the case if any lacunae are revealed in oral evidence.

The Judge took the view: "*Overall, Mr Slack's report was an unimpressive, results-driven piece of work. His attempts to defend it in oral testimony were entirely unpersuasive. In my judgement, very little weight can be placed on Mr Slack's written and oral expert evidence…*"

So don't be slack to avoid a grilling cross examination and reputational damage.

Mark Solon
Solicitor and Founder of Bond Solon
www.bondsolon.com

Where Does the Expert Fit into the Litigation Process?

Identifying where the expert fits in the overall process, the key points of their involvement (report, conference, expert meeting, giving evidence), & how to prepare for these important aspects of the role.

The experience of each expert will differ slightly. It depends on, among other things, the complexity of the case, the number of experts involved, whether the case is discontinued, settled, or proceeds to Court.

Instruction & initial report
The claimant instructs experts for an initial investigation, usually some time before the defendant instructs experts. Remember this when using your conflict checking system, as you could receive instructions from a defendant some years after reporting for the claimant.

The solicitor should provide you with a letter of instruction setting out whether you are to comment on breach of duty, causation or the current condition and prognosis of the claimant. They should state the legal tests you are to apply when considering your opinion.

You must ensure that the work falls within your area of expertise and, if not, say so. It is better to turn down instructions, or clarify exactly what you can comment on, at this stage than to be professionally embarrassed further down the line.

The instructions should come with a set of collated medical records and an outline of the relevant chronology. There may also be factual witness statements from the claimant or others and, if you are instructed by the defendant, you should receive a copy of the allegations as set out by the claimant in their Letter of Claim or the Particulars of Claim.

Based on these documents, your own expertise, and any independent research required, you will draft your report. Ensure you apply the legal tests and address any specific questions you have been asked.

It is really important to provide your report within the timeframe you have indicated or, if that is not possible, give your instructing solicitor plenty of notice of any delay. They are likely to be working to a specific timetable.

If your report is clearly supportive of the claim or defence, you may not hear much by way of response initially. If you raise particular issues, or your report is not supportive, you are likely to hear from the solicitor fairly quickly with a request to tease out these issues.

You may also be asked for your availability for a conference with Counsel either in person or by telephone.

Conference with Counsel
This will be the next big date in your diary in any major case. The solicitor instructs a barrister, experienced in clinical negligence cases, to critically assess the evidence: the records, the witness statements and the experts' reports. You will be expected to attend either in person or remotely. If it is possible to attend in person, do. It makes such a difference to be physically present in the room with the others involved in the case, and makes communication clearer too.

In preparation for the conference, read your report and know it well. Read any other reports or papers you have been sent and consider how they sit alongside your report. If there are points of disparity, be prepared to talk about this and suggest reasons for this or ways to overcome it.

Many experts find the conference exhilarating, relishing the academic challenge of a discussion with other professionals at the top of their game. Be mindful of the others present. They may include the claimant or a healthcare professional who has had allegations of negligence made against them. It is likely to be upsetting for them to hear details of their own lives discussed dispassionately in front of them.

After the conference, you may be asked to make some presentational amendments to your report to finalise it for service on the other side. You should not be asked to change your opinion, unless your opinion has actually changed, as this would not be appropriate.

Commenting on opposition reports
When your solicitor receives the report of your opposition expert, they should send it to you for comment. Consider it objectively, identifying areas where you agree, and giving reasons for the instances where you disagree.

Be methodical. Your solicitor will need a well thought through response from you to inform their advice to their client, their case plan, and any negotiation which may take place.

Meeting of Experts
After the case has been issued, it follows a timetable ordered by the Court. During this period you will meet with your opposite number to address an agenda of questions. The aim of the meeting is to narrow the issues in dispute, and to produce a joint statement.

The agenda will be drawn up by the solicitors, sometimes into one agreed list, sometimes two separate ones. There will be no solicitors present at the meeting; it is entirely between you and the other expert. Do not set aside your professional obligations. You must not mention anything you know about the progress or strategy of the case to the other expert.

You should review the agenda prior to the meeting. Consider your answer to each question, and make a note. Regardless of whether you meet in person or by video or audio call, you must treat this as a work commitment. Do not be rushed or distracted by external domestic or professional events, and be sure to give it your full attention.

Taking a good note of your discussion is really important, even if you are not the scribe for the meeting. The joint statement must accurately represent and explain your position, regardless of whether you agree or disagree with the other expert. Use your notes when you review the joint statement and be absolutely sure that you fully agree with the answers attributed to you before you sign the document.

Giving Evidence in Court

Some clinical negligence cases do get this far. Always work on the basis that yours might reach Court. If asked, could you explain your opinion clearly to the Judge and, if challenged, could you respond calmly and objectively?

The best advice is to prepare, prepare, prepare. Read your report, the report of your opposite number and your joint statement. Be familiar with the medical records and the Court documents; including Particulars of Claim, Defence, Schedule of Loss, and witness statements.

Try to be in Court for as much of the trial as possible so that you can observe the Court etiquette and perhaps see others taking the stand before you do. It will give you an insight into how the barristers put their questions, and hopefully help you feel more confident about what to do when it is your turn!

When it is your turn, stay calm. Listen to what you have been asked, answer with reference to your report, where possible, and state clearly if you think you are being asked to answer something that falls outside of your area of expertise. Do not make submissions, but do give your opinion. Your role is to inform the Court to the best of your ability, enabling the Judge to come to a decision.

The expert's duty is to the Court, and good practice in discharging this duty is essential. The expert is integral in identifying, narrowing and explaining the key issues in a case so that justice can be done.

To find out more about **Inspire MediLaw**, the upcoming conferences for expert witnesses, and other course dates for, visit their website at **www.inspiremedilaw.co.uk**

The Future of the PI Expert Witness 2021

Dr. Mark Burgin BM BCh (oxon) MRCGP is the author of the new book The Art of PI Medical Report Writing published by New Generation Publishing and available on Amazon.

There is an old Chinese curse 'May You Live in Interesting Times' and for PI medical experts the last few years have been very interesting. Experts have been jailed for contempt of court, sued for tens of thousands of pounds and subject to a barrage of criticism from the courts. At the same time fees have been falling as solicitors and agencies take an increasing cut of a fee that has not changed. It is not surprising that experts have been looking for easier ways of earning money and are becoming risk adverse. There are many roles that are less interesting and place higher value of the sorts of skills that PI professionals have.

As a senior PI expert I have helped many colleagues improve their reports and make them robust through my MERA type audits. Improving reports is not easy because doctors and physios are busy and find it difficult to keep up to date in their own profession, never mind the law. Legal changes are rarely easy to understand even for lawyers and knowing that there is a problem is not the same as being able to find a solution. Experts find the advice given by lawyers difficult to put into practice and thus have seen them as the opposition. It can feel to experts that they are being sniped at from the side-lines by lawyers who have never written an expert report themselves.

Solicitors are also under increasing pressure and whilst there are bad apples in both professions, they are mostly trying to help experts. Solicitors are understandably short tempered with experts who cannot find a solution to their problems. Part of their frustration is that they do not know how to solve the issue either and are hoping that the expert has the answer. Lawyers increasingly feel that whatever they do the third party will raise complaints such as fundamental dishonesty. As changes to law whittle away at the bottom-line cutting corners is the only way to survive. This makes good lawyers feel sad because they want to do a good job.

Getting out of PI.

Many professionals are already taking the steps needed to get out of PI work such as moving into other areas of law and many will not return. Gradually depletion the stock of high performing professionals has occurred in many areas of society. Education and health were previously the envy of the world and are now better known for failing schools and hospitals. The legal system has also suffered cuts with legal aid at its lowest level in living memory. Legal aid was first introduced in 1949 with the welfare state when arguably the UK was poorer than it is today. How we could afford more in the past when we had less money is a reason for unhappiness generally e.g. student grants.

The law is at a crossroad, it can either adapt to the changes and push an agenda of high quality and professionalism or allow changes to cause dumbing down. There will be (or is) a haemorrhage of the brightest and best or a refocus on what is important. Those professions who have allowed the tick box culture to destroy their professionalism are now working in clouds of toxic stress. My own profession – general practice is now dominated by peripatetic GPs moving rapidly between practices trying to reduce their exposure to stress and to survive. GP partners, long the backbone of the NHS are leaving and their numbers falling when for instance consultant numbers are increasing.

There is only one solution that will turn the tide and re-establish the confidence of demoralised PI professionals. It is only when a profession goes back to its fundamentals and fights against the purposeless work can motivation return. Purposeless work is a scourge on our industry and largely imposed by faceless bureaucrats. GPs and solicitors have both tried to keep their heads above water by employing ever growing teams to perform those tasks that have no purpose apart from achieving targets. In PI these teams provide a barrier between the professional and the claimant so both the professional and the claimant interact with these middle people. Their needs get lost in translation and one-size-fits-all solutions.

Back to fundamentals.

At the heart of all the regulations and protocols and guidance is the medical expert report which is used by the court to determine the injuries. It is easy to get lost in the noise of the advice and miss the point that is fundamental to any good report. The medical report should be fit for the purpose which it is required. Any product which is defective should be withdrawn and replaced with one that it is not defective. This

does not happen in PI leaving many claims supported by a report that does not address the material issues. Often the authors of those reports believe that their reports are of a good standard and are upset when they learn that they have failed.

The claimant should be at the heart of the process, in management theory the lawyers and the experts should serve the claimant. As both experts and solicitors cut corners the amount of time that is given to the claimant decreases. Experts may complain that the claimants do not understand the purpose of their report and solicitors that the claimant forgot to mention key facts at the examination. The claimant is confused by a process that involves thousands of letters but no human being to explain what is going on. As the system moves to unrepresented claimants with a computer that says 'no', dissatisfaction is likely to increase.

Justice should not only be done but seen to be done, without a clear idea of what winning looks like some claimants will have over optimistic views of the outcome. Some professionals will laugh at the claimant who values their claim at £1M for a simple RTA but the judge trying to deal with this claimant will not see the funny side. Having a complex system is not a problem whilst there are lawyers to guide a claimant through the process. I hope that we are at 'peak law' because if the systems get any more complex even the judges will struggle to make sense of it. There is a need to consolidate laws and guidelines rather create new ones to fix the problems. Sometimes the simple and wrong answer is better than the complex but unobtainable one.

Becoming a happy expert.
For many working in PI the concept of happiness is about as foreign as the idea of having a work-life balance. Weekends increasingly have been sacrificed for the SLAs that appear to have no useful purpose apart from keeping MROs in business. The frustration of an expert is easy to understand when they have provided a report within 72 hours has sat on the lawyer's desk for 18 months. Of course the case will now be urgent and the expert asked if they can get it back by 16.00. For experts with a day job and a family this may mean cancelling a desirable (but not important) activity such as seeing their children grow up.

Some experts realise that the cumulative weight of these unreasonable demands causes a growing dissatisfaction with their job. Cutting corners is not the answer because the reward of doing a good job is then lost. Getting angry with the claimants or the solicitors equally robs the expert of the enjoyment that pleasant social exchanges offer. Some will get out but others will continue to work despite their increasing cynicism as burnout increases the emotional weight of working. The answer for the PI expert to avoid this fate is simple, focus on quality.

The expert who is able to ignore speed and cost as issues is freed to enjoy the professional challenge in PI work. At first this feels like yet another target but soon the expert is able to see that focusing on quality gives all the benefits and none of the burdens of a micro-managed industry. To some this will seem counter intuitive, if experts produce high quality reports then they will earn less money. Money is happiness isn't it? Rewarding an expert for good reports rather than for producing cheap poor-quality reports is good for the industry as a whole. Experts need to take the lead by arranging independent audits, challenging rules that encourage poor practice and working slower (so they can say hello to their friends and family).

Conclusions.
"If you find yourself in a hole, stop digging" is good advice and for experts it means stop chasing targets that have little or nothing to do with their product. The expert report is a chance to assist the court by setting out the facts and giving opinions on the material issues before the court. At its best it is a document that survives unscathed throughout a prolonged legal process and makes settling the case straightforward. At its worst it spawns satellite litigation which drags on for years before an unpleasant outcome befalls the author. Even an expert who is successful at defending litigation will not describe themselves as happy.

The report must stand on its own without clarification or additions and must foresee the way that the case will go. This is a lot to ask but the best reports are both robust and fair and these experts are rightfully proud of their work. Being happy is not difficult, do something that you enjoy and know that you are doing a good job. Pride in one's work along with getting on with other people are two of the main pillars that make a job worth doing. I have written about how to achieve these outcomes. My book makes it clear that writing a great medical expert report is not easy, because it is a challenge.

Having professional challenge means keeping learning in that area just ahead of what you know. For some the enormity of what they do not know is too much, for others they believe that they already know everything so there is nothing left to learn. The Art of PI Medical Report Writing was written for those humble enough to accept that they have more to learn who still have the courage to learn more. I hope that it will offer the PI industry a path towards a future where those working in the PI industry will receive rewards. They should not be distributed equally but to given on the basis of quality. The alternative is that the beatings will continue until the morale improves.

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Anthony Gold's Injury And Medical Claims Team Recover Damages Of More Than £70 Million

by David Marshall
Managing Partner |Injury & Medical Claims |Commercial
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2020. Even naming this year as a standalone sentence invites mixed feelings of dread, of ill health, financial distress and family tensions.

At Anthony Gold the impact of the pandemic was no different, in that we still had to weather the sudden storm of the chaos brought about by Covid19. Across the entire firm there was a rapid need to restructure the working habits and routines of our staff, and simultaneously prioritise the needs of our clients.

Whilst adjusting to a new working lifestyle, based predominantly at home, our injury and medical claims team (IMC) also had to ensure that the standards of care and consideration provided to our clients remained unaffected. Our clients depend on us to provide the highest levels of commitment, pandemic or no pandemic, and I'm delighted to say that we did not drop that ball. The team, led by Jon Nicholson, successfully recovered damages for our clients of more than £70 million in 2020.

That remarkable level of success, however, represents more than just a number.

It's a testament to the hard work and dedication of our team of lawyers, who regularly go above and beyond what is expected from a legal advisor.

Jenny Kennedy, who is listed as a "Hall of Fame" solicitor in The Legal 500, recovered more than £10.5 million for one client. Ian Peters regularly secured multi million-pound settlements for his clients throughout 2020 totalling more than £17 million. Department Head Jon Nicholson was successful in negotiating a settlement of over £7 million damages for a client injured by clinical negligence whilst a baby.

The Trustpilot reviews from our clients add another layer of positivity and recognition to this success, with comments such as "…nothing was too much trouble and he would be happy for us to contact him whenever we needed him. Thanks again for your caring, professional and honest support…", of solicitor Samuel David. Another client, in his praise for an IMC partner, said
"…Adam Dyl was our allocated solicitor, and we have nothing but praise for him. He kept us regularly updated on our case. He was compassionate and always took the time to explain things to us properly, giving us time to think things through so we could make properly informed decisions".

We can all agree that 2020 will be remembered by many as a year of hardship. And sadly the widescale disruption caused by Covid19 continues into 2021.

Some people, however, will have had exceptionally burdensome strains, including those injured in accidents through no fault of their own and whose lives changed beyond all recognition. It is addressing the day-to-day anxieties surrounding the recovery, rehabilitation and ongoing care of these people which dominates the IMC team's routine, whether they are working to support them from an office, a loft, or their kitchen table.

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Accidents on Survival Challenge Courses- Who is to Blame?

Participation in organised events where participants navigate obstacles and survival challenges remains popular.

By their very nature, these events are physically demanding and involve obstacles and activities giving rise to possible risk of injury. On occasion injury does occur and although a participant has voluntarily taken part in the event, they may look to secure compensation from its organiser.

From time to time we see reported judgements where the courts have considered this issue. One such recent English case was Margot Eraine Harrison, Intuitive Business Consultants Limited (Successor in title to SR UK Ventures Limited [t/a 'Bear Grylls Survival Race"]) v Big Bang Promotions International Limited, Beyond the Ultimate Limited ([2021] EWHC 2396 (QB).

Margot Harrison was injured on 8 October 2016 while taking part in the 'Bear Grylls Survival Race' in North London. The event comprised of obstacles and survival challenges situated over 5k and 10k distances.

The claimant was attempting an elevated monkey ring obstacle when she fell to the ground below and suffered injury to her right leg and right shoulder. The event was organised by the first defendants, who subcontracted with the second defendants to design the course and its obstacles, to plan and manage the race, to provide staff and to risk assess the obstacles.

The claimant based her damages claim on section 2 of the Occupiers Liability Act 1957 in respect that the defendants failed to take reasonable care for her safety. Liability was denied and causation was similarly in dispute.

This particular obstacle, which involved participants swinging between rings from one elevated platform to another, was known to be challenging and most participants fell when attempting it. Two marshals on the starter platform provided general advice as to the position a participant should adopt in order to access the first monkey ring. The presence of marshals providing general instruction was one 'control measure' identified in the risk assessment. The presence of a 'heel bar', which assisted with a participant's departure from the platform, was another.

The claimant argued the defendants failed to implement those control measures and so were in breach of their duties of care under the 1957 Act. Her evidence was she did not hear any instruction from the marshal as to how to set off from the platform (and specifically that it should be done from a 'sitting' position) and was unaware of the presence of a heel bar. However, the claimant had stated previously she did not believe advice was required as she could see from other participants how the obstacle was attempted.

Evidence was also led from the marshal on the platform at the time of the accident, who was clear that she had been briefed to provide general guidance to participants on the platform and there was no reason why this would not have been done. Photographic evidence of her on the platform 'pointing downwards' when the claimant was close by supported this.

An element of risk attached to participation in this event, but a risk assessment had been conducted and control measures put in place. The judge's view was those control measures were sufficient so to demonstrate the defendants were taking reasonable care for the safety of participants. The judge observed participants in this event do so on a voluntary basis and were not obliged to attempt each obstacle. An alternative 'forfeit' activity was available if an obstacle was to be missed.

Having heard evidence, the judge's view was the claimant's injuries were the result of her losing her grip on what was a challenging obstacle. Had liability attached, the judge would not have found there to be any contributory negligence on the part of the claimant. Most participants fell from the monkey rings. In leaving the platform as she did, she was following the technique adopted by other participants. The court concluded the accident was unfortunate but it could not be said to have been caused by any fault on the part of the defendants. In activities such as this, an element of risk exists and will materialise occasionally. The claimant was aware of such risk when she volunteered to take part in the event.

Of importance in cases where individuals take part in events involving physical challenges is whether any breach of duty can actually be said to be causative of the accident. Participants will often be unable to complete every obstacle but that is not necessarily a result of any failure on the part of the organiser or other defendant/defender. Assessment of risk is also key.

From Harrison, personal injury practitioners across the UK see the outcome of cases such as this will depend on the specific facts.

Digby Brown Solicitors are experts at helping people who have been injured through no fault of their own.

We have seven local offices - Glasgow, Edinburgh, Dundee, Inverness, Kirkcaldy, Aberdeen and Ayr.

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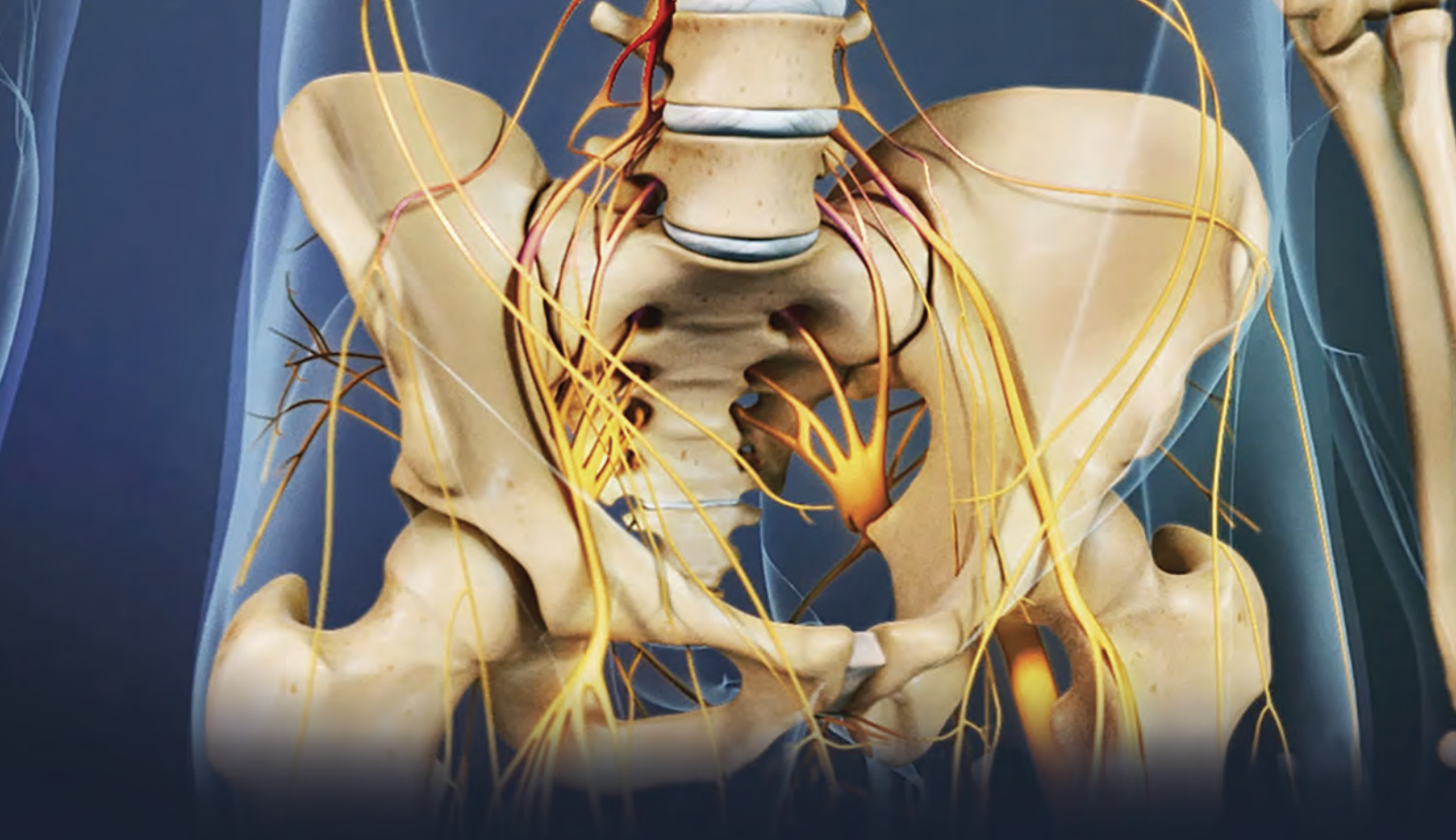

Cauda Equina Syndrome

by Tim Edbrooke

Cauda equina syndrome is a relatively rare condition, comprising around 2–6% of lumbar disc operations, with an incidence in the population thought to be from 1/33,000 to 1/100,000. Its medicolegal profile is disproportionately high due to failure to diagnose at an early stage, and the considerable impact that ongoing symptoms have on lifestyle.

The collection of nerves at the end of the spinal cord is known as the cauda equina due to its resemblance to a horse's tail. The spinal cord ends in the upper lumbar spine. The individual nerve roots at the end of the spinal cord that provide motor and sensory function to the legs and the bladder continue along in the spinal canal. The cauda equina is the continuation of these nerve roots in the lumbar and sacral region. These nerves send and receive messages to and from the lower limbs and pelvic organs.

Cauda equina syndrome (CES) occurs when there is dysfunction due to compression of multiple lumbar and sacral nerve roots of the cauda equina, and most commonly results from a herniated disc in the lumbar region. The size of the disc herniation that results in cauda equina is often much larger than normal; however, if the spinal canal is smaller due to heredity, or conditions such as arthritis, a smaller disc herniation can produce CES. A single strain or injury may cause a herniated disc resulting in a rapid onset of symptoms. However, many disc herniations develop and increase over time, do not necessarily have an identified cause and result in a more insidious onset of symptoms. Similarly CES may also gradually develop as a result of spinal lesions and tumours; infections or inflammation, and lumbar spinal stenosis.

CES resulting from compression by lumbar disc herniation, prolapse or sequestration is the most extensively documented, and three variations of CES are described:

1. Rapid onset without a previous history of back problems.

2. Acute bladder dysfunction with a history of low back pain and sciatica.

3. Chronic backache and sciatica with gradually progressing CES often with canal stenosis.

The onset of CES may be either acute, progressing over a period of hours, or gradual over a period of weeks or months, and within these groups CES may be complete with painless incontinence, or incomplete with some sphincter function.

Cauda equina syndrome (CES) is usually characterised by one or more of the 'red flag' symptoms:

1. Bilateral low back pain (LBP) in combination with:

2. Bilateral neurogenic leg pain or sciatica, weakness, or sensory disturbance.

3. Saddle, perineal, and/or genital sensory disturbance.

4. Bladder, bowel and/or sexual dysfunction.

From a clinical, and a medico-legal perspective, it is critical that each of the 'red flag' symptoms are specifically examined subjectively and objectively, and that each examination is documented, and acted upon if necessary. The primary issue, both clinically and from a medico-legal perspective is that, left untreated for a sufficient period of time, which in some case may be as little as 24 hour, some or all of the symptoms may persist in the long-term or become permanent leading to significant changes in lifestyle and function.

Early diagnosis by a doctor or physical therapist (physiotherapist, osteopath, chiropractor) gives the patient the best chance of a satisfactory outcome. 50–70% of patients have a relatively acute onset and tend to do less well. However around 50–70% of these patients can have an acceptable result with relatively minor residual deficits after urgent, but not necessarily emergency, surgery.

In the other 30–50% of patients who present with a more gradual onset of symptoms, prompt and appropriate management is key. The patient must be offered help quickly, and this relies upon the initial practitioner with whom they have contact asking questions regarding symptoms in an appropriate way with adequate explanation to ensure the patient fully understands what it is that they are looking for. The 'red flag' symptoms are often more subtle than clinicians believe them to be, so if, for example, a patient is asked and warned about perineal numbness as absolute anaesthesia, more subtle paraesthetic changes may be missed which could have acted as an early warning.

If there is any suspicion of CES the patient should be seen by a doctor who must then check for urinary dysfunction, changes in perineal sensation, loss of anal tone, and examine for neural deficit in the lower limbs. Most physical therapists are able to carry out a full neurological examination of the lower limb, but would not include the more invasive examination performed by a doctor. If a physical therapist believes a patient is presenting with CES they must ensure rapid transfer to a GP or hospital A&E department with an accompanying letter or telephone call to avoid delays.

Accident and Emergency departments should respond quickly according to an established CES protocol by confirming the clinical diagnosis then alerting the spinal surgery team. Baseline neurological criteria should be noted including anal sphincter tone and perineal pin-prick sensation. An emergency MR scan should be arranged as soon as possible. Ultrasound scanning may be useful in assessing urinary retention, and the volume drained on catheterisation should be recorded

A proper explanation and consent procedure concerning short- and long-term prognosis should take place in order to avoid any misunderstanding by the patient, including the same information in a printed format to confirm the information given, and to avoid the possibility of litigation if a neurological deficit persists. Decompressive surgery should be performed as soon as appropriately skilled staff are available.

The key points when considering whether there has been a failure in care in the pre-operative stages are:
o Whether the patient has been asked about 'red flag' symptoms in a way that they understand, with sufficient emphasis on the sometimes-subtle changes being asked about, with time to consider their response, and warned to immediately report such changes should they occur.

o Whether there are records in the clinical notes of the 'red flag' questions having been asked, with the response, and of a full neurological examination looking for objective signs of nerve root or spinal cord compression.

o Whether, in the presence of changes suggestive of CES, the patient has been referred promptly and appropriately for further assessment.

Most frequently questions regarding delay in diagnosis and referral revolve around who was responsible for the delay, and whether the practitioner concerned was qualified to make the diagnosis. If a practitioner holds a qualification that allows them to advertise an ability or expertise in treating back pain it is reasonable to assume that they have knowledge of CES and should be able to recognise the signs and symptoms. It is also reasonable to expect a practitioner faced with a patient/client who has symptoms they, the practitioner, cannot explain, to refer that person immediately to someone with the requisite expertise.

Delays in diagnosis occur because of failures to question patients carefully about symptoms, or to listen carefully to the answers. A significant proportion of victims of CES have pre-existing conditions which mimic the symptoms of CES: A UK population-based cross-sectional postal study of 1415 women found a prevalence of urinary incontinence of 39.9%, and genital neuropathy post-partum is not uncommon. Again, the sensitivity of questioning and examination is key.

CES is a rare condition which can have serious long-term consequences for patients, and the clinicians involved, with unpleasant clinical and legal sequelae if the condition is not well managed in the initial stages.

Tim Edbrooke
September 2021

Tim Edbrooke qualified as a Chartered Physiotherapist in 1990 and has worked for the NHS; the Police Service in Occupational Health; as a Governing Body Physiotherapist for British Triathlon and UK:Athletics, and as a private practitioner in Harley Street, London, specialising in spinal conditions, and in Exeter specialising in spinal conditions, sports injuries, and Occupational Health.

He has considerable experience of preparing reports for Health Care Professions Council tribunals, and of preparing reports for the Police in criminal cases of assault and sexual assault.

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Examining how Expert Witnesses Support the Courts in Response to the Pandemic

Fiona Hotston Moore outlines the ways expert witnesses can support legal counsel amid increasing pressure on the UK court system.

The COVID-19 pandemic has brought additional pressure and changes to UK court proceedings. A recent report by the House of Lords indicates there has been a significant rise in the number of court cases as a result of the pandemic and the impact it has had. It has also shown the pandemic has accelerated the funding deficit, adding more stress to a system that was already under considerable strain.

An example of this can be seen through the family court. Before the onset of the pandemic in March 2020, there were nearly 56,000 outstanding cases waiting to be heard, and while proceedings were switched relatively quickly to virtual hearings in spring 2020, this backlog had escalated to 67,000 cases by mid-summer 2020 alone.

Not only has there been a notable rise in the number of divorce cases following periods of lockdown, there has also been a surge in the number of family shareholder disputes. Such disputes are becoming increasingly common across a wide range of industries, including farming, retail and manufacturing.

And more significantly, the report estimates that even if days spent in court could be increased, it might take three years to reduce the existing backlog to pre-pandemic levels.

Against this backdrop of increasing pressure, it is clear that urgent steps are needed to help relieve the strain on the system. The House of Lords has shared a series of recommendations to help clear the backlog, including increasing available court time by utilising the new Nightingale courtrooms, and making greater use of part-time and retired judiciary. Further recommendations include a more innovative approach to cases, including using technology for virtual hearings and greater use of alternative dispute resolution (ADR) such as mediation.

But there is more that can be done to alleviate pressure in addition to these measures. As part of this, it is crucial that the skills and expertise of expert witnesses, and the role they can play in supporting matrimonial cases and commercial disputes, are more widely understood and utilised to help address the mounting backlog of cases.

Increasingly, forensic services experts are called to give evidence and be cross-examined concurrently, which helps clients to avoid what can be a costly court process. They also play an increasingly important project management role in mediation and ADR.

Giving concurrent evidence in 'hot tub' hearings

'Hot tubbing' is a colloquial term which refers to the court process of calling expert witnesses to give evidence and face cross-examination concurrently, rather than sequentially, and is a practice that is growing in prominence.

Although it has been available in the English courts for many years, adoption of the practice has been much slower here than it has in other countries. However, with the move to virtual hearings and a willingness to try new approaches, the courts now seem more willing to adopt hot tubbing for cross-examination of experts.

Allowing expert witnesses to give concurrent evidence makes the whole process more streamlined and is encouraged to reduce court costs. In family cases, the average divorce costs £15,000, but where the matter requires a hearing and the attendance of expert witnesses to give evidence on the valuation of a business, the costs can be considerably higher. For example, if three expert witnesses were previously lined up to be cross-examined sequentially over the course of three days, bringing them together to be cross-examined concurrently instead would see the timeframe reduce to less than a day. Not only will this help to reduce court fees, but also the costs of the expert witnesses, lawyers and barristers involved.

Of course, an expert giving evidence in the hot tub is likely to have vastly different experience from one who faces the more traditional approach of sequential cross-examination. In the hot tub, the process adheres to a structured discussion between the experts and barristers, which is chaired by the judge, so it is typically less adversarial. The experts are encouraged to comment on each other's views, to clarify common ground, and to reduce perceived disagreements as far as possible.

Ultimately, the expert witness will have less thinking time in the hot tub, and will face questions from fellow experts alongside questions from the barristers, which will quicken the overall process.

It's fair to say that virtual hot tubbing, whilst daunting, can be an extremely cost-effective process of giving evidence. Ideally, the joint statement of experts will have

been produced and agreed between them before the hearing, and the barristers and judge will have agreed an agenda for topics to be considered at the hot tubbing.

To help prepare the process and drive efficiency ahead of the hot tub, experts should address a number of practical issues, including:

- Determining what IT platform will be used and sharing the details with other attendees
- Receiving the court bundle before the hearing and downloading it onto a local computer
- Establishing who will attend the hearing – including assistants – and ensuring all attendees have stable connectivity
- Ensuring there is no background noise or potential for interruption

The growing prominence of mediation and ADR

Forensic experts are increasingly invited to attend mediation, arbitration or roundtable discussions, with an intention to assist the parties involved to reach a settlement before it escalates to the considerable expense of a court hearing. ADR can be very effective in reducing both the costs of litigation and bringing long-standing and stressful disputes to a conclusion.

Not only can forensic experts add value before mediation, in preparing documents ahead of ADR to explain the positions to the mediator or arbitrator, and assist the parties in understanding the strength and weaknesses of their respective positions, they can also assist in dealing with any accounting or tax questions during the meeting.

With the growing backlog of cases, the courts increasingly views claimants who do not try mediation as a first measure to resolve a dispute unfavourably. There is ongoing discussion about the idea of making mediation compulsory, albeit there is a concern that this would make it less effective and it could be perceived as a box-ticking exercise. In our experience, mediation can be very effective in resolving disputes even where the parties have very different views of the financial position providing the mediation is entered into with an open mind.

About the author
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Fiona joined FRP in 2020 as a Partner in our Forensic Services team, she is based in our Norwich office.

Fiona qualified as a Chartered Accountant in 1990 and as a Chartered Tax Adviser in 1991. She is a Fellow of the Institute of Chartered Accountants and has specialised in expert witness and corporate finance work since 2000. She is a member of the Academy of Experts, trained as a Single Joint Expert and is an Accredited Counter Fraud Specialist.

Fiona specialises in share and business valuation cases with particular experience in the Family Court. She also has considerable experience in commercial disputes, tax disputes and professional negligence matters.

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Conflict of Interest

by Alec Samuels

Every expert "worth his salt" is aware of the necessity to avoid a conflict of interest or the perception of a conflict of interest in his evidence. If the risk is present he has an instinctive or intuitive awareness, he feels it in his bones, he feels distinctly uncomfortable. The duty to the client is to exercise reasonable care, the sort of care to be expected of a professional in the circumstances. The duty to the court is to be honest, impartial, independent, objective, unbiased – an advocate for the truth.

The expert should seek to establish and maintain a professional arm's length from the client, however well he may know the client, however good their relations are.

The expert who sees himself as a member of the team, trying to help the client to win, acting as an advocate for the client, praising his client, will be exposed, damage the case for the client, upset the judge, and probably be publicly criticised by the judge, and suffer serious loss of reputation. The expert lets the lawyers get on with the law and the procedure and the strategy; he sticks to his lathe, he stays in his comfort zone, he keeps to his ethic.

The doctor instructed as expert for the patient bringing a case in clinical negligence is not acting on behalf of the patient but as an expert in the proper professional practice of medicine, in order to enlighten the judge. The expert has a different and separate and detached role from all the others involved in the case brought by the client. The expert may find it necessary to take a view unfavourable to the client. So be it. The lawyers will know how to handle the situation.

If a conflict of interest does exist, or emerges during the progress of the case, then the expert must immediately disclose that conflict to the instructing solicitor and to the other side, and probably withdraw, unless the opposite party agrees that the expert should be allowed to continue; and then the matter must be disclosed to the judge. Failure to disclose when required to do so is unacceptable.

A conflict of interest may arise inadvertently or almost inadvertently. The expert has frequently assisted the client in the past, in a proper professional relationship, e.g. as a surveyor in building disputes. Or the expert was an employee in the same company. Perhaps the client is often involved in litigation; perhaps the expert is one of only very few specialists in the subject-matter. Perhaps many years ago the expert and the client were students together, or worked on the same project, or had a few little business dealings. Perhaps they were distantly related, e.g. second cousins. Perhaps one is a shareholder in the company of the other. Or the expert may have in the past acted for the other side. He may have been a handwriting expert not realising that he was being approached by both sides. These situations are not necessarily a bar, but should be investigated and appraised. Confidential information may have been involved in the previous relationship with the other side.

Some situations almost automatically arouse suspicion. As the expert has acted for the client before, if the client wins he will probably instruct the same expert again, and the more work the expert has the more reputationally and financially he will gain; so there may be a temptation not to disclose. Also in the course of a busy commercial life the expert and the parties may have genuinely forgotten or not appreciated the possible significance of their previous relationship.

So the expert at the beginning should ask himself: Have I ever had any professional or other relationship with either party? Is there any chance of a conflict of interest? If so should I withdraw? Or disclose?

Any evidence that the client or the instructing solicitor had been trying to influence the expert, or to get him to change his report, and succeeding, will of course be disastrous for credibility.

So the expert must never allow himself to be carried away by the excitement of battle. What is the scientific truth about the whole matter? Nothing less.

A simple, lucid and reliable source of the law and practice is to be found in the professional handbook The Reliable Expert Witness, a guide to professional reports and expert evidence, by Mark Tottenham, Clarus Press, 2021, pp 20-21, 54-56 and 101. The latest judicial statement is to be found in Secretariat Consulting v A Company [2021] EWCA Civ 6, at paragraphs 88-89 and 102-124, a complicated factual case but a straightforward legal judicial decision. In Zuber Bux v GMC [2021] EWHC 762 (Admin) Mostyn J lucidly summarises and illustrates the law paras 23-33, 34-47, 48-58, referring to hospitality and relationship between client and expert, and describing a knowing conflict of interest as moral turpitude.

The law of evidence is well served in the books: Law of evidence, Ian Dennis, 7th edition, Sweet and Maxwell, 2020. Cross and Tapper, Roderick Munday, 13th edition, OUP, 2018. Murphy on Evidence, R Glover, 15th edition, OUP, 2018. Phipson on Evidence, HM Malek QC, 19th edition, Sweet and Maxwell, 2020.

Workplace Accidents: When does Fault Arise?

*In the recent case of **Johnson v National Platforms Limited** (County Court in Sunderland), the Claimant brought a claim for damages against his employer, National Platforms Limited in respect of injuries sustained in a workplace accident.*

On the day of the accident the Claimant, an experienced platform operator, along with two others were within a cage on the platform working at a height of approximately 20 metres. As the Claimant began to rotate the cage, there was a loud bang and the cage dropped to one side. It was later determined that this had happened due to the failure of the rotator bolt in the cage rotator assembly.

In the proceedings the Claimant alleged breach of a number of regulations, namely:

- the Management of Health and Safety at Work Regulations 1999;
- the Personal Protective Equipment at Work Regulations 1992;
- the Lifting Operations and Lifting Equipment Regulations 1998;
- the Provision and Use of Work Equipment Regulations 1998; and
- the Work at Height Regulations 2005.

A breach of the Employers Liability (Defective Equipment) Act 1969 (the 1969 Act) was also alleged. Unusually, no oral evidence was called by either party.

The Judge (Deputy District Judge DG Morgan MBE) rapidly disposed of the alleged breaches of the Regulations which, as the judge put it, *"were not pursued [by the Claimant] with any great gusto"*. The reason was a simple one: s.69 of the Enterprise and Regulatory Reform Act 2013 (ERRA 2013) operates in such a way that for accidents occurring on or after 1 October 2013 a breach of health and safety regulations made under the Health & Safety at Work Act 1974 (which these regulations were) does not give rise to any civil liability.

The real question for the court was whether the 1969 Act applied and whether there was "fault" on the part of the Defendant. Section 1(1) of the 1969 Act provides:

(1) Where after the commencement of this Act

a) An employee suffers personal injury in the course of his employment in consequence of a defect in equipment provided by his employer for the purposes of his employer's business; and

b) The defect is attributable wholly or partly to the *fault of a third party (whether identified or not)'*

The injury shall be deemed to be also attributable to negligence on the part of the employer

Section 1(3) of the 1969 Act defines 'fault' as follows:

'fault' means negligence, breach of statutory duty or other act or omission which gives rise to liability in tort in England and Wales or which is wrongful and gives rise to damages in Scotland

The Defendant's case was that there was no evidence as to what the defect in the bolt was attributable to and there was no evidence that anyone (including the manufacturer) was guilty of 'fault' as defined by the 1969 Act. The Claimant's position was that if "fault" had been established on a prima facie basis then it was for the Defendant to rebut that position.

The judge rejected that argument stating that *"It is for the Claimant to satisfy the court that there is fault and the test that is to be applied is the standard test in civil proceedings i.e. upon the balance of probability taking into account all of the evidence before the court and submissions made on behalf of all parties"*.

It was an agreed matter that there was *"excessive corrosion"* to the bolt which had led to it sheering, allowing the lock nut to work its way out of the cage rotator assembly. The court, from the evidence provided to it by experts, accident investigators and manufacturers found that *"the principal cause of the corrosion of the rotator bolt was that there was a chemical reaction between the two metals used for the bolt and the bushing causing the bolt to sheer and giving rise to the rotator assembly failing"*.

In moving on to consider the issue of liability the judge posed, and answered, two questions:

- *In answer to the question 'Should that have happened under normal circumstances?' the answer is unequivocally 'No'.*
- *Why did it happen? Again it is abundantly clear to me that the specification of a chrome bolt to fit into a stainless steel bushing must have been at the time of manufacture whether by Ruthmann or by a third party engaged by them to design the machine – it matters not because section 1 (1)(b) provides ……..'The defect is attributable wholly or partly to the fault of a third party (whether identified or not).'*

The judge therefore found that the use/specification of metals that were likely to corrode by Ruthmann (the manufacturer) or others was a 'fault' for the purposes of section 1(3) of the 1969 Act and on the basis of those findings the Defendant was caught by the provisions of section 1(1) of the 1969 Act and consequently liable to the Claimant.

Whilst this is a first instance decision, and is not binding on the parties, the case does nevertheless provide a timely reminder to Defendant's that notwithstanding the provisions of S69 ERRA 2013, there is still, in certain circumstances, an opportunity for the Claimant to succeed in establishing strict liability against an employer. It should be noted that the 1969 Act does not in itself impose statutory duties (which would be captured by the provisions of S69 ERRA 2013), but instead provides a framework to enable an employer to be deemed to be negligent for the actions of another, where certain conditions are met. Practitioners should therefore be alive to the presence of the Act and undertake appropriate investigations to understand whether or not a defect in an item of work equipment could be deemed to be the "fault" of a third party, which would then impose negligence upon the employer. In such circumstances practitioners should also investigate the opportunities available to seek an indemnity or contribution from that third party where appropriate.

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A Reflection on Life as an Expert Witness during the COVID-19 Pandemic

*As I return to the **Somek and Associates** Headquarters Office this week, I can hardly believe it has been 16 months since I was last here. It has been lovely to be with colleagues again and to get back into the routine of working once more from a proper office. As I reflect back over the last 16 months, I am incredibly proud of how quickly our company and its experts readily adapted to the "new normal" and how determined everyone has been, to support the timely progression of medico-legal cases. Having been asked whether I think the landscape for the Expert Witness has changed as a consequence of the pandemic, I can offer the following reflections.*

The Virtual Assessment

Whilst virtual assessments were not a new concept prior to the first Covid-19 lockdown in March 2020 and had had a role for some practicing clinicians, it was a new method for many expert witnesses in the fields of care, occupational therapy, physiotherapy and speech and language therapy. After consideration of the best virtual platforms to use and ensuring the security of the same, we were able to identify that the suitability of a virtual assessment was dependent upon:

❖ The nature and complexity of the claimant's condition

❖ The claimant's knowledge, skills, and abilities in respect of video technology (or the availability of a family member who could assist them whilst also maintaining social distancing guidelines)

❖ The nature and complexity of the specific assessment techniques

❖ The claimant's context and environment

Whilst virtual assessments were not preferred for situations where the claimant had a significant cognitive deficit or where specific hands-on assessment of muscle tone or objective measurements of grip strength/ range of motion or sensation were required, they did prove very successful for many groups of claimants, particularly in the field of Care and Occupational Therapy. Feedback from our experts indicates that they were able to discuss the claimant's pre-existing condition and lifestyle, their subjective account of their clinical condition and functional abilities. A discussion of the claimant's past care requirements was also able to be undertaken in full. Experts also reported being able to objectively assess through video observation:

• Bed, chair, toilet, bath, and car transfers

• Carers hoisting a child from bed to wheelchair/in and out of standing frame

• Stair and step mobility

• Functional abilities e.g. hot drink preparation, play activities

• Dressing/ undressing skills

• Manipulative/prehensile skills (including use of upper and lower limb prostheses)

• Putting prosthesis on/taking it off

• The home enviornmental (access, room size, wheelchair/mobility accessibility throughout, the suitability of furniture, size of garden and property)

• Speech/ communication and the use of the eye gaze system

• Concentration and memory, with certain cognitive assessments being administrated through screen sharing

Indeed much of the feedback from our experts has been that they consider in the majority of their cases, the information obtained from a virtual assessment

was largely on a par with that obtained using a face-to-face assessment method and as such they felt very able to provide a CPR compliant report. That said, a face-to-face assessment will also offer the additional advantage of easier rapport building with a claimant, the tangential observation of how the claimant presents within the context of their own environment (e.g. how they interact and assist their children or cope with their pet). Other environmental observations such as the size or lighting conditions of a room may be less distinctive virtually.

Ultimately the future reliance upon virtual assessments as a replacement for the face-to-face assessment is still to be tested, and there has been a reluctance from solicitors and barristers to rely wholly upon an expert's report when a virtual assessment took place, certainly in circumstances where the opposing expert undertook a Face-to-Face assessment where understandably they are concerned as to the perception of reduced credibility of a virtual assessment, and a negative impact upon the outcome of the case. I suspect that time will tell on this one as experts and their instructing parties are more familiar with and better at articulating the specific case strengths of the virtual assessment. It would certainly be a shame to simply lose all the experience and intelligence that has been accrued to date.

It would be very interesting to hear of any cases that do proceed to trial purely on the basis of a virtual assessment. Given the need for proportionality and cost efficiency in litigation, I consider the virtual assessment will continue to have an important role in respect of, for example loss of service reports (where there is no disability), or where the claimant has made a significant level of recovery. I also consider it could be a useful alternative to a face-to-face assessment, where a re-assessment is required (the original assessment having happened Face-to-Face) or where a report by a solicitor is required at very short notice and is certainly something that Somek and Associates will continue to offer.

Early Influencing Factors

At the height of the pandemic, with all of our experts being practicing clinicians and often working many extra hours, we were required where possible to support their ability to work clinically by agreeing to the postponement of some of their case deadlines or re-allocation of instructions were agreed by the client. Our clients were always extremely supportive and indeed grateful to our experts. The Coronavirus Act (2020) also mandated that social distancing practice and correct use of Personal Protective Equipment were adhered to. Our robust risk assessment process for face-to-face assessments, and the move to virtual platforms meant that the safety of the experts as well as claimants and their families, was paramount at all times. We stayed regularly in touch with the clients on all of our cases and there was a real sense of us all "working together".

Timely access to medical records was a challenge at times, with many NHS staff working remotely and staffing levels reduced due to staff needing to self-isolate due to contamination or close contact with a COVID positive individual. We opened up an emergency telephone number for use by experts and claimants in the evenings and at weekends for calls related to their impending assessments and any change in the health status or circumstances of expert or claimant. The COVID protocol also encouraged closer co-operation between parties.

The Experts Meeting

The virtual platform has also changed the nature of some experts' meetings, with more meetings happening using a video platform than simply happening by phone. This certainly offers the experts a more personal experience and an ability to better detect the effectiveness of the experts in responding to questions put by their counterpart. Another advantage is that some of the joint statement drafting can also happen "live on screen", as opposed to in the days that following the experts' meeting. I consider that the virtual platform will continue to play a part in Experts' Meetings.

Case Conferences

Almost overnight our face-to-face conferences became virtual ones and from the perspective of our experts this has been largely successful and of course result in a reduction of costs associated with travel time and expense. Difficulties have occurred with the technology from time to time, but conferences appear to have been better attended by more experts at the same time, undoubtedly because it is easier for many of the busy clinicians to make time for a video conference than the longer time required of their attendance in person. The ability for Counsel or other medical experts to share a document on the screen to further discussion, has made the process much more cohesive and helpful. In the past where experts have been unable to attend in person they have frequently dialled into conference by telephone and it has certainly been our experience that a video attendance is always better than a telephone one for issues of audio clarity and simply knowing when you can interject! I do consider that a large proportion of conferences will continue to be held remotely, even if in part. I equally recognise, that Counsel/ the solicitor may wish to meet their expert in person before they ultimately enter the witness box.

Trials/Hearings

We have had experts who have attended virtual trials and hearings during this time and Somek and Associates has undertaken work with its experts regarding the preparation required of them for a virtual trial and prepared a guidance document covering the environment, access to their documents using separate display screens, dress code, contacting their instructing solicitor during the trial/hearing and of course ensuring that they have their Zoom cat filter disabled! The Academy of Experts produced similar Guidance for Experts giving Remote Evidence.

We are aware that there are still further inroads to be made generally in respect of virtual trials/hearings, from timetabling to access to essential documents. We are however pleased to have been involved in cases

that started and concluded within the period of the pandemic to date.

The Future

So where do we see ourselves over the months and years ahead? Well we have for the last few months begun receiving new case enquiries/instructions relating directly or indirectly to the COVID-19 Pandemic. From clinical negligence cases concerning the standard of nursing care related to infection control in the hospital environment to, COVID-related respiratory and neurological conditions/ long COVID. We already know that so many people have lost their lives and anticipate an increase in Fatal Accident and Dependency claims.

Of course, there are also cases related to a delay in diagnosis or management of conditions such as cancer. We have not as yet been made aware of cases related to staff from other healthcare departments being moved/ re-deployed to critical care units where they may have lacked suitable knowledge and skill or related to the return to practice via temporary registration with their professional body, of those previously retired clinicians who may not be clinically up to date. Will this be defensible? We anticipate cases in these areas might however emerge over the coming years, along with cases relating to the standards of practice afforded to them by their General Practice Surgery, at a time when video or telephone assessments were used as an alternative to Face-to-Face assessments.
We may also see the impact of COVID-19 in employment related claims whether related to the health and safety of their work environment or expected working practices or related to contractual issues relating to their re-deployment. Access to adequate personal protective equipment claims under The Employers Liability Defective Equipment Act of 1969 are certainly anticipated, as are claims relating to the impact of working conditions on the mental and physical health of those key worker staff on the front line (whether in the NHS, public transportation service, schools, or supermarkets).

On the other side, there may a reduction in litigation due to a reduction in personal injury claims secondary to road traffic accidents, with so many less vehicles on the roads (albeit this is rapidly returning to pre-pandemic levels). Similarly there has been a reduction in the number of elective patient admissions and outpatient appointments and therefore there is likely to have been a reduction in clinical errors. This is coupled of course with the outpouring of public support of the NHS as evidenced by the weekly "clapping for carers" and the messages of thanks in the windows of homes and businesses alike. There is a strong possibility therefore that there will be a reluctance to litigate against the NHS. As an organisation Somek and Associates is well placed to offer quantum and liability experts to provide reports on such matters and are continuously reviewing the demand in specific specialist areas to ensure we have the right capacity and expert skill set.

As an organisation we wish to support the Legal Profession as these cases progress, and judgements are handed down and although this year has brought considerable challenges, we do at Somek and Associates feel proud to be such an integral part of the shaping of legal history.

Jessica Thurston, (MSc Occupational Therapy, BSc (Hons) Occupational Therapy).
Jess is Chief Operating Officer and Care and Occupational Therapy Expert Witness, Somek & Associates Ltd.

Somek & Associates is one of the largest providers of Expert Witness services in the UK, and has over two hundred experts, which include, occupational therapists (care experts), nurses, midwives, physiotherapists, speech and language therapists, and other allied health professions.

For more information about Somek & Associates' Healthcare Professional experts – please contact admin@somek.com
or visit their website **www.somek.com**

HANDLING A DENTAL NEGLIGENCE CASE?

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

Toby assists courts, counsel and judges in making accurate and well-informed decisions in cases relating to restorative dentistry and all aspects of prosthodontics, periodontics, endodontics and implantology.

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

Causation, liability, prognosis and quantum are included, often rendering court hearings unnecessary.

Whether acting for the claimant or defendant, please call.

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UK Legal Protection for Workers with Long COVID

Most legal COVID-19 restrictions have now been lifted in Scotland, England and Wales. As a result, city centres and commuter routes are beginning to resemble what they looked like before the pandemic. However, it is estimated that more than 2 million people are still suffering the effects of long COVID. According to a recent survey undertaken by the Office of National Statistics, 6.2% of adults in Great Britain believe they may have experienced long COVID since the start of the pandemic. Of this group, 57% reported that long COVID had negatively affected their general wellbeing, 39% reported it had negatively affected their ability to exercise and 30% reported it had negatively affected their work.

As a result, employers must consider how to manage employees with long COVID. There is not a one-size-fits-all solution, and employers need to consider this in terms of implementing and following policies.

What is long COVID?
The term "long COVID" has been most commonly used to describe signs and symptoms that continue to occur or develop for more than 12 weeks, and are not explained by an alternative diagnosis, after an individual has contracted and suffered the effects of acute COVID-19.

The Trade Union Congress (TUC) recently conducted a study relating to workers' experiences of long COVID. The TUC found that the symptoms of those suffering the effects of long COVID were varied and each individual surveyed experienced these symptoms to greater or lesser extents. Fatigue, brain fog, shortness of breath, difficulty concentrating, memory problems, pain-related symptoms and depression were the most commonly experienced symptoms.

Could long COVID amount to a disability?
The TUC has argued that long COVID should be deemed a disability. However, as discussed above, the effects of long COVID can be different for different people. Each case will need to be considered on its own merits as to whether their condition qualifies as a disability.

The Equality Act 2010 defines a disability as a physical or mental impairment that has a "substantial" and "long-term" adverse effect on a person's ability to do normal daily activities. Employment tribunals do not focus so much on the medical label given to a condition, but will look at the effect of the impairment. Someone suffering from chronic fatigue will likely be considered to be suffering from a physical impairment. Someone who struggles with concentrating will likely be considered to be suffering from a mental impairment.

"Substantial" means more than "minor or trivial" and so has a low threshold. "Long-term" means it has lasted or is likely to last 12 months or longer. However, long COVID is a new condition and it is unlikely any case coming before a tribunal now will be on the basis that someone has had long COVID for 12 months or longer. It will therefore be for a tribunal to predict how long the impairment may last. As time passes, it seems viable that a tribunal could find that long COVID can amount to a disability under the Equality Act.

How should employers approach a case where an employee says they have long COVID?
Our advice to employers is to treat long COVID as any other health condition. Employers should ensure they have relevant medical evidence in front of them before making any decisions. Specific medical evidence obtained for the purposes of litigation will likely be even more important than previously, whether this is from a respiratory consultant, mental health professional, cardiovascular expert or otherwise. Where previously a decision may have been made based on GP notes, these notes are unlikely to be sufficient to draw a sensible conclusion when it comes to cases of long COVID.

The employer should come to a decision as to whether an employee is disabled under the Equality Act by considering the evidence. An employer may consider that there is a high likelihood that the employee's condition amounts to a disability and look to meet its duties to the employee. In doing so, it does not need to formally concede the position on disability, it can simply agree to work with the employee to alleviate the impact and, if appropriate, help get the employee back to work. This could involve looking at workplace provisions, criteria and practices (PCPs), such as working hours, workload, physical tasks and travel requirements, and making adjustments to these.

As to what adjustments must be made, this will depend on what is reasonable, considering factors such as the cost, the practicality of making the adjustment and its effectiveness. There has been case law which has looked at whether it is reasonable to extend full pay during absences as an adjustment. On balance, the cases have decided that employers will only rarely be required to extend sick pay as a reasonable adjustment because it does not usually assist the employee to work. However if an employer provides permanent health insurance benefits, the expectation that the employer does what it can to ensure the employee can benefit from this may be greater.

It is advisable that employers keep contemporaneous notes of their decision-making process when implementing or rejecting reasonable adjustments. These will be helpful in a tribunal hearing.

Will dismissal be unfair and discriminatory?

An employer should ensure that its absence management policies are fit for purpose and cater for the peculiarities that long COVID presents. If the policies are appropriate and followed properly, then a dismissal may be fair. As above, employers should ensure that notes are kept of their thought-making process when it came to the decision that the employment was no longer sustainable.

Aside from the disability discrimination claim that an employee may bring if their condition amounts to a disability, employers should consider other indirect discrimination claims that an employee may bring. Employers should recognise that other protected characteristics may also be triggered when engaging with or making any decision relating to an employee suffering from long COVID. The impact of the condition may vary considerably between protected groups e.g. older employees, ethnic minorities and/or women – all found to be more susceptible to long COVID. Therefore, any capability procedures should be approached with caution and some flexibility maintained. A rigid approach, which dictates that no reasonable adjustments will be made if an employee is off sick with long COVID and the employer will dismiss, could by itself amount to an indirectly discriminatory practice if a protected group is treated less favourably. Whilst it would be open to an employer to argue that the practice was justified, it would need to give some serious strategic thought to how that argument would be put forward.

Closing remarks

The Department of Business, Energy and Industrial Strategy (BEIS) and Acas have developed a new advisory hub for employers and disabled people in England, Scotland and Wales, which includes advice relating to reasonable adjustments, flexible working and long COVID.

We are yet to see how the tribunals will interpret an unfair dismissal or discrimination case based on long COVID. However, whilst this is new ground for all of us, the legal concepts do remain the same and it will be for the tribunals to apply those concepts to each set of individual facts presented to it.

Author

Verity Buckingham - Counsel

Verity is experienced in all aspects of employment law and corporate immigration matters.

She deals mostly with corporate clients advising on contentious and non-contentious employment matters. Verity's contentious practice includes defending claims in the Employment Tribunal and experience of Employment Appeal Tribunal litigation in relation to claims of unfair dismissal, discrimination, equal pay and whistleblowing. She also advises individuals at a senior level on negotiating exits. Verity's non-contentious work includes reviewing and drafting all forms of employment documentation, including employment contracts, executive service agreements and employee handbooks consisting of extensive policies and procedures.

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Lacking Credibility? An Expert's Overriding Duty to the Upper Tribunal

The case of Heath Colin v London Southend Airport clarifies the obligations of experts when giving evidence to the Upper Tribunal (Lands Chamber)

Why are experts needed?
Expert evidence is used to assist the court when the case before it involves matters on which it does not have the requisite technical or specialist knowledge. When acting as an expert, the judiciary expects the expert to act with clarity, impartiality and independence. Experts should have the relevant expertise required, as experts that generalise or are out of date will not fulfil their obligations to the court.

Experts' obligations to the Upper Tribunal
The duties of an expert witness in any Upper Tribunal (Lands Chamber) proceedings are set out at Rule 17 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 (the 'UT Rules'), and Part 18 of the Lands Tribunal Practice Directions 2020 (the 'UT PD') which supplement those rules.

The duty of an expert is to help the Tribunal on matters within their expertise and this duty overrides any obligation owed to the client or their agent. Any application of this overriding duty should be informed by Part 35 of the Civil Procedure Rules (the 'CPR'), and the accompanying Practice Direction 35 and Guidance for the Instruction of Experts in Civil Claims. Experts may also have to comply with any professional guidelines which apply.

In accepting instructions as an expert, an expert must be satisfied that they are able to fulfil their overriding duty, and that they are able to act with independence.

Heath Colin Alridge & Others v London Southend Airport Company Limited
In the recent Upper Tribunal (Lands Chamber) decision in Heath Colin Alridge & Others v London Southend Airport Company Limited [2021], the Tribunal was not satisfied that the experts in the case had sufficient regard to their duties, choosing to reject the experts' valuations.

The Tribunal focused on determining how the change in noise levels resulting from the use of the runway extension at London Southend Airport affected the market value of the lead claim properties.

The Tribunal endorsed the principle of assessing the depreciation in value of the lead claim properties having regard to the values with and without the runway extension being in use, known as 'switched on' and 'switched off' values. The Tribunal relied on their own 'switched on' values which were the mid-point values between the parties' experts' respective valuations.

In determining the 'switched off' values, the Tribunal rejected the claimant's expert's use of 'repeat sales test' based on analysis of repeat sales of matching pairs of properties, one affected, one unaffected by the use of the runway extension. The Tribunal also rejected the airport's valuation experts' approach of applying indexing to pre- and post-first claim day prices. This resulted in none of the properties having experienced depreciation in value, whereas during cross-examination the expert had conceded that 'at least some of the properties had been depreciated.'

Dissatisfaction with experts in other recent cases
In Bluefoot Foods Ltd v Greater London Authority (2015), the Tribunal found that the expert report failed to consider the inaccuracy of the accounts provided by the claimant. The expert's evidence was not found to be evasive or untruthful in anyway, but the Tribunal found that by the expert's own admission and confirmation within his report, his valuation assumed the revised accounts provided by the claimant (Mr Rosen) were entirely accurate.

In Mohammed v Newcastle City Council (2016), the Upper Tribunal also noted that some of the expert witnesses had accepted much of what they were told by the claimants far too readily and as a result had failed to exercise the type of meaningful critical and objective judgment expected of an independent expert witness. It was insufficient for an expert simply to rely on what a claimant had told him. The Tribunal notes that an expert should not be the "puppet" of his client but should act in a way that satisfies the duties required under UT Rule 17(1).

Why does it matter?
It is extremely important for parties in Tribunal proceedings that their experts retain credibility in front of the Tribunal, as a lack of credibility can lead to evidence being disregarded, negatively impacting a party's case. Ensuring an expert understands their primary duty to the Tribunal from the outset of their instruction is a critical step in ensuring credibility is retained throughout. Failing to do so can of course also

lead to serious implications for costs awards by the Tribunal.

About the Author

Alex Minhinick is a director in the planning and compulsory purchase team at Burges Salmon LLP. He manages high value litigation arising from the compulsory purchase (CPO) of land on behalf of claimants and acquiring authorities in the Upper Tribunal (Lands Chamber), and regularly instructs expert witnesses on behalf of his clients.

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Does an MRI Help in Detecting Brain Tumors?

Dr Nader Khandanpour is a radiology consultant,subspecialising in neuroradiology, based at St George's University Hospital, London.

Magnetic Resonance Imaging, commonly referred to as MRI, is a fairly common test that is used to diagnose a variety of health conditions. Doctors will most likely suggest an MRI when they need to analyse one or more parts of your body including the brain, chest, lungs, and spinal cord among others. Doctors often turn to an MRI test when an X-ray, CT scan or even an ultrasound is unable to provide clear images.

An MRI is heavily relied upon when it comes to diagnosing conditions related to the brain; it is used to study the condition of the brain or to even identify the underlying causes of dizziness, headaches and seizures.

In case of serious health issues, like brain tumours, MRI is one of the best available methods of diagnosis. A brain tumour, if it exists, will most likely, always show up in an MRI scan. It is a very specific and reliable report that allows your doctor to analyse the tumour and make a treatment plan accordingly.

What exactly is the science behind an MRI?
An MRI might seem like a complex procedure and some patients get nervous at the thought of undergoing an MRI. If one tries to understand the procedure and the simple, yet enamouring, science behind it, it will make things easier and quicker.

During an MRI, the patient is asked to lie inside a huge, strong magnet. This magnet produces a very strong magnetic field which makes the protons in the body react and quickly align with the magnetic field. A radiofrequency current is released which stimulates the protons; when it is switched off, the protons again realign with the magnetic field. The energy released by these protons along with the time it takes for them to realign with the magnetic field depends on several factors in the body including the chemical composition of the molecules. It is these magnetic properties that are analysed by a doctor to draw a conclusion and diagnose the patient's health problem.

Often, during or before an MRI, an intravenous dose of contrast might be given to a patient. It is basically a special dye called a contrast medium that increases the speed at which the protons react and align with the field. It is preferred by radiologists since the speed of the protons determines the brightness of the image produced – if energy particles align faster, the image will be brighter.

Role of MRI in Detecting Brain Tumours
MRI plays an important role in case of diagnosis of serious medical conditions like brain tumours. In case of brain tumors, the following types of MRIs may be used:

- Intravenous Gadolinium Enhanced MRI
- Functional MRI

There are different kinds of MRI scans that each serves a different purpose like detecting tumours, understanding how much blood is reaching the tumour, studying the cellular structure of the brain etc. They help doctors in preparing treatment programs, planning for surgeries and analysing the effectiveness of treatment given. Your doctor will recommend a suitable MRI test based on your medical case.

Dr Nader Khandanpour
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Consultant Neuroradiologist & Honorary Senior Lecturer

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The Initial Approach

The solicitor must establish whether you are the right expert to instruct, but may not have the clinical knowledge to get this right. It is up to you to accept or turn down their approach, based on whether the issues fall within your area of clinical expertise. You should mention all possible conflicts of interest at this stage.

If you are asked for a fixed fee desktop report, ensure you know the scope of the instructions and the volume of the documentation so as to avoid committing to perusing reams of records at a low hourly rate. In your report, set out the scope of your instructions, what work you did to reach your conclusions, and what further work you think is necessary (if any) to produce a full report.

With requests for an informal opinion, it is a good idea to call the solicitor to discuss the case and, if you feel comfortable doing so, share your thoughts on the relevant clinical issues and the expertise needed.

As a rule of thumb, do not produce a report that cannot be disclosed to the Court. There are sometimes circumstances where reports are used improperly by solicitors, either accidentally or otherwise. Your priority when considering these requests is to protect your professional reputation.

Instructions

The solicitor may seek your clinical opinion on breach of duty or causation. They need you to commit to a well-reasoned view, to enable them to bring or defend a claim. They may instruct you to report on the patient's condition and prognosis in order to quantify the claim.

Their letter of instruction should outline the key dates and events, key people, and allegations of negligence. It should state what type of report you are to prepare, the legal tests you must apply, and be accompanied by a full, collated set of medical records; a chronology of events; and relevant witness statements.

On receipt of instructions you should confirm the due date for your report, reiterate the cost estimate, and raise any queries now that you have seen the documentation.

This sets the tone for your working relationship during the case, and it is useful for the solicitor to have a confirmation of your expected timescales and costs. A claimant solicitor will be mindful of the limitation date, after which they are not permitted to issue the claim. The defendant solicitor may be working towards a deadline for a Letter of Response or submission of their defence.

Progressing the case

While waiting for your report, there is usually little that the solicitor can do to progress the case.

With this sudden period of inactivity, the client can feel anxious that there is no progress. The solicitor can only reassure them and hope you will meet your deadline! They may be waiting to hear from you before instructing the next expert. In a claimant's case where either breach of duty or causation do not appear clear cut, this is common practice in order to manage costs wisely.

They may also be liaising with you, other experts, the client, and a barrister's clerk to set up a Conference with Counsel to discuss the medical evidence, including your report.

For these reasons, if there is going to be any delay to your report or you make unexpected findings, you should inform the solicitor as soon as you can.

The Conference with Counsel

Your report will be circulated to the other experts instructed by the solicitor, and discussed with the client. Be sensitive to that, particularly if you report for the claimant's investigation, and ensure your report can be understood by a lay person.

The Conference is chaired by the barrister instructed in the case and the client is also likely to be present. This meeting determines whether the case can carry on or be discontinued, so it is crucial. The solicitor relies on you to understand the issues, to put forward your reasoned opinion, and to give a considered response to the views of other experts or the legal team.

You may be asked to make changes to the wording or structure of your report. You should not be asked to make material changes that you do not agree with. Your report is your opinion, not that of the client or the lawyers. It is you who must explain it in Court.

Moving in to the Court timetable
Following a positive Conference, the parties and the Court fix a timetable to manage the case to trial. Your solicitor should send you the timetable, which includes deadlines for finalising and exchanging expert evidence, and the meeting and joint statements of experts. Put these deadlines into your diary.

As the case progresses to trial, the solicitor will be working with all experts in the case to finalise reports; checking (and rechecking!) all evidence before it is disclosed to the other side; evaluating evidence received; circulating it to experts and the barrister for comment; drafting agendas for the expert meetings; keeping an account of costs; reporting to the funder regularly; and talking the client through every stage. They may also be negotiating with the other side in an attempt to settle the case.

Be aware that the solicitor instructing you is likely to be running a caseload of 60 or more files, all at different stages of the investigative or litigation process. You might be asked to respond to a query or attend a phone conference at short notice, and it is good to have some flexibility to do so being mindful of the deadlines involved.

Payment
Your expert witness practice is a business, and you are entitled to be paid for your work. Ensure you have agreement of your costs, cancellation charges, and payment terms at the outset. If you do not receive payment in line with your agreed terms, raise this with your instructing solicitor.

To escalate the matter, contact their supervising partner or head of department. You may wish to instruct a credit control company to take the matter further if necessary, but tackle the issue with your usual contact before escalating, as there may be a simple administrative reason for the oversight which can easily be resolved.

The conclusion of the case
Whether it settles, discontinues, or goes all the way to trial, the case will conclude. It is not always possible for your solicitor to share the details, so you may not hear much beyond the outcome. Do ask for feedback or comments on your role. This is a useful learning opportunity and, potentially, a testimonial for you to add to your CV or website.

If all goes quiet, you can ask for an update. To inform your data audit, in compliance with the applicable data protection laws, you will likely be checking the status of any quiet cases at least once a year.

Be aware of the competing pressures your instructing solicitor is juggling, and expect a similar level of understanding in return. Maintaining good lines of communication will make for a positive working relationship.

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Individuals and the Court Process:
Proposed Changes to CPR 45 in Light of Recent Amendments to the Overriding Objective

***Benjamin Clayton** discusses proposed amendments to CPR 45, in the context of the recent update pertaining to vulnerable witnesses. Such changes not only take greater account of individual differences, but also put to bed long standing arguments between claimants and defendants.*

Following the recommendation in the report by the Civil Justice Council on Vulnerable Witnesses in civil proceedings, on 6th April 2021 the overriding objective was updated to assist vulnerable witnesses and parties in navigating proceedings.

The new Overriding Objective states:
"2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –

(a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;"

There is further the introduction of the new Practice Direction 1 A, which clarifies that vulnerability of a party or witness may impede participation, and also diminish the quality of evidence and that courts should take all proportionate measures to address these issues in every case.

The practice direction sets out that relevant factors could be personal, situational, permanent or temporary and thereby provides a wide ambit. Factors identified include age, immaturity or lack of understanding, communication or language difficulties (including literacy) and physical/mental disability, impairment or a health condition.

The courts will further be required to take account of any potential impact that the subject matter of the facts relevant to the case and any relationship with another individual involved in proceedings may have.

In respect of subject matter, within the practice direction the example of having witnessed a traumatic event is given, which has clear utility in respect of claims involving psychiatric injuries and secondary victims. The examples provided in respect of relationships are sexual assault, domestic abuse or intimidation (actual or perceived), however this is clearly not an exhaustive list.

Once vulnerability has been identified, the court will then need to consider the ability of the witness to: understand the proceedings and their role in them; express themselves throughout proceedings; put their evidence before the court; respond to or comply with any request of the court, or do so in a timely manner; instruct their representatives (if any) before, during and after the hearing; and attend any hearing. This is a comprehensive approach and therefore provides a greater remit to assist individuals.

Practitioners are encouraged to identify any issues of potential vulnerability from an early stage, so as to consider how best to proceed and allow parties/the court to consider appropriate provisions to further the overriding objective.

Given the broad nature of vulnerability, it is perhaps advisable for a proactive approach to be taken in identifying potential vulnerability, as it may be that some individuals will not necessarily make any difficulties known. This may be through reticence or simply a lack of knowledge.

This is something that can occur in cases involving a foreign language wherein representatives have been able to converse with a litigant to an adequate standard pre-litigation, but subsequently difficulties are experienced at trial, such as during a difficult cross-examination. This can lead to unnecessary adjournments and wasted costs. One can see how the same could apply to cases involving vulnerability.

The practice direction identifies that in certain cases it will be appropriate to set ground rules before a vulnerable witness is to give evidence, so that appropriate directions can be made. This may include the nature and extent of evidence, the conduct of advocates and/or parties in respect of that evidence and whether any support needs to be put in place.

Overall, the update is a positive step that recognises the difficulties faced by such individuals and seeks to ensure greater access to justice and fairer hearings. This also brings civil proceedings closer in line to practices long utilised in criminal courts and arguably furthers the aims of the Equality Act 2010.

Although practitioners already need to consider issues of vulnerability owing to the Equality Act, it is considered that a more rigorous approach will need to be adopted moving forward. As identified, the scope of vulnerability is somewhat wider under the practice direction. It can therefore be envisaged that this could lead to increased costs. An example of such can be seen in noise-induced hearing loss claims, where claimants are left with a physical disability, resulting in lengthier communications with their advisors.

It is perhaps therefore of some comfort that now when a court considers costs and their proportionality under rule 44.3(5), it will have to take into account any additional work undertaken or expense incurred due to the vulnerability of a party or any witness. Vulnerability will need to be considered when costs management orders are made.

This appears to be an appropriate and common-sense approach, which provides the best opportunity to ensure that relevant steps are taken; by providing proportionate costs recoverability.

A similar approach, that not only takes account of individual factors, but importantly accounts for the costs of such can be seen in proposed amendments to CPR 45.

The Civil Procedure Rules Committee (CPRC) is said to be amending Part 45 in due course to allow for counsel's advice to be used in infant settlement hearings and further translation fees.

The subject of both such fees featured in the much-debated decision of *Aldred v Cham [2019]* EWCA Civ 1780, in which it was held that the fees for counsel advising on child settlements under the RTA protocol and interpreter fees were not recoverable in accordance with CPR 45.29(I) as they were not considered to be 'a particular feature of the dispute'.

This has had an impact upon claimant practitioners who, by virtue of the rules are required to produce advices on quantum and ensure that documents are translated as appropriate. It was seen by some as a significant barrier to access to justice, as it would simply become financially unviable for some firms to take on such cases. These concerns were in fact acknowledged by the Supreme Court when refusing the application for appeal in Aldred, with Lords Hodge, Briggs and Leggat recommending that the CPRC should consider the implications of the case.

It appears that heed has been taken and consequently CPR 45.29I (h) is to be amended to read "any other disbursement that has arisen due to a particular feature of the dispute or which are required by the rules to be incurred" (amendment in bold).

This rule change does not alter the decision in *Aldred*, as in that case it was found that the age of a child or language of a litigant were factors that pertained to the individual, not a feature of the dispute. Essentially the rules side-step this decision and allow for such features to be taken account of and costs recovered.

This development, like the amendment to the overriding objective ensures that individual characteristics do not pose as a barrier to justice, which is the cornerstone upon which any legal system is founded.

The Impact of Expert Evidence

by Karen Wilsher (Partner) and Claire Devine (Senior Associate) at Charles Russell Speechlys LLP

The recent case of *ND v GD [2021] EWFC 53* provides important authority for family practitioners. The court had to consider several conflicting factors and carry out a *'careful balancing exercise'*. On the one hand, the Court had to take into account the wife's special health needs (she had been diagnosed with Young Onset Alzheimer's (YOA) in 2018 shortly after the parties' separation) and on the other, the fact that the husband had significant non-matrimonial assets. Ultimately, the Court had to determine how these contrasting, but important, factors should be dealt with to achieve a fair outcome.

One of the central aspects of the case was the wife's diagnosis of YOA and how this impacted upon her needs. YOA is sadly a neurodegenerative condition and her condition made her a vulnerable party such that she was represented by her litigation friend throughout the proceedings. Understandably, expert evidence was required in order for the Court to be able to properly consider a fair outcome and this article will principally consider the case in light of the expert evidence that was obtained. A single joint expert (SJE) occupational therapist, a SJE consultant old age psychiatrist and a SJE financial advisor were instructed in the case.

Background

The parties had a long marriage of 23 years and have two adult children (who at the time of the proceedings were studying at university). Five years prior to separation, in 2013, the husband inherited his late mother's estate worth £3.6 million at probate. This comprised a residential property portfolio which had largely been kept separate from the parties' other assets. Comparatively, the matrimonial assets were relatively modest, totalling £750,000 including pensions and of which about £380,000 was the net equity in the family home. At the date of the final hearing the net assets were around £2.6 million (after deduction of a significant IHT liability on the husband's property portfolio).

One of the key issues to be determined in the case was the wife's needs and particularly what housing and income funds would be appropriate for her. Expert evidence was required in terms of her life expectancy, specific financial needs and also how her needs could and should be met.

Expert evidence

Life expectancy

The SJE consultant old age psychiatrist provided written and oral evidence, which was described by Peel J as being 'impressive, clear and reasoned'. The SJE gave evidence that the wife's life expectancy was between 5 to 10 years – and that given her *'extremely young age'* she would probably survive longer than the average but probably 'not as much as 10 years'.

Importantly, Peel J notes in paragraph 23 (vii) of his judgment when referring to the SJE:

"He thought it very reasonable, and desirable, for W to remain at home rather than enter a care setting. In a care home she would be much younger than the other residents, with little in common between them, and her brain would be subject to less stimulation than living in the community. He described it as being "very important" for her to be at home for her quality of life. He drew the important distinction between a residential care home and a nursing care home, the latter becoming only necessary when medical care is required. He told me that the majority of people with dementia are able to live at home for the rest of their lives, albeit becoming increasingly dependent on higher levels of care provision."

The SJE evidence concerning the importance of the wife's future home and living arrangements proved to be very significant as evidenced by Peel J's decision below.

Income costs

Evidence was also given by a SJE financial advisor, who had provided bespoke capitalisation funds factoring in the wife's anticipated income and care costs over a range of different possible life expectancies.

In his judgment, however, Peel J found these to be of limited use in this case. Peel J acknowledged that the SJE had *'done exactly what he was asked to do, conscientiously and fairly'* but took the opportunity to remind practitioners that, whilst Duxbury calculations (a formula used by courts to calculate a capital sum in lieu of periodical payments) are a tool and not a rule, *"there would have to be a very good reason to go down a different route"*. As part of his evidence, the SJE had highlighted some of the differences between the underlying assumptions he had utilised in his calculations and those factored in to the Duxbury formula. It was noted that *'over a short timescale of 5-10 years the different modelling…would not lead to great variance in the computed figures. The longer the term, the greater the divergence'*. In this case, the SJE consultant old age psychiatrist had given evidence of his view that the wife's life expectancy was between 5 to 10 years.

Using Duxbury as a tool was the approach preferred by Peel J, who stated *'Although I acknowledge that there may be the odd case where an expert is required to carry out a very clearly defined and tailored Duxbury calculation, in the vast run of cases it is inappropriate to reach beyond the Duxbury tables in At A Glance, or the Capitalise programme for a more advanced formula'*. This case does therefore highlight the potential need for various different approaches depending on the specific needs at issue.

SJE occupational therapist

The SJE occupational therapist gave a written report setting out costings of the various levels of care which were available to the wife. From this report Peel J noted:

"A care home setting should only be considered when W is no longer able to live safely at home. If possible, she should continue to live in her current location (X town) as it is quiet and safe, and she has a level of structured routine there which is beneficial to her overall level of independent functioning. He considers that a single storey property would be desirable to avoid a need to move house or carry out adaptations in the future. His view is that the cottage is inappropriate for W's housing longer-term."

This was also pivotal in the assessment of the wife's housing needs as set out below.

Decision

Peel J awarded the wife a total lump sum of £950,000 on a clean break basis. This involved applying a significant portion of the husband's non-matrimonial assets to meet her housing need (assessed at £650,000) and her capitalised income/care costs fund (assessed at £300,000). The court preferred a clean break to avoid the emotional and financial cost of an ongoing financial relationship and acknowledged that having the flexibility of a fund would be beneficial to the wife in meeting her needs as they developed.

Importantly, in relation to the wife's housing needs Peel J stated at paragraph 65 of his judgement:

"I do not accept the submission on behalf of H that to provide W with a housing fund in excess of the value of the FMH would be to afford her a housing standard beyond that enjoyed during the marriage. In many (perhaps most) cases, it would be ambitious to seek a fund greater than the value of the FMH, but on the very specific facts of this case I do not regard the value of the FMH at £500,000 as a ceiling on W's housing needs". He went on to add that "W's health requirements take this case beyond the usual arguments about standard of living and appropriateness of housing."

This case therefore highlights the impact that tailored and specific expert evidence can have when the assessment of and the requirement to meet, very sensitive and specific needs is so crucial to the overall resolution.

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Study Could Help Save the Sight of People with Diabetes

Researchers at the University of Aberdeen are investigating a new treatment for diabetes which they hope could reduce one of the most common complications of the condition - sight loss.

The team of scientists, funded by the British Heart Foundation (BHF), are aiming to find new ways of preventing diabetic retinopathy (DR) and have been given a grant of £286,000 for the study, which is being led by Professor Mirela Delibegovic in collaboration with clinical colleagues Professor John Forrester and Dr Lucia Kuffova.

People living with cardiovascular disease and high blood pressure can develop a condition called retinal microvascular disease and this is increased in the presence of diabetes.

Diabetic retinopathy is one of the most common complications of diabetes. Those with DR develop damage, often permanent, to the retina - the light-sensing layer inside the eyeball - and as a result, are at risk of losing their sight.

People in the UK known to have diabetes are offered retinal screening once a year to detect signs of changes in the retina caused by DR. This new project aims to identify physical signs of DR when they occur, but before they lead to loss of vision, and to help find treatments to prevent it from developing.

Professor Delibegovic, Director of the Aberdeen Cardiovascular Disease Centre at the University of Aberdeen, explains: *"Given its nature, DR is a significant and worrying complication of diabetes and so it is important that we understand more about it and find ways to reduce and prevent it. Being able to intervene sooner could make a real difference for people living with diabetes."*

"In addition, as Type 2 diabetes - the most common type of diabetes – can often go undetected and undiagnosed for many years, up to 40% of people with Type 2 diabetes already have signs of DR when they are first diagnosed with the condition. Being able to intervene sooner could make a real difference for people living with diabetes."

Over the next three years, the team will investigate if inhibition of an enzyme, called PTP1B, will lead to protection against retinal microvascular disease and diabetic retinopathy.

James Jopling, Head of BHF Scotland, said: *"This is an important project which could benefit patients living with heart and circulatory disease and diabetes. As such, it is vital we understand more about diabetic retinopathy. Research projects like this one in Aberdeen help inform how we treat patients, identify those at particular risk and ultimately find new ways to save and improve lives."*

For more information on the BHF's life saving research and the work of the BHF visit **www.bhf.org.uk**

How to Write Excellent Reports

by Michael Young BA BDS MSc

In his keynote address to the Expert Witness Institute (EWI) 2021 online conference, Lord Hodge, Deputy President of the Supreme Court and EWI President, set out his observations about what the court expects of a competent expert witness.

- Independence and Impartiality. While this might seem obvious, he felt it was concerning that in a 2019 survey 25% of expert witnesses had felt pressurised to change their report in a way that damaged their impartiality, and 41% indicated that they had come across other expert witnesses they considered to be a 'hired gun'.
- Expert evidence must be 'expert'.
- In addition, an expert witness has to undertake the task of 'being an expert' being aware and competent in their duties to the court.
- Continual critical examination of their own work or opinion.
- Ownership, or, as expressed by Lord Justice McFarlane in a 2018 speech in one word: 'Clarity'. Both clarity of thought and clarity of expression or presentation of the evidence will assist the judge greatly. Lord Hodge stressed that it was imperative that expert witnesses take full responsibility throughout the process of preparation and presentation for his or her opinion evidence.

The last two points are the most relevant to what I am about to say. Continual critical examination of your own work or opinion includes what you write in your reports. Clarity of thought and of expression of evidence and opinion are immensely important qualities, which every expert should strive for in their reports.

Whole books have been written on the subject of writing reports, so this article is no more than a brief overview of what I consider to be the major elements. I will focus on:

- the intellectual process;
- macrostructure of report;
- microstructure of report.

The information and advice in the article is intended to help newcomers to the expert witness fraternity, as well as being a refresher for more experienced members.

First, remind yourself what are the two main purposes of a report:

- your report should be a comprehensive and coherent account of your investigation;
- your report should also provide information upon which others will be basing their decisions.

Are you someone who as soon as you receive a set of instructions and the case file wants to start writing the report straightaway? My first piece of advice is, don't! You need to gear your brain up and go through what I call the intellectual process of report writing. These initial processes form the planning and organisation phases of report writing.

Setting out and writing your report should only be started after you have:

- read carefully through all of the evidence. (Evidence is information indicating whether something is true or valid.);
- closely read the evidence, reading every word, annotating and making notes as you do so;

● been sceptical in your reading, accepting nothing at face value, interrogating the evidence and posing questions as you go along;

● evaluated, analysed and interpreted the evidence, that is, assessed its value, examined every element, and explained its meaning.

You will need to research the literature, which will make you familiar with current thinking and will aid your understanding of this. It is often useful at this stage to bring together the evidence you have collected and to compare and contrast it with what your research has revealed. When trying to handle a lot of evidence it often helps to organise it thematically. Comparing and contrasting, and grouping evidence thematically can be an enormous help when you come to the discussion section of your report.

Having completed all of the above, and satisfied yourself that you now have a firm grasp of the case in hand, you are now ready to put pen to paper, or fingers to keyboard, and start work on your report, but not before you have given serious thought to the layout, the framework or skeleton on to which you are going to add the flesh.

(It is assumed that your reports are where necessary Civil Procedure Rules compliant and that they therefore contain every element that is required under the rules, so I don't need to mention them.)

To aid the reader, you should incorporate plenty of white space into your reports. Cramped text, especially in a small font, is difficult to read. You should develop a consistent hierarchy of when you use upper case, lower case, bold, or underline for your headings.

If your report is going to be a logical examination of the subject under investigation, then I recommend the body of your report is set out as follows:

● a synopsis of the evidence. This can be as long or as short as you think is necessary, but it should always be limited to pure statement of fact and must not include any discussion or opinion;

● the evaluation, analysis and interpretation of the evidence. As with the previous section, you must not stray into discussion or opinion;

● your discussion. This is where you set out the range of opinions, various arguments, interpretations, approaches etc., as well as setting out the strengths and weaknesses of each (I will say more about the discussion section below.);

● your conclusion(s);

● your recommendation(s). This section is self explanatory;

● To assist the reader it is wise to include a glossary of technical terms.

The discussion section is probably the most difficult to write, but almost certainly the most important. It is often the one that poses the greatest problems, especially for inexperienced experts: many experts do not make it absolutely clear to the reader what is fact and what is opinion. To stop becoming too bogged down with what can seem like information overload, I applied a method I used for a number or years. This method bears the acronym PEACH. I would already have my list of the points I wanted to discuss as part of the intellectual process. Having identified a **p**oint, I then look for the **e**vidence to either support or refute the point. Next, I **a**nalysed the evidence and came to my **c**onclusion. I would finally **h**ighlight the conclusion of each of my points in the summary section, which usually sits towards the front of your report together with your introduction.

I have come across so many reports that are confused and confusing because the author has not adopted a logical approach, and where the title of their sections bears little resemblance to the content.

It is important that whilst writing your report you use reasoning that is both logical and sensible, when reaching your conclusions. Your conclusions must always flow from and be supported by your arguments and discussions.

Try to remember that how your report is received by its intended audience depends to a large extent upon how easy it is to read.

If your report were a building then so far you have constructed the framework and assembled the materials you are going to use; now it's time to add the brickwork. Words, the order in which you arrange them, punctuation, and tenses of verbs all make up the solid structure of your report.

There is no such thing as a report writing style, except that they should always be very clear, concise and correct. Reports should be written using familiar words and plain English. Jargon and technical terms will have to be used, but should always be explained in a very easy to understand layman's language. Your reader may be highly educated but not in your particular specialism.

Keep sentences short. Stick to one point per paragraph. Be consistent in your use of punctuation, but try to limit its use, because its incorrect use can often change the meaning of a sentence, phrase or clause.

The following is a brief summary of how and when punctuation should be used:

● a full stop marks the end of a sentence;

● a colon is used at the front of lists or to introduce a statement in front of the list;

● a semicolon can be used to separate items in a list, to divide a sentence, and to list groups of words;

● a comma is used in complex sentences to separate clauses, and between single word items in a list.

If punctuation baffles you, then I suggest sticking to full stops, colons at the start of lists, and commas but only if you really have to.

The nomenclature of verb tenses has changed since I was at school, but I must admit I still use the old terms because I know what they mean. You don't necessarily have to know their names to use them correctly, but it helps. There are five tenses:

- the imperfect, which refers to incomplete actions that happened in the past. Use 'was' or 'used to' to express this tense;
- the perfect, which refers to completed actions that happened in the past. However, this action may have occurred more than once. Use 'has' to express this tense;
- things that happened before another event are expressed using the pluperfect. Use 'had' to express this tense;
- use the present tense only if something is still ongoing;
- the future tense is expressed using 'will'.

This is by no means an exhaustive explanation of the use of tenses, but I hope it helps.

Ambiguity is a common fault in reports and is caused by one or all three of the following:
- poor syntax, that is, incorrect word order;
- the overuse or incorrect use of punctuation;
- the overuse of subject pronouns, that is, 'he', 'she', 'they', 'it'.

If you want to improve the writing of your reports I suggest you read *Oxford A-Z of Grammar and Punctuation by John Seely*. I know when I started out as a writer I wasn't totally confident about my writing skills, which is why I made improving them a priority.

There is little excuse for incorrect spellings, however, electronic spell checkers can only identify incorrectly spelt words; they will not pick out an incorrectly spelt word that is another word spelt correctly. Extra care is needed when writing names, addresses and specialist terms.

Writing any report is a challenge and can be initially quite daunting. Managing to present a coherent report in as few pages as possible comes down to how you initially plan and organise the evidence. Being able to filter out the important from the unimportant is something that comes with practice, and with practice you will also find that you are doing most of the hard work before you even start writing. Remember: twelve pages of closely argued reasoning will do more for your reputation than forty pages of drivel.

The look and presentation of your report is also important, but an outwardly beautifully presented report should never try to mask substandard content.

I started out citing advice from an eminent judge, in particular their views about the need for the expert to present their evidence and opinion with clarity of thought. I hope that what I have offered here helps you do just that in writing.

Finally, I want to leave you to ponder this quotation: 'If language is not correct, then what is said is not what is meant; if what is said is not what is meant, then what ought to be done remains undone.' (Confusius)

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High Court Draws Adverse Inferences from Failure to Call Relevant Witness, and Finds Default Interest Clause to be an Unenforceable Penalty

The High Court has rejected a claim for misrepresentation, finding that although a fraudulent misrepresentation had been made, it had not induced the claimant to enter into the transaction: ***Ahuja Investments Ltd v Victorygame Ltd*** *[2021] EWHC 2382 (Ch).*

The court's finding as to (lack of) inducement was based in large part on the claimant's failure to call its former solicitor to give evidence, in circumstances where the claimant had obtained information from the solicitor in the course of the proceedings, but had successfully claimed litigation privilege in respect of the relevant communication (see our blog post here). As there was no explanation from the claimant for the failure to call the solicitor to give evidence, the judge inferred that his evidence would be unhelpful from Ahuja's perspective.

The decision demonstrates that, while the courts will not lightly draw adverse inferences from a failure to call a witness, it may do so in an appropriate case. Here it was perhaps ironic that the claimant had successfully prevented information from the relevant witness coming before the court by asserting litigation privilege, but that information had nonetheless damaged its case because it helped justify an inference that the witness had material, but unhelpful, evidence to give.

The decision is also of interest for the court's conclusion that a default interest provision in a loan agreement was penal where it provided for 12% interest per month (compounded monthly) on amounts outstanding after the redemption date.

Background

The dispute arose out of the purchase by the claimant (Ahuja) of a shopping centre in Southall, Middlesex, from the defendant (Victorygame) for just under £18 million, funded in part by a loan of £800,000 advanced to Ahuja from Victorygame.

Ahuja alleged that it (through its sole director and beneficial owner, Mr Singh) was induced to enter into the sale contract, and the loan agreement, by fraudulent (alternatively negligent) misrepresentations about the duration of the leases of retail units in the centre and the rental income from the tenants. It was common ground that a schedule was provided to Ahuja's solicitors, and became incorporated into the sale contract, which stated (in capitalised, red text) that "ALL TENANTS HAVE SIGNED A 15 YEARS LEASE FROM THE 20/2/15", when in fact the substantial majority were for 6 years 9 months and not all ran from that date.

Victorygame accepted that there was a misrepresentation, which they said was due to an innocent mistake, but denied that it had induced Ahuja to enter into the transaction. It said Ahuja knew the true terms of the leases before exchanging contracts for a number of reasons, including because the original leases were in the possession of Ahuja or its solicitors.

It was common ground that the leases had been provided to Ahuja's solicitor, Mr Randeep Jandu (of Stradbrooks). The defendants contended that the court should infer that Mr Jandu had either inspected the leases and discussed them with his client, or that Mr Jandu had told his client that he had not inspected the leases and had been instructed to proceed in any event because his client was not concerned about the terms of the various leases.

There was no evidence from a number of individuals who had played a central role in the transaction, including Mr Jandu. Ahuja had obtained a letter from Stradbrooks' professional indemnity insurers, but had successfully asserted litigation privilege over that letter, as noted above.

As an alternative to its claim for misrepresentation, Ahuja claimed for breach of contract.

Victorygame counterclaimed for sums due from Ahuja. These included sums due under the loan agreement which provided for (among other things) default interest at 12% per month on "the amount that may remain outstanding from the Redemption Date". Ahuja claimed that this was an unenforceable penalty.

Decision

The High Court (HHJ Hodge QC sitting as a High Court Judge) found that Victorygame had made the lease term representation fraudulently, but that it had not induced Ahuja to enter into the contract. The court based the latter finding in part on adverse inferences resulting from Ahuja's failure to call Mr Jandu to give evidence. The misrepresentation claim therefore could not succeed.

As the lease term representation was a term of the contract, and was false, Victorygame was in breach of contract. However, Ahuja had not proved that the

property would have been worth more if the representation were true, and therefore that it had suffered any actual damage as a result of that breach.

With regard to the counterclaim, the court found that the default interest provision was an unenforceable penalty.

The below looks in more detail at the adverse inferences and penalty issues.

Adverse inferences

The judge referred to the well-known principle that, in certain circumstances, the court may be justified in drawing adverse inferences from the absence of a witness who might have been called, and who might be expected to have material evidence to give. Having referred to relevant authorities he stated that, before the discretion to draw an adverse inference or inferences can arise at all, the party inviting the court to exercise that discretion must first:

1. establish that the counter-party might have called a particular person as a witness, and that that person had material evidence to give on that issue;

2. identify the particular inference which the court is invited to draw; and

3. explain why such inference is justified on the basis of other evidence before the court.

If those conditions are satisfied, the party who has failed to call the witness "may have no good reason to complain if the court decides to exercise its discretion to draw appropriate adverse inferences from such failure".

The judge also referred to the Supreme Court's observations in *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, a decision handed down after the hearing in this case, but which the judge said merely served to reinforce the conclusions he had reached independently. In that case the court referred to "a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality". Tribunals should be free to draw, or decline to draw, inferences "using their common sense without the need to consult law books when doing so". Whether a failure to give evidence was significant would depend entirely on the context and particular circumstances, including for example whether the witness was available to give evidence, what evidence it was reasonable to expect they would have been able to give, what other evidence there was on those points, and the significance of those points in the context of the case.

The judge in the present case noted that there was no evidence from Ahuja as to why the court had not heard evidence from Mr Jandu, despite the judge inviting Mr Singh to provide an explanation. It was clear from the evidence of Ahuja's current solicitor, in opposition to the application for disclosure of the letter from Stradbrooks' professional indemnity insurers, that the letter contained information relevant to the present proceedings which was not apparent from the conveyancing file. Ahuja had asserted privilege over the letter and elected not to call Mr Jandu as a witness.

The judge was satisfied that the defendants had established both that Ahuja could have called Mr Jandu as a witness, and that he had material evidence to give. He was also satisfied that the defendants had identified the particular inferences they would invite the court to draw from Mr Jandu's absence, and had explained why such inferences were justified on the basis of other evidence before the court.

The judge accepted the defendants' submission that Ahuja's "manifest desire" to keep Mr Jandu from giving evidence permitted the court to infer that his evidence would be unhelpful from Ahuja's perspective. He was satisfied that this was "one of those perhaps rare cases" where it was appropriate to draw adverse inferences from Ahuja's failure to call Mr Jandu as a witness, adding: "Indeed, I can conceive of few cases where it would be more appropriate to do so".

In particular, the judge drew the inference that Mr Singh had instructed Mr Jandu not to trouble to consider the terms of the leases (or to charge Ahuja for doing so) because Mr Singh was concerned only with the rental income from the leases and not with their length. That attitude on the part of Mr Singh was consistent with other documents and with the commercial realities of the case.

Largely on the basis of that finding, the judge said he was entirely satisfied that the lease term representation contributed in no way to Mr Singh's decision to proceed with the property. Mr Singh considered that the tenants would remain for as long as the units were making a profit, and that if any tenant ceased to make a profit it would probably no longer be good for the rent regardless of their lease term.

Penalty clauses

Applying the principles established by the Supreme Court in *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67 (considered here, *https://hsfnotes.com/litigation/2015/11/04/supreme-court-rewrites-english-law-rule-on-penalties/*), the judge rejected Victorygame's submission that the default interest provision was a primary obligation which did not operate on a breach of contract and was not therefore susceptible to the law on penalties. He said it was clear from the authorities that whether or not a clause imposes a secondary liability upon a breach of contract was a question of substance and not form. If the substance of the contractual arrangement was the imposition of a punishment for breach, the concept of a disguised penalty could enable a court to intervene.

While it may be possible to circumvent the rule by "careful drafting", the drafting in the present case did not do so. The obligation to pay default interest arose on a breach of the obligation to repay the £800,000 advance on the Redemption Date.

The question then became whether the provision imposed a detriment which was out of all proportion to Victorygame's legitimate interest in enforcing the primary obligation. The judge accepted that it was difficult to demonstrate that a default interest rate applying prospectively from the time of a default is a penalty, but said it was not impossible. The question, he said, was whether the default interest rate actually applied because of the increased credit risk presented by a defaulting borrower was nevertheless, extravagant, exorbitant, or unconscionable.

In the present case the court was satisfied that the default interest rate of 12% per month, which represented a 400% increase in the pre-default interest rate, was properly to be characterised as a penalty.

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The General Medical Council's Fitness to Practise Procedures: How the Process will Unfold, What to do, and When

For any doctor, being the subject of a complaint can cause great stress and anxiety. When an allegation results in a formal investigation by the General Medical Council (GMC), the process that follows can be daunting and confusing. Writes David Hardstaff of BCL Solicitors LLP.

Early advice and support are crucial to ensure that a doctor's career and ability to work are not unfairly disrupted. Equally, action taken at an early stage of an investigation can have important consequences in later fitness to practise proceedings, and in some circumstances, avoid the need for further proceedings to take place at all.

Referral to the GMC and investigation

Complaints against doctors can be referred to the GMC in several different ways, including through a complaint made directly to the GMC, or following an investigation by a local NHS trust or private healthcare provider. In addition, doctors have an obligation to inform the GMC without delay if, anywhere in the world:

- they have accepted a caution from the police or been criticised by an official inquiry
- they have been charged with or found guilty of a criminal offence
- another professional body has made a finding against their registration as a result of fitness to practise procedures

If a doctor finds themselves suspended by an organisation from a medical post, or has restrictions placed on their practice, they must inform any other organisations they carry out medical work for and any patients they see independently.

On receipt of a complaint or self-referral by a doctor, the GMC will decide whether to investigate, exercising its powers under the General Medical Council (Fitness to Practise) Rules Order of Council 2004 (as amended) ('the GMC Fitness to Practise Rules'). Under GMC Rule 4, the GMC will write to the doctor to notify them that an allegation has been made and an investigation is being considered.

In some cases, the GMC will conduct a provisional enquiry to decide whether a full investigation is necessary. However, where an allegation raises concerns regarding a doctor's fitness to practise, an investigation will almost always take place.

In conducting an investigation the GMC may take the following steps:

- review documentary evidence from a range of sources
- take witness statements
- obtain expert reports on clinical issues and performance
- conduct an assessment of the doctor's performance
- conduct an assessment of the doctor's physical and mental health

Following the referral of an allegation under GMC Rule 8, Rule 7 requires that the GMC must again write to the doctor:

- informing them of the allegation and stating the matters which appear to raise a question as to whether their fitness to practise is impaired
- providing them with copies of any documents received by the GMC in support of the allegation
- inviting them to respond to the allegation with written representations within the period of 28 days from the date of the letter
- informing them that representations received will be disclosed, where appropriate, to the maker of the allegation (if any) for comment

It is important to seek legal advice before responding to any request from the GMC for an account or representations. Effective representations at this stage may satisfy the GMC that further fitness to practise proceedings are not necessary.

Following an investigation, the findings are considered by two GMC Case Examiners, one medical and one non-medical. The Case Examiners will review the evidence and decide whether to:

- conclude the case with no further action
- issue a warning
- agree undertakings to address a problem, or
- refer the case to the Medical Practitioners Tribunal (MPT) for a hearing

Both Case Examiners must agree on the outcome. If they fail to agree, the case will be referred to the GMC's Investigation Committee to decide on the outcome.

If at the end of the investigation the decision is made to issue a warning but the doctor disputes the facts, a hearing will take place to resolve the issue.

Referral to the MPT

The Medical Practitioners Tribunals Service (MPTS) runs fitness to practise hearings for UK doctors. The overriding objective of the MPTS in making procedural rules is to ensure that MPTs deal with cases fairly and justly. The GMC Fitness to Practise Rules are intended to achieve this objective.

Cases are either designated as 6-Month Cases or 9-Month Cases depending on whether the GMC's investigation, case preparation, and disclosure are completed before or after the Case Examiners' decision. Hearings in 6-Month Cases should start within six months of that decision, whereas hearings in 9-Month Cases should start within nine months.

Case management procedures apply to all matters before the MPT. Case management is intended to ensure that cases are heard within their target timescales and usually takes place during a telephone conference and/or pre-hearing meeting. Hearings take place at the MPTS hearing centre in Manchester, although in certain circumstances, participants may appear remotely by video or telephone.

Case management is the responsibility of a Case Manager. The process includes agreeing hearing dates and directions in relation to when the parties must disclose any evidence they propose to rely on.

Participation in case management procedures is voluntary however it is strongly in the interests of any doctor subject to proceedings to ensure they are represented during this process. If a party does not comply with directions made during the case management process, the MPT has discretion to draw adverse inferences, refuse to admit late evidence, and to award costs.

Interim Orders Tribunals

Upon application by the GMC, the MPT has the power to impose interim orders restricting a doctor's practice while an investigation and proceedings are underway. In seeking restrictions, the GMC must set out the reasons why it is necessary to make or review an interim order.

Interim Orders Tribunals (IOT) are made of three tribunal members, one medical and one non-medical. The tribunal may make or review interim orders in person during a hearing, or following a review on the papers provided the GMC and doctor are in agreement.

Although subject to periodic review, interim orders imposed at an early stage in proceedings may remain in place for a significant period of time. Early advice and assistance in avoiding the imposition of interim orders that are disproportionate or unfair is crucial.

Fitness to Practise Tribunals

Fitness to practise hearings take place before an MPT, usually at the MPTS hearing centre in Manchester. As with IOTs, which consider interim orders, MPTs are made up of three members and include at least one medical and non-medical member.

In certain circumstances participants can appear remotely however it is generally expected that the parties, legal representatives, and witnesses will attend in person.

The tribunal will come to a determination in relation any factual issues having heard all the relevant evidence in the case. This can include live evidence from witnesses and experts, and documentary evidence presented by the parties. On hearing the evidence, the tribunal decides whether the alleged facts are proved on the balance of probabilities.

If the tribunal finds that the allegation is not proved, the proceedings will conclude without any finding against the doctor.

If the tribunal finds that the allegation is proved but that the doctor's fitness to practise is not impaired, the proceedings will conclude, with or without a warning on the doctor's registration.

If the tribunal finds that the allegation is proved and the doctor's fitness to practise is impaired, it will continue to consider what sanction to impose.

Sanctions

A wide range of sanctions are available, including the following:

- warnings
- undertakings between the doctor and GMC
- conditions on the doctor's registration
- suspending the doctor from the medical register for a fixed period
- erasure of the doctor from the medical register (normally for life)

Appeals

Both the doctor and GMC have 28 days to lodge an appeal against any decision of the tribunal. Appeals are heard by the High Court or the Court of Session.

Author

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A Truly Expert Witness

by Flora McCabe, Head of Advocacy and Risk Management in Lockton LLP's Healthcare Practice

"There is a worrying trend generally which seems to be developing in terms of failures by experts generally in litigation complying with their duties. Practice Direction 35 makes the position very clear." This was the damning analysis of the Honourable Mr Justice Fraser earlier this year, in ***Beattie Passive Norse Ltd v Canham Consulting Ltd (2021).*** Far from being an idiosyncratic viewpoint, Justice Fraser's stance is representative of some very real concerns about the quality of experts being appointed, their knowledge of their role, and the extent to which their instructing lawyers are educating them properly.

This article seeks, largely through a roundup of key expert evidence – related cases, to:

1. Remind experts of their major duties;
2. Explore some of the failings of expert evidence over the past couple of years;
3. Understand the consequences of experts making errors;
4. Suggest how to avoid repeating these mistakes; and
5. Review the insurance available.

Expert duties

It is all too easy to get swept up in the drama and pace of litigation, particularly where a defendant and / or their legal team are determined to win at any cost. A good expert must do all they can to resist what at best can be infectious over enthusiasm and at worse overt pressure to take a certain stance, and instead ensure that they are adhering to their duties, which are clearly stipulated in the Civil Procedure Rules ("CPR"). The Practice Direction which accompanies CPR 35 – the specific rules governing expert evidence and behaviour – makes it crystal clear that:

- Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation and that the expert's overriding duty is to the court and that this overrides any duty to his or her client.
- Experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate
- Experts must consider all material facts including those which might detract from their opinions
- Experts must make it clear when a matter falls outside their sphere of expertise and / or they are unable to reach a definitive opinion
- Experts must make it clear immediately to the Court if they change their opinion on any material matter
- Experts must make it clear which of the facts relied on in a report are within the expert's own knowledge

The above likely sounds basic and intuitive but putting it into practice is much harder than initially appears, as is clear from a detailed examination of two different cases below.

Examples where experts have failed and why

The tragic case of *Z v (1) University Hospitals Plymouth NHS Trust, (2) RS (& Others* (December 2020) related to a Claimant who had severe and irreversible brain damage following cardiac arrest in November 2020.

Here, the Claimant was moving from a state of coma to a vegetative state, with a 10-20% chance that he might progress to a minimally conscious state (MCS) minus. There was disagreement as to what action to take between the Claimant's wife (who said that he would not want to be kept alive if he could not be helped) and his birth family (who maintained that his strong Catholic faith would mean that the sanctity of life would prevail over all other considerations).

Following the Court's declaration that it was not in the Claimant's best interests to be given life sustaining medical treatment, including nutrition and hydration, and that treatment could be lawfully withdrawn, there was a further application by his birth family, led by his niece, for three declarations, the first of which was that they would be allowed to rely on the evidence of Dr. P (the expert who was heavily criticised by the Judge). Whilst the Judge admitted Dr.P's report and allowed him to give oral evidence, the Judge concluded that he "*did not think [he could] place any weight on [the expert's] evidence*" for the family. This is because the expert:

(i) had read none of the patient records;

(ii) had not seen the reports of the expert called by the Official Solicitor, or of the treating doctors, until just before giving evidence, at which point he saw only 1 out of the 6 available documents;

(iii) had not spoken to the treating team, nor seen the MRI, the EEGs or any other scans;

(iv) had not read any of the court judgements in the case or any of the case papers;

(v) had relied solely on the word of the Claimant's niece, without any corroboration, on the issue of the Claimant's reaction when his birth family attended;

(vi) had relied on an unstructured series of exercises, carried out by the birth family on their visit, which he said demonstrated that the Claimant was able to respond to instruction; there was an imbalance of evidence here, because he had kept no records of how often the Claimant did not respond to instruction;

(vii) in his oral evidence, he was "untroubled by any of these deficiencies".

Overall then, the expert concerned was woefully under-prepared, failed to interrogate his sources or

indeed consider the salient document and, as a result, was unsurprisingly deemed unreliable and inconsistent in his oral evidence. Such performance made a mockery of proceedings and will have added to the pain and suffering experienced by all parties, as well as contributing significantly to the stress of being involved in this sort of case and creating unnecessary further financial burden. Just as in many other walks of life, there is no replacement for thorough reviews of all documents and good preparation; you owe this to your clients at the very least. And tackle your legal team if you believe they have not provided you with all the information you would expect to see.

Next, we turn to a case from earlier this year, Dana UK Axle Ltd v Freudenberg FST Gmbh [2021] EWHC 1413 (TCC) Joanna Smith J excluded, during the trial itself, the entirety of the defendant's technical expert evidence due to "the full and startling extent of the Experts' breaches of CPR 35". This was a claim arising out of the alleged premature failure of pinion seals manufactured by FST and supplied to Dana, a manufacturer and supplier of automotive parts. On Day 7 of the trial, Dana applied to exclude FST's technical expert evidence. The Judge agreed:

- FST had failed, in breach of a PTR order, to provide full details of all the materials provided to the experts, whether by FST or its lawyers.
- There was no detail of any factual information provided orally by FST and no list of all the documents which had been provided to the experts.
- "the experts had unfettered and unsupervised access to the Defendant's personnel" and were provided with information by FST during calls and virtual meetings. However, there was no record of any of these calls or meetings.

As anyone involved in any profession should be aware, attendance notes and good record keeping are non-negotiable. The concern here was that FST experts were seeking (and receiving) guidance and approval from FST's in-house technical team on the content of their reports, which went beyond contact limited to providing logistical assistance. The absence of notes around the nature of their contact meant there was nothing to prove the contrary. The Judge made it very clear that:

"It is essential for the Court to understand what information and instructions have been provided to each side's experts, not least so that it can be clear as to whether the experts are operating on the basis of the same information and thus on a level playing field. Experts should be focussed on the need to ensure that information received by them has also been made available to their opposite numbers."

Where experts liaise directly with their clients to obtain information which is not recorded: *"there can be no transparency around the information to which they have been privy and no equality of arms with their opposing experts of like discipline."*
The Judge also said that it was: *"entirely unacceptable for Dana and the Court to discover, during the course of the trial, that FST's experts had not only engaged in site visits about which they did not inform Dana's experts at the time and, in respect of which, they have apparently kept no records, but also that there were, in fact, more site visits than had previously been disclosed in their reports."*

The Judge was not only damning of the experts but of their legal team:
"The establishment of a level playing field in cases involving experts requires careful oversight and control on the part of the lawyers instructing those experts; all the more so in cases involving experts from other jurisdictions who may not be familiar with the rules that apply in this jurisdiction. For reasons which have not been explained, there has been no such oversight or control over the experts in this case."

This is therefore a reminder to all experts that your lawyers should be giving you appropriate guidance on your duties to the Court; if they do not then you should speak up. They should also be instructing you in a timely fashion, making you aware of relevant deadlines, providing you with all documentation rather than cherry picking and remaining objective in their instructions to you. Please challenge them if not and make it very clear if you feel remotely uncomfortable with any task you are being asked to perform. It seems very pertinent to conclude this section with the Judge's resounding reminder of what a privilege it is to be given the role of an expert witness, and how your actions have a direct impact on the operation of the justice system in this country:

"The provision of expert evidence is a matter of permission from the Court, not an absolute right (see CPR 35.4(1)) and such permission presupposes compliance in all material respects with the rules ... the use of experts only works when everyone plays by the same rules. If those rules are flouted, the level playing field abandoned and the need for transparency ignored, as has occurred in this case, then the fair administration of justice is put directly at risk."

The Consequences of failure to adhere to rules
Few cases illustrate more aptly the severe consequences of failing to adhere to an expert's duties than *Liverpool Victoria Insurance v Khan [2019]* EWCA Civ 392,[2019] 1 WLR 3833, on appeal from [2018] EWHC2581. This is a particularly horrifying example of deep seated failings by an expert and their legal team. The case relates to a personal injury matter where the Claimant was involved in a road traffic accident in December 2011. The GP expert had a thriving private practice in medico-legal work, conducted at various locations. This practice involved frequent examination of claimants in low-value personal injury claims. He produced around 5,000 reports a year. He assessed the Claimant for a medico-legal report about ten weeks after the accident.

The report stated that whiplash symptoms had subsided by the time of the assessment, and that the Claimant had fully recovered from the injuries sustained in the accident. The Claimant informed his solicitor that he was unhappy with the prognosis set out in the report because he had ongoing symptoms of neck, shoulder and wrist pain. At the request of the solicitor, the GP produced an amended report without

further examining the Claimant, and apparently relying on notes which had been incorporated in the original report. The revised report bore the same date as the original and gave no indication that there had been a previous report or any revisions made. However, it differed very significantly, as it stated that some painful symptoms had not yet improved, and that the prognosis was that pain and stiffness in wrist, neck and shoulder would fully resolve within 6 to 8 months from the date of the accident.

The fact that the report had been revised only came to light when, in error, the Claimant's solicitor included the original report in the trial bundle. The trial was adjourned and four years later the insurers pursued the GP for contempt of court. The judge found that ten out of 14 grounds alleged against the doctor had been proved to the criminal standard and that his conduct went beyond negligence when it came to altering the prognosis between the first and revised report.

Particularly pertinent for the readership of this article is the gravity placed by the Court on the fact that the GP expert had signed a statement of truth – which all experts are required to do upon completion of an expert report – verifying what in fact was a report containing untruths. The Court reminded us that: *'contempt of court involving a false statement verified by a statement of truth ... is always serious, because it undermines the administration of justice'.*

Crucially for this readership, the Court does not distinguish between intentional and reckless statements: experts will 'usually' be *'almost as culpable'* for making false statements *'recklessly'* as they would be for making statements 'intentionally':

"To abuse the trust placed in an expert witness by putting forward a statement which is in fact false, not caring whether it be true or not, is usually almost as serious a contempt of court as telling a deliberate lie.

Applying this *'inflexible rule'*, they reasoned that *'the deliberate or reckless making of a false statement in a document verified by a statement of truth will usually be so inherently serious that nothing other than an order for committal to prison will be sufficient'."*

It is helpful to set out the Judge's reasoning in full: *'In the present case, the inherent seriousness of the Respondent's conduct in contempt of court – in particular, in the putting forward of the revised report as if it represented the Respondent's honest and independent opinion based upon his own examination of Mr Iqbal - was aggravated by a number of factors. First, the judge found it to have been motivated initially by a desire to keep his report-writing factory running at full capacity. The Respondent was, therefore, at least indirectly motivated by a concern for financial profit. Secondly, the Respondent persisted in the conduct which constituted his contempt of court, putting forward false statements on three different occasions. Thirdly, on one of those occasions he acted with deliberate dishonesty. Fourthly, he sought on that occasion to cast the blame for his own misconduct on someone else. Fifthly, although he did not maintain that deliberate untruth for very long, he thereafter recklessly put forward another explanation which was also untrue. Sixthly, having regard to the terms of his declarations and his statement of truth, we are bound to say that we think that the recklessness which the judge found came close to the borderline between reckless and dishonesty.*

We accept that there were a number of matters in the Respondent's favour, to which some weight had to be given. It seems to us, however, that the judge gave disproportionate weight to one of them, namely the fact that in most respects the misconduct was reckless rather than intentional: for the reasons we have given, there was in the circumstances of this case little difference in culpability between those two states of mind. It also seems to us that disproportionate weight was given to what was referred to as delay, the majority of the passage of time being attributable to the Respondent's choice to contest the proceedings throughout. The disproportionate weight which he gave to those considerations contributed, in our view, to his passing a sentence which was so lenient as to fall outside the range reasonably available to him. The judge did not identify any powerful factor or combination of factors in favour of suspension'.

Key learning points from this Judgment therefore include the fact that if you make any form of reckless or untrue statement, it can not only derail the entire case, and have a myriad of unpleasant consequences for the clients involved, including extreme personal financial penalties such as third party costs orders, but it can also result in a criminal sentence. Accepting expert instructions should therefore never be taken lightly, and you need to ensure that you are fully cognisant of your obligations at all times and have them fully in mind when you sign your statement of truth. At best inconsistencies in your oral evidence, failure to be objective and failing to prepare will result in your client losing the case, a bad case to enter or remain in existence, wasting time, effort and money and at worst you could compromise your entire professional career and personal life.

One would have hoped that these lessons would have been learnt, but as little as ten days ago, Judgment was handed down in *Robinson -v- (1) An NHS Trust* and (2) *Dr Mercier*. The case related to an extraction performed under general anaesthetic by a maxillofacial surgeon. Here, for only the second time in a clinical negligence case, a third-party costs order was obtained against Dr Mercier, a general dental practitioner, who had acted as an expert witness for the Claimant. He is now required to pay £50,543.85, representing the costs that were incurred as a consequence of his advice.

His failings were as follows: at trial, Dr Mercier conceded that he did not have any experience of performing an extraction under general anaesthetic over the last 20 years, had no experience of consenting a patient for extraction under general anaesthetic and that he was not as well placed as the Defendant's expert witness (a consultant maxillofacial surgeon) to comment on the case. The Claimant discontinued her claim during the trial, following Dr Mercier's evidence.

The Judge held that Dr Mercier had flagrantly disregarded his duties to the Court by giving a report on a subject matter in which he had no expertise. The punishment of having to find over £50,000 from his own pocket / his indemnity provider may seem grave but sends a much needed warning shot across the bows of all those who accept instruction without adequate thought.

How to avoid making errors

Firstly, start as you mean to go on and ensure you have the basics right. In practice, this means:

• A CV that accurately reflects experience and is neither over long nor out of date

• Prove your independence and that you have no theories or practices you are especially wedded to

• Ensure when you accept an instruction that you were in practice at the time in question

• Confirm that you have expertise / experience / qualifications in the relevant field; simply do not accept instructions which put you in difficulty because you are not well qualified or knowledgeable enough to deal with them.

The *Robinson case* mentioned above encapsulates the need for experts to report strictly within their own area of expertise, both in terms of specialty and also having regard to their contemporaneous practice.

Secondly, set out the relevant legal tests at the outset and ensure you have an excellent understanding of the law. Whilst it is crucial that you do not set yourself up as a lawyer or try to make legalistic submissions, you need to ensure that you are looking at the case in front of you through the correct lens. You therefore should complete and refresh regularly your expert witness training, and also ask your legal team to provide you with an unadulterated and objective document setting out the standards required of you. *Thimmaya v Lancashire NHSFT + Jamil (30 January 2020),* heard last year, illustrates the consequences where an expert is cross examined and cannot explain the legal test in question – the Bolam test in this instance, in the course of a clinical negligence matter. Very sadly, the expert in question's understanding was impaired by mental health issues that he was struggling with. As such, he should have ceased acceptance of medicolegal work, and it was ruled improper, unreasonable, negligent to have persisted. This resulted in a third party costs order of £88,000 being made in Defendant's favour against the Claimant's expert.

Thirdly, ensure your report is top quality!

• Get dates / quotations right
• Be up-to-date
• Aim for balance in approach
• Defer to those in other fields where appropriate
• Sensible citation of literature
• Don't go overboard in volume of literature
• Be relevant
• Ask yourself "what are the key issues for the judge to decide in this case at trial?"

Your legal team should be assisting with checking all these points and, as discussed in *Griffiths -v- TUI UK Limited* [2020] EWHC 2268 (QB) only a couple of days ago - they should really interrogate your evidence, pointing out lacunae, in order to ensure that you are in fact able to properly substantiate your comments.

Fourthly, ensure you do not ignore things or blow things out of proportion. In a Technology and Construction Court case of 2017 the Judge was highly critical of ICI's experts, condemning the evidence given by one expert during cross examination as "*...not the sort of evidence one would expect from a wholly impartial independent expert witness*." (Imperial Chemicals Industries Limited v Merit Merrell Technology Limited).

He went on to say "*On all matters where the experts for the two parties hold different views, I prefer the evidence of [Merit's expert]...I find his evidence to be wholly impartial and his independence to be uncompromised. His conclusions were sensible and did not seek to advance the case of the party instructing him.* The same, regrettably, could not be said of [ICI's two experts]."

This entails:

• Taking a realistic approach to the facts of the claim

• Dealing with both / all versions of the facts;

• Not ignoring difficulties (e.g. in the medical records);

• Being very aware that the judge is the arbiter of fact;
• Not being railroaded by your opposite number;

• Having concrete examples / literature to back up viewpoint;

• Returning for further discussion another day if need be;

• Not being over the top or overly passionate or spirited in your arguments.

Fifthly, ensure you make a proper effort in the production of the joint statement:

• Consider taking the initiative in recording the discussions;

• Give detailed reasons for opinions expressed;

• Make concessions if appropriate (but explain your reasoning). A salient lesson on this point is set out in more detail in the section on expert indemnity and the case of *Jones v Kaney.*

Finally, should you be one of the few to be privileged enough to attend a Trial then please ensure that you:

• Are a team player;

• Know the papers / issues / medical records;

• Know the literature;

• Listen properly to questions;

• Maintain equilibrium (especially with the judge);

• Work out what the judge wants / likes;

• Don't attempt to be an advocate.

Arksey v Cambridge University Hospitals NHS Foundation Trust [2019] is an excellent example of where an

expert was caught out in this manner at the Oral evidence stage, which was found "unimpressive". The Judge opined that: "there was a failure on his part to address the questions that he was being asked: I had no doubt, that this was a deliberate ploy on his part to avoid answering the questions, rather than any kind of misunderstanding on his part as to what he was being asked, and the technique was adopted by him because of the difficulty he found himself in, in addressing the questions".

Expert Indemnity

In *Jones v Kaney [2011] UKSC 13, Stanton v Callaghan [1998] 4 All ER 961,* the Supreme Court overturned 400 years of practice and held that a party can sue their own expert witness for negligence in the litigation. What began as a relatively standard personal injury case following a road traffic accident developed into something far more dramatic. Here, Dr K, a clinical psychologist, was called as an Expert Witness to determine whether or not the Claimant was suffering from post-traumatic stress disorder. Dr K originally supported Jones in his claim but then signed a joint statement that failed to accurately record her views and the discussions held between the experts because she felt under pressure to accede to the views of her opposite number. The joint statement was damaging to Mr Jones' claim and resulted in the matter settling on unfavourable terms. Mr Jones issued proceedings against Dr Kaney seeking damages on the basis that his claim settled at an undervalue as a result of her actions.

Whilst such risks for parties and experts alike can be avoided by following the advice within this article, and for parties to avoid the temptation to put pressure on their expert, there may still be situations where you end up requiring support in the event of a claim against you. In such circumstances, it is crucial that you hold appropriate insurance in the event that you are brought into a complaint or claim.

Lockton offer comprehensive cover for those who do expert witness work. Lockton is one of the leading advisors on professional indemnity insurance. We have unparalleled knowledge of the coverage available under professional indemnity insurance policies, and strong relationships with a wide array of top professional indemnity providers. But our expertise does not stop with insurance. We make it our business to understand the specific risks and challenges inherent in your specific area of expert witness practice.

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Typical limits of indemnity range from £100,000 to £5,000,000 with higher limits available on request.

Hopefully, from both your perspective and that of your clients, you will never face a claim, but if you do, it will give you significant peace of mind to know that you hold adequate indemnity

About the author:

Flora McCabe is Head of Advocacy and Risk Management in Lockton LLP's Healthcare Practice and specialises in defending medical practitioners and healthcare organisations when they face claims and complaints. Her team offer specialist indemnity cover for doctors, dentists and healthcare corporates including:

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Beddoe Applications - What, When & How?

by Ally Tow, Dispute resolution at Boyes Turner

When trustees or personal representatives are engaged in litigation issues often arise as to how their litigation costs are to be funded. How can a trustee ensure that their costs will be met from the trust fund or personal representatives from the deceased's estate? In these cases, it is often necessary for the trustee or personal representatives to make a "Beddoes application" so-named after the case Re Beddoe [1892] wherein LJ Lindley held:

> *"a trustee who, without the sanction of the court, commences an action or defends an action, unsuccessfully, does so at his own risk as regards the costs, even if he acts on counsel's opinion."*

What is a Beddoes application?

A Beddoes application is an application made by trustees or personal representatives engaged in litigation to ensure that their costs can be met from the trust fund or the deceased's estate. If no application is made then the trustees or personal representatives risk becoming personally liable for their own costs as well as those of any other party for any proceedings commenced, or defended, if they are ultimately unsuccessful with those proceedings. Whilst they could in theory seek to establish that any costs incurred were properly incurred as an expense of the trust or estate, a Beddoes application provides certainty at the outset of the proceedings for trustees, personal representatives and beneficiaries alike.

How and when should a Beddoes application be made?

In any Beddoes application the trustees or personal representatives engaged in litigation seek permission from the court as regards the continuance of proceedings issued, known in the application proceedings as the main action. In deciding the application, the court determines whether the costs of the main action should be recoverable by the trustees/personal representatives from the trust or estate. In doing so, the court considers whether it is in the interests of the trust/estate for the action to be brought or, if brought against the trust/estate, for the trustees/personal representatives to continue to defend the same.

The Beddoes application must be made in proceedings separate to the main action. The beneficiaries of the trust/estate must be made a party to the proceedings as it directly affects them, although they may not receive all documents if they are a hostile party to the main action.

Beddoes applications are brought under Part 64 of the Civil Procedure Rules 1998 ("CPR"). Although brought as an application for directions as to whether or not the trustees/personal representatives should bring or defend, or continue to bring or defend, proceedings in their capacity as trustees/personal representatives, they are issued by way of a claim form under CPR, Part 8.

Under CPR Rule 46.3(2) the general rule in relation to costs is that the trustee or personal representatives are entitled to be paid the costs of any proceedings brought, insofar as they are not recovered or paid by any other person, out of the relevant trust fund or estate.

When issuing a Beddoes application it is necessary for supporting evidence to be filed which should include details as to what steps the trustees/personal representatives have taken as regards matters generally prior to the issue of the application. It is important therefore for trustees/personal representatives to ensure they have entered into some form of dialogue with the beneficiaries/third party as regards the main action, even if such consultation has ultimately not proved fruitful. Such contact should also extend to the possibility of settlement of the main action as well as the question of costs.

CPR PD 46, paragraph 1.1 makes it clear that whether costs were properly incurred depends on all the circumstances of the case including whether the trustee or personal representatives obtained directions from the court before bringing or defending the main action, acted in the interests of the fund or estate or in substance for a benefit other than that of the estate, including their own and acted in some way unreasonably in bringing or defending, or in the conduct of, the main action.

A Beddoes application in practice

In the recent case of Clyne v Conlon & Others [2021] Master Clark sitting in the High Court, Chancery Division considered a Beddoes application brought by Maria Clyne ("Maria") who was now the sole executor of the estate of her uncle, Patrick Conlon ("Patrick Senior"), who died on 4 June 2018 leaving a will dated 8 March 2016.

Background to the claim

A grant of probate was issued to Maria and her sister, Jacqueline on 19 October 2018 but Jacqueline was removed as executor by way of a court order dated 26 October 2020.

Patrick Senior's will provided for the beneficiaries, Maria and his three sons, Kevin, Martin and Patrick, to receive a 25% share of the residuary estate which had a net value of about £516,000.00.

The estate's two main assets were properties registered in Patrick Senior's sole name, being 168 Headstone Drive, Harrow which consisted of two flats

and the freehold reversion of 84 Canning Road, Harrow. Kevin claimed to be beneficially entitled to one half of Headstone Drive and all of Canning Road.

The main action

In February 2021 Kevin issued a claim against Maria in her capacity as executor of Patrick Senior's estate. The particulars of claim contended that in the early 1980s Patrick Senior and Kevin agreed to go into business together buying and refurbishing properties with a view to profit and that it was an express or implied term of that agreement that they should retain equal interests, as beneficial tenants in common, in the properties bought pursuant to that agreement.

The particulars then went on to set out a series of purchases and sales, all said to follow a similar pattern, and each resulting in the property in question being held by Patrick Senior and Kevin as tenants in common in equal shares. Kevin concluded the particulars by asserting that following a discussion between Patrick Senior and Kevin in about 1995 regarding dividing up the properties between them, they had entered into an oral agreement whereby Kevin would retain sole ownership of Canning Road and the upstairs flat at Headstone Drive and Patrick Senior would retain sole ownership of another property, 7 Blawith Road and the downstairs flat at Headstone Drive.

As a result, Kevin asserted that Headstone Drive had continued to be held on trust for him and Patrick Senior as beneficial tenants in common in equal shares with Canning Road being held on trust for him absolutely.

Maria was the only defendant to the proceedings and was sued solely in her capacity as executor, not beneficiary. None of the other beneficiaries were originally parties to the main action.

The Beddoes application

In April 2021, Maria filed a defence and counterclaim in the main action and at the same time issued a separate Beddoes application, pre-action correspondence between the parties' solicitors having failed to resolve matters. All three sons were joined as defendants to the application.

Kevin opposed the application on the grounds that all the beneficiaries in the estate were adults and his claim to ownership of assets could properly be carried on between them as substantive parties to the main claim, with each deciding if they wished to defend it. To this end, Kevin confirmed his willingness to join Patrick and Martin to the main action.

As to Patrick and Martin, Patrick filed an acknowledgment to the Beddoes application confirming that he did not oppose it. Martin did not do so but did write to Maria's solicitors shortly prior to the issue of the application stating that he did not believe Maria should be entitled to an indemnity from the estate in respect of her legal costs. He further stated that he agreed with Kevin's claim and would not be challenging it. He went on to say that Maria and Patrick had already received inheritances from the estates of their parents (in the case of Patrick from his adoptive parents) and so he and Kevin had a legitimate legal natural right to inherit Patrick Senior's estate.

Conclusions

In deciding whether it would be right to make the order, Master Clark, hearing the application considered the following factors:

The merits of the main action;

- Whether Maria had acted reasonably in defending the main action to date;
- Whether by continuing to defend the main action she would be acting reasonably;
- The risk of injustice to Maria if the order were not granted;
- The risk of injustice to Kevin if the order were granted; and
- Whether there were other ways of managing the risk of injustice to the parties.

Having considered the above matters, and relevant evidence referred to by both parties, Master Clark held that in his judgment the merits of Maria's defence were not insufficiently strong to justify the main action being defended by the estate. He also concluded that as Maria had been sued in her representative capacity only she had acted reasonably in defending the claim to date – had she not done so Maria would have been open to a claim of breach of duty by Patrick, Patrick being unable to defend the main action himself as he was not a party to the same. In Master Clark's view therefore, Maria ought to be indemnified for her costs to date by the estate. Going forward, unless and until the beneficiaries were added to the main action, in Master Clark's judgment Maria would be acting reasonably by continuing to defend the claim.

The Master found that without the protection of a Beddoes order if Kevin were successful with his claim then Maria alone would be liable for total combined costs of about £230,000.00 (having regard to the costs budgets filed by the parties in the main action). She would therefore be burdened with the entire risk of the defence, the value of Kevin's claim being £240,500.00 (£212,500 for half the value of Headstone Drive and £28,000.00 for the value of Canning Road). This would be the case despite the fact Patrick and Martin, notwithstanding his support of Kevin, would benefit from its success in that the share of each of the beneficiaries in the residuary estate would not be diminished by the amount of the value of the properties.

As against this, if successful, Kevin would recover assets worth £240,500.00 but if he obtains the normal order that Maria, as the unsuccessful party, pay his costs of the main action with her own costs being paid from the estate, he would bear one quarter of those costs from his share of the residuary estate, some £57,500.00, notwithstanding his success.

In Master Clark's judgment the order that most appropriately managed the risk of injustice for both parties is one that provides for Maria in her capacity as executor to be indemnified in respect of all costs of

the main action, insofar as they are not recovered from or paid by any other party. If Kevin joins in the other beneficiaries (including Maria in her personal capacity) to the main action, such an order will not prevent him from seeking an order for costs from one or more of them in their personal capacities and/or an order that the costs in respect of which Maria is indemnified should be paid from specific beneficiaries' shares of the residuary estate. If, on the other hand, Kevin does not join in the other beneficiaries (or more accurately fails in an application seeking permission to join them), then the position as to seeking costs from them may be less straightforward but in Master Clark's view that would be as a consequence of his own decision not to join them at an earlier stage.

Judgment

For those reasons, Master Clark made a Beddoes order in Maria's favour.

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Employment Tribunal Rulings on Covid-19 Issues - What Can we Learn?

by Helen Coombes and Shalina Crossley

Introduction
The covid-19 pandemic required many employers to make difficult decisions in unprecedented and rapidly evolving circumstances, giving rise to concerns this would lead to a deluge of employment tribunal claims. This article looks at some of the early cases to see what lessons can be learned when planning for a return to work.

Employment tribunal (ET) decisions are starting to be published on key issues such as employees refusing to work, compliance with health and safety rules and the calculation of payments under the furlough scheme. Some of the more instructive findings and conclusions that can be drawn from them are summarised below.

Employees refusing to work
Employers who were able to continue operating during lockdowns found that some of their employees refused to attend work. Employees have statutory rights to stay away from work or take other appropriate steps to protect themselves (or others) where they reasonably believe there are circumstances of serious and imminent danger. It has been unclear how ETs would interpret this in the context of the covid-19 pandemic.

The case of Accattatis v Fortuna Group(1) involved a sales and project marketing co-ordinator who requested to be furloughed or to be allowed to work from home, given his concerns about commuting and attending the workplace. The employer offered annual leave instead. The ET found that the employee could not work from home and that he could not simply refuse to attend the workplace due to the pandemic.

In a contrasting case (Montanaro v Lansafe Ltd),(2) an IT professional found himself in Italy on annual leave when lockdown was announced and decided to remain there. In finding the employer's decision to dismiss him unfair, the ET took the view that the threat of coronavirus itself was a serious and imminent danger and that the employee was taking appropriate steps to protect himself by working remotely from Italy.

In Rodgers v Leeds Laser Cutting Ltd,(3) however, the ET observed that if the virus itself was capable of creating circumstances of serious and imminent danger, this would result in the law protecting any refusal to work in any circumstances simply by virtue of the pandemic. The employer in that case had implemented the government's workplace safety guidance and the employee had not raised any particular concerns. The ET concluded that the employee had no right to absent themself from work.

Firm conclusions cannot be drawn from this small handful of decisions, but it seems likely that ETs will generally follow the approach in Rodgers and require some evidence that the employer is failing to take proper precautions or other evidence of particular danger before an employee can be justified in refusing to go into the workplace.

The way in which the employer and employee have behaved also makes a difference. In Montanaro, the employer gave the employee no advice on whether he should stay in Italy or return to the United Kingdom. The employer behaved inappropriately, for example by sending a dismissal letter to the employee's UK address despite knowing he was in Italy.

In Rodgers, the employee left the workplace with a casual "see you later mate" and was caught flouting self-isolation rules outside of work while trying to claim that he was justified in not attending work.

Some employees have not refused to go to work altogether but have declined to carry out certain tasks. In one such case, dismissing an employee for refusing to attend the home of his self-isolating manager to deliver equipment was found to be automatically unfair(4) where the employee was taking appropriate steps to protect himself.

The situation has changed since the decisions on these cases, with most people now being vaccinated and the government recently lifting most restrictions and encouraging a return to work. Nonetheless, the potential certainly remains for employees to meet the "serious and imminent danger" test, such as where their employer has demonstrably failed to put in place suitable health and safety measures.

Dismissal for failure to comply with health and safety rules
While some employees have objected to attending the workplace due to their concerns, others have refused to comply with their employer's workplace safety guidance. Kubilius v Kent Foods Ltd(5) concerned a delivery driver who was dismissed for failing to wear a mask while in his lorry cab at a client site. The ET found the dismissal to be fair despite the official guidance around mask-wearing at the time having been optional.

This case supports employers' rights to enforce their own health and safety rules even where they go beyond government guidance, albeit the ET focused more on the disciplinary process and the employee's ban from the client site, meaning he could no longer perform his job, than the instruction to wear a mask. There will still be cases where dismissing an employee

for a failure to wear a mask would constitute an unfair dismissal, for example if a medical exemption applies, but employers will be in a stronger position to enforce requirements that have been identified as control measures in their health and safety risk assessment.

Clinically vulnerable employees

One of the most difficult issues for employers to get right has been the protection of people who are clinically vulnerable. There have only been a few decisions on this, but it appears that ETs are backing a cautious approach to those whose health is most at stake.

In Prosser v Community Gateway Association Ltd,(6) the ET found there was no unlawful discrimination against a pregnant worker when she was sent home at the beginning of the pandemic and not allowed to return until health and safety measures had been put in place. The ET went as far as to commend the employer on doing everything it could to keep the employee and her baby safe during the pandemic, including paying her beyond her contractual entitlement.

In Gibson v Lothian Leisure,(7) the ET found that a chef was automatically unfairly dismissed when he refused to return to work having raised concerns about the lack of any health and safety measures and the risk of infecting his clinically extremely vulnerable father. The employer did not submit a defence or attend the hearing, so the ET heard no evidence to dispute the employee's account that there were no precautions and he was told to just "shut up and get on with it". This case shows that an employee's right to protect "other people" against danger can, at least in the circumstances of the pandemic, extend to family members at home – previous cases had concerned the protection of customers. Note, however, that at the time of this case the shielding guidance was in place for the clinically extremely vulnerable and the vaccine programme was not yet underway. It would not necessarily be reasonable for employees to take similar action to protect their clinically extremely vulnerable relatives today.

Missing claims deadline

Claimants have largely found ETs to be unsympathetic when pleading the circumstances of the pandemic as the reason for their failure to present their claim in time. Arguments such as a mistaken belief the ETs were closed(8) due to the pandemic and living on a boat in lockdown with intermittent Wi-Fi(9) have been dismissed. A claimant caring for his elderly parents during a period where his father had passed away and he was working additional hours was a rare situation in which it was not reasonably practicable(10) for him to submit his claim on time.

Furlough issues

With the government guidance on the furlough scheme(11) being updated constantly, it is unsurprising to see a considerable number of ET decisions arising from it.

While many businesses chose to make use of the scheme, the guidance has always been clear that this was a decision for the employer and there was no legal "right" to be furloughed. In a string of decisions such as Woods v Hawkes Ltd(12) and Kapetanakis v Historical Souvenirs Ltd,(13) ETs have unsurprisingly confirmed this to be the case, despite employees attempting to argue they should have been furloughed instead of being asked to work.

In Mhindurwa v Lovingangels Care Ltd,(14) however, the ET found that a failure to consider the use of the furlough scheme was enough to make a dismissal for redundancy unfair. The employee had been made redundant in July 2020 after the employer had seen a reduction in demand for live-in care work due to the pandemic.

The ET said that a reasonable employer would have considered whether the use of the furlough scheme could have avoided the need for redundancy. This case has generated significant interest, but employers who implemented redundancies despite furlough being available do not necessarily need to be concerned about facing similar claims (which in any event could now be out of time). At most, a consideration of using the furlough scheme would have been required. This is borne out by another ET decision that a dismissal was not unfair despite the fact the employer could have continued furloughing the employee for longer.(15)

Following this review of ET decisions on the furlough scheme, it is all too apparent that both employers and employees struggled to perform the necessary calculations when claiming furlough. Some employees appear to have taken the furlough scheme's promise of 80% of their wages at literal face value and expected to receive 80% of whatever their last pay packet was before the scheme. ET judgments are littered with phrases such as "the Tribunal doing the best it can" to recalculate what employees were owed at the relevant time.

Some employers seem to have misunderstood the furlough scheme rules and expected employees to continue to carry out some work despite being on furlough. In one such case, where the employee refused to help with a salon refurbishment,(16) the employer chose not to pay the employee (or claim their wages from the government) for the month in question. Unsurprisingly, the ET found this to be an unlawful deduction from wages.

ETs have also made clear in several cases that furlough constitutes a contractual variation(17) which remains in force irrespective of whether the employer has claimed for the employee under the scheme. This has led to awards of furlough payments to employees in situations where the employer had not recouped the money from the scheme.

Comment

ETs are in the difficult position of revisiting the circumstances of the first year of the pandemic and the guidance applicable at the time. They are recognising the difficult circumstances in which employers were forced to operate, and ET decisions generally

appear to be well balanced while strongly influenced by whether the employer and employee behaved reasonably or unreasonably overall.

Most of the early cases have focused on monetary claims such as breach of contract and pay disputes, with fewer health and safety decisions to date than expected. The ETs are currently dealing with a large backlog of cases, however, so we can expect more pandemic cases filtering through to complete the picture. Another factor is that some employees may be pursuing covid-19 personal injury claims, which are heard in the civil courts rather than by the ET. The central issue in such cases is likely to be whether the employer acted negligently in a way that caused or materially contributed to the employee contracting the virus.

For employers facilitating a return to work, the most important lessons from the ET decisions so far are to consult with staff, update risk assessments, implement suitable covid-19 prevention measures, and ensure these are communicated to staff and properly enforced. While the government has now lifted most legal restrictions, the pandemic is continuing. ETs have consistently found in favour of claimants where the employer has not taken appropriate steps to protect staff. It is too early to draw firm conclusions regarding the approach ETs will take to disciplining employees who have refused to return to work, but clearly employers would be well advised to deal with such situations on an individual basis.

Finally, it is important to keep in mind that the ET decisions highlighted above mainly concerned events during the first few months of the pandemic, since which time the circumstances and government guidance have evolved considerably. ETs will assess any case based on the prevailing covid-19 situation and guidance in place at the relevant time, which means that cases on similar facts to some of the decisions discussed above could be decided differently today.

For further information on this topic please contact Helen Coombes or Shalina Crossley at Lewis Silkin by telephone (+44 20 7074 8000) or email (helen.coombes@lewissilkin.com or shalina.crossley@lewissilkin.com). The Lewis Silkin website can be accessed at /www.lewissilkin.com/en/campaigns/coronavirus

Skin Camouflage in the Expert Witness World

by Phil Briggs, Skin Camouflage Practitioner

What is Skin Camouflage?
In short, skin camouflage creams are highly pigmented creams used by people with a visible difference to match the area of concern to the surrounding, unaffected skin. They can be used to cover scarring or other skin conditions such as Vitiligo, Melasma, Rosacea and many more conditions. There are many brands of skin camouflage in hundreds of skin colours and with differing properties making some more suited to large areas of the body, some to smaller areas of the face and others for use on the hands. Skin camouflage creams can be used by any gender, age or skin colour. They are applied daily, are waterproof and are long lasting. Most skin camouflage creams are fixed in place using a Fixing Powder.

What is the role of a Skin Camouflage Practitioner?
A skin camouflage practitioner will have a consultation with the client in order to assess the area to be covered. During the consultation the practitioner will try a number of products and colours to find the best match to the surrounding skin. Sometimes more than one product is needed to provide an accurate match and sometimes a number of different techniques are required. Once a solution has been found, the practitioner will then teach the client how to apply the products, the best way to maintain them throughout the day and how to remove them at the end of the day. A client consultation usually lasts between one hour and 90 minutes.

How can a Skin Camouflage Practitioner help in a claim involving a client who has been left with scarring or another visible difference following an accident, possible malpractice or intentional harm?

If a client has been left with a change in their appearance, they can be assessed by a skin camouflage practitioner. If it is found skin camouflage creams can be used to reduce the appearance of the scarring or other visible difference, the practitioner will write a report for the court outlining all the recommended products and tools needed to cover the area. They will further list the costing of the products and tools and how often each would need to be replaced. These costs can then be added to the claim the client is making.

Can a consultation be done by photograph or video?
No. A consultation must be done in person. A practitioner will try many different products to find the best solution. This can't be guessed at via video link as even a product a practitioner feels may be the best one can prove not to be when tested directly on the scar or condition. A practitioner cannot even assess the suitability of skin camouflage for a scar or condition without testing the products in person. Sometimes a scar may appear to be suitable for skin camouflage creams but in practice the creams do not reduce its appearance.

Here is an example of skin camouflage creams at work
Below is a photograph of a client who had a skin graft taken from his thigh area and placed on the right side of his face to replace skin which had to be removed.

There are two aspects which make the area stand out and cause the client distress. The first is the outer edge of the scar which is red in colour. The second is the skin from the thigh area has a yellow undertone, differing from the client's redder undertones in the surrounding facial skin. The client had been applying a commercial cosmetic over the whole area which didn't blend in the skin graft and in fact drew more attention to it than the graft itself. After a consultation with the client I was able to find a suitable yellow toned skin camouflage cream to cover the red scar area. This was applied as randomly as possible so as to avoid a block of colour and to break up the appearance of the red scar 'ring'. Secondly a pink toned skin camouflage cream was gently stippled over the yellow graft area. This helped to better match the graft to the client's surrounding skin. Once applied and blended the whole area was set with translucent fixing powder setting it in place for the day.

As you can see, some texture of the scar remains as skin camouflage creams do not alter texture but the overall effect greatly reduces the appearance of the graft and its scar and improved the everyday confidence of the client. This example shows it is not always a case of finding just one colour which matches the client's skin, but a combination of colours and techniques to achieve the best results possible.

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Left, Skin graft without skin camouflage
Right, Skin graft with skin camouflage

Scotland: Extent of reverse onus of proof confirmed in careless driving claim

The Court of Session Inner House has granted a pursuer's appeal as the Lord Ordinary had failed to apply the reverse onus of proof given the circumstances of the claim..

Cameron v Swan [2021] CSIH 30

Prior to the claim for damages, the first defender had pled guilty to careless driving after running over a drunk individual lying down unseen in the middle of the road. The first defender had been driving in the course of his employment for the second defender and had been overtaking another vehicle at the time of the collision. However, the pursuer's claim against the driver had failed at first instance, as the defenders had *"rebutted the onus upon them to disprove the libel of the criminal charge."*

Lord Carloway, delivering the opinion of the Court, ruled the Lord Ordinary failed to apply the reverse onus of proof to the defender's negligent driving as a whole rather than at a specific location.

Background

The first defender was making bakery deliveries around 5am one morning in April 2016. At one point he was following behind a taxi who pulled over, which the defender assumed was in order to allow him to overtake. However, the taxi had pulled over in response to an unmoving figure lying in the middle of the lane before him. The defender drove around and past the taxi, straddling the central reservation, running over the sleeping pursuer.

The taxi driver said the first defender had been driving *"a bit closer than I would like without tailgating"* whereas the defender denied following the taxi too closely and asserted that he had been "keeping a proper lookout".

Due to inconsistencies between both of their testimonies, as well as the lack of knowledge as to how far back the first defender was behind the taxi, it was unclear to the court how visible the pursuer would have been to the first defender.

The court heard evidence from the two main witnesses and several experts: a psychologist, two PCs, a road traffic incident consultant and a road traffic investigator.

The Lord Ordinary ruled that the claim failed on the basis that the defender was far enough away from the taxi driver to manoeuvre around the vehicle. It was concluded that *"the pursuer had failed to prove a breach of the sole standalone duty in relation to keeping a safe distance between his van and the taxi"*.

Relying on the psychologist expert's evidence of the defender's potential line of sight, the Lord Ordinary determined that:

"Neither the precise distance at any given time between taxi and van was a matter of evidence. Likewise the exact placement of each vehicle in the roadway and in conjunction with each other was, again on the basis of the evidence, unknown. Without knowledge of these factors … it was impossible to determine if at

any point time there was as a matter of fact a sightline available to the driver of the van to the pursuer lying on the roadway."

The pursuer appealed the judgment on the grounds that:

1, The reverse onus of proof was flawed; the charge in fact focused on the quality of the defender's driving rather than the driving at the location of the incident.

2, The Lord Ordinary had made material errors of fact; failed to record and to consider relevant evidence; and set out evidence which had not been led at the proof.

Judgment

The appeal was allowed. The Court held that the *"the accident was caused by the fault and negligence of the first defender and that the second defenders are vicariously liable therefor."*

Through a misunderstanding of evidence and failure to consider relevant witness evidence, the Lord Ordinary had *"reached a conclusion which cannot reasonably be explained or justified"*.

There had been a failure to pay enough attention to the guilty plea and account coming from the first defender himself. *"The tendering of a plea of guilty… amounted to a clear and unequivocal judicial admission that his negligence had been the cause of the injuries to the pursuer."*

Lord Carloway found that *"the locus of the libel was the place at which the pursuer was injured. It is wide enough to encompass the nature of the first defender's driving as he approached that point"*. Driving too close to the taxi *"was one aspect falling within the general libel of driving without due care and attention and failing to notice the pursuer"*.

Driving so close behind another vehicle in the early hours of the morning, in an area of town and at a time when drunk pedestrians may be using the road was not reasonable behaviour when such hazards might be harder to spot and therefore need more time to react to. To that end, *"drivers are not entitled to assume that other users of the road will do so with reasonable care"*.

Lord Carloway criticised the lack of comparison between the two key witness' accounts as well as the lack of consideration for the defender's driving behaviour while following the taxi as part of his duty of care as a driver.

Concluding, Lord Carloway discussed the issue contributory negligence, which had not been addressed previously by the Lord Ordinary. The Court apportioned 65% fault to the pursuer and 35% to the defenders, as there was "no difficulty in holding that the greater fault lay with the pursuer".

What can we learn?

- Facing a reverse onus of proof remains *"an uphill task"*, the court will address inconsistencies in key

witness testimonies and require defenders to provide for missing information.

- The duty of care of a driver is broad and involves their driving behaviour before an incident. Drivers must consider the circumstances and location in anticipating unreasonable behaviour from others as part of their duty to drive with due care and attention.

- Ultimately, whilst drivers do owe a duty of care to those who can be reasonably anticipated to misuse public highways, the nature of unreasonable behaviour will be prominent in deciding contributory negligence. The Court considered the decision of *Green v Bannister* as a comparator to these circumstances. In Green, a pursuer who had been run over by a person reversing from a parking in a cul de sac was 60% responsible for their misfortune. In this instance, the pursuer was held to have chosen a more dangerous location to lie down.

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Certain about capacity? Expert evidence is no guarantee...

Claims involving lack of capacity and an individual's ability to make a will, as a result, are often based on a variety of evidence sources. The use of medical evidence came back into the spotlight in the case of Hughes v Pritchard which for some practitioners may have provided a surprising result.

Evan Hughes died leaving a will executed just under a year before his death. That will was executed at a time when Evan was living with dementia and also grieving the loss of his son and the last will was challenged because Evan lacked testamentary capacity (as well as several other claims not discussed here). The court agreed, finding the will was invalid due to a lack of capacity but that, had it not been invalid for such a reason, a farmland plot would have been subject to a proprietary estoppel claim in any event.

The slightly unusual factors in the case are that the will was drafted by a solicitor who followed the 'Golden Rule' which is often not the case in such claims. The expert evidence presented to the court also suggested Evan had testamentary capacity. However, the expert gave evidence at trial that he had not appreciated the significant changes in the last will compared to Evan's previous wills. The court was not persuaded however that Evan had appreciated the "understanding that he had had with his son Elfed over many years" nor "the promises made to his daughter-in-law and grandsons thereafter" (judgement para 86) and how these were then affected by the subsequent changes he made to his will.

The case is a reminder that reliance on expert or medical evidence is no guarantee of successfully upholding (or indeed overturning in some cases) a will. All aspects of the testator's intentions should be considered carefully, especially when taking instructions for a new will or in bringing/defending a claim. A will drafter should not be afraid to question their client on the changes, particularly where they are quite significant or change a long-standing history of testamentary intentions in early wills. Reviewing earlier wills with a testator helps to get a feel for the changes being made and to verify the information being given by them or others. It will also help if a Larke v Nugus enquiry about the circumstances in which the will was made arrives which will inevitably ask if such discussion took place.

Hughes v Pritchard & Others [2021] EWHC 1580 (Ch)

When an Independent Expert has 'Unfettered and Unsupervised Access' to the Client - A Cautionary Tale

by Charlotte Heywood - Partner, Paul Thwaite - Partner and Charlotte Thomas - Associate at Stephenson Harwood.

Background

The TCC has found a defendant in breach of a Pre Trial Review Order, CPR Part 35 and the Guidance for the Instruction of Experts in Civil Claims 2014 (the "**2014 Guidance**") in what should stand as a cautionary tale for parties, independent experts and solicitors.

In *Dana UK AXLE Ltd v Freudenberg FST GmbH* [2021] EWHC 1413, Mrs Justice Joanna Smith granted the Claimant's ("Dana") mid-trial application to exclude the Defendant's ("FST") three expert reports in their entirety. Subsequently, the court has found entirely in Dana's favour, awarding it £11 million in damages.

Dana's application had been preceded by the following key events:

a) Both parties had been invited to serve expert evidence in the fields of engineering and materials/ polymer science (the dispute between the parties having concerned the alleged premature failure of pinion seals manufactured by FST);

b) FST's reports were filed late but Dana elected not to object, on the basis that various defects in the reports be remedied including:

- none of the reports identified the documents upon which the expert had relied;
- two of FST's experts had undertaken site visits to FST factories without putting Dana on notice and without providing Dana's experts a similar opportunity and the reports of those experts did not provide any photographs taken or notes made during those visits; and
- sources of data and other information were often not provided.

c) At the Pre Trial Review, FST was granted relief from sanctions in respect of the late service and permitted to rely on the reports at trial subject to filing and serving revised reports amended to comply fully with the CPR including:

- providing full details of all materials provided to the experts by FST / its solicitors;
- disclosing all documents produced by or provided to each expert during any site visit including for example any notes taken; and
- identifying the source and details of any data or other information relied on.

d) Dana also served targeted CPR Part 35 questions to each of FST's experts.

e) FST served two revised reports, which Dana considered unsatisfactory. In its openings, Dana expressed concern that information had been provided directly by FST to its experts rather than via FST's solicitors. Dana said this was particularly concerning in circumstances where FST alone had knowledge of its manufacturing processes and procedures and had served no factual witness evidence, such that Dana, the experts and the court were dependent upon FST's disclosure.

f) In the light of Dana's submissions, Mrs Justice Smith directed FST's solicitors to provide a witness statement setting out its understanding of all of the contact the experts had had with FST. The witness statement revealed that:

- there had been phone calls between FST and its experts regarding assistance locating documents and technical information but there were no records of those calls;
- FST's experts had had direct communications with FST personnel regarding the commercial terms of the experts' engagements and logistical support;
- FST's experts had in fact undertaken more site visits than disclosed in the reports. No disclosure was provided in relation to these visits; and
- there were 175 new documents to disclose, said to comprise the relevant correspondence including FST and one or more of its experts.

As a result, Dana invited the Court to exclude FST's technical expert evidence.

Breaches of the PTR Order

Mrs Justice Smith held that there had been a serious breach of the requirement to provide full details of all materials provided to the experts by FST / its solicitors. Crucially:

- Whilst FST had provided lists of documents, it had failed to identify all of the materials provided to the experts;
- FST solicitor's first witness statement failed to provide details of any factual information provided orally by FST to its experts;
- FST's new disclosure demonstrated that "*a significant amount of information*" was provided to each

expert over a long period of time, which was never disclosed to Dana or otherwise identified – indeed, the experts had had "*unfettered and unsupervised access to [FST's] personnel*" including calls and virtual meetings (of which there were no records) and correspondence that went "*far beyond contact limited to locating documents or technical information, or the provision of logistical assistance*".

This was "*not just a technical or unimportant breach*", because it is:
"*essential for the Court to understand what information and instructions have been provided to each side's experts, not least so that it can be clear as to whether the experts are operating on the basis of the same information and thus on a level playing field*".

The Judge considered that FST's conduct was particularly egregious given that FST had called no factual witness evidence, making this "exactly the sort of case" where the experts on both sides ought to have cooperated in relation to the obtaining of the primary factual evidence they required.

Mrs Justice Smith was "*amply satisfied*" that FST had breached the letter and spirit of the relevant parts of the PTR Order. All of these breaches were "serious and unexplained". She also agreed with Dana's suggestion that it was clear from FST's new disclosure that FST's failure to comply with the relevant parts of the PTR Order was "*unlikely to have been inadvertent*", because FST could not have complied without revealing the nature and extent of the communications between it and its experts.

Mrs Justice Smith identified the following breaches of CPR Part 35 and the 2014 Guidance:

- There was a "*free flow exchange of information*" between FST and its experts with seemingly little to no oversight from FST's solicitors, making it inevitable that the experts had been privy to information not shared with Dana's experts;
- The flow of information continued between the joint expert meetings and the signing of the joint statement, which should not have happened. Whilst the TCC Guide is clear that legal advisors should not be involved in negotiating or drafting joint statements, it must follow that the same prohibition applies to the parties themselves;
- As referred to above, FST's experts had attended site visits without informing Dana;
- The analyses and opinions of FST's experts appeared to have been "*directly influenced by FST*" (for example, one expert had asked an in-house specialist at FST to "*correct any mistakes or mis-informed opinions*" in his assessment and asked whether his draft report was "*the type of report that you were looking for*").

Conclusions

The case is a stark reminder of the obligations of parties, independent experts and solicitors and the importance that complying with those obligations has on ensuring transparency and equality of arms in proceedings – particularly where one party to the proceedings has unique knowledge and chooses not to adduce any factual witness evidence. It is not unusual for parties to have a high degree of direct contact with their independent experts, particularly in circumstances where the expert evidence is highly technical in nature, however the decision is an important reminder to ensure that:

- If possible, solicitors should be in attendance at meetings between clients and experts. Either way, records must taken of all meetings / calls between the experts and the client (particularly if lawyers are not in attendance).Where facts and information have been passed to the expert verbally, a note needs to be taken by the expert of this;
- Instructing solicitors should be copied to all communications between experts and the client. Communications of this nature should be limited to the provision of information and should not continue between joint expert meetings and joint expert statements beyond the joint expert meetings;
- Reports must disclose all such interactions including site visits;
- Reports must also disclose the source of all information / data in support of each factual statement / opinion;
- All such factual information and relevant documents must be disclosed to the other side;
- The other side's experts must be informed of site visits and must also be given opportunity to attend site.

The issue of transparency in expert evidence and maintaining impartiality is clearly an issue of which the TCC is acutely aware at present. Indeed, in the recent costs judgment of *Beattie Passive Norse Limited v Canham Consulting Limited* [2021] EWHC 1414 (TCC), Mr Justice Fraser commented:

"*There is a worrying trend generally which seems to be developing in terms of failures by experts generally in litigation complying with their duties*."

This follows comments from Lord Hodge, Deputy President of the Supreme Court and president of the Expert Witness Institute at the Institute's recent annual conference that: "*It was disappointing that the [recent survey carried out by the Expert Witness Institute]… points to evidence of instructing parties putting pressure on experts to change their evidence in a way which they feel damages their impartiality. Lawyers must do better.*"

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Reflections on Being an Expert Witness

by Dr Peter Wareing, Director, P Wareing Food Safety Ltd
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Last year in the Summer issue of The Expert Witness Journal, I wrote about the concept of Food Safety Culture; what it was, and how it could help in reducing the likelihood of food poisoning or illness due to incorrect control of allergens in food. I showed that in many cases where someone was ill due to eating food containing unexpected (not on the label) allergens, Food Safety Culture was either poor or non-existent. This is pertinent now that Natasha's Law, known as The UK Food Information Amendment, has come into effect on 1st October 2021. It requires businesses to provide full ingredient lists and allergen labelling on foods pre-packaged for direct sale on the premises. The legislation has been introduced to protect allergy sufferers and give them confidence in the food they buy, following the death of Natasha Ednan-Laperouse in 2016. According to the new rules, PPDS (Pre-packed for Direct Sale) food will have to clearly display the following information on the packaging:

- Name of the food.
- Full ingredients list, with allergenic ingredients emphasised (for example in bold, italics or a different colour).

In this article, I will reflect on some of the cases with which I have been involved where an expert opinion was required, and close with two cases in the media, where the expert was called to account. They have covered a range of topics, from suspected food poisoning whilst on holiday, foodborne pathogens being isolated from food ingredients, disputes between equipment manufacturers and food manufacturers, chemical burns whilst working, allergen cross contamination of catering establishments, foreign body contamination, for example. The cases have been civil and criminal, writing a report for prosecution/claimant or defence.

Case 1 Ingredient Contamination

The first case I took highlighted the need to be independent and impartial, a requirement that has cropped up from time to time since then. An ingredient manufacturer supplied a producer of cakes with an ingredient that caused the icing on the cakes to 'blow', due to gas production from contaminating yeasts, over the shelf life of the cakes. This was an interesting case which played to my strengths as a food mycologist; someone who investigates yeasts and moulds in foods. In summary, the fault with the cakes lay with both parties; the ingredient was contaminated at the supplier, but the processes at the cake manufacturer allowed this particular high gas producer to build up in the factory, making the problem worse. The group of problematic yeasts were not requested in the ingredient specification from the

cake manufacturer, however, practices at the supplier also allowed a build-up in the ingredient.

My report, requested by the ingredient manufacturer, detailed the issues on both sides, including those from 'my' side. The ingredient company were very unhappy about this and wanted me to alter it to put the company's practices in a better light, "Because that's what we are paying you for." As it was my first case, I went to the legal team representing the company, who reassured me that my job was to be impartial and fair, and theirs to extract the relevant information to argue the case on behalf of their client. It also bears noting that, at the joint expert meeting, the expert employed by the cake manufacturer tried his hardest to drive me into a corner and agree totally with his argument that the fault lay completely with the ingredient supplier. The settlement was complex, with elements in favour of both sides. I learned some salutary lessons from the case!

Case 2 Dispute between Co-Manufacturers

This was a complex case where a UK company selling supplements had a contract with a US co-manufacturer to produce some of its products. The US company was unable to produce the product to the required specification, and the product also became contaminated. The case was heard there under New York court procedures, but presided over by a UK judge, under UK rules of arbitration, which was a challenge in itself. I was asked to comment. The US company claimed that the process was at fault, and the product could never be made as specified; this despite it being made successfully in UK and European factories.

The experts appointed by the US manufacturer wrote reports that were somewhat biased in favour of the US manufacturer. In total, I wrote three reports for the case: the first giving an opinion on the facts, and commenting on the other expert reports, then two further reports commenting on counter reports, and further counter reports from the other side. All of the reports from those witnesses were somewhat biased and included some elements of calling into question my ability to report on the case. Surprisingly, when the other experts were cross examined and asked to comment on their written opinions of my reports, they agreed they were accurate and well-founded, essentially retracting their views.

Another valuable point learned was the need to be well-prepared; the witnesses of fact for the US company were unable to show that they had command of the evidence, when they were questioned on their statements, denying what they wrote, and employing excessive delaying tactics in answering questions. The case was settled out of court in favour of the UK supplement manufacturer. It was an interesting experience, and perhaps showed the more aggressive nature of experts in the US.

Case 3 Industrial Injury at Work

I was asked to provide an opinion on behalf of a company in which an employee allegedly suffered chemical burns to the mouth and throat from a caustic cleaning product which carried over into the final product. The staff member had taken part in an informal taint taste panel on the soft drink production line. Since two other members of staff did not suffer any burns, it was assumed by the company that it was an erroneous response. Investigation of the incident did show anomalies in the staff member's account. However, some food safety management procedures related to the incident were either not completely clear, or not being followed correctly or reported properly by staff members. My report showed that there were sufficient grounds for doubt, so that instructing solicitors advised the company to settle out of court.

Case 4 Food Poisoning at a Hotel

In this case, several people became ill after consuming food contaminated with a food poisoning bacterium, Campylobacter, which can occur in poultry. The hotel was served with four charges, three related to the incident, and one to the food safety system that they had in place. After detailed review of the evidence, it was clear that charges 1-3 should be accepted; food poisoning had occurred, and on balance of probability this was caused by the hotel. However, in general the hotel did have a food safety system in place which was implemented and maintained; the problem was that the chef produced this food item as a one off, without a review of the risk assessment for that case. In addition, some of the evidence from the Local Authority hinged on swab samples taken from food and work surfaces. The microorganisms isolated and the timing of the swabs merely showed that surfaces become contaminated when fresh vegetables and salads are prepared; the use of colour coded chopping boards and good cleaning procedures after preparation reduce the risk of cross contamination. Charge 4 was therefore not accepted by the defence, and this was agreed by counsel for the prosecution out of court.

Cases in the Media

Earlier this year, Tesco were fined the largest amount ever for a food business, £7.5 million, for selling out of date food. Cadburys were the previous holder of this distinction, for selling chocolate, which was contaminated with Salmonella, in the 1980's. The recent case was widely reported in the media, from the BBC and newspapers to the food press, for example The Grocer and Food Safety News.

There are a number of implications for retailers: making sure that all food on display is within the use by date, it is the law, and a simple to follow method to try to ensure food sold is safe. The second is being honest when you get it wrong, it may help working with your local authority. Another implication is that of the honesty and integrity of the expert employed, and the need for that expert to not be persuaded or coerced into a different view to the one that the evidence suggests, for the sake of winning the case.

Judge Qureshi reserved some harsh comments for the expert employed by Tesco in the case, "He even compared the cotton-like mould on grapes to the mould in blue cheese. He is completely at odds with the feeling of disgust that any ordinary member of the

public would have on seeing the mould on grapes." Kate Vickery of Osborne Clarke commented "Tesco presented compelling evidence from a leading microbiologist that the out-of-date food found in the stores in Birmingham was still safe to eat. The Divisional Court disagreed and confirmed that simply selling food past its use-by date was enough to commit the offence."

The second case was one where Dr Bux, formerly a medical practitioner (now removed from the Medical Register), worked for clients who claimed to have had food poisoning whilst on holiday. Each claim for which he wrote a report was quite small, and so the fraud went undetected for some time; writing some 700 reports between 2016 and 2017, to a value to Dr Bux of over £100,000. The cases involved a conflict of interest because his wife worked at the solicitors which pursued the claims. The judge said that the reports were written "on a boilerplate basis. They were superficial, unanalytical, devoid of any differential diagnoses, and were invariably supportive of the claim."

Online Articles

Natasha's Law - UK Food Labelling Resource - Homepage (natashas-law.com)

Tesco out-of-date food fine 'a warning' to other chains - BBC News. www.bbc.co.uk/news/uk-england-birmingham-56818519

What does Tesco's record fine for selling out-of-date food mean for the industry? | Comment & Opinion | The Grocer. www.foodsafetynews.com/2021/04/tesco-fined-7-5-million-for-out-of-date-food-sales/

Tesco fined £7.5 million for out-of-date food sales | Food Safety News. www.bondsolon.com/dishonest-expert-loses-ban-appeal/

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

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

Non-Accidental Injuries in Animals; A Vet's Perspective

by Jeremy Stattersfield

In 1981 I sat in court on my first case involving a whippet that the court accepted had been starved through neglect. Awaiting the outcome I considered whether it was appropriate for such a case to result in a criminal record for the owner. Such athought has never crossed my mind in cases involving non-accidental injuries.

A little while later, I sat and read a witness statement after I had examined the remains of a Staffordshire Bull Terrier. A lady had been sitting , quietly knitting in her caravan window , when her neighbour returned home and started shouting at his dog. The dog was brought out of the caravan and tied to the towbar. The owner went inside and returned with a hammer, and with one swift blow to the head, had killed the defenceless animal. My examination confirmed death was instantaneous. It appears the dog had soiled the carpet once too often, and as an item of property, akin to the carpet, could be disposed of by the owner. Unlike the murder of a person, such an act is only a criminal offence if suffering has occurred. The owner was therefore free to both purchase a new carpet and a new dog. This was one of the first incidences where I was presented with a non-accidental injury, and it opened my eyes to a world most vets choose to avoid.

As in the case above, the presence of a witness may clarify the cause of the injury, but in many cases it requires an astute veterinary surgeon to start to ask questions. As a Vet, one is bound to confidentiality. However, the Royal College of Veterinary Surgeons recognises the importance of intervention in both cases where the vet may feel a NAI has occurred, or such an injury is likely to occur. Our professional body quite rightly put the welfare of our patients above the sanctity of client – vet confidentiality.

The latter point reflects the change that occurred in legislation in the early 2000's. The Protection of Animals Act 1911 (ref 1) from the end of the Edwardian era was put out to grass (but remains on the statute books) by prosecutors as the new Animal Welfare Act received royal assent in 2006 (ref 2). This was the first time that animals could be protected from what might happen to them. Animals in abusive situations could be removed pending court decisions, rather than being taken into care by police under section 19 of the police and criminal evidence act 1984. Under this legislation, the animal was merely taken as evidence, and cases occurred where they were returned to owners prior to court proceedings. Indeed, other animals at risk on the premises had to watch, as their injured friends disappeared down the drive nuzzling the neck of an unimpressed PC.

One example of this occurred with an owner of two collies, who was caught on CCTV kicking and beating one dog. Injuries were found by the police only on the one animal that featured in the video, but both dogs were passed into the care of the RSPCA (under section 18 AWA 2006). Clinical evaluation of both pets revealed multiple fractures in various degrees of healing. The pattern of non-accidental fractures in humans is well documented but the excellent work by Munro (ref 3) helped me assess these. The pattern in animals is that, as in people, fractures are more often upper limb, they are often multiple, and, if presented to a vet, the x-rays will usually show they have been present for some time and occurred at different times. Without the second dog, the evidence would have been substantially weaker and the case's resolution less clear cut.

As part of the video evidence in the case of the two collies, the owner was seen threatening the dog with a knife. The dog does not flinch, but cowers when a hand or foot are raised. Psychological abuse causing stress or fear can be hard to interpret correctly in animals, as it will be based on innate and acquired behaviour. This dog did not associate a knife with a bad event. But hands and feet evoke a different response. Stab wounds in my experience are relatively uncommon in welfare cases, although within practice it is not uncommon for dogs that were apparently defending their owners, to receive such injuries. These clients frequently skirt the courts but not for the care of their pets which is often exemplary!

Many times, a dog is presented after being kicked or beaten, and it may be hard to detect any changes unless the animal is lame or stiff. Swellings on the body may be difficult to identify and bruises rarely show, due to the thickness of the skin and the presence of fur. Even when the animal is shaved or examined under UV light, significant bruises may go undetected. During such examinations, it is important to check mucus membranes of the mouth and perineum for abrasions and bruises. Likewise, the eye sclera and conjunctiva are also vulnerable areas. Teeth are frequently chipped and occasionally displaced, as both cats and dogs will turn to face an assailant. A second examination a few days later may reveal resolution of minor swellings noted at the first examination, and sequential blood samples for parameters raised in stress (e.g. cortisol) or raised with muscle or tissue damage, may help attach a timeline. It could be argued that if nothing is seen, there is nothing serious to worry about! A recent post mortem on a dog that was presented after an incident, seemed normal externally, with a single canine tooth fracture. On deflecting the skin, there were bruises of the subcuticular

tissues and superficial muscles that were affecting over 70% of the body area. Whenever an animal is presented, often by the RSPCA, it is vital to complete contemporaneous paperwork which will include clinical evaluation forms and often, in NAI cases, external wound forms. These accurately reflect ones objective findings and are the bedrock of clinical evidence. I was content to take a question under cross-examination about a feline external wound form used by me for a rabbit. I stated that it was far more important to work contemporaneously, than delay whilst I designed a new form. Of course, we now have a rabbit form; but not yet a guinea pig.

The quality of witness evidence can assist clarity for the court in beating and kicking cases as there are variables to be considered. A dog kicked by a passer-by, because it had bitten the terrier belonging to the aggressor, bled to death from liver rupture. Alongside the comments of the pathologist and myself about the ferocity of the impact, the two independent witnesses were able to confirm the fact that it was kicked as hard as the person could do; as if kicking a football. They also confirmed he was wearing working boots. They also stated that the dog was kicked repeatedly with anger. All good evidence for the magistrates when considering the events leading to the collapse and death of the dog. The distraught owner stood shocked throughout still holding the lead which had restrained the dog during the incident and for the last few moments of his life.

A more common form of injury is that caused by air rifle pellet wounds. Early in my career I assisted a dairy farmer at their wits end, because local youths thought it funny to shoot his high-yield dairy cows in the udder, and watch the milk flood out. Cats are the pet most often targeted and it is not unusual to find pellets by chance in X-Rays that have been taken for a completely unrelated reason. One cat that sat in a vet's waiting room for 15 minutes with what the owner thought was a bite earlier in the day from a feral cat, was found to have a pellet lodged in his heart. Needless to say, the diagnosis was reached at a post mortem a few hours later. The assailant, as usual, was never caught.

Birds, however, are the group most often seriously injured by pellets and within our coastal area. Herring Gulls are targeted apparently for their inappropriate defaecation and noisy mating habits. Such cases are rarely successfully prosecuted as it is hard to confirm the source of the pellet. Prosecution for using a firearm, in this case usually an air rifle, on public land, is far easier for the police and far more likely to succeed. In the case of herring gulls, they were until recently, on a general licence from Natural England (ref 4) permitting their killing, where necessary. Their main means of protection, rather than Animal Welfare Act is the Wildlife and Countryside act year (ref 5) but this affords poor protection to these birds. However for birds of prey the act is more helpful. These stars of motorway driving tend to ride thermals and present a revolving target. It saddens me that this act affords protection based on the species affected and in no way considers the rights of an animal to a life free of unnecessary suffering or premature needless death.

The requirement to prove suffering in NAI cases centres around; the interpretation by a veterinary surgeon of the objective evidence of witnesses, the objective evidence of sound or visual recordings, one's own objective examination of the animal and clinical pathology or post mortem evaluation, and the available published research, in particular with references to physical pain or emotional suffering published within scientific journals. It is vital that such references are credible and peer reviewed or endorsed. Tail docking in dogs has been an emotive subject raising complex issues in courts. The very timeline behind the evolution of the legislation has to raise questions with regard to the test of causing unnecessary suffering. In simple terms the goalposts seem to move :-

• In 1911 (xx) legislation restricted the docking of dogs to under x days of age but could be performed by a lay person

• In 1966 the veterinary surgeons act was extended to include docking and consequently only a vet could perform the procedure

• In 2006 the Animal Welfare Act states a vet can only dock a dog under or at 5 days of age if it is of a particular breed and to be used as a working dog for certain purposes. Soon afterwards detailed forms were produced with the assistance of DEFRA to tighten the application of the legislation.

Most Vets,it seems, still fail to administer any analgesic when they perform the task. There is therefore a grey area as to whether an animal suffers when the tail is amputated. And there is the secondary consideration as to whether such suffering is unnecessary.

Consequently in the five month old animal shown it was important to back up the implications of placing a rubber ring around the tail in terms of pain. The rings are used in lambs legally to make the tail lose its blood supply and fall off once the tissue is dead. Detailed contemporaneous notes were made of the dog demonstrating pain responses to it being touched. His behaviour in terms of body posture and movement were also noted. Added to this it was necessary to amputate the dying extremity to relieve his suffering and that provided a histopathological report detailing the inflammation and also a tentative timeline. All this assisted the court in understanding the experience of the animal without any degree of anthropomorphism.

Putting our feelings as humans to interpret the behaviour of animals is a dangerous extrapolation. However, looking at the conduct of people towards animals does give an insight into how they may conduct themselves with other people. The link between violence towards animals and violence towards humans was first published in 1994 (JAVMA). But as long ago as 1750 William Hogarth had produced the widely circulated engraving entitled "The Four Stages of Cruelty" which showed the progression from cruelty to animals to violence towards human beings. Regrettably my own experience of people who have tortured animals also supports this. Many of the more

extreme cases rely on either post mortem evidence or video evidence. A call from an RSPCA officer asked if I could examine a dog that may have been drowned. By the end of the call he had gone on to say the dog had been in water for "several days", interred for "several more days" and then frozen. There were good aspects to the provision of evidence in as much as the animal was both microchipped and the evidence had been correctly sealed and identified providing continuity of evidence. An excellent Pathologist examined the tissues and, despite the delays in examining the body, drowning was established beyond reasonable doubt.

Cases of video evidence are challenging for a veterinary surgeon as it must be made clear to the court that ones expertise lies in the vet interpretation of what is seen and one is not able to do anything other than reflect on the footage presented. One cannot comment on matters such as authenticity. In such cases I detail what I have seen objectively prior to giving a professional interpretation. Video footage, for instance of a cat being swung by its tail had a time stamp. This enabled me to suggest the centrifugal force applied to the tail and suggest it was equivalent to hanging a 10 kg weight on the tail but I had to state that it was a matter for the court to decide if the time stamp could be regarded as accurate.

As for any expert witness the reality is far from that shown on any video or TV serial. But the role of guiding a judge or magistrates impartially through waters they cannot navigate alone is both of benefit to our legal system and, in the case of non-accidental injuries to animals, often beneficial to animal welfare and possibly that of people too.

A Rabbit in the Headlights?

by Mr Roger Flaxman, Chartered Insurance Practitioner

The expectations from policies of insurance are in the course of a radical change as a consequence of some major events in recent years. The pandemic is the most recent in a chain of unconnected occurrences that have taken the industry by surprise and so the approach to insurance claims and litigation will require an understanding of the environment in which the insurance is now involuntarily ensconced.

Storm, tempest, flood and fire are the 'perils' that usually keep insurers awake at night, wondering how much worse will become the losses as climate change makes its mark. Vast sums of money are spent by the industry in modelling scenarios that will predict the future of weather patterns, but they are by no means fool-proof. Nature has a way of reminding us that 'it' is in control of the universe, not us, and not even AI, yet. Unexpected events are the nightmare of an industry that relies upon statistics for its pricing and controls. Weather patterns, geopolitical shift and economic peaks and troughs all play a part in the reaction of the insurance industry to its attitude to customers and appetite for risk; and ultimately the price and availability of insurances that meet a customer's 'demands and needs'.

Statistics record the past but what about the future? How much should the industry have a responsibility to its policyholders to foresee their risk and provide cover in advance of the event actually happening? The pandemic has confounded all the above and thrown the industry into a state of paralysis like a rabbit in the headlights.

Apart from a very select few underwriters and brokers with exceptional foresight, no-one foresaw or believed in the likelihood of a world-wide viral pandemic. It was case of "there are safeguards against anything like that happening". No one thought to ask what safeguards or who was in control of the safeguards, but 'they' were equally confident that 'they' must exist. My career in the insurance industry started in 1970 and I have experienced several very 'hard markets' and the enormous changes in culture and process that have come with the advent of digital technology and the replacement of human capital intelligence with the algorithm.

I recall an occasion in 1998 whilst working for an international broker firm, attending a 'blue sky scenario' workshop in the USA. Some thirty or forty senior insurance executives from my firm were asked to look into the future and predict new types of risk that the industry needed to get its head round and design insurance against. Everyone was expected to put forward a suggestion. One such American executive, aged about 50 at the time, said "I envisage a rogue private airplane crashing into the empire state building or the twin towers because the skies are overcrowded, computers are taking over from experienced people and bad guys are out there." Amongst the American contingent of the workshop there were literally, cries of incredulity at this chap's statement which can be summed up by the comment from one of New York's own senior insurance gurus, "No rogue airplane would get within a country mile of the New York city's skyscrapers before it would be shot down by the USAF". So, that was that then. No further discussion on such a 'stupid' idea; and that turned out not to be as 'stupid' as not predicting a terrorist attack by three commercial airliners at the same time on a quiet Tuesday morning in September.

It is not an intended criticism of the insurance industry for not having predicted these exceptional events, but the fact is that exceptional events do occur, and the insurance industry is expected by its insuring public to be ahead of the game in foreseeing things that its training and experience gives it the knowledge and skill to foresee. That is because insurance is an economic necessity in the modern western world and without it the economy is unstable. It therefore perhaps has a responsibility to its collective, annual policyholder population to be thinking and planning ahead on behalf of the policyholders from whom it will be collecting the next year's premium revenue. One of the industry's most popular sayings is "If we can think of the worst thing imaginable it is a matter of when it will happen, not if". At times the insurance industry is not a cheerful place be.

The unexpected, unforeseen, exceptional event of the Covid pandemic is a particularly interesting case to examine now because it has crystalised implications for the future of insurance that will affect every business and affect the recoverability from losses for people who rely upon insurance without really understanding what it provides.

Covid, the disease and the consequences, brought about unprecedented numbers of claims in two areas of insurance, in particular: travel (cancellation and curtailment) and Business Interruption (BI).

The BI claims were the more numerous and the more serious for the industry. The outcome of the BI claims, in particular, is that the industry has now withdrawn large parts of the cover it once offered; at the time perceiving there to be little or no risk. A similar outcome 'no more insurance' has arisen from the consequences of the Grenfell fire tragedy. The Hackitt (Dame Judith) Report, the government reaction to combustible cladding replacement, the draft Building Safety Bill and the ongoing official Inquiry into the fire and its causes, have all contributed to fire insurance recently becoming unavailable to vast numbers of

property owners. Why? Because the facts exposed as a result of the fire and its causes has led the insurance industry to take stock of what risks they can accept in the certain knowledge of the culture, behaviours and attendant risks in building and property maintenance that have now become public knowledge. Did the industry know of these matters before the post fire results? Probably, but not certainly.

In the case of the BI insurances and the impact they have had on the industry's appetite for paying claims, it is necessary to explain a little of what the insurance provided, and why, in order to understand the industry reaction and what it forebodes.

Business Interruption insurance is designed to protect the business from going under following a fire flood or other 'peril' that has stopped it in its tracks. The time between a fire and a premises being fully re-instated and operative is typically eighteen months to two years; and can be longer. During that time the business may not be able to trade as before or, in some cases able to trade at all. BI insurance provides (broadly) a replacement of its Gross Profit so that the business keeps its lights on and can survive until the reinstatement is complete and trade has resumed as before.

The insurance had traditionally been based upon the consequences of a physical peril such as storm, tempest, flood and fire (there are other perils, as well) and the physical damage arising therefrom. It is called damage-based BI insurance. However, over the last twenty-five years or so there has been a gradual trend amongst insurers to offer what is called 'non-damage' business interruption cover to protect against occasions and events that arise from circumstances where there is no physical damage as such, but the business is interrupted by other events, such as: murder, suicide, denial of access, disease, bomb hoax, failure of utilities; and there are more. Different insurers offer their own variations on the theme.

In each case the expectation of the insurer was that the non-damage event would be localised to their insured and only their insured would be affected at any one time. Nobody expected all the businesses in all of the country to be affected simultaneously. Consequently, the policy wordings reflected the foreseen probability and chance of a single event affecting the insured. Had the concept of a national, international or world-wide pandemic been foreseen by the industry it would have said, to government as well as the public, "we cannot insure that risk because it is on a par with a nuclear risk (which would affect everyone at the same time) and in those risks there is no 'spread' of risk which is an essential pre requisite to the concept of insurance, i.e. that the losses of the few are paid by the contributions (premiums) of the many.

Consequently, when the rash of BI claims hit the market in April 2020, the insurers (most of them) said "we are not going to pay these claims because we had never intended to cover the pandemic risk". The Financial Conduct Authority took a different view and organised a test case to put the wordings of selected insurers before the high court to see what it made of whether the cover existed in fact or was precluded by the intention of insurers, expressed after the event.

The case was based upon two particular aspects of the 'non-damage' cover: Disease and Denial of Access. These each required a competent local authority to determine the trigger of the policy cover (presence of a 'notifiable' disease or actual denial of access to the insured premises). Insurers argued that the government is not 'a competent local authority' and it was they that imposed the closure of premises and stay at home regulations; therefore, the clauses were not triggered, and no cover was available.

The Supreme Court eventually found broadly in favour of the policyholders and the insurers have been instructed to pay claims; and promptly. Some insure are heeding that obligation, whilst others are not.

However, the consequence of the Supreme court's findings and decisions has quickly caused insurers to revise their policy wordings to give narrower cover in their polices for ensuing renewals.

Ironically, the pandemic, in particular has raised the profile of the importance of insurance against interruption of a business by a host of hitherto unforeseen, or perhaps just not considered, occurrences and events. The concept of 'lockdown' at the whim of a government is now a real and present danger to every business.

Whilst the pandemic may, hopefully abate and vaccination enable people to go about their business and lives without fear of lockdown there is nevertheless a risk that unintended consequences, both directly and indirectly connected with the covid episode may lead to insurers drawing in their horns when new and unexpected risks present themselves for which statistical evidence and modelling does not exist to provide data for the algorithms.

Possibly the next most frightening risk to the industry is that of Cyber losses and liabilities. This is a comparatively new area of insurance and is by no means fully understood as to the cause or the scale of the losses that can arise from cyber activity; either accidental or malevolent. It should be appreciated that in the insurance industry any one individual insurer is likely to concentrate only on their own specialist class of risk and so there is no collective joined up thinking or approach to comprehensive exposures to risk. The foreseeability of the western world's cyber technology being compromised or shut down by an, as yet unidentified, cause is no less implausible than was the terrorist attack of 9/11, twenty years ago. Insurance as we know it cannot cope with pandemic risk of any kind and so the question is what will replace it; and when? The only source of information that provides a joined-up approach to business (or other) risk comes from the body of some 3,000 firms of insurance broker whose job it is to know the market and guided their clients towards insurance solutions and reputable insurers that are likely to meet their claims obligations.

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Dishonest Claim, Dishonest Claimant, is there a Difference?

Is there a difference between a fundamentally dishonest claim and a fundamentally dishonest claimant in the context of Section 57 of the Criminal Justice and Courts Act?

Michael v IE&D Hurford Ltd (t/a Rainbow) [2021] EWHC 2318 (QB)

In his influential judgment, Mr Justice Knowles in *LOCOG v Sinfield* acknowledged that *"it will be rare for a claim to be fundamentally dishonest without the claimant also being fundamentally dishonest, although that might be a theoretical possibility, at least."*

This theoretical possibility was recently addressed in the High Court decision of *Michael v IE&D Hurford Ltd (t/a Rainbow).*

The Defendant appealed a first instance decision rejecting their application to dismiss the Claimant's claim for fundamental dishonesty pursuant to Section 57 of the Criminal Justice and Courts Act. It was submitted that the Recorder should have reached the *"unavoidable and inevitable"* conclusion of a finding of fundamental dishonesty following the Claimant's oral evidence at trial. The oral evidence contradicted his pleaded claim and witness statement.

Dismissing the appeal, the High Court confirmed that it was open to the lower court to find that *"signing an inaccurate witness statement, statement of case or disclosure statement"* does not automatically lead to a finding of dishonesty on the part of the Claimant. The first instance court was satisfied that the Claimant was able to provide an honest explanation for the inconsistencies.

It is interesting to contrast the test for contempt of court to that of dishonesty. Contempt of court applies the test of recklessness, meaning that signing an inaccurate witness statement, statement of case or disclosure statement can result in committal proceedings. Signing an inaccurate statement might not result in your claim being unsuccessful but could result in a loss of liberty.

In similar circumstances, how might defendants avoid circumstances in which a court might find the claim to be dishonest, but not the claimant? Do decisions such as Michael open the door to dishonest claimants blaming their legal representatives for dishonest statements?

The appeal judgment seems to suggest that defendants be given the opportunity to 'explore' potential issues of complicity and collusion between claimants and their representatives in such circumstances. However, the practicalities of such an exploration within the confines of litigation, were disappointingly not addressed by the High Court.

First instance decision

The Claimant was involved in a road traffic accident in 2018. It was not disputed that the collision occurred, but three heads of loss remained in dispute: credit hire, physiotherapy, and the value of the injury claim. The statements of case consisted of the Particulars of Claim, Defence and Reply to the Defence.

The Claimant's witness statement stated he was told he *"might benefit from physiotherapy to help aid faster recovery. I obtained this as I feel that it helped."* The claim for physiotherapy sought to recover the costs of 8 sessions at £100 each, and *"was accompanied by detailed notes of some 8 treatment sessions seemingly compiled by the physiotherapist."*

At trial, the Claimant stated he had only attended one session of physiotherapy. This was plainly at odds with the pleaded claim, his witness statement and the physiotherapist 'notes'. This evidence was *"happily volunteered"* by the Claimant, as was ostensibly inconsistent evidence in respect of his employment history and credit card statements. Clearly, this was *"information that did not assist his claim."*

Nonetheless, the Recorder concluded *"the* [Claimant's] *oral evidence in cross-examination was honest and accurate insofar as the* [Claimant] *could understand what was being asked of him and remember."*

The discrepancies were explicable on the basis that the Claimant *"did not know or understand the basis of the claim that the solicitors had advanced on his behalf."* The Claimant was awarded damages for the successful element of his claim, and the application for a finding of Section 57 dishonesty was dismissed.

Appeal

The appeal could be summarised as a solitary pleading; that the Recorder was wrong to have found the Claimant was not fundamentally dishonest and therefore wrong to dismiss the application under Section 57. The appeal set out five issues which should, in the submission of the Defendant, have inevitably led to a finding of fundamental dishonesty. This included the evidence and statements submitted around the physiotherapy, credit hire and employment history.

The appeal was dismissed. Mrs Justice Stacey noted that the Recorder's reasoning was full and comprehensive. The challenge to the finding of fact required a *"very clear case"* to overturn the first instance decision, and as the case turned on the credibility of the Claimant, the appellate courts had to be very cautious interfering with the finding of fact.

Despite acknowledging that the Claimant had signed documents with a declaration of truth, "the Recorder was entitled to conclude that the respondent did not understand the documents." Any discrepancy could be explained by his lack of understanding.

Analysis of the decision

Dismissing the appeal, Mrs Justice Stacey reiterated the test for dishonesty established in *Ivey v Genting*. This test considers whether the Claimant's conduct was honest by applying the objective standard of ordinary people. The Court will consider the Claimant's own knowledge or belief as to the facts when applying this objective standard.

There's an argument that labelling the test as an objective standard is misleading.

Ultimately, the factfinder still has to determine *themselves* whether a claimant was dishonest by their objective standard (a judge doesn't conduct a straw poll outside the Court when reaching the conclusion). Reasonable people can disagree on what the threshold for dishonesty is (or whether it's been met).

It is not unreasonable to suggest that some would consider the behaviour or knowledge of the Claimant in *Michael* to have been dishonest (the Defendant clearly did). As seen in *LOCOG* itself, variance between the interpretation of the threshold can (and does) occur within the judiciary.

In the first instance decision of *LOCOG*, Recorder Widdup found that the creation of false invoices and misstatement by Mr Sinfield was *"dishonest by ordinary standards."*

However, he still found *"Mr Sinfield did not set out to bring a dishonest claim but made a careless error in the initial presentation of part of his case which he later compounded by attempting to conceal it",* indicating that initial part of his conduct was not dishonest.

He also declined to make a finding of Section 57 fundamental dishonesty. By contrast, Mr Justice Knowles had no hesitation in reaching such a conclusion. His view seemingly being that one knows whether or not one has a genuine claim for gardening or not.

If those two judges can look at the same set of facts and reach different conclusions as to what is or is not dishonest, where does this leave a Defendant with a potential Section 57 argument from a practical perspective?

What we can say with confidence is that in this instance the facts in Michael were not enough to generate a finding of 'subjective' (albeit said to be objective) dishonesty.

The fact he had signed the Particulars of Claim, disclosure and witness statements were not enough.

Indeed, Mrs Justice Stacey stated that *"it is too bold a submission to assert that an inaccurate pleading or defective disclosure statement is synonymous with the respondent's fundamental dishonesty."*

Perhaps not too many people could disagree with that conclusion in the broadest of terms albeit one might be tempted to add the caveat but it feels like a clue.

It would be very difficult for a reasonable tribunal to reach the conclusion that a person who can be shown to have *known* they were acting dishonestly was not in fact dishonest:

Judge: *"I appreciate you may **think** you were dishonest – but I disagree."*

Not very likely is it?

The appeal judgment appeared to target the inquiry on whether the Claimant's explanation for dishonest statements was dishonest, not on whether his statements themselves (which are, let us recall, signed with a statement of truth) are dishonest. The following element of the judgment perhaps raises more questions than answers:

"Where, as here, there was a genuine accident with genuine injuries and vehicle damage, but also aspects of the evidence which appear troubling or dishonest, a Defendant may, in order to prove dishonesty on the part of a Claimant him or herself, need to explore in evidence potential complicity or collusion by a Claimant with their solicitor. It may depend in part on the adequacy of the explanation for the inaccuracies provided by the Claimant. That did not happen in this case."

How would a defendant prove the proposed 'collusion' though? The above judgment ignores the very practicalities of privilege and the ability of defendants to 'explore' these issues, for example, by seeking access to the claimant's file of papers.

In the absence of unfettered access to claimant solicitors' files for this exploration, it is apparent that a claimant would need be seen to 'own' the dishonesty. Decisions such as Michael suggest that a claimant could effectively 'hide' dishonesty behind the actions of their solicitors, or other issues such as language difficulties.

Imagine Mr Michael confirmed on his own terms or in his own words that he had attended eight sessions of physiotherapy, and then offered oral evidence at trial (or been shown evidence) that he had only attended one session – that doesn't make such a claimant honest, it just means he has been caught (albeit he's *"caught"* himself").

It would have been very difficult for the first instance judge to find he was not dishonest based on the Claimant's own knowledge of the facts, and on an objective standard in our view. However, as the Claimant's inconsistency was set out in documents prepared or disclosed by his solicitors, the Recorder at first instance was comfortable in finding he had an honest explanation for the inconsistencies.

College 'Highly Commended' for Our Member Support During Pandemic

The College's efforts to support psychiatrists during the pandemic was recognised last night as RCPsych won 'highly commended' in the Memcom awards for Best Member Support during COVID by a large organisation.

The commendation came after the College rolled out the biggest webinar programme of any medical royal college, transformed the way we deliver exams so they could be done remotely during 2020, and worked with NHS England to provide comprehensive guidance for members on our website within days of the pandemic starting.

RCPsych President Dr Adrian James said: "This is a real honour and it's very much deserved, because our amazing staff team and dedicated volunteers have done a superb job of supporting our hard-working members during an extremely challenging time."

Paul Rees, who collected the award with HR Director Marcia Cummings and our former Dean, Dr Kate Lovett, said: "When the pandemic struck, the mental health of people across the UK and globally was put under huge strain.

"At the College we needed to move extremely fast to migrate all our services online and continue to deliver an excellent member experience, to frontline doctors, working for the NHS and other mental health services.

"It's a huge credit to our fantastic staff team and volunteers that we were able to do this, transforming areas of our work at an unprecedented pace, to provide members with the information, training and career progression opportunities they need and expect."

Our submission to Memcom set out the work the College did to support members during the pandemic.

Member webinars
We supported our 19,000 members by rolling out the biggest webinar programme of any medical royal college, with 76,551 live and on-demand member views for our 247 free and paid-for online events.

This meant that psychiatrists and other mental health professionals could continue to learn about the latest developments in mental health care provision, and how to handle the impact of the pandemic on services, through via online platforms.

Membership exams
As it was vital that trainee doctors could still pass their exams and move into national recruitment, as fully qualified doctors, we digitised our exams, via one of the biggest projects ever run by the College - which saw us deliver the biggest virtual Objective Structured Clinical Exam (OSCE), or clinical exam, delivered by any medical royal college.

Six hundred and ninety-four candidates sat our OSCE in September and October.

A further 2,516 candidates sat our digital Paper A and Paper B in October, November and December.

Overall, a combined 3,218 candidates sat our digital OSCE and Paper A and Paper B - one of the highest number of candidates examined by any medial royal college digitally in 2020.

Guidance for members on how to handle COVID-19 in NHS services
Working in partnership with the NHS, we published comprehensive guidance on our website for clinicians on how to deliver mental health services in the midst of the pandemic.

We published this guidance within days of the first lockdown, and during the course of 2020, the information was viewed almost 500,000 times – with 21% of those views coming from overseas.

We also published podcasts and videos on how to handle the impact of COVID-19.

Boosting recruitment into psychiatry
Our Choose Psychiatry campaign, which promotes recruitment into psychiatry through professionally produced videos on social media, helped further boost the popularity of our specialty among foundation doctors.

For the first time on record, thanks to the impact of Choose Psychiatry, 100% of core training places in psychiatry were filled across the UK.

Telling the nation about the impact of COVID-19
We secured the highest level of media coverage ever, with 13,207 media mentions (up by 34% on 2019) and an aggregate audience of 1.25bn (more than seven times higher than in 2019) – with regular appearances on TV and radio news and across the national press.

Health Secretary Matt Hancock was questioned about the story on ITV's Good Morning Britain, with the interviewer saying: "The President of the Royal College of Psychiatrists, Dr Adrian James, says we're facing the biggest mental health crisis since the Second World War. What are you doing to protect the mental health of the nation which is inevitably going to struggle?"

We were quoted 40 times in Parliament, including being quoted twice at Prime Minister's Questions.

Supporting our staff to support our members
Having switched to being a virtual College overnight on 18 March, with our 210 members of staff working from home, we rolled out daily half hour digital staff events, including a weekly CEO staff briefing – and provided our staff with comprehensive wellbeing advice, and full end-to-end mental health support, from mental health professionals, 24 hours a day.

Everything underpinned by a values-based approach

One of the reasons we thrived, despite the many challenges, was that a positive, empowering and enabling culture had already been established across our members and staff alike, through the introduction and embedding of our values of Courage, Innovation, Respect, Collaboration, Learning and Excellence.

Shortlisted for other awards
The College was also shortlisted for several other Memcom awards. They included:
Membership organisation of the year
Best website of a membership organisation
Best podcast
Best magazine for a professional association or membership organisation
Best sustainability initiative.
Our President Dr Adrian James said: *"The fact RCPsych were shortlisted for these other awards shows the exceptional quality of work the College team is doing across so many areas of our work."*
For further information, please contact:
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Web: www.rcpsych.ac.uk - Twitter: @rcpsych

High Court finds lack of Evidence Decisive when Dismissing Psychiatric Injury Claim

The High Court recently provided a valuable decision on the issue of psychiatric injury, providing an overview of the existing law and principles in this area.

Mackenzie v AA Limited and one other [2021] EWHC 1605 (QB)

The decision followed an application by a Defendant to obtain summary judgment in respect of an alleged personal injury claim within the confines of a claim for wrongful dismissal.

The Claimant had assaulted a colleague at a work away day and after an investigation, was subsequently dismissed from his job. In response, the Claimant pursued a claim for wrongful dismissal, alleging the assault had occurred because he was overworked and physically and mentally ill.

He claimed that the Defendants were responsible for his psychiatric injury and sought *"Damages for personal injury resulting from the damage to his health and wellbeing"*. The Defendants submitted that the Claimant had not disclosed reasonable grounds for bringing his personal injury claim and made the application.

The judge found that the Claimant was unable to prove the Defendants ought to have known he was suffering from psychiatric conditions and the Defendants were granted summary judgment on that issue.

Additional applications were also made in respect of other issues forming part of the overall claim for wrongful dismissal. This article does not consider those applications as they are not relevant to the issue of psychiatric injury.

Background

At the time of his dismissal the Claimant suffered from several physical health conditions. By early/mid 2017, the Claimant alleged that due to an exceptionally challenging workload, the Claimant had become overstressed, and this had caused his physical and mental health to deteriorate. The Claimant alleged that the Defendants were aware of the effect upon his health. He was therefore unable to exercise full self-control. It was the Claimant's case that his medical condition which led directly to the incident was caused by the Defendants' breach of duty as they failed to take reasonable care for his safety and health.

Further, the Defendants' treatment of the Claimant after the incident and his subsequent dismissal exacerbated a deterioration in his mental health and that the Defendants were responsible for his psychiatric injury.

The Claimant referred to *Hatton v Sutherland* [2002] in which sixteen principles were outlined relating to an employer's potential liability in a psychiatric injury claim.

The Claimant stated he had been given several very challenging objectives and consequently was working intensively. He claimed that he had experienced some loss of memory and/or concentration in the course of his work and exhibited outbursts of temper and the Defendants were aware of this. The Claimant also alleged that the board and members of senior management were aware he had become overstressed and of the deterioration in his physical and mental health. He claimed that prior to his dismissal the Defendants had clear evidence of his symptoms. He claimed it was wholly foreseeable that the Defendant's treatment led to an exacerbation of his condition and delayed his subsequent recovery.

The Defendants submitted that the Claimant had not disclosed reasonable grounds for bringing his personal injury claim and he had no arguable case. He had provided no medical evidence in respect of any psychiatric illness or known risk of him suffering that injury. The Defendants relied upon the fact that the Claimant was the most senior employee and would therefore set his own working practices. In addition, the Claimant had not discussed any psychiatric illness with his employer before the incident.

Judgment

Deputy Judge Metzer's judgment outlined the issues on foreseeability raised in *MacLennan v Hartford Europe Limited* [2012] by Hickinbottom J, where it was said the foreseeability threshold is high and may prove a formidable obstacle on the facts of a particular case. Hickinbottom J in *MacLennan* outlined that to be successful a claimant must show that his employer knew or ought to have known that as a result of stress at work there was a risk the claimant would suffer harm, and the claimant must then show that the employer knew or ought to have known that due to stress at work there was a risk the claimant would suffer harm of the kind he in fact suffered.

The judge found it *"to be of some significance"* that neither party was able to provide details of any authority where an occupational stress claim had succeeded, absent an express warning.

To succeed with his personal injury claim the Claimant required a finding that the Defendants' breach of contract/duty caused his psychiatric condition, and the burden was upon him to show the Defendants had actual or constructive knowledge of an imminent risk of psychiatric injury prior to the incident in 2017.

Deputy Judge Metzer found there was *"simply no evidence"* that the Claimant or his doctor provided the Defendants with "anything to suggest he was suffering from a psychiatric condition." According to the

Claimant's expert, the Claimant's family was not aware of any relevant deterioration in his medical condition. The judge found that the evidence showed the Claimant as being someone *"stoical and quite driven"* who *"responded well to the challenges of hard work"*. The loss of memory/concentration and outbursts of temper/emotion fell *"far short of being able to establish a realistic, as opposed to a fanciful prospect of proving that the Defendants were, or should have been on notice that Claimant was suffering from the recognised psychiatric condition, or at such imminent risk."*

According to the Claimant's expert report it was the incident itself which resulted in the *"unmasking of the symptoms to become manifest"* and the Claimant *"did not ask for help as this is not his personality type"*.

In conclusion the judge found that the Claimant *"failed to establish any reasonable grounds, or reasonable prospect of proving"* that the Defendants ought to have known he was suffering from the psychiatric conditions and the Defendants were granted summary judgment.

What can we learn?

- This is a prime example of the significant hurdle faced by Claimants in proving foreseeability in psychiatric injury cases. In this case the Claimant sought to explain his behaviour by retrospectively alleging that he was overworked and that his employers were on notice of this and the impact on his health. There was no such evidence to support that contention.

- In cases of this nature, depending on the specific nature of the claim, there should be a thorough investigation into the circumstances and whether the Claimant can prove foreseeability.

- When considering foreseeability of a psychiatric injury an employer is entitled to assume that an employee can withstand the normal pressures of the job unless it is known an employee is at particular risk of injury or some other problem or vulnerability. The duty of an employer is not triggered in circumstances where there is awareness that the employee is experiencing stress at work. The employer has a duty to act only when the indications of imminent harm arising from work are clear enough for any reasonable employer to realise it should address the issue.

- It is anticipated that the number of psychiatric injury claims will increase. Mental health issues are topical and there is now much less stigma associated with reporting such issues. The impact of the pandemic, furloughing of some staff possibly resulting in higher workloads for others coupled with redundancies make this fertile ground for Claimants. However, they remain difficult for Claimants to prove. Whilst expensive to defend, nevertheless, each case should be investigated and assessed on its own merits and, where appropriate, a robust defence maintained.

Author:
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Partner

Drink & Drug Driving - Christmas Campaign

by Ms. Joanne Caffrey

As we approach Christmas and the national drink & drug driving policing initiative periods I review the controversial issue of drink/drug driver prosecutions and look at two aspects:

- Can innocent people end up being convicted of a drink/drug drive offence?
- Can the guilty avoid conviction?

Upon initial glance many might wonder how my expertise of police custody procedures and 'safer custody' apply to the drink/drug drive procedure.

Drink/Drug drive procedures are part of the custody portfolio due to the station procedures aspects. All pre-arrest contact is part of the 'safer custody' portfolio. The legislation under the Road Traffic Act is under the roads policing portfolio, but overlaps with the custody portfolio.

When I was operational all station and hospital procedures were conducted by a sergeant, so every constable request was conducted by the sergeant. This meant when I was on duty I handled all station and hospital procedures for my policing division. There was hardly a day without a station procedure being conducted.

During my police service I also trained as an intoxilyser trainer, completing the course at National Police Training, Harrogate. I trained other custody sergeants how to use the intoxyliser and conduct station evidential procedures, including all the MGDD forms. Following the adoption of 'safer custody' by 2006, the sergeant was removed from the process to keep them impartial and focused upon the care and detention of the detainee.

I previously taught constables the roadside procedures and by 2006 I was teaching custody staff (sergeants and detention officers) the safer custody aspects of dealing with drink & drug driver cases, and about the supervision of constables at the station conducting such procedures.

So how could an innocent person face a conviction?
It is essential that procedures are conducted to make any custody and prosecution safe. Not all members of the public have previous involvement with the police and criminal justice system so do not understand how this could happen. Let's have a look at a hypothetical scenario.

We are within a Christmas drink/drug drive campaign and officers are encouraged to utilise their powers to request a preliminary breath test whenever possible. A motorist is driving home from work along a road within the 60 miles per hour speed limit. They are less than a minute away from home when all of a sudden a learner driver 'bunny-hops' out of a junction into the side of their vehicle. They loose control of their vehicle, mount the kerb and hit a wall. During this process they have struck the side window with their head and the air bag has deployed. They have sustained a head wound and blood is dripping down their face. They are unable to hear due to the airbag deployment affecting their hearing.

Their stress hormones – adrenaline – activate with a sudden rush of fight/flight surging through their body. They are in complete panic. Their mind has gone into complete emotional response. They want to

get home to safety. They exit the vehicle and set off attempting to run home but due to the injuries and loss of balance they look to on-lookers like they are drunk. They also vomit with stress response as they try to run. As they arrive home their partner calls an ambulance, unable to get any reasoning from them as to what has occurred.

In the meantime, police attend the road traffic collision and through witness accounts have reasonable grounds to believe the driver who has made off, was drunk. They were staggering away and vomited. The number plate produces the address.

As police arrive at the house they see the ambulance leaving with the driver within. Ambulance crew believe the head wound is too deep and there are clear signs of concussion and/or other head injury. Ambulance staff can smell no alcohol but note the driver to be uncooperative and unsteady on their feet.

The police officers waiting at A&E are keen to obtain a breath sample to establish if they have a drink/drug driver, and are persisting with A&E staff to let them speak to the driver.

The driver is now in a cubicle being attended to by staff. They are in the process of receiving stitches to the head and are awaiting being sent for a CT scan. The police officer has been given permission by the on-duty doctor to ask the driver about the collision.

The officer produces their official paperwork and begins to ask for samples for analysis. The driver is still receiving treatment and is still dealing with some loss of hearing and severe head pain. Having never been involved with police officers before they say "I'll come to the station when I'm finished here and sort it all out". The officer repeats their requests and follows through with some official wording which the driver does not properly understand. This was the formal warning concerning fail to provide and prosecution. The driver is irritated by the officer and sharply repeats their earlier response that they will attend the station when clear.

Several hours later they are released from hospital and attend the police station to be informed the procedure is completed and they were reported for the offence of failure to provide.

The driver now looks to receive a conviction for which many may assume means they were drink/drug driving. This could have serious ramifications for their employment.

What if they were over the limit?
Looking at can the guilty avoid conviction. What if the driver had been drinking before leaving work? What if they were over the prescribed limit? Instead of receiving a conviction for driving whilst over the prescribed limit they are receiving a lesser offence for failure to provide.

Overlapping Safer Custody
A significant aspect for 'safer custody' is that the process is compliant with best practice guidance so that not only does the person not die during the process but the process does not then lead to the exclusion of evidence against a person, or the case to collapse. A phrase I often use if that procedures are there for a reason.

'Fitness' to proceed with a person is a key aspect to consider. Are they fit to proceed or should the officers revert to unfit/lacking capacity?

Is this period of being unfit short term or long term? For every 'offence' there are points to prove for the prosecution team. And for each point to prove the 'defence' can look for a statutory defence for their client to use.

For example, with the above scenario we might need to consider issues connected to:
• hospital patients,
• medical reasons for failure to provide;
• incapacity
• doctor consent
in addition to others.

Head Injuries
It is possible for a head injury to appear as intoxication. Traumatic brain injury may be defined as a traumatically induced structural injury and/or physiological disruption of brain function as a result of an external force. It may be indicated by new onset or worsening of at least one of the following clinical signs, immediately following the event:

• any period of loss of or a decreased level of consciousness

• any loss of memory for events immediately before or after the injury

• any alteration in mental state at the time of the injury (confusion, disorientation, slowed thinking, etc.)

• neurological deficits (weakness, loss of balance, change in vision, praxis, paresis/plegia, sensory loss, aphasia, etc.) that may or may not be a transient intracranial lesion.

A blow to the head can result in bruising or bleeding inside the skull or inside the brain. Not all head injuries are visible and complications may occur at any time after the event. Staff must be aware of the risks associated with head injuries, particularly when dealing with persons who may have been involved in a fight or a road traffic collision. Staff should also be aware that symptoms of a serious injury to the head can display as the common signs of drunkenness (eg, slurred speech, drowsiness and vomiting). A head injury may result in a rapid deterioration in the health of the person.

The National Institute for Health and Care Excellence (NICE) guidance explains: "High-energy head injury. For example, pedestrian struck by motor vehicle, occupant ejected from motor vehicle, fall from a height of greater than 1 metre or more than 5 stairs, diving accident, high-speed motor vehicle

collision, rollover motor accident, accident involving motorised recreational vehicles, bicycle collision, or any other potentially high-energy mechanism."

Guidance for doctors from the British Medical Association and the Faculty of Forensic & Legal Medicine 2020 (FFLM). This document contains the following statements:

• The Police Reform Act 2002 and The Criminal Justice (Northern Ireland) Order 2005 permit the taking of blood from incapacitated drivers.

• Legally, it is the responsibility of the police constable to establish whether the person has or lacks capacity. Nevertheless, before taking a sample (Health Care Professionals) HCPs should satisfy themselves that the individual lacks the capacity to consent and therefore falls within the remit of the legislation.

• The relevant legal test of capacity is that the driver is: '…conscious of what he or she is doing and has heard and fully understood the request for his consent

• HCPs will want to consider whether the person: • understands what the request involves, and why the specimen is being sought • understands any risks associated with the specimen being taken • understands what will be the consequences of refusing to give consent • can retain the information for long enough to make an effective decision • can weigh the information in the balance; and • can make a free choice.

• Decisions about a person's capacity may have particular implications where the person refuses to agree to a specimen being taken, since refusal without 'reasonable excuse' will lead to a charge of 'failure to provide a specimen'. Lack of mental capacity might be a 'reasonable excuse' and it is therefore important that doctors document their decisions about mental capacity carefully

What happens if a blood sample is obtained from a person under hospital procedures for incapacitated drivers?

A person who is incapable of consenting, may have a sample of blood taken from them without their consent. The obtained sample is then retained until the person is capable of either providing consent for it to be sent for analysis, or refusing.

If they consent then an analysis can be obtained and establish a drink/drugs level in the blood.

If they do not consent then they can be proceeded with for failure to provide.

The above scenario is purely a training and discussion scenario, and is not legal advice and neither does it cover all of the issues.

The scenario raises the issue that if a driver is considered incapacitated through a head injury that the obtaining of the blood sample could achieve a safer process, and convict those that have been driving whilst over the limit.

Court Clarifies Law on Pharma Patent Claims

Pharmaceutical manufacturers that claim patent rights over multiple compounds on the basis of a general formula will welcome a new ruling by the Court of Appeal in London, experts in patent litigation have said.

Nicole Jadeja (life sciences Partner) and Sarah Taylor (Senior Practice Development Lawyer) of Pinsent Masons, were commenting after the court considered the standards of disclosure that apply to complex pharmaceutical patents, and in particular those patents which contain claims with functional features and mixed structural/functional features.

Disclosure requirements are a feature of patent law. They are designed, among other things, to ensure that people can understand what the scope of a patent is and what invention it claims.

In its ruling, in a dispute between FibroGen and rivals Akebia Therapeutics and Otsuka Pharmaceutical (FibroGen, Inc v Akebia Therapeutics, Inc & Others [2021] EWCA Civ 1279), the Court of Appeal considered disclosure requirements as they apply to the concept of 'sufficiency' in UK patent law. This is a developing area of patent law in the UK, particularly in the context of the life sciences sector and pharmaceutical patents. It has been recently considered by the Supreme Court in Regeneron v Kymab [2020] UKSC 27, and was further clarified in Illumina Cambridge Ltd v Latvia MGI Tech SIA [2021] EWHC 57 (Pat) by Lord Justice Birss who gave the leading judgment for the Court of Appeal in this case.

Section 72(1)(c) of the Patents Act 1977 states that a patent is liable to be revoked if "the specification of the patent does not disclose the invention clearly enough and completely enough for it to be performed by a person skilled in the art". This is colloquially referred to as classical insufficiency, and the relevant date for assessing that sufficiency is the time the patent application was filed.

There are other forms of insufficiency too that have been established by case law. Excessive claim breadth, also known as 'Biogen' insufficiency, occurs when a claim extends beyond the technical contribution of the patent, and so does not support the invention. Uncertainty insufficiency is another category of insufficiency and applies where the language used in the patent claims is so ambiguous that it renders the patent invalid for not disclosing the invention clearly enough.

Case law has also established the concept of plausibility in respect of insufficiency, amongst other areas of patent law. In the context of insufficiency, this requires that the assertion that the invention will work across the scope of the claim must be plausible or credible.

It is established case law in England and Wales that the question of whether the requirements of sufficiency are met boils down to whether the skilled person can readily perform the invention over the whole area claimed without undue burden and without needing inventive skill.

In its ruling, the Court of Appeal has clarified how the case law applies in the context of pharmaceutical patents where the claims made about the underlying invention are defined in both structural and functional terms. The court overturned the High Court's decision in respect of insufficiency, holding that the judge applied an unnecessarily high threshold for measuring the sufficiency of claims with structural and functional features.

The importance of this decision was highlighted by one of the judges who was ruling on the case for the Court of Appeal, Sir Christopher Floyd. He agreed with Lord Justice Birss, and said that "... on the issues of sufficiency, we are differing from a patent judge of enormous experience and distinction [Lord Justice Arnold, who ruled on the case for the High Court], and the issues addressed in this case are of importance to the patenting of inventions in this important area of technology".

The Court of Appeal disagreed with Lord Justice Arnold's decision in the High Court (Akebia Therapeutics, Inc & Others v FibroGen, Inc [2020] EWHC 866 (Pat)) that "the skilled person or team must be able to identify substantially all compounds covered by the claim without undue burden" to avoid insufficiency on the basis of excessive claim breadth.

Instead, the Court of Appeal said it will be enough that it is "possible to make a reasonable prediction the invention will work with substantially everything falling within the scope of the claim" provided that the skilled person can identify some of those compounds, beyond those already named, and are able to work substantially at any point across the structural class in that regard without undue burden.

Lord Justice Birss proposed a three-stage test for plausibility, or what he said may be more appropriately called "reasonable prediction". This, he said, should entail firstly identifying what it is which falls within the scope of the claimed class; secondly, determining what it means to say that the invention works – i.e. asking what is it for; and thirdly, asking whether it is possible to make a reasonable prediction the invention will work with substantially everything falling within the scope of the claim.

Jadeja, said "In re-framing the critical question on sufficiency as requiring only some, and not all, compounds falling within the claim to be found effective, the Court of Appeal clarified that, for the purposes of assessing if this could be done without undue burden, it does not matter if any research project involves a lot of work or is lengthy. It only matters that it can be done with undue burden, for example, because the necessary testing is routine and iterative."

"The question which will now be central to future cases on this type of insufficiency is how many compounds or molecules need to be found effective. This is necessarily a fact specific question which means we will inevitably see more cases testing the boundaries of the law of insufficiency," she said.

The court also clarified the law in relation to uncertainty insufficiency. It said that there is a distinction to be drawn between a claim that is difficult to construe, or which has some room for doubt or fuzziness at the edge, and one that is conceptually uncertain. It said that where experts cannot agree on exactly where the claim boundary lies, this would undermine any claim for patent infringement but not render the patent invalid on the basis of uncertainty.

"The ruling will be welcomed by those in the pharmaceutical industry," Taylor said. "It offers important guidance to pharmaceutical manufacturers as many pharma patent claims are framed with a structural feature and double functional features."

"The ruling is positive from an innovator's point of view, as well as providing some clarity for those who draft patents. It means that patents for broad chemical formulae when the therapeutic effect of the compounds covered by the formulae is included in the claims may be less vulnerable to sufficiency attacks than if the High Court's original decision had stood, and therefore may give pharmaceutical manufacturers increased confidence in the strength of such patents. Arguments that such patents claim inventions which are too broad, the limits of which cannot be ascertained even through an extensive research project, will need to be far more nuanced and expert evidence is vital in this regard," she said.

Jadeja said: "Interestingly, the decision brings the law in England and Wales in line with the German Supreme Court decision in the case concerning Dipeptidyl-Peptidase-Inhibitoren, which the Court of Appeal found to be highly relevant. It noted that the German ruling was not considered by the High Court in this case. If this case is anything to go by, the UK courts, as many predicted, still seem keen to algin with European Patent Office decisions and European case law where it can."

The Court of Appeal was considering the issues in the context of a dispute over the validity of patents owned by FibroGen for a product used to treat chronic kidney disease anaemia and related conditions, and whether rival companies Akebia Therapeutics and Otsuka Pharmaceutical, who are both engaged in clinical trial testing for a rival product, infringed those patents. The High Court previously ruled in favour of Akebia and Otsuka.

At the heart of the High Court's decision was its view that both families of patents in dispute in the case – family A and family B – were lacking in sufficiency. However, after hearing the arguments on appeal, the Court of Appeal reversed the High Court's findings in relation to sufficiency. The court considered that the 'family A' patents of FibroGen's were valid after all and that they had been infringed. It held, however, that the 'family B' patents were still invalid on the basis that the underlying invention was obvious.

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No Conflict Zone?

Can an Expert Witness act Both for and Against the Same Client in Two Related Arbi-

Article authored by Jonathan Y. H. Chan

The UK Court of Appeal recently examined the issue in **Secretariat Consulting Pte Ltd and others v A Company [2021] EWCA Civ 6.**

Can an expert witness act both for and against the same client in two related arbitrations? Related to this issue, does an expert witness owe a fiduciary duty of loyalty to his/her client? These issues were recently considered by the UK Court of Appeal in ***Secretariat Consulting Pte Ltd and others v A Company [2021] EWCA Civ 6, [2021] 4 W.L.R. 20,*** a case which concerned the engagement of delay/ quantum experts in construction arbitrations. Although the Court of Appeal ultimately found that it was unnecessary to find the existence of a fiduciary duty of loyalty owed by the expert to the client, it nevertheless found that an expert's overriding duty to the court/tribunal and the duty which he/she owes to his/her instructing client are not inconsistent, and that depending on the circumstances, the relationship between an expert and his/her client may bear the hallmarks or the characteristics of a fiduciary relationship.

In that case, SCL and SIUL were entities belonging to the same corporate group (the **"Secretariat Group"**) that provided litigation support services in construction arbitrations. SCL was engaged by a developer ("**C**") of a large petrochemical plant (the "**Project**") to act as its delay expert in an arbitration brought by certain sub-contractors against C ("**Arbitration 1**"). SIUL was later engaged to act as a quantum expert for the third-party project manager against C in a separate arbitration ("**Arbitration 2**") relating to the same Project.

C applied for an injunction preventing SIUL from doing any further work in Arbitration 2, on the basis that SCL had owed C a fiduciary duty of loyalty which prevented SIUL from providing similar services to the third party in a claim in a different arbitration against the same claimant arising out of the same development that involved the same or similar subject matter.

At first instance (**[2020] EWHC 809** (TCC)), O'Farrell J held that there was a clear relationship of trust and confidence between SCL and C such as to give rise to a fiduciary duty of loyalty, which was owed not only by SCL, but also by SIUL as they were part of the Secretariat Group being marketed as one global firm and having a common financial interest. The judge went on to find that SCL and SIUL were in breach of the fiduciary duty of loyalty, in circumstances where SCL and SIUL were advising and assisting in arbitrations which concerned the same delays and accordingly there was a significant overlap in the issues. O'Farrell J thus granted the injunction. SCL and SIUL appealed.

The Court of Appeal dismissed the appeal albeit based on different reasoning. Referring to Lord Phillips' dicta in **Jones v Kaney [2011] UKSC 13**, Coulson, Males and Carr LJJ concurred that a fiduciary duty of loyalty or a duty to avoid conflicts of interest on the part of an expert to his/her client would not be contradicted by the expert's overriding duty to the court or arbitral tribunal to give independent and objective evidence. Coulson LJ further said that *"the expert's overriding duty to the court could be said to be one of*

the prime reasons why the expert may indeed owe a duty of loyalty to his client", as the client wants a *"frank and honest appraisal"* of his case by the expert. Moreover, it is in the client's interest that the expert's evidence is and is seen to be independent and unbiased. Thus, *"complying with the overriding duty to the court is the best possible way in which an expert can satisfy his professional duty to his client".*

Notwithstanding, the Court of Appeal was reluctant to conclude that there was such a fiduciary duty of loyalty owed by the expert to the client, saying that such a conclusion may have many unseen ramifications and that "*[the] close nature of a fiduciary's relationship with the other party - the need for the fiduciary to be 'on his side'...*" might not be the most accurate way of describing what a litigation support professional/expert does and should do when instructed in litigation or a commercial arbitration. Coulson LJ only stated as follows: *"Depending on the terms of the retainer, the relationship between a provider of litigation support services/expert, on the one hand, and his or her client on the other, may have one of the characteristics of a fiduciary relationship, namely a duty of loyalty or, to put it another way, a duty to avoid conflict of interest. That is not contradicted by the expert's obligation to the court. But, unlike the judge, I do not consider that it is necessary or appropriate to find the existence of a freestanding duty of loyalty in the present case".*

Instead, the Court of Appeal based its decision on the expert's contractual duty to avoid conflict of interests arising out of a conflict of interest clause in SCL's retainer which was based on a conflict check carried out in respect of all the Secretariat entities. It was held that in light of the conflict check (and as the various entities within the Secretariat Group were marketed as one global firm), the undertaking given by SCL in its retainer was binding on all the companies in the group. The defendants' argument that such a finding would amount to *"piercing the corporate veil"* was rejected on the basis that it was *"a question of contract construction, informed by the factual background"* and that it reflected *"the reality of the scope of the conflict check actually undertaken".* Coulson LJ further said, and Males LJ agreed, that: *"It is perfectly possible for a group like Secretariat, if it thought it commercially sensible to do so, to make plain that its representations as to conflict of interest and its undertakings for the future were based solely on the entity involved, and that, despite the scope of the conflict check that they had undertaken, no such representations or undertakings were given in relation to any other entity in the Secretariat group".*

The Court of Appeal then turned to consider whether there was a conflict of interest in that case. Acknowledging that a conflict of interest was a matter of degree, the Court of Appeal considered the roles of SCL and SIUL as delay/quantum experts, which were to provide wide-ranging support and advice in arbitrations. The Court observed that delay/quantum experts are usually "*retained at an early stage to sift through the reams of factual material, looking for particular events on which to focus*". Also, "*[in] general... and particularly when the relevant discipline is of a technical nature, including delay and quantum experts such as we are concerned with here, the expert will be an important resource for the lawyers and others responsible for the conduct of the case*", and he/she is rarely a mere testifying expert but part of the client's litigation team. Such roles and responsibilities had increased the risk that there would be a conflict of interest with such an expert, having been engaged by a client, employed by another party to carry out the same or similar wide-ranging role against the interests of that client. Further, and importantly, on the facts of the case, there was an overlap of parties, role, project, and subject matter. For such reasons, the Court of Appeal found a clear conflict of interest and a breach of the obligation to avoid conflict of interest.

It is noteworthy, however, that Coulson LJ stressed that: *"None of this should be taken as saying that the same expert cannot act for and against the same client. Of course, an expert can do so. Large multinational companies often engage experts on one project and see them on the other side in relation to a dispute on another project. That is inevitable. But a conflict of interest is a matter of degree. In my judgment, the overlaps to which I have referred – of parties, of role, of project, of subject matter – make it plain that in the present case, there was a conflict of interest."*

Although this case was decided on its own facts, this decision is significant in at least four respects. First, as noted by the Court of Appeal in the judgment, this is the first direct English authority that considered the issue of whether an expert owes a fiduciary duty of loyalty to his/ her client. Although the Court of Appeal declined to determine this point, the Court of Appeal recognised that it is possible that the relationship between an expert and his/her client may have one of the characteristics of a fiduciary relationship.

Second, the Court of Appeal did not only follow **Jones v Kaney** saying that there was no conflict between an expert's obligations to the court and his/her obligations to his/her client, but it went further to say that *"complying with the overriding duty to the court is the best possible way in which an expert can satisfy his professional duty to his client".* Whilst the Court of Appeal did not consider it necessary or appropriate to find the existence of a freestanding duty of loyalty in this case, this dicta has removed a major obstacle facing the court in recognising a duty of loyalty owed by an expert to his/her client in an appropriate case in the future.

Third, from a more practical point of view, this decision illustrated how the Court would look at the contractual provisions in a retainer to find whether an expert owes any duty to avoid conflict of interest to his/her client, and depending on the wording and context, the Court may even find that the duty extends to other entities within the same corporate group.

Providers of litigation support services/ expert should therefore pay attention to any representations or undertakings that they may make to their clients as regards conflict of interest.

As the Court of Appeal suggested, an expert witness group may, if it wishes, make clear that other

companies in that group remain free to act for parties opposed to the client in the same or related disputes. It remains to be seen, however, whether this is feasible or commercially sensible in practice.

Fourth, although this case concerned delay/quantum experts, the Court's analysis that a close working relationship between experts, lawyers and clients exacerbated the risk of conflict of interest should also apply to other disciplines where the experts are heavily involved in the preparation of their client's case, and this case has wider implications which go beyond construction litigation/arbitration. However, as the Court of Appeal stated: *"A professional expert witness offers his services in return for payment and the relationship between the expert and his client is essentially contractual. It is therefore necessary to focus on the incidents of that relationship, concentrating on the terms of the expert's retainer and the role which he is required and expected to perform."* In other words, a conflict of interest is a matter of degree, and each case turns on its own facts and circumstances.

This article by Des Voeux Chambers' Jonathan Chan first appeared in Des Voeux Chambers' newsletter: A Word of Counsel 1st edition 2021 (12th issue)

Case update: Franses v Cavendish - the sequel

by Michael Duncan, Burges Salmon

In 2018 the Supreme Court shocked the commercial property world when it ruled in Franses v The Cavendish Hotel that a landlord must - for the purposes of terminating a tenancy under Section 30(1)(f) of the Landlord and Tenant Act 1954 - demonstrate that, if a tenant were to leave voluntarily, it would still carry out its proposed scheme of redevelopment.

Now that the Court has determined that a new lease should be granted to the Cavendish Hotel, the parties have found themselves in Court again. This time they were asking the Court to decide what the terms of the renewal lease should be. Judgment was handed down in "the sequel" on 18 June 2021.

The parties failed to agree on a number of aspects of the renewal lease. However, for the purposes of this blog, we shall just focus on rent. Unlike the decision in 2018, this iteration of Franses v Cavendish did not create any new law. However, it is illuminating in that it demonstrates the Court's approach to establishing renewal terms in relation to Central London retail property, when the review date fell during the Covid-19 lockdown.

The landlord's expert witness put forward a rent of £174,750 per annum. The tenant's expert suggested £96,500 per annum. The evidence of both experts was rigorously examined, with the judge concluding as follows: "both counsel successfully undermined the evidence of the other side's expert... However, I emphasise that these criticisms only go so far in the circumstances of this case. This is for a number of reasons. The first is that both experts in their first reports had to struggle with how to address a Covid-dominated rent assessment when there were no comparables. Neither approach was successful but I recognise the difficulty the experts were in."

Ultimately, the judge set the rent at £102,000 per annum, much closer to the tenant's valuation. By way of context, prior to the renewal, the rent had been £220,000 per annum (albeit this had been set in 2011 and following the rent review provisions in the previous lease, which required certain covenants to be ignored).

As highlighted by the judge's assessment of the experts' evidence, Covid continues to create uncertainty in the market. Whilst each lease renewal will be very fact specific, landlords and tenants may wish to refer the detail of this case, to see which arguments the judge found attractive and which were dismissed out of hand.

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Decarbonising Supply Chain Disputes Through Effective Contract Management

by Duncan Gorst and Danielle Griffiths, Osborne Clarke

With businesses increasingly focused on environmental, social and corporate governance, how can the resolution of disputes via arbitration be made greener for all involved while still ensuring maximum efficiency and cost-effectiveness?

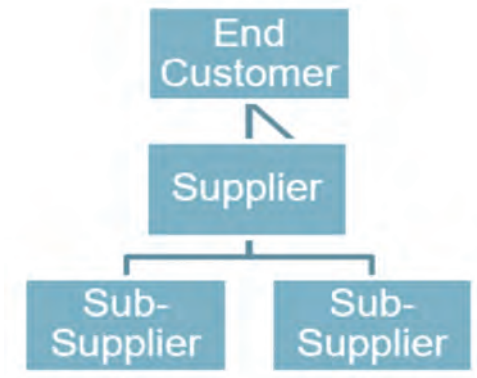
Environmental, social and corporate governance (ESG) criteria have become a central component of effective corporate governance. The risks posed by climate change are now at the forefront of the boardroom agenda. Coordinating an ESG policy that fits into a company's corporate strategy can be a daunting task, in particular in globally operating businesses with complex international supply chains. The green drive is also starting to affect the conduct and management of disputes.

Arbitration, the dispute resolution mechanism of choice for companies of all sizes operating internationally, tends to have a high carbon footprint. This is normally due to the large amount of travelling involved and the volume of paper generated during a typical dispute — in November 2019, an environmental impact assessment conducted by the Campaign for Greener Arbitrations found that more than 20,000 trees would need to be planted to offset the carbon emissions from a single medium-sized commercial arbitration. Another principal cause of carbon-rich disputes is the lack of a bespoke dispute resolution process that takes into account the legal relationships between different links in the supply chain and the types and causes of disputes that may arise during a project or transaction.

Case study: typical supply chain arbitration

It is highly unlikely that an entire supply chain will be governed by a single contract. International supply chains are particularly susceptible to inefficient and carbon rich disputes due to the matrix of contracts with often diverging dispute resolution clauses.

Taking the example of a simple supply chain involving an engine for a wind turbine - the end customer contracts with a supplier for an engine. The supplier sources individual components, for example bearings and gearboxes, from sub-suppliers, before assembling them and delivering the engine to the end customer. The end customer will typically only have a contract with the supplier. The supplier will have individual contracts with its own suppliers. In practice, these contracts usually contain dispute resolution clauses providing for different laws and for disputes to be heard by disparate tribunals.



Imagine that the bearings corrode and crack and the gearboxes overheat. The end customer and supplier cannot agree on a settlement. The end customer commences arbitration against the supplier. Even though the supplier is not at fault for the root cause of the defects, it is still contractually liable to the end customer. The supplier will be ordered to pay damages to the end customer due to failures of the components. The supplier will then have to claim its losses from its sub-suppliers in separate proceedings.

This will inevitably result in the same issues being re-arbitrated, even though the dispute between the supplier and its sub-suppliers arise out of exactly the same facts. The complexity will increase if these proceedings run in parallel which increases the risk of inconsistent decisions. A new tribunal will be presented with a fresh set of pleadings and exhibits even though they may be substantively the same as those in the prior proceedings. Witnesses will have to be re-examined. Experts will have to conduct more investigations with findings that overlap with previous findings. Inconsistencies may lead to follow-on litigation or arbitration. There will be additional hearings which will require more travel and additional papers. Not only will this generate considerable excess costs, it will create a significantly larger environmental impact than having all issues decided by one tribunal in one set of proceedings.

Focus on contract management

There are things that businesses can do at the contract stage that may avoid the above scenario. An efficient and environmentally conscious dispute resolution policy may include the following hallmarks:

- **Uniformity in the supply chain:** Customers and suppliers may be able to agree on a framework dispute resolution agreement, which, where possible, means that the dispute resolution procedure is consistent across the supply chain.
- **Consolidate claims and join suppliers:** Many institutional arbitration rules, such as the ICC Rules and LCIA Rules, provide for some form of consolidation and joinder — businesses should ensure that their arbitration agreements are drafted in such a way that these will work.

◆ **Expedited procedure:** Many institutional arbitration rules also provide for some kind of expedited procedure, offering a compressed timetable. Although in principle intended for low value disputes, they can in appropriate cases be extended to higher value disputes and could help to reduce the carbon footprint of proceedings in combination with the other points in this list.

◆ **Agree to a remote hearing in advance…:** Parties may be best served by agreeing in advance to a remote hearing and the protocol for the management of any remote hearings. Experience has shown that remote hearings can be successful and there are clear environmental advantages in not having to travel. Once a dispute has arisen, reaching agreement with a counterparty as to how a dispute should be conducted may be more difficult. See our recent video on remote hearings.

◆ **... Or dispense with a hearing entirely:** Remote hearings still have a carbon footprint due to the energy needed to operate computers and servers. It might be worth having cases decided on (electronic) documents only rather than having a hearing at all, especially in smaller, less complex or lower value cases. This can be provided for in an arbitration clause, either expressly or by reference to institutional rules that offer a documents-only procedure.

◆ **Go paperless:** Forego hard copies in favour of submitting documents electronically by email or file transfer. If a hearing is necessary, then electronic hearing bundles will save time, costs and be much greener at the same time as being more efficient for all involved.

◆ **Utilise existing contractual and procedural frameworks:**
Various initiatives have been started by legal practitioners to encourage green contracting and green arbitrations. The Chancery Lane Project is a collaborative effort from lawyers from around the world to develop new contracts and model laws to help fight climate change. Sample clauses include the avoidance of excessive paperwork in dispute resolution and low carbon arbitration hearings. There is even a clause proposing that the governing law is interpreted in a manner consistent with the objectives of the UN Framework Convention on Climate Change and the Paris Agreement. The Campaign for Green Arbitrations is an effort to facilitate greener arbitration proceedings. A set of Green Protocols aims to promote better environmental behaviour. The protocols are intended to serve as practical guidance for users for implementing the Guiding Principles of Green Arbitrations for all stakeholders involved in the practice of arbitration, from parties and their lawyers to arbitrators, hearing venues and institutions. There is also a Model Green Procedural Order, which suggests directions such as electronic communications and electronic service of documents, remote meeting of witnesses and experts and remote hearings, including for substantive hearings as well as procedural ones.

◆ **Green alternative dispute resolution (ADR):** Inspired by the Green Pledge which led to the creation of the Campaign for Greener Arbitrations, the mediation community has created the World Mediators Alliance on Climate Change, which has developed its own Mediator's Pledge. Much like the arbitration pledge, the Mediator's Pledge encourages mediators to consider and minimise their impact on the environment, including encouraging environmentally friendly travel, use of video technology and electronic correspondence. In seeking to avoid or settle disputes, parties can also consider green ADR processes.

Osborne Clarke comment
An environmentally friendly dispute resolution process also tends to make it more efficient and more cost-effective. Our experience of supply chain arbitrations such as the one in the case study above has shown what a large environmental impact a typical dispute can have. Remote working and remote arbitration hearings, in particular during the Covid-19 pandemic, have been just as effective as traditional in-person hearings. The extent to which ESG frameworks and green initiatives have been developed and acted upon suggests that companies will be able to manage their differences and disputes in a sustainable manner in future. Companies may even consider including requirements for greener dispute resolution practices in their contracts from the outset, where possible.

Parties to arbitration proceedings must, however, remain conscious of the need to reconcile their sustainability objectives with the wider objective of an efficient and effective arbitration process and the delivery of a robust and enforceable award.

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What Impact Will the Government's 'Planning for the Future' Have on Rights to Light?

by Paul Fawell B.Sc. (Hons) MRICS and co authored by Alice Cook BA (Hons) at Right of Light Consulting Chartered Surveyors.

In August 2020, the Government released a policy document titled 'White Paper: Planning for the Future'. In this document, the Government sets out its broad plan for reform of the regulatory framework for planning in England.

Here we explain the key elements of this white paper, how it relates to other recent planning reforms, and what impact any reforms might have on individuals who seek to enforce their 'rights to light' against property developers.

1. What is 'Planning for the Future?'

In recent years, there have been many changes to planning rules and regulations aimed at removing barriers to development, encouraging growth in housing stock, and enabling commercial property development.

The Government's 'White Paper: Planning for the Future' (henceforth, 'Planning for the Future') proposes to completely reform the English planning system. The stated goal of Planning for the Future is to "streamline and modernise" England's regulatory framework for planning and development. This system is still based on the principles set out in the original Town and Country Planning Act 1947 - a framework which is now a little outdated, to say the least.

Planning for the Future identifies a range of problems with the existing planning framework:

- **Uncertainty.** England's planning system, shaped by the 1947 Act (with its latest incarnation being the Town and Country Planning Act 1990), makes the system discretionary in character: At the heart of the system is the right of 'Local Planning Authorities' (henceforth 'local authorities') to give (and refuse) permission to planning applications. It is suggested that the uncertainty involved makes the costs prohibitive for all but the largest developers;
- **Cumbersome 'Local Plan' processes:** While it is a statutory obligation to have such a plan in place, only 50 per cent of local authorities currently do, with the average preparation time being seven years;
- **Excessively bureaucratic planning processes.** Assessments of housing need, viability and environmental impact are complex and opaque;
- **Lack of public trust.** A recent poll showed only seven percent of respondents trusted their local authority to determine whether large scale developments were good for the area;

• **Outdated technology and data use**. Planning systems are largely document-based, rather than data-based, with little use of interactive digital tools and consultation mechanisms;

• **The developer contribution process** is inefficient. Developers are required to make contributions to affordable housing and infrastructure, but the process is complex and lacks transparency;

• **Little focus on quality and aesthetics.** It is suggested there is no place in the existing system to incentivise beautiful and high quality developments;

•**Too few homes being built.** A chronic undersupply of housing has pushed up prices: In Italy, Germany or the Netherlands, residents get around twice the amount of living space for the price;

In response to these problems, in Planning for the Future, the Government seeks an overhaul of the planning system to:

•Streamline the planning application approval process;

•Simplify the role of Local Plans;

•Adopt a 'digital-first' approach to the planning process. That means moving from documents to data;

•Bring a new focus on design and sustainability;

•Improve public infrastructure delivery;

•Open up land for development.

2. How Does Planning for the Future Relate to Other Recent Changes to the Planning System?
Planning for the Future is part of a broader move in recent years to make the planning system more friendly to development. One of the more significant changes in recent years was the extension of Permitted Development Rights (PDRs) through 2020 and 2021.

A PDR is a right to develop property without the need to go through the full planning permission process. Though, crucially, 'prior approval' from the local authority is still usually required for development.

Significant changes to the PDR system over past two years include:

• A new permanent PDR which allows the enlargement of dwellinghouses without planning permission;

• New PDRs allowing additional stories to be built on dwellinghouses without planning permission;

• New 'adequate natural light' requirements. In order for developments authorised by PDRs to be approved, it is often required that the developer show evidence of "the provision of adequate natural light in all habitable rooms of the dwellinghouses". It is now a requirement for any PDR that facilitates transition of a property from a commercial or industrial use, to a dwellinghouse.

3. What Impact does Planning for the Future and Other Changes Have on Rights to Light?
While recent changes, and Planning for the Future, may well help to deal with the housing crisis in the UK, these changes may also present a source of conflict: Neighbouring property owners and residents affected by the new developments may complain on a range of grounds.

'Rights to light' (also called 'Rights of light' or 'Right of Light'), are a key mechanism which would allow a neighbour to interfere with a development scheme, regardless of planning permission or proposed changes to planning rules. In short, rights of light are a form of easement available in England, which gives owners a right to block developments which would impede natural daylight. It usually requires that the daylight was 'received' by that property for a period of at least 20 years. These rights can be passed on via a deed, or implicitly through the conveyance of property.

You can read more about these rights at Fact Sheet 3: A Guide to Legal Rights of Light.
www.right-of-light.co.uk/resources/factsheet-3/

Recently, we have seen how far courts are willing to go to protect neighbouring properties' rights of light. *Beaumont Business Centres Ltd v Florala Properties Ltd* [2020] EWHC 550 (Ch) is the most recent example of rights of light case law the industry needs to take into account. In that case, the court found that there had been an infringement of the plaintiff's right to light and accordingly made the following Declaration: The claimant (Beaumont) was entitled to an injunction that ordered the defendant (Florala) to reduce its development to remove the right of light injury that had occurred.

On the facts of that case (as an occupying tenant was not a party to proceedings), the court declared that the injury could alternatively be remedied through compensatory damages.

The court's recognition of this right to injunctive relief is something that the industry needs to take seriously: The cost of altering a development to remove the injury to a claimant's right to light could be catastrophic

4. What Is the Difference Between Rights of Light and "Adequate Natural Light" Requirements in Planning?
As 'rights of light' disputes are considered a civil issue, reforms in the planning process are unlikely to remove this barrier to development. Rights of light are not currently a material planning consideration (i.e., the local authority do not need to consider these when making their decisions on planning permission), and can therefore be a surprise to many later down the line.

However, when making decisions on planning permission, local authorities do often consider the impact and availability of daylight and sunlight when making decisions. In calculating whether a development will still allow for sufficient sunlight/daylight, local authorities often follow the BRE Guide: Site Layout Planning for Daylight and Sunlight criteria for neighbouring properties.

In addition to this, as mentioned earlier, is the requirement for local authorities to consider whether a development would allow for "adequate natural light" as part of the prior approval process for PDRs.

The differences between daylight and sunlight, as they are treated for planning purposes, and legal rights of light, are an area where developers are often caught out. We look at these key differences below.

The first major difference is that when considering 'adequate natural light' for planning purposes, usually only habitable rooms in domestic properties are considered.This means that compliance with the daylight/sunlight criteria for planning purposes, does not eliminate rights of light risk.

The second major difference is that rights of light are assessed using different measurement methods. Given a right of light injury is determined by whether a neighbouring room drops below a certain threshold, rather than the loss of light that occurs (though this can be a factor in the strength of the neighbour's claim), in urban areas, neighbouring properties are likely to already be below the threshold even before any development takes place. Therefore, any further reduction to the light would automatically constitute a right of light injury. This means that unless an application proposal is replacing what is on the site already, which is unlikely to be the case with most development, there is going to be right of light risk associated with the new schemes.

5. What Is Our Overall Assessment of 'Planning for the Future'?

With Planning for the Future proposing to remove barriers in the planning process and encourage development, we would expect to see an increase in neighbourly opposition to development, including opposition based on rights of light. Whilst the housing crisis in England is ample evidence that the current planning system is no longer fit-for-purpose, we have to consider whether the proposed reforms would place an unfair burden on neighbouring owners. Planning for the Future does acknowledge that some may view the proposed reforms as 'too much change, too fast', but the Government is clearly of the view that the potential benefits of change far outweigh the potential negative impacts.

One area of potential additional conflict is the focus in Planning for the Future on designating land for housing development, while still continuing to protect the green belt. This suggests the focus for housing sites will be in already populated areas where there is the potential to cause a loss of light to nearby neighbouring properties. Whilst housing developments are unlikely to be under any more threat from rights of light than previously, developers should remain mindful of their proximity to existing neighbouring properties.

It is inevitable that moving to a more rule-based, rather than discretionary, system will make it harder for some individuals to protect their interests: While Planning for the Future does focus on improving community engagement with local plan processes, by their nature, as policy documents, local plans will not be able to consider the interests of individuals in individual cases.

Although the planning reforms are likely to lead to more development, rights of light may continue to be a barrier that may impact and threaten new housing schemes and developments later down the line. What is important for developers and local authorities going forward is to remain mindful of rights of light, regardless of compliance at planning and the process to obtain permission.

6. How to Mitigate the Risk of 'Rights to Light' Litigation

There are a number of options available to developers to manage this risk. Key options include:

- **Liability insurance.** Developers can insure against the possibility of rights to light litigation;
- **Amending the proposed development.** Developers can negotiate their development with neighbours to reduce any loss of light, in return for an agreement not to bring a civil suit against the developer for rights of light;
- **Negotiating compensation.** Developers can actively contact neighbours to offer compensation for any potential loss of light;

Appropriation of rights of light from local authorities. Local authorities have the power to override a neighbour's entitlement to seek an injunction on rights to light. Where doing so it is the responsibility of the local authority to compensate the affected individuals for their loss of light. The basis for compensation is the same as 'compulsory purchase' principles. Note, however, that this power will only be exercised by local authorities with caution.

Conclusion

The Government's recent white paper, Planning for the Future, as well as reforms to planning rules and regulations over the last couple of years, indicate a clear direction for planning law in England: Rules and regulations will be relaxed to enable development of more dwellinghouses, as well as to support more efficient use of existing industrial and commercial premises. It is worth noting, that any easing of planning constraints runs the risk of increased 'rights to light' litigation from neighbours whose light is, or could be, affected.

Paul Fawell acts on behalf of claimants, defendants and in the capacity of joint expert; on cases relating to daylight and sunlight for planning and legal rights of light. Paul Fawell has acted on the following in a number of key cases including *Ottercroft Ltd v Scandia Care Ltd; 2016*, which went on to be decided in the Court of Appeal and his work is in London, Essex and Nationwide.

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How can the Solicitor Assist in Safeguarding Expert Evidence?

by Michael Wright Senior Associate, Dentons

A recent case highlights the role of solicitors in the proper handling of expert evidence.

The reliance of clients on expert evidence is increasingly present in the early stages of disputes. Expert evidence plays an important role in decision making and is persuasive in alternative dispute resolution (ADR). Although ADR does not always resolve a dispute without resorting to litigation, solicitors should be aware of the ways they can handle expert evidence at the early stages of the dispute in order to mitigate issues arising at trial.

The recent judgment of Joanna Smith J in *Dana UK Axle Ltd v Freudenberg FST GmbH [2021] EWHC 1413 (TCC)* provided observations on the role of the solicitor in safeguarding expert evidence from being excluded at trial.

The claimant brought proceedings against the defendant following the alleged premature failure to pinion seals manufactured by the defendant and supplied to the claimant. On the seventh day of trial, the claimant was successful in its application to exclude the defendant's expert evidence. This was due to the defendant's failure to provide full details of all materials provided to each of the defendant's experts. In particular, the defendants failed to disclose the factual information provided orally by the defendant to its experts and subsequently failed to list all documents and information with which the experts relied on. The court further observed that the defendant's other breaches of CPR 35, PD 35 and related guidance would have been sufficient in themselves to justify refusing the defendant permission to rely on the relevant reports.

It is apparent from the commentary made by Joanna Smith J that solicitors play a role in ensuring that expert evidence is obtained on a level playing field. In addition, oversight by the solicitors is needed to control any free flow exchange of information between experts, instructing clients and in-house experts. The main points for solicitors to consider are listed below.

◆ Joanna Smith J observed that establishing a level playing field in cases involving experts required careful oversight and control on the part of the solicitors instructing those experts. This is especially relevant where cases involve experts from other jurisdictions who might not be familiar with the relevant rules.

◆ It is suggested that solicitors who are instructing an expert on behalf of their client should adopt a "gatekeeping" role to carefully supervise interactions between client and expert. Interactions which do not include the instructing solicitors immediately risk creating a lack of transparency as to what has been discussed and what information and documentation may have been provided by the client to the expert, especially where such interactions have gone unrecorded. Direct contact of this nature, without solicitor involvement, may also raise questions as to the client's influence on the expert's ultimate opinions and report and, consequently, as to the expert's independence.

◆ CPR 35.9 should be kept in mind by the parties, their experts and solicitors (where one party has access to information which is not reasonably available to another party, the court may direct the party who has access to the information to prepare and file a document recording the information, and serve a copy on the other party).

◆ Joanna Smith J also observed that legal advisers should not be involved in the negotiating and drafting of joint statements. It was apparent in this case that the experts were relaying information from the joint meetings to the defendant's employees and seeking input on responses.

◆ Separately, experts should also be focused on the need to ensure that information received by them has also been received by their opposite numbers.

With thanks to **Millie Leonard** who co-authored this article. This article was first published by **Construction Law** on 7 July 2021, please see *www.constructionlaw.uk.com/how-can-the-solicitor-assist-in-safeguarding-expert-evidence/*

External Walls
Do we now need an External Wall Coordinator?

by Bernadette Barker BA (Hons) Dip Arch RIBA MSc (Construction Law & Arbitration) FCIArb DipICArb MIFireE

New roles within the construction industry are constantly evolving perhaps in part to the recognition of the increasing complexity and performance requirements of buildings both in construction and design.

In recent years external walls have become ever more complex and so has the legislation surrounding them that perhaps we now need to introduce the new role of an External Wall Coordinator?

Would the appointment of an External Wall Coordinator minimise the risk of errors in design and construction of the external wall?

The suggestion of the appointment of an External Wall Coordinator is not to detract from the role of the architect but to support the architect and recognise that external walls are becoming overly more complex and the design and construction of them needs to be carefully managed throughout the design and construction process.

Until recently there was actually no interpretation of an external wall under the Building Regulations.

Approved Documents B Fire Safety 2019 edition incorporating 2020 amendments -for use in England under Appendix A now describes the external wall of a building as:

'The external wall of a building includes all of the following. Anything located within any space forming part of the wall.

Any decoration or other finish applied to an external (but not internal) surface forming part of the wall.

Any windows and doors in the wall.

Any part of a roof pitched at an angle of more than 70° to the horizontal if that part of the roof adjoins a space within the building to which persons have access, but not access only for the purposes of carrying out repairs or maintenance'.

For this article I will be talking about '*built up*' walls, and not traditional cavity brick walls.

A built-up wall is constructed in a series of separate layers and there are numerous decisions to be made by the design team.

For an external wall you will generally have a backing wall, this could be block work, for example, or it could be an SFS (Steel Framing System).

You will also need amongst other components:
Insulation for thermal performance;

A vapour control layer;

A breather membrane;

You may or may not have a cavity within the wall as part of the design.

And if there is a cavity what cavity barriers are being used?

If services are running through the wall how will they be fire stopped?

If there is SFS you will need an internal lining.

An external layer.

Will the external layer be?

Render?

Or cladding? If so what type?

Or a rainscreen?

Or curtain walling?

Or perhaps there will be spandrel panels in the curtain walling?

A green wall? If so will it be synthetic or natural?

Windows and doors?

Services on or through the wall?

Attachments to the walls which can include, canopies, sun shading and brise soleil

And how high is the building?

However the wall is built up, between each and every one of these layers there are interfaces.

Although it may not appear to be, the external wall can be one of the most complex elements of a building with more or less every design team member requiring an input.

So have walls now become so demanding and complex that at times that we should appointing one individual to oversee the design and construction of the external wall element of the building throughout the life span of the development from conception to completion (and even possibly beyond when there may be complex maintenance regimes that need to be managed).

It is though actually most probably too big a role for one person.

Perhaps we need two External Wall Coordinators, one during the design stage and one during the construction stage?

The design of the external wall brings together all design disciplines which could include for :

- Acoustic Engineer;
- Architect;
- Drainage engineer;
- Facade engineer;
- Fire engineer;
- Structural Engineer;
- Mechanical and electrical engineers;
- Specialist contractors (s) may also be required.

Once the wall is designed, in an ideal world, to reduce coordination and interface issues between contractors, you would have one contractor responsible for constructing the whole external wall.

However, the wall is often broken up into subcontractor specialist packages some of which might be prefabricated off site and just craned in, for example balconies or sheathing boards.

So where can things can go wrong?
Well, everywhere.
Consider even this simple scenario:

A contractor will tender for one of the specialist packages.
Trying to win the tender he may suggest an alternative product to the one he has been asked to price; the one that the whole design team has spent months agreeing will satisfy all of their design criteria.

But does the contractor understand why the product he was asked to price was chosen?
If he doesn't understand, the wrong alternative proposed product can easily be suggested and it may not be compatible with other products it interfaces with or it may not have the required life span or required fire rating or acoustic performance or thermal performance or even all of them.

The proposed alternative product may seem, at first glance, suitable on reading the supplier's marketing materials and literature, but drill down and you may find that, say a product has a claimed fire rating, this fire rating may only be suitable when the product is used under certain circumstances and in conjunction with other materials.

When selecting the proposed alternative products did anyone check that the test certificate (s) and see what for what use the product has been tested for? If it is stated that the product is only suitable for internal use it cannot be used in or an external wall.

But the contractor may not have looked at the 'small print' or even discussed with the manufacturer whether the product is suitable or not.

Proceed with an alternative product without checking with the design team it is suitable for its intended use and that is a very expensive mistake to rectify once the product is covered up.

With an External Wall Coordinator their remit might include for ensuring that any alternative product proposed is reviewed by all designers who had an input into the selection of that product.

New products are constantly being developed to solve evolving problems and manufacturers who have invested in developing products of course need to sell them and see a return on their investment.

Consider another example of where errors can occur: A labourer on a site may be fixing the cavity barriers and is under pressure to finish.

It may perhaps be getting dark, beginning to rain or he just has to finish by say 4pm to keep up with his program as he is anyway off to another site the next day.

The labourer takes the decision to speed things up by reducing the number of fixings by increasing the spacing between them.

He may not understand why the cavity barriers had to be fixed in a certain way.
Has anyone told him?
Is anyone checking?

If no one has checked the work you will now have cavity barriers that have not been installed correctly with the required number of fixings. The cavity barriers may then fail in the event of a fire.

With an External Wall Coordinator their remit might include for ensuring that QA/QC procedures are in place and that the installers are trained in the specific product or even ensure that the manufacturer's representative comes to site to demonstrate how a product is installed.

To summarise, these are my outline views

- At design stage appoint an External Wall Coordinator;
- At design stage consider appointing a team member from each design team to coordinate with each other and the External Wall Coordinator;
- At construction stage appoint an External Wall Coordinator;
- At construction stage ensure that any proposed change to a product is advised to design team members and the External Wall Coordinator;
- Drill down and read the test information for any proposed product for the wall;
- Check the conditions under which the products were tested;
- Read the BBA (British Board of Agrément) Certificate and check for the installation requirements;
- Read all test certificates;
- Understand the products;
- Understand the interfaces between components of the external wall;
- Ensure the contractors and subcontractors and have a QA/QC procedure and that they are implemented;
- Ensure the installation teams are trained;
- Ensure the teams will coordinate and cooperate with each other;
- Make use of manufacturers' CPD programs and help lines. They want to help and you and for to use their products;
- Where possible minimise the number of contractors responsible for constructing the external wall which will minimise the number of interface requirements twin contractors.

Author
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Managing Risks with £1 Million of Contract Wins

East Midlands based risk management company, Finch Consulting, has consolidated a strong start to 2021 by securing over £1m of new contract wins.

Finch specialises in helping organisations understand and mitigate environmental, health and safety, and engineering risks across multiple sectors including construction, food manufacturing, electrical vehicle supply and waste processing.

New wins include providing machinery safety training for an international food and beverage manufacturer and securing a contract to oversee health and safety procedures for a global digital marketing specialist. Finch have also led the way in helping UK and overseas businesses understand and manage the new legislation changes related to UKCA marking.

As well as compliance matters, businesses are increasingly needing proactive support with asset management plans. The introduction of the "super-deduction" tax incentive has provided a much-needed stimulus to support the recovery of one the UK's key economic sectors by encouraging investment in assets, and Finch is supporting many manufacturing businesses understand the risks associated with procuring engineering assets..

Commenting on Finch's success, Finance Director, Andrew Millington said "After a year of uncertainty in 2020, I'm very proud that we have been able to build on the positive start to 2021 with a continued flow of new and interesting projects. Thanks to the hard work and innovation of everyone within the Finch community we have kept the company in a position of strong profitability and on track with an ambitious budget"

Despite the difficulties experienced in the past 18 months, Finch continue to invest to support its people and its ambitious growth plans, with a vision to become the leading mid market risk management business in the UK.

Below, LR Dom Barraclough Janine Watterson and Andrew Millington.

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Spontaneous Breakage of Thermally Toughened Glass

by Ben Wallace, Glass and Glazing Federation

With construction products in the spotlight more than ever it is important to have the right products installed in the right places. A common glazing industry issue that we regularly experience, both throughout the UK and internationally, is the seemingly random spontaneous fracture of thermally toughened soda lime silicate safety glass. This is where the installed glass shatters into thousands of pieces. Thermally toughened soda lime silicate glass was first manufactured in 1931.

Fractured thermally toughened glass may remain in place, or it may fall out. The design of this product means that the internal stress obtained during the toughening process causes the glass to get the shattering effect. Whilst thermally toughened glass has many benefits regarding additional strength when thinking about wind loadings, impact, and safe breakage behaviours, it also carries risk. If fractured, glass falling from height and/or acting as a barrier, can have significant safety implications.

In addition, large projects with multiple spontaneous fractures could have significant financial implications. This may involve multiple Expert Witnesses acting on behalf of their clients trying to ascertain the cause of fracture.

It was in 1961 that E R Ballantyne issued a report on the breakage of thermally toughened cladding panels from a building in Melbourne, Australia. This report showed that an inclusion of 'nickel sulphide' was at the origin of the fracture. Further work explained that the inclusion experienced a phase change that caused the toughened glass to fracture.

Thermally treated glasses may fracture from a variety of causes. These in order of occurrence are:

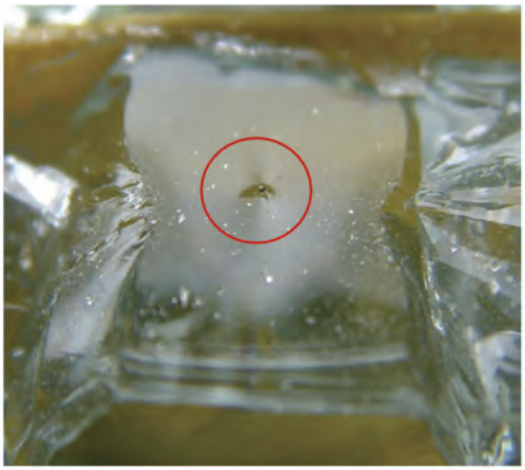
- Edge damage (e.g. caused during manufacture, transportation, installation, service conditions)
- Sharp body impact, either accidental or malicious
- Poor glazing design (e.g. glass to metal contact)
- Poor workmanship (e.g. incorrect installation, inappropriate assembly of fittings, unskilled labour)
- Inferior glazing materials (e.g. use of incorrect gaskets, bushes, etc)
- Excessive loads either mechanical or thermal
- Incorrect processing of glass
- Inclusions in the glass

1 Ballantyne E.R.: Report 061-5: Fracture of toughened glass wall cladding, I.C.I. House, Melbourne, CSIRO, Division of Building Research, Melbourne: 1961

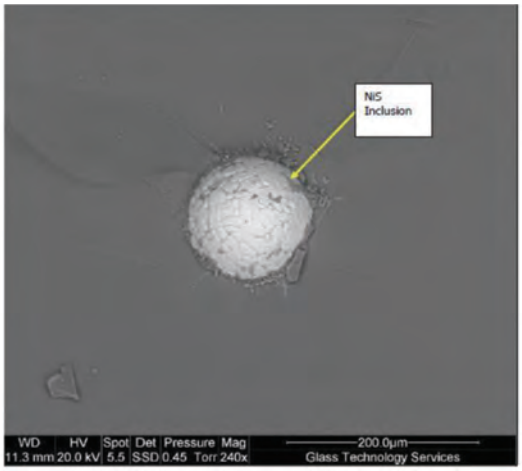
Thermally treated glass therefore becomes associated with unexplained, but noticeable, breakages and these have been labelled "spontaneous fractures", whereas breakages from similar causes in other types of glass are frequently referred to as "cracks". In fact, thermally treated glass is less susceptible to breakages than any other form of glass, but the fracture propagates with a loud noise which may be accompanied by falling particles and is therefore much more obvious.

In addition, with toughened glass, the origin of the fracture, which is a source of information as to the cause, is often lost. Of the various causes of "spontaneous fracture", only that associated with the presence of foreign particles in the glass is more likely to cause fracture in thermally treated glass than in other forms of glass, because they can disturb the very high built-in stresses in thermally treated glass. Spontaneous breakage due to inclusions is possible in any of the three different types of thermally treated glass products available:

- Heat strengthened soda lime silicate glass – EN 18632



Above, example of an inclusion in a toughened glass origin.



Above, Magnified NiS Inclusion.

• Thermally toughened soda lime silicate safety glass – EN 12150

• Heat soaked thermally toughened soda lime silicate safety glass – EN 14179

The presence of an inclusion within annealed glass is not a problem. It is only of concern when in the tensile stress zone of a thermally treated product.

This article covers the spontaneous breakage of thermally treated glasses, together with types of inclusions, the rate of occurrence and associated risks.

For the purpose of this article the following definitions apply:

• Spontaneous breakage (also referred to as spontaneous fracture) - An apparent unexplained fracture that can occur in heat treated glasses without an obvious external influence.

• Inclusions - An inclusion that by virtue of its size and position in the thermally treated glass can cause failure.

• NOTE: These can be of various materials that are either critical (e.g. nickel sulphide) or non-critical (e.g. refractory stone, un-melted frit)

• Critical inclusions - An inclusion or small impurity in the glass that can undergo a phase change which may lead to fracture of thermally toughened soda lime silicate glass sometime after toughening.

• NOTE: Failure is also possible in heat strengthened soda lime silicate glass.

• Nickel Sulphide inclusions -The most common type of critical inclusion found within thermally treated soda lime silicate glass.

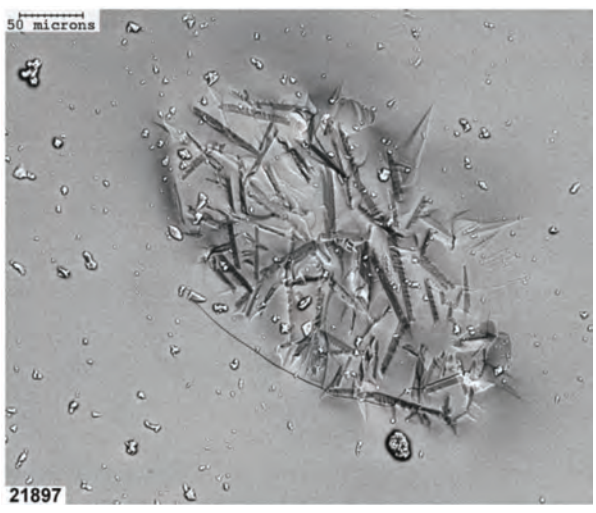
• Level of associated risk - Risk of spontaneous breakage of thermally treated soda lime silicate glass on a statistical basis due to the presence of critical inclusions.

Types of Inclusions- **Non – Critical**
These can be one of the following:

• Un-melted frit

• Fragments of refractory block

• Inclusion that does not undergo phase change



Above, example of un-melted frit

If these are sufficiently large and in the tensile stress zone (towards the centre of the glass thickness), they can disrupt the stresses built into toughened glass to an extent that the glass fractures from around the inclusion. Often this will occur during manufacture, but it can also occur sometime after manufacture, usually fairly quickly, but it may be a matter of months. Toughened glass containing a non-critical inclusion which survives longer than a few months is very unlikely to fracture from the inclusion in service.

Types of Inclusions- **Critical**
Nickel Sulphide
Background nickel sulphide has two main states, one of which is stable at high temperatures and one which is stable at lower temperatures. When glass is thermally treated the nickel sulphide transforms to the high temperature state during the heating process, but the glass is cooled rapidly which does not allow the reverse transformation to the low temperature state. This reverse transformation occurs over a period of time, accompanied by an increase in volume.

Therefore if:

• The nickel sulphide inclusion is large enough, and

• Within the tensile (central) portion of the thermally treated glass, it can cause fracture at some time after manufacture.

All types of thermally treated glass, i.e. heat strengthened, thermally toughened, can be subject to spontaneous breakage as the result of the presence of critical nickel sulphide inclusions. However, the risk of spontaneous breakage due to the presence of a critical nickel sulphide inclusion can be significantly reduced by using heat soaked thermally toughened soda lime silicate safety glass in accordance with EN 14179.

Rate of Occurrence of Fracture Due to Critical Inclusions
There are no definitive and proven concentration levels for critical inclusions in any manufacturers thermally toughened soda lime silicate safety glass.

NOTE: Glass manufacturers have taken action to reduce nickel contamination of the annealed glass since NiS was shown to be a cause of spontaneous fracture of toughened glass.

Consequently, the incidence of NiS in glass has now been reduced.

Spontaneous breakage of thermally toughened soda lime silicate safety glass due to critical inclusions remains statistically unlikely for the large quantities of glass supplied and installed in buildings.

Reducing Spontaneous Breakage due to Critical Inclusions
Heat soaked thermally toughened soda lime silicate safety glass is manufactured by taking thermally toughened panes and subjecting them to the heat soak process cycle. The heat soak process cycle consists of a heating phase, a holding phase and a cooling phase. This process encourages unstable α phase to convert to the β stable phase and force the glass to fracture within the heat soaking oven. The heat soak process

cycle in EN 14179-1 requires the glass to be heated to a temperature greater than 280 °C, held at a temperature of 290 °C ± 10 °C for a period of 2 hours before controlled cooling to an ambient temperature.

This process is used to reveal the presence of critical inclusions in glass panes. It is a destructive test that is designed to break glass that is at risk.

Heat soaked thermally toughened soda lime silicate safety glass in accordance with EN 14179-1 has a reduced rate of fracture due to the presence of critical inclusions. Heat soaked thermally toughened soda lime silicate safety glass in accordance with EN 14179-1 will have a residual risk of occurrence of critical inclusions of 1 in 400 tonnes.

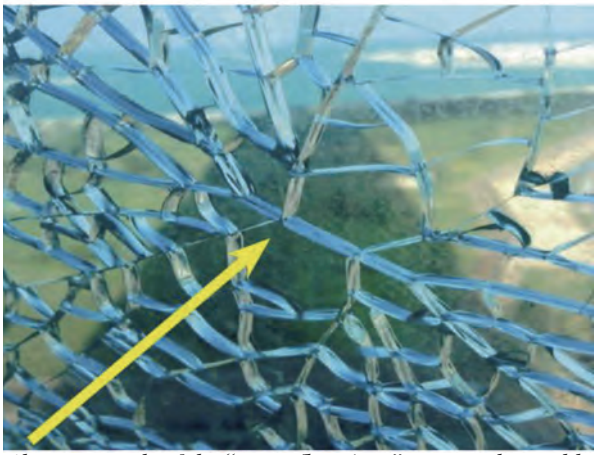
The heat soak process cycle itself is not fail safe. Other types of non-critical inclusions that may not be removed during the heat soak process cycle, and smaller sized critical inclusions that do not necessarily fracture in the heat soak oven, may cause fracture in use.

It is not possible to provide a specific definitive quantifiable residual risk of fracture due to critical inclusions in any specific batch of heat soaked thermally toughened soda lime silicate safety glass.

Heat soaked thermally toughened soda lime silicate safety glass in accordance with EN 14179 is deemed to be the best product for reducing spontaneous fractures as a result of critical inclusions.

The statistical analysis which provides the level of risk of critical nickel sulphide inclusions remaining in heat soaked thermally toughened soda lime silicate glass is valid for large volumes of production, but does not necessarily relate to individual projects.

Contamination of the float glass occurs in batches leading to periods of glass containing no critical nickel sulphide inclusions followed by "spikes" when a number of inclusions are present in a particular batch of float glass. It is for this reason that there appear to be batches of glass supplied for specific projects that have been selected "by chance" from a contaminated batch of float glass and others that appear to be free from contamination. Residual risk analysis is indicative only



Above, example of the "Butterfly Wings" pattern observed by myself in Abu Dhabi.

and over the life of a building. Nickel sulphide induced failures may occur despite heat soaked thermally toughened soda lime silicate safety glass in accordance with EN 14179-1 being installed.

Assessment of Fracture Pattern Characteristics of Thermally Treated Soda Lime Silicate Glass

The fracture pattern of Thermally Treated Glasses is characterised by a pair of particles commonly referred to as the "Butterfly Wings".

This fracture pattern can occur with other glass types. In the case of Thermally Treated Glass the fracture, which produces such a fracture pattern can be the result of wind, snow, soft/hard body impact, centre punch, surface chips and any type of particle inclusion.

To determine the specific cause of the fracture, the origin must be examined in detail by a qualified expert. To determine if it is the result of an inclusion, it may be necessary to send the inclusion particle, if present, for laboratory analysis.

The orientation of the façade can play a part in the timing of fractures. Typically South, East and West facades will show spontaneous fractures first followed by the North façade sometime later. It is simply a function of time / temperature / stress in the glass all combining to form a pattern of breakages on a building.

The above three images show an example of the incorrect glazing in the overhead position that has suffered Spontaneous Fractures due to Critical Inclusions. The images effectively demonstrate the safety implications of these fractures.

There are many instances of spontaneous breakages occuring on buildings in commercial and domestic installations all over the world. All of which are different but all will look to portion liability and many of which end up in a legal dispute. It is crucial that the correct and suitably qualified industry expert witness is appointed.

Author
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After leaving the military, Ben worked for a UPVC Manufacturer as a technical advisor to the trade. Upon joining the GGF in 2012 as a trainee Technical Officer, he carried out a two-year training programme to become a full Technical Officer after shadowing some of the industry's leading experts. Since then Ben has been involved in all elements of the glazing industry and worked on some extremely high profile glazing projects internationally.

www.ggf.org.uk

Are We Set to See an Increase in Lift Related Claims?

As a practice of independent building services engineers, we have our fair share of building services related expert instructions but by far the largest case load relates to lift and escalator claims. Partly, this is because we are an established and renowned lift consultancy where the vast majority of commissions are commercial instructions. Additionally, we are fortunate to have not one but two lift industry, time served Chartered Engineers who act as experts: ***John Newbold****, the Director of the Department, and* ***Colin Craney*** *who is unique in the industry being also a Barrister. Both are well known and respected within the industry.*

This profile, and our relationships with many instructing lawyers, are not the only reasons our expert instructions related to lifts and escalators are busier than ever.

There are several reasons why this may be the case:

You only have to take a look at the cranes in our cities skylines to realise that buildings are getting taller and, with that, the number and rise of required lifts. Couple that with the requirement for public and commercial buildings to be accessible and it's no surprise that lifts and escalators are in high demand.High rise lifts employ different and more complex engineering to overcome the issues introduced by height and lift speed. Unfortunately, the availability of skilled labour has not kept up with this due to a historic lack of training and investment. Inevitably, and in common with most industries, the incorporation of I.T technology and the recent trend towards 'big data' and A.I. demands skill sets not routinely found in the lift industry - further exacerbating the skills shortage.

Lifts and escalators are highly regulated with the landscape ever-changing. This has accelerated and will continue to do so as the tragedy of Grenfell unfolds. This is not just in the arena of fire, where lifts in higher rise buildings are increasingly relied upon, but also in inspection and testing which seems to be another aspect criticised by the Grenfell inquiry. A Brexit induced change to statutory certification has created further challenges, not yet technical (as all European Norms have been directly adopted), but in documentation and sign off where the new UKCA mark (replacing the CE mark) has to be approved by a UK Approved Body. For lifts the transition has been extended, which is a further sign of the slow responses in the industry.

We are seeing in our commercial projects significant strain on the supply chain. This is being reflected in higher costs and long or indeterminate lead times. This post pandemic situation is not unique to the lift industry, but we speculate whether these will feed future commercial delay claims, especially as lifts are an end of programme project package.

It is easy to see that these issues (either singularly or multiples of) are likely to lead to mistakes with designs, installation and commissioning with corresponding programme extensions and the inevitability of commercial claims.

Tragically, accident investigations and claims are an ever present workload. Mercifully, claims related to lift users are often minor in nature through slips, falls and impact by doors. Serious accidents to lift users are very rare and, because of multiple and ever improving safety systems, are caused by catastrophic (usually multiple) engineering failures.

It is a different matter for those working within the industry where accidents and occasionally fatalities remain stubbornly common.

Root cause engineering analysis is necessary, often involving test and simulation to truly understand a mode of failure, who are the parties at fault and most importantly, lessons learned to hopefully prevent re-occurrence.

The engineering knowledge required for this needs to be diverse, which is where real world field experience comes into its own. Our investigation techniques have involved simulations and dynamic measurements of equipment and components in addition to drawing on our past and current field experience. Reports need to be logically formulated using clear, jargon free language (important in a jargon strewn industry), but we are not limited to just the written word if our message can be more clearly conveyed through other mediums. We have constructed engineering models, videos and animations to supplement our arguments – all in an attempt to ensure all parties have a clear and unambiguous reading of our message.

Some interesting examples of investigations and cases have included:

Nearly an Escalator Run-away
In surveying a pair of escalators Colin found that two of the four nut-and-bolt sets which secured the drive chain sprocket and emergency brake disk to the step band drive shaft had fractured. The failure of all four bolts would have disabled the escalator emergency brake and the step band would have runaway under passenger load.

One of the fractures and the associated fastening point is shown at Figure 1.

Figure 1 Fractured bolt at the step drive and corrosion product discharge at the flange

A shedding and build-up of corrosion product is clearly visible around the location of the failed bolt and was found to be similar around the other three bolts, albeit that this had not been identified or reported under the maintenance or Examination regimes. Further corrosion can be seen at the internal flange joint between the components indicating cyclical rotational movement, and likely imminent failure.

The fracture surface of one of the two sheared bolts, which is shown at Figure 2, is clearly indicative of fatigue failure in a brittle material.

Figure 2 Fatigue fracture surface typical of a fatigue induced fracture in a brittle material

Further examination revealed that the bolts, which should have formed an interference fit, were likely to have been insecure in their locations giving rise to movement and the cyclical loading.The stress on the bolts drove the growth of fatigue cracks, which had developed from the thread root. The elongation of one of the fixing holes is clearly apparent in Figure 3.

The escalators had a vertical rise of over 11m and were used intensively over an extended operational day. Overall, the engineering design was poor, particularly for such an onerous application, and the manufacturer had extended its standard design application for

Figure 3 Elongation of the bolt hole at the step drive

a 5m escalator rise to an extended 11m rise and duty without apparently re-evaluating the stresses placed on the machine. The escalators were subsequently replaced.

A Twisted Lift Car and Fake Bolts

Another investigation involved a failure of a freight lift car structure due to extreme overload - more than 200% of its rated load. Subsequent operation of the car safety gear during descent caused the car structural sling to twist and rack as the safety gear engaged wholly on one guide rail, imposing excess impact, shear and torsional loadings and stresses upon the structural fasteners and the car sling assembly.

The contractor elected to repair/reinstate the lift car which included replacing the structural fasteners in the car sling. The lift dated from the 1960s and incorporated fasteners of imperial design, including a number of special 'set over head' machine bolts.

The contractor reported problems in obtaining the 'set over head' bolts, but subsequently arrived at the job site with a box of shiny new 'set over head' bolts and a request that an acceptance form should be signed. A rather unusual request? A Test Certificate, drawing and specification was requested, but needless to say none were forthcoming.

When the contractor's engineers attempted to tighten the replacement 'set over head' bolts, the bolt heads sheared from the shank sections. The fracture surface, which is a good example of a torsional ductile failure, is shown in Figure 4. Not forgings, but forgeries!

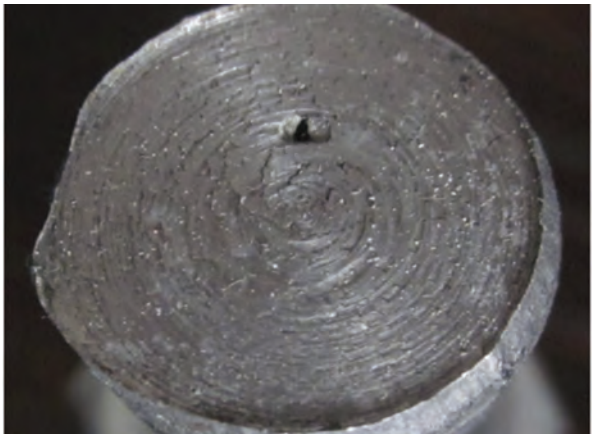

Figure 4 Fracture surface of a replacement set over head machine bolt typical of a torsional ductile failure

Non-certified Door Locks
Supply chain integrity has also become a concern in recent years and not always in relation to the widely criticised Chinese suppliers. An investigation of a failure of a lift landing gate interlock in which the gate was opened whilst the lift car, which continued to operate, was absent from the floor. This could too easily have resulted in a fatality and revealed that a failed casting differed significantly in form from that in the design drawings. Inspection of other interlocks revealed further, and more radical, deviations from the design specification and drawings.

Whilst the failure of the first casting arose due to a fatigue crack, other castings were found to incorporate significant design deficiencies that compromised the overall integrity of the interlocks. Detailed inspection revealed the presence of cracks in the castings which had developed as a result of the component assembly process. This differed from the original design specification and included manual peening of the ends of a steel pivot pin in order to secure this within the casting. Stresses introduced in the castings during the peening of the pivot pins induced cracks in the cast material. These cracks were located at points at which the cast components were weakest.

In order that the client's lifts could be retained in service whilst compliant replacement components were manufactured all interlocks were inspected and the cast components subjected to dye penetrant tests.

Subsequent investigation revealed that the components, which had been manufactured in the UK, had not been approved under the Lifts Regulations, or for that matter any definable quality standard, but had been manufactured under a subcontract, with little or no quality control or understanding of the regulatory requirement and the possible hazards and risks that might arise. The variations to the design and material specification were undertaken on an ad-hoc basis by the subcontractor.

The Missing Cam
Upon investigating a serious fall down a lift shaft by a lift user, an understanding of how the lift moved away allowing the swing landing door to be opened needed to be established.

It is required that a landing lock for a lift of this age has two circuits; one to confirm the door has closed and the other to confirm that the door is mechanically locked, and the lift can move away. The locking action is normally performed by an electromechanical cam mounted on the lift and interacting with the landing door lock.

The cam and door lock mechanism was missing so that when the door lock jammed in an unlocked position, the lift could move away allowing the lift user to open the door and fall.

Subsequent analysis of the schematic diagrams and control circuits revealed that the electrical capability for cam and door locked circuits were present but shorted out so that the cam could be omitted from the design.

This cost saving ultimately cost the installer a lot more.

Rusty Ropes
Regardless of commonly held perceptions lift suspension rope failures are rare and when this does arise causation is more often related to an extraneous factor or event. We are however regularly asked to advise in relation to rope condition and other related problems. In part, this is due to the higher rise installations requiring rope structures without internal self lubricating cores.

Figure 5 shows a section of a set of suspension ropes which have developed rouging, a form of fretting corrosion, under which the internal core of a rope becomes dry.When the rope strands and wires distort under pulley loading, the wires abrade each other with a subsequent loss of material and rope diameter characterised in the rouge evident at the rope surface. These ropes were prescribed for immediate replacement prior to further use of the lift.

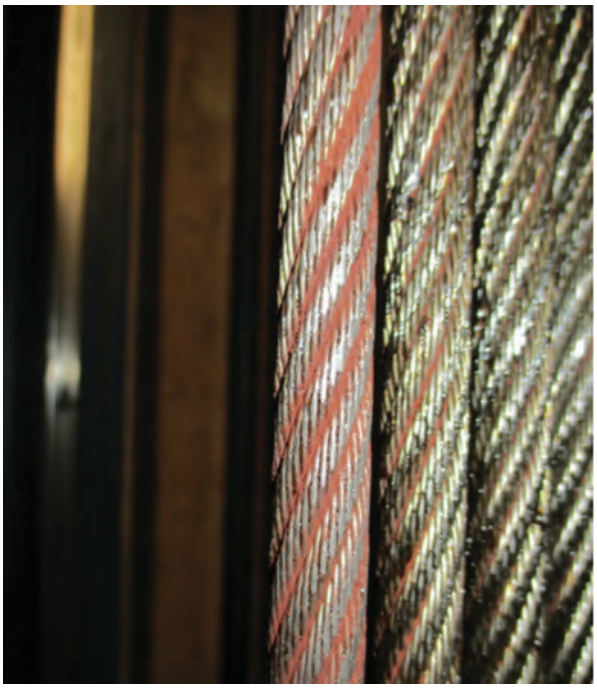

Figure 5 Lift Suspension Ropes & Rouging

Escalator Step Deflectors
A hazard affecting escalators is that of side-of-step entrapments due to friction between shoes and the skirts at the side of the moving steps. A mitigation in the form of skirt deflectors, usually brushes has been mandatory in the UK since HSE's 1983 Guidance Note PM34 which required that new escalators installed after 1st January 1984 should be equipped with these. However, PM34 did not prescribe an installation method or design, but did require that retrofitting of skirt defectors to existing escalators should not in itself cause any further hazard. A subsequent EC requirement required skirt deflectors on all new escalators installed after February 2005 and prescribed dimensional requirements for the application of the deflectors.

The Standard specifies detailed shape and dimension ranges including the end piece of the skirt deflectors (which need to be prior to the comb intersection) and the range of dimensions the deflector is allowed to be fitted above the step line.

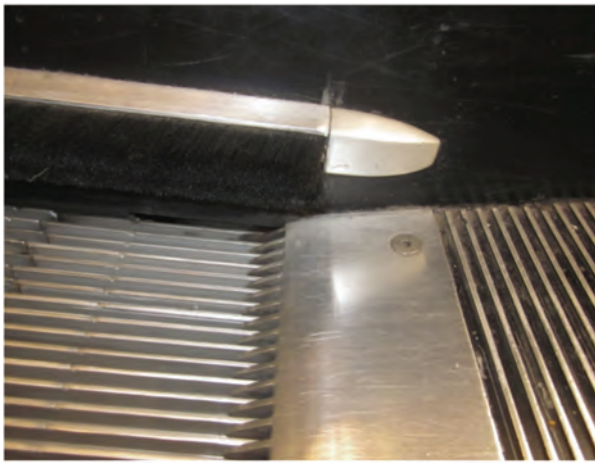

Figure 6 Skirt Deflector Extending Over Comb

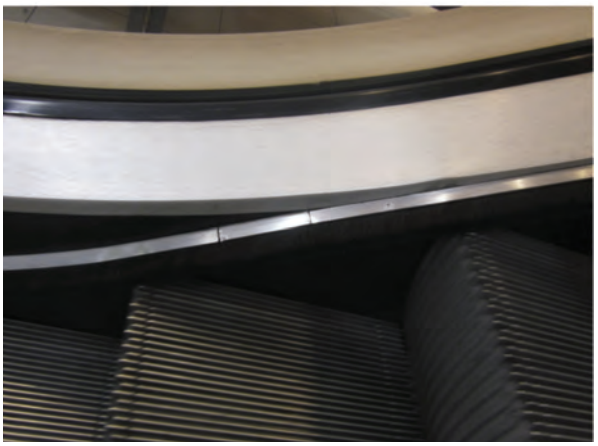

Figure 7 Insufficient Clearance Between the Underside of the Skirt Deflector and Step Treads at the Escalator Transition/Horizontal Section

Many escalators in the UK continue to operate with skirt deflectors installed prior to the 2005 revision, installed to dimensions which conflict with those prescribed as figures 6 and 7 illustrate. These give rise to a risk of trapping the foot of a child between the deflector and moving steps. We are surprised to receive reports of injuries arising due to this situation because the problem can be resolved at a relatively low cost avoiding what are readily avoidable entrapment incidents and subsequent litigation and disputes.

Application of LOLER

Some of our recent cases have involved prosecutions relating to the Lifting Operations and Lifting Equipment Regulations (LOLER 1998) and in particular the extent of the duties of Competent Persons undertaking periodic Thorough Examinations under the Regulations. Passenger carrying lifts are examined by a Competent Person at intervals not exceeding 6-months. In the event of an accident or failure the application of hindsight, coupled with misunderstandings of the extent of the duty of the Competent Person, may lead to allegations of negligence and/or breach of the statutory duty. We have longstanding knowledge of the Regulation and have advised enforcement authorities and defendants in this area.

These examples demonstrate the diversity of engineering and standards required to represent clients in lift and escalator expert cases.

The recent pace of regulatory change, the move to more high-rise buildings and the challenges of up-skilling the workforce all seem likely ingredients that will ensure that demand for expert witness services will at least keep pace with the return to commercial activity post pandemic.

Bios

John Newbold is Director of SVM Associates' lift and escalator consultancy. He is a Chartered Engineer and member of the I.E.T and I.H.E.E.M. He oversees the commercial operation of SVMA as well as providing expert representation for building owners/managers, users, suppliers, and contractors alike. This is for providing expert reports, representation in alternative dispute resolution methods and criminal claims.

Colin Craney (BA (Hons), BSc (Hons), LLB (Hons), MSc, LLM, MBA, CEng, CMgr, FCIBSE, FCMI, FCIArd, CMIDSH) is an accredited mediator, consultant on the HSE OHSCR Register and non-practising Barrister called to the Bar by the Honourable Society of the Middle Temple. He has provided expert witness services and given evidence to Coroners Courts and in criminal and civil litigation cases. This is in addition to commercial consultancy delivering lift projects and advising lift owners to manage their portfolio for SVM Associates.

Caesar's Wife no Longer the Exemplar in Bias Cases?

*In **Kelly v Minister for Agriculture and Others** the Supreme Court quashed the Cabinet's decision to dismiss the applicant from his position as harbour master at Killybegs Fishery Harbour Centre. A Minister (who was also a local TD) was involved in both raising complaints against the applicant and, in the Cabinet decision-making process which followed. This "twin involvement" of the Minister was found by the Supreme Court to constitute objective bias and so the decision to dismiss the civil servant was quashed.*

Facts

The applicant was appointed harbour master at the Killybegs Fishery Harbour Centre in 1996. A complaint arose around the applicant providing pilotage services through a company of which he was a director and a 1% shareholder. The Department of the Marine and Natural Resources ("the Department") decided to investigate, appointing the personnel officer of the Department as the investigator in 2004.

Separately, a Minister (who was also a local TD) made unrelated complaints with reference to the applicant. The Minister then attended a meeting in 2004 with the investigator, at which the Minister outlined a wider range of complaints in relation to the applicant.

Thereafter, various matters were investigated, resulting in a final report by the investigator recommending dismissal. This was appealed to the Civil Service Appeal Board. The Appeal Board did not accept that the applicant would not derive any benefit from his pilotage work. The Appeal Board did not disturb the recommendation of dismissal in respect of this matter. The Appeal Board also upheld the investigator's findings concerning the other complaints, but disagreed with the investigator that these grounds were sufficiently serious to justify dismissal.

In 2009, the Cabinet met, including the Minister who had made complaints about the applicant. The Cabinet decided to dismiss the applicant. The applicant applied to judicially review his dismissal, on the basis that the decision was affected by actual bias and objective bias. The applicant predominantly focused on two claims when presenting his case; the meeting of the Minister and the investigator in 2004 tainted the disciplinary process which followed, and the fact that the same Minister who had made the complaints in 2004, participated in a Cabinet meeting in 2009 which decided that the applicant should be dismissed from his civil service position.

The High Court refused the applicant's application, and the Court of Appeal upheld this decision of the High Court. Leave was given to appeal the decision to the Supreme Court. In granting leave to appeal to the Supreme Court, the Supreme Court considered that the case raised issues of law of general public importance relating to the test for bias.

Supreme Court Decision

Actual Bias

For actual bias to be established, a decision-maker must be *"influenced by some existing relationship, interests, or attitude, without which the decision would be different."* In addition, the influencing factor on the decision-maker must be one that pre-dates and is external to the decision making process. In essence, the applicant must prove *"the decision-maker was deliberately setting out to hold against a particular party, irrespective of the evidence."* Due to these requirements, "*an allegation of actual bias is rarely likely to succeed*"

Dunne J discussed several factors as to why there was no actual bias on this occasion: the investigating officer had no pre-existing relationship/attitude towards the applicant, the decision to investigate the applicant had been made before the meeting between the Minister and the investigator in 2004, the matters complained of by the Minister did not form part of the subsequent investigation and the Minister's involvement was included in the chronology presented to the Appeal Board (i.e. it was not concealed). Dunne J concluded that "there is simply no evidence to support the contention that [the investigating officer] was so influenced by the meeting with the Minister that he deliberately found against Mr Kelly". All Supreme Court Judges agreed with Dunne J that actual bias was not present in this case.

Objective Bias

As stated by *Denham J in Bula Mines Ltd v Tara Mines Ltd* (no. 6), the test for objective bias is "whether a reasonable person in the circumstances would have a reasonable apprehension that the applicant would not have a fair hearing from an impartial judge on the issues."

On the question of objective bias, the Supreme Court considered both the Minister's participation in the Cabinet meeting at which the decision was made to dismiss the applicant and the Minister's meeting with the investigator in 2004 that preceded the dismissal.

On the Minister's participation in the Cabinet meeting, Dunne J found:

"It is, in my view, impossible to conceive of a situation in which the hypothetical, reasonable observer, aware of the relevant facts, would not have had a reasonable apprehension of bias, by reasonable involvement of the Minister in the ultimate decision to dismiss Mr Kelly…It should have been apparent to the Minister that it was inappropriate for her to participate in the Cabinet decision leading to the dismissal of Mr Kelly, given her previous interest and involvement in the matters at issue"

Dunne J stated that *"a finding of objective bias against one member of a body, when that body has the responsibility of making a decision, will taint the decision of the body overall."* Therefore, Dunne J concluded that the Cabinet's decision to dismiss that applicant had to be quashed due to the Minister's involvement.

While stating that both factors were relevant, O'Donnell J placed increased focus on the Minister's meeting with the investigator in 2004 by reason of the facts: that the meeting was set up, that it is unlikely that such a meeting would have been afforded to a member of the public, that the normal function of civil servants is to accept direction from Ministers, that no official note of the meeting was kept and that shortly after the meeting the applicant was informed for the first time of the fact of the investigation and suspended from duty.

O'Donnell J criticised the application of the Caesar's wife test when considering objective bias:

"[T]he reasonable bystander must be expected to be not just fair, but robust and aware that a standard for objective bias that is met if even a suspicion can be voiced could result in a near-impossible test which could be too easily invoked by disappointed parties who cannot point to any weakness in the individual decision. It is easy to say that the system benefits if the most demanding standards are required, since this will exclude even unrealistic suspicions about the process, but such a test assumes that the benefit of avoiding any hint of suspicion in the mind of even the most committed cynic is costless, when in fact such a test exacts a very heavy price in decisions set aside and outcomes delayed. Indeed, if a reasonable bystander had an interest in the classics, he or she might be aware that the test that Caesar's wife must be above suspicion, often used to justify demanding of officials, adjudicators and judges that they not only perform their functions correctly, but do so in a way that cannot be criticised by even the most suspicious person … was first announced to allow Caesar justify divorcing his wife, Pompeia, an event that did not seem to trouble him, since it left him free in due course to marry a third wife. Pompeia's views are not known. It would be more impressive if the standard of behaviour was one demanded of oneself rather than used as a vehicle to criticise and undermine the decisions of others. This, or any other case, should not be approached on the basis that if a suspicion can be stated, particularly in a world of fevered social media commentary, a decision must inevitably be set aside.

Moving from the reign of Caesar to the reign of the smart phone, O'Donnell J brought matters back to today, warning against considering cases of objective bias "on the basis that if a suspicion can be stated, particularly in a world of fevered social media commentary, a decision must inevitably be set aside."

O'Donnell J further acknowledged that:
"the Minister did not form any part of the [investigating officer's] investigation, that the investigation itself was meticulous, that the facts were not in dispute, and that [the investigating officer's] recommendation as to the penalty was open to review…,an extensive applicant process before a body that had no knowledge of the Minister's involvement, and which produced the relevant recommendation for dismissal. Furthermore, the fact that the structure required that, before an established civil servant was dismissed, it was necessary for the Government to decide to accept the recommendation to that effect, provided another layer to the process tending to insulate it from the events of five years earlier. If there was nothing more in the case, and a Cabinet that knew nothing of the background had accepted the recommendation of dismissal, then I think a reasonable bystander would consider that, while the events of 2004 were troubling, the suggestion that a dismissal in 2009 was a product of, or in some sense procured by, a ministerial intervention five years earlier was implausible."

O'Donnell J went on to state that the special features of this case that would mean the reasonable bystander, whilst assumed to be more forgiving than Caesar, would reach a finding of objective bias:

"In this case, however, the Minister was also an active participant in the investigation, and made a complaint in relation to it, was present at the outset of it, was one of the first people to meet the investigator and express strong views to the investigator, and then participated in the final decision. … I consider that the reasonable bystander would not, at a minimum, be able to confident that the procedure was not affected by the twin involvements of the Minister as a complainant/informant at the outset of the process, and as a decision-maker at its conclusion. "

On the Minister's meeting with the investigator, MacMenamin J warned that the investigator *"whose findings were to have binding effect, embarked on the investigation with this range of quite damning criticisms in his mind"*. MacMenamin J went on to explain that the focus was not on whether the investigator actually behaved in a bias manner:

"[The] objective bias test does not concern whether [the investigating officer] used this information or whether it informed part of his investigation; but, rather, that a meeting had taken place between himself and an extremely important person who had told him these things about the man who he was about to investigate, and that he [the investigating officer], had carefully noted them all down."

Despite differing views on exactly which aspect of the investigation was the most problematic in terms of objective bias, all, except Charleton J, found that the investigation process was tainted by objective bias due to the involvement of the Minister, with MacMenamin J summing up the sentiment:

"It is necessary to bear in mind throughout, that the test for objective bias is, itself, an objective one … It is not what we judges think, but rather the inference which an objective observer would draw as to the process, seen in its entirety."

Assessment

This decision serves as a useful reminder for employers in relation to the following issues:

1. Actual bias is difficult for employees to prove, as they must show that the decision-maker was deliberately setting out to find against the employee, irrespective of the evidence produced throughout the investigation.

2. Objective bias can be established if the employee under investigation can show that there is a reasonable apprehension that they did not receive a fair investigation conducted by an impartial investigator and concluded by an impartial decision-maker.

3. Re-affirmation of the fair procedures principle that an individual cannot be the decision-maker in their own case. Twin involvement as both the complainant and the decision-maker is a catalyst to an investigation being tainted by objective bias. This may result in the decisions from an investigation being quashed.

When appointing investigators and impartial decision-makers, employers should ensure that the appointees have not previously been a party to the investigation (i.e. a witness or complainant) and do not have a history of animosity towards the employee under investigation.

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With thanks to **Rosanna McAleese**, trainee within the Employment Group at Arthur Cox, for her contribution to this article. **www.arthurcox.com**

In a New Survey, a Majority of Attorneys & Expert Witnesses Call for Increased Cryptocurrency Regulation

by Dr Stephen Castell CITP

A recent Survey conducted by *Advice Company* [1] has found that, while half of the surveyed experts and attorneys (49%) see cryptocurrency as very speculative, and one-in-five (18%) see it as a fraud or Ponzi Scheme, an equal number 'wish they had bought some' [2]. This interesting study, probably the first of its kind, provides a valuable insight into objective, independent assessment and evaluation, by skilled legal and expert professionals, of cryptocurrency, blockchain, digital assets and decentralized finance client matters, projects and disputes. And it confirms the now rapidly-growing widespread call for tighter regulation of cryptocurrencies, and digital asset products and services.

The Survey noted that cryptocurrencies have recently played a dramatic role in impacting our understanding of financial speculation, cybercrime, and ransomware. Ever since breaking onto the scene in 2009, cryptocurrencies have continued to remain an intensely polarizing phenomenon. While cryptocurrency proponents argue it is a revolutionary new form of currency that will democratize finance and change the world, others contend it is nothing more than an elaborate scam.

The Advice Company survey was interested in what highly educated, trained and experienced attorneys and experts thought of cryptocurrencies, and it solicited responses from a diverse group of such professionals, with widely different areas of expertise and varying levels of familiarity with 'crypto'. The Survey responses showed a relatively high degree of agreement and some common themes:

- Half of respondents viewed crypto as very speculative, and the vast majority believed it needs further regulation.
- Roughly a third (31%) reported personally purchasing cryptocurrencies.
- Many attorneys had already dealt with cryptocurrency matters (18%), and many more (55%) expected to do so in the future as part of their legal practice.

Bitcoin has little utility value as actual 'money'. It is only marginally exchangeable for other currencies, or for paying for goods and services, and is principally a tradeable investment instrument, a highly speculative, and volatile, 'store of value': it can be said 'to exist only ***to*** exist' [3]. There are crypto 'stablecoins' and 'utility tokens' that, by contrast, are conceived from the start to be of practical business and social usefulness [4].

One way or another, for the time being, cryptocurrencies are undoubtedly here to stay. Digital forensics expert Richard Sanders, of *CipherBlade*, the Blockchain Investigation Agency, has commented: "Most people will be utilizing this innovation within a decade, likely without realizing it … broader society can't ignore the elephant in the room just because we don't like or understand it…", echoing my own analysis in an earlier article in this journal: " … blockchain applications … are … here to stay, and the majority will be robust implementations by established major corporations, with most of us, as consumers, hardly needing to know any of the details …" [5].

However, as I also pointed out, "… [while a] few of these [crypto innovations] may prove to be commercially-successful, disruptive game-changers, and usher in the possibility of a new global 'crypto-economy' paradigm … many have tended to have been significantly fuelled by the 'black cash' of drug-dealers, money-launders, traffickers and the like". This growing 'dark crypto underbelly' sadly continues to be entrenched and confirmed, not least by recent headlines such as the FBI's seizure of millions of dollars in bitcoin from the Colonial Pipeline Hackers, and clearly cryptocurrencies will continue to create growing, and new, challenges for law enforcement and the legal system.

I recently proposed for the crypto industry a self-regulatory protocol, the *CryptoSure Trust Model* [6], and either something like that, or enforced imposed statutory controls, will have to be put in place, bringing cryptocurrencies into the embrace of a regulated system of *Trusted Third Parties* operating firmly within the *Rule of Law*. Absent such regulation, we will see a continuing escalation of crypto scams, frauds, failures, investigations, criminal prosecutions and civil disputes which would not be healthy for establishing 'Decentralized Finance' as a robust and reliable part of the financial system, nor for society at large.

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NHS medical records: What is happening with patient data?

NHS Digital was due to change the way GPs stored patient data on the 1st September, but this has recently been postponed. There were concerns that patients had not been given enough time to consider the changes, there was misinformation and lots of patients were completely unaware of the scheme. The proposals are called the General Practice Data for Planning and Research ('GPDPR') data collection. Under the scheme, for the first time ever, data that general practitioners ('GPs') store on patients could be uploaded and stored on a central database that NHS Digital control.

What are they collecting?
NHS Digital are planning to collect all records created up to 10 years ago. This will include data on sex, ethnicity, sexual orientation, diagnoses, medications and information about a patient's physical, mental and sexual health. It would not include clearly identifiable information such as names or addresses.

Most of the records collected will be 'pseudonymised' which means personal data, which could be used to identify patients (such as NHS numbers, date of birth or postcodes) will be replaced or removed. This process doesn't completely anonymise the data and privacy experts are concerned it will be possible for patients to be reidentified by reverse engineering the data.

How are they collecting it?
The two different options for opting out are:

1. Type 1 opt-out: this prevents confidential informtion being shared outside your GP practice for purposes other than your individual care. This stops GP practices from sharing data to NHS Digital and prevents them from collecting it in the first place.

2. National data opt-out: this enables patients to opt out from having their confidential patient information shared for reasons beyond their individual care. This allows NHS Digital to take the data but blocks them from sharing it externally.

Changing the way patients could opt-out was one of the reasons for delaying the implementation. Some GPs felt NHS Digital were not obtaining sufficient consent and were refusing to share their patients' data. For consent to be valid it must be informed so the patient understands what they are agreeing to. This is why doctors explain about blood tests, surgeries and examinations before they happen. GPs have raised concerns that they don't fully understand the risks and benefits of the GPDPR and therefore can't explain it to their patients to obtain consent.

Why has this been delayed?
The Parliamentary Under Secretary of State Jo Churchill wrote to GPs and explained that they are not setting a fixed start date for the collection of data until a number of measures are in place.

1. Data can be deleted after it has been uploaded so that patients can change their opt-out status at any time. Under the old plan, patients had to register their opt-out before the 1st of September and there was no way to delete data once it had been uploaded.

2. The backlog of opt-outs has been cleared.

3. A Trusted Research Environment has been developed and implemented so that GP data can't be copied or shipped outside of the NHS without explicit consent.

4. They have comprehensively communicated and educated GPs and patients about the scheme.

This is the second time the programme has been pushed back. Jo Churchill made a similar announcement in June and the implementation was delayed from the 1 July to 1 September. A similar scheme called Care.Data was abandoned in 2016 following very similar criticisms and this had also been delayed several times. Interestingly, in the most recent announcement there has been no new date set for the roll out.

Why does NHS Digital want GP records?
NHS digital have said they will use the patient data to support "research and analysis to help run and improve health and care services". Patient data is very useful to do things like develop new drugs, treat conditions and spot trends which is why third parties would be interested in buying it. NHS digital have reassured the public multiple times the data is not for sale. They are trying to mollify these concerns by introducing the 'Trusted Research Environment' and being transparent about who will be accessing the data.

This isn't the first time there has been privacy concerns about how the NHS handles our data. The Royal Free NHS Trust have a relationship with Google's DeepMind Health (which was incorporated into Google Health in 2019). In partnership they

developed an app called Streams which uses patient data to diagnose acute kidney injury. In 2018 the ICO ruled that the app was not compliant with the Data Protection Act 1998 primarily because patients would not have reasonably expected their information to be used in the way it was. The close link between the app and Google continues to cause concern.

It is clear medical data is very valuable for both public health and commercial purposes. Although we like to think it will only be used in ways that benefit the NHS, the concern is that it might not be. Once it is collected and anonymised, we lose control of how it is used, and it could be used in ways that don't directly benefit us. It will be interesting to see whether NHS Digital can overcome these concerns and set a new date for implementation.

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(Mc) Clouds of (Expert) Witness

by Peter Crowley of Windor Actuarial Consultants

The best laid plans of civil servants – especially Her Majesty's Treasury. Try and save the Exchequer a bit of money – and look after your senior cronies by offering them some "senior privilege" – and, what do you know, but some upstart takes you to court for age discrimination! Age is, I understand, a "Protected Characteristic"(wish someone would protect mine - it's getting far too large!) and so you end up back at the beginning – with lots of potential compensation to pay! Did none of them consider consulting the lawyers on this?

Where do you go? The usual requirement – to put someone back to the position they would have been in had they not suffered the injustice – or "Counterfactual", as I believe the lawyers call it – can be difficult to determine. Lord Peter Wimsey never had to contend with pensions, so his expert deliberations on the real location of his brother at the time of the alleged murder is of less help than we might like to hope.

Let's start with the civil service's own schemes – an interesting collection of names and capitalization relating to past incarnations and benefit levels. The most recent, and current default scheme is called "alpha" – which seems appropriate (for any civil servant not acquainted with Aldous Huxley's Brave New World, this is how they see themselves….)

2015 Remedy (McCloud)
Last updated 06/10/2021
Changes to Civil Service Pensions under Remedy
In 2015 the government introduced reforms to public service pensions. Most public sector workers were moved into a new pension scheme called 'alpha.'

In 2018, the Court of Appeal found that some of the rules put in place back in 2015 to protect older workers by allowing them to remain in their original scheme, were discriminatory on the basis of age.

As a result, steps are being taken to remedy those 2015 reforms, making the scheme fair to all affected members. The majority of active members will start seeing changes in their pensions from April 2022.

Over the coming months, we'll be sharing more information and guidance to help you understand if you're affected and what this may mean for your pension but for now, there's no action you need to take.

Public service pension schemes consultation response - updated February 2021
The government's consultation response sets out how the government will remove the discrimination identified by the courts in the way that the 2015 pension reforms were introduced for some members.

All members of civil service pensions who continue in service from 1 April 2022 onwards will do so as members of alpha. Classic, classic plus, premium and nuvos will be closed in relation to service after 31 March 2022.

It has also been decided that eligible members will receive a choice at retirement of which pension scheme benefits they would prefer to take for the period from 2015 to 2022.

The choice will be between their pre-2015 pension scheme or their alpha pension. Not all members are better off in their pre-2015 scheme, so it is important that individual members are able to choose which benefits are better for them.

Background - Updated February 2021
In 2015 the government introduced reforms to public service pensions, meaning most public sector workers were moved into new pension schemes in 2015. Most civil servants were moved into the alpha pension scheme.

In December 2018, the Court of Appeal found that the 'transitional protection' offered to some members of the judges' and firefighters' schemes was discriminatory against younger members.

On 15 July 2019 the Chief Secretary to the Treasury made a written ministerial statement confirming that, as all the main public service pension schemes contained similar 'transitional protection' arrangements, the difference in treatment will need to be addressed across all those schemes for members with relevant service.

The discrimination that was identified in the public service schemes arises between the different treatment between members in these categories:

1. those individuals who were members of pre-2015 public service schemes as at 31 March 2012 and were fully transitionally protected by remaining in that scheme after 1 April 2015 (as a result of being within 10 years of their normal pension age);
and
2. those who were members of the pre-2015 schemes as at 31 March 2012 and were not treated as fully transitionally protected and moved to new post-2015 arrangements on or after 1 April 2015.

For the Civil Service the pre-2015 schemes are; classic, classic plus, premium and nuvos and the post-2015 scheme is alpha.

On 4 February 2021 an updated Written Ministerial Statement was made and this set out the government's response to the consultation.

Legal process - updated February 202
The government will introduce new legislation when parliamentary time allows. Pension schemes will also run individual consultations on their specific scheme regulations. Once these steps are complete, implementation will begin, and the changes will then be introduced.

Removing the discrimination will take time, but the government is committed to ensuring all eligible members are treated equally and are able to choose to receive pension scheme benefits for the period 2015-22 from either scheme at the point of when they retire.

As is often the case, attempts to save money on pay and related remuneration can backfire – the usual failure being the inability to understand that people "out there" will realize if their benefits have been degraded, and no amount of carefully wrought wordage will hide the fact.

This happens too often in pensions – and I have seen it backfire in the private sector as well. Basic logic can backfire badly with pensions, and needs to be confirmed via expert legal advice.

The Covert Human Intelligence Source (Criminal Conduct) Act 2021: Making Lawful Criminal Conduct

by Dr David Lowe, Leeds Law School

Introduction

In April 2021 the UK government passed the Covert Human Intelligence Sources (Criminal Conduct) Act 2021, which came into force in July 2021. A covert human intelligence source, commonly referred to as a CHIS, is in police terms an informant or in the security service terms an agent. For this article they will be referred to as informants. With the Act allowing in specified conditions informants to participate in criminal conduct, the Government felt it had to legislate on this issue following a majority decision of the Investigatory Powers Tribunal that held such action can be lawful. In the case, *Privacy International and others v Secretary of State for Foreign and Commonwealth, and others* [2019] UKIPTrib IPT_17_186_CH the claimants challenged a policy that the Prime Minister acknowledged existed in March 2018 that the Security Service (MI5) authorise the commission of criminal offences by its agents.

The challenge was based on seven grounds:

1. There is no lawful basis for the policy, either in statute or at common law.

2. The policy amounts to an unlawful de facto power to dispense with the criminal law.

3. The secret nature of the policy, both in the past and now, means that it is unlawful under domestic principles of public law.

4. For the purposes of the European Convention on Human Rights (ECHR), the policy was not and is not "in accordance with law".

5. Any deprivation of liberty effected pursuant to a purported authorisation given under the policy violates the procedural rights under Article 5 of the ECHR.

6. Supervision of the operation of the policy by the Intelligence Services Commissioner in the past, and now the Investigatory Powers Commissioner, does not satisfy the positive investigative duty imposed by Articles 2 (right to life), 3 (prohibition of torture and 5 (right to liberty of the person) of the ECHR.

7. Conduct authorised under the policy in breach of Articles 2, 3, 5 and 6 (right to fair trial) of the ECHR is in breach of the negative and preventative obligations in the ECHR. It is submitted that the policy itself is unlawful to the extent that it sanctions or acquiesces in such conduct.

From its beginning both the police and the security services have used informants. As in virtually all cases informants operate within terrorist or criminal circles, their information can be a valuable asset during investigations. For many years the governance of informants was through internal policy and guidelines with no consistency in procedures and it was a practice that was open to challenge regarding the methods as to how informants were recruited and handled. Even though Home Office guidelines in handling of informants was introduced in 1984 to guarantee a degree of uniformity as to how the police in England and Wales handled informants. Following the House of Lords decision in R v Khan (Sultan) [1996] 3 WLR 162 where the Court held the 1984 Home Office guidelines were acceptable, Khan took his case to the

European Court of Human Rights (Khan v UK [2000] 8 EHRC 310). Knowing that the guidelines would not be seen by the European Court as a document that would come under the term 'in accordance with the law', the government introduced the Regulation of Investigatory Powers Act 2000 (RIPA) governing the recruitment and handling of informants came under statutory control. This article will examine the main provisions regarding informants in RIPA and assess the rationale as to why the 2021 Act was introduced amending RIPA by allowing in certain circumstances informers to participate in criminal conduct.

Regulation of Investigatory Powers Act 2000

Compared to the 1984 Home Office guidelines, in essence RIPA tightened up the procedures governing the recruitment and use of informants. As anticipated, the European Court of Human Rights in Khan v UK held that the Home Office guidelines was not an act prescribed by law (a statute) which is required under the limitations given in article 8 ECHR (right to privacy) for the state to interfere with this right. Section 26(8) RIPA defines an informant as one who covertly establishes or maintains a personal or other relationship with a target (person or organisation) to obtain information or gain access to another person to gain information to be passed on to the state agencies. Another key change in informant handling is the accompanying Codes of Practice that provide guidance to the police in applying RIPA when handling informants. Although a breach of the Codes of Practice will not always amount to unlawful action by a police officer, such a breach is likely to result in any information obtained by an informant during an investigation that could be used as evidence in a criminal trial being rendered inadmissible. One significant change in RIPA and Covert Human Intelligence Sources Codes of Practice (CoP) is that under section 29(5) informants are managed by a handler and a controller. Under paragraph 6.8 of the CoP the controller has to be a rank above that of the handler and their role is to maintain a general oversight in the use of the informant by the handler. Under RIPA and the CoP a risk assessment is carried out prior to, during and at the end of the use of the informant regarding the task they are asked to perform, and the likely consequences should it become known that the person was an informant.

Under the previous Home Office guidelines, risk assessments were carried out, but the recording of how they were managed was not as rigorous as RIPA. Under section 29(5) RIPA the handler must report to the controller on a continual basis. In paragraph 6.15 of the CoP it outlines that these reports include informing the controller when and where any meetings or contact will be made with the informant, the conduct of the informant and the safety and welfare of the informant. Under RIPA it is not acceptable for the handler to meet the informant on their own without the knowledge of their supervisor/line manager acting as a controller, and RIPA encourages the handler to be accompanied by a colleague during any meetings with the informant. This is to provide corroboration that the handler was acting ethically with the informant.

Covert Human Intelligence Source (Criminal Conduct) Act 2021

A long-standing condition under section 27 RIPA is when handling informants it has to be ensured they do not get involved in carrying out any form of criminal conduct and if they did then they would be arrested and potentially charged with offences related to the conduct they were involved in. This has changed with the introduction of The Covert Human Intelligence Source (Criminal Conduct) Act 2021 that has amended RIPA in relation to handling of informants that allows in certain circumstances for the informant to carry out criminal conduct. It is important to note that this is only permissible in certain circumstances.

Introducing a new section, section 29B RIPA, it allows for the Secretary of State (which in the case informants linked to terrorist activity will be the Home Secretary) to authorise an informant to carry out criminal conduct. The authorisation tasking the informant to carry out criminal conduct must be granted at the same time as an authorisation is granted to handle the informant under section 29 RIPA. Compared to the grounds for authorising the handling of an informant under section 29, the grounds for an authority tasking an informant to carry out criminal conduct is limited and can only be authorised where it is necessary:

1. When it is in the interests of national security;

2. For the purpose of preventing or detecting crime or of preventing disorder; or

3. When it is in the interests of the economic wellbeing of the UK.

The conditions for this authority are that what is sought to be achieved cannot be achieved by conduct that would not constitute a crime and that the criminal conduct that will be carried out is necessary and proportionate to what is being sought to be achieved. The authorised criminal conduct is conduct carried out in connection with the informant that is specified in the authorisation, that is carried out for the purpose of or in connection with the investigation or operation specified or described in the authorisation. Under section 29B RIPA among the agencies that can apply for a criminal conduct authorisation, includes:

1. Police;
2. National Crime Agency;
3. Serious Fraud Office;
4. Intelligence services;
5. Armed forces;
6. HM Revenue and Customs

The 2021 Act amends section 32 RIPA regarding oversight of authorisations by judicial commissioners. Where an authorisation to use an informant is issued, under section 32A RIPA, approval of the judicial commissioner is required before the authorisation can take effect. The judicial commissioners will only grant an approval if they are satisfied that there are reasonable grounds for the authorisation. In relation to an authorisation for an informant to carry out criminal conduct, the judicial commissioner must have oversight of the authorisation and give notice that it is either granted or cancelled.

The grounds for an authorisation allowing an informant to carry out criminal conduct are limited and the conditions are strict. When looking at the grounds, it is anticipated these authorisations will be primarily in relation to terrorism investigations or serious organised crime, linked to terrorist groups' activity, where there is potentially a life-threatening situation. Section 1 Security Services Act 1989 statutorily defines the role of the UK's security services which is:

1. The protection of national security, in particular protection against threats of espionage, *terrorism* and sabotage, from the activities of foreign states' agents and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means; [my emphasis]

2. Safeguard the economic well-being of the UK;

3. Support the activities of police forces, national Crime Agency and other law enforcement agencies in the prevention and detection of serious crime.

Echoing the mischief rule on statutory interpretation, it appears the intention of the 2021 Act is to place the practice of allowing informers to carry out criminal conduct, mainly by the UK's security services, on a statutory footing.

The security service's practice of authorising some of their informers (agents) to carry out criminal conduct was addressed by the Investigatory Powers Tribunal (IPT) in *Privacy International and others v Secretary of State for the Foreign and Commonwealth Office and others,* where the claimants raised the issue that under the UK Security Services guidelines allows for the authorisation of their informants to commit criminal offences. As the claimants argued that this practice was contrary to a number of rights contained in the European Convention on Human Rights, the IPT were requested to examine the lawfulness of the Security Services' guidelines. In paragraph 13 of the Security Services guidelines, while it is accepted that RIPA did not provide immunity for informers who participated in crime, there may be circumstances where:

'…it is necessary and proportionate for agents to participate in criminality in order to secure or maintain access to intelligence that can be used to save life or disrupt serious criminality, or to ensure the agent's continued safety, security and ability to pass on such intelligence.'

Paragraph 4 of the Security Services Guidelines state that full and accurate records of everything said to an agent on the subject of participation and of their response, adding the agent must be informed the security service authorisation will not bestow immunity from prosecution. In relation to running informers in terrorism investigations, one aspect where *prima facie,* the informer will be committing an offence under section 11 Terrorism Act 2000, where they are a member of a terrorist organisation (i.e., a proscribed organisation as listed in Schedule 2 Terrorism Act 2000). Albeit a 3:2 majority verdict, the ICP found that this practice was legitimate, saying:

'The running of agents, including the running of agents who are embedded in an illegal or criminal organisation … would obviously have been occurring before [the introduction of Security Service Act 1989]. … The 1989 Act did not create the service for the first time: it simply controlled it. It is impossible, in our view, to accept that Parliament intended in enacting the 1989 Act to bring to an end some of the core activities which the Security Service must have been conducting at that time.'

Citing the Manchester Arena bombing and the London terrorist attacks that occurred in 2017, the IPT stated these events serve to underline the need for intelligence gathering and other activities in order to protect the public from serious terrorist threats. On the issue as to whether the Security Service has the power as a matter of public law to undertake the activities of running informants that involve their carrying out criminal conduct, the IPT found that they do have that power.

On the question if the action is in accordance with the law regarding a violation of article 8 ECHR (right to privacy) the IPT found the Secret Service Guidelines have a basis in RIPA, which would be within the meaning if 'in accordance with the law' as held by the European Court of Human Rights in *Zakhorav v Russia* (2016) 63 EHRR 17 where the Court examined the margin of appreciation enjoyed by a national authority in achieving the legitimate aim of protecting national security, including secret surveillance methods. The IPT also held that to claim a violation of article 8 or other ECHR rights, as the ECHR does not in general permit an *actio popularis* (a remedy by a group in the name of a collective interest), it must be the person who claims to be a victim of their rights.

Conclusion

When it was a Bill going through parliament a factsheet was issued by the Home Office stating that the Act would not be providing a new capability, rather it would provide a clear legal basis for a longstanding tactic that is vital for national security and the prevention and detection of crime. The Home Office see the participation in criminal conduct by informers as essential by allowing them to work their way into the heart of groups that would cause harm to the public. The important aspect to the 2021 Act are the safeguards in place sufficient to protect both the agency staff, the informer and the potential victim. It might have been preferable that rather than a politician, in this case the respective secretary of state granting the authorisation, it should be the judiciary. This would definitely meet the ECHR requirements of judicial oversight. However, as the judicial commissioners have an oversight in relation to the granting of authorisations, this may suffice. Another aspect to 2021 Act is there is no coverage of what form of criminal conduct would be permissible in these authorisations. This was an issue human rights groups, led by Reprieve has a major concern with as they said there should clear limits to how far informers working undercover in terrorist groups could be allowed to go. As covered above, in relation to terrorism the

recruitment of, the handling, and request for the informer to carry out criminal conduct would invariably involve a member of a terrorist organisation and that in itself is an offence. It is important to ascertain the degree of seriousness of criminal conduct can the informer carry out. For example, it would be totally disagreeable for the informer to be party to murder, but it may involve, conspiracy or party to planning an act of terrorism under section 5 Terrorism Act 2006, where prior to the attack the informer will pass on the intelligence needed for the agencies to make arrests before the attack occurs. There is no doubt that the 2021 Act is a controversial piece of legislation, but one that is necessary. It will be essential that scrutiny and oversight of these authorisations, especially by the judicial commissioners is robust and not simply a rubber-stamping exercise.

Dr David Lowe is a retired police officer and is currently a senior research fellow at Leeds Law School, Leeds Beckett University researching terrorism & security, policing and criminal law. He has many publications in this area including his recent books 'Prevent Strategy: Helping the Vulnerable being drawn towards Terrorism or Another Layer of State Surveillance?', 'Terrorism and State Surveillance of Communications' and 'Terrorism: Law and Policy', all published by Routledge. Routledge will be publishing the 2nd edition of his book 'Terrorism Law & Policy: A Comparative Study' in October 2021. David is regularly requested to provide expert commentary to UK national and international mainstream media on issues related to his research areas and he provides an expert witness service.

Champerty Pops up Again!

by Jeremy Marshall, Senior Investment Manager, Omni Bridgeway

Like with buses, another case has just come along that needs to be jumped on. One of the issues that funders have been considering for a while is the efficacy, outside of the insolvency context, of funding assigned claims held in a special purpose vehicle (SPV), possibly owned by the funders themselves. This is something that we have done outside of England, but we haven't yet completed in England. An example of a case that could be susceptible to being funded in this way is one where a group of claimants (having the same underlying claims) will group together, potentially so as to make it economic to pursue the claims. The funder would fund the SPV and put up any necessary security for costs on its behalf. One of the primary challenges for us has been the champerty jurisdiction and the confusion as to whether such causes of action can be assigned at all. The recent case of *Farrar v Miller*[1] considers these issues and appears to take one step backwards, so theoretically making such a solution less attractive unless we are prepared to put the issue to the test.

Maintenance and champerty

It's best to remind ourselves of the champerty problem. Maintenance, and its fellow troublemaker, champerty, are common law rules that have almost been branded on all funders. As has been set out in numerous cases, a person is guilty of maintenance if he supports litigation in which he has no legitimate concern without just cause or excuse. Champerty occurs when the person maintaining another seeks a share of the proceeds of the action. It is for this reason that people speak of champerty being an aggravated form of maintenance.

Maintenance and champerty are rules that apply to all contracts and the consequences are significant. Such contracts can be voided – either by a claimant (perhaps unlikely) or, in order to cause trouble, by a defendant (much more likely). Therefore, a transfer of a cause of action can certainly be voided because it infringes the rules of maintenance and champerty.

The champerty test

The case law regarding maintenance and champerty is really anchored in the decision of the House of Lords in a case titled *Giles v Thompson*[2] from 1994. There was only one speech of Lord Mustill who said, as it pertained to the common law, *"I believe that the law on maintenance and champerty can best be kept in forward motion by looking to its origins as a principle of public policy designed to protect the purity of justice and the interests of vulnerable litigants."* Lord Mustill stated that the single question that should be asked is whether there is *"wanton and officious intermeddling with the disputes of others in where the meddler has no interest whatever, and where the assistance he renders to one or the other party is without justification or excuse."*

Litigation funding should pass the test

It is unusual for an entire industry to develop when the efficacy of litigation funding in a key jurisdiction like England is still not crystal clear and funders have to judge the acceptable limits to their "meddling". The industry has, however, developed in earnest and it has sought to navigate the choppy waters that maintenance and champerty create. Occasionally, the defendant waves rise up – a key example was in the 2020 *Akhmedova*[3] litigation where a full-on challenge on champerty grounds was made and rejected – Mrs Justice Knowles referring back to the Court of Appeal's implicit support of funding in *Excalibur*[4] *("litigation funding is an accepted and judicially sanctioned activity perceived to be in the public interest")* and concluding that *"It is thus difficult to envisage how litigation funding conducted by a responsible funder adhering to the Code of Conduct[5] could be construed to be illegal and offensive champerty or might be held to corrupt justice"*.

But we need to tackle the aspect that causes most difficulty – the control or "meddling". To date, although the researches of counsel in *Akhmedova* revealed no example of any agreement with a litigation funder having been found to offend public policy, equally it is likely that no such agreements provided for control of the litigation to be unconditionally in the hands of the funder (in a non-insolvency context). In *Akhmedova*, counsel was very quick to point out that the claimant remained in control of the litigation and the industry's Code of Conduct referred to by Knowles J requires that the funder does not seek to influence the lawyers to cede control or conduct of the dispute. However, since the extent of Burford's control was a ground for the champerty challenge in the case, Knowles J did address the issue head on and she found that *"Burford's mere control would not - of itself - suffice to engage the law of champerty. A funder of litigation is not forbidden from having rights of control but is forbidden from having a degree of control which would be likely to undermine or corrupt the process of justice."*

Assignments of causes of action

The reader may ask what all this has to do with *Farrar v Miller.* That case concerned an assignment of a claim (commenced in 2014) from a client to his law firm. The assignment was in writing and unsigned although it was executed as a deed and witnessed in September 2019. The recitals to the assignment recorded the fact that the solicitors had significant WIP on the clock and were acting under a CFA. The assignment stated that the client did not have sufficient funds with which to continue the proceedings to their conclusion, had fully investigated alternative funding options and, after doing so, had concluded that it was in his best commercial interest to enter into the deed. The solicitors agreed to accept the assignment and to distribute the recoveries subject to an

agreed priority order – which, importantly, included themselves in priority to the client. A month after the assignment took place, the client unexpectedly died.

The judge found that the assignment was a legal assignment under the Law of Property Act since the assigned claims were legal choses of action. The assignment of a right or cause of action has generated its own case law with the general principle being set out in a case called *Trendtex Trading* where Lord Roskill stated that "*If the assignment is of a property right or interest and the cause of action is ancillary to that right or interest, or if the assignee had a genuine commercial interest in taking the assignment and in enforcing it for his own benefit, I see no reason why the assignment should be struck down as an assignment of a bare cause of action or as savouring of maintenance.*" The test for whether a legal claim can therefore be assigned has often been therefore to gauge to what extent the assignee has a genuine commercial interest.

The interplay between assignments and funders

It is perhaps becoming clearer where this article is going – the aim is to consider in what circumstances assignments of causes of actions can legitimately be made, and does – or should – it matter whether the assignee is a professional funder or simply a third party?

Surprisingly, the Court has not had to grapple with this question too often. Indeed there have only been two recent examples where the principles have been considered. In *JEB Recoveries LLP v. Binstock*[6], three individuals who had a claim against Mr Binstock formed an LLP and assigned into it their legal causes of action. Simon Barker J rejected the suggestion that the assignment was champertous and he did not consider that any aspects of the arrangement undermined the ends of justice. In *Casehub Limited v. Wolf Cola Limited*[7], the claimant was a company which built consumer group actions online. It took an assignment of consumers' claims to recover monies alleged to have been unlawfully charged by third parties. It aggregated the claims into a single portfolio of claims and, once the value of the portfolio reached a certain threshold, brought a claim in its own name against the third party in question. The judge was not satisfied that there were any or any sufficient public policy grounds which would lead to the conclusion that the assignments were invalid. On the contrary, he found that there were strong public policy grounds in favour of upholding the assignments. Since the sums in dispute were quantified, there was no risk of damages being inflated or the litigation process being abused in other ways; neither the "*purity of justice*" nor the "*interests of vulnerable litigants*" were threatened and he found that there was no adverse impact on the administration of justice.

The solicitor problem

Unfortunately, the flexibility of the judicial approach to assignments has some defined limits, and they predominantly relate to the inability to assign claims to lawyers. In *Farrar,* the challenge for the law firm was that legislation has provided two methods of costs recovery – either the CFA or the DBA regime. The costs arrangements are either sanctioned by statute or they are not; and if they are not, the common law does not ride to the rescue. In the instant case, the assignment was not sanctioned by the relevant legislation and - assuming it to stand alone - clearly failed as a champertous transaction.

No commercial interests

However, the aspect of *Farrar* which appears most contentious is the parallel approach the judge took to the status and interest of the law firm. In respect of the law firm's genuine commercial interests in the litigation, the firm pointed to the fact that all its fee income was dependent on the success of the case. The judge, though, was having none of it – he simply restated the position that if the fee agreements were not within the statutory scheme, the agreement was champertous. The judge held that control of the proceedings moved by virtue of the assignment away from the proper claimant and his proper successors in title on bankruptcy and/or death to a party that has - apart from its interest in its fee recovery - no legitimate interest in prosecuting them. The judge also held that the assignment had the arguable potential of improving the law firm's financial position. In the event, therefore, the Judge held that the entering into the assignment in replacement of the previous cost arrangement undermined the purity of justice or corrupted public justice.

What if the assignee had been a funder?

At first blush, this perhaps seems a surprising conclusion and the interesting twist is what the outcome would have been had the assignment not been to a law firm but, instead, to a professional funder. If the assignment had been to a funder, then there would have been no objections in relation to the law firm's statutory scheme for remuneration, and so the focus of the decision would have rested solely on whether the purity of justice was undermined. The challenge is that the judge would still have found that control of the proceedings would have moved away from the proper claimant and that the funder had no legitimate interest in prosecuting them apart from its own financial interest. The funder could argue that it did have a further interest because it had agreed to distribute certain recoveries to the client – albeit that it would now distribute such recovery to the client's estate - and the fact remains that the client had willingly ceded control of the claim in the first place (to borrow from the language of the Code of Conduct). In those circumstances, and following the reasoning of Knowles J, the argument would then be that it is incumbent on a judge to go on and consider whether the assignment to the funder really undermined the purity of justice. If the funding was provided on normal commercial terms, and the assignment had been a voluntary decision which the assignor freely considered was in his best interests, and if there were no indicia of the corruption of justice via the way that the funder went about exercising control, then it is hard to see that the mere fact of the assignment of the claim to a funder should render it champertous.

There is, however, a difference between looking at the picture through the lens of control and the lens of ownership. In the prior example, the assignment has the impact of changing the ownership structure such that the original claimant no longer has any rights over its own cause of action. This arrangement is far removed from a simple change of control. It is to be recalled that Knowles J spoke of the need to analyse the degree of control to consider whether the interests of justice are undermined. It is doubtful that she had in mind a complete ceding of ownership as well as control.

The question then becomes whether a total transfer of control has the effect of undermining the process of justice. Such an arrangement does render it understandable to speak of trafficking in litigation albeit that it is important to note that the current judicial approach is to cast that epithet into the bin[8]. To understand that term, it is best to go back to *Giles v Thompson* where Lord Mustill made it clear that he had in mind the risk of the transfer of such claims giving rise to *"an obvious temptation to the suborning of justices and witnesses and the exploitation of worthless claims which the defendant lacked the resources and influence to withstand"*. It is hard to see a professional funder seeking to fund worthless claims in the hope of a quick settlement, although it is perfectly proper that champerty remains as a deterrent for such behaviour – it was partly for this reason that Lord Justice Jackson in his Final Report on the Review of Civil Litigation Costs recommended that the rule against champerty should not be repealed. It may well be that the real battle ground in such a case would be how to set limits to what is a genuine commercial interest, and whether is it in order to create that genuine commercial interest out of the damages anticipated from the case itself. The funder's argument will need to be that it is very much in order if there are no counterbalancing features that prejudice or suborn the interests of justice.

Deserving claims demand solutions

These champerty and maintenance issues that are specific to the common law are to be contrasted with the approach taken by civil law legal systems, where no such rules exist, but where one relies simply on the more general legal doctrines underlying tortious acts, ie fairness and reasonableness. Hence, in the Netherlands, it is in principle not against any rules to ask claimants to assign their claims into a funded SPV, with a view to having the SPV litigate those claims, which is evidently more efficient compared to each individual claimant having to participate separately in the litigation. This has led to a multitude of group claims, including anti-trust follow on actions, being litigated in the Netherlands. The Dutch courts are accommodating the process, recognizing that the claimants are served by an efficient as well as an economically viable process. Separate from the SPV model, a recent change in the Dutch legislation also allows a representative claimant to seek damages for the class it represents through a representative foundation rather than merely obtaining a declaratory judgment on liability.

So we think the time may soon be coming when we should put the maintenance and champerty rules to the test. The ideal circumstances are where there are a series of similar claims (possibly arising out of the same event) that are held by a disparate group of individuals who, individually, cannot possibly bring the claims because of costs considerations. There is a genuine desire by those individuals to protect themselves from the possible adverse costs consequences from any litigation and there is a compelling public interest to have the claims litigated. We, as a commercial funder, wish to fund the claims on the basis that a significant share of the recovery goes to the claims' original owners but we need to ensure that appropriate control is in place. We therefore wish to take assignments of the claims and capitalise a SPV as the deemed claimant. We are prepared to put in place appropriate security for costs arrangements on behalf of the claimant. Answers on a postcard please if you can immediately see a series of claims that leap out at you as warranting such treatment.

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New Landmark Partnership with UAE to Tackle Illicit Finance

The UK and UAE will ramp up the targeting of those financing terrorism and serious and organised crime gangs as part of a landmark new partnership.

The new first of its kind agreement was signed by Home Secretary Priti Patel and UAE Minister of State Ahmed Ali Al Sayegh on Friday.

The agreement of the UK-UAE Partnership To Tackle Illicit Financial Flows is part of the new, ambitious and strengthened Partnership for the Future between the UK and the UAE as announced by the Prime Minister Boris Johnson and the Crown Prince of Abu Dhabi Mohammed Bin Zayed.

This aims to ensure that the UAE and UK are able to work more closely together to tackle the shared global challenges that we face, and promote prosperity and security for our citizens.

Home Secretary Priti Patel said: I will always take the strongest possible action to the keep the British people safe, and this new agreement bolsters both our countries' efforts in going after the terrorists and serious and organised crime gangs that seek to do us harm.

The partnership will help to keep the public safe, protect our prosperity and bring dangerous criminals to justice.

Minister of State Ahmed Ali Al Sayegh said: The UAE stands with the UK in the global fight against illicit finance. We are committed to stamping out terrorist financing and serious and organised crime in all of its forms to protect the UAE and uphold the integrity of the international financial system.

The partnership marks a key milestone in the close cooperation between the UAE and UK. Through the robust, collaborative structure of the partnership, the UAE is determined to advance our shared priorities and reinforce our efforts to keep our two nations safe, prosperous and secure.

The partnership is a concrete articulation of the UK and UAE's shared ambition to increase co-operation on illicit financial flows. It offers a robust platform to build a stronger and more enduring strategic partnership, advancing the priorities laid out in the UK's Integrated Review and the UAE's National Anti-Money Laundering and Counter Terrorist Financing Strategy.

The launch of the Partnership To Tackle Illicit Financial Flows was held in London today (17 September) in a meeting chaired by the Security Minister Damian Hinds.
The partnership will bolster law enforcement by enhancing intelligence sharing and joint operations between the UK and UAE against serious and organised crime networks.

The UK and UAE's understanding of terrorist financing internationally will also be improved by sharing insight and expertise to help identify and stop terrorist financial flows.

Furthermore the partnership will raise professional standards on countering money laundering with a particular focus on high-risk sectors such as dealers of precious metals and stones, and real-estate as well as emerging technologies such as crypto currencies.

There will be an annual meeting between the Home Secretary and the UAE Minister of State to ensure progress on the partnership's ambitious objectives.

The partnership follows the UK's ambitions, made in the Integrated Review, to increase our co-operation with the UAE on illicit financial flows.

The Rise in Security for Costs Applications in a Fragile Economic Climate

by Neil Rudd, Senior Forensic Accounting Manager at Azets.

I'm sure you don't need a finance expert to tell you that the last eighteen months have not been the best for the UK economy. However, all being well, UK businesses in the main have hopefully managed to weather the storm and can succeed again without the need for government financial support.

Azets' recent SME Barometer Report[1] found that more than two thirds of businesses surveyed are expecting the economy to improve in the next twelve months. Positively, 89% were confident that they will be trading in twelve months' time, however, only 54% thought that their profits would increase in that time-frame, with the remainder believing that their profits will either stay the same or reduce.

In the context of this uncertain economic climate, I wanted to pick up the fictional story of 'you' as the CEO of the polyester manufacturer, Luxurious Polyester Ltd. For those of you who missed my article on contract disputes in the March 2021 issue of Expert Witness[2], you are defending a contract dispute claim for failure to fulfil minimum volumes required under a supply contract to PPE Pandemic Ltd (a wholesaler of personal protective equipment).

If, as you hope, you defeat the claim, the vast majority of the time you would expect the Court to award you at least some proportion of the costs incurred defending it. These would be paid to Luxurious Polyester Ltd by PPE Pandemic Ltd (or their third party litigation funder) in recognition that you did not have a choice in incurring the costs to defend a claim which ultimately proved to be unfounded.

Like many businesses in the current economic climate, PPE Pandemic Ltd's finances are suspected to be precarious, with its future prospects unclear. Should Luxurious Polyester Ltd successfully defeat the claim, you are concerned that the Claimant would not be able to pay an award for costs ordered by the Court.

You probably feel aggrieved that your business might get lumbered with significant costs defending an ultimately unfounded claim. However, there is a legal mechanism that could come to your aid. As Defendant, you can apply to the Court for a 'security for costs' order under Civil Procedure Rule 25.12[3]. This should be applied for as early in the proceedings as possible and if you are successful, the Court will order PPE Pandemic Ltd to pay an amount which will be held by the Court, until such time it may be required to fulfil an award for costs.

To persuade the Court to grant the security for costs order, Luxurious Polyester Ltd must provide written evidence setting out:

(a) why the Claimant may be unable to satisfy any potential cost order; and

(b) an estimate of the likely costs that will be incurred defending the Claim.

This is where your forensic accountant can help you. Having accounting expertise complimented by a familiarity with submitting written evidence to courts, arms them with the key skills for assisting your legal team in the preparation of the application.

Often the hardest part of demonstrating that the Claimant may be unable to satisfy a costs order, is obtaining sufficient financial information to analyse their financial position and recent / prospective trading performance. A forensic accountant with advanced open source data and asset tracing capabilities, complimented with access to a global network, can add significant value.

It is also worth noting that the claim submitted may also be a valuable source of information. Luckily this is the case for Luxurious Polyester Ltd, as PPE Pandemic Ltd has provided significant financial information about itself as part of its quantification of the profit it alleges it has lost as a result of a breach of contract.

The information obtained can be used by forensic accountants, to address whether the Claimant would be able to satisfy a costs order, presenting complex financial information in a simple and understandable way, suitable for use in the security for costs application. Alternatively, if the Claimant's financial outlook is not as bad as suspected, a forensic account will advise on the merits of pursuing a security for costs application, preventing wasted costs.

Such analysis would include for example, an assessment of the Claimant's:

(a) recent and likely future financial performance, considering risks specific to the business, the industry it operates in and the wider economy;

(b) solvency position and whether this will likely improve or deteriorate; and

(c) ability to turn sufficient assets into cash at the time required to satisfy an award for costs.

In the case of Luxurious Polyester Ltd, there is a good argument that PPE Pandemic Ltd would be unable to satisfy an award for costs. Having only been incorporated at the start of the Covid-19 pandemic, it has not built-up significant assets. Despite demand for personal protective equipment being extremely high recently, supply chain and certification issues have meant that trade has been poor and its balance sheet is weak.

However, unfortunately you might not be in for the easy win with your security for costs application as it might appear. PPE Pandemic Ltd has its own forensic accountant critiquing the application and they have access to more detailed financial information from their client. PPE Pandemic Ltd will emphasise the role Luxurious Polyester Ltd's alleged breach of contract has played in reducing its access to the raw materials needed to trade.

The Court would likely be reluctant to grant a security for costs order that could potentially stifle and force the abandonment of a genuine claim. It is a delicate balancing act for the Court, weighing a possible injustice against PPE Pandemic Ltd against the risk that Luxurious Polyester Ltd will be unable to recover its legal costs defending a potentially unfounded claim.

Conclusion

Given the large number of businesses in delicate financial circumstances and the increase in contract disputes, security for costs applications are likely to be common in the coming months. As forensic accountants, we look forward to assisting our clients in applying for or critiquing security for cost applications.

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- Contentious and non-contentious business valuations
- Post company acquisition / sale disputes, expert determinations, and breach of warranty claims

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UK Supreme Court Clarifies Scope of 'Lawful Act Economic Duress'

A recent decision by the UK's highest court has clarified the circumstances in which a party to a commercial contract is entitled to rescind that contract on the grounds of 'economic duress' under English law.

The Supreme Court ruled against Times Travel, a Birmingham-based family-run travel agency, as it was unable, on the facts of the case, to establish the existence of 'lawful act economic duress', which may arise where a contract results from a threat to do an act which is itself lawful. This meant that Times Travel was not entitled to rescind a new contract it had entered with the national carrier airline of Pakistan, Pakistan International Airline Corporation (PIAC).

At the relevant time, PIAC was the only airline that offered direct flights between the UK and Pakistan. Under the new contract, Times Travel waived its right to bring a claim for unpaid commission (worth around £1.1million) under a previous agreement between the parties.

Legal experts at Pinsent Masons, the law firm behind Out-Law, said that the decision was of general commercial relevance. The case confirms that the doctrine of lawful act duress, including lawful act economic duress, does exist despite the arguments of some academic commentators. It also provides guidance to distinguish between what the court described as "hard-nosed commercial negotiation" from genuine economic duress.

The decision is also interesting due to an intervention by the All-Party Parliamentary Group on Fair Business Banking (APPG), a cross-party group of members of the House of Commons and the House of Lords. The APPG was given permission to provide written and oral submissions to the court on how the doctrine of lawful act duress operates in the banking context. The APPG had expressed concerns about the doctrine restricting small business banking customers from challenging settlements, including renewed facilities, with their lenders entered under alleged duress.

Commercial and financial services litigation expert Joanne Gillies said that the overriding message from the Supreme Court is that claims for lawful act economic duress will face a very high bar to success.

"The court has firmly restated that there is no general doctrine of good faith or inequality of bargaining power in English contract law – and Scottish law is likely to follow suit," she said.

"The difficulty for claimants of establishing lawful act duress is illustrated by the court declining here to find duress despite a number of notable findings, such as that: PIAC's defence to the waived claims was unreasonable; the waiver of claims was an 'onerous' term; the court would likely have awarded summary judgment to Times Travel on some aspects of the commission due but for the waiver it agreed; PIAC prevented Times Travel from seeking advice before signing the new agreement; and PIAC exploited its monopoly position. The decision is consistent with the principles of freedom of contract and contractual certainty in English and Scots law, and large businesses in particular are likely to welcome that," she said.

Gillies added, however, that businesses should be aware that the case leaves the door ajar for claimants to try to bring claims arguing, for example, that the behaviour of a particular defendant was "unconscionable" or "reprehensible". While successfully running these arguments would require extreme facts, Gillies said potential defendants - typically a business with ostensibly greater bargaining power than its counterparty – may wish to take additional steps to guard against claims.

"For example, when agreeing new terms with an existing counterparty, businesses should be careful if insisting on a waiver of previous claims against them, especially if their defence to those claims is weak," she said. "They may also wish to record details of contractual negotiations and what leverage was applied, including any demands which might be regarded as onerous. Finally, whilst the case shows that using commercial leverage to extract increased demands from a commercial counterparty is generally an acceptable part of doing business, companies should be very wary of making a legal threat concerning a matter which sits outside the scope of the commercial relationship between the parties or the contract being negotiated."

Times Travel was a travel agent whose business consisted almost exclusively of selling plane tickets to and from Pakistan on flights operated by PIAC. PIAC had arrangements with several travel agents under which it allocated them a certain number of tickets, and then paid commission to the agents for the number of tickets each sold. The airline was entitled to terminate these arrangements at any time by giving the agents one month's notice.

In 2011 and 2012, some travel agents, including Times Travel, alleged that PIAC had not been paying it some of the commission it was due. Some of the agents brought claims to recover the unpaid sums. Under pressure from PIAC, Times Travel did not join in the claims. However, in September 2012, PIAC cut Times Travel's normal fortnightly ticket allocation from 300 to 60, as it was entitled to do, and gave notice that it would terminate the contract the following month. PIAC presented Times Travel with a new contract, without the ability to take that agreement away to obtain advice, under which Times Travel waived any right to claims under the previous agreement. Times Travel entered the new contract, and its ticket allocation was restored.

Times Travel later brought a claim against PIAC for the unpaid commission, arguing that it was entitled to rescind the new contract. It said that it only entered the new contract as it would otherwise have gone out

of business. In response, PIAC argued that it had not acted in bad faith as it genuinely believed that the disputed commission was not due. The High Court found in favour of Times Travel, but this was overturned by the Court of Appeal, which held that lawful act economic duress could only be established if PIAC had acted in bad faith – in other words, if PIAC had made the request for Times Travel to waive its claims whilst knowing it had no defence to those claims.

Lord Hodge gave the leading majority judgment of the Supreme Court. Lord Burrows gave a separate judgment that reached the same outcome.

The two judgments disagreed on how to determine what was an "illegitimate threat", being one of the two necessary elements of a claim for lawful act duress along with causation to enter the contract. Lord Burrows said there were two elements to an illegitimate threat: the defendant must deliberately increase a counterparty's vulnerability to a demand, and then make that demand in bad faith. He considered that these elements were necessary and sufficient to show an illegitimate threat. However, Lord Hodge said there must be "reprehensible" or "unconscionable" behaviour by the defendant for a threat to be illegitimate; acting in bad faith is not necessary, but nor is it sufficient to show reprehensible or unconscionable behaviour.

Both judges warned that the courts should approach with caution any extension to the doctrine, "particularly in the context of contractual negotiations between commercial entities". Lord Hodge said: "In any development of the doctrine of lawful act duress it will also be important to bear in mind not only that analogous remedies already exist in equity, such as the doctrines of undue influence and unconscionable bargains, but also the absence in English law of any overriding doctrine of good faith in contracting or any doctrine of imbalance of bargaining power".

Lord Hodge found that PIAC had not "used any reprehensible means" to increase or exploit Times Travel's vulnerability nor did he find any bad faith on the part of PIAC. The airline's actions were that of "hard-nosed commercial negotiation that exploited PIAC's position as a monopoly supplier", but "did not involve the reprehensible means of applying pressure which gave rise to the findings of lawful act economic duress" in previous cases, he said.

Notably, Lord Burrows - who had agreed with the findings of the Court of Appeal - found that PIAC did not act in bad faith, as it believed its defence to the claims for commission to be genuine. He accepted that his proposed test placed a significant burden on a claimant, who would have to prove the bad faith of the defendant. Lord Burrows also referred to a claimant's potential ability to invoke the law of unconscionable bargain - the exploitation of weakness to induce someone to enter a contract who has not obtained advice. Whilst typically reserved for individuals, Burrows stated that "it is not inconceivable that the relevant weakness could be the very weak bargaining position of a company".

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Newcastle United Football Company Ltd v The Football Association Premier League Ltd & Others

[2021] EWHC 349 (Comm) - Before His Honour Judge Pelling QC, London Circuit Commercial Court Judgment delivered 24 February 2021

The facts

By a decision letter dated 12 June 2020 the Football Association Premier League Ltd ('PLL') advised Newcastle United Football Company Ltd ('NUFC') that if the club was purchased by the Saudi Arabian Public Investment Fund, where the latter was state owned, then in accordance with Section A of the PLL's Rules, the Kingdom of Saudi Arabia would become a director of NUFC. NUFC challenged this decision and commenced arbitration pursuant to the PLL's Arbitration Code. On 9 October the arbitrators nominated by NUFC and PLL jointly appointed Michael Beloff QC as chairman.

On 23 October 2020 PLL notified NUFC that over the last three years their solicitors had been involved in 12 arbitrations in which Mr Beloff had been an arbitrator (including three in which he had been nominated by PLL's solicitors) and that more than two years previously Mr Beloff had advised PLL on four occasions including in March 2017 in relation to Section F of the PLL's Rules which concerned director disqualification. Relying on this disclosure NUFC invited Mr Beloff to recuse himself but on 25 October he declined to do so.

On 28 October Mr Beloff exchanged emails with PLL's solicitors that primarily concerned locating the March 2017 advice but included an enquiry as to whether PLL thought he should stand down. At Mr Beloff's request, these exchanges were provided to NUFC on 29 October. On 2 November 2020 PLL indicated that it was not prepared to disclose the March 2017 advice.

On 4 November 2020 NUFC applied to the court to remove Mr Beloff under section 24 of the Arbitration Act 1996 on grounds that there were justifiable doubts as to his impartiality, where Mr Beloff had: (i) previously been retained by PLL to advise on overlapping issues under the PLL Rules; (ii) previously been appointed on three occasions by PLL's solicitors; (iii) initially failed to disclose these matters; and, (iv) engaged in private communications with PLL's solicitors on 28 October.

PLL opposed the application contending that: (i) the March 2017 advice concerning Section F did not relate to any of the issues in the present arbitration; (ii) Mr Beloff had been appointed chairman by his fellow arbitrators and not by PLL's solicitors; (iii) he was not dependent for his income on appointments by PLL's solicitors which were not anyway in excess of IBA Guidelines; and, (iv) the exchanges on 28 October were not in breach of IBA Guidelines and would not create a real possibility of bias.

The issue

Was the test for apparent bias satisfied?

Decision

The judge found that there was no overlap as the present arbitration was to focus on Section A of the PPL Rules and the March 2017 advice was unlikely to have touched upon Section A issues. He acknowledged that whilst it would have been helpful to see the March 2017 advice, no adverse inference should be drawn from PLL's refusal to waive privilege and there was no evidence to suggest that either PLL's solicitors or Mr Beloff would have misrepresented the contents of the advice.

As to the other arbitral appointments the judge thought that a fair minded and informed observer would not infer a real risk of bias given the small pool of suitably experienced sports arbitrators.

Regarding the 28 October exchanges the judge observed that as the emails were concerned with obtaining privileged information, Mr Beloff could not be criticised for not copying these emails to NUFC. Mr Beloff's unilateral enquiry to PLL about standing down had been an error of judgment but could be explained by the pressure of time and was mitigated by Mr Beloff's request that all emails should be disclosed to NUFC. This did not amount to evidence of a real risk of bias.

Finally, looking at things in the round, given Mr Beloff's limited income from historic and future PLL work, and applying the IBA Guidelines the judge decided that a fair minded and informed observer would not conclude there was a risk of bias.

Commentary

This decision has some parallels with construction adjudication where adjudicators with good reputations may be repeatedly nominated by law firms and will often also act as consultants or expert witnesses within a relatively small circle of practitioners.

Each case will turn on its own facts but this judgment reinforces the need for adjudicators to make full and early disclosure of previous connections with their nominating solicitors and clients and for the other party to study this information closely and promptly come to a view as to whether or not the nomination is to be opposed on grounds of apparent bias.

Ted Lowery - May 2021
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Mastercard? That'll do Nicely! Do you Need to Issue a New Claim if Your Amendment Might be Statute Barred?

It is no coincidence that construction cases play a prominent role in many of the leading decisions concerning limitation. It is the nature of our work that problems have a tendency to emerge some time after the work was completed and, more than occasionally, new problems come to light after proceedings have commenced.

As construction litigators, we are therefore all no doubt familiar with having to draft an amendment to a claim that is, or might be, vulnerable to a limitation challenge. While we probably trust that we are familiar with the law on the point, many of us would likely turn to our reliable friend, the White Book, to remind ourselves of how the court might approach such an application. A couple of TCC decisions over this year suggest that this course of action might not reveal the full picture.

What does the White Book say?

CPR 17.3 and 17.4, read together, tell us that we can amend a claim with consent or with the permission of the court, but that if the relevant limitation period has come to an end the court will only have a discretion to allow such an amendment if the "new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings" (I'm ignoring mistakes as to names or changes in capacity, for present purposes). There is then lots of complicated law as to whether or not the amendment really is a "new claim" or really does "arise out the same or substantially the same facts".

As we all know, if such an amendment is then permitted, the amendments are treated for limitation purposes as relating back to the date the original claim form was issued. So far, so good.

But what if, as is often the case, it isn't completely clear whether the limitation period has expired, or whether the amendments can come within the strictures of CPR 17.4?

The White Book, at 17.4.2, says that where it is reasonably arguable that the relevant limitation has expired and/or does not come within 17.4, "permission to amend should be refused leaving the claimant to bring fresh proceedings on the new claim". That is based on two Court of Appeal decisions, *Chandra v Brooke North* and *Ballinger v Mercer Ltd.*

On one view that makes sense. Allowing the amendment gives the claimant the benefit of relating back, so, if there is any reasonable argument that the amendment is statute barred or outside 17.4, it should be refused; otherwise the defendant would lose the opportunity to argue the point in due course. Often, the point may not become clear until factual or expert evidence is resolved at trial.

However, it has always seemed to me a needlessly cumbersome and costly approach. Instead of making the claimant issue a new claim, pay a new court fee, and work out how best to manage that new claim alongside the existing claim, why not just allow the amendment subject to resolving the limitation point later, or, failing that, at least allow the claimant to accept that the new claim only relates back six years from the date of amendment?

There is no suggestion in the White Book that such an approach might be accepted by the court.

However, there has for some time been a line of authorities that recommended exactly this approach as a sensible, cost-effective way to proceed, originating in the decision of Field J in *WM Morrison v Mastercard,* followed by the Court of Appeal in both *Mastercard v Deutsche Bahn* and *Libyan Investment Authority v King.* In the latter case, Nugee LJ made clear that he considered this to be a useful practice and that it extended to the wider approach of allowing an amendment and leaving to the trial judge the question of whether the amendment would relate back or not (in other words, not even requiring the claimant to accept up front that the time should only run from the date of the amendment).

It may be that this has gone largely unnoticed because until this year it seems to have been thought that the approach will only be permissible where all the parties' consent, or at least do not object. However, if that was the reason – and I don't think it was a good one – it is not one that is likely to have survived two TCC decisions this year.

Recent developments

In *Advanced Control Systems Inc. v Efacec Engenharia E Sistemas S.A.*, Mr Roger Ter Haar QC, sitting as a Judge of the High Court, was invited to reject a "Mastercard" application on the basis that consent was required. He concluded, after reviewing the line of cases above, that there was no limit in principle to the circumstances in which this approach could be adopted and granted the application, which sought to treat the amendments as made at the time of the amendment rather than relating back to the date of the claim form.

If that is right, then it significantly opens up the likely number of occasions when a "Mastercard" approach might be suitable.

However, over the summer, HH Judge Russen QC, sitting as a Judge of the High Court, handed down the decision in *DR Jones Yeovil Ltd v Drayton Beaumont Services Ltd*, which further considered the scope of the "Mastercard" approach. While he agreed that this approach was not dependent upon the consent of the defendant, in his view Advanced Control Systems was wrong to say that there was no limit to the type of cases where this approach might be appropriate.

In his view, the option was only permissible (subject to discretion on the facts) where the defendant accepts, or the court decides, that there cannot be a reasonably arguable limitation defence to **the entirety** of the proposed amendment. Where there is a reasonably arguable limitation defence to the entirety of the new cause of action introduced by the amendment which cannot be overcome by CPR 17.4, a party would be forced to adopt the conventional approach and issue a fresh claim.

The rationale for this potentially significant fetter on the application of the "Mastercard" approach appears to be that it is premised on the recognition that the claimant had the alternative of issuing fresh proceedings without facing an obvious limitation claim in relation to the whole of the claim. In other words, that the claimant could not have been prevented from bringing a new claim for at least some of the matters within the amendment. The judge took the view that this was the case in all the previous decisions, apart from, possibly, Advanced Control Systems, and that this requirement should police the use of the "Mastercard" approach.

Final thoughts

For what it is worth, I welcome the wider use of the "Mastercard" approach. It seems to me that there will be situations where allowing an amendment, but putting off arguments as to limitation until a later date, will be more sensible and far more cost-effective than requiring a claimant to issue fresh proceedings, or arguing over CPR 17.4, which might turn on facts or expert issues. No doubt there are also situations where such an approach will make a claim needlessly cumbersome and the case would benefit from the matter being resolved then and there; but the difference between those situations seems to me to be best resolved by case management discretion rather than the rule proffered in DR Jones.

Either way, I think the White Book could helpfully expand its commentary at 17.4.2 to highlight these possibilities, and court users would benefit from clarification from the courts as to how best to proceed.

This article was written by ***David Pliener***. First published on **Practical Law's Construction Blog**.

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The Lynch Extradition - What Does it Reveal About UK and US Tactics and Tools?

by Nick Vamos, Partner, and Sefki Bayram, Legal Researcher, at Peters & Peters LLP

In July 2021, former CEO of Autonomy, Michael Lynch, lost the first round of his US extradition battle. The court's judgment is an important addition to the body of high-profile cases, from Gary Mackinnon in 2007 through to Julian Assange earlier this year, looking at the extradition arrangements between the UK and US. Those arrangements are often criticised for being unfairly imbalanced, making it easier to extradite people to the US than vice versa. Despite a comprehensive independent review in 2013 finding that there were no legal disparities in the treaty or its application in the UK courts, these criticisms persist. As Lynch's case shows, the disparity lies not in any legal texts, but in the differing approaches of prosecutors on either side of the Atlantic, and the tools at their disposal to secure a conviction.

Lynch's extradition story

Mr Lynch's extradition has been requested to stand trial on charges of conspiracy, securities fraud and wire fraud in connection with the $11bn sale of Autonomy to Hewlett Packard ('HP') in 2011. The US indictment alleges that Mr Lynch deliberately concealed and misrepresented the true financial performance of his company prior to the sale. HP is already suing Mr Lynch in a long-running High Court case in which judgment is pending. Mr Lynch failed in a bid to adjourn the extradition proceedings to await the outcome of the civil case.

US extradition requests come under 'Part 2' of the Extradition Act 2003. The UK court does not determine guilt or innocence, nor review the underlying evidence. However, it must decide whether the request is valid, whether any of the statutory bars to extradition apply, and whether extradition would be compatible with the requested person's human rights. In court, Mr Lynch advanced five arguments:

1. The offences for which he was sought did not amount to extradition offences because the conduct alleged did not occur within the US for the purposes of section 137(3)(a), and the conduct alleged, if properly transposed, would not amount to an offence in the UK to satisfy the dual criminality test under section 137(3)(b);

2. His extradition would be unjust or oppressive by reason of the passage of time: the conduct alleged dated back to 2009 and the first indictment was not issued until 2018;

3. His extradition would not be in the interests of justice under the so called 'forum bar' because the alleged criminal conduct concerned the takeover of a UK company, audited in the UK and applying UK accounting standards, which could be prosecuted in the UK (and was in fact investigated by the SFO). In addition, Mr Lynch is a British citizen with 'lifelong' links to the UK;

4. If extradited he would face a real risk of treatment contrary to Article 3 of the European Convention on Human Rights ('ECHR'). In particular, that the provision of healthcare at his post-conviction detention facility would be so inadequate as to amount to inhuman or degrading treatment;

5. The extradition request contained material misrepresentations and omissions of fact and completely avoided the fact of the ongoing civil trial before the High Court such as to amount to an abuse of process.

Unfortunately for Mr Lynch, District Judge Snow rejected them all.

On ground one, the District Judge considered that where the "effects of the Defendant's conduct" were felt in the USA and there had been significant financial and reputational harm caused both directly and indirectly within the USA to HP, this was sufficient for the purposes of section 137(3)(a). Furthermore, when the conduct alleged against Mr Lynch was transposed to the UK, it was capable of amounting to offences under UK law satisfying section 137(3)(b). On ground two, the District Judge concluded that there was no injustice or oppression as a result of the delay by the US authorities.

On ground four, the District Judge accepted that Mr Lynch suffered from various chronic medical conditions but was satisfied, on evidence from a Medical Director of the US Federal Bureau of Prisons, that those conditions would be adequately treated in custody. The District Judge rejected the contrary evidence of a defence expert, who he described as "an unreliable partisan witness" whom on occasion presented his evidence "in a misleading way", adding that he had "significant doubts" that the defence expert was in fact an expert.

On ground five, the District Judge concluded that there was no abuse of process and that the information contained in the particulars was correct and complete. It was the court's consideration of ground 3 - the forum bar - in cases where both the UK and US had jurisdiction to prosecute which is of most interest, and is likely to give rise to further arguments on appeal.

The Forum Bar

Under the forum bar, the court is required first to consider whether a substantial measure of the alleged conduct was performed in the UK. In other words, did the UK have concurrent jurisdiction to prosecute Mr Lynch for the same alleged criminality? If so, the court is then required to consider seven 'specified matters' (and only those matters) to decide whether the extradition would be in the interests of justice.

The US Government conceded that a substantial measure of Mr Lynch's conduct occurred in the UK. As such, the arguments focused on the specified matters, and whether they pointed towards or away from extradition. Dealing with each in turn:

(a) The place where most of the loss or harm resulting from the extradition offence occurred or was intended to occur

The District Judge held that in cases of alleged financial loss and harm, the court must distinguish between how quantifiable loss or damage has been caused and (legally and factually) to whom. The judge found that the loss was intended to and actually fell on HP – a US-based entity with predominantly US-based shareholders – who had been forced to issue an $8.8bn write-down. The judge also found that HP had suffered harm far beyond its financial losses, including the need to defend lawsuits, bring civil proceedings, and assist multi-jurisdictional investigations, all of which caused lasting reputational injury. The judge rejected Mr Lynch's argument that the court was not permitted to consider reputational harm for this purpose, which might be correct when conducting a dual criminality assessment but not when considering forum.

(b) The interests of any victims of the extradition offence

The judge concluded that there was "a clear public interest in the trial of the CEO of a major public company, who was responsible for an alleged fraud causing very significant losses". Furthermore, he agreed with the US Government that the interests of HP and US investors, as victims, would not be satisfied by either the outcome of the civil claim or the conviction of Mr Hussain, Autonomy's former CFO, currently serving a five-year sentence in the US for his role in the fraud.

(c) Any belief of a prosecutor that the United Kingdom, or a particular part of the United Kingdom, is not the most appropriate jurisdiction in which to prosecute D in respect of the conduct constituting the extradition offence

This subsection entitles (but does not require) a UK prosecutor to submit to the court his or her belief that the UK is not the most appropriate jurisdiction in which to prosecute the alleged conduct. In this case, the SFO had investigated parts of the alleged fraud between 2013 and 2015 before ceding jurisdiction to the US authorities. The SFO prosecutor had submitted a statement in the extradition proceedings setting out the basis for that decision and his belief that the case should be prosecuted in the US. Of most interest and relevance was the question of whether evidence obtained from co-operating witnesses in the US would be admissible against Mr Lynch in any equivalent UK criminal proceedings. First, the SFO's view was that

securing the evidence of the US co-operating witnesses in admissible form was likely to be problematic, and second that the SFO would have difficulty obtaining all relevant unused material from the US authorities relating to these witnesses (and, it is assumed, other aspects of the US investigation) in order to discharge its disclosure obligations.

Following existing case law, the District Judge noted that he was not entitled to review the SFO's belief on any grounds other than irrationality. As the belief was not irrational, it strongly favoured extradition.

(d) Were D to be prosecuted in a part of the United Kingdom for an offence that corresponds to the extradition offence, whether evidence necessary to prove the offence is or could be made available in the United Kingdom

Relying inter alia on the statement from the SFO, the court held that the evidence of the co-operating witnesses was significant, and that it would be difficult to prove the case where that evidence was not available in the UK. It was unclear whether these witnesses would co-operate or could be compelled by US prosecutors to give evidence in the UK and procedures to obtain their co-operation would result in significant delay. In the view of the SFO, "seeking to 'convert' such witnesses into witnesses for the Crown in an English criminal proceeding would give rise to considerable complexity and uncertainty of outcome". It was therefore unclear whether the entire corpus of US evidence would be transferable to the UK.

(e) Any delay that might result from proceeding in one jurisdiction rather than another

The District Judge was satisfied that the SFO would take considerable time before it was able to make a decision to charge, and that further substantial delays would commence in the UK.

(f) The desirability and practicability of all prosecutions relating to the extradition offence taking place in one jurisdiction

The District Judge accepted, as a matter of public policy, the desirability of co-conspirators being tried in the same jurisdiction. He recognised that Mr Hussain had already been tried in the US and so could not be tried alongside the Defendant. However, as was established in *Ejinyere v US* [2018] EWHC 2841 (Admin), this section does not require a joint prosecution and, even where joint trials are not possible, there were "*benefits from trying all co-defendants under the same law, before the same courts and ensuring that all those convicted are sentenced under the same sentencing regime.*" As to Mr Lynch's complaint that there would be an inequality of arms if he were to be tried in the US because prosecution witnesses had been granted immunity, but his defence witnesses had not, the District Judge ruled that it was open to him to make an application to the US court for defence witness immunity.

(g) The Defendant's connections with the United Kingdom

The judge agreed that Mr Lynch's ties to the UK are strong and long-standing, and this factor was an important one weighing against extradition.

However, applying an overall evaluative process of the factors for and against extradition, the District Judge held that extradition to the USA was in the interests of justice and that the forum bar did not apply.

Transatlantic comparisons

This case highlights some of the stark differences between the UK and US criminal justice systems. The US, especially in high-profile fraud cases, is heavily reliant on 'flipping' more junior employees into co-operating witnesses through plea bargaining, which in turn is reliant on very high sentences and heavy discounts, both of which are in the gift of the US prosecutor. The equivalent UK framework does not permit such easy 'flipping' and the heavy-handed, plea-bargaining tactics employed by US prosecutors are often viewed as coercive and unfair on this side of the Atlantic. By the same token, disclosure obligations on UK prosecutors can be considerably more onerous than for their US counterparts, especially in relation to the process by which a witness was persuaded to co-operate and any inducements they may have been offered. Therefore, it is not hard to understand why the SFO viewed the fact that the US case against Mr Lynch hinged on evidence from co-operating witnesses as potentially an insurmountable barrier to a UK prosecution.

Implications for future cases

Mr Lynch's case illustrates a wider and persistent problem in cases of UK/US concurrent jurisdiction. The court's forum analysis was heavily swayed by the SFO's belief that the UK was not the correct jurisdiction in which to prosecute Mr Lynch. That belief, in turn, was almost entirely dependent on the SFO's view that it would be very difficult to use evidence from US co-operating witnesses in a UK trial, as well as to discharge its disclosure obligations in respect of those witnesses.

Within the confines of Mr Lynch's extradition proceedings, the conclusion that the UK was not the correct jurisdiction, and the weight placed on that by the District Judge is hard to challenge. However, it raises the possibility that the use of co-operating witnesses will be a US 'trump card' in concurrent jurisdiction discussions between the respective prosecutors and any subsequent extradition proceedings. Given the healthy and justifiable aversion within the UK criminal justice system to eye-watering US sentences, over-powerful prosecutors, and coercive plea bargaining, how at the same time can these factors be in the 'interests of justice' to support extradition when the defendant could be prosecuted in the UK instead? This is the conundrum posed by Mr Lynch's case, which our extradition procedures appear powerless to address.

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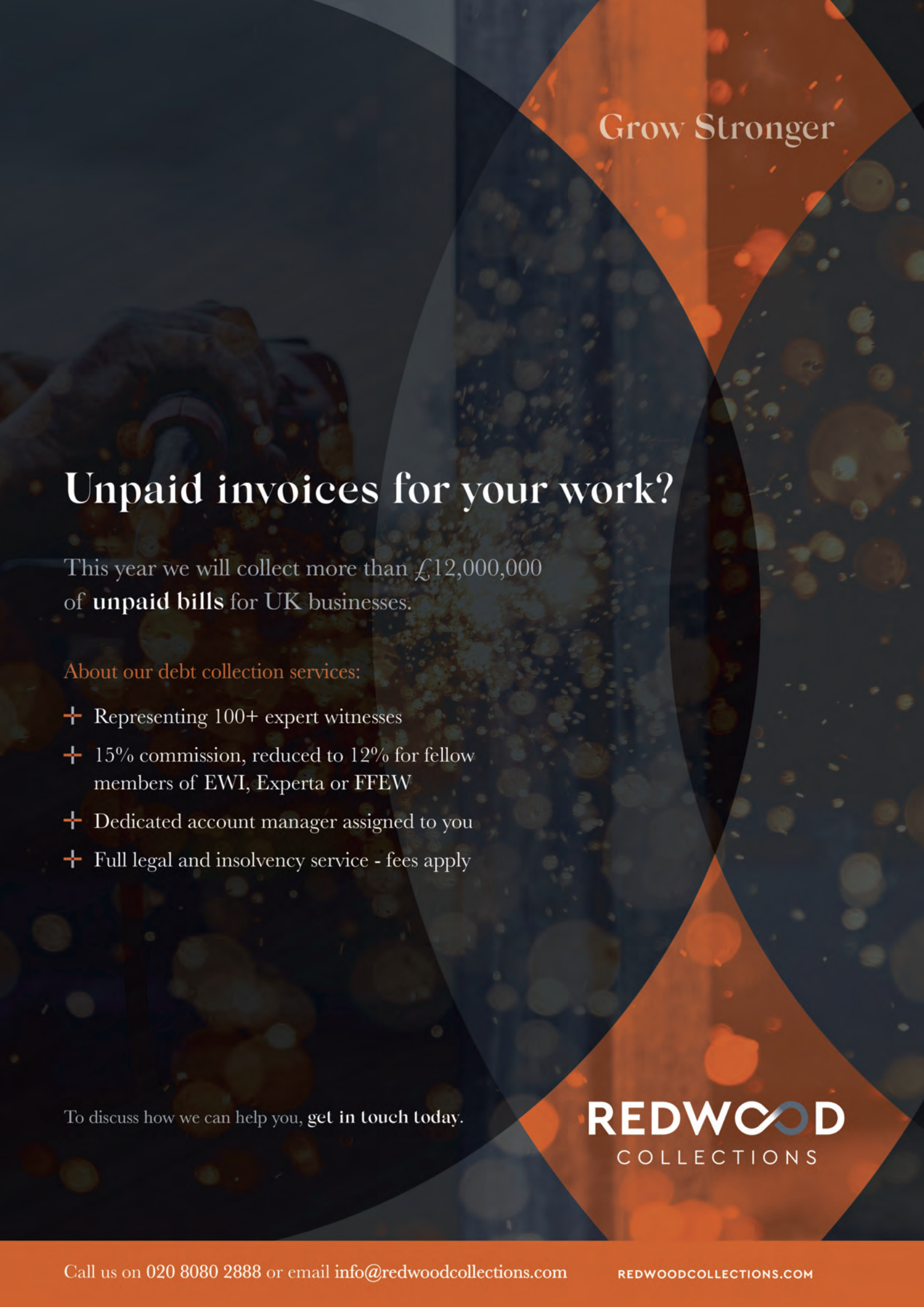
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