ISSN 2397-2769

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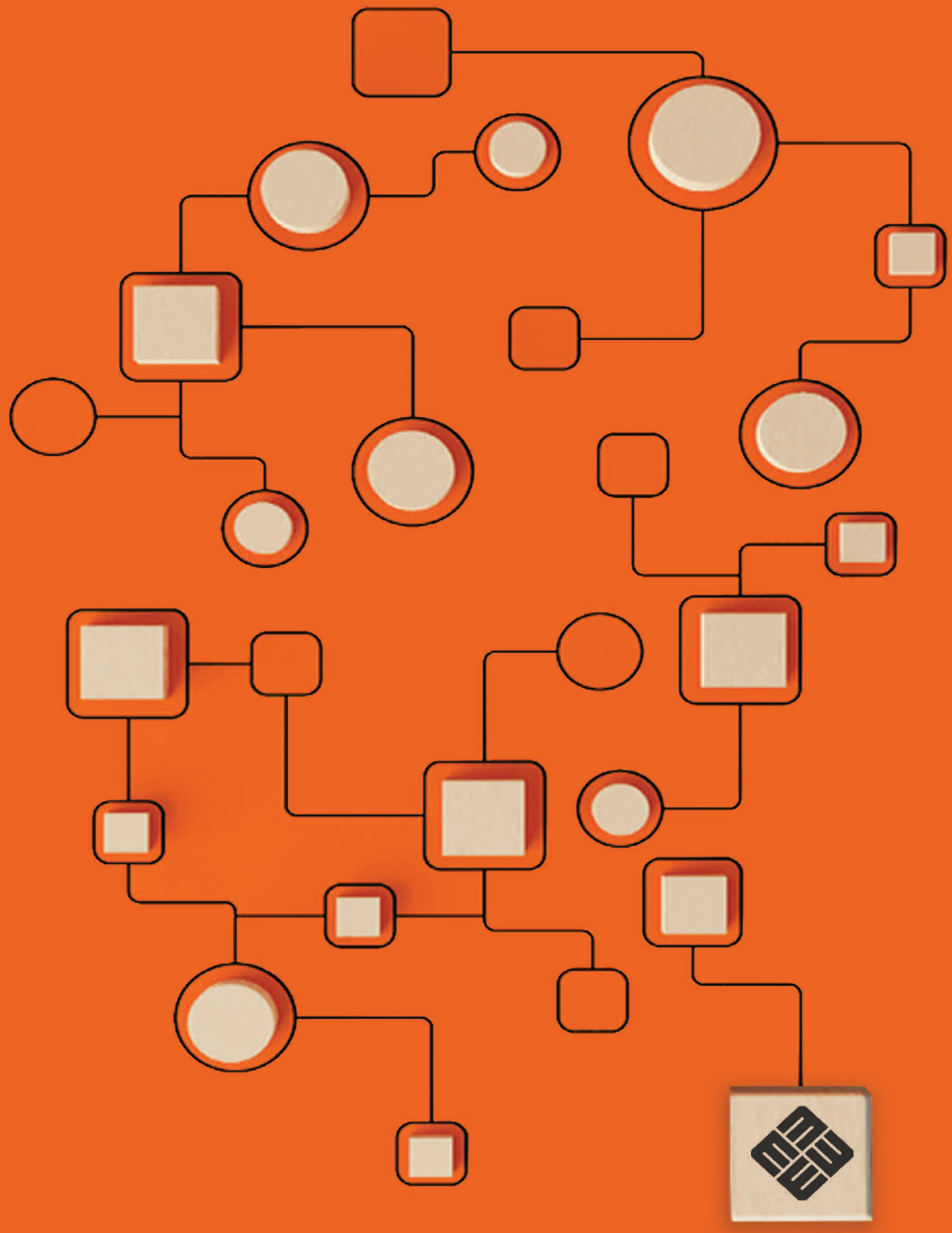

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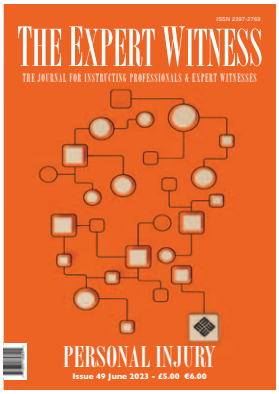

Welcome to the Expert Witness Journal

Hello and welcome to the 49th edition of the Expert Witness Journal.

This issue focuses mostly on Medical-legal issues. For many health professions Medico-legal work is an attractive option seeking to diversify their practice, take a career break or leave clinical medicine altogether. With the number of legal processes involving the NHS increasing every year, it is an important and rapidly evolving area to work in.

We are proud to be exhibiting at the Medico-Legal Conference, firmly established as the UK's leading industry event. Bringing together over 400 of the UK's leading doctors, medical professionals, medical-legal experts, and service providers to network, share expertise, and discuss some of the most important medico-legal issues of our time. The conference and exhibition will take place on 20th June 2023 at the Congress Centre in the heart of London.

The conference is open to in person visitors or live virtually. For virtual attendees, all sessions will be available on-demand for 30 days after the conference has taken place. Pop by our stand and say hello.

In this issue we feature articles on Hearing loss, Liability for Life Changing Injuries Sustained in a Rugby Match, clinical negligence, road traffic claims and much more.

We are always looking for contributors, if you wish to contribute please mail us.
Many thanks for your continued support.

Chris Connelly

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

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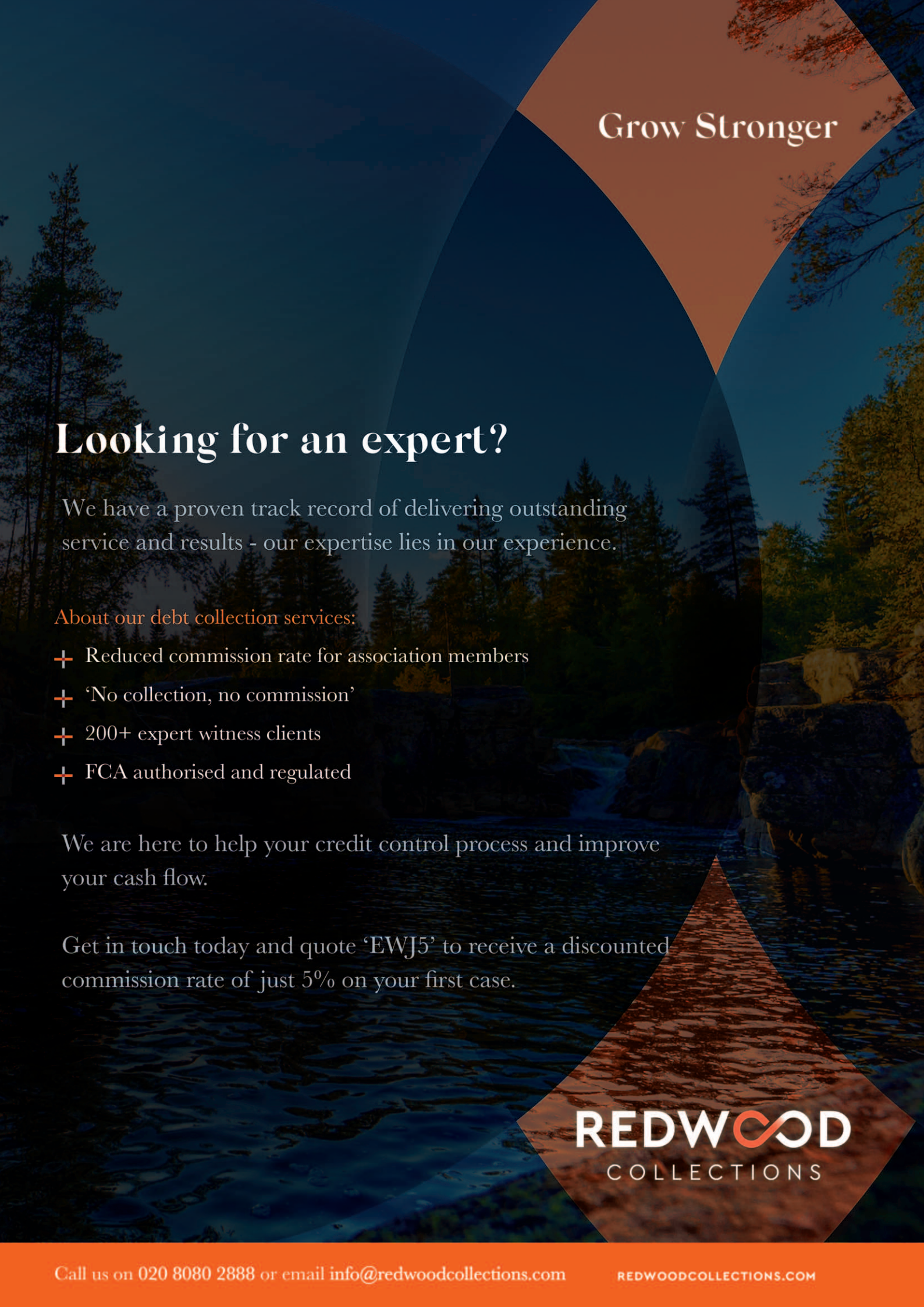
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Covid Fraud
The Problem with No Cure

*In the article, **Niall Hearty**, Partner at **Rahman Ravelli**, discusses recent statistics that have further emphasised the huge amounts of fraud involving coronavirus payment schemes and assesses the scale and source of the problem.*

Nobody wants to hear a bad diagnosis. But all the examinations indicate that the government's attempts to recoup the huge amounts it lost to Covid-related fraud have little or no chance of making a recovery. Despite the most strenuous attempts to put a positive spin on the situation, all the vital signs are showing that the efforts to regain what was lost are flatlining.

To take one recent statistic, taxpayers are facing a loss of almost £1 billion to fraudulent grant applications - and other payments made by mistake – from the days when the government was trying to help businesses that were struggling as the pandemic took its toll. The Department for Business, Energy and Industrial Strategy (BEIS) has said that the emphasis on getting the money to where it was supposedly needed means that a fortune has been paid out in error and is never going to be recovered. Its annual report has put the price of that "fraud and error" at £985 million. This, in simple terms, is taxpayer money that is now gone for good. Perhaps even more damningly, it represents approximately 8.4% of all Covid payments distributed via small business and hospitality and leisure sector grants and the local authority discretionary grants fund. A total of £11.7 billion was handed out in 2020-21 – and almost a tenth of that should not have been.

The National Audit Office has said that an underwhelming 0.4% of all "estimated irregular payments" paid out in grants by local councils has been recovered. With recovery action often not starting until years after the businesses took money they were not entitled to, it is hard to envisage the coming years witnessing a huge flurry of long-overdue repayments.

For all the government references to crackdowns, those the government hopes to be cracking down on have had years to cover their tracks and / or dissipate the payments they should never have received. It should also be remembered that the grant payments were just a small slice of the £154 billion the government paid out to support businesses during the pandemic. Recent weeks have also seen BEIS put the overall loss to the taxpayer through Covid loan support schemes at £15.8 billion and HMRC putting the price of error and fraud in Covid payments since 2020 at £4.5 billion.

Since the full effects of the pandemic kicked in almost three years ago, there has been a steady stream of bad news regarding the sheer scale of Covid-related fraud. This is, obviously, due primarily to those who have planned and then executed the fraud. But the fraud was only possible because the architects of the various payment schemes did not foresee the open goal they were offering to those who relish an opportunity to make illegal gains.

The government's mantra about tackling Covid fraud sounds increasingly like sabre rattling long after the battle has been lost. It has had much less to say about its responsibility for what has happened or about holding individuals or departments responsible for the high-priced debacle that Covid payments have become. The fact that not a great deal of sophistication was required to make fraudulent gains from Covid schemes is the worst indictment of their introduction. Nobody would argue that something had to be done to address the very obvious problems that coronavirus was causing the economy. Most people at the time recognised the need to help businesses who were imperilled by a once in a lifetime threat. Few, if any, of those people, however, would have expected the government's response to provide colossal easy pickings for those looking for fraudulent gains.

It is unfortunate for all of us that there were many more who recognised this in the less principled sections of society than there were in the corridors of government.

There was certainly a need to help businesses whose very existence was under threat because of the pandemic, and desperate times often call for desperate measures. But it appears that the government's coffers have suffered as a result of this rush to distribute cash. There has been no shortage of criticism of the government's approach, some if which has even come from within the government itself. Any future publication of BBLS statistics in the future is unlikely to quell that criticism.

wwww.rahmanravelli.co.uk

A One-sided Battle of Experts and a Costly Outcome for One Defendant

by Kate Archer, Partner, DAC Beachcroft and Jenny Fitzpatrick, Associate, DAC Beachcroft

The recent case of *Rowbottom -v- (1) The Estate of Peter Howard, deceased* and (2) *David Teasdale* [2023] EWHC 931 (KB), in which DAC Beachcroft acted on behalf of the first defendant (D1) and his insurers, provided an valuable lesson for experts, and those instructing them, and demonstrated the costly effects of relying on expert evidence which fails to meet the standards expected and demanded by the courts.

Background

The facts surrounding the tragic accident at the centre of this case are simple. On the evening of the 5th July 2018 the claimant (C) was the pillion passenger on a motorcycle ridden by Peter Howard when it was in collision with a motor car driven by David Teasdale, the second defendant (D2). Mr. Howard was tragically killed in the accident and C brought a claim against his estate (D1) and D2. The claim was valued by C in excess of £10 million. In separate criminal proceedings D2 was prosecuted for the offence of causing death by careless driving but was acquitted.

The issues at trial

Both defendants accepted, as did the court, that C was blameless and the issue for the trial judge was whether the collision was the fault of D1, D2, or both. D2's position was that he remained on the correct side of the road and that it had been Mr. Howard who was responsible for the accident having strayed onto the wrong side of the road.

The lay evidence

The judge, His Honour Judge Sephton KC, sitting as a Judge of the High Court, heard evidence from various witnesses of fact some of which was agreed prior to the Trial with two lay witnesses giving evidence on behalf of D2.

Having considered the evidence of the witnesses present at the time of the accident, the judge came to the conclusion that none could help him with the central issue of where the vehicles were at the moment of impact and was left with considering the expert evidence in relation to this crucial point.

The expert evidence

This was a case in which the judge's views of the expert evidence would be vital and this came from three accident reconstruction experts, Mr. Roberts for C, Mr. Davey for D1 and Mr. Green for D2.

It was clear that the experts had significantly different opinions on the issues key to the claim. Unsurprisingly, the experts were closely examined by the counsel for the parties, in the case of Mr. Green, the inquisitorial questioning coming from Mr. Winston Hunter KC instructed on behalf of C and Mr Nigel Lewers for D1.

Mr. Green's evidence did not impress the judge who stated that *"I have, with some dismay, come to the conclusion that I cannot rely upon the evidence of Mr Green, for a number of reasons."*

The judge's reasons, while specific to the evidence in this case, do provide a clear insight into the nature of matters that are likely to tip the balance when it comes to the judge determining which party's evidence is to be preferred.

The most basic reason is that in his evidence, Mr Green advanced propositions of physics that were obviously incorrect. For example, he suggested that at the moment of collision, the forward motion of both vehicles cancelled each other out. Since the Vauxhall continued along its path at a considerable speed until it hit the verge, the proposition that its forward motion was cancelled out is palpably false. In my judgment, Mr Green compounded the error when he was asked to account for his statement. Instead of agreeing with the suggestion of Mr Hunter that this was nonsense, he hedged by saying that "how it's written is not correct" as if some typographical error was responsible for the blunder. A second example is his assertion that "you can't put fluid under pressure, you can't compress it." Whereas I accept that liquids are not readily compressible, the suggestion that fluids cannot be put under pressure is absurd. I am left wondering what is the purpose of the oil pressure gauge in my motor car if the purpose is not to show the pressure in the oil system.

A second reason why I do not feel able to rely upon Mr Green is that he did not appear to me to understand the obligation of an expert fairly to deal with all the evidence and not simply to address the points that support his hypothesis. Mr Hunter's criticism is fair that Mr Green was happy to emphasise the witness evidence that supported his theory whilst remaining silent about those witnesses whose evidence did not. I am critical of the fact that Mr Green relied upon the marks on the upright of the Recycling sign without drawing the court's attention to the fact that there were several other marks on the upright that were not consistent with his theory.

The judge was also critical of Mr. Green's approach to the expert's discussion adding:

I am thus forced to the conclusion that in failing to explain to his fellow experts that they had misunderstood him, Mr Green has not complied with his obligation to help the court understand the expert evidence and in explaining his conduct to me, he has given inaccurate and unreliable evidence.

However, the judge described himself as *"impressed"* by C's expert, Mr Roberts, and that "*the most convincing expert witness was Mr Davey*". *In relation to Mr. Davey the judge made clear why and in so doing showed what a court is looking for from experts:*

However, the judge described himself as "impressed" by C's expert, Mr Roberts, and that "the most convincing expert witness was Mr Davey". In relation to Mr. Davey the judge made clear why and in so doing showed what a court is looking for from experts:

Mr Davey carefully analysed the evidence and presented a fair and, to me, convincing account of the collision in his written and oral evidence. In giving his evidence, he was firm but not inflexible. He was an impressive witness. My conclusions about what happened are largely informed by his opinion.

The decision

In the light of the view taken of the expert evidence, the judge came to the conclusion that D1 had not been on the wrong side of the road when the impact took place although he had been travelling at a speed slightly in excess of the speed limit, the judge saying "The mere fact that he was exceeding the speed limit by a modest amount did not, in my view, carry with it a foreseeable risk of harm to his passenger. I have accepted Mr Roberts's evidence that this accident and its consequences would have been no different had Mr Howard been riding at a slightly lower speed. Thus, so far as the allegation of excessive speed is concerned, neither breach of duty nor causation has been proved."

The judge went on to find that D2 had "drifted onto his incorrect side of the road", probably as a result of a loss of concentration, and did not see the motorcycle coming towards him until the last moment, making no attempt to avoid the collision. It was, the judge concluded, D2's negligent driving that was the cause of the accident and went on to find that C's claim against D2 succeeded but that C's claim against D1 had to be dismissed.

Conclusions

This was a case in which the expert evidence was to prove to be key. Confidence in the evidence of Mr. Davey and the views taken on the report of Mr. Green led to the conclusion that this was a case to run to trial, and that decision was vindicated by the finding that D1 was not responsible for the accident. The judgment shows the importance of undertaking a critical analysis of any expert evidence and the results that can be achieved by taking robust decisions and running the right cases to trial.

In cases where the lay evidence is not conclusive, expert evidence is likely to be the determining factor. While no party wishes their expert to be easily swayed and dissuaded from their opinions, a steadfast refusal to see and to deal properly with weaknesses and counter-arguments is a failure that will not impress a court. It is rare for judges to refer to experts opinions as "obviously incorrect" and "palpably false" but when they do the die is cast and the outcome clear.

The dismissal of the entire claim against Mr Howard was particularly welcome to the first defendant's insurers as, given the severity of the claimant's life-changing injuries, the claim advanced on her behalf was very significant.

If you wish to discuss this further, please feel free to get in contact with our Motor Injury Team at DAC Beachcroft Claims Limited.
www.dacbeachcroft.com

‘Every 90 Seconds’ - Action For Brain Injury Awareness Week 2023

by Eurydice Cote, Senior Associate, Medical Negligence & Personal Injury, Kingsley Napley

In the UK someone is admitted to hospital with an acquired brain injury every 90 seconds.

Each year, charity Headway spearheads a campaign week to raise awareness of acquired brain injuries (ABIs) and their impact on sufferers. This year they are highlighting that, in the time it takes to clean your teeth, another person goes to hospital with a brain injury.

What is an acquired brain injury (ABI)?
An ABI refers to a brain injury of any cause that occurs after birth and is not related to a congenital or a degenerative disease. The term includes traumatic brain injuries – i.e. those caused by trauma, perhaps from a fall.

What are some of the causes of non-traumatic ABIs?
Some key causes include heart attack, infections leading to conditions such as encephalitis, sepsis and meningitis, brain aneurysms that rupture, and stroke. Headway’s data suggests that there is an admission to hospital for a stroke every 4 minutes in the UK.

Some brain injuries also occur during birth, for example a hypoxic brain injury, where the brain is starved of sufficient oxygen (see Kingsley Napley’s birth injury page).

What is the impact?
The impact can be far ranging and debilitating. Symptoms may include paralysis or weakness, spasticity (tightening and shortening of muscles), poor balance, problems with memory and cognition, depression and fatigue.

The impact is not limited to the sufferer. Repercussions for families and loved ones can be very significant. See Kingsley Napley’s blog on ‘Coping with brain injury’.

Long-lasting damage is not always visible and another Headway campaign highlights the hidden nature of disabilities. Damage to certain parts of the brain, such as the prefrontal cortex, can potentially lead to significant personality changes, including difficulties with emotional management as well as anxiety and depression.

Early treatment and access to rehabilitation services are vital and can reduce the possible impacts on relationships.

What is being done?
On 2 December 2021, the government committed to publishing an ABI strategy to support sufferers and to seek to prevent ABIs where possible. The strategy is still awaited and we hope that this will bring improvements in the rehabilitation provisions available on the NHS.

Could there be a legal claim?
If someone else’s error caused or contributed to a brain injury then there may be a claim. It is important that brain injury sufferers and their families are aware of their rights. Where they are entitled to an award of compensation, this can have a huge impact for their future.

Those areas where a medical negligence claim may arise include:

- Errors in the management and treatment of a traumatic brain injury (for example, delays in proceeding to a craniotomy).
- Delays in diagnosing or treating strokes.
- Errors in surgery leading to the brain not getting enough oxygen.
- Missed or delayed diagnosis of meningitis.
- Failures in the treatment of brain bleeds, such as ruptured aneurysms, subarachnoid haemorrhage, and subdural haematoma. (See Kingsley Napley’s blog on subarachnoid haemorrhage, a rare type of stroke whereby an aneurysm ruptures and where it is not treated in time can re-bleed and cause a more serious brain injury.)

Failures in the management of infections can also lead to brain injuries. For example, we see cases where sepsis was not diagnosed in time and a brain injury results. This may be because the right blood tests were not done in A&E or because a GP did not refer to hospital.

Claims for personal injury can be made if a traumatic brain injury was a result of someone’s negligent actions – i.e. in a road traffic accident or a workplace accident.

What has to be proved?
Essentially it has to be shown that there was fault and that as a result, a brain injury was suffered. For medical negligence the test is whether the standard of care was below a reasonable level and but for this, the brain injury would have been avoided or would have been less severe. This requires evidence from independent experts. We at Kingsley Napley have significant experience in this area and work with leading experts, including neurologists and neurosurgeons, to get the best outcomes for our clients.

What are the levels of compensation?
There is no set amount for a brain injury. The award will depend upon the impact on the person's life but may include sums for new or adapted accommodation, aids and equipment and care as well as accounting for any lost earnings. Our priority is to ensure that the injured person gets the rehabilitation treatment that they require as soon as possible and the maximum award to provide for a positive future.

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Barry v Ministry of Defence [2023] EWHC 459 (KB)

A review of the High Court decision in Barry v Ministry of Defence [2023] EWHC 459 (KB)

Kate Longson, Barrister at Ropewalk Chambers, *reviews the High Court decision in Barry v Ministry of Defence [2023] EWHC 459 (KB) and the ongoing uncertainty surrounding the application of the Moore et al. Guidelines for Diagnosis and Quantification of Military Noise-Induced Hearing Loss 2020.*

Those who practise in the field of noise induced hearing loss are waiting with bated breath for some authoritative guidance on the application of the controversial medicolegal guidelines proposed by Professor Brian Moore et al. Amendments are proposed to the Coles, Lutman and Buffin 2000 (CLB) method in an industrial context, in respect of which my colleague Katie McFarlane has recently written (https://www.bailii.org/ew/cases/EWHC/KB/2023/459.html) and, in addition, an entirely new set of diagnostic criteria have been proposed for the diagnosis of so called 'military noise induced hearing loss' (M-NIHL).

The high court is currently dealing with thousands of claims advanced on the basis of the new M-NIHL diagnostic criteria. Those cases are being case managed together and a selection process will determine which will cases are to be treated as lead claims to proceed to trial for resolution of the generic issues. In the meantime, county court matters which turn on the same issues are approaching trial with little/no indication as to how the Moore Guidelines are likely to be received by the court.

The high court has, in the last few days, confirmed that we will have to wait a little longer for a resolution to the question of the application of the Moore et al. method.

Mr Barry is an ex-member of the Royal Marines. He suffered NIHL arising from his military service, the majority of which was thought to have been occasioned by one particular training exercise, 'black alligator'. Breach of duty was admitted. The Defendant instructed Professor Mark Lutman who opined that the Claimant was, indeed, entitled to a diagnosis of NIHL using the CLB/LCB method. The Claimant, who relied upon the evidence of Mr Hisham Zeitoun and Professor Brian Moore, suggested that the new M-NIHL Guidelines should be applied and that, if they were accepted, the quantum of his hearing loss would be slightly greater.

Professors Lutman and Moore gave oral evidence at the trial and the Claimant urged the court to make a determination as to which methodology should be preferred for assessing the diagnosis and quantification of the Claimant's NIHL. However Johnson J ultimately agreed with the Defendant that it was not necessary for him to make a determination as to which methodology should be applied, citing 10 reasons as to why it would be improper for him to so do:

87. First, it is common ground that Mr Barry has suffered hearing loss as a result of noise exposure in the course of his military service. So far as diagnosis is concerned, there is no live issue between the parties. It is not therefore necessary to investigate different diagnostic criteria.

88. Second, Mr Barry satisfies both the CLB guidelines and Professor Moore's original criteria and Professor Moore's revised criteria. His case is not therefore apt for evaluating the respective merits of the different methodologies.

89. Third, there is a difference between Professor Lutman and Professor Moore as to the extent of Mr Barry's noise hearing loss. That difference results from their differing methodologies. For this reason only it might be said that there is a need, in the circumstances of this particular case, to make a finding as to the methodology that is to be preferred. However, the difference in outcome on the different methodologies is not significant. The experts agree that the binaural noise induced component of Mr Barry's hearing loss is of the order of 20dB. Professor Lutman estimated an average noise induced hearing loss of approximately 16dB in the 1-2-4kHz range. Professor Moore's estimate was 17dB (and 22dB for the 1-2-3kHz range). Despite the logarithmic nature of the decibel as a unit of measurement, these differences are not significant. The experts explicitly agreed that "there is no meaningful difference in outcomes between the two methods in the present case."

90. Fourth, there is a larger difference between the outcomes of the respective methodologies when applied to the left ear alone. The average noise induced loss at the 1, 2 and 3khZ frequencies is 32.7dB or 25.3dB depending on whether Professor Moore's method or Professor Lutman's method is used. The corresponding figures at the 1, 2 and 4kHz frequencies are 29.3dB and 21.7dB. In each case the difference is around 7.5dB. However, neither expert suggests that it is appropriate to consider the respective outcomes by reference to each individual ear in isolation. In their joint report they focus on the binaural loss and, on that measurement, there is no significant difference.

91. Fifth, the court's role is to resolve the issues between the parties in a particular case. The intense factual focus on the circumstances of a particular case means that there are dangers in making findings as to the appropriate scientific methodology that should be applied more generally. To take the present case, Mr Barry was a relatively young man at the time his hearing deteriorated. None of the experts suggest that age-related hearing loss is a significant factor in his hearing loss. Mr Barry was able to give a clear account of his noise exposure in both the military and other contexts (motorbikes, discos), which was not subject to significant challenge. There is no

suggestion that, apart from military noise exposure, he has been exposed to levels of noise that could explain his hearing loss. Other cases will be less clear cut.

92. Sixth, there is an important difference between the exercise on which Professor Lutman and Professor Moore are engaged in terms of deriving diagnostic criteria, and the court's task of making findings as to causation and damage. Diagnostic criteria are a tool that can be used by expert witnesses to provide an expert opinion to the court. It is for expert witnesses in each individual case to select and deploy diagnostic criteria as they consider appropriate, alongside a holistic view of the clinical picture. The criteria are not intended to operate algorithmically without expert interpretation. The court's role is to establish, on all the evidence (including but not limited to the expert evidence) whether the claimant has established his case on causation and loss on the balance of probabilities.

93. Seventh, it is clear that there were some significant misunderstandings as between the expert witnesses, even after their joint statement. So, for example, Professor Lutman had understood that Professor Moore's methodology had been designed so as to achieve as many positive results as possible in a sample of 58 cases where the individuals were bringing claims for military noise induced hearing loss. That understanding was misplaced – the methodology had been derived from different and larger samples, and the 58 cases had been used as a way of testing its efficacy. The scope for such misunderstandings is considerable: Professor Moore's methodology is new, has been significantly and recently modified, and has not yet (so far as I was shown) been the subject of further scrutiny in the academic literature (beyond the peer review process that was applied before his papers were published).

94. Eighth, the fundamental difference between the methodologies is based on Professor Moore's finding that military noise exposure has an impact in higher frequency ranges than other types of noise exposure. He may be right about that, but it is a contested issue. Professor Lutman says that Professor Moore's finding was based on his observations of a selection of particular audiograms of military veterans, but that a different finding might have been made if a different (or larger) sample had been used.

95. Nineth, there were a number of issues between Professor Lutman and Professor Moore as to the design of the various studies which underpinned a number of the published papers, including their own papers. Both experts were clearly seeking to assist the court with their best interpretation of the literature and with evidence that was not dependent in any way on the interests of those who instructed them. Both experts made appropriate concessions. I have no doubt as to their scientific integrity. Mr Steinberg submits that the inherent likelihood is that Professor Moore's scientific papers were published in good faith, that they represent his true views, that they bring all of his expertise and experience to bear on the subject matter at hand and that they are motivated by a sincere desire to contribute to the canon of scientific scholarship. I agree. The same can be said of Professor Lutman's work. It is helpful to have the two proponents of the competing methods give evidence – they are more familiar with the methodologies than anyone else; they are the original architects. This does, though, mean that in one sense they are not independent of the underlying issue (ie which of their two methodologies is to be preferred). If, in a future case, that does have to be resolved then it may be helpful to have the benefit of an opinion of a single, jointly instructed, epidemiologist on the issues that arose when

comparing the methodologies, including the design of the different studies, the appropriate comparator cohort to test the null hypothesis, the appropriate population statistics to be used, and the calculation of the sensitivity and specificity scores and the positive predictive values for the different methods.

96. Tenth, many more claims of military noise induced hearing loss are currently before the courts. They are being case managed together. It is proposed that lead claims will be selected as vehicles for the resolution of generic issues. The present case is not part of that group, and it has not been selected as a lead claim for the resolution of more generic issues. The MoD say that Mr Barry's claim is not a suitable lead case. It is appropriate, in this context, to exercise caution and restraint before making findings that are not truly necessary for the resolution of the issues in this particular case.

The tenth and final reason given by Johnson J is likely to be at the forefront of the minds of county court judges who are tasked with hearing military noise trials prior to the conclusion of the test litigation. It is likely that, unless it is necessary for the resolution of the particular case, judges are likely to be reluctant to engage in discussions about the merits of the respective methodologies.

With county court trials listed throughout the summer months, various experts will be subject to cross examination about their preferred choice of methodology. It remains to be seen how the M-NIHL Guidelines will be received by circuit judges who are well used to resolving causation issues in noise induced hearing loss litigation.

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Establishing Liability for Life Changing Injuries Sustained in a Rugby Match

*In the case of **Czernuska v King (2023) EWHC 380** (KB), the High Court heard a liability-only trial to consider whether a rugby player, Natasha King (Defendant), was liable for negligence for serious personal injuries suffered by an opposing player, Dani Czernuszka (Claimant), during the course of a rugby match. The case is an interesting exploration of the application of the law relating to negligence in competitive sports.*

Czernuska v King (2023): Background of events leading to the life changing injury

Dani Czernuszka very sadly suffered multiple catastrophic injuries as a result of being tackled during an amateur rugby match. She suffered a significant spinal cord injury which rendered her paralysed from the waist down, resulting in her being wheelchair dependent for life.

She was 28 years old at the time and the mother of two young children. It goes without saying that these were life changing injuries.

Czernuszka and King were both players on opposing teams in a rugby match in "a developmental" (i.e. beginners) rugby union league. Czernuszka was quite new to the game, while King had been playing for some years and was relatively experienced. King was the captain of her team and, according to witnesses, an influential member of the squad.

The two teams met for their first game of the new rugby season on 8 October 2017. The whole match was captured on video, a recording of which was available for the Judge hearing the case. King's team apparently behaved particularly aggressively with a significant amount of 'trash talk', swearing and verbal abuse directed towards their opponents, and it seemed that, as the match went on, King had marked Czernuszka as a target.

In a previous friendly match between the two teams, there were a series of incidents which involved King, including a player having their wrist broken during a tackle and another apparently being intentionally hit on the back of the head.

In the lead-up to the incident that caused Czernuszka's severe personal injury, King had tackled her while she was running with the ball, causing them both to hit the ground with some force. Czernuszka immediately recovered while King, on the other hand, appeared to be winded by her own tackle and play was stopped temporarily. During this time, Czernuszka and her team members appeared to celebrate (they were winning 14 – 0) and the video footage shows that this seemed to aggravate King and her team. Czernuszka's teammates gave evidence in Court that King was clearly very angry afterwards, having been overheard saying that she was going to "break" Czernuszka.

Just a few minutes later, the rugby ball came near to Czernuszka and she bent down to pick it up. King was seen to run directly at Czernuszka and, while she was bent over with her head and neck exposed, tackled her. Czernuszka was effectively parcelled up by King who pulled her off her feet at the back of her knees and drove downwards, with the full weight of King landing on the top of her back. Czernuszka sustained a T11/12 fracture with a corresponding spinal cord injury causing Czernuszka to be paralysed from the waist down. She suffered a life changing injury.

Czernuska v King (2023) The Court's decision on compensation for the life changing injury

The primary issue for the Court was whether King had committed an act of negligence within the meaning of the law and whether she was liable to pay compensation for Czernuszka's personal injury claim. The Judge decided that the applicable legal test for this was whether King failed to exercise such a degree of care as was appropriate in all the circumstances.

The Judge was persuaded that Czernuszka was not in possession of the ball and therefore should not have been tackled at all. They also found that she was in an exposed position and was not prepared to be tackled, and furthermore that she was vulnerable due to her smaller size and stature compared to King. The Judge ultimately found that King executed the tackle with reckless disregard for Czernuszka's safety and it was done in a manner that was liable to cause her injury and making it a valid injury claim.

The Judge did not find that Natasha King necessarily intended to injure Dani Czernuszka, but instead that she was so angry towards Czernuszka that she had set out to seek revenge, and had consequently 'closed her eyes' to the obvious risk she was placing Czernuszka under. The Judge therefore held that King is liable to Czernuszka for the life changing injuries she suffered.

While those playing a contact sport like rugby often accept a certain level of risk of a sporting injury, it seems that if those who have suffered injury can prove that the events of the game went well beyond the normal course of play, they may be able to establish liability in their favour for an injury claim. However, this is not a straightforward task and this particular case had the benefit of complete video footage to assist the Court. Those that find themselves in a similar situation to Dani Czernuszka in this case should seek experienced and specialist legal representation from life changing injury claim solicitors.

The Claimant (Dani Czernuszka) in this case has been successful in achieving a liability finding which is a key step towards being compensated for the life-changing injuries she has suffered.

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Novus Actus Interveniens: a Critical Analysis of Jenkinson v Hertfordshire CC [2023] EWHC 872 (KB)

3PB head of Clinical Negligence and Personal Injury Group ***Michelle Marnham*** *analyses the case of Jenkinson v Hertfordshire CC [2023] EWHC 872 (KB), a case which presents us with an intriguing change in clinical negligence law, with Baker J challenging the long-standing notion of the 'specific rule' in medical negligence cases.*

With the ruling sparking debate regarding the existence and applicability of the novus actus interveniens doctrine in this area, Michelle Marnham examines the origins of the 'specific rule' and provides a critical analysis of Baker J's decision.

Read Michelle's analysis below.

Introduction

1. *Jenkinson v Hertfordshire CC [2023]* EWHC 872 (KB) represents an intriguing change in clinical negligence law. Baker J has challenged the long-standing notion of the 'specific rule' in medical negligence cases. The ruling has sparked debate regarding the existence and applicability of the novus actus interveniens doctrine in this area.

2. This article aims to examine the origins of the specific rule and provides a critical analysis of Baker J's decision.

Factual background

3. Jenkinson involved a Claimant who suffered a severe fracture to his right ankle after stepping into an uncovered manhole or drain gully. The Defendant, Hertfordshire County Council, admitted liability for breaching the Highways Act 1980. However, a dispute arose over the subsequent surgical treatment of the Claimant's injury. The fixation of the Claimant's fracture failed within a few days. The Defendant's expert, Mr Machin, argued that the surgery was performed negligently. He concluded that "had the initial surgery been carried out to the correct standard, then Mr. Jenkinson, in all probability, would have been able to return to work within 3 to 6 months post injury. He would have returned to the same job with minimal restriction and whilst he would have experienced some minor stiffness and ache this would not have prevented him carrying out his normal activities". The Defendant sought to amend its Defence to include the novus actus interveniens treatment, contending that the chain of causation was broken by negligent treatment. Although this application was refused at first instance by DJ Vernon, Baker J in the High Court permitted this amendment for the reasons explored below.

The 'so grossly negligent' rule

4. Traditionally, the prevailing view in clinical negligence law is that subsequent medical negligence to an original tort could only break the chain of causation if it was deemed to be 'so grossly negligent as to be a completely inappropriate' response to the original injury. In *Hogan v Bentinck West Hartley Collieries (Owners) Ltd [1949]* 1 All ER 588, a majority of three to two in the House of Lords held that inappropriate treatment operated as a novus actus. Lord Reid, dissented. In his dissenting judgment Lord Reid considered that only a 'grave lack of skill and care' in the provision of intervening medical treatment could serve to break the chain of causation. The editors of Clerk and Lindsell preferred Lord Reid's dissenting view and submit that 'only medical treatment so grossly negligent as to be a completely inappropriate response to the injury inflicted by the defendant should operate to break the chain of causation.' (see paragraph 2-124).

5. Lord Reid's approach was later affirmed by the Court of Appeal in *Webb v Barclays Bank plc [2002]* PIQR P8. In Webb, the Claimant, an employee of Barclays Bank, stumbled and fell over a protruding stone in one of its forecourts. In the fall, she hyperextended her left knee, which was affected by the consequences of polio she had contracted as a child. The knee was left in a grossly unstable condition. She received an above-the-knee amputation, based upon a recommendation which was negligently given as, in this factual matrix, amputation should only have been recommended as a last resort. Barclays had pleaded that the amputation and subsequent problems related to it were not caused or contributed to by their negligence but were solely due to the intervening negligence of the Claimant's treatment from the hospital.

6. The Court of Appeal disagreed with the Defendant finding that the negligent advising of the amputation did not 'eclipse the wrongdoing' as it was not a 'completely inappropriate' response, despite the clinician's conduct still arguably satisfying the conventional test for negligence. Webb was therefore considered a helpful framework for Claimants, sparing them from investigating every instance of medical negligence to pursue their claims.

DJ Vernon's decision

7. At first instance, DJ Vernon relied on Webb to conclude that only grossly negligent medical treatment could sever the chain of causation between the Defendant's original negligence and the Claimant's subsequent injuries. As DJ Vernon was of the view this had not occurred, he found that the Defendant had

not shown a real prospect of establishing a necessary ingredient of the proposed defence. Permission to amend the Defence was therefore refused.

Baker J's challenge

8. In the High Court, however, Baker J challenged the existence of this specific rule. He considered that the normal rules of causation should apply to clinical negligence and that the chain of causation also applies according to standard principles. Baker J opined that there was no logical justification or policy reason for creating a distinct rule in cases of negligent medical intervention. He argued that the continuation of such a rule would lead to 'litigation within litigation,' as determining when treatment becomes a grossly inappropriate medical response would be an unnecessarily onerous and complex task.

9. In order to arrive at this conclusion, Baker J examined the authorities and disputed the proposition that a specific rule of law existed to medical treatment being 'so grossly negligent' as to constitute novus actus interveniens. Expanding on his reasoning Baker J provided that: 'Without the constraint of the 'specific rule' as a principle of law, in my judgment there is a real prospect on the basis of Mr Machin's opinion, if accepted at trial, of a finding that the claimant's initial injury, admittedly the result of the defendant's negligence, was so badly mistreated that the defendant ought not, in fairness, to be considered responsible for the consequences of that mistreatment.'

10. Baker J's decision is arguably more consistent with the approach taken in *Rahman v Arearose [2001]* QB 351, a case decided a month before Webb. In Rahman, the Claimant experienced an assault during the course of his employment for which his employer was held responsible. The Claimant suffered a fracture to the orbital wall of his right eye. Surgery carried out by way of bone graft (to prevent the eye from sinking in its socket) was performed negligently which resulted in blindness in that eye, as well as psychiatric consequences due to both the assault and loss of sight. It was agreed that the negligent execution of the surgery, causing blindness, for which only the NHS Trust was responsible for.

11. Laws LJ stated that 'it does not seem to me established as a rule of law that later negligence always extinguishes the causative potency of an earlier tort...The law is that every tortfeasor should compensate the injured claimant in respect of the loss and damage for which he should justly be held responsible.'

12. It was further stated in Rahman that there was 'nothing in the way of a sensible finding that while the second defendant obviously (and exclusively) caused the right-eye blindness, thereafter each tort had its role to play in the Claimant's (psychological) suffering.' The Court therefore found that the first defendant was held responsible for some of the damage beyond that which the Claimant would have suffered in any event had the surgeon not acted negligently.

13. As Baker J noted, Rahman in the Court of Appeal was not, however, a decision against the Specific Rule since the point was not taken.

14. The amendment of the Defence was therefore permitted. In his ruling, Baker J effectively reframing the test, suggesting that the focus should be on whether the Claimant was 'so badly mistreated' that it would be unfair to hold the Defendant responsible for

the consequences of that mistreatment. This revised test aims to assess the severity and appropriateness of the medical intervention, rather than relying on arbitrary standard of gross negligence.

Implications

15. Unless successfully appealed, Baker J's decision has far-reaching implications for practitioners. Critics argue that his departure from the established 'so grossly negligent' rule disregards the need for a clear standard in determining when medical treatment breaks the chain of causation. However, others are of the view that the High Court decision 'must be correct' and that there is no genuine reason as to why clinical negligence law should have its own special category.

16. In light of this decision, practitioners in the future will need to consider any subsequent medical treatment undertaken by the Claimant in greater detail. In the short term, one may see a flurry of applications, for example with the Defendant applying to amend their Defences in cases where the issue of Novus Actus Interveniens had not previously been taken and Claimants applying to join the medical profession as a Second Defendant.

Michelle Marnham is a Leading Junior Barrister with over 20 years' experience, specialising in Personal Injury and Clinical Negligence. Michelle is recommended in the Legal 500 as a 'persuasive and effective advocate who is particularly skilled in dealing with claims involving complex issues.'

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Prescription and Limitation - A General Comparison North and South of the Border

In an updated article which compares prescription and limitation in Scotland and England and Wales, ***Iain Drummond****, Partner, and* ***Ryan McCuaig****, Solicitor, in the Construction, Engineering and Infrastructure disputes team at Shepherd and Wedderburn, examine the general position in the relevant jurisdictions*

Prescription and limitation apply to all claims in delict/tort and contract. Different rules apply north and south of the border, but the purpose of both is to ensure that a wrongdoer cannot be sued for a historic delict/tort or contractual claim, as a matter of public policy. Time-bar will operate against these 'stale' claims, in order to avoid the difficulties of proof created by delays and to prevent businesses and individuals from living with a threat of litigation hanging over them indefinitely.

This area has been subject to significant controversy in Scotland in recent times, resulting in new legislation to alter the position. This article looks at both jurisdictions and provides some tips on the main periods that generally apply and how and when to stop or delay 'the clock' running for time bar, especially in claims for latent defects.

This article does not deal with all prescription or limitation periods or all features of those periods. Whether the periods apply and if so how, is usually highly fact-sensitive. Also, there is a 'cliff-edge' aspect to prescription and limitation, in the sense that when the periods expire, the rights are lost; there is no tapering. For these reasons, it is important to obtain timely and comprehensive advice from a specialist.

Scotland: legislation
Historically, Prescription and Limitation was regulated by the Prescription and Limitation (Scotland) Act 1973, as supplemented by case law.

5-year prescription period
Under section 6 of the 1973 Act an obligation is extinguished after five years:

(a) without any relevant claim having been made in relation to the obligation; and

(b) without the subsistence of the obligation having been relevantly acknowledged.

In general terms, this applies to:

- obligations to pay a sum of money and other contractual obligations;
- obligations to pay compensation;
- breach of contract and negligence claims.

It was the 5-year prescription period which gave rise to controversy following the case of *David T Morrison & Co Ltd v ICL Plastics Ltd & Others* [2014] UKSC 19 and other cases that followed it, such as *Midlothian Council v Raeburn Drilling 2019* SLT 1327. This resulted in the 1973 Act being amended by the Prescription and Limitation (Scotland) Act 2018, which is discussed in more detail below.

20-year prescription period (longstop)
A 20-year prescription period applies as a long-stop. An obligation will thus expire if, after 20 years, no relevant claim has been made and the subsistence of the obligation has not been acknowledged. This is a "catch all" provision which applies to all obligations. It is designed to impose an absolute time limit on obligations being enforceable. Unlike the five-year period, the 20-year period cannot be extended on the basis of a lack of awareness by the pursuer.

It should be noted that there is a 2-year prescription period for a right of relief against a joint wrongdoer. This is governed by S.8A of the 1973 Act. The 2-year period generally begins when a party is found liable by a court or commits to a settlement, where it considers that a third party should also contribute.

David T Morrison & Co Ltd v ICL Plastics Ltd & Others [2014] UKSC 19
This was a significant judgment by the UK Supreme Court which effectively reversed 30 years of practice. The court held that where the 5-year prescription period applies, a claimant in Scotland must pursue its claim within five years of the date when it became aware that it had suffered a detriment such as an additional expense, or when it could, with reasonable diligence, have become so aware, whether or not the claimant knew the detriment to be a loss resulting from a breach of contract or negligence.

The decision in Morrison gave rise to perceived unfairness, for example in the case of *Midlothian Council v Raeburn Drilling and others 2019* SLT 1327 where it was held that the 5-year period for the Council to make a claim against its engineer had started in 2006, when the engineer failed to advise the Council that the ground upon which the Council intended to develop properties required installation of a gas defence system. This was notwithstanding the fact that the Council was unaware of a design failure until 2013, when it received the first complaint from a tenant.

The effect of this was that the Council's right to claim against its engineer had become time-barred before the properties were completed.

This perceived unfairness was addressed in the Prescription (Scotland) Act 2018, key parts of which came into force on 1 June 2022, amending the 1973 Act. The amendments provided that the start of the 5-year prescriptive period for a claim for breach of contract or negligence would now only begin when the pursuer who suffered the loss claimed for, was aware, or could with reasonable diligence have been aware:

(a) that loss, injury or damage had occurred;

(b) that the loss, injury or damage was caused by a person's act or omission; and

(c) of the identity of that person.

Crucially, now, all three of the above elements must be within the pursuer's knowledge (or would be within the claimant's knowledge if exercising reasonable diligence) in order for the 5-year period to start running.

This change will delay the start of the prescriptive period in many more cases than before Morrison. It does not apply to any obligations which were extinguished before 1 June 2022, so the old law will still be relevant to many existing actual or potential claims.

England and Wales: legislation
In England and Wales, the relevant legislation is the Limitation Act 1980. Limitation is the equivalent of prescription in England and Wales; the difference is that Limitation limits the ability to sue for an obligation whereas Prescription causes the obligation to cease.

6-year limitation period
The 1980 Act applies a 6-year limitation period in England and Wales to the following claims:

- tort;
- simple contract;
- sums recoverable by statute; and
- enforcing judgements.

12-year limitation period
The 1980 Act also has a 12-year limitation period for:

- actions on a specialty (e.g. contracts executed as a deed); and
- actions relating to recovering land.

15-year limitation period (longstop)
Section 14B of the 1980 Act specifies a 15-year (long-stop) limitation period for negligence claims.

In relation to negligence claims for latent defects, section 14A of the 1980 Act applies a 'discoverability' exception, meaning that the limitation period is the later of:

- 6 years from when the cause of action accrued (i.e. when the damage occurred); or
- 3 years from when the claimant knew or ought to have known:

a) the material facts about the loss suffered;

b) the identity of the defendant; and
c) his cause of action.

However, this exception will not apply where the construction contract excludes liability for negligence (other than for death or personal injury which cannot be excluded).

Like in Scotland, actions to recover a contribution from a third party are limited to 2 years. ***In England and Wales, this is regulated by S.10 of the Limitation Act 1980. The relevant date, from which the clocks starts running, is either the date of the decision of a court or arbitration, or in cases not involving a formal decision, the date upon which the amount of contribution is agreed between parties.***

How to stop time running
There are a number of ways to stop or pause 'the clock' for time-bar:

- **Raise court proceedings** - raising court proceedings will stop time-bar and preserve an action. In England, this happens when the court receives the claim form. In Scotland, this happens when the Writ/Summons is served.

- **Commence arbitration proceedings** - commencing arbitration proceedings will stop the clock for time bar. This happens when an arbitration notice is submitted to the other party, **or, in England and Wales, to a relevant body (e.g. the body appointed by the arbitration agreement to nominate an arbitrator),** but the rules vary depending on which legislation applies.

- **"Relevant Acknowledgement" -** in Scotland, S.10 of the 1973 Act requires that there has either been such performance towards implementation of the obligation as clearly indicates that the obligation still subsists; or that there has been an unequivocal written admission clearly acknowledging that the obligation still subsists. Both will have the effect of refreshing the clock. Similarly, in England and Wales, acknowledgement or part performance refreshes the clock, which then starts running anew.

- **Agreement between the parties - parties can enter into a 'Standstill Agreement' to alter the prescription/limitation period. This is a well-established practice in England and Wales,** but is relatively new, and much more restricted, in Scotland, following the Prescription and Limitation (Scotland) Act 2018. For more information on Standstill Agreements in Scotland, see our article here. (https://shepwedd.com/knowledge/legal-time-bar-scotland-allowance-standstill-agreements-0)

- **Induced error/fraud/concealment** - The clock may be paused by fraudulent concealment or induced error such that the claimant is ignorant of or caused to believe there is no claim. In Scotland this is regulated by S.6(4) of the 1973 Act, whereas in England, the relevant provision is contained in S.32 of the Limitation Act 1980.

Falling foul of time-bar will normally extinguish any right of claim that a claimant may have. This could have potentially disastrous consequences for businesses that have suffered financial loss due to acts or omissions by others. It is therefore crucial to take legal advice on potential claims as early as possible and from a specialist.

Key Takeaways

1. Time-bar should be 'front of mind' for anyone considering pursuing or defending a breach of contract or negligence claim. This is particularly so for latent defect claims which will often only become apparent well after the completion of works. For a claimant, unless the proposed claim is manifestly within time, it is prudent to commence protective proceedings as a matter of urgency, or if parties are being co-operative, consider entering into a standstill agreement to stop the time bar period running.

2. If there is a choice of jurisdictions between north and south of the border, consider which set of statutory provisions and case-law will best allow you to advance your claim.

3. If in doubt, seek specialist legal advice as early as possible.

If you have any questions regarding any of the above, please do not hesitate to contact Iain Drummond or Ryan McCuaig.

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Court of Appeal Re-affirms Restrictions on Use of Expert Evidence in Road Traffic Accident Claims

Introduction

In *Raspin v Taylor* [2022] EWCA Civ 1613 the Court of Appeal re-affirmed the need for the limited use of expert reconstruction evidence in road traffic claims. The Court had originally advised upon restriction of such evidence in the case of *Liddell v Middleton* [1996] P.I.Q.R P36. Needless to say, over the next 25 years adherence to such guidance was not followed by the parties nor enforced by the lower courts on case management.

The accident

On the afternoon of 11 August 2019 the claimant was riding his motorcycle along Ackworth Road in Pontefract. He approached the junction with Hardwick Court, a minor road on his right. As he did so, a Ford Ka being driven by the defendant pulled out from Hardwick Court and turned right onto the main road. The claimant's motorcycle collided with the defendant's car on Ackworth Road. At the time of the collision the car was fully in the carriageway along which the motorcycle was travelling but at an angle as it was completing its turn.

The judgment

The Trial Judge found that the collision was caused by the negligence of the defendant. He concluded that the defendant had looked right, left and right again before she pulled out from the minor road. In his judgment she should have looked left again as she continued to pull onto the major road. Her failure to do so was causative of the collision. The judge also determined that the claimant was negligent in that he approached the point of the collision at an excessive speed. He found that the claimant's degree of responsibility for the collision was substantial thereby leading to the reduction of any damages by 45%.

The stance of the defendant

From the outset the Defendant insurers maintained that the claimant motorcyclist was solely responsible for the accident due to the speed he was travelling, that the defendant did all that was required in looking right, left and right again, that by the time the motorcyclist appeared she had already committed to her turn and could not have reasonably seen the motorcycle nor avoid the collision.

This was a bold approach in light of the lay evidence for the following reasons:

- The defendant driver was the only lay witness on behalf of the defence. From her police interview through to trial she stated that there were no vehicles on the road when she looked and pulled out. This could not be correct on the accepted evidence as they were two cars approaching from her right not to mention the motor cycle from her left (see below).

- Three lay witnesses were called by the claimant: (i) Mrs Ward (a passenger in a car approaching the scene) who "just could not comprehend how the car driver was pulling out and just kept coming" into the path of the motorcycle. (ii) Mr Barker who saw the car pull out "straight into the path of the motorcyclist" and having noted the motorcycle swerve to the left stated "the car just kept on coming". (iii) Mr Ward, another driver approaching the scene became aware of the motorcycle approaching. Indeed, he stated in his police witness statement made after the accident (on the same day) "It was almost like she was oblivious to

him and had just not seen him." On the Defendant driver's own evidence this was clearly correct.

● The lay evidence all described the motor cycle as travelling at or near the 30mph speed limit. It was the defendant's case that the claimant motor cycle was travelling much faster, relying upon RTA expert reconstruction evidence of a Dr Walsh.

The claimants stance
The claimant was content to rely upon all of the lay evidence to prove primary liability. He was also content to rely upon the expert evidence to give a range of the speed. Indeed, it was expected that the Court would try the case on the lay eye witness evidence and then compare and balance that evidence with any expert evidence on speed. This approach was the correct legal approach (see below).

The judge's approach
The defence lay witnesses were all cross examined by counsel for the defendant. They were all challenged as to what they saw (not least as their evidence undermined the Defence case). On analysis, the Judge found them all to be honest and credible witnesses.

It was clear from their evidence that the defendant car driver pulled out from the side road and continued to pull out into the path of the motor cyclist. She simply had not seen the motor cyclist to her left when he was there to be seen. Indeed, she had not even seen the vehicles to her right (of the independent lay witnesses) when they were also there to be seen by her.

Nevertheless, having examined the lay evidence and the failings of the defendant driver in not seeing vehicles to her right, having looked, and therefore not seeing the motor cycle to her left if she had looked, the Learned judge stated: "As will be seen below, though, my conclusion does not rest on this line of reasoning".

The Judge's reasoning went on to concentrate upon the analysis of road traffic accident reconstruction evidence, in particular of Dr Walsh, the defendant's expert. His evidence was wide ranging, going into areas other than speed and relying upon academic research as to the behaviour of drivers.

The defendant's appeal
The defendant had elevated its primary case in the Court below (and now on appeal) based on the expert evidence to escape liability and override any lay evidence. It appealed on this basis seeking total absolution for the defendant on the issue of liability.

In responding to the appeal the claimant cross appealed, in accordance with legal principles, that the scientific evidence was but one part of the case. If proper account of the lay evidence is taken – namely being at the forefront of the analysis rather than the scientific evidence then the judgment is wholly sustainable .

Legal principles on accident reconstruction evidence
It is well established in case law that RTA cases are to be tried upon lay witness evidence when available. Expert evidence may assist the Judge upon technical matters. Nevertheless, such expert evidence is to assist in the assessment and interpretation of the lay evidence and not replace it.

The principles were well summarised by Mr Justice Coulson (as he then was) in the case *Stewart v Glaze* [209] EWHC 704 (QB), with reference to Court of Appeal guidance. At Section 2.2 of his judgment, he reviewed the role of accident reconstruction experts in cases as follows:

"2.2. Accident Reconstruction Evidence
Cases such as the present action often feature accident reconstruction experts. There is no doubt that their expertise can sometimes be of considerable assistance to the court……

In *Liddell v Middleton* [1996] P.I.Q.R P36, Stuart Smith LJ said:
"In such cases the function of the expert is to furnish the judge with the necessary scientific criteria and assistance based upon his special skill and experience not possessed by ordinary laymen to enable the judge to interpret the factual evidence of the marks on the road, the damage or whatever it may be. What he is not entitled to do is to say in effect 'I have considered the statements and/or evidence of the eye-witnesses in this case and I conclude from there evidence that the defendant was going at a certain speed, or that he could have seen the plaintiff at a certain point'. These are facts for the trial judge to find based on the evidence that he accepts and such inferences that he draws from the primary facts found. Still less is the expert entitled to say that in his opinion the defendant should have sounded his horn, seen the plaintiff before he did or taken avoiding action and that in taking some action or failing to take some other action, a party was guilty of negligence. These are matters for the court, on which the expert's opinion is wholly irrelevant and therefore inadmissible…. We do not have trial by expert in this country; we have trial by Judge. In my judgment, the expert witnesses contributed nothing to the trial in this case except expense. For the reasons that I have indicated, their evidence was largely if not wholly irrelevant and inadmissible. Counsel on each side at the trial succumbed to the temptation of cross-examining them on their opinions, thereby lengthening and complicating a simple case…. In road traffic accidents it is the exception rather than the rule that expert witnesses are required."

In my judgment, it is the primary factual evidence which is of the greatest importance in a case of this kind. The expert evidence comprises a useful way in which that factual evidence and the inferences to be drawn from it, can be tested. It is, however, very important to ensure that the expert evidence is not elevated into a fixed framework or formula, against which the defendant's actions are then to be rigidly judged with a mathematical precision."

Judgment of the court of appeal

The Court of Appeal not only rejected the defendant's appeal but also re-affirmed the position of the claimant in his cross appeal that the lay evidence must be taken as the primary evidence with expert evidence then being applied on relevant matters (in this case only the issue of speed).

The Court of Appeal was critical of the length and breadth of Dr Walsh's report and theoretical matters raised, for example driver behaviour below, Davis LJ stated:

The gap acceptance theory expounded by Dr Walsh could not be determinative of whether the defendant was in breach of duty. I doubt whether this evidence was relevant. Dr Walsh's expertise in relation to estimating speed by reference to the marks left on the road by the motorcycle was unquestioned. The speed of the motorcycle was relevant and important. What Dr Walsh had to say about the behaviour of motorists in general could not assist on the issue of how a reasonable motorist should have coped with the junction from which the defendant emerged. If his evidence was intended to say what did or did not amount to a breach of duty, it was inadmissible. In any event, what kind of gap a group of motorists thinks is reasonable to allow entry from a minor road onto a major road tells us nothing about whether the emerging motorist should check to their left for a second time as they move out onto the major road.

Further, with Davis LJ continued:

Although unnecessary for my decision on this appeal, I consider that, if there were anything arguably open to criticism in the judge's approach, it would be in the emphasis he placed on the expert evidence. This was a collision which was witnessed by three lay witnesses who had a clear view of what happened. Their evidence was consistent. The defendant's car continued to pull out onto the major road when the motorcycle was there to be seen. The car could have stopped in time for the collision to be avoided. That evidence should have been the central focus of the judge's consideration of the case. To that he needed to add the fact that the defendant did not see any traffic on the main road. In her evidence she was categoric in her assertion that there was no vehicle on the main road in either direction. The judge said that this factor "might go" to the issue of the effectiveness of the defendant's observation. It quite plainly did go to that issue. More to the point it demonstrated that the defendant was not keeping a proper lookout when the claimant was there to be seen, whatever his speed.

He then referred to the cases of *Stewart v Glaze* and Liddell v Middleton (both above) and continued about the legal principle they established:

I agree with that proposition. In this case the expert evidence was of significance in providing evidence of the speed of the motorcycle though it seems to me that the judge did fall into the trap of engaging in an exercise of mathematical precision. The expert evidence was not central to the case. The lay evidence which established that the defendant pulled out of a minor road and continued to pull out even when the motorcycle was in view and when she could have stopped was paramount. This only reinforces my conclusion

that this court should not interfere with the judge's conclusion.

Conclusion

The Court of Appeal in Raspin took the opportunity to draw attention to the approach and use of expert evidence in road traffic cases. It recognised that expert evidence can be useful but (a) it does not take precedence over the primary lay evidence to an accident and (b) there must be focus on the relevant issues which may assist the court.

It is expected that this case will be brought to the attention of the case management courts by parties in restricting the issue(s) upon which the experts are to report.

Given that Liddell is still good law after 25 years this re-alignment is timely.

First published by APIL's PI Focus Magazine - March Edition 2023

Author

Simon Browne KC of 39 Essex Chambers appeared for the successful Claimant/Respondent in the Court of Appeal

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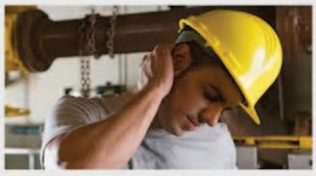
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Mental Health Act

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Do you Ask Staff to Waive Latent Personal Injury Claims in Your Settlement Agreements?

by Joanne Moseley, Irwin Mitchell

In April, the UK parliament discussed proposals to manage asbestos in workplaces and to introduce measures to protect the public from being exposed to it. It can be present in any building built or refurbished before 2000, and the scale of the problem is huge. Our report found that around 87,000 public buildings contain asbestos.

During that debate, one MP indicated that, in the education sector, teachers and lecturers had been asked to sign non-disclosure agreements (NDA) preventing them from discussing asbestos in their workplaces. Another MP told parliament that she was asked to sign an NDA after she took early retirement from teaching in an FE college which, expressly stated, that she agreed to waive all of her rights to compensation in the event that she developed asbestosis.

The Parliamentary Under-Secretary for Work and Pensions said this in relation to the use of NDAs: "*I have been appalled this afternoon to hear about the issues affecting teachers. This is a matter for the Department for Education, but I will ask my officials to raise it with the DFE so that a response can be provided*".

It's therefore likely that the education sector will be put under the spotlight and challenged if they attempt to waive personal injury claims that are dormant at the time an employee signs a settlement agreement.

Asbestos related diseases

Asbestos exposure is the single greatest cause of work-related deaths in the UK, with the HSE estimating that more than 5,000 people die from asbestos-related cancers every year. More than half of those deaths are from mesothelioma, a type of cancer that can occur on the lining of the lung or the lining surrounding the lower digestive tract. According to the HSE, the UK has the highest rate of mesothelioma deaths per capita in the world.

Settling personal injury claims via a settlement agreement

It's perfectly okay to include personal injury claims in the list of claims an employee agrees to waive in a settlement agreement. It's usual, for example, to include physical (or more likely) psychiatric injury where an employee alleges discrimination. Employers will also want to include stress-related claims that arise from the employee's employment.

But, it's not reasonable for an employer to try and settle any free-standing personal injury claim which the employee doesn't know they have. In the context of asbestos, mesothelioma is not typically detected in the early stages of the disease, as it has a long latency period of 15 to 45 years, with some prolonged cases of 60 years before symptoms show.

It is, however, reasonable for employers to ask employees to agree that they are not aware that they have any conditions which would give rise to a personal injury claim at the time they enter into the settlement agreement. This is included to ensure that the employee does, in fact, disclose any conditions they know or suspect they may have.

Challenging NDAs that waive latent personal injury claims

Generally, provided an employee has had the terms of a settlement agreement explained to them by a solicitor (or other suitable person), and it meets all of the other legal conditions necessary, they will be bound by its terms.

However, there are some circumstances where an employee, who had agreed to waive future personal injury claims, will still be able to sue their employer. For example, they could argue that their waiver is void under the Unfair Contract Terms Act 1977 and/or section 1(3) of Law Reform (Personal Injuries) Act 1948. For that reason, those advising the employee will usually require 'any latent free standing personal injury claim' to be excluded from the list of settled claims. Most employers usually include this type of wording in their settlement agreements.

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Financing Early Treatment for Accident Survivors with Neurological Injuries

Although the Rehabilitation Code is a vital tool for lawyers fighting for neurologically injured clients, since it provides a key avenue for obtaining early and potentially life altering interventions, nevertheless, much more needs to be done to ensure that it is an effective option for all those who could benefit.

The Code is a voluntary initiative for personal injury legal claims, first published in 2007 and most recently updated in 2015. Its purpose is to help claimants get treatment they need to enable the best and speediest medical, social and psychological recovery.

Accordingly, the Code is of particular significance to those with serious neurological injuries, as these often benefit considerably from early intervention. With long waiting lists and limitations on innovative treatments offered by the NHS, private rehabilitation services can be hugely positive for such claimants.

The purpose of the Code is to assist both the claimant and defendant. The claimant can access rehabilitation more swiftly, often providing a better chance of a good recovery, and the defendant may, as a result, pay less in compensation. Despite this, in my experience with the Code in action, outcomes can at times be mixed.

The Code requires that claimant and defendant lawyers collaborate to address the injured party's needs from first notification of a legal claim. In the case of a serious neurological injury, it sets out that any assessment of needs must be by a rehabilitation professional or case manager, who should carry out an immediate needs assessment (INA) and produce a full report detailing recommendations. This will usually be paid for by the defendant, who must then consider whether they will fund any or all of those recommendations. The Code makes clear that any private care should be arranged, wherever possible, in liaison with a claimant's current medical team to avoid causing any problems with existing treatment.

The Code establishes that a claimant's need for rehabilitation should be addressed as a priority, whether liability in the claim has been agreed or not. In the normal course, where there has been an admission of liability, the Courts can order an interim payment of damages. However, this process is not always practicable, quick or indeed the most cost-effective approach and using the Code can allow specialist treatment to be commenced more speedily.

Yet, where liability has not been conceded, the situation becomes much more problematic.

The Code clearly states that, irrespective of there being no agreement on liability, the health and economic benefits of early rehabilitation, where severe injuries have been suffered, can be especially strong. Nevertheless, defendants inevitably have concerns about paying for rehabilitation in this scenario since, under the Code, if a claimant eventually loses their case they would not be bound to repay any funding.

For neurological injuries, rehabilitation interventions are often extremely expensive. They may include a period of in-patient care and input from disciplines including occupational therapy, speech and language therapy, physiotherapy and psychological therapy.

Nonetheless, where a defendant's case is by no means strong and no admission has been made, it can be short sighted to ignore the Code. For, in my experience, where a pragmatic approach is taken in the absence of an agreement on liability, this almost always leads to a positive outcome for both parties, with a swifter settlement and significant costs savings as a result.

My team at Kingsley Napley are experts in obtaining the best rehabilitation outcomes for our neurologically injured clients and we seek to use the Code whenever possible generally with excellent outcomes. However, there are arguably insufficient incentives for defendants in all cases to engage.

The Code is linked to the Pre-Action Protocols for both Personal Injury Claims and Clinical Disputes which set out certain principles with which parties to a legal claim are expected to comply before formal Court proceedings are issued.

The Protocols are not legally binding but non-compliance with aspects of them can lead to financial consequences, for example, having to pay more in legal costs to the other party. Despite this, a recent judgement (*Andrew Evans v R&G Allgemeine Verischerung AG* [2022]) concluded that a failure to comply with the Rehabilitation Code did not mean that the defendant should face penalising cost consequences (indemnity costs). While I understand the lines are difficult to draw here, I hope that this issue will be revisited and re considered by the Courts as soon possible.

For cases of medical negligence, it is my experience that NHS Resolution, the body dealing with clinical claims on behalf of the NHS, and indeed many other indemnifiers in this field, do not fund early rehabilitation in the absence of liability being admitted. While the Code itself references 'personal injury claims', the Protocol for clinical cases refers to the Code and is clear that early rehabilitation should be considered. Nonetheless, as matters stand for victims of medical accidents, access to the Code and to early rehabilitation is very underutilised. I have had significant success with the Code in personal injury claims and it is my view that the Code needs to be made mandatory in medical negligence cases. Clarity is required on the scope of the Code to achieve this.

I am also aware that there are suggested abuses of process where INA reports have been obtained and then no agreement to fund any recommendations has been forthcoming or have been very delayed. It also appears that on occasions the INA report has been used to help the defendant value the claim or to inform a premature offer of settlement rather than to genuinely assist early rehabilitation.

There is no doubt in my mind that the Code should be championed wherever possible and defendants reminded at the outset of claims of their obligation to consider this empathetic route which can be so life enhancing for those needing to fight for compensation.

This article was first published in the NR Times on 5 May 2023.

Author
James Bell is the head of the Medical Negligence and Personal Injury practice at Kingsley Napley and has undertaken medical negligence cases for over 25 years. Throughout his career James has dealt with a very wide range of cases concerning all types of negligence claims – delayed diagnosis cases, birth injuries, anaesthetic injuries, surgical errors, GP and hospital negligence, all types of orthopaedic claims, including complex hip and knee replacement surgery claims and all types of cancer cases.

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Accidents Abroad: The Five Most Common Holiday Injuries

With summer almost here, many thoughts will turn to sandy beaches and sun-soaked afternoons around the pool.

However, while many holidaymakers may be working out budgets or creating a packed itinerary, it also pays to invest in holiday insurance and brush up on the safety risks.

Many Brits are unsure what to do in the event of an accident when away, so it's wise to familiarise yourself with your holiday destination's medical procedures. We look at some of the most common holiday injuries and share some expert legal advice for when accidents do happen.

1. Slips, trips and falls
Lounging around the pool with book (or cocktail) in hand can be one of the real joys of a summer vacation. That's not to say this relaxing pastime doesn't come with its hazards.

Every year, approximately 155,000 injuries occur in or around swimming pools with many as a result of slippery surfaces.

Holiday venues should safety-proof their poolsides by minimising splash, providing slip-resistant flooring and encouraging guests not to run poolside.

2. Sunburns and heatstroke
Us Brits aren't used to the Sun so may not be best placed to properly protect ourselves against its potentially harmful effects.

In a recent survey, 32% of Brits said they travel abroad to simply kick back and sun bathe yet even the most dedicated sun worshipper needs to take necessary precautions to guard against nasty burns, heat stroke and even skin cancer.

Take it easy the first few days by letting yourself acclimatise and limiting your exposure to shorter intervals.

Remember, SPF is an absolute necessity with fairer complexions requiring higher factors. Even if products are waterproof, they often lose potency after a dip in the sea or pool so remember to reapply liberally for maximum protection.

3. Food poisoning
Fears of foreign food can seem like an antiquated throwback these days, yet a combination of extra heat, humidity and unfamiliar water can contribute to an upset stomach for many British tourists each year.

According to a recent survey, Spain is the most common destination for food poisoning. Bacteria can grow quicker in warmer climates so remain cautious around riskier foods like seafood or chicken.

Should you take ill, make sure to consume as much water as possible as vomiting leads to excessive dehydration. Rest as much as possible, eat bland foods and keep surfaces clean to avoid spreading infection.

4. Sporting injuries
A well-planned holiday can often mean a winning mix of rest and recreation. Warmer climes can be a chance to try new, more exotic sports like surfing or scuba diving while homeland pursuits like football, golf or tennis may take on fresh focus.

Make sure to kit yourself out with the proper clothing and equipment and ensure you have travel insurance, and your Global Health Insurance Card is up to date. Without this, healthcare costs can vary around the world, a simple knee scan could set you back around £5,000.

It's also wise to check the credentials of the company should you book any trips or excursions. A simple scroll through their online reviews could inform you of any potential safety hazards.

5. Road accidents
A change to right hand driving can baffle even the most experienced of drivers. Statistically, only 30% of the world's countries drive on the left (as in the UK) so chances are you'll be finding your bearings.

Drivers should take their time and pay extra attention to the speed limit until they adjust to the change. Driving cautiously can prevent a whiplash injury or something more serious.

In the case of a crash, Susanne McGraw, Head of Personal Injury at Watermans advises: "Unfortunately, accidents do happen and making a claim against a company or individual abroad can be daunting.

"If you think you need to pursue a claim, the best thing to do is seek legal counsel immediately. Expert help can make the claims process as straightforward as possible and fight to secure you the maximum level of compensation.

"In addition, access can be arranged to any additional services required such as physio or counselling to help you recover."

Sources

Brits reveal the real reasons they book a holiday abroad | The Sun

Connecticut Swimming Pool Accident Lawyers (hgesq.com)

Countries that Drive on the Left 2023 (worldpopulationreview.com)

Most common types of accidents on holiday | Benenden Health

Whiplash Injury Claim & Compensation | Watermans Solicitors

Expert Witnesses: High Court Grants Permission for Change of Experts on Condition of Disclosure of Certain Documents Prepared by the Experts or Recording their Views

A recent decision illustrates how the court will exercise its discretion in considering whether to grant permission to substitute a new expert, and whether to require the disclosure of draft reports and other documents as a condition of granting permission: ***Avantage (Cheshire) Ltd v GB Building Solutions Ltd [2023] EWHC 802 (TCC).***

It is well established that the court can, and normally will, require a party to waive privilege in a previous expert's report where it grants permission to change experts, and may in some circumstances order disclosure of other documents prepared by the expert or recording their views. While the court cannot override privilege, it can impose such a condition as the "price" of granting permission.

The present case is of interest in illustrating the courts' approach where claimants sought to substitute two of their experts with a single new expert. In the first case the previous expert was too ill to continue. In the second case the expert was able to continue but the claimants did not have confidence in the expert.

The court granted permission for the substitution in both cases but took a different approach to imposing conditions. In the first case, as there was no hint of expert shopping, there was no need to disclose the previous expert's reports or other documents recording their views. However, as the previous expert had inspected the relevant (now demolished) property shortly after the incident in question, the court ordered disclosure of that expert's notes of site visits and interviews with factual witnesses. Fairness and transparency required that this material should be made available to all the relevant experts in the case.

In the second case, the court allowed substitution of the expert despite the defendants' legitimate concerns about expert shopping. However, permission was granted on the condition of disclosure of the previous expert's reports (including drafts) and other documents he had prepared expressing his opinions – but not attendance notes prepared by the claimants' solicitors.

The decision arguably takes a more flexible view of the need for a "good reason" for a change of expert than some previous decisions (see for example this blog post, https://hsfnotes.com/litigation/2012/04/10/permission-to-change-experts-only-if-good-reason/). In this case the court granted permission for the substitution of the second expert on the basis that the claimants were not happy with the expert and should be able to rely on an expert in whom they had confidence. The courts may not always consider that this is sufficient, particularly where a change of expert is sought at a late stage. Each case will turn on its facts.

Background

Following a fire at a retirement village, the developer, freeholder and leaseholder of the property brought proceedings against the contractors and consultants engaged in its construction, alleging deficiencies in design and construction which they said had resulted in the spread of the fire. The claimants had permission to call various expert witnesses including a forensic scientist, Ms H, to give evidence on the cause, origin and spread of the fire, and a fire engineer, Mr W, to give evidence on whether the design of the property complied with the Building Regulations and whether the design should have included sprinklers.

The claimants applied to substitute Ms H with another expert, Dr K, on the grounds that Ms H was seriously unwell and required medical treatment. The defendants did not oppose the application in principle but argued that the substitution should be made on the condition that the claimants be required to disclose Ms H's expert reports (draft and final versions), site inspection notes, notes of any witness interviews, and any other documents evidencing her opinion on the cause, origin or spread of the fire including attendance notes produced by the claimants' solicitors.

The claimants also applied to call Dr K in place of Mr W, on the grounds that they were unhappy with Mr W as an expert and there was a potential for conflict between his views and the claimants' other experts dealing with overlapping areas. The defendants opposed the application on the basis that it was expert shopping, and argued in the alternative that if permission was granted it should be on condition of disclosure of Mr W's expert reports (including drafts) and any other documents evidencing his opinions, including attendance notes.

Decision

The High Court (O'Farrell J) granted both applications on condition that certain documents be disclosed, but not all of those sought by the defendants.

The judge referred to T*he University of Manchester v. John McAslan & Partner [2022] EWHC 2750 (TCC)* (considered here, https://hsfnotes.com/litigation/2022/11/24/high-court-declines-to-impose-disclosure-conditions-on-party-wishing-to-replace-expert-as-no-expert-shopping

-had-taken-place/) for its helpful review of the authorities. She summarised the relevant principles, including the following:

- The court has a general discretion to permit a party to substitute a new expert witness, pursuant to its specific power to control the use of the expert evidence under CPR 35.4 or as part of its general case management powers under CPR 3.1(2). The usual rule is that such permission should not be refused.
- The court has the power to grant permission on condition that the original expert's reports are disclosed to the other party. Such a condition is usually, to prevent expert shopping and ensure that the expert's contribution is available to the court and all parties.
- The court's power to impose conditions may extend to other documents containing the substance of the original expert's opinion but the court must be cautious about encroaching on areas of privilege and consider carefully the potential value of such other documents. In particular, there must be a strong case to justify disclosure of solicitors' attendance notes.

Applying these principles, the judge noted that the claimants had been forced to replace Ms H due to reasons beyond their control, and there was no question of expert shopping. It would therefore be unjust to order the claimants to disclose her reports, draft reports or other documents setting out her opinion. However, she accepted the defendants' argument that Ms H had conducted site inspections and investigations shortly after the fire and would have gathered relevant primary evidence regarding the condition of the property and the presence of defects. As the property had since been demolished, such information would no longer be available to other experts. Similarly, her notes of an interview with a neighbouring resident could contain details that might be significant to the experts but which the witness did not see as significant, or did not recall, and which would therefore not be addressed in his statement. Accordingly, as a matter of transparency and fairness, the court ordered the claimants to disclose all early inspection notes and witness interviews conducted by Ms H.

Regarding Mr W, the judge noted the defendants' legitimate concerns that the application seemed to be an exercise in expert shopping. However, she was satisfied that, in the interests of justice, the claimants should be given permission to rely on an expert in whom they had confidence. The order was made on the condition that Mr W's reports (including drafts), and any other documents he had prepared expressing opinions on the dispute, should be disclosed. However, the judge did not consider that the claimants should be required to disclose their solicitors' attendance notes. In the absence of any suggestion of culpable behaviour on the part of the claimants, who were simply unhappy with Mr W as an expert, such an order would constitute an unnecessary invasion of the claimants' privilege.

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HASSAM, LADITAN, RABOT & BRIGGS – Quantifying Whiplash and Non-Whiplash Injuries Together After the 31 May 2021 Whiplash Tariff Reforms – Consideration of the Court of Appeal Judgments

Quantifying Whiplash andNon-Whiplash injuries together after the 31 May 2021 Whiplash tariff. By Lydia Campbell

Whiplash reform recently came into force in England and Wales with the purpose of quantifying whiplash injuries in a different way to that was previously used (the Judicial College Guidelines). In essence, whiplash injuries incurred on or after 31 May 2021 became quantifiable based on a pre-determined tariff which awarded sums dependent on the duration of the whiplash injury. However, a question has lingered in the back of the minds of personal injury practitioners – if there is an overlapping non-whiplash injury (i.e., one that relies on quantification via the usual JC Guideline means), how should it be quantified?

Quantifying injuries has never been as simple as 'totting up' each injury to reach an overall sum. Instead, it is appropriate to consider overlapping injuries that have a crossover in terms of the pain, suffering and loss of amenity, to reach a figure that compensates for both injuries but does not duplicate an award. Logically, therefore, it would raise issues if a non-whiplash injury was overlapping with a 'whiplash' injury, not least because of the likely large gap in value between the tariff and common law quantification. Would the whiplash tariff prevail, would the JC Guidelines stand strong, or would there be a middle-ground interpolation? On 20 January 2023, a judgment was handed down by the Court of Appeal considering just that.

The Claimant in *Rabot* suffered a whiplash injury of 8-10 months alongside a moderate soft tissue injury to both knees with a 4–5-month prognosis. The judge valued the injury by adding the agreed tariff award (£1390) alongside the common law valued knee injury (£3890) and 'taking a step back' to reach an overlapping sum (£3100). The Defendant appealed on the basis that the calculation was wrong as a matter of law. In *Briggs* the Claimant had a 9-month whiplash injury with a 6-month prognosis for a soft tissue knee injury. The judge took a similar approach by adding the JC Guideline quantification (£3000) alongside the agreed tariff sum (£840) and reducing it to reflect the overlap (£2800).

Interestingly, the Claimants in the cases appealed the judgment, stating that the correct mechanism would be to simply 'add' the whiplash and non-whiplash injury, in a simple 'A+B' approach. By contrast, the Defendants argued that the 'bottom up' approach was the appropriate means of quantification. They stated that the tariff should be utilised to consider all the PSLA that was attributable to the whiplash injury, and one is to assess the common law value separately for what is left, increasing the overall sum to reach a similar number to the 'step back' approach that was utilised by the judges.

Expectedly, the majority judgment led by Nicola Davies LJ favoured the arguments put forward by the Defendants. Nicola Davies LJ stated that it was to be assumed that Parliament had not strayed further into the common law than necessary to remedy the issues that the reforms had presented. The purpose was to reduce the damages for whiplash injuries, but not to alter the position on non-whiplash injuries that relied on common law assessment through the Judicial College Guidelines. Stuart-Smith LJ went further and stated in the concurring judgment that reforms "removed certain claimants' rights to full compensation for whiplash injuries, but not for other kinds of injury".

Something that wasn't considered specifically in the caselaw and appeals, was what happens in a situation where there is a non-tariff injury coupled with a tariff injury, and the 'step back' is less than the tariff injury. Surely it would make no logical sense to reduce an award to less than the non-tariff/whiplash value?

For example, let's assume a non-tariff injury is £2700, and the tariff injury is £300. Combined, it totals £3000, but with a step back of around 20% (a figure that is artificial and is not a recognised formula but is merely being used for the purposes of this article), the total is £2400, which is less than what the Claimant would have received based on the non-whiplash injury alone. It must therefore logically follow that the decision in the *Rabot* judgment, (that Parliament's intention was not to reduce the non-whiplash injury value), means that in these circumstances there should be a minimum award that is at least equivalent to the value of the non-whiplash injury as valued by the JC Guidelines. If this was not true, there would simply be no reason to bring the whiplash claim, and Claimants need only rely on non-whiplash injuries to ensure higher compensation.

Whilst the judgment has reiterated the longstanding 'overlap' or step-back approach that has been utilised previously, practitioners are still left with little

guidance on what the judgment means practically, going forward. No formula is offered on how to quantify injuries of this sort. It will logically, therefore, follow in future that Claimants and Defendants will be left in the hands of their legal representatives to fight for a reasonable and reflective figure for the injuries.

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Lydia has an extensive and broad legal background, having worked as a local authority prosecutor and as an independent mental health/capacity advocate before completing a specialist Personal Injury and Clinical Negligence Pupillage, inclusive of road traffic, credit hire and non-injury RTA claims

Her experience includes working in group litigation, road traffic, industrial disease and clinical negligence - all of which she is happy to accept instructions in. Notably, Lydia spent time working alongside a partner at a leading firm of solicitors in Liverpool in Defendant clinical negligence work, assisting in serious injury claims valued at more than £24 million. Lydia has represented Claimants and Defendants alike and welcomes instructions from both.

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High Court Dismisses Application to Exclude Expert Evidence at Trial

by Thomas Herbert - Ropewalk Chambers

In *Fawcett v TUI UK Ltd* [2023] EWHC 400 (KB), Dexter Dias KC, sitting as a Deputy High Court Judge, considered an application by the Claimant to exclude the Defendant's expert evidence in a personal injury trial. The application was dismissed.

Background

The Claimant sued the Defendant as administratrix of the estate of her late husband Mr Roy Fawcett ("the Deceased"), who died on 12 October 2017 whilst on holiday in the Dominican Republic. During the course of that holiday, which was purchased from the Defendant, the Deceased drowned in shallow water whilst snorkelling during an island excursion.

The Claimant brought claims against the Defendant in contract and tort. Whilst it was agreed that English law is applicable to the claim, as the judge explained at [4], local standards under Dominican law may be relevant in determining the duty of care owed by the excursion provider for whose acts and omissions the Defendant is, on the Claimant's case, vicariously liable.

The Defendant filed and served a report by Mr Tom Magner. In response, the Claimant sought an order revoking permission granted to the Defendant to rely upon Mr Magner's evidence. As the judge noted at [6], the central point made by the Claimant was that the *"sheer extent of the disregard of the obligations and professional duties of an expert"* necessitated its excision from the trial evidence. The Claimant's position was that Mr Magner was *"trying to fashion himself impermissibly as a legal and local standards expert. He is not. He is an engineer."*

The application was opposed by the Defendant.

Outcome

In dismissing the application, the judge dealt with each of the Claimant's objections to Mr Magner's evidence in turn.

Ground 1: Lack of Expertise

The judge considered, first, whether this question could be assessed at an interim hearing. He decided that it could: [10]. He went on to decide at [12] that *"the defendant must satisfy the court that he has the necessary expertise."* In terms of how sufficient qualifying expertise is attained, the judge observed at [14] that "one obvious route" is that *"expertise is acquired by doing the thing in question, usually over many years"* (quoting HHJ Matthews in *De Sena v Notaro* [2020] EWHC 1031 (Ch)), but went on to note that this does not preclude other routes, such that *"each case of acquiring the requisite expertise is uniquely fact-specific"*.

As to the bar to be surmounted, basing himself on *Rogers v Hoyle* [2015] 1 QB 265 at [43] and other authorities, the judge noted that the bar is *"not particularly high"*, with the degree of expertise going largely to the weight to be given to the evidence rather than its admissibility. At [16], he opined:

> *Even though the bar is said to be not particularly high, bar still there is. It is not simply a case of anybody who presents themselves as an expert does gain access to that status in this court. Therefore, the test must be, in my judgment, solid evidence of sufficient expertise of the relevant discipline or issue – self-proclamation as expert is not enough.*

On the facts of the case, the judge held as follows at [27]:

> *[T]o say that Mr Magner's evidence falls below that not particularly high threshold is to be, in my judgment, too forensically ambitious and unpragmatic. It is to press the case that effectively Mr Magner's evidence is intrinsically worthless. That submission cannot survive the information Mr Magner has provided in his CV. To reach a different conclusion on the papers would, in my judgment, require the court to hear oral evidence and have Mr Magner's expertise probed and dissected. That is not a necessary or proportionate course at this procedural stage. In fact, it is precisely what the trial is for. This is an objection, in my judgment, that goes to weight and not to admissibility* (Hoyle v Rogers at [43]).

Ground 2: Failure to Identify the Relevant Dominican Republic Standards

This was not pressed by the Claimant at the hearing: see [28].

Ground 3: Expressing Opinions Outside Areas of Expertise

The judge noted that this question was also considered by the Court of Appeal in *Rogers v Hoyle* at [52], where Christopher Clarke LJ stated that it was preferable to treat over-reaching opinions:

> *… as a question of weight rather than admissibility, particularly since there is no clear point at which an expert's specialised knowledge and experience ceases to inform and give some added value to the expert's opinions. It is a matter of degree … the proper course is for the whole document to be put before the court and for the judge at trial to take account of the report only to the extent that it reflects expertise and to disregard it in so far as it does not …*

The judge therefore held at [32] that this objection was *"classically a matter for the trial judge's judgment and discretion"*: it was not a basis for the exclusion of Mr Magner's evidence; and it was not appropriate at an interim stage to excise or to remove a particular passage or passages because that is "a matter for the trial judge to assess once the evidence is before her or him."

Ground 4: Failure to Maintain Impartiality

The judge considered this objection to be *"tantamount to an allegation of bias"* and, therefore, *"inescapably a serious allegation"* such that there must be "a clear and cogent basis to make it out": [33].

At [35], the judge noted inter alia that, in his experience, *"courts handle expert witnesses situated at every point of the spectrum between dispassionate and disinterested objectivity to impermissible and over-exuberant partiality. It will be a question for the trial judge where on that forensic spectrum Mr Magner falls and whether … he is a "partial advocate"*, offering advocacy under the "guise of expertise"".

Accordingly, the judge found that the Claimant's application on this ground was *"fundamentally misconceived"*: [37].

Comment

This judgment demonstrates that the assessment of expert evidence is par excellence a matter for the trial judge, with a relatively low bar to be surmounted before matters will go to weight rather than admissibility. Judges at interim hearing should accordingly, and for good reason, be reluctant to exclude – or excise passages of – expert evidence from a trial judge's consideration.

Releasing All Claims Means… Releasing All Claims (Maranello Rosso v Lohomij BV)

by Ben Sigler, Partner and Harriet Campbell, Senior knowledge lawyer at Stephenson Harwood LLP

In *Maranello Rosso v Lohomij BV & others*[1] the Court of Appeal confirmed that express words are not needed to release unknown claims of fraud or dishonesty. This judgment highlights the importance of understanding precisely what claims you are releasing in a settlement agreement. While the court will exercise caution in concluding that unknown claims for fraud or dishonesty fall within a standard form release clause, this is not a rule of law. Rather, it is part of the Court's general approach to contractual interpretation. The judgment also considers the application of the 'sharp practice' principle in the context of release clauses.

Key takeaways

● The rules for interpreting a settlement agreement or a release clause are the same as for interpreting any contract.

● The rules of contractual interpretation were summarised in *Wood v Capita Insurance Service Ltd* [2017] AC 1181; [2017] UKSC 24. The Court's aim is to identify the objective meaning of the contractual language by:

● identifying what the reasonable person, with the knowledge available to the parties at the time, would have understood the contract to mean;

● considering the contract as a whole, giving appropriate weight to its constituent elements depending on the nature, formality and quality of its drafting; and

● checking each suggested interpretation against the provisions of the contract and investigating its implications and consequences.

It is does not matter in what order the Court undertakes this analysis.

● The Court will be cautious in concluding that a settlement releases unknown claims for fraud and dishonesty in the absence of express words to this effect (the 'cautionary principle'). However, this is not a determinative rule of law. Where a letter before claim alleges fraud or dishonesty (in whatever form), it is likely that a subsequent widely worded release of all claims (known or unknown) will be construed as releasing unknown claims for fraud and dishonesty unless they are specifically excluded. This is the case whether or not allegations of fraud or dishonesty ultimately form part of a party's pleaded case.

● Where a release clause is construed by the Court as including unknown claims for fraud and dishonesty, this means the Court has concluded such claims were contemplated by the parties. It is therefore unlikely that a party will be found guilty of 'sharp practice' (the principle established in *BCCI v Ali*[2] that a release might not be given effect if a party tries, through 'sharp practice', to exclude liability for a claim they knew about, but which was unknown to the other party at the time at which a settlement agreement was entered into).

Background

The claimant, Maranello Rosso Limited (**"Maranello Rosso"**), purchased a company which owned a valuable collection of classic cars with a view to subsequently selling the cars at auction for a substantial profit. Maranello Rosso obtained finance for the purchase of these cars from the First Defendant, Lohomij BV (**"Lohomij"**), on terms that Maranello Rosso was obliged to sell the cars at auction through the Second and Third Defendants respectively, entities affiliated with Bonhams Auction House (**"Bonhams"**).

A term of the finance agreement was that Maranello Rosso would not sell the cars without Lohomij's consent. The sale at auction did not generate the profit that Maranello Rosso expected, and it was dissatisfied with the way in which the auction was conducted. Accordingly, solicitors for Maranello Rosso asserted, in a letter before claim addressed to Bonhams, claims for negligence and breach of duty and also referred to allegations of duress, bad faith, illegality, and a conflict of interest in relation to its dealings with Lohomij (with whom it alleged Bonhams had a financial connection) (the **"Spring Law Letter"**).

Following negotiations, the parties (including Bonhams and Lohomij) entered into a settlement agreement (the "Settlement Agreement") in which all parties agreed to release:

"*all claims… whether present, actual, prospective or contingent, whether or not known to the Parties… and whether arising in contract, tort, under statute or otherwise… which relate to, arise from, or otherwise connected with… the sale of the Collection… including all claims alleged in Spring Law's letter.*"

Subsequently, Maranello Rosso issued these proceedings alleging that, since the Settlement Agreement had been entered into, information had come to light showing that Bonhams, Lohomij and a number of their representatives were party to a conspiracy to injure Maranello Rosso it by unlawful means.

The Court's decision

At first instance, HHJ Keyser KC granted summary judgment for the Defendants and dismissed Maranello Rosso's claims finding that the unlawful means conspiracy had been compromised by the Settlement Agreement. The Court of Appeal agreed. It rejected the suggestion that HHJ Keyser KC had adopted an '*overly-literalist*' approach in his analysis. The approach to construction of the settlement agreement had been correct, and it was irrelevant whether HHJ Keyser KC had, in applying ***Wood*** started with the language of the contract and moved on to consider the factual background or vice versa. The Court of Appeal also agreed that no special rules of construction applied when construing release clauses to determine whether they resulted in fraud, dishonesty or conspiracy claims being released.

In relation to 'sharp practice', the Court of Appeal also upheld the HHJ Keyser KC's findings. The principle exists to prevent an offence to the '*conscience of the Court*'[3]. Here, HHJ Keyser KC concluded that it was not unconscionable for the Defendants to rely on the release clause as having settled claims in fraud and conspiracy. The Court of Appeal saw no reason to overturn that finding, particularly in circumstances where the Spring Law Letter had, in fact, alleged that the Defendants had acted in bad faith. Indeed, it was, in fact, unconscionable for Maranello Rosso to seek to avoid the effect of the release clause in circumstances where it had received valuable consideration from the Defendants pursuant to the Settlement Agreement.

Comment

Parties need to ensure, when agreeing settlements, that they document precisely the types of claims they intend to compromise. If they do not want to compromise unknown claims arising from fraud or dishonesty, this must be expressly stated. The Court of Appeal's decision has also somewhat narrowed the 'sharp practice' exception, confirming that if a release clause is construed as releasing unknown claims for fraud, it is highly doubtful whether the 'sharp practice' principle could ever apply.

References

1 Maranello Rosso Ltd v Lohomij BV & Ors [2022] EWCA Civ 1667

2 Bank of Credit and Commerce International SA v Ali [2002] 1 AC 251

3 Maranello Rosso Ltd v Lohomij BV & Ors (Rev1) [2021] EWHC 2452 (Ch)

To Refer or Not to Refer? High Court Provides Further Guidance on Solicitor Referrals to Medical Specialists

by Mary Cooney, Partner - www.williamfry.com

Expert evidence is at the heart of all litigation. It can make or break any case. There has been a flurry of recent case law discussing the proper approach to instructing expert witnesses; in particular the appropriateness of solicitors instructing medical experts to prepare condition and prognosis reports where the plaintiff is not a patient of that medical expert. Condition and prognosis reports, whether prepared by the treating doctor or an independent medical expert, are relied on in all personal injury and product liability cases that result in personal injuries. They enable the court to appraise the plaintiff's alleged injuries.

Background

The case of *McLoughlin v Dealey & HSE* [2023] IEHC 106 ***(McLoughlin)*** considered whether the court should attach less weight to evidence of an orthopaedic surgeon who was called to give evidence, on the basis that the plaintiff had been referred to that expert directly by her solicitor, rather than her GP.

The plaintiff suffered a back injury at work, following which she decided that she could not continue her career as a nurse due to its physically demanding nature. The plaintiff's GP medical notes, produced in court, did not record any ongoing complaints of back pain in the two and a half years following the accident. The plaintiff claimed she was managing the pain and did not feel the need to bring it to her GP's attention. The plaintiff's solicitor referred her to an orthopaedic surgeon who prepared three reports following examinations and consultations with the plaintiff. This evidence was subject to scrutiny by the court.

Recent case law

In *Sarah Cahill v Brian Forristal and Rachel O'Riordan v Brian Forristal* [2022] IEHC 705 [discussed here], the plaintiffs' solicitor made the referral to an orthopaedic surgeon and a consultant psychiatrist rather than the plaintiffs' GP.

Twomey J opined that a plaintiff's GP should make medical referrals to consultants, who would have the benefit of access to the plaintiff's medical history. He found that referrals by solicitors amounted to prima facie evidence that there was no medical basis for the referral, thereby affecting a plaintiff's credibility and their injuries allegedly suffered.

Twomey J did accept that solicitor referrals may be appropriate in certain circumstances, and he noted that a defendant would be entitled to refer a plaintiff to a different consultant, of the same speciality, for a second opinion.

Findings of the High Court in *McLoughlin*

Ferriter J in *McLoughlin* held that a solicitor is entitled, in accordance with their duties to their client, to advise a plaintiff to engage the services of a medical expert. He further stated that there is no provision in Irish law or the rules of court that requires a plaintiff in a personal injuries action to only call a treating doctor with whom they have an ongoing relationship. There is nothing in principle prohibiting an independent medical expert being called on behalf of a plaintiff.

However, Ferriter J highlighted the importance of ensuring that any independently retained expert is properly informed as to the plaintiff's relevant medical history (i.e., they must be briefed with all relevant information and past medical history). They should also have appropriate opportunity to examine the plaintiff. Further, they should provide their expert opinion to the court objectively and in accordance with their overriding duty to the court. Ferriter J opined that a solicitor who does not ensure that any expert engaged by them complies with the legal requirements imposed, will not be doing their best by their client. This applies to solicitors on both sides of personal injury litigation.

Ferriter J concluded that there was no breach of the duty owed to the court in this case, and the full appropriate weight was granted to the evidence. As the plaintiff had given an accurate representation of her medical history, the expert was not hindered in their judgment. The court also noted that defendants are permitted to have a plaintiff examined by medical experts of their choice, provided court rules are followed and relevant information, including medical records, are provided.

Law Society protocol for commissioning medical reports

Following the above judgments, on 24 March 2023, the Litigation Committee of the Law Society issued a "Protocol for Commissioning Medical Reports" (Protocol), addressing the issue of solicitors commissioning reports directly from medical practitioners. The Law Society states that the principles set out by Ferriter J underpin the Protocol, which they recommend solicitors follow.

Contact Us

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Contributed by Grainne Carr & Hannah Garvey

Submarines, Sherlock Holmes and Clinical Negligence

by Thomas Herbert - www.ropewalk.co.uk

A topic close to my (legal) heart, and one upon which I have been known to speak unprompted at some length, is the correct approach to fact-finding where several possible causes, or causal mechanisms, are suggested for the damage under investigation: a common feature of clinical negligence (and, more widely, personal injury) litigation.

This raises questions relating to the so-called *Rhesa Shipping* 'heresy' – that is, the circumstances in which a court may, or must, decide a case on the burden on proof – and, in some cases, the circumstances in which the 'doctrine' of res ipsa loquitur will apply.

This article considers these questions and ends with some examples of their application in clinical negligence litigation.

The *Rhesa Shipping* 'Heresy'

Rhesa Shipping Co v Edmunds concerned a ship, *The Popi M*, which sank in calm seas and fair weather as a result of a large and sudden entry of water into her engine room through her shell plating. The vessel's owners claimed against her hull and machinery underwriters, contending that the loss was caused by a peril of the sea or alternatively by crew negligence. The suggested peril of the sea was a moving submerged object i.e. a submarine. The underwriters contended that the vessel was not seaworthy. More specifically, the underwriters advanced a mechanism for unseaworthiness through wear and tear, based on expert metallurgical evidence.

The trial judge, Bingham J, rejected that theory: [1983] 2 Lloyd's Rep 235. He also rejected the owners' argument that there had been crew negligence. That left the possibilities that the vessel was in some other way unseaworthy or that it collided with a submarine. At a high level of generality, neither of those explanations would necessarily be hard to imagine. It is far from unknown for vessels to be sent to sea in an unseaworthy state and it is far from unknown for vessels to collide with submersible objects. However, the evidence to support either theory on the particular facts of the case was unsatisfactory, as the experts on both sides candidly recognised.

Bingham J observed that on each side there was recognition that the hypothesis for which that side contended was highly improbable; it was supported as the most likely hypothesis only because any other hypothesis, and in particular the hypothesis advanced by the other party, was regarded as almost (if not altogether) impossible. At p. 245, he said:

Rarely can competing menus have been proffered with such guarded recommendations by each of the chefs responsible.

After setting out cogent reasons why the submarine theory was improbable and his reasons for rejecting the metallurgical argument advanced by the underwriters, Bingham J stated his conclusion at p. 248:

In the result, I find myself driven to conclude that the defendants' wear and tear explanation must on the evidence be effectively ruled out. That leaves me with a choice between the owners' submarine hypothesis and the possibility that the casualty occurred as a result of wear and tear but by a mechanism which remains in doubt. Cases must be decided on evidence. My conclusion is that despite its inherent improbability, and despite the disbelief with which I have throughout been inclined to regard it, the owners' submarine hypothesis must be accepted as, on the balance of probabilities, the explanation of this casualty.

The Court of Appeal upheld Bingham J's decision and the matter thereafter found its way to the House of Lords.

In his celebrated speech, Lord Brandon of Oakbrook opined, inter alia, as follows [1985] 1 WLR 948, 951-955:

My Lords, the appeal does not raise any question of law, except possibly the question what is meant by proof of a case "on a balance of probabilities." Nor do underwriters challenge before your Lordships any of the primary findings of fact made by Bingham J. The question, and the sole question, which your Lordships have to decide is whether, on the basis of those primary findings of fact, Bingham J and the Court of Appeal were justified in drawing the inference that the ship was, on a balance of probabilities, lost by perils of the sea.

In approaching this question it is important that two matters should be borne constantly in mind. The first matter is that the burden of proving, on a balance of probabilities, that the ship was lost by perils of the sea, is and remains throughout on the shipowners. Although it is open to underwriters to suggest and seek to prove some other cause of loss, against which the ship was not insured, there is no obligation on them to do so. Moreover, if they chose to do so, there is no obligation on them to prove, even on a balance of probabilities, the truth of their alternative case.

The second matter is that it is always open to a court, even after the kind of prolonged inquiry with a mass of expert evidence which took place in this case, to conclude, at the end of the day, that the proximate cause of the ship's loss, even on a balance of probabilities, remains in doubt, with the consequence that the shipowners have failed to discharge the burden of proof which lay upon them.

This second matter appears clearly from certain observations of Scrutton LJ in La Compania Martiartu v The Corporation of The Royal Exchange Assurance [1923] KB 650. That was a case in which the Court of Appeal, reversing the trial judge, found that the ship in respect of which her owners had claimed for a total loss by perils of the sea, had in fact been scuttled with the connivance of those owners. Having made that finding, Scrutton LJ went on to say, at p. 657:

This view renders it unnecessary finally to discuss the burden of proof, but in my present view, if there are circumstances suggesting that another cause than a peril insured against was the dominant or effective cause of the entry of sea water into the ship … and an examination of all the evidence leaves the Court doubtful what is the real cause of the loss, the assured has failed to prove his case.

While these observations of Scrutton LJ were, having regard to his affirmative finding of scuttling, obiter dicta only, I am of opinion that they correctly state the principle of law applicable. Indeed counsel for the shipowners did not contend otherwise.

My Lords, the late Sir Arthur Conan Doyle in his book "The Sign of Four", describes his hero, Mr Sherlock Holmes, as saying to the latter's friend, Dr Watson: "how often have I said to you that, when you have eliminated the impossible, whatever remains, however improbable, must be the truth?" It is, no doubt, on the basis of this well-known but unjudicial dictum that Bingham J decided to accept the shipowners' submarine theory, even though he regarded it, for seven cogent reasons, as extremely improbable.

In my view there are three reasons why it is inappropriate to apply the dictum of Mr Sherlock Holmes, to which I have just referred, to the process of fact-finding which a judge of first instance has to perform at the conclusion of a case of the kind here concerned.

The first reason is one which I have already sought to emphasise as being of great importance, namely, that the judge is not bound always to make a finding one way or the other with regard to the facts averred by the parties. He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden. No judge likes to decide cases on burden of proof if he can legitimately avoid having to do so.

There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take.

The second reason is that the dictum can only apply when all relevant facts are known, so that all possible explanations, except a single extremely improbable one, can properly be eliminated. That state of affairs does not exist in the present case: to take but one example, the ship sank in such deep water that a diver's examination of the nature of the aperture, which might well have thrown light on its cause, could not be carried out.

The third reason is that the legal concept of proof of a case on a balance of probabilities must be applied with common sense. It requires a judge of first instance, before he finds that a particular event occurred, to be satisfied on the evidence that it is more likely to have occurred than not. If such a judge concludes, on a whole series of cogent grounds, that the occurrence of an event is extremely improbable, a finding by him that it is nevertheless more likely to have occurred than not, does not accord with common sense. This is especially so when it is open to the judge to say simply that the evidence leaves him in doubt whether the event occurred or not, and that the party on whom the burden of proving that the event occurred lies has therefore failed to discharge such burden.

In my opinion Bingham J adopted an erroneous approach to this case by regarding himself as compelled to choose between two theories, both of which he regarded as extremely improbable, or one of which he regarded as extremely improbable and the other of which he regarded as virtually impossible. He should have borne in mind, and considered carefully in his judgment, the third alternative which was open to him, namely, that the evidence left him in doubt as to the cause of the aperture in the ship's hull, and that, in these circumstances, the shipowners had failed to discharge the burden of proof which was on them.

Lord Brandon accordingly concluded, at p. 957, that the judge ought to have found that the ship owners' case was not proved.

The Scope of the 'Heresy'

In *Ide v ATB Sales Ltd* [2008] PIQR P13, having recited the decision in *The Popi M*, Thomas LJ stated as follows at [4]-[6]:

The Popi M was a very unusual case and as these two appeals demonstrate, the difficulties identified in that case will not normally arise. In the vast majority of cases where the judge has before him the issue of causation of a particular event, the parties will put before the judges two or more competing explanations as to how the event occurred, which though they may be uncommon, are not improbable. In such cases, it is, as was accepted before us by the appellants, a permissible and logical train of reasoning for a judge, having eliminated all of the causes of the loss but one, to ask himself whether, on the balance of probabilities, that one cause was the cause of the event. What is impermissible is for a judge to conclude in the case of a series of improbable causes that the least improbable or least unlikely is nonetheless the cause of the event; such cases are those where there may be very real uncertainty about the relevant factual background (as where a vessel was at the bottom of the sea) or the evidence might be highly unsatisfactory. In that type of case the process of elimination can result in arriving at the least improbable cause and not the probable cause.

In Datec Electronic Holdings v UPS [2007] UKHL 23 ([2007] 1 WLR 1325, [2005] EWCA Civ 1418)) one of the issues was whether the claimants had discharged the burden of establishing on a balance of probabilities that the loss of packages was caused by theft by an employee of UPS. As Richards LJ stated in his judgment at paragraph 67, there was sufficient evidence in that case and the surrounding circumstances to enable the court to engage in an informed analysis of the possible causes of the loss and to reach a reasoned conclusion as to the probable cause. He considered all of the possible causes and concluded that theft by employees was the probable cause of the loss. He concluded at paragraph 83:

Nor do I see any inconsistency between my approach and the observations of Lord Brandon in The Popi M. The conclusion that employee theft was the probable cause of the loss is not

based on a process of elimination of the impossible, in application of the dictum of Sherlock Holmes. It does take into consideration the relative probabilities or improbabilities of various possible causes as part of the overall process of reasoning, but I do not read The Popi M as precluding such a course. Employee theft is, as I have said, a plausible explanation and is very far from being an extremely improbable event. A finding that employee theft is more likely than not to have been the cause of the loss accords perfectly well with common sense. Thus the various objections to the finding made by the trial judge in The Popi M simply do not bite on the facts of this case.

On appeal, the approach of Richards LJ was criticised by counsel for UPS on the basis that he had been lured into a process of elimination (which could at best arrive at a conclusion as to which of many possible causes was the least unlikely) rather than a conclusion as to any cause which was more probable than all the others viewed together. In giving the only substantive opinion on this issue, Lord Mance rejected that criticism, though pointing out at paragraph 50 that:

Inevitably, any systematic consideration of the possibilities is subject to a risk that it may become a process of elimination leading to no more than a conclusion regarding the least unlikely cause of loss.

As a matter of common sense it will usually be safe for a judge to conclude, where there are two competing theories before him neither of which is improbable, that having rejected one it is logical to accept the other as being the cause on the balance of probabilities. It was accepted in the course of argument on behalf of the appellant that, as a matter of principle, if there were only three possible causes of an event, then it was permissible for a judge to approach the matter by analysing each of those causes. If he ranked those causes in terms of probability and concluded that one was more probable than the others, then, provided those were the only three possible causes, he was entitled to conclude that the one he considered most probable, was the probable cause of the event provided it was not improbable.

Dealing with matters more broadly in *Milton Keynes Borough Council v Nulty* [2013] 1 WLR 1183, Toulson LJ opined as follows at [34]-[37]:

A case based on circumstantial evidence depends for its cogency on the combination of relevant circumstances and the likelihood or unlikelihood of coincidence. A party advancing it argues that the circumstances can only or most probably be accounted for by the explanation which it suggests. Consideration of such a case necessarily involves looking at the whole picture, including what gaps there are in the evidence, whether the individual factors relied upon are in themselves properly established, what factors may point away from the suggested explanation and what other explanation might fit the circumstances. As Lord Mance observed in Datec Electronics Holdings Limited v UPS Limited [2007] UKHL 23, [2007] 1 WLR 1325, at 48 and 50, there is an inherent risk that a systematic consideration of the possibilities could become a process of elimination "leading to no more than a conclusion regarding the least unlikely cause of loss", which was the fault identified in The Popi M. So at the end of any such systematic analysis, the court has to stand back and ask itself the ultimate question whether it is satisfied that the suggested explanation is more likely than not to be true. The elimination of other possibilities as more implausible may well lead to that conclusion, but that will be a conclusion of fact: there is no rule of law that it must do so. I do not read any of the statements in any of the other authorities to which we were referred as intending to suggest otherwise.

The civil "balance of probability" test means no less and no more than that the court must be satisfied on rational and objective grounds that the case for believing that the suggested means of causation occurred is stronger than the case for not so believing. In the USA the usual formulation of this standard is a "preponderance of the evidence". In the British Commonwealth the generally favoured term is a "balance of probability". They mean the same. Sometimes the "balance of probability" standard is expressed mathematically as "50 + % probability", but this can carry with it a danger of pseudo-mathematics, as the argument in this case demonstrated. When judging whether a case for believing that an event was caused in a particular way is stronger that the case for not so believing, the process is not scientific (although it may obviously include evaluation of scientific evidence) and to express the probability of some event having happened in percentage terms is illusory.

[Counsel] submitted that balance of probability means a probability greater than 50%. If there is a closed list of possibilities, and if one possibility is more likely than the other, by definition that has a greater probability than 50%. If there is a closed list of more than two possibilities, the court should ascribe a probability factor to them individually in order to determine whether one had a probability figure greater than 50%.

I would reject that approach. It is not only over-formulaic but it is intrinsically unsound. The chances of something happening in the future may be expressed in terms of percentage. Epidemiological evidence may enable doctors to say that on average smokers increase their risk of lung cancer by X%. But you cannot properly say that there is a 25 per cent chance that something has happened: Hotson v East Berkshire Health Authority [1987] AC 750. Either it has or it has not. In deciding a question of past fact the court will, of course, give the answer which it believes is more likely to be (more probably) the right answer than the wrong answer, but it arrives at its conclusion by considering on an overall assessment of the evidence (i.e. on a preponderance of the evidence) whether the case for believing that the suggested event happened is more compelling than the case for not reaching that belief (which is not necessarily the same as believing positively that it did not happen).

(See also *Graves v Brouwer* [2015] EWCA Civ 595 at [24]-[25] per Tomlinson LJ.)

Against the background of these authorities, and with characteristic concision, Jackson LJ stated in *O'Connor v The Pennine Acute Hospitals NHS Trust* [2015] EWCA Civ 1244 at [64]:

It is not an uncommon feature of litigation that several possible causes are suggested for the mishap which the court is investigating. If the court is able, for good reason, to dismiss causes A, B and C, it may be able to reach the conclusion that D was the effective cause. But the mere elimination of A, B and C is not of itself sufficient. The court must also stand back

and, looking at all the evidence, consider whether on the balance of probabilities D is proved to be the cause.

The Correct Approach

Drawing the above threads together:

- It will often be the case that several possible causes are suggested for a particular injury or condition.
- In such circumstances, if the court is able, for good reasons, to dismiss a number of causes, it must still stand back and consider – on all the evidence – whether the remaining cause or causes are proved on the balance of probabilities.
- Where the causes are not improbable, it is a permissible exercise for a judge to analyse each cause in turn, adopting a process of elimination, so long as the judge does not merely arrive at the 'least improbable' cause.
- To find the 'least improbable' cause proved would be to commit the *Rhesa Shipping* 'heresy'.
- In this connection, it is always open to the court to find that a party has not discharged the burden of proof; indeed, sometimes it is the only course open to the judge.

What About Res Ipsa Loquitur?

In *O'Connor,* Jackson LJ observed at [59] that a "vast body of case-law" has developed on the topic of res ipsa loquitur.

The classic exposition of the 'doctrine' appears in *Scott v London & St Katherine's Docks* (1865) 3 H & C 596, 601 per Earle CJ:

There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

At [60] in *O'Connor,* however, Jackson LJ stated:

More recent authority has tended to the view that res ipsa loquitur is not a principle of law at all. There is no reversal of the burden of proof. The so-called res ipsa loquitur cases are merely cases in which, on the totality of the evidence, the court was able to make a finding of negligence. It has always been the position that courts can make findings of fact by means of inference when there is no direct evidence of the events in issue.

Then, at [61], Jackson LJ approved the following principles set out by Brooke LJ, with whom Hobhouse LJ and Sir John Vinelott agreed, in *Ratcliffe v Plymouth & Torbay Health Authority* [1998] PIQR P170, P184, as regards the application of the 'doctrine' in clinical negligence cases:

(1) In its purest form the maxim applies where the plaintiff relies on the res (the thing itself) to raise the inference of negligence, which is supported by ordinary human experience, with no need for expert evidence.

(2) In principle, the maxim can be applied in that form in simple situations in the medical negligence field (surgeon cuts off right foot instead of left; swab left in operation site; patient wakes up in the course of surgical operation despite general anaesthetic).

(3) In practice, in contested medical negligence cases the evidence of the plaintiff, which establishes the res, is likely to be buttressed by expert evidence to the effect that the matter complained of does not ordinarily occur in the absence of negligence.

(4) The position may then be reached at the close of the plaintiff's case that the judge would be entitled to infer negligence on the defendant's part unless the defendant adduces evidence which discharges this inference.

(5) This evidence may be to the effect that there is a plausible explanation of what may have happened which does not connote any negligence on the defendant's part. The explanation must be a plausible one and not a theoretically or remotely possible one, but the defendant certainly does not have to prove that his explanation is more likely to be correct than any other. If the plaintiff has no other evidence of negligence to rely on, his claim will then fail.

(6) Alternatively, the defendant's evidence may satisfy the judge on the balance of probabilities that he did exercise proper care. If the untoward outcome is extremely rare, or is impossible to explain in the light of the current state of medical knowledge, the judge will be bound to exercise great care in evaluating the evidence before making such a finding, but if he does so, the prima facie inference of negligence is rebutted and the plaintiff's claim will fail. The reason why the courts are willing to adopt this approach, particularly in very complex cases, is to be found in the judgments of Stuart-Smith and Dillon LJJ in [Delaney v Southmead Health Authority (1995) 6 Med LR 355].

(7) It follows from all this that although in very simple situations the res may speak for itself at the end of the lay evidence adduced on behalf of the plaintiff, in practice the inference is then buttressed by expert evidence adduced on his behalf, and if the defendant were to call no evidence, the judge would be deciding the case on inferences he was entitled to draw from the whole of the evidence (including the expert evidence), and not on the application of the maxim in its purest form.

Further Reading: Some Examples

On close analysis of the evidence in *O'Connor,* the Court of Appeal found that the trial judge had taken care not to commit the *Rhesa Shipping* 'heresy' and had reached his findings on the balance of probabilities without relying on res ipsa loquitur: see [86].

In *Collyer v Mid Essex Hospital Services NHS Trust* [2019] EWHC 3577 (QB), HHJ Coe QC (sitting as a Judge of the High Court) cited *O'Connor* and concluded, with evident regret, that it was not possible to identify the cause of the Claimant's injury, such that he was unable prove his case on the balance of probabilities: see [176].

A further recent example of a clinical negligence claim that failed because it was not proved on the balance of probabilities is *Johnson v Williams* [2022] EWHC 1585 (QB): see in particular [78]-[86].

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Testing the Inconsistences Hill v Angus Council [12.01.23]

by Tim Lennox, Senior Associate, Glasgow - www.kennedyslaw.com
This case review was co-authored by Dawn Leckie, Trainee Solicitor, Edinburgh.

In a recent case handed down by the Sheriff Appeal Court, the Sheriff Principal considered whether the previous sheriff erred in attaching too great a weight on hospital records when assessing the credibility of the pursuer, where the authenticity of the documents was not agreed and the nurse who wrote the record had not been called to give evidence.

Background

Mr Hill brought an action against Angus Council following an accident in March 2019 when he fell down the stairs in the communal stairwell for his flat, owned by the defender. He based his claim on the defender's alleged failure to comply with the Housing (Scotland) Act [2001] and the Occupiers' Liability (Scotland) Act [1960]. The stairwell had lights on a timer, which he and other neighbours reported as defective prior to the incident. The lights were not fixed and, as he left his property one morning, he was unable to see where he was stepping and fell. The key issue at first instance was the credibility and reliability of the pursuer's evidence.

The case was heard by Sheriff Brown who found in favour of the defender. She accepted the accident occurred, however, considered the pursuer's evidence to be unreliable due to the "sheer number of inconsistencies".

The pursuer appealed, raising issues with the sheriff's consideration of the evidence of two of his neighbours and in relation to entries within his medical records. He argued that the sheriff erred in discounting the evidence as unreliable and incredible, and that the reasoning for failing to find that the accident was caused as asserted by the pursuer was "plainly wrong". The pursuer argued that the sheriff had no evidential basis to find that the medical records were an accurate record of what the pursuer had reported to the nurse.

Decision

The appeal was heard by Sheriff Principal Lewis. She considered that the discussions with the plaintiff's neighbours were "brief and unspecific as to date, time, precise location and cause", and there was no further helpful information ascertained in chief or cross-examination. She was unsurprised that whilst the neighbours were considered credible and reliable, the sheriff at first instance didn't consider them helpful in determining the cause of the accident. She did not consider deeming them credible and reliable was contradictory to assessing that the information they could provide as unhelpful.

The Sheriff Principal rejected the pursuer's position that too much weight was placed on the contemporaneous records. The explanation of how the accident occurred as recorded by the nurse at the hospital differed from the pleadings and the pursuer's evidence. The Sheriff Principal stated that as the medical records were disclosed, the defender was entitled to test the pursuer's credibility and reliability on the content.

Ultimately, the Sheriff Principal was content with the approach and view taken by the sheriff at first instance and found no reason to depart from her conclusions. The appeal was ultimately refused with expenses awarded to the defender.

Comment

The case highlights the importance of considering the finer details in a pursuer's case. On the face of it, there was evidence that the accident occurred. The pursuer cited several witnesses, who were all well regarded by the Court, however, there was little informative value within the content of their evidence. The documentary evidence contrasted significantly from the pursuer's version of events and considerable weight was given to the records given their contemporaneous nature.

The Benefits of Securing Suitable Accommodation for a Brain-injured Child

by Victoria Johnson at Penningtons Manches Cooper

When a child suffers a severe brain injury, one of the biggest changes for their family is the type of home that they need to live in. Where the injury happened because of a failing in the child's medical care, a claim for some of the additional costs of this accommodation can be pursued.

Why would an accommodation claim need to be brought?

Suffering a severe brain injury may mean that the child grows up with physical and mental disabilities. This can affect the type of home that they can live in. For example, they may now need:

- an extra room or rooms for live-in carers, if they require round the clock professional care;
- a one-storey property or the installation of lifts, if they cannot use stairs;
- other adaptations for accessibility in and out of the home, such as ramps;
- wider doorways and corridors, especially if they use an electric wheelchair;
- additional security to ensure they are safe;
- environmental controls, such as windows that open via a remote;
- a sensory or therapy room, if they require therapies at home; or
- adaptations to the bathroom and kitchen to allow them to use these rooms.

They may also incur higher running costs such as heating, electricity and water, and more space may be required for disability-related equipment.

This list in not exhaustive and every claim will differ depending on the child and family's circumstances.

How is the claim made?

Firstly, a clinical negligence claim will always need to establish if the child's brain injury was caused by a failing in their care. If so, and if they require changes to their adaptation because of their injuries, then a claim can be put forward. The aim of a claim is to try to meet the reasonable needs of the child that arise as a result of their injuries.

The full costs of a new house cannot be claimed. The courts will only allow a claim for a proportion of the capital costs of a property. This is because, firstly, the child would always have had some costs related to

renting or purchasing a home, even if they had not been injured. The cost of the property that the child would have needed, had they not been injured, is therefore deducted from any claim made.

The courts have also determined that the defendant should not have to pay the entire difference in cost between the home that is needed now, and the home that would have been needed if the child had not been injured. This is because the value of the home will appreciate over time, and this is seen as providing a 'windfall' or benefit to the person making the claim. A sum equivalent to lifetime interest is therefore deducted from the accommodation claim to reflect this.

The courts do allow the full costs of adaptations to the house and additional running costs to be claimed.

Why is accommodation so important?
The families of children who are injured at birth often report that securing suitable accommodation is the most important part of the claim for them.

One reason behind this is that it is common for the family's current home to be too small or not suitable for any live-in professional carers, so the child's parents have to take on the task of providing round the clock care for the disabled child, often with no support. This may include waking up several times in the night, and therefore has a huge impact on the parents' health and wellbeing, as well as often limiting their ability to work. Once a larger home is secured and professional carers start coming in to help, the parents can resume a more parental role, rather than having to be full time carers.

Another reason that families prioritise accommodation is for the comfort of the child. In a recent case, Penningtons Manches Cooper acted for a young man in his twenties who suffered an injury at birth and was left with very severe disabilities. In the home he lived in before the claim, he did not have an accessible bathroom and his mother was no longer physically able to transfer him by herself as he grew up. He therefore had to be washed in his bedroom and had not had a bath or shower since he was a child.

As part of the clinical negligence claim, damages were sought for a larger home with an adapted bathroom, and he is now able to have a bath or shower as often as he wishes, with the help of his care team. His mother reports that this has made a huge difference to his quality of life as he loves being in the water.

In another recent case, a young woman in her teens who was severely injured at birth was unable to move around her home using her electric wheelchair, as the doorways and corridors were not wide enough. She had to rely on her family to wheel her in a manual chair, and consequently had no level of independence. Since pursuing a claim, her family have moved to a more suitable home and she can now use her electric chair, providing her with the independence to move around her own home as she wishes.

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GDPR Fines: Are they working?

This article by Alison Berryman, Head of UK at specialist technology law firm Biztech Lawyers. Within the below Alison looks closely at whether GDPR fines are actually working, and if big tech companies see them as just a cost of doing business.

In September 2022, the UK's Information Commissioner's Office (ICO) announced its intention to fine TikTok £27 million for breaches of the UK GDPR law. It accused the social media network of collecting personal data from under-13-year-olds without parental consent, failing to provide proper information to users in a concise, transparent, and easily understood way, and processing special category data without legal grounds to do so.

On April 4th, 2023, the ICO revealed that the actual fine would be £12.7 million, less than half of the sum originally anticipated, and just 0.001% of Tiktok's 2022 revenue. This is despite the maximum possible fine being 4% of global annual turnover.

In fact, since the introduction of GDPR there have been very few fines issued by the ICO. Some EU countries have issued more, although many of these have been very low value. Even the largest fines have typically been less than 0.01% of annual turnover - for instance, in 2019, the French data protection authority (CNIL) fined Google €50 million for lack of transparent information, and in 2021, Amazon was fined €746 million by the Luxembourg National Commission for Data Protection (CNPD) for breaches related to targeted advertising. Meta was also fined €405 million by the Irish Data Protection Commission (DPC) in 2022 for breaches related to the handling of children's personal data.

It's hard to imagine such comparatively small penalties serving as an effective deterrent to tech giants with vast financial resources. A cynic might even think that the armies of privacy lawyers being hired within these organisations are only there to help the companies find ways to avoid the rules and defend against enforcement action, rather than helping them comply with best practice.

However, where the threat of fines is ineffective, the risk of bad PR, and the resulting erosion of public trust, may give some organisations at least a brief pause for thought. As data breaches continue to make headlines, there is a growing sense that major tech corporations cannot be trusted to protect individuals. TikTok, in particular, has faced scrutiny over its data protection practices, and some governments have already banned staff from using TikTok due to concerns about data privacy. Google has also suffered from being compared negatively on privacy matters to Apple, a brand with a strong reputation for protecting users' rights.

While regulators could (and arguably should) increase fines for major corporations that breach the regulations, ultimately, it will be the public that makes BigTech take notice. As long as people continue to use these services, tech giants will leverage their data as much as they can (or can get away with). Only when users vote with their feet and choose alternative providers will real change happen. It is up to individuals to ask themselves how much they care, and if they are willing to choose a different social media platform, search engine, or online shop. For many, it is a tricky balance.

Is your Expert really an Expert? How to choose a Registered Psychologist to be an Expert Witness in a Personal Injury Case

by Dr Kathryn Newns and Dr Karen Addy

Background – What does a HCPC Registered Psychologist Expert Witness do?

Expert witnesses are utilised to help provide opinion on matters about which the judge could not form a decision unaided. They owe a duty to the court to act independently in their role to provide information about complex issues. As HCPC Registered Psychologists, we are often called upon to determine whether someone's difficulties following an incident represented a clinically significant difficulty; whether these difficulties pre-existed the index event; to ascertain any vulnerabilities to mental health difficulties; and to consider attribution, treatment if required, and prognosis.

In order to carry out our duties to the court we are required to undertake a full psychological examination of a client, going back to childhood in order to ascertain any psychological vulnerabilities, discussing any previous traumas and establishing how the individual usually copes with adversity, examining other life stressors around the time of the index event; as well as how they reacted at the time, immediately afterwards, and how they presently function. We would ask whether help was sought for psychological difficulties, how these difficulties impacted daily living, and whether any psychological treatment had been successful. In addition to interview, we may use psychometric assessments, GP records, hospital records, therapy records, and other medical reports in order to form our opinion.

Clinical Psychologists are frequently instructed in low value, fast track claims, for example low speed traffic accidents (assessing, often for "PTSD" or travel anxiety); trips and falls (being asked to examine fear of falling, for example); and workplace accidents (assessing anxiety at work, or other psychological ramifications of injury). In more complex cases, Clinical Psychologists may be instructed in cases involving chronic pain, clinical negligence, and significant life altering injuries.

Experts who are not experts

It seems that hardly a year goes by without an expert being criticised for failing to fulfil their expert witness role – being biased; lacking the relevant experience; and even lacking a basic understanding of the role of the expert witness.

In 2019 a high profile fraud trial collapsed as the expert witness was judged not to be an "expert" – he had little or no understanding of the duties of an expert, had no expert witness training, and lacked appropriate academic qualifications (and in fact could not recall if he had A-levels). [1]

GP expert, Dr Zafar, was described by a judge as having "remarkably" run a system which enabled him to see a client and write the report within 15 minutes, referring to this as a "report writing factory"[2]. He recklessly changed a report without reassessing the claimant, adopting the symptoms and prognosis as suggested by the solicitor. The Court of Appeal in Dr Zafar's case noted that a false statement supported by a statement of truth (whether given recklessly or dishonestly) is a serious offence and should have resulted in a custodial sentence. Dr Zafar was struck off the medical register.

Of note as well, in the family division in 2023, a case highlighted the difficulties inherent in instructing a "Psychologist", due to this not being a protected title.[3]

Training and Accreditation for Experts

So how does a solicitor avoid inadvertently using a reckless expert witness or one who does not understand their duty to the court? How do they know whether the expert they are instructing knows their duties, and has the relevant qualifications, experience and knowledge?

There is no universal regulation of expert witnesses in England or Wales. The Academy of Royal Colleges published guidance for expert witnesses, endorsed by 9 healthcare professional bodies and regulators. Key to this guidance is that healthcare professionals who act as expert witnesses should undergo specific training for being an expert witness and should undertake regular Continuing Professional Development in expert witness work. The British Psychological Society was not one of the professional bodies who endorsed this guidance.

Especially given the lack of accreditation of expert witnesses, it can be difficult for the solicitor to ensure that their expert is fully trained as an expert witness.

It can also be difficult to ensure that the professional you are using are fully accredited with an appropriate professional body. As noted above, the title "Psychologist" is not protected, and instructing parties run the risk of instructing an unqualified mental health professional. As the generic title of psychologist is not protected this means the title "psychologist" may be used by an individual regardless of their regulatory status, or qualifications. Clinical Psychologists, Forensic Psychologists, Health Psychologists, Educational Psychologist, Sport and Exercise Psychologist and Counselling Psychologists must be registered with the HCPC as "Practitioner Psychologists". If the instructed expert does not have one of these titles, and is not registered with the HCPC, then there is no guarantee that they are a fully qualified psychologist. If a psychologist is registered with the HCPC their qualifications can be easily checked via https://www.hcpc-uk.org/check-the-register/ to ensure they are working in their area of expertise (for example a registered occupational psychologist is not providing evidence on forensic issues)

Training in expert witness work specifically for psychologists is available through the British Psychological Society, although no accreditation currently exists through that professional body and there is no requirement for psychologists taking expert witness training to be HCPC registered, this means people using the title psychologist may have had expert witness training but not have had relevant professional training to be a HCPC registered practitioner psychologist

The Expert Witness Institute (EWI) have a rigorous certification process that involves practical assessments, demonstration of an ability to write a CPR compliant report, and evidence of being able to undertake a joint statement, understand the joint statement process, and perform well under cross examination. The accreditation must be renewed every 5 years. The EWI do ensure all those on the certification programme who are psychologists are registered with the HCPC.

Bond Solon alongside Cardiff Law School also have a thorough approach to accreditation involving training and examination in law and procedure; report writing, and cross examination, however, unlike the EWI certification there is no requirement to renew this although certified experts must undertake regular CPD with Bond Solon to maintain that accreditation. It is important to note that (at the time of writing) there is no requirement for psychologists applying for certification with Bond Solon to be on the HCPC register.

The Risks and Benefits of using Agencies

When utilising an agency to instruct an expert witness it can be particularly difficult to ensure that due diligence has been undertaken. Ideally, agencies would ensure that their experts: have the necessary qualifications; have undertaken expert witness training; are able to write a CPR compliant report; and undertake ongoing CPD in expert witness work. Sadly, many agencies and associate groups do not require their experts to have undertaken any expert witness training or accreditation. Furthermore, many agencies insist on paying very low fees for Psychology reports, giving a significant financial disincentive for an expert to seek adequate training.

Agencies are often preferred by solicitors for low value cases, and in some cases can be very helpful in terms of deferred payment terms; scanning and organising paperwork; and sourcing multiple experts for a case. However, unless the agency is undertaking checks on the experts that they are using and paying that expert a fair price for their work, it is difficult to guarantee that the expert that they put forward for a case is appropriate.

What Next? The Solution

Instructing parties should ensure that their expert has undertaken the appropriate expert witness training. They must also confirm that any Psychologist that they instruct is fully regulated and qualified and on the HCPC register. (this can be checked via https://www.hcpc-uk.org/check-the-register/)

Asking for an example report is a good way to ensure that the expert is able to produce a good quality CPR compliant report. Checking the expert's CV for their training in expert witness work is essential. Experts would benefit from taking note of the opinion raised by the Court in the case of Re C ('Parental Alienation'; Instruction of Expert) [2023] EWHC 345 (Fam) where the view was expressed that experts' CVs should be well structured in order to transmit information, for example regarding training and qualifications "crisply and clearly". However, better still is the reassurance that is afforded by expert witness certification alongside ensuring that the Psychologist is on the HCPC register and working within their field of expertise.

References

1. R v Marcus Allen & Ors

2. Liverpool Victoria Insurance Co Ltd v Zafar [2019] EWHA Civ 392.

3. Re C ('Parental Alienation'; Instruction of Expert) [2023] EWHC 345 (Fam).

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Assessing Capacity: The Principles

Alex Ruck Keene KC (Hon) reports on a capacity masterclass from MacDonald J in the Court of Protection, and highlights an updated capacity guide from 39 Essex Chambers.

In 2015, in *Kings College Hospital NHS Foundation Trust v C and V* [2015] EWCOP 80, MacDonald J provided both the then-authoritative summary of the principles to apply in assessing capacity, and a masterclass in the application of those principles to a complex case. In *North Bristol NHS Trust v R* [2023] EWCOP 5, MacDonald J has updated his authoritative summary to take account of the Supreme Court decision in *A Local Authority v JB* [2021] UKSC 52, and again provided a masterclass in the application of those principles.

The case concerned the question of the capacity and (if she lacked capacity in the relevant domains) the best interests of a woman as regards her birth arrangements. The woman, R, was a serving prisoner; she was a failed asylum contact and wished no contact with her mother who was understood to be present in England. She had had two previous children, both of whom had been removed from her care, one to adoption and one to placement with her mother. Little was known about the circumstances of her current pregnancy. She had had continued deterioration in the growth of her baby, and a number of other complications, which the clinicians involved considered meant that only a Caesarean section was consistent with recommended safe obstetric practice in this case. R had not said that she did not want a Caesarean section, but the clinicians were concerned as to whether she had capacity to make the decision. One doctor, a Doctor Q, considered that she had capacity to make decisions about her birth arrangements; none of the other clinicians considered this to be so. However, as MacDonald J observed at paragraph 44:

[…] a difficulty in this case has been in identifying whether R is suffering from an impairment of, or a disturbance, in the functioning of the mind or brain. In particular, in circumstances where those who have assessed R are (with the possible exception of Dr Q) agreed that her presentation suggests that the functioning of her mind is impaired, but where they have not been able to arrive at any formal diagnosis for a presentation variously described as "unusual" and "baffling", this case has given rise to the question of whether a formal diagnosis in respect of R is necessary in order for the terms of s.2(1) of the 2005 Act to be satisfied.

As MacDonald J had set out in the C case, but which usefully bear reproducing here, the 'cardinal principles' that must be followed are that:

i) A person must be assumed to have capacity unless it is established that they lack capacity (Mental Capacity Act 2005 s. 1(2)). The burden of proof lies on the person or body asserting a lack of capacity, in this case the Trust, and the standard of proof is the balance of probabilities (Mental Capacity Act 2005 s. 2(4) and see ***KK v STC and Others*** *[2012] EWHC 2136 (COP)at [18]);[1]*

ii) Determination of capacity under Part I of the Mental Capacity Act 2005 is always 'decision specific' having regard to the clear structure provided by ss 1 to 3 of the Act (see ***PC v City of York Council*** *[2014] 2 WLR 1at [35]). Thus, capacity is required to be assessed in relation to the specific decision at the time the decision needs to be made and not to a person's capacity to make decisions generally;*

iii) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success (Mental Capacity Act 2005 s. 1(3));

iv) A person is not to be treated as unable to make a decision merely because he or she makes a decision that is unwise (see ***Heart of England NHS Foundation Trust v JB*** *[2014] EWHC 342 (COP)at [7]). The outcome of the decision made is not relevant to the question of whether the person taking the decision has capacity for the purposes of the Mental Capacity Act 2005 (see* ***R v Cooper*** *[2009] 1 WLR 1786at [13] and* ***York City Council v C*** *[2014] 2 WLR 1 at [53] and [54]);[2]*

v) Pursuant to s. 2(1) of the 2005 Act a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain. It does not matter whether the impairment or disturbance in the functioning of the mind or brain is permanent or temporary (Mental Capacity Act 2005 s. 2(2)). It is important to note that the question for the court is not whether the person's ability to take the decision is impaired by the impairment of, or disturbance in the functioning of, the mind or brain but rather whether the person is rendered unable to make the decision by reason thereof (see Re SB (A Patient: Capacity to Consent to Termination) [2013] EWHC 1417 (COP)at [38]);

*vi) Pursuant to s. 3(1) of the 2005 Act a person is "unable to make a decision for himself" for the purposes of s.2(1) of the Act if he is unable (a) to understand the information relevant to decision, (b) to retain that information, (c) to use or weigh that information as part of the process of making the decision, or (d) to communicate his decision whether by talking, using sign language or any other mea*ns.

vii) An inability to undertake any one of these four aspects of the decision making process set out in s 3(1) of the 2005 Act will be sufficient for a finding of incapacity provided the inability is because of an impairment of, or a disturbance in the functioning of, the mind or brain (see ***RT and LT v A Local Authority*** *[2010] EWHC 1910 (Fam) at [40]). For a person to be found to lack capacity there must be a causal connection between being unable to make a decision by reason of one or more of the functional elements set out in s. 3(1) of the Act and the diagnostic element of 'impairment of, or a disturbance in the functioning of, the mind or brain' required by s. 2(1) of the Act, i.e. for a person to lack capacity the former must result from the latter (****York City Council v C*** *[2014] 2 WLR 1 at [58] and [59]);*

viii) The information relevant to the decision includes information about the reasonably foreseeable consequences of deciding one way or another (Mental Capacity Act 2005 s. 3(4)(a));

ix) The threshold for demonstrating capacity is not an unduly high one (see ***CC v KK & STCC*** *[2012] EWHC 2136 (COP)at [69]).*

In the *North Bristol* case, MacDonald J noted (at paragraph 43) that:

The foregoing authorities now fall to be read in light of the judgment of the Supreme Court in ***A Local Authority v JB*** *[2022] AC 1322. The Supreme Court held that in order to determine whether a person lacks capacity in relation to "a matter" for the purposes of s. 2(1) of the Mental Capacity Act 2005, the court must first identify the correct formulation of "the matter" in respect of which it is required to evaluate whether P is unable to make a decision. Once the correct formulation of "the matter" has been arrived at, it is then that the court moves to identify the "information relevant to the decision" under section 3(1) of the 2005 Act. That latter task falls, as recognised by Cobb J in Re DD, to be undertaken on the specific facts of the case. Once the information relevant to the decision has been identified, the question for the court is whether P is unable to make a decision in relation to the matter and, if so, whether that inability is because of an impairment of, or a disturbance, in the functioning of the mind or brain.*

Applying these broad principles, MacDonald J turned to the specific question before him, identifying (at paragraph 57) that there were four questions he had to address:

First, what is the "matter", i.e. what is the decision that R has to make. Second, what is the information relevant to that decision. Third, is R unable to make a decision on the matter. Fourth, if R is unable to make a decision on the matter, is that inability caused by a disturbance in the functioning of her mind or brain.

As to the first question, MacDonald J considered as being too broad the formulation advanced by the Official Solicitor, namely "whether to carry her baby to the point of natural childbirth or to have the baby delivered earlier and, if so, whether to do so by induction or Caesarean section." This was because:

59. In this context, in circumstances where R has had continual deterioration in growth of her baby from 28 weeks and that her abdominal circumference now well below the 5th centile, indicating a growth restricted, oligohydramniotic pregnancy, ***the decision R is being asked to make is whether or not to undergo the procedure clinically indicated in those circumstances****. This does not mean that the option of carrying the baby to term followed by labour either induced or natural is irrelevant. But in light of the fact that R's treating team can now offer for decision only one clinically safe course, it is relevant as information to be retained, understood, weighed or used when deciding the matter, rather than as part of the proper formulation of the matter to be decided. (emphasis added)*

Turning then to the relevant information, MacDonald J reminded himself that the task had to be undertaken by reference to the specific facts of this case because:

61. Human decision making is not standardised and formulaic in nature in that we do not, at least consciously, break a decision down carefully into discrete component parts before taking that decision. In addition, decisions are always taken in a context, with the concomitant potential for a myriad of other factors, beyond the core elements of the decision, to influence the decision being taken. This has the potential to make the

task of creating a definitive account of the information relevant to a particular decision a challenging one. This difficulty can be addressed however, by acknowledging that in order to demonstrate capacity, a person is not required or expected to consider every last piece of information in order to make a decision about the matter, but rather to have the broad, general understanding of the kind that is expected from the population at large (see ***Heart of England NHS Foundation Trust v JB*** *[2014] EWHC 342 (COP)at [25]). Within this context, the Mental Capacity Act Code of Practice at [4.16] states relevant information includes "the nature of the decision", "the reason why the decision is needed" and "the likely effects of deciding one way or another, or making no decision at all".*

In the particular circumstances of R's case, this meant that:

62. […] the information relevant to the decision on the matter in this case can usefully be derived from the questions that might reasonably be anticipated upon a member of the population at large being told that their doctor is recommending an elective Caesarean section and being asked whether or not they consent to that course. Namely, why do you want to do a Caesarean section, what are the alternatives, what will happen when it is done, is it safe for me, is it safe for my unborn child, how long will I take to recover and what will happen if I decide not to do it. Within this context, I am satisfied information relevant to the matter requiring decision by R in this case can be articulated as follows:

i) The reason why an elective Caesarean section is being proposed, including that it is the clinically recommended option in R's circumstances.

ii) What the procedure for an elective Caesarean involves, including where it will be performed and by whom; its duration, the extent of the incision; the levels of discomfort during and after the procedure; the availability of, effectiveness of and risks of anaesthesia and pain relief; and the length and completeness of recovery.

iii) The benefits and risks (including the risk of complications arising out of the procedure) to R of an elective Caesarean section.

iv) The benefits and risks to R's unborn child of an elective Caesarean section.

v) The benefits and risks to R of choosing instead to carry the baby to term followed by natural or induced labour.

vi) The benefits and risks to R's unborn baby of carrying the baby to term followed by natural or induced labour.

At paragraph 63, MacDonald J made clear that in relation to (iv) that R's child had no separate legal identity until born, but that:

that legal position does not prevent the impact on the unborn child of taking or not taking a decision being information relevant to the matter requiring decision. Indeed, I consider it a safe assumption that one of the foremost pieces of information a pregnant woman would consider relevant in deciding whether to undergo any medical procedure during pregnancy is that of the potential impact on her unborn child. On the evidence of Dr Jobson, in this case R has shown some preference for having a live, healthy baby, as inferred from her showing occasional interest in the baby by asking for scan photos, wanting baby clothes and speaking about going to see the baby from time to time.

As to the third question, on the evidence before him, MacDonald J identified, first that:

65. There is some difficulty in this case in establishing the extent to which the relevant information was conveyed to R. This stems from the relative brevity of each of the documents recording the outcome of the various capacity assessments that have been undertaken on R. During the course of her oral evidence, Dr Zacharia noted, "we are not good at writing capacity verbatim" and that, especially where professionals differ, it would be very helpful to have more detail.

MacDonald J made it clear that he agreed with those sentiments, and in a passage of broader application, continued:

Given the number of capacity assessments that are required to be carried out on a daily basis in multiple arenas, it would obviously be too onerous to require a highly detailed analysis in the document in which the capacity decision is recorded. However, a careful and succinct account of the formulation of the matter to be decided and the formulation of the relevant information in respect of that matter, together with a careful and concise account of how the relevant information was conveyed and with what result, would seem to me to be the minimum that is required.

On the evidence before him MacDonald J found that:

68. […] Whilst on occasion R may be able to understand in a limited way the information conveyed to her regarding the matter on which a decision is required (as demonstrated, for example, by R being able to verbalise to Dr Jobson that a Caesarean section is cutting open her tummy to deliver the baby), she is unable to retain that information for long enough to be able to use or weigh the information and communicate a decision and, in the circumstances, is unable to make a decision about whether or not her baby should be delivered pre-term by elective Caesarean section.

As to the fourth question, the Official Solicitor had initially argued that, in identifying the impairment of the functioning of the mind or brain under s.2(1), the court must identify the underlying condition. This position was moderated in argument, but MacDonald J helpfully set out why a formal diagnosis is not required:

46. In A ***Local Authority v JBat [65]****, the Supreme Court described s.2(1) as the core determinative provision within the statutory scheme for the assessment of whether P lacks capacity. The remaining provisions of ss 2 and 3, including the specific decision making elements within the decision making process described by s.3(1), were characterised as statutory descriptions and explanations in support of the core provision in s.2(1), which requires any inability to make a decision in relation to the matter to be because of an impairment of, or a disturbance in the functioning of, the mind or brain. Within this context, the Supreme Court noted that s.2(1) constitutes the single test for capacity, albeit that the test falls to be interpreted by applying the more detailed provisions around it in ss 2 and 3 of the Act. Again, once the matter has been formulated and the information relevant to the decision identified, the question for the court is whether P is unable to make a decision in relation to the matter and, if so, whether that inability is because ofan impairment of, or a disturbance, in the functioning of the mind or brain.*

*47. Once the case is before the court, the overall assessment of capacity under the single test is a matter for the judgment of the court (see **Re SB (A Patient: Capacity to Consent to Termination**) [2013] EWHC 1417 (COP) at [38]). In this context, the question of whether any inability of R to make a decision in relation to the matter in issue is because of an impairment of, or a disturbance in, the functioning of the mind or brain is a question of fact for the court to answer based on the evidence before it. In this context, the wording of s.2(1) itself does not require a formal diagnosis before the court can be satisfied that whether any inability of R to make a decision in relation to the matter in issue is because of an impairment of, or a disturbance, in the functioning of the mind or brain. The words "impairment of, or a disturbance in" are not further defined elsewhere in the Act. In these circumstances, there is no basis for interpreting the statutory language as requiring the words "impairment of, or disturbance in" to be tied to a specific diagnosis. Indeed, it would be undesirable to do so. To introduce such a requirement would constrain the application of the Act to an undesirable degree, having regard to the complexity of the mind and brain, to the range of factors that may act to impair their functioning and, most importantly, to the intricacies of the causal nexus between a lack of ability to take a decision and the impairment in question. In **PC v City of York Council McFarlane LJ** (as he then was) cautioned against using s.2(1) as a means "simply to collect the mental health element" of the test for capacity and thereby risk a loss or prominence of the requirement of a causative nexus created by the words "because of" in s.2(1). Reading s.2(1) as requiring a formal diagnosis would in my judgment significantly increase that risk.*

48. In the foregoing circumstances, a formal diagnosis may constitute powerful evidence informing the answer to the second cardinal element of the single test of capacity, namely whether any inability of R to make a decision in relation to the matter in issue is because of an impairment of, or a disturbance, in the functioning of the mind or brain. However, I am satisfied that the court is not precluded from reaching a conclusion on that question in the absence of a formal diagnosis or, to address Mr Lawson's original proposition, in the absence of the court being able to formulate precisely the underlying condition or conditions. The question for the court remains whether, on the evidence available to it, the inability to make a decision in relation to the matter is because of an impairment of, or a disturbance in the functioning of, the mind or brain.

MacDonald J accepted the evidence of the consultant psychiatrist involved that even though there had been no formal diagnosis, on the balance of probabilities, R had a learning disability, which amounted to an impairment that disabled R from being able to make a decision about whether or not her baby should be delivered pre-term by elective Caesarean section, by preventing her from retaining information long enough to use and weigh it to make a decision. He also noted the psychiatrist's evidence that "in circumstances where is an element of dissociation due to past trauma, R may also be at times choosing not to retain the information" (paragraph 71, the word 'choosing' being an interesting one here).

As he had found that R lacked capacity to make the decision, MacDonald J had then to consider what course of action was in her best interests. As with considerations of capacity, and in line with previous case-law he found that the impact on R of any adverse impact on the unborn child of taking or not taking the decision was a legitimate factor to be taken into account when assessing R's best interests (paragraph 79). On the evidence before him, and:

81. […] Given what I am satisfied is the would be the extremely traumatic experience for R of having to give birth to a dead child should the appreciable risk of the baby dying before natural or induced labour can occur become manifest, I am satisfied on balance that an elective Caesarean section is in R's best interests.

82. I am further reinforced in my view that an elective Caesarean is in R's best interests by the, albeit limited, views she has expressed in respect of the same. Whilst I am satisfied that R does not have capacity to consent to an elective Caesarean section, it is relevant that she has never expressed an objection to such a procedure when it has been discussed with her. Lack of objection is not assent. However, I consider that this is nonetheless a further factor providing support for the court's conclusion as to best interests. As does the preference R has shown, on occasion for giving birth to a live, healthy baby.

MacDonald J concluded by observing that

*84. As I have had cause to observe in another urgent case of this nature that came before me in the week I dealt with this matter, for the court to authorise a planned Caesarean section is a very serious interference in a woman's personal autonomy and Art 8 rights. As the Vice President noted in in **Guys and St Thomas NHS Foundation Trust & Anor v R**, Caesarean sections present particular challenges in circumstances where both the inviolability of a woman's body and her right to take decisions relating to her unborn child are facets of her fundamental freedoms. Against, this Parliament has conferred a jurisdiction on this court to authorise medical treatment where a person lacks capacity to decide whether to undergo that medical treatment and where the medical treatment is in the person's best interests. I am satisfied it is appropriate to exercise that jurisdiction in this case, for the reasons I have given.*

A postscript to the judgment confirmed that R had undergone an elective Caesarean section in accordance with the care plan, which proceeded smoothly. R's baby was born in good condition and was doing well for his gestation.

Comment

I have set out the reasoning of MacDonald J in some detail in relation to the elaboration of the capacity test as it applied to R because it shows (1) both the rigour of the steps required in a complex case; and (2) the consequent transparency of the decision reached. Whether or not one agrees with the outcome, it is entirely clear what MacDonald J considered to be the matter in question, what the information was that was relevant to that decision; how he reached the conclusion that R could not retain or use and weigh the information, and how that inability was caused by an impairment or disturbance in the functioning in her mind or brain. It is therefore precisely the sort of transparent and accountable, and therefore defensible, decision that I would suggest meets the demands of the CRPD (see further in this regard this article).

One point that is brought out by the transparency of the decision is that is possible and interesting to compare MacDonald J's list of relevant information with that set out in the Royal College of Gynaecologists and Obstetricians' August 2022 Planned Caesarean Birth consent guidance. The latter is said to be used for women over the age of 16 with mental capacity (and people under 16 years who are Gillick competent). MacDonald J's list was drawn up for the purposes of deciding whether or not R had capacity. There are strong similarities, but not a direct overlap. This may be a function of the fact that the guidance was not before MacDonald J (there is no reference to it in the judgment), but it would have been interesting to see whether MacDonald J considered that the requirements of the RCOG guidance meshed with his own analysis of the position. It is certainly the case that, more broadly, there may be an insufficiently recognised tension between supporting people to make decisions for purposes of the MCA (which pushes towards a minimalist approach to the relevant information), and complying with the requirements of securing informed consent for purposes of the law of negligence (which pushes towards a maximalist approach).

MacDonald J's clear confirmation that a formal diagnosis is not required in order to reach a conclusion that a person lacks capacity to make a decision is helpfully crisp, as are his observations about the minimum requirements for recording assessments. We have updated our guidance note on assessing and recording capacity accordingly to reflect them (as well as to make a few other updates required by the passage of time since the last update).

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References

[1] Note that the standard of proof strictly applies only in the court setting. Outside the court setting, in the context of care and treatment, the question is whether there is a reasonable belief that the person lacks capacity to make the decision (s.5).

[2] Although, as the Royal Bank of Scotland case makes clear, that does not mean that the fact that the proposed decision appears unwise is irrelevant – it is a trigger to consider whether the person has capacity to make it:

Links

1. Kings College NHS Foundation Trust v C and V | 39 Essex Chambers

2. North Bristol NHS Trust v R [2023] EWCOP 5 (10 February 2023) (bailii.org)

3. A Local Authority v JB | 39 Essex Chambers

4. KK v STCC [2012] EWCOP 2136 (26 July 2012) (bailii.org)

5. PC & Anor v City of York Council [2013] EWCA Civ 478 (01 May 2013) (bailii.org)

6. Heart of England NHS Foundation Trust v JB [2014] EWCOP 342 (17 February 2014) (bailii.org)

7. C, R. v [2009] UKHL 42 (30 July 2009) (bailii.org)

8. PC & Anor v City of York Council [2013] EWCA Civ 478 (01 May 2013) (bailii.org)

9. SB (A Patient; Capacity To Consent To Termination), Re [2013] EWCOP 1417 (21 May 2013) (bailii.org)

10. RT v LT & Anor [2010] EWHC 1910 (Fam) (27 July 2010) (bailii.org)

11. PC & Anor v City of York Council [2013] EWCA Civ 478 (01 May 2013) (bailii.org)

12. KK v STCC [2012] EWCOP 2136 (26 July 2012) (bailii.org)

13. A Local Authority v JB (Rev1) [2021] UKSC 52 (24 November 2021) (bailii.org)

14. Heart of England NHS Foundation Trust v JB [2014] EWCOP 342 (17 February 2014) (bailii.org)

15. SB (A Patient; Capacity To Consent To Termination), Re [2013] EWCOP 1417 (21 May 2013) (bailii.org)

16. Mental capacity—why look for a paradigm shift? | Medical Law Review | Oxford Academic (oup.com)

17. Planned Caesarean Birth (Consent Advice No. 14) (rcog.org.uk)

18. Valid consent to medical treatment | Journal of Medical Ethics (bmj.com)

19. Mental Capacity Guidance Note: Assessment and Recording of Capacity | 39 Essex Chambers

20. Royal Bank Of Scotland Plc v AB | 39 Essex Chambers

'Beauty Surgeons' Putting Patients in Jeopardy, The European Society of Plastic, Reconstructive and Aesthetic Surgery (ESPRAS) Calls for Specialist Training Standard

The European society that represents all national associations in Plastic Surgery across Europe today issued a call-to-action for a comprehensive approach to protect patients from under-trained 'Beauty Surgeons', some of whom are not certified Plastic Surgeons and only trained in special regions of the body - or even not trained in surgery at all.

The European Society of Plastic, Reconstructive and Aesthetic Surgery (ESPRAS - http://www.espras.org) ensures that all member Plastic Surgeons have advanced multi-year training in Plastic Surgery, however, in most European countries there is no law to stop medical doctors without specialisation calling themselves "aesthetic surgeons" or "beauty doctors". Shockingly, often even paramedics can take on these titles with just basic knowledge acquired over weekend courses or short Plastic Surgery attachments. On the flip side, board-certified surgeons meet the highest degree of qualification; have multi-year specialisation, work rotations in ICU and emergency care, undertake research and teaching, are required to demonstrate a catalogue of operations, and sit a final exam.

Riccardo Giunta, consultant Plastic Surgeon in Munich, Germany and President of ESPRAS says: "*Individuals who claim to be aesthetic surgeons, beauty surgeons, or beauty doctors without proper training as certified plastic surgeons may compromise patient safety. The financial allure of both aesthetic surgery and non-surgical aesthetics attracts many individuals, and the public is generally uninformed about the standard of care in training. Patients may believe that a professional with these titles has the appropriate qualifications to ensure safety, but this may not be the case. They may not have passed the standards of a board certified Plastic Surgeon and lack essential knowledge. Unregulated commercial organisations perpetuate this issue, leading to the pseudo-legitimisation of under-trained individuals. Furthermore, although surgeons of other specialties have surgical training, they have not been trained in Plastic Surgery or have only limited Plastic Surgical training in their specific region of the body.*"

ESPRAS conducted a survey across 23 European countries, to assess levels of education/specialisation in Plastic Surgery. The results demonstrated a high level of training required for board certification, further driving home the need for the public to be made aware of the dangers of opting for a practitioner who is not trained to this standard. Such a move is the first step to ensuring quality of training, with patient safety taking precedence over financial gain, ESPRAS claims in its position paper. ESPRAS is working to support national legislation to provide clear regulation of aesthetic surgery Europe-wide.

Cosmetic Surgery Abroad - Whose Contract, Whose Law?

by Richard Mumford

Clarke v Kalecinski [2022] EWHC 488 (QB)
Lisa Pal v Dr Luc Damen, Belgo International Research, Applications and Development NV [2022] EWHC 4697 (QB)

Two cases (*Clarke v Kalecinski & ors* [2022] EWHC 488 (QB) and *Pal v Damen & ors* [2022] EWHC 004697) illustrate some of the difficulties faced by claimants in pursuing actions arising from surgery carried out abroad.

In *Clarke*, the Claimant wanted to undergo cosmetic breast and thigh surgery. She came across the website of a clinic based in Poland (D2) which was majority owned by a surgeon (D1). The website advertised consultations in the UK at a number of UK addresses, followed by surgery in Poland provided by UK-trained, UK-registered surgeons with fluent English language skills including D1. The Claimant duly underwent the procedures but experienced infection immediately afterwards which was not effectively managed by either the surgeon or the clinic. She returned to the UK in a state of acute sepsis and was immediately taken for washout surgery in an effort to control the infection and save her life. Three of the four unconnected surgical sites were found to be infected. The Claimant was required to undergo skin grafting; she experienced scarring and loss of confidence which prevented her continuing her previous job as a stripper and lap dancer.

The Claimant issued proceedings against the surgeon, the clinic and the clinic's insurer (D3), the last of these pursuant to a direct right of action (a so-called "Odenbreit" claim). D1 and D2 served defences which admitted the existence of contracts and the existence of a duty in tort between the Claimant and each of them but denied breach of either the contractual or tortious duty. The parties proceeded on the basis that the proper law of the contract was English law and that the law of the claim in tort was Polish law (albeit on this latter point the Particulars of Claim were not explicit and had not been clarified despite a request from D3). In its skeleton served shortly before trial, D3 argued that the failure explicitly to plead the application and content of Polish law in the Particulars of Claim meant that English law should apply by default. The Judge, considering the background and the basis on which the parties had proceeded to date, allowed the Claimant to amend her Particulars to plead Polish law in relation to the tort. The Judge also allowed D3 to raise unpleaded arguments as to the standard of care applicable and the extent to which local safety standards required to be considered. The Judge also considered D3's perhaps ambitious argument that notwithstanding D2's admissions in its defence, there did not in fact exist a contract between the Claimant and D2; the Judge rejected this submission, finding on the facts that *"this was one contract but involving both parties: the surgeon and all the other care givers at the clinic"* (para 77).

Having dealt with these and other preliminary issues, the Judge went on to consider the substance of the claim. This was somewhat one-sided in so far as D1 and D2 had effectively ceased to participate in the action, serving no factual or expert evidence and providing little disclosure. However, D3 raised an argument of potentially wider application by its submission that *"only local standards of medical operation were relevant in case of medical negligence performed abroad"*, drawing an analogy with package holiday cases in which satisfaction of local standards (as to e.g. glass safety) was considered sufficient to discharge the contractual duty. D3 argued that the Claimant (who relied upon a UK plastic surgery expert) had adduced no evidence of a Polish standard and therefore her claim must fail.

The Judge disposed of this argument in two ways; first, in the context of this case *"where it is a term of the contract that the first defendant would operate to the same standard as a UK surgeon, skilled in this specialism, and registered with the GMC, it is that standard, that applied to the activities in issue here. The care offered by the clinic likewise"* (para 107, underlining in the original). Second, the Judge found that the breaches identified by the Claimant's (unopposed) expert were "couched in such stringent terms that they cover any surgical and indeed clinical practice whether governed by local Polish customs or not" and *"put paid to any subtlety of distinction between local custom and English practice that might if [D3's counsel] were correct, in other circumstances be considered relevant"* (para 109). The Judge went so far as to observe that "There are certain irreducible standards in life-threatening situations where local custom, practice and standards are irrelevant, and this was in my judgement, such a situation" (para 110). Judgment was duly entered for the Claimant against all defendants; however, it appears likely from the circumstances of the case that enforcement may only be possible against D3 whose limit of indemnity equated to approximately £38,500 on a claim worth around 4 times that amount.

In *Pal*, a similar factual matrix arose. The Claimant wished to undergo breast augmentation surgery and found the website of a Belgian clinic (D2). D1 was the surgeon who in due course performed the procedure. Unfortunately, it appears the outcome was not as wished (the details of which are not specified in the judgment) and the Claimant issued proceedings

against the surgeon and the clinic in the English court, as was in principle her right as a contracting consumer pursuant to Article 18(1) of Regulation EU No 1215/2012 (Brussels recast). However, D1 and D2 both challenged the English court's jurisdiction, arguing that the Claimant had failed to establish a *"jurisdictional gateway"*, in this case a *"plausible evidential basis"* for asserting the existence of a contract with each of them. Specifically, D1, the surgeon, argued that the contract was only with the clinic and D2, the clinic, argued it was only with the surgeon. After consideration of the documentary evidence and expert evidence adduced by each of the parties, Master Cook concluded that there was a good arguable case that the Claimant had entered into a contract with the surgeon (D1) but that the same could not be said in respect of the clinic (D2) and that the court therefore did not have jurisdiction over the latter claim.

These two cases serve as a reminder of some of the procedural and substantive complexities involved in pursuing claims relating to medical treatment abroad, as well as the potential for a hollow victory where limits of indemnity are applicable.

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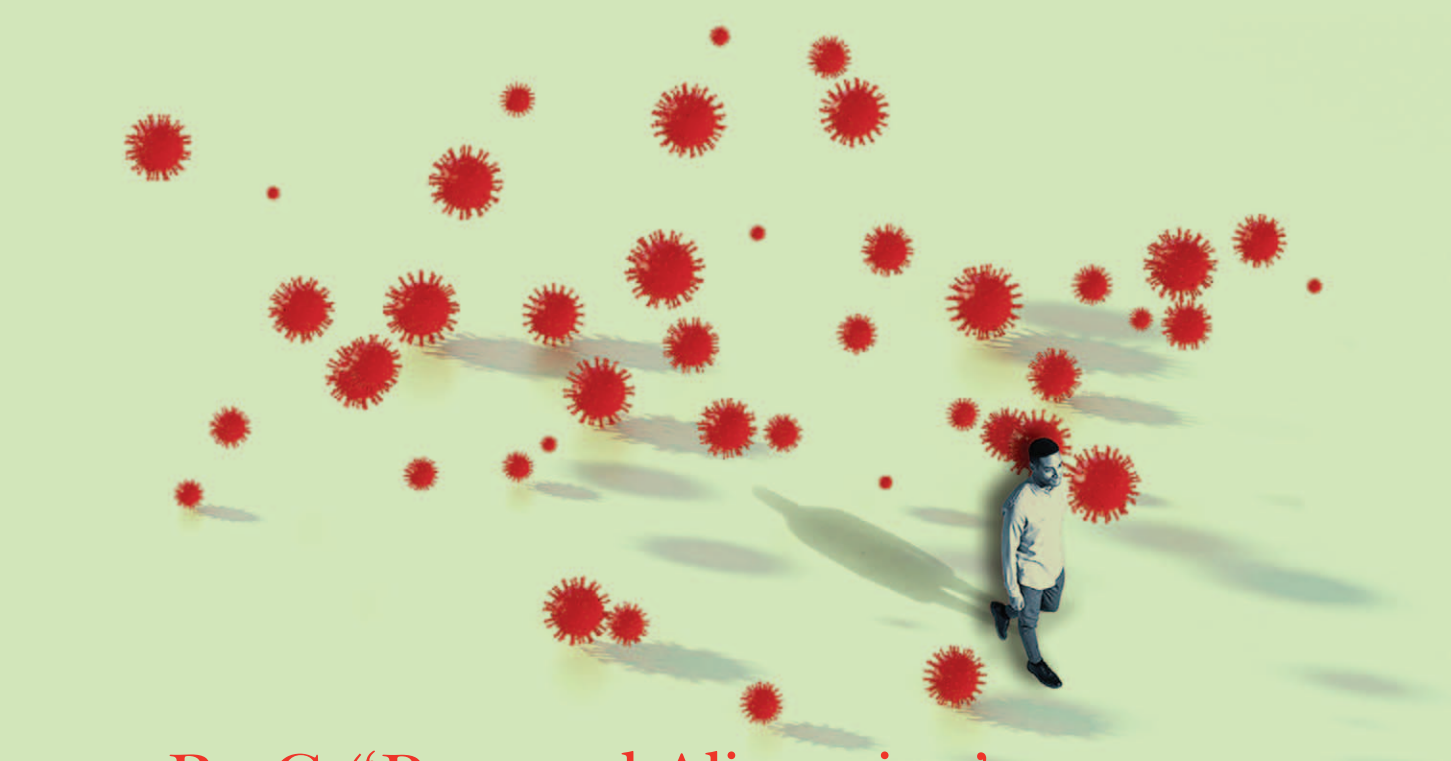

Re C ('Parental Alienation'; Instruction of Expert) [2023]: Red Light Spells Danger – but not a definitive embargo on instructing unregistered and unchartered psychologists

In determining the applicant mother's appeal against an order made by HH Judge Davies refusing her permission to reopen findings of fact, the President gave guidance relating to the instruction of experts in family proceedings where there is an allegation of parental alienation.

Brief Background

The proceedings related to two children (aged 13 and 11 years old at the date of the appeal) where post separation of the parents, contact between the children and the father broke down in 2018 leading to cross applications to suspend contact and to enforce to earlier order. Proceedings were reactivated in December 2019, a guardian was appointed and directions allowed for the instruction of a "Child and Adolescent Psychiatrist or psychologist" to consider the reasons and causes of the older child's unwillingness to see or speak to her father and the younger child's past unwillingness to do so, and to assess their emotional needs to inform the court as to the appropriate child arrangements. The identity of the expert, Ms A, was only confirmed and agreed after the hearing. Perhaps unsurprisingly, the President found that the process adopted by the court lacked the necessary rigour: the order did not specify the required professional discipline of the expert as between psychology and psychiatry, Ms A's CV was never submitted to the court and the court order, presumably agreed between the parties, erroneously described Ms A and "Dr A".

Ms A undertook the instruction and concluded the children had been alienated against their father by the mother. Her report was plainly influential on HHJ Davies who ordered the children's removal from their mother's care with no contact to the mother, pending a fuller hearing which ultimately concluded with limited contact to the mother pending final hearing.

At the final hearing the Judge gave a carefully reasoned Judgment i) relying on her own analysis of the extensive oral evidence of the parents; ii) weighing up and accepting the evidence of Ms A that both children had been influenced and encouraged by their mother to think negatively of their father and that this had caused significant emotional damage to them; and iii) accepting the guardian's own analysis (based on the CAFCASS Alienation Tool) and conclusion that without significant change the children's negative view of the father would become entrenched causing long-term emotional harm. The mother applied for permission to appeal the fact-finding part of the Judgment, inter alia, asserting:

"The judge was wrong in relying upon the report of [Ms A] whom holds herself out as a "psychologist" and give diagnoses

despite not being qualified to do so; the judge was wrong to give any weight to her report given that she does not meet the criteria in Part 25 FPR. In this regard the judge completely failed to deal with the criticisms made on the mother's behalf of [Ms A] and was wrong in the circumstances to accept the expertise and the recommendations of [Ms A]."

Peel J refused the application on 1 September 2020 on the basis it was "totally without merit" and in respect of the challenge to Ms A's instruction, found she was jointly instructed, no appeal against her appointment was made, she produced reports and gave oral evidence, which was challenged. Her expertise was firmly placed in the arena by the mother and it was open to the judge to accept her evidence and to find she was an impressive witness. Further, Ms A's evidence was only part of the totality of evidence which the Judge considered.

The mother issued a further application to reopen the issues that had been determined in June 2021 and sought the instruction of an expert, Professor Wang, a clinical psychologist and Chair of the Association of Clinical Psychologists (ACP)-UK to advise upon the professional and / or clinical qualifications of Ms A to undertake the assessments of the adults and / or children in the manner sought by Ms A's instructions. Prof Wang also sent an uninvited letter to the court setting out his opinion as to the inappropriate instruction of Ms A. The Part 25 application failed and in his dismissal of the application, the Judge summarised the applicable legal context for an application to reopen, relying principally in Re E [2019] EWCA Civ 1447, setting out paragraph 50 of the Judgement of Peter Jackson LJ:

"A court faced with an application to reopen a previous finding of fact should approach matters in this way:
(1) It should remind itself at the outset that the context for its decision is a balancing of important considerations of public policy favouring finality of litigation on the one hand and soundly-based welfare decisions on the other.

(2) It should weigh up all relevant matters. These will include: the need to put scarce resources to good use; the effect of delay on the child; the importance of establishing the truth; the nature and significance of the findings themselves; and the quality and relevance of the further evidence.

(3) 'Above all, the court is bound to want to consider whether there is any reason to think that a rehearing of the issue will result in any different finding from that in the earlier trial.'

There must be solid grounds for believing that the earlier findings require revisiting."

The Judge, in applying the three-stage test in Re E refused the mother's application but observed that there was a legitimate debate as to the meaning of the label 'psychologist' and that, even in light of the more recent guidance, it was accepted that it remains open for a court to appoint a 'psychologist' who is not a Chartered Member of the British Psychological Society (BPS) or otherwise registered. The mother further appealed that decision (as well as appealing the decision to impose a filter on further applications until June 2025 and ordering the mother to pay £20,000 towards the father's costs of the application to reopen the findings).

The Appeal
The appeal was granted by Peel J on 15 July 2022, not because the proposed appeal had a real prospect of success but 'for some other compelling reason', namely that it was in the public interest for the court to consider the instruction of unregulated psychologists as experts in the Family Court in general, and Ms A's instruction and role in this case in particular.

Indeed, the mother's appeal (supported by ACP) focussed on the assertion that the Judge did not sufficiently engage in the process of evaluation when considering the question of reopening the findings. In particular it was said Ms A was not qualified to carry out the assessment as a result of the selection process lacking sufficient rigour. As a result, Ms A was instructed when a clinical psychologist was necessary and that Ms A's CV was diffuse and confusing which would have made it hard for the parties and court to drill down into her underlaying qualifications. It was submitted that there was a wealth of 'new information' which cast doubt on Ms A's qualifications and ability to report in this case (see para.30 of The President's judgement and his subsequent discussion of each source of alleged new material).

The court considered whether it should determine the issue of Ms A's qualifications to act as an expert psychologist in Family Proceedings. ACP is a representative professional body for clinical psychologists whose aim is to provide strategic and coherent professional leadership to all clinical psychologists in the UK with the task of ensuring the public are protected from those who claim to be "psychological experts" without the requisite qualifications, expertise and regulation. ACP applied to intervene on the basis of their ability to provide:
"…independent submissions on the issues…from the unique perspective of the representative body of psychologists who are qualified to report in cases such as these. It is able to offer an independent analysis and account as to the core qualifications, skills and expertise required in order to be able to undertake an expert assessment in private law proceedings."

However, ACP went far beyond its permitted remit in the course of the appeal: The President noting that the ACP skeleton is plain in asserting that "[Ms A] should not be holding herself out as a psychologist of any description,"…"[she] was neither qualified nor appropriately trained to make recommendations for therapeutic interventions for the children or adults [in this case], still less to deliver and / or guide the delivery of those interventions by others." However, the Judge observed there was no authoritative document (such as a statutory instrument or formal regulation) in support of ACP's claim that Ms A was neither qualified or trained to hold herself out as a psychologist.

The court found the ACP had made a significant departure, without leave of the court, from the basis upon which the ACP had sought, and were permitted (with the consent of all parties), to intervene in the appeal. The ACP, by providing a granular, negative critique of Ms A, had succeeded in putting before the court, in another form, the evidence that would have been likely to come from its Chair, Prof Wang. The President was unapologetic in his assessment of the ACP's intervention: "The surprising manner in which the ACP abused the permission that it was given to intervene in this appeal is deprecated". He concluded that it was neither possible nor fair to embark upon a detailed audit of Ms A's involvement in this case by measuring her work against the critical opinion advanced by ACP (see para.58).

Was HHJ Davies original decision to refuse the instruction of Prof Wang at first instance now open to challenge?

The court went on to consider the appeal against the July 2022 refusal to order a rehearing. The President noted there was no appeal against the Judge's earlier determination in May 2022 not to allow the instruction of Prof Wang. However, given the President had refused to be drawn into consideration of the detailed critique of Ms A, it was necessary to consider the correctness of the Judge's decision not to conduct a similar exercise in the first instance. In short, he held that the court was already aware of Prof Wang's opinion set out in his uninvited letter to the court in January 2022, the Judge had experienced Ms A being cross examined and she had the underlaying detail set out in Family Justice Council (FJC) / BPS and ACP guidance. The Judge was not in error for refusing leave to instruct Prof Wang.

Qualification

The central issue of the Mother's appeal, the ACP submissions and Prof Wang's letter was that Ms A was "unqualified" to call herself a psychologist, to conduct a psychological assessment, to act as an expert in the Family Court and, in particular, to discharge the specific instructions given to her.

ACP's case could not be put on the basis of some authoritative document (a statutory instrument or regulation). Instead the ACP's case was built through a patchwork of factors which, ACP contended, when taken together, exclude Ms A. Principally, only practitioner psychologists who are registered with HCPC, which is given statutory responsibility for the regulation of practitioner psychologists, may use the following titles:

- Clinical Psychologist;
- Counselling Psychologist;
- Educational Psychologist;
- Forensic Psychologist;
- Health Psychologist;
- Occupational Psychologist;
- Sport and Exercise Psychologist;
- Registered Psychologist; and
- Practitioner Psychologist.

Separately, a psychologist may be a "chartered psychologist" which is a grade of membership of the BPS only open to those with certain post-graduate qualifications and who have been vetted by BPS. Thus an individual who is not registered with HCPC may not use one of the protected titles, and, if not chartered with BPS, may not call themselves a "chartered psychologist". However, the term "psychologist" is not, of itself, regulated or protected and under current legislation, the HCPC is not authorised to protect the basic title "Psychologist." Therefore, unless laws of misrepresentation of qualifications, deception and fraud are crossed, it is not illegal for anyone to hold themselves out as being any kind of psychologist (e.g. Assessment Psychologist; Child Psychologist; Criminal Psychologist; Consultant Psychologist etc) provided it is not one of the protected titles.

ACP further advanced the case that non-regulated psychologists (who are entitled to call themselves "psychologists") are not qualified to undertake psychological assessments in the Family Court on the basis that a psychological assessment will normally include the administration of one or more psychological assessment tools, most of which are controlled by their publishers to be available only to those psychologists who have the requisite qualifications to use them:

i) The first tier containing tests capable of being purchased by anyone;

ii) The second tier requiring the purchaser to demonstrate and evidence their competency at a relatively high level; and

iii) The third tier requiring (for some publishers) registration with the HCPC as a practitioner psychologist or a psychologist chartered with the BPS, and for others: a doctorate, or certification to practice in a related field to purchase, or certification/full active membership in a professional organisation requiring training and experience in the relevant area of assessment.

The court heard argument that Ms A was not qualified to purchase the tools which are necessary to assess each on the various elements of the first question posed to Ms A in her instructions. Further, in respect of question 8, which invites advice on therapeutic or other input for the children or parents, ACP submitted that it was not unreasonable to expect that an expert would share the same or substantially similar qualifications to those employed in the NHS who advise of therapy, and that Ms A's CV did not indicate that she was so qualified. The court declined to determine within the confines of the appeal, whether the ACP's patchwork of points amounts to a total embargo upon an individual such as Ms A so as to prevent them from being able to provide expert opinion in response to instructions given in this or similar cases. It did, however, accept that the points raised by ACP were of value in flagging up the potential for the qualifications of a candidate for instruction to fall short of what is required. The President considered it appropriate to refer those matters to the FJC for investigation and consider issuing revised guidance.

Having already concluded that the Judge was correct to not admit Prof Wang's letter as evidence and was right not to permit his instruction as an expert, the court further concluded the Judge took the correct approach in not taking Prof Wang's letter into account as one of the factors when hearing the substantive application to reopen the factual conclusions. Indeed, if the Judge had placed reliance upon the letter as part of her decision it would have been vulnerable to a charge of abuse of process. It was further contended that the Judge erred in her approach by ignoring the letter as "information" that, in accordance with the approach in Re B (Children Act Proceedings) (Issue Estoppel) [1997] 1 FLR 285, should properly have been considered by the Judge (see para.79). The President refuted this submission on the basis that the "information" to which Hale J (as she was then) referred, in the context of an application to reopen a factual determination must relate to factual information that casts doubt upon the previously found facts. A letter restating an assertion that had been foursquare before the court at the original hearing is not of the same quality as fresh factual information. It was an opinion and the court was not obliged to take into account every piece of new information, but may do so. The President, at para. 81 to 85 set out his clear and unequivocal reasons as to why the appeal must fail.

General considerations to the instruction of psychologists

The President went on to consider the general question of importance underlaying the appeal: the guidance around the instruction of experts and specifically un-regulated psychologists as experts in the Family Court. The President was clear that what followed was not intended to change or amend what is said in the FJC/BPS guidance to the President's Memorandum.

The basic concepts and labels are well known to family practitioners:

- There is no definition of an 'expert' in Family proceedings, save for the circular procedural definition at FPR 2010, r23.2(c): "expert" means a person who provides expert evidence for us in proceedings;
- There are statutory exceptions to the term in Children and Families Act 2014 s.13(8);
- Expert evidence will only be permitted if it is necessary to assist the court to resolve the proceedings justly (C+FA 2014 s 13(6));
- An expert witness may give factual evidence on a matter that he is not qualified to give expert evidence upon, but his opinion will only be admissible 'on any relevant matter on which he is qualified to give expert evidence' [Civil Evidence Act 1972, s 3]. There is no definition of 'qualified' in CEA 1972;
- Save for those individuals who are excluded from giving expert evidence by C+FA 2014, s 13(8), the question of whether an expert is 'qualified to give expert evidence' [CEA 1972, s 3] is a matter for the court in each individual case;
- The instruction and role of experts in the Family Court is already the subject of extensive coverage within FPR 2010, Part 25 and PD25A-D. In particular:

a) The duties of an expert are set out at FPR 2010, r 4.1;

b) The 'standards for expert witnesses in children proceedings in the Family Court' are set out in the Annex within PD25B;

c) There is a list in Appendix 1 to the PD25B standards the statutory regulators applicable to the various UK health and social care professions. It includes the list of 'protected titles' regulated by the HCPC;

d) Appendix 2 to the PD25B standards has a list of examples of professional bodies/associations relating to non-statutorily regulated work, this list includes:

i. Association of Child Psychotherapists;
ii. The UK Council of Psychotherapy;
iii. The British Association of Counselling and Psychotherapy;
iv. The British Association of Behavioural and Cognitive Psychotherapies;
v. The British Psychoanalytic Council.

Certain categories of psychologist, the protected titles, may only be used by those who are validly registered under the regulations but the general label "psychologist" is not protected and may be used by an individual whether registered or not. A report by an unregistered person calling themselves a psychologist may be called a psychological report.

The court considered the open-house nature of the term "psychologist" was unhelpful and potentially confusing. However, that was a matter for the psychological profession and, ultimately, Parliament, whether a tighter regime should be imposed. HCPC, having declined to intervene in the appeal, set out in a letter to the court the registration scheme and HCPC's role in setting standards of proficiency for practitioner psychologists (see para.95).

The courts and practitioners must necessarily work with the current, potentially confusing scheme but must do so with its eyes wide open to the need for clarity over the expertise of those who present as a psychologist but who are neither registered nor chartered. There is clear and solid ground in the registration scheme, be that HCPC registration or chartered status with BPS. A psychologist's CV should prominently highlight if they are HCPC registered or not and it is incumbent on an un-registered psychologist to assist the court by providing a short and clear statement of their expertise.

The court further clarified that it was not for the Supreme Court to prohibit the instruction of any unregulated psychologist: the question of whether a proposed expert is entitled to be regarded as an expert remains one for the individual court, applying as it must the principles set out in *Kennedy v Cordia (Services) LLP (Scotland)* UKSC 6 (adopting the approach in *Daubert v Merrell Dow Pharmaceuticals Inc* (1993) 509 US 579).

In a cautionary note, the President commented:
"This is not, however, an open house and there is a need for

caution. In every case the court should identify whether a proposed expert is HCPC registered. A sensible practice, where the expert is un-registered, is for the court to indicate in a short judgment why it is, nevertheless, appropriate to instruct them."

In relation to the 3 Tiers of psychological assessment tools which require a bespoke or advanced level of understanding from the user, the court considered further evaluation and explanation is required before it may be taken further by the courts. But if it were correct that publishers do restrict access to a range of valuable tools to those with HCPC registration, this can only enhance the need for the court to understand whether a potential expert is, or is not, registered. The President confirmed he was going to invite the FJC to investigate this issue and consider revising its guidance to include reference to this factor if that is justified.

Future guidance may come in the form of a traffic light indication of expertise to assist the parties and the court at the initial stage of choosing an expert by establishing a template into which the basic qualifications of any "psychologist" should be entered so that readers can, at a glance, see whether an individual is currently registered with the HCPC (and if so what category), or a Chartered Psychologist, or not.

If, on investigation by the FJC, the three-tier structure controlled by the publishers of assessment tools is seen as a valid indicator, that too should be included. It will remain open to the court to instruct any person who it considers is capable of discharging the expert role in each case, but, particularly where a proposed psychological expert is un-registered, the court should be on notice of the need to look more carefully at the underlying evidence of appropriate expertise.

Finally, in a cautionary note about the terminology of "Parental Alienation" the court referred to the ACP skeleton which stated:
"The decision about whether or not a parent has alienated a child is a question of fact for the Court to resolve and not a diagnosis that can or should be offered by a psychologist. For these purposes, the ACP-UK wishes to emphasise that "parental alienation" is not a syndrome capable of being diagnosed, but a process of manipulation of children perpetrated by one parent against the other through, what are termed as, "alienating behaviours". It is, fundamentally, a question of fact."

It is the behaviour that is found to have taken place within the individual family before the court which must be analysed and the impact that that behaviour may have had on the relationship of a child with either or both parents. The court's focus must therefore be on the 'alienating behaviour' rather than any quest to determine whether the label 'parental alienation' can be applied.

Conclusion
Practitioners and Judges alike must continue to conduct a rigorous assessment of a psychologist's qualifications and training in order to properly evaluate the proposed expert's ability to undertake the instruction sought in each particular case. However, ultimately, there is no prohibition on the court permitting the instruction of a psychologist who is not a Chartered Member of the British Psychological Society (BPS) or otherwise registered. Pending the FJC's investigation into whether there are publisher restrictions to psychologists accessing different tiers of assessment tools based on their qualifications and membership / registration, and whether this can be a reliable indicator of expertise, the courts may at some point in the future have a simplified template CV for all psychologists seeking instruction as an expert in the Family Court.

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She has advocated in both the High Court and Court of Appeal.

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Transparency in the Family Courts

This article looks at the effect of a new pilot scheme to allow accredited journalists to report on cases in the Leeds, Carlisle and Cardiff Family Courts

Scrutiny of the family courts has been a hot topic of debate for some time now. There have been various rule changes over the years to allow access to the family courts, in particular allowing the media to attend some court hearings. However, many restrictions have remained in place. A new pilot scheme taking place over the next 12 months will now allow accredited journalists to report on some cases in the Leeds, Carlisle and Cardiff Family Courts, with the intention of enabling closer scrutiny of the actions of local authorities and the court themselves.

The pilot will begin with only public law cases, which usually involve local authorities, such as proceedings for a child to be removed from their family, but will extend to private law cases within "a couple months". Private law cases are those where the courts adjudicate on issues relating to children when the parents cannot agree, for example, with which parent a child should live or which school a child should attend. As part of the pilot, journalists will be given access to legal documents produced in the case, such as witness statements and expert reports.

Transparency in the Family Courts

The importance of the principle of open justice has been recognised in the United Kingdom for centuries. However, the view that the principle of open justice does not or should not apply to family proceedings, be that under the Children Act or Matrimonial Causes Act, have become more common place.

The current rule is that, broadly speaking, children matters as well as financial proceedings are to be held in private. Meaning the only people who may be present in the court room are the parties themselves, their advisors and court staff. Members of the public and wider family members are usually excluded. Accredited members of the press may attend some hearings in financial proceedings, but there are strict rules about what documents they may see and what they can report. The perceived secretive nature of these proceedings can impact on the public and lead to a lack of confidence in the family justice system. A growing wave of support has been that to comply with the principle of open justice, it is only fair that all who want to understand the family court and its processes should be able to witness it first hand, not behind a veil of privacy and tightly controlled (and minimal) reported judgments.

The pilot is one initiative to provide greater transparency within the family court system.

What does the pilot say?

The pilot, introduced by Sir Andrew McFarlane, President of the Family Division, will run from January 2023 to January 2024 in the Family Courts sitting at Cardiff, Leeds and Carlisle, with the aim of permitting greater reporting of children cases. Under the pilot, no longer will it be necessary for accredited journalists to apply for and be granted leave to publish information from the courts covered by it. Such reporting would be subject to a Transparency Order issued in each case which will allow reporting, although strict anonymity on the proceedings will be imposed. Accredited journalists will also be entitled to see the key documents and the principal professionals in the case, for example experts, can be named.

The pilot will start with public law cases and then be extended to cover private law cases. It will not extend to financial cases.

What does this mean in practice?

Clients have long been reassured that if they are unable to reach an agreement without court intervention and they enter the court arena to resolve financial issues or arrangements for their children they would, save in rare cases, be able to do so in a private environment. Even if their case was considered complex, nuanced or dealt with an important point of law and the judgment published, it would in most cases be fully anonymised to protect the identity of the parties.

This may now change. Starting with the pilot, and potentially to be expanded following the awaited publication of a report by the Financial Remedies Court Transparency Implementation Group, for those commencing proceedings within any of the pilot courts, clients and solicitors must be prepared for members of the accredited press to be in court and for the cases to be reported in the press, although the report should anonymise the parties and children will not be named. It should be noted that the court retains a discretion to restrict reporting in certain circumstances.

These changes may give rise to a greater proportion of clients looking to resolve matters out of court, perhaps with the help of a mediator or through arbitration. Generally, if parties are able to resolve matters without involving the court, whether financial in nature or regarding their children, the outcome is more positive in terms of the speed of resolution, the cost involved and, most importantly where children are involved, the ongoing long-term relationship between the parties. It may well be then that the greater scrutiny of the family courts leads to other benefits for separating families.

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This article was first published on the Burges Salmon website on 13 March 2023.

The Developing Role of Computer Forensics in Personal Injury Claims

by Amber Jenner, Legal Director, London and Joanne Kelly, Partner, London at Kennedys law

Over the past few years, we have seen technology become more central to and integrated with our day to day lives. According to a recent online survey, it is currently estimated that around 86-89% of the world's population has a smartphone, with 111 million registered users of Fitbit in 2021 and in 2022 20% of British homes had a video doorbell. Not only is data from these devices useful to the user, but it can also be a valuable resource in personal injury claims and particularly those of a serious or catastrophic nature.

Computer forensics

Historically, insurers involved in serious injury claims have regularly used social media and surveillance in order to properly evaluate claims to ensure fair compensation. This has, to some extent, largely relied on luck as to whether a claimant leaves their home on a particular day and how much a claimant posts about their life publicly on social media. There is, however, a better source of largely untapped electronic information available which the Civil Procedure Rules (CPR) permits disclosure of, but in reality is often overlooked by both parties. At Kennedys, we refer to this as computer forensics.

Computer forensics takes a new approach to gathering claims intelligence from unique sources such as laptops, mobile phones, fitness trackers, travel cards, video doorbells, GPS data and even Alexa devices. Such data shows a fuller picture over a prolonged period, making it more reliable than surveillance and social media in showing the true picture. We have been at the forefront of its use in serious and catastrophic injury claims, leading to outcomes for our clients which would not have been obtained but for computer forensics. We list below a number of recent case studies.

Case studies

- Through computer forensic disclosure we established that a claimant's allegations as to when she stopped running her own business were inaccurate. As a result, her loss of earnings claim was proven to be exaggerated. The claim settled for less than 10% of the damages pleaded on a costs-inclusive basis.

- Computer forensic interrogation enabled us to disprove that a claimant was unable to use public transport and required increased assistance and costs when travelling abroad. This, along with other areas of proven exaggeration led to a significant reduction in the claim value initially advanced by the claimant.

- A seven-figure claim settled for less than 3% of the pleaded value after computer forensic disclosure refuted a variety of allegations as to levels of the claimant's physical capability.

- A lack of evidence in computer forensic disclosure refuted allegations that a claimant relied on various electronic devices to prompt them with day to day tasks due to their alleged ongoing brain injury.

- Computer forensic investigations revealed that a photograph of an alleged hazard from the date of the accident taken by the claimant had in fact been taken six years pre-accident and was widely available on Google. This finding significantly undermined the both the claimant's credibility and their case on liability.

Comment

Looking ahead, we expect computer forensics to become more prolific in personal injury claims both for quantum and liability arguments. As more technology is developed and used by society, the harder it will be for a person's actions to not be recorded by electronic data in one way or another. We are finding judges are taking less convincing to make orders for such disclosure, with a wider understanding as to the benefits that computer forensics disclosure can have on a case.

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The Camera Never Lies? Our Research Found CCTV Isn't Always Dependable When it Comes to Murder Investigations

by Phoebe Roth, Commissioning Editor, Science + Technology - https://theconversation.com

As a victim or suspect of a crime, or witness to an offence, you may find your actions, behaviour and character scrutinised by the police or a barrister using CCTV footage. You may assume all the relevant footage has been gathered and viewed. You may sit on a jury and be expected to evaluate CCTV footage to help determine whether you find a defendant guilty or innocent.

You may believe you will see all the key images. You may trust the camera never lies.

However, the evidence we gathered during our study of British murder investigations and trials reveals how, like other forms of evidence such as DNA and fingerprints, CCTV footage requires careful interpretation and evaluation and can be misleading.

Instead of providing an absolute "truth", different meanings can be obtained from the same footage. But understanding the challenges and risks associated with CCTV footage is vital in a fair and transparent system to prevent possible miscarriages of justice.

Evidence

The justice system often relies upon digital evidence to support investigations and prosecutions and CCTV is one of the most relied upon forms. Recent estimates suggest there are more than 7.3 million cameras in the UK, which can capture a person up to 70 times per day.

The public may be filmed on council-owned CCTV, by cameras in commercial premises, or at residential premises (home cameras or smart doorbells, as well as on public transport and by dash cams.

In our study of 44 British murder investigations, we showed how CCTV provides many benefits to investigators. It can help identify suspects and witnesses, and implicate or eliminate suspects. It can also help to corroborate or refute accounts provided by suspects and witnesses. However, our findings also indicate how CCTV can be unreliable and problematic.

Shortcomings

CCTV is sometimes inaccessible or lost because the detective who is sent to retrieve the footage lacks the skills, training or equipment to recover it in a timely manner. This is especially important since CCTV is often deleted within three weeks of being recorded. We found that it was often over-written within 7 to 10 days.

At other times, owners are unable to access systems or cannot manage the volume of CCTV requested, for instance, when taking buses out of service for footage to be downloaded. And even when footage is successfully seized, there may not be officers available to view it all.

There is also the risk that important footage which could exonerate a suspect is not disclosed to the defence, which could mean innocent people are imprisoned.

Detectives must frequently make sense of poor-quality images that are blurry or grainy. This is not easy. In some of the investigations we observed, the police tried to enhance poor-quality images, though this was not always successful.

Investigators must also decide whether to draw on experts to interpret footage and present evidence at court. However, the police have no clear guidance to help determine whether and when to draw on such expertise. We observed cases where officers decided against expert input because they were confident of their own interpretations.

Our study also revealed how some detectives or CCTV officers are used repeatedly to view or interpret footage because they are regarded by others (or assign themselves) as "super-recognisers". These are people who may be better at recognising faces than others. However, there is no robust measure for determining whether someone is a super-recogniser. Furthermore, if super-recognisers are incorrectly viewed as expert witnesses, their evidence could be overvalued during a police investigation or at court.

By the time CCTV footage is shown to a jury, it has been choreographed carefully by the police and prosecution barrister. They are often adept at selecting, organising and editing footage into slick packages.

These techniques are also used by the defence who deliberate over whether to use moving footage or still images, at what speed to show the clips and at what point to add commentary. This is to demonstrate an "alternative truth" and provide a contested interpretation of the same footage. It might be difficult for juries to determine how the footage has been edited.

Gold standard?

Murder investigations are generally regarded to be the gold standard of criminal investigation, due to the investment of time, resources and expertise. Nevertheless, we uncovered many challenges, errors and risks involved in the use of CCTV. These are likely to be even greater in other kinds of criminal investigation, where staffing and knowledge of digital evidence may be more limited.

The complexities of CCTV evidence need to be understood by everyone involved in handling, interpreting and presenting footage, as well as by those of us whose actions and accounts may be scrutinised on the basis of CCTV footage.

The challenges and risks identified here are likely to intensify as digital technologies advance - demonstrated by recent concerns with automated facial recognition technologies and the risk of deepfake videos.

https://theconversation.com

Record, Retain and Review

*by **Joanne Caffrey**, Expert witness for police custody, use of force and ligature deaths*

Disclosure of digital recordings for police custody of a detainee, from the point of incident, arrest and throughout the custody unit detention.

When a death in custody occurs there are standard procedures which occur, and these include seizure of all digital recordings from point of initial contact – body worn footage, vehicle CCTV, and custody unit CCTV. It is automatically accepted that these recordings may be relevant to the investigation, and may have a bearing on any issue in the case. However, the same principles are not always considered for cases which do not involve a death. This means evidence can be lost, and issues cannot be confirmed or refuted.

In this paper I will discuss some of the reasons why such digital recordings, which have been recorded, should be reviewed and retained and listed on the disclosure schedules.

When a person is arrested they may, or may not, be prosecuted. Likewise, a member of the public may lodge a complaint or case against the police officer. The officer may find themselves as either part of the prosecution or as a defendant.

Any digital recording may be capable of having a bearing on any issue raised with the case. At the point of charging, or releasing without charge, the prosecution are unlikely to know what the defence may be. This will be raised with the defence statement in due course, which identifies the line of defence. These lines of defence may have never been considered by the officer in the case/disclosure officer, at the time. For example, the defence could state:

- Legal entitlements were not complied with making some key evidence inadmissible;
- That some recorded information will undermine the prosecution case and/or indicate new lines of investigation for another suspect;
- That due to recorded behaviours it was reasonable to believe the detainee was suffering from a condition which made their consent/lack of consent invalid;
- That due to behaviours it was reasonable to believe the detainee needed to be afforded the safeguards which the law allows them to have access to, which they were not afforded.

From an officer point of view, if such allegations are made by the defence how do you dispute such lines of enquiry?

As an expert witness, the best evidence for me to review are the digital recordings. The written custody record is not always an accurate record of what was said, done, or experienced. The digital footage allows for the context to be considered.

So why in so many cases, which do not involve death in custody, is the digital recording not listed on the used/unused schedule of material for disclosure? In some cases when the disclosure officer is asked such a question it simply boils down to the fact they did not realise that the custody BWV/CCTV may be part of the 'relevance test'. Custody CCTV has become so 'normal' that officers simply do not consider it being

relevant to the event(s) which occurred outside of the unit.

Let us take a look at the law and guidance concerning recordings, retention and review.

Legislation wise, the key legislation (see comparable for Scotland and Northern Ireland) involving digital recordings includes:

• The Criminal Procedure & Investigations Act (CPIA) 1996 and Codes of Practice;

• The Freedom of Information Act 2000

• The Data Protection Act and GDPR

• The Protection of Freedoms Act 2012 and the Surveillance Camera Code of Practice

Guidance exists concerning the use of body worn video (BWV)[1]. All recordings should be treated as 'subject to investigation' until it is confirmed otherwise. Unless force policy states otherwise, there should be a tendency towards capturing audio/visual evidence when deciding whether to record. Prior to disposal, officers are required to take all reasonable steps to ensure that the images are not required as evidence in any case or complaint under investigation.

Disclosure officers and/or investigators must inspect, view, listen to, or search all relevant material. The disclosure officer must provide a personal declaration that this task has been completed. In some cases, a detailed examination of every item of material seized would be disproportionate. In these cases, the disclosure officer can apply search techniques.

The prosecution duty is:

• to take all proper care to preserve the exhibits safe from loss or damage;

• to co-operate with the defence in order to allow them reasonable access to the exhibits for the purpose of inspection and examination;

• to produce the exhibits at trial

BWV footage will be potentially disclosable as unused material if it is not being used as evidence.

Relevant material may be relevant to an investigation if it appears to an investigator, or to the officer in charge of an investigation, or to the disclosure officer, that it has some bearing on any offence under investigation or any person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case.

The reasons why Police use BWV might include:

• continuing to record will safeguard the BWV user against any potential allegations from either party

• continuing to record will safeguard both parties as it is a true and accurate recording of any significant statement made by either party and of the scene

BWV should be used when attending a mental health related police incident. The National Police Chiefs Council (NPCC) agreed definition of a Mental Health Incident is: "Any police incident thought to relate to someone's mental health where their vulnerability is at the center of the incident or where the police have had to do something additionally or differently because of it."

BWV material is required to be disclosed to the defence.

A 'policing purpose' covers all situations where a user exercises a police power, where they would have ordinarily made a record in their pocket notebook, or there is a strong and reasonable presumption towards collecting/capturing evidence.

Officers should begin recordings at the start of any deployment to an incident and continue uninterrupted until the incident is concluded, for example, at the resumption of normal patrolling or because recording has commenced through another video system at a custody centre.

This means that digital footage has been recorded concerning not only the incident but also the transportation of the detainee, until handed over to the custody officer. This footage is therefore all subject to the requirement to review and retain and disclose it within the used/unused schedules.

Once at custody, typically the cameras will cover from the vehicle dock area with visual recordings. College of Policing recommends that the custody officer's desk area and the intoxilyser room are both covered with visual and audio recordings. These will also be recordings which require review and retention and listing on the schedules. These recordings may be relevant to the defence to establish if they are capable of having a bearing on any issue raised within their defence statement.

When the prosecution receive any updated defence statement(s) they are required to review the material again. The overriding principle being if there is any doubt retain the footage and disclose on the schedules.

Handover procedures between custody staff, concerning a detainee, are recommended to be conducted within sight and sound of the CCTV system. The information covered should include the risks, disabilities, medical needs, vulnerabilities, emerging issues, control strategies and welfare needs of each detainee. It should also cover the status of each investigation, including the actions required to achieve effective and lawful resolution of the matter for which the person has been detained. The incoming shift of custody officers and staff must ensure that they are aware of all of this information. The recording will demonstrate what the custody staff were aware of, and/or what was passed on.

CCTV can be used to record activity in many areas, including:

- the vehicle docking area
- entrance to the custody suite
- access corridors to and from the rest of the police station
- holding areas

- the charge room area
- the custody officer's desk in the charge room (it should provide separate images showing the officer's face/body, detainee's face/body and property transfer on desk)
- detainees' property store or entry to this area
- cell corridors
- entry to the interview rooms
- the fingerprinting area
- the evidential breath analysis device room
- exercise yard
- the custody office CCTV equipment cabinet
- the custody CCTV viewing area
- cell interiors (including detention rooms)

CCTV may visually cover the following areas but, because of the need to protect legal privilege, should not have audio-recording or audio-monitoring facilities:

- rooms set aside for private legal consultation
- general interview rooms

The CCTV for the custody officer's desk and the evidential breath analysis device room must contain audio.

Forces should use cells with CCTV for the safety and welfare of all detainees and not only those who pose specific risks. The requirements of continual observation cannot be replicated by relying on the existence of CCTV.

The officer or member of staff appointed to monitor detainees continuously via CCTV must not be expected to view more than four cells simultaneously on a split screen display, or to carry out additional duties that may distract them from continuously viewing the CCTV.

People whose images are recorded on custody CCTV systems are, however, entitled under data protection legislation to request access to the CCTV recordings via a subject access request.

Retention periods for images seized under the CPIA are the same as for all unused material.

Concerning the purpose of this article, it is essential that officers recognise the digital records of a person's custody (from incident to release) is recorded information which requires a review and retention decision. It needs to be subjected to the 'relevance test' to consider if there is any recorded data which is capable of having a bearing on any issue raised in this case. Subject to defence statements this review needs to be further considered, to ensure that relevant digital recordings are not unnecessarily disposed of. Where there is doubt, the recordings should be listed on the unused material schedule. Remember, that a person can always apply to access the data regardless of whether a prosecution continues.

References

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Author

Joanne Caffrey, Expert Witness for Police Custody Procedures, Use of Force and Ligature Deaths.

With experience as an expert witness includes advising upon, approximately, 200 cases. These cases are distributed between England, Wales, Scotland, Northern Ireland, Republic of Ireland and the Isle of Man.

The cases involve custody sectors of police, prison, mental health, immigration, security staff and the children's sector. (Custody commences from the point of initial contact & arrest).

Joanne has provided services for a public inquiry, coroner, fatal accident inquiries, civil, criminal and misconduct cases. She has been engaged by legal teams representing the defence, and the prosecution/claimant. There has been repeat business from the police federation. police ombudsman agencies and the Crown office.

Main areas of service concern:

- Death during restraints
- Serious injury during restraints
- Ligature deaths

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Duties of Expert Witnesses: Duffy v McGee T/A McGee Insulation and GMS Insulations Limited [2022] IECA 254

by Rachel Lafferty

The judgment of the Court of Appeal in this case, delivered in November last year, was a strong reminder to expert witnesses and legal practitioners alike, of the strict parameters of role and responsibilities of an expert witness when engaged in litigation.

The proceedings involved a personal injuries claim brought by plaintiffs who claimed to have been exposed to toxic chemicals in their home following the spray of insulation at the premises. One of the central features of the appeal from the decision of the High Court, which we will focus on for the purposes of this article, was in relation to expert evidence and the duties of experts when giving their evidence to the Court.

Evidence of the expert acting for the defendant, Dr Thompson, had given rise to concern on the part of the High Court which found the evidence proffered by Dr Thompson could not be described as independent or unbiased. His specialism was in the space of toxicology, yet his report, among other matters, expressed views on legal issues and doctrines, questioned whether the plaintiffs were telling the truth and purported to give his opinion on psychiatric reports and medical reports which were exchanged, even though these areas were not within his discipline. The High Court proceeded to entirely exclude his evidence on this basis.

On appeal, Judge Noonan held that the High Court was correct to exclude the evidence, and found that the report prepared by the expert contained 'red-flags' and that the expert had seriously abused his position. The expert had also relied on two papers which the Court described as 'industry generated' and which had not been peer reviewed. The Court found the expert had made no attempt to consider any alternative scenario in respect of some strongly disputed facts, and simply took his clients' instructions at face value. The Court held;

"I am satisfied the trial judge was perfectly correct to exclude Dr Thompson's evidence in its entirety. There was in this case such an abject failure to comply with the most basic obligation of an expert, namely, to be objective and impartial, as to render all of Dr Thompson's evidence inadmissible."

Judge Collins delivered an additional short judgment, to add his own observations to the judgment delivered on behalf of the Court by Judge Noonan. He noted that expert evidence is often indispensable to the just resolution of civil proceedings but that experience demonstrates it is far from being an unalloyed blessing. Judge Collins referred to fact expert testimony may add to the duration of trials significantly, and noted there is often overlapping testimony at trial. He referred to Order 39, Rule 58(1) of the RSC which provides, "expert evidence shall be restricted to that which is reasonably required to enable the Court to determine the proceedings" and noted the rule gives extensive power to the Court to give directions in respect of expert evidence.

The judgment also engaged in discussion around the concept of reliability of material relied upon by the experts in their evidence, and noted that in the Irish jurisdiction there is no general requirement that expert evidence must meet any specific threshold of reliability as a condition of admissibility nor do the Irish Courts exercise a 'gatekeeping' function in that regard. Judge Collins did note issues of reliability will of course determine the weight to be given to evidence by the Court. Judge Collins concluding comments are stark and are worthy of note in concluding this article. He noted;

"[t]his is a disturbing case and it is certainly to be hoped that its like will not be seen again. As I have said, there needs to be a significant change of culture in this area. As well as the duties of expert witnesses themselves, I emphasise again the responsibilities of legal practitioners. The adverse consequences… may also have adverse consequences in costs. The Superior Courts have a broad jurisdiction to make costs orders against non-parties, if necessary…"

The case therefore serves not only as a reminder to expert witnesses as to the responsibilities and incumbent duties of their role, but also as a clear reminder to legal practitioners of their own responsibilities in their instruction of expert witnesses in litigation and the necessity for careful review of expert reports received. It will be interesting to see whether Judge Collins' comments give rise to greater scrutiny by the judiciary of the experts engaged by parties to litigation, and indeed greater scrutiny of the material being relied upon by those experts following this decision, and the comments of the Court.

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Road Haulage Operators Convicted of Involvement in an Over £100m Money Laundering Scam

Six defendants including a senior manager and two drivers of a road haulage business have been found guilty on Friday 18 November 2022 of running a large-scale money laundering operation involving in excess of £100 million in cash.

Stoke Crown Court of two counts of conspiracy to launder cash together with Leon Woolley (DOB 3/12/1978) a transport planner at the firm.

Nicholas Fern (DOB: 10/04/1971) and Damion Morgan (DOB: 20/08/1997), drivers working for Hughes, were convicted of a single count of conspiracy to launder cash over a period of months.

Liam Bailey (DOB: 29/11/1999), a further transport planner at the firm and Simon Davies (DOB: 09/11/1970) a business associate of Hughes, were each convicted of one count of conspiracy to launder money.

The Regional Organised Crime Unit for the West Midlands became aware of a criminal operation to launder cash through a haulage company, Genesis 2014 (UK) Ltd. Mr Hughes used an encrypted network phone, known as Encrochat, to communicate with a man in Dubai, Craig Johnson, a convicted fraudster from Stoke on Trent.

They agreed that large sums of cash would be collected at various places in the UK and elsewhere, on a regular basis, with the intention of transporting the cash to London where it could be transferred onwards and legitimised. The scale of cash involved, the lack of any explanation for its provenance and the surrounding circumstances, provided an irresistible inference that the cash was the proceeds of criminality. The total amount of cash at issue was between £100 million and £150 million depending on the size of the loads for each journey.

The French authorities had broken into the Encrochat network and reported activity to the British authorities. On 26 March 2021, two Genesis vans driven by Fern and Morgan were stopped separately, each containing substantial bags of cash. The combined total involved around £700k. Hughes was arrested the same day and a further £60k in cash recovered from his home. Extensive phone content indicated the scale and duration of the operation and established that Hughes had held the Encrochat phone in 2020. In total, it is estimated the laundering operation involved in excess of £100 million in cash.

Hughes, who had previously been convicted of drug trafficking and VAT fraud, also should not have been running a haulage business because his operator's license had been revoked for 5 years in 2018.

Leon Woolley and Liam Bailey worked in the office at Genesis Ltd and Simon Davies was a business associate of Hughes, also involved in directing other defendants to transfer the cash proceeds of criminality.

Jonathan Kelleher of the CPS said: "The defendants were involved in the wholesale haulage of huge quantities of criminal cash, totalling in excess of £100 million. They were an essential distribution part of the criminal network, transferring the cash proceeds of criminal activity for the wider benefit of organised criminals, as well as their own gain.

"The use of an encrypted Encrochat phone and the communication with criminals in Dubai illustrate the sophisticated methods increasingly used by organised networks, operating across the world.

"The combined efforts of the Regional Organised Crime Unit for the West Midlands, CPS Serious Economic Organised Crime and International Directorate and instructed counsel, have successfully disrupted this distribution element of the criminal network.

"The CPS Proceeds of Crime Division will now pursue the defendants to strip them of their own gains from their involvement in organised crime."

Detective Inspector Jonathan Jones of the Regional Organised Crime Unit for the West Midlands said: "These men were part of a nationally significant Organised Crime Group offering professional money laundering services to criminals up and down the country, and beyond. Their convictions and sentences will be a warning to deter others from involvement in money laundering which is as abhorrent as the crimes that generate the cash in the first place. Close cooperation and tireless effort from the outset between the police, CPS Serious Economic Organised Crime and International Directorate and instructed counsel was the key to success in this case.

"£701,685.75 has already been forfeited in civil proceedings from this OCG with half of this returning to Staffordshire Police via the Home Office Asset Recovery Incentivisation Scheme to contribute to fighting crime in the county."

The CPS is committed to continue to work alongside law enforcement to bring prosecutions where money launderers are seen to conspire with other criminals to wash clean their ill-gotten gains. The CPS is also committed to working more widely with banks, businesses, charities and beyond, to help educate others so that they can avoid becoming victims to attacks from money launderers.

We require your articles our 50th issue is out in August and if you would like to contribute please email us at admin@expertwitness.co.uk

Keep the Noise Down! When Does Noise Amount to Nuisance?

Tejani v Fitzroy Place Residential Limited and another [2022] EWHC 2760 (TCC)

Summary
An owner of a Central London residential apartment claimed damages for nuisance caused by noise thought to be coming from the façade of the building.

The facts
This case concerned a new build residential apartment (the Apartment) which was part of a building in Fitzrovia, London. The Claimant, Mr Tejani bought the apartment off plan in 2012 for £2.595 million and completed the purchase in May 2016 when the apartment was complete. The Defendants were the landlord and the developer.

Mr Tejani claimed that there were unusual noises heard within the Apartment to such an extent that they constituted an actionable private nuisance and the landlord was therefore liable in damages. In the alternative, Mr Tejani claimed damages for breach of the covenant of quiet enjoyment although it was accepted that there could be no such breach unless a private nuisance was established.

In addition, Mr Tejani claimed that the developer did not take reasonable steps to rectify defects of which they had been notified in accordance with their contractual obligations. Clause 5.6 of the contract for sale stated:

"The Developer shall take reasonable steps to procure that any defects in the Works ….. shall be remedied as soon as reasonably practicable……provided always that the Buyer shall have given notice in writing to the Developer of any such defects no later than twenty - three (23) months following the Certificate Date ……."

The noises
It appeared from the expert evidence that the noises were being created by the movement of components of the façade due to thermal effects. The parties disagreed, however, on the type and level of the noise and whether or not they were sufficient to amount to nuisance or breach of the covenant for quiet enjoyment.

Mr Tejani relied on his evidence and that of his children who in fact spent more time in the apartment than Mr Tejani and his wife. The Tejani family described the noises as a "*bang*", "*a loud thud….*", "*a click and pop….*"

Both parties appointed noise experts who in the main agreed about the type and level of the sounds but disagreed as to standard that should be applied. The experts prepared some audio simulations for the court based on their recordings.

The law on private nuisance
In *Lawrence and another v Fen Tigers Ltd and others [2014]* UKSC 13 , Lord Neuberger described nuisance as:

"an action (or sometimes a failure to act) on the part of a defendant, which is not otherwise authorised, and which causes an interference with the claimant's reasonable enjoyment of his land…."

Lord Wright said in *Sedleigh-Denfield v O'Callaghan [1940]* AC 880, 903 said:

"a useful test is perhaps what is reasonable according to the ordinary usages of making a living in society, or more correctly in a particular society."

In *Sturges v Bridgman (1879)* 11 Ch D 852, 865, Thesiger LJ observed that the locality of the nuisance complained of was relevant and "what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey".

In addition, the authorities suggest that regard must also be had to the standards of the average person rather than just the litigant in any particular case.

Taking the case law into account, the Judge in this case concluded:
"*I have taken from these authorities that for the noise the subject of the current action to give rise to an actionable nuisance it must be such as to materially interfere with the ordinary comfort of the average person living in the Apartment taking into account the character of the neighbourhood.*"

The decision
The first question for the Judge was whether the noise being experienced was sufficient to give rise to an actionable nuisance. The Judge considered the locality not to be very relevant in this case bearing in mind it was situated in central London in an area where there was some noise intrusion from nearby bars and traffic. Having said that, it was also noted that some *but not all* the noise complained of would be masked by such external noise.

Next the Judge noted that the noise was unlikely to cause a person to wake up at night. This was because there were few instances of the noise occurring at night and the noise was less audible in the master bedroom than in other areas. The Judge also did not accept that the noise heard in the simulations played in court would awaken someone.

The Judge then considered whether the noise might still materially interfere with the ordinary comfort of someone living in the Apartment and concluded that

it would not. Consequently, the claim for damages based on private nuisance and breach of the covenant for quiet enjoyment failed.

Turning now to the claim against the developer, the Judge found that there was a defect within the meaning of the contract but that there was no liability as Mr Tejani had not properly notified the developer within the strict time limit of 23 months. The Judge also held that even if wrong on that point, the developer had taken reasonable steps to remedy the problem.

Our comments

As the Judge noted, this was a difficult outcome for Mr Tejani and his wife. It is a clear reminder that noise nuisance cases are notoriously difficult to establish unless the interference is obvious and persistent. Otherwise, it is a matter for the Judge to decide on the expert evidence whether lower levels of intermittent noise can interfere with a person's enjoyment of their property. It is also critical for new build purchasers to take up matters with the developer as soon as possible after completion and in accordance with the terms of their contract.

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This article was first published by international law firm Taylor Wessing on 19 January 2023.

Could On-site Safety Hold Back Growth of the Construction Industry?

When it comes to industries that encounter hazards day to day, construction comes out on top. Research from HSE found that a quarter of the fatal injuries to workers in the UK occurred in the construction industry across 2021/22.

This shows that there's still work the UK must do to improve safety for construction workers. But even with room for improvement, it makes us wonder where some of the best places in the world are for workers in the industry.

With some insights from Jonathan Beadle at van leasing company, Van Ninja, we look at the best places to work in construction, where some of the worst locations are, and what those countries towards the bottom of the safety pile should be looking to change to improve their placing on the list.

Construction around the world: breaking down the best and the worst

Workwear Guru, who supply construction clothing and apparel for sites and companies, conducted a survey in 2021 that looked at the best places to work in construction. These countries were ranked based on the average salaries available, the cost and quality of living in said country, and the safety of working conditions on these sites.

From the findings of the survey, we can see that the top 10 best places for the industry is dominated by countries located in and west of Europe. Switzerland takes first place, followed by the UK in second, and then Belgium. However, this is the overall score and the country with lowest incident rate for accidents is Poland with just 4% of workforce reporting injuries while working. Singapore similarly has a low incident rate of 5%, and the UK also has a relatively low rate of accidents at 8%.

On the opposite end of the scale, the list for the 10 worst places to work in construction features locations all over the globe. The worst place in the world for workplace safety is reported to be Myanmar in Asia with an incident rate of 58%.

On-site safety: safety practices that can be implemented

With shocking statistics like over half of construction workers in Myanmar – formerly known as Burma – reporting potentially fatal workplace incidents in construction, it shows that globally more attention can still be paid to improving the on-site safety.

Incidents and accidents often happen due to a lack of awareness and preparation. This is why, before even beginning projects, workers should be adequately trained in safety practices that can be implemented to improving job site safety. These should include sections on awareness of the tools they are working with, the cleanliness of the site, and identifying potential hazards before they occur, as well as sections on communication with other members of the workforce to prevent potential hazards forming.

The training shouldn't just be down to those who'll be operating equipment either. Site managers could benefit hugely from extra training focusing on proper supervision, monitoring, and reporting of the sites and any potential incident dangers or those that have occurred. Proper management of documentation and administrative processes around the safety of the workers should be reviewed to make sure they are of an appropriate standard.

Having quality equipment to work with, both in terms of machinery to operate and protective clothing, is crucial to ensuring worker safety. If you're on a site where a drill is required but the drill bit or body is of poor quality, there is the possibility of the operator of the equipment getting put in harm's way.

Similarly, there should always be the appropriate equipment for jobs. For example, if you have a lot of heavy goods that need transporting, exploring van leasing options can prove the ideal solution rather than stretching your current equipment thinner.

Industry experts are predicting that construction will continue to grow into the new year. The Office for National Statistics (ONS) found that the value for new orders was up 22.8% in only the first quarter of 2022. With more projects for companies to work on, an extra emphasis must be placed on worker safety to avoid any potential incidents that could not only injure your workforce, but subsequently slow down progress.

Sources

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What is the Role of a Court Reporter in a Dilapidations Dispute?

In any commercial litigation in Scotland, it is open to the parties (and to the court on its own initiative) to appoint an expert – known as a court reporter - to examine factual evidence and to report to the court on his or her findings. The purpose of this procedure is to avoid the need for a proof (trial) on the issues that are the subject of the reporter's remit. It is a process which is designed to save the parties (and the public purse) time and money.

Unsurprisingly, the court reporter procedure has proven popular amongst parties litigating claims for terminal dilapidations. It is generally far more efficient for an independent third-party expert (usually a building surveyor) to examine the available evidence and report on the extent of repair works required and the cost of the same. This can save days, or even weeks, of evidence.

So far, so good. But a remit to a court reporter is not always the panacea that parties might hope for. What if they are unhappy with the reporter's findings?

The recent decision in *William Dale Hill and Rowanmoor Trustees Limited as Trustees for the HFD Management Services LLP Family Pension Trust v Apleona HSG Limited* is a useful reminder of the limited circumstances in which the findings of a reporter can be challenged. The judge (Lord Braid) summarised the role of the court - in scrutinising a reporter's findings – in three short points:

1. the parties are bound by the terms of the joint remit, which will prescribe the questions to be answered and the procedure to be followed. This means that - unless a reporter strays outside of the limits of the remit – it is generally not possible to challenge the findings they make. Framing the terms of the remit is therefore incredibly important. The court will not come to the rescue of a party who subsequently seeks to argue that the remit should have said something else.

2. the findings of the reporter on the issues remitted and are final and binding. Once an issue of fact has been determined by a reporter, neither party can lead evidence on it at proof (trial) and invite the court to reach a different conclusion.

3. the court always has jurisdiction to order further enquiry where a reporter has failed to exhaust or to comply with the terms of the remit. The court will not reach its own decision on any issue where the reporter has erred. It will instead direct the expert to reconsider and to issue another report.

In *HFD*, the landlord's principal objection to the findings of the reporter was that he made a finding of 'not proven' in relation to a number of wants of repair on the basis that he could not be satisfied that they existed at the end of the lease. The joint remit agreed between the parties *entitled* the Reporter to make such further enquiries as he reasonably considered proper to allow him to reach an opinion on any of the questions remitted to him. But the court found that this did not *oblige* the reporter to do so and that it was therefore open to him to make a 'not proven' finding. If the landlord was troubled by this outcome then the judge's pithy answer was that it should have either (a) framed the remit so as to impose a duty on the reporter to carry out further enquiries or (b) provided sufficient evidence that wants of repair existed on the material date.

The final issue that arose in HFD was that the report took a long time to finalise and, as such, that it had delayed the progress of the litigation. The main reason for this was the time that it took to agree the terms of the remit. If the court reporter procedure is to achieve the purpose which parties have in mind (i.e. to save time and money) then a remit has to (1) clearly and comprehensively reflect the parties intentions and (2) be agreed quickly. Of course, in many cases, this may present a challenge.

When it works well, the court reporter procedure brings significant benefit to landlord and tenant, but it is important to be aware of the potential pitfalls. It may not be right for every case

If you require advice in relation to a dilapidations claim, please do not hesitate to get in touch with our Real Estate Litigation team or your usual **Brodies'** contact.
https://brodies.com/rganisations/real-estate-litigation/

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