Your Witness

Newsletter of the UK Register of Expert Witnesses published by J S Publications

Scope of the expert's duty of care

The duty of care owed by an expert witness to the court and the potential liabilities to those instructing the expert are well known. There is, however, a slightly grey area surrounding the question of the expert's potential liability to others who may believe themselves to have been adversely affected by opinions expressed in court. This was a matter that came before the court in *Radia -v- Marks* [2022] *EWHC* 145 (*QB*).

Professor Marks is a medical expert who had previously been instructed as a single joint expert (SJE) in employment tribunal proceedings brought against Mr Radia's former employers. Mr Radia had alleged disability discrimination by his employer on the basis of his medical condition. The tribunal dismissed the claim, finding that he had not told the truth and that he had intentionally misled the tribunal. No appeal was made against that ruling. Mr Radia was ordered to pay costs.

Following the dismissal of his claim, Mr Radia brought a civil action against Professor Marks, claiming that in breach of duty (in tort and in contract) the expert misreported his account given at an assessment consultation. He alleged that the expert then compounded this error by not undertaking a competent review of the medical records, which would have revealed the error in the report and allowed the mistake to be corrected.

The 'error' amounted to a discrepancy between the weight recorded by the expert in his report and that recorded in the medical records. The issue was, submitted Mr Radia, the root cause of the tribunal's conclusion that he was untruthful. In his submission, this was the reason he alleged had led to both the adverse liability findings and the consequential adverse costs order.

The claim fell outside established categories of negligence. It was therefore a novel claim to which the six-point plan for analysing the scope of duty identified in *Khan -v- Meadows* [2021] *UKSC* 21 should be applied.

Expert's opinion confined to medical matters

The defendant, as an SJE, had owed both the claimant and the employer a duty of care in his assessment of the claimant's medical condition and in his reporting on the condition to the tribunal (*Jones -v- Kaney* [2011] *UKSC* 13). The harm identified in the *Radia* claim was the tribunal's findings of dishonesty. However, the expert's duty of care did not extend to protecting the claimant from the risk of an adverse credibility finding, or a finding of dishonesty.

As the judge pointed out, the expert had been instructed to provide evidence on the medical matters in the case. He had not, of course, been asked to pass opinion on the claimant's credibility or truthfulness. Indeed, any expert's opinion was admissible only to the extent that it addressed matters within that expert's area of expertise.

Minor discrepancies placed in context

So far as the discrepancy in the claimant's recorded weight was concerned, the court found that there had been no breach of duty. The expert had accurately recorded what he had been told at the consultation. Professor Marks had admitted a failure to notice the different weight in the hospital records. Both parties had adduced expert evidence in relation to the expert's standard of care. It was shown that the medical records were very extensive (running to hundreds of pages), poorly organised and not paginated. If the discrepancy had been noticed, the appropriate course for an SJE would have been to have recorded both weights in the report. However, the impact of the expert's evidence on the issues for the court to decide had been peripheral.

On a wider question of causation, the court had, in any event, made the costs order against the claimant upon a finding that he had known from the outset that his case had no reasonable prospect of success. The tribunal would almost certainly have made such an order irrespective of the finding of dishonesty.

Protection for competent experts

The case makes it clear that provided experts carry out their duties to the court with reasonable competence (even allowing for occasional errors or mistakes) and do not offer opinions outside their scope of expertise, any adverse conclusions that might be drawn from their expressed opinions (and that might affect a party's credibility or good character) are not ones that fall within an expert's duty of care. **The discharge of an expert's duty to the court cannot be a breach of duty to the client. The expert has no duty of care to protect any party from the risk that they might be found to be dishonest or discreditable.**

The case further clarifies that an error, such as failing to pick up some relevant information from the medical records, does not necessarily amount to a breach of duty by the expert. Whether such an error constitutes a breach of duty must be looked at in the specific context of the case. This will include the manner in which the information is presented to the expert, the time constraints under which the expert was working and the extent to which information that has been omitted has affected the expert's opinion.

Chris Pamplin

Inside

Issue 107

March 2022 © J S Publications

Warning to experts straying beyond

Expert witnesses can make mistakes, but what are the consequences?

Experts who stray beyond their area of expertise have always been at risk of severe criticism by the court. With the lifting of an expert's immunity from suit, there are now a range of sanctions available. It is important, though, to keep in mind that after an expert accepts instructions, circumstances may change. Consequently, experts must remain alert to such changes and mindful of any factors that may affect their competence and capacity, or require their initial opinion to be revised.

The confused expert

In a recent clinical negligence case, *Thimmaya -v- Lancashire NHS Foundation Trust*[1], a consultant spinal surgeon was instructed for the claimant in an action against the NHS Trust. During the trial, the expert became confused, had difficulty dealing with the questions put to him, and was unable to articulate the test to be applied in determining breach of duty in a clinical negligence case. As a result, the claimant was left with no choice but to abandon her claim because the expert was the sole expert upon whom she had relied. The Trust sought a costs order against the expert for the entirety of its costs.

The expert did not have much experience in carrying out the surgery in question, having done it only twice before, and then under supervision. However, he had explained to the claimant's solicitors that he was able to give an opinion as he had treated a lot of patients recovering from the procedure. He had acted previously as an expert, and the court acknowledged that, in those cases, he had probably demonstrated familiarity with the Bolam/Bolitho tests for clinical negligence.

However, in the months following his initial instructions, the expert had suffered from psychiatric difficulties which culminated in him being off sick from his clinical work from November 2017 and retiring from clinical practice in 2018. The expert admitted that he was having cognitive difficulties but had not appreciated that he was unfit to give evidence.

Failure of mental capacity leads to wasted costs order

Hearing the claim for costs, Judge Evans held that on the balance of probabilities, the expert could not answer questions in cross-examination as to the test for breach of duty because he did not know, was unable to recall, or could not apply the legal test, perhaps because of his general cognitive difficulties. He was aware of his inability to concentrate and to engage properly with cross-examination. Whilst his difficulty may have arisen after the date of his instruction, he should not have continued to act as an expert witness at a time when he was unable to work in his clinical practice. He should have taken sick leave from his medico-legal practice at the same time as he did from his clinical practice. He had not even informed the claimant or her advisers of his condition, and this was a serious failing that amounted to improper, unreasonable or negligent conduct.

Finding that the expert had failed in his duty to the court, the judge made an order that he should bear the Trust's costs but only from the date on which his mental capacity to act had changed. The judge acknowledged that the expert had been through a difficult time and, although it would not be right to use him as an example to send a general warning to experts, all experts should understand the importance of their duties to the court and the potential consequences if they failed in them. The claimant had lost the opportunity to have her case tried on its merits and there had been significant costs consequences to the NHS. The expert was ordered to pay costs of £88,801.

The inexpert expert

This is not an isolated case. In September 2021, Judge Abigail heard an application in *Hudson Robinson -v- Mercier*[2]. The application was made by an NHS Trust that sought a third-party wasted costs order against the claimant's expert.

The claim was for negligence or breaches of duty by the Trust in relation to the failure by one of its maxillofacial surgeons to remove the claimant's upper left second molar whilst under general anaesthetic. The claimant's case at trial in respect of breach of duty and causation rested solely on the evidence of one expert, Dr Mercier. The expert was a general dental surgeon with no particular expertise in maxillofacial surgery. This became apparent during the course of his evidence and, at its conclusion, the claimant withdrew her claim.

Seeking an order against Dr Mercier for its costs, the Trust argued that he should not have given evidence in the case at all, and had failed to abide by his duty to the court to ensure that he had sufficient expertise to opine. The court found that, on receipt of instructions, it must have been obvious to Dr Mercier that he, a dentist, was not able to comment on whether a maxillofacial surgeon had made negligent errors. Furthermore, throughout his evidence at court, Dr Mercier had failed to make any reference to the differences between his role and that of an oral and maxillofacial surgeon, and had failed to even address his mind to whether there were differences to which he could not speak. The court found that the expert had shown a flagrant disregard for his duties to the court by giving evidence on issues on which he had no expertise.

The judge, by reference to *Ridehalgh*[3], set out the **3-stage test to be applied when considering making a cost order against an expert**:

- **Had the [third-party] of whom complaint was made acted improperly, unreasonably, or negligently?**
- **If so, did such conduct cause the applicant to incur unnecessary costs?**
- **If so, was it, in all the circumstances, just to order the [third-party] to compensate the applicant for the whole or part of the relevant costs?**

their area of expertise

When applying the test, however, it is right to acknowledge that the language of the case of *Ridehalgh* is that of impropriety, unreasonableness and/or negligence. A mere mistake or error of judgment is not generally sufficient, but a gross neglect or inaccuracy may suffice in a matter that it is a third party's duty to ascertain with accuracy.

Flagrant and reckless disregard of duties

The judge quoted Smith J in *Philips -v- Symes*[4] who said:

> *'It seems to me that in the administration of justice, especially, in spite of the clearly defined duties now enshrined in CPR 35 and PD 35, it would be quite wrong of the Court to remove from itself the power to make a costs order in appropriate cases against an Expert who, by his own evidence, causes significant expense to be incurred, and does so in flagrant reckless disregard of his duties to the Court.'*

The court in *Philips* envisaged that cases of '*flagrant reckless disregard*' of the duties of experts to the court would be '*exceptional*'. However, the ultimate question to be addressed is whether, in all the circumstances, it is just to make an order.

The court concluded that, but for Dr Mercier's report, the claim would not have been brought. Consequently, the whole of the Trust's costs had been caused by his flagrant disregard for his duty to the court. The Trust had been put to considerable expense in financing costly and needless litigation. Accordingly, the court made a third-party costs order against the expert for the whole of these costs, amounting to £50,543.

The decisions in these cases should not be viewed as opening the floodgates to third-party costs claims against experts who merely make an error or whose evidence has otherwise been open to some criticism. The test in *Philips* for making a costs order against an expert remains a high one that requires a finding of gross dereliction of duty or recklessness by the expert. **A costs order against a non-party would always be exceptional,** and that means more than out of the normal run of cases.

Threshold test higher for experts

As highlighted in the case of *Walker -v- TUI*[5] in January 2021, the threshold test must be higher because an expert witness is in a different position to a legal advisor. The wasted costs jurisdiction applicable to legal advisors is not applicable to experts. Even if the test was akin to that of the wasted costs jurisdiction, the defendant would have to establish improper, unreasonable or negligent conduct on the part of the expert.

In *Walker*, a claimant husband and wife had each issued proceedings against the defendant claiming damages for gastric illness which they said they had suffered at a hotel whilst on a package holiday in Turkey. Both claimants had relied on medical reports provided by the same doctor. Directions were made by consent which allowed the claimants to rely on the doctor's reports, and all parties to rely on the medical evidence of a single joint consultant gastroenterologist. The parties agreed on the appointment of a Dr Leigh as the gastroenterology joint expert. He duly produced a report, as well as answers to Part 35 questions. His opinion was that the claimants' symptoms were the result of food and drink consumed at the hotel. The defendant did not accept Dr Leigh's opinion or reasoning and, at the start of the trial, applied for Dr Leigh to be cross-examined. Dr Leigh had attended the trial to give oral evidence in support of his report. The court gave permission for him to be cross-examined. The evidence given at trial by Dr Leigh was that the husband's gastroenteritis could, on the balance of probabilities, have been caused either by food and drink consumed at the hotel or from having close contact with his wife, who it was said was ill first. The court held that his claim therefore failed. It further found, on the basis of the wife's oral evidence, that she had not fallen ill as alleged, so her claim then failed.

As a result of what was seen as a significant departure from his originally expressed opinion, the defendant subsequently applied for Dr Leigh to be joined as a defendant for costs purposes.

Refusing to do so, the trial judge said that, although the court had made a number of criticisms of Dr Leigh and his report, there was no finding that his evidence or conduct had been negligent or vexatious, nor that his professional conduct had been improper. Although Dr Leigh's evidence had been criticised, his evidence had not caused significant expense to be incurred in flagrant disregard of his duties to the court, as required by *Philips*. The claimants' cases had failed on their own evidence. Additionally, no evidence had been provided that, but for the evidence of Dr Leigh, the claims would not have proceeded to trial at all, nor that his conduct had led to significant expense being incurred from the date of accepting instruction. The court was also mindful that the defendant had failed to identify any lack of expertise and, indeed, had agreed to his instruction as a single joint expert.

The point was also made that, pursuant to a decision of the court in *Popek -v- National Westminster Bank plc*[6], Dr Leigh should have been told that he was going to be cross-examined and on which topics, and should have been warned that a costs order might be sought against him.

Conclusion

It remains the case that where an order for costs is sought against an expert witness under Civil Procedure Rule 46.2, this can only be granted where it has been shown that the expert has been in **flagrant disregard of the duties to the court** and the **expert's evidence has caused significant expense to be incurred**. That is still a high bar for any applicant to get over.

Flagrant, reckless disregard for duty to the court can, naturally, be costly

References

[1] *Thimmaya -v- Lancashire NHS Foundation Trust* [2020] 1 *WLUK* 437.

[2] *Hudson Robinson -v- Mercier* [2021] 9 *WLUK* 400.

[3] *Ridehalgh -v- Horsefield* [1994] *Ch* 205, *CA*.

[4] *Philips -v- Symes (No 2)* [2004] *EWHC* 2330 (*Ch*).

[5] *Walker -v- TUI UK Ltd* [2021] 1 *WLUK* 398.

[6] *Popek -v- National Westminster Bank plc* [2002] *EWCA Civ* 42.

Remote hearings: here today, gone to

Pandemic forced remote hearings to the fore

It is the general rule that witnesses give their oral evidence in public, this being subject to any order of the court. However, the ability of the court to hear witness evidence by video or via an electronic platform has existed for some time. Civil Procedure Rule (CPR) 32.3 states that a court may allow a witness to give evidence through a video link or by other means. In paragraph 2 of Practice Direction 32 Annex 3, it is stated:

> *'[Video evidence] is, however, inevitably not as ideal as having the witness physically present in court. Its convenience should not therefore be allowed to dictate its use.'*

As a result, permission to give such evidence has been used sparingly (although the use of video links in the criminal courts is long established and far more common). That was, of course, before Covid-19 brought everything to a shuddering halt. The pandemic drove us to online hearings using the Justice Department's own secure platform. True, court staff still had to attend their offices to deal with the administrative work, but the parties, legal representatives, witnesses (including experts) and judges all became familiar with using the technology. On the whole, the system functioned tolerably well.

Some hearings were fully remote; others were hybrid, with some people physically present in the courtroom and those prevented from attending giving evidence remotely. Hearings taking place over more than 1 day may have used a combination of methods.

Protocols and practice directions were drawn up, and the major problems and issues identified. The courts shifted to the new system with surprising alacrity. The First-Tier Tribunals, in particular, embraced the system, and for 2 years almost every case in some jurisdictions has been conducted using this method.

Most judges and others involved in proceedings would probably regard the forced experiment as having been reasonably successful. There have, though, been a few problems with reliability of the technology, and some cases where the court has struggled to impose its managerial authority on unruly or difficult parties and witnesses. **Indeed, the majesty of the law is severely weakened when taken out of the courtroom and into the participant's kitchen!**

Many court users found favour in remote hearings

An oft-cited objection to remote hearings is that they make it difficult to assess the veracity or demeanour of witnesses when weighing the merits of their evidence. However, this criticism has been heard less frequently recently.

A wholly remote approach might be appropriate to ensure that a claim is heard more quickly than would be the case if the parties waited until an in-person hearing was possible. It was also found that hearings that started off in person, or on a partly remote basis, could conveniently be continued wholly remotely for the purposes of listening to oral submissions or delivering judgment.

Expert witnesses, such as surveyors in the Lands Tribunal, were broadly in favour of remote hearings. They were seen as being more convenient, particularly in relation to reducing travel costs and giving greater flexibility of working time and work venue.

Surveys find remote hearings work well...

In December 2021, HM Courts and Tribunals Service (HMCTS) published its evaluation of remote hearings during the Covid-19 pandemic.

The decision to use remote hearings was, in some cases, driven by a jurisdictional approach, whereas in other jurisdictions the judge made the decision. Where judges had scope to decide whether a hearing was held remotely, the judicial survey indicated that perceived vulnerability of parties was by far the most important factor in influencing the decision. Other factors were likely hearing length and complexity; severity of case and therefore potential seriousness of the outcome; stated preference of public users; and health considerations.

HMCTS found that the likelihood of attending a hearing remotely was heavily influenced by jurisdiction. For the period May to October 2020, most crown and magistrates' court users attended in person (87% and 91% respectively). In contrast, most family court users attended remotely (86%). There were higher rates of litigants-in-person amongst public users attending remote hearings (65%), compared with 34% of those who attended in person.

The majority of public users attended remote hearings from home (79%). Those who were legally represented were rarely sitting with a legal representative. This, it was said, made it harder to communicate during the hearing. Since January 2021, around two-thirds of judges (64%) and legal representatives (71%) attended hearings from home. These figures declined towards the end of the study period.

Only 10% of HMCTS staff supported remote hearings from home. Most legal representatives (78%) stated their preference during the pandemic was to work from their home, and three-fifths (59%) said they would still prefer to work from home post pandemic.

Professional observers, such as reporters and academics, reported difficulties with accessing remote hearings in the early stages of the pandemic (spring 2020), but it was widely felt that access for professional observers improved as time went on. This was attributed to improvements in the availability and accuracy of listing information and because, with time, court staff had a better understanding of remote hearing processes.

Around half of judges thought remote hearings were effective at creating a comparable environment to in-person hearings (51%), but

4 in 10 thought they were ineffective in doing so (37%). Legal representatives and HMCTS staff were more likely to consider that remote hearings were effective at creating a comparable environment (69% and 62% respectively).

Legal representatives were less likely to consider that there was a difference in public users' attitudes or behaviour in remote hearings compared with judges and HMCTS staff (36% compared with 61% and 67% respectively). A reduction in formality was the most significant change observed by all professional groups. Reductions in perceived levels of concentration and respectfulness were also commonly observed by professional respondents, whilst punctuality was considered to be a less significant issue for those attending remote hearings.

In our own recent survey of expert witnesses, 79% of respondents had been involved in remote meetings. Fewer than 10% found such meetings ineffective, while for the majority (73%) they were at least as effective as face-to-face meetings. Two-thirds of our respondents feel remote meetings should continue post pandemic.

... so let's scrap them

As we emerge into a post-pandemic world, though, there is already a hardening of approach to the use of remote hearings. The change in attitude has been rapid.

Shortly after New Year 2022, when the country was in the grip of the Omicron variant, the Court of Appeal heard an application in *Tradestar International Limited -v- The Commissioners for Her Majesty's Revenue & Customs*[1]. The original hearing had been before the tribunal via the CVP video hearing platform. A face-to-face hearing was not held because of the circumstances of the pandemic and the inability of the sole director of Tradestar, who was in South Africa, to attend a hearing in person. The connection via the video platform worked well during the first 5 days of the hearing. The tribunal was satisfied that all attending could participate fully. However, problems arose with the director's connection due to issues with power outages in South Africa. The tribunal had initially directed that the tribunal should be informed of any planned outages so that arrangements could be made to work around these times. Prior to conclusion of the proceedings, the director chose to no longer participate in the hearing. The tribunal was satisfied, however, that this was a matter of choice rather than an inability to attend. In its subsequent appeal against the decision of the tribunal, the appellant expressed concerns about the use of the video platform for its appeal. Their applications for an adjournment were refused. The court was satisfied that, in the light of difficulties in travel from South Africa, the video platform was a fair and effective way of conducting the hearing, and that it provided a satisfactory way for all the parties to participate fully.

A few short weeks later, at the end of January 2022, and after some lifting of Covid travel restrictions, the court heard a contrasting application in *Jackson -v- Hayes & Jarvis (Travel) Ltd*[2]. The defendant, a UK based tour operator, had organised a foreign package holiday for the claimant at a hotel resort in Kenya. The claimant had suffered an accident at that hotel resulting in life-changing injuries. Her claim against the defendant for damages for personal injury and consequential losses was valued in excess of £5 million. The defendant intended to call the hotel's then manager as a lay witness. It had also instructed a Kenyan architect to give expert evidence on the applicable local health and safety requirements, and the standard of care expected of a reasonable local hotelier. Both witnesses lived in Kenya.

Application was made for both witnesses to give their evidence remotely by video link. It was suggested that the trial should be a hybrid hearing. The witnesses would give evidence remotely because it was not proportionate, or in the interests of justice, for them to travel from Kenya (a 13-hour flight), given the health risks of international travel during the ongoing pandemic and the current testing rules on arrival in the UK. Nevertheless, the application was refused.

A few weeks earlier, that application would almost certainly have been granted. However, in the intervening time, the case of *United Technology Holdings Ltd -v- Chaffe*[3] has put a different complexion on things. In that case, Judge Pelling QC pronounced that '*the default position*' is now that hearings should take place in court in the absence of good reasons to the contrary.

Under CPR 32.3, the court could allow a witness to give evidence via a video link. That was consistent with the overriding objective of actively managing cases by making use of technology pursuant to CPR 1.4(2)(k). However, as noted earlier, the guidance in Annex 3 to Part 32 says its use is not to be dictated by considerations of convenience alone. If convenience was the primary consideration, it was accepted that there were very good reasons for the witnesses in Kenya giving evidence remotely, having regard to the continuing health risks caused by the pandemic, the difficulty posed by the lengthy journey from Kenya and the testing procedures they would have to go through on arrival in the UK. However, those were only potential risks. There was no evidence that the witnesses would refuse to attend the trial in person, or that they would face insurmountable difficulties if required to do so.

It appears that those experts and court users who might have expected to see greater flexibility resulting from our 2-year experiment with remote hearings are going to be disappointed. It seems very likely that we are going to revert rapidly to the pre-pandemic position.

Court signals a return to predominantly hearings in person

References

[1] *Tradestar International Limited -v- The Commissioners for Her Majesty's Revenue & Customs* [2022] *UKFTT (TC)*.

[2] *Jackson -v- Hayes & Jarvis (Travel) Ltd* [2022] 1 *WLUK* 321.

[3] *United Technology Holdings Ltd -v- Chaffe* [2022] *EWHC* 151 (*Comm*).

Criminal capacity and mental health

A guilty mind is needed for a successful criminal conviction

As every law student knows, **a criminal offence must comprise two elements – the act itself (*actus reus*) and the mental intention to commit the crime whilst knowing the action is wrong (*mens rea* – or guilty mind). Without both elements, a perpetrator should not be convicted.**

Offences are often committed by individuals while the balance of their mind is disturbed by mental illness. Consequently, they are unable to appreciate the nature of their actions or know that they are wrong. Such people lack the capacity to be tried for criminal offences or, if they are, have available the defence of diminished responsibility. Lack of capacity may also be used as a partial defence, such as reducing a charge of murder to the lesser one of manslaughter.

First use of criminal insanity

The first legal test for criminal insanity was formulated in the famous case of *R -v- M'Naghten* in 1843. Daniel M'Naghten shot and killed the secretary to the Prime Minister, Edward Drummond, apparently in the belief that he was the Prime Minister, Robert Peel. M'Naghten claimed that he was being persecuted by the 'Tories', and that their spies followed him everywhere and were conspiring to murder him. At trial, his defence team put forward a defence of insanity, offering expert testimony and other evidence in support. The defence barrister was Alexander Cockburn, who went on to become a long-serving Lord Chief Justice. The adding of insanity as a permissible defence was a major legal development. The speed with which establishment figures were able to add it suggests the legal community was prepared to act when a suitable case arrived. Following direction by the judge, the jury returned a verdict of not guilty by reason of insanity. M'Naughton spent the rest of his life in Bethlem Hospital (Bedlam) and the newly created Broadmoor.

Failures to convict due to the defence of insanity were, from the outset, never popular with the public at large, particularly in high-profile cases. The M'Naughton test was formulated following public outrage after the verdict. This imposed a stricter test for criminal insanity. **All defendants are presumed to be sane unless they can prove that, at the time of committing the criminal act:**

1) **the defendant's state of mind caused them to not know what they were doing when they committed said act, or**
2) **the defendant knew what they were doing but did not know that it was wrong.**

Sanity is a rebuttable presumption, and the **burden of proof is on the party denying sanity**. The standard of proof is on a balance of probabilities. In general, the Rules apply only to cases in which the defect of reason is 'substantial'. However, the word 'substantial', incorporated into Section 2 of the Homicide Act 1957, has proved problematic.

General public dislikes pleas of insanity

In relation to the partial defence of **diminished responsibility** set out in the 1957 Act, the **defence must prove an abnormality of mental functioning** which substantially impaired the defendant's ability to understand the nature of his conduct, form a rational judgment or exercise self-control. In *R -v- Golds*[1], the Supreme Court clarified the meaning of 'substantially'. The trial judge had directed the jury that 'substantially' was an everyday word that did not require elucidation. The jury rejected the defence of diminished responsibility. Before the Court of Appeal, however, it was argued that the judge should have directed the jury that the 'substantially impaired' test would be met if the impairment was more than merely trivial. Lord Neuberger observed that, as a matter of dictionary definition, 'substantial' was capable of meaning either '*present rather than illusory or fanciful, thus having some substance*' or '*important or weighty*'. A review of the authorities showed that in the context of diminished responsibility, the word 'substantially' had always been held to be used in the second of those senses. It was not synonymous with 'anything more than merely trivial'. Accordingly, the trial judge had not erred when directing the jury.

Cost of public dislike of pleas of insanity

It will be apparent that issues of mental health, capacity and criminal actions, the way they interact and the attitude of the courts and the public at large, have always been problematic. In serious cases, particularly murder or terrorist acts, there appears to be a reluctance to allow a defence or partial defence that relates to the mental health of the individual at the time the act was committed. This is notwithstanding that it is not uncommon for persons to be convicted and imprisoned, only to be transferred to a secure mental hospital after the passage of some time (and usually after the prominence of the case has faded from public view).

The prison population in the UK stands at around 85,000 people and is the highest in Western Europe. In a report published in 2017 by the House of Commons Committee of Public Accounts (HCCPA), it was established that there had been a failure to establish effective screening procedures. This meant that the Ministry of Justice, HM Prison and Probation Service and NHS England did not know the full extent of the number of prisoners with mental health issues. There was no reliable or up-to-date data on the prevalence of mental health illness in prisons. The most commonly used estimate, that 90% of prisoners have mental health issues, is now 20 years old!

It is not unreasonable to suppose that a significant number of those incarcerated should not be in prison at all. They should, instead, be in an institution where they can be treated properly and, if possible, rehabilitated.

People in prison are more likely to suffer from mental health problems than those in the community. Yet prisoners are less able to manage their mental health conditions because most aspects of their day-to-day life are controlled by the prison. These difficulties are being exacerbated by a deteriorating prison estate, long-standing lack of prison staff and the increased prevalence of drugs in prison.

The HCCPA report recognised that improving the mental health of prisoners is a difficult and complex task, but said it is an essential step in reducing re-offending and ensuring that those who are released from prison can rebuild their lives in the community. Despite this, so far the government's efforts to improve the mental health of those in prison have been poorly co-ordinated. Information is still not shared across the organisations involved, and not even between community and prison GP services.

Role of medical experts

Medical experts have always played a pivotal role in the evaluation of a defendant's mental capacity. Even in the trial of M'Naghten, there was an array of eminent medical practitioners called to give their expert opinions. Since then, there have been huge advances in the understanding of mental health conditions and in the drugs and treatments available.

Whether a person should be held in prison, or whether it would be more appropriate for them to be detained in a hospital, will, to a large extent, hinge upon the medical evidence available at the time, and whether the mental condition is believed to be treatable. Where, due to advances in medical understanding or the availability of new treatments, circumstances have changed, it should be possible to carry out some re-evaluation of the original conviction and sentence.

In *R -v- Miller*[2], the Court of Appeal heard an appeal against a sentence of life imprisonment imposed in 1988 on an offender following her guilty plea to manslaughter on the grounds of diminished responsibility. The appellant, now aged 63, was of low intellect and suffered from a personality disorder, learning disability and behaviour disorder linked to alcohol and substance abuse. Aged 29, she had killed a family friend in a planned attack and was sentenced to life with a minimum term of 10 years and 1 day.

Medical reports had stated that the appellant's mental responsibility for the killing was substantially diminished by her psychopathic personality disorder and 'mental handicap', but also stated that her disorder was not susceptible to treatment and therefore the criteria for a hospital order under the Mental Health Act 1983 section 37 was not met. The sentencing judge had rejected the suggestion that a hospital order could be made, regarding the appellant as a pathological liar and totally unreliable.

In 2005, the appellant was moved to a secure hospital and had since remained under in-patient psychiatric care. While in the secure hospital, the appellant began successful treatment with new antipsychotic medication in 2014. She subsequently transferred to treatment in the community, but her condition deteriorated, and she was placed in a rehabilitation unit.

The appellant should have returned to the hospital for continuing treatment but, under the terms of her conviction, life sentence and release under licence, there was the real prospect that she would be sent back to prison.

The Court of Appeal heard fresh evidence in the form of a joint report by medical experts. The experts agreed that the appellant's offending had occurred in the context of her mental disorders and that, if recalled, she would be returned to prison. That would result in further deterioration of her disorder, whereas a recall under a restriction order would mean a return to hospital and immediate treatment. They agreed that a hospital order offered the best protection for the public.

The Court of Appeal found that the appellant's mental disorder had contributed significantly to her committing the offence. The trial judge had sentenced the appellant in the belief that the appellant's mental disorder was inherently untreatable. This had been the unanimous view expressed by the medical experts' reports provided to the judge at trial. However, the fresh expert evidence established that the appellant's mental disorder was treatable and, indeed, had been treatable at the time of sentence. The nature of the mental disorder made it appropriate for the appellant to be detained in hospital.

The appellant had already served more than the minimum term of her sentence. Considering and weighing the new expert evidence, the Court of Appeal quashed the sentence of life imprisonment and replaced it with hospital and restriction orders under Sections 37 and 41 of the Mental Health Act.

There's still work to do

The decision of the Court of Appeal is one that can be viewed as benefiting both the offender and the public. The appellant was a continued risk to herself and others, and continued monitoring and maintenance of her medication was essential. The decision made meant that the chances of rehabilitation would be improved greatly. Transition to the community could be gradual and managed carefully, which would be possible under Section 37/41 orders, but not under a life sentence. Conditions that could be attached to a conditional discharge from Section 37/41 orders also made it possible to require the appellant to maintain appropriate medication, which could not be a condition of release on licence.

Given the conclusions and recommendations contained in the Public Accounts Committee's 2017 report, it is to be hoped that further reviews of the expert medical evidence might be undertaken in similar cases.

Keeping the mentally ill in prison is costly on many levels

References

[1] *R -v- Golds (Mark Richard)* [2016] *UKSC* 61.

[2] *R -v- Miller (Barbara Carol)* [2021] *EWCA Crim 1955*.

Services for registered experts

Expert witness members of the *UK Register of Expert Witnesses* have access to a range of services, the majority of which are free. Here's a quick run down on the opportunities you may be missing.

Your Witness – FREE

First published in 1995 and now at more than 100 issues, *Your Witness* was the first newsletter dedicated to expert witnesses. All quarterly issues are freely available to members.

Factsheets – FREE

Unique to the *UK Register of Expert Witnesses* is our range of factsheets (currently 76). All are available and searchable on-line. Topics covered include expert evidence, terms and conditions, getting paid, training, etc.

E-wire – FREE

Now exceeding 100 issues, our condensed e-wire is our fast link to you. Containing shortened articles, as well as conference notices and details of urgent changes that could impact on your work, it is free to all members.

Little Books series – DISCOUNTED

Distilled from more than three decades of working with expert witnesses, our *Little Books* offer insights into different aspects of expert witness work. To find out more point your browser at *www.jspubs.com/books*.

Court reports – FREE

Full access to the complete *ICLR case law library* for Professional service level members (call us on 01638 561590 for access codes). Basic reports on some key cases available to all in our library.

LawyerLists

Based on the litigation lawyers on our Controlled Distribution List, *LawyerLists* enables you to buy recently validated mailing lists of UK litigators. A great way to get your marketing material directly onto the desks of key litigators.

Register logo – FREE

Vetted and current members may use our dated or undated logo to advertise their inclusion.

General helpline – FREE

We operate a general helpline for experts seeking assistance in any aspect of their work as expert witnesses. Call 01638 561590 for help, or e-mail helpline@jspubs.com.

Re-vetting

You can choose to submit yourself to regular scrutiny by instructing lawyers in a number of key areas to both enhance your expert profile and give you access to our dated logo. The results of re-vetting are published in summary form in the printed *Register*, and in detail on line.

Profiles and CVs – FREE

Lawyers have free access to more detailed information about our member experts. At no charge, you may submit a **profile sheet** or a **CV**.

Extended entry

At a cost of 2p + VAT per character, an extended entry offers you the opportunity to provide lawyers with a more detailed summary of expertise, a brief career history, training, etc.

Photographs – FREE

Why not enhance your on-line entries with a head-and-shoulders portrait photo?

Company logo

If corporate branding is important to you, for a one-off fee you can badge your on-line entry with your business logo.

Multiple entries

Use multiple entries to offer improved geographical and expertise coverage. If your company has several offices combined with a wide range of expertise, call us to discuss.

Web integration – FREE

The on-line *Register* is also integrated into other legal websites, effectively placing your details on other sites that lawyers habitually visit.

Terminator – FREE

Terminator enables you to create personalised sets of terms of engagement based on the framework set out in Factsheet 15.

Surveys and consultations – FREE

Since 1995, we have tapped into the expert witness community to build up a body of statistics that reveal changes over time and to gather data on areas of topical interest. If you want a say in how systems develop, take part in the member surveys and consultations.

Professional advice helpline – FREE

If you opt for our Professional service level you can use our independently operated professional advice helpline. It provides access to reliable and underwritten professional advice on matters relating to tax, VAT, employment, etc.

Promo Badge – FREE

Use the *Promotional Badge* to add a clickable link to any email or web page and take customers direct to your entry on the *Web Register*.

Discounts – FREE

We represent the largest community of expert witnesses in the UK. As such, we have been able to negotiate with publishers and training providers to obtain discounts on books, conferences and training courses.

Expert Witness Year Book – FREE

Containing the current rules of court, practice directions and other guidance for civil, criminal and family courts, our *Expert Witness Year Book* offers ready access to a wealth of practical and background information, including how to address the judiciary, data protection principles, court structures and contact details for all UK courts.

Address
J S Publications
PO Box 505
Newmarket
Suffolk
CB8 7TF
UK

Telephone
+44 (0)1638 561590

Facsimile
+44 (0)1638 560924

e-mail
yw@jspubs.com

Website
www.jspubs.com

Editor
Dr Chris Pamplin

Staff writer
Philip Owen