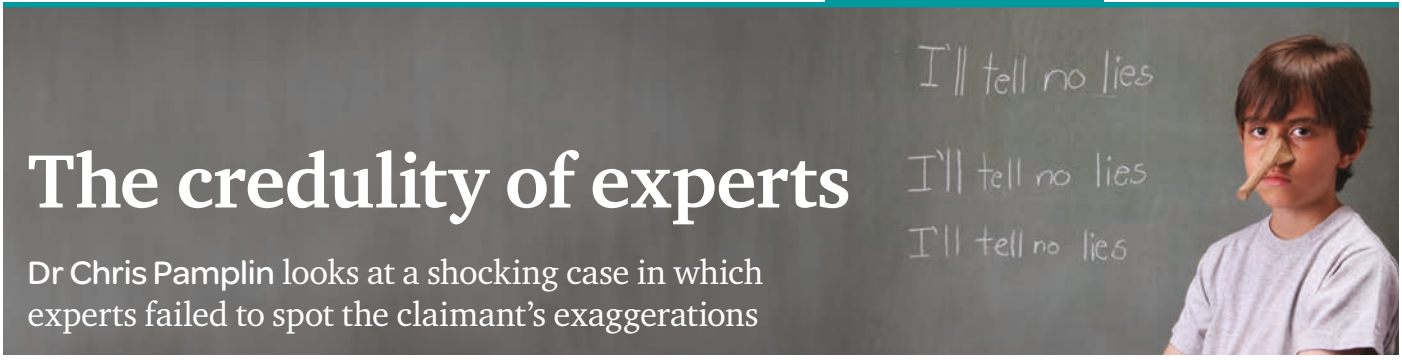

The credulity of experts

Dr Chris Pamplin looks at a shocking case in which experts failed to spot the claimant's exaggerations

IN BRIEF

- Experts should not assume the people with whom they interact are fundamentally honest.
- Covers *Williams-Henry v Associated British Ports Holdings Limited.*
- Warns experts not to lose sight of causation and to say which complaints are caused by the tort, which are not, and which they can't establish either way.

Most experts might assume that when taking instructions, the people with whom they interact are fundamentally honest. As was demonstrated in the recent case of *Williams-Henry v Associated British Ports Holdings Limited* [2024] EWHC 806 (KB), [2024] All ER (D) 44 (Apr), there are dangers for experts who make this assumption.

The claimant had suffered a traumatic brain injury when she fell from Aberavon Pier. The pier was found to have been insufficiently guarded by railings. The defendant admitted liability. However, while settling the level of damages, the court found the claimant had greatly inflated the value of her claim.

Under surveillance

Application had been made for the claimant's social media to be disclosed. The claimant had also undergone a period of video surveillance. This subsequently revealed that, despite her statements to the contrary, she had taken holidays and attended spa weekends. She had also been on trips to the cinema, pop concerts, weddings and hen nights. She had been drinking and partying, all without any visible sign of any of the conditions caused by the accident she claimed stopped her undertaking such activities.

Ritchie J, in a judgment just short of 100 pages, catalogued the blatant lies he determined the claimant had told. He also found that her answers given in cross-examination had been 'breathtakingly dishonest', and that she had been untruthful and manipulative both in court and in the statements she had made to the medico-legal experts in the case.

Dismissing the claim, Ritchie J said that, based on the genuine injuries sustained by the claimant, an award of damages in the sum of £596,704 would have been appropriate. However, following the finding of 'fundamental dishonesty' within the meaning of the Criminal Justice & Courts Act 2015, s 57, it would not be a substantial injustice to dismiss the claim. While it seemed like a large sum of money of which to deprive a genuinely injured person, by drafting and passing s 57, Parliament sought to stamp out dishonesty in personal injury claims and the claimant had breached that law. Further, she was wholly unrepentant when giving evidence about her disabilities, and had sought, in parallel, to defraud the Department for Work and Pensions and her insurer.

The judge was in no doubt that the claimant had been the author of her own downfall. He said:

> 'Had the claimant been honest and genuine with her clinicians, the defendant, the court and the experts, the case would never have warranted surveillance and would probably have settled in late 2023, with a quite substantial payment and no costs penalty.'

Experts criticised

In the course of his lengthy judgment, Ritchie J referred to the claimant's interaction with the experts, including the manner in which she had attempted to manipulate them and the fabrications she had, seemingly with relative ease, persuaded some of them to accept as being true. The criticism of the experts concerned makes uncomfortable reading.

In some respects, the experts might be forgiven for their seeming naivety. The claimant had obviously suffered a serious accident and had undergone a number of medical treatments, including the removal of part of her frontal lobe. Although she was said to be suffering from depression and deteriorating mental health at various times after her accident, there was nothing, perhaps, in her demeanour that should necessarily have led the experts to believe she was being untruthful. The claimant, herself, had held a relatively senior position with Admiral, a reputable and respected insurance company.

There were a large number of experts in this case drawn from a range of disciplines. Most had relied to some extent on the claimant's self-reporting of her condition and symptoms. But in some instances, the judge was scathingly critical of the experts who had simply accepted at face value what the claimant had told them. One of the pain experts, for example, said that the claimant's pain was attributable to maladaptive excitability of the ankle soft tissues caused by post-trauma changes in them. He said there were soft tissue abnormalities when he examined her. When cross-examined on exactly what he did by way of examination, he admitted he simply put his hand on the claimant's ankle and, when she said it was painful, he withdrew his hand. The judge said this was a 'facile test'. He was unable to see how this could lead to the expert's complicated theory in relation to the cause of pain, if any. It was not until he had been taken through the many untruths told to him by the claimant that he eventually backed away from this opinion.

Lacking an inquisitive mind

Where it had been possible to check the accounts given by the claimant, some experts had failed to do so. One expert had, in the judge's view, undervalued the claimant's four years of work at Admiral in a highly complex and demanding role. The expert had taken at face value the claimant's complaints of disability and lost social life without cross-checking them with the chronology and orthopaedic records.

This criticism was also directed at one of the neuropsychologists, who, the judge found, had based her report on 'an uncritical acceptance of what the claimant and her mother had told her'. This report, said the judge, had not been sufficiently logical, analytical or objective.

Ritchie J also found some experts had displayed a reluctance to take into account the findings of other experts. When asked to contrast his opinion with another expert who had been unable to find any clinical cause for the apparent pain, the expert had replied, without irony, that consultant orthopaedic surgeons only dealt with bones. The judge considered this displayed an arrogance and lack of understanding. When challenged on his use of the phrase 'the claimant had neurological injury in the left leg', he backed down and admitted the neurological injury was in the spinal nerve roots at L5, not the leg.

Similarly, some experts had displayed a reluctance to modify or revise initial opinions when faced with the later video evidence. One expert, commenting on the disclosed videos, said that conscious exaggeration may be in the range of opinion. However, he saw no reason to modify the opinions in his original report despite the social media disclosure and Part 35 questions that appeared to substantially undermine his findings. Another expert stated she could not rule out intentional misrepresentation but thought the claimant more likely had a 'functional overlay'. That diagnosis was not within her area of expertise and she should have deferred to the psychiatrists. The videos did not make her change her uncritical acceptance of the claimant's self-report.

A failure to elucidate causal factors

High among his criticism of the experts was the judge's finding that some experts had made no effort to separate causal factors relating to the fall.

One expert had advised that the claimant would benefit from care, including assistance with DIY and gardening. The expert also recommended adaptations to the claimant's accommodation, including the consideration of single-level accommodation and the provision of specialist equipment. Furthermore, the appointment of a long-term case manager and long-term support workers, as well as rehabilitation, were also proposed. The expert advised that the claimant was unlikely to return to full-time work and would probably retire early, and he advised it would be challenging for her to return to any sort of work. The judge considered that this expert's recommendation for lifelong care and case management, and single-level accommodation, were lacking in objectivity. He also considered it an abrogation of the expert's responsibility to avoid advising on causation relating to the accident while, at the same time, advising that the defendant should pay for lifetime case management and care. He found that this expert had not been prepared to separate accident-related factors from other factors.

The judge also found this to be the case in the evidence of one of the physiotherapists involved, who had made no effort to consider causation and the accident. In medico-legal reporting it was, said the judge, inappropriate to ignore advising on which complaints were caused by the tort and which were not.

Other experts were exemplary

It should be noted, though, that not all of the judge's comments were critical of the experts—far from it. He was full of praise for some of the experts, whom he found to be impressive witnesses. In several instances, experts who had been shown evidence gathered from social media or video surveillance were able to make supplemental reports qualifying their original findings. Some experts, even prior to the surveillance evidence, had been unable to account for some of the claimant's complaints and assertions, indicating that there was no discernible clinical basis for them. Ritchie J found these experts to have been 'fair and measured' and was grateful for the assistance they had given.

Lessons for expert witnesses

Even if claimants appear to be fundamentally honest, experts should keep in mind that there are going to be claimants whose erroneous statements are very believable because the claimant believes them to be true. As the American writer Seth Godin said, 'People don't believe what you tell them. They rarely believe what you show them. They often believe what their friends tell them. They always believe what they tell themselves.'

Rather than simply repeating matters reported to them by a claimant, experts should cross-reference these with other medical notes, video evidence, social media, employment and personnel documentation, and deal, clearly and objectively, with any contradictions found.

Experts should be able to prove the assertions they make in their reports. These assertions should be capable of withstanding reasonable cross-examination. All too often in this case, the experts' assertions fell at the first hurdle.

If new evidence becomes available, such as surveillance evidence, lawyers should ensure that experts see it. Experts should also avoid dogmatically adhering to initial findings if the evidence calls into question opinions they had given prior to such evidence being made available to them. Ritchie J said of one expert witness that watching the process of getting her to admit the claimant had given a worse account of her symptoms than was the reality was like watching counsel pushing a boulder up a steep hill.

It would be good practice for lawyers to instruct experts to consider later surveillance and social media evidence in a supplemental report, rather than leaving this to a joint report stage.

Experts should never lose sight of causation. They should always offer an opinion, where it is possible to do so, about which complaints are caused by the tort and which are not. If this is impossible to establish, they should say so. Failure to do this can be a breach of their duty to assist the court.

Conclusion

Williams-Henry serves as an excellent training manual for experts involved in personal injury litigation. The best of the expert evidence was a fine example of what is expected of the expert, but the worst was very bad indeed. **NLJ**

Dr Chris Pamplin is the editor of the UK Register of Expert Witnesses (*Jspubs.com*) and can be contacted on *chris@jspubs.com*. *Newlawjournal.co.uk*