Your Witness

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Issue 100

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Centenary issue... we're getting older!

Your Witness began way back in September 1995. Through its pages, we have charted the significant changes in the expert witness landscape over the intervening 25 years. To mark the milestone, on pages 4 and 5 we review the archive and pick out some of the major themes and events (every issue of *Your Witness* is available to member experts through our on-line library; just visit *jspubs.com/yw* to dip in).

Lack of experts in the Family Court

In Autumn 2018, the President of the Family Division, Sir Andrew McFarlane, established a working group to identify the scale of the problem of medical expert witness shortages in the family courts. He wanted to consider the causes and identify possible solutions. In November 2019, the working group produced a report confirming the nature and extent of the shortages of medical and other health professional experts, identifying a wide range of causes and proposing solutions. The report can be found by searching for '*Medical Experts in the Family Courts*' on Google.

MedCo funding crisis

Even before the present pandemic, MedCo (which operates the portal for low-value personal injury claims caused by road traffic accidents (RTA)) was reporting a fairly drastic fall in its income and a funding 'black hole'.

Since it first started in April 2015, MedCo has reported that operating costs have increased annually. What are the reasons claimed? That would be the provision of additional services, the cost of IT operations, increased staff resources, the cost of the MRO audit programme and its new accreditation scheme and CPD provisions. From 2016, though, income has fallen.

MedCo points out that medical reporting organisations (MROs) have traditionally been responsible for more than 90% of its annual income. However, there has been a significant reduction in the number of operational MROs since 2018, meaning that income has fallen. The only other main source of income is the annual fee paid by Direct Medical Experts (DMEs). Neither Indirect Medical Experts (IMEs) nor Authorised Users (AUTs) pay any fees to MedCo, despite the cost of providing them with various MedCo services.

MedCo has no employees and contracts out all its operational staff resourcing and business support to MIB Management Services Limited (MIBMSL). In February, MedCo said that, as a result of changes to MIBMSL's costs structuring, the annual service costs forecast for 2020 would increase. MedCo also pointed out that it has contracts with other third-party suppliers, some of which include the provision for periodic charge increases, as well as the ability to charge for ad hoc additional work requests and 'charges per registered user'.

In 2016, MedCo reported *c.* £5.8m in turnover. However, unaudited accounts for 2019 show that income has fallen to £2.15m, with expenses now almost £3.2m (an increase of 67% compared with 2016). The draft budget forecast for 2020 shows income falling further to £1.7m, while expenses are expected to increase dramatically to £3.85m.

With implementation of the Civil Liability Act in April 2020, MedCo is at the sharp end of all RTA claims being pursued, and insurers are prohibited from making any offer to settle without the claimant having undergone a medical examination. A new portal for claims worth less than £5,000 will almost certainly see an increase in the number of litigants in person, and all of this is likely to increase the financial burden on MedCo and make its funding position even worse. The portal has been designed specifically for litigants in person, and promises to be simple and user friendly.

In the light of all this, MedCo's directors have decided that a new charging policy should be introduced in 2020. It will be carried out in conjunction with a review of the current service levels provided and associated operating costs.

One option under consideration, and perhaps the most likely to be implemented, is the introduction of an 'all users pay policy'. This could mean that all solicitors and claims management companies who commission medical experts for whiplash claims would have to pay some sort of membership fee.

The government, along with the insurers' powerful lobbying body, has made no secret of the fact that a primary purpose of the April 2020 legislation is to target fraudulent claims. Such claims allegedly cost insurance companies millions annually. However, concurrent efforts to slash the cost to the courts and discourage claims has resulted in fewer solicitors prepared to undertake low-value RTA work (to say nothing of the genuine claimants who have been made to feel isolated and unfairly judged). Consequently, the number of solicitors who will be available to plug MedCo's black hole must surely be limited.

Perhaps the answer is that, after only 5 years, the system is already broken. Those who framed the legislative provisions might need to go back to the drawing board.

Chris Pamplin

The 'new normal'

COVID-19 has ushered in a 'new normal'

The outlook remains uncertain for many as we settle into a third month of lockdown and social distancing (odd phrase that, when physical distancing is what we are actually doing whilst working hard to continue our social links). Those who can, have found different and novel ways of working. If you have not yet experienced the sometimes stuttering and pixelated joys of Zoom, Skype or Google Meets, you are now in the minority!

When the lockdown came...

The justice system and the experts, lawyers and judges who work within it have had to be resilient, imaginative and adaptable. It now seems very long ago, but in February 2020, COVID-19 was, for many, not such a big deal – it was just a rather nasty dose of the flu. Once herd immunity was established, we were all going to be fine. By March, though, it was clear that the situation was rather more serious, and a few short weeks later we were all sent home and the UK went into lockdown.

The fallout was grave. We couldn't get our hair cut, couldn't order our favourite takeaway and, oh yes, all the courts closed and there was precious little work. Since then, many of us have settled into the challenges of trimming our hair (or worrying a little less about it), learning to cook and working from home.

... courts were unusually fleet of foot

For once, HM Courts and Tribunals was fairly quick off the mark. Judges found that they had a so-far unexplored programme on their laptops called 'Teams', which appeared to have installed itself but that had no immediately obvious use. Once the deeper mysteries had been explained, the judiciary proved rather adept and were soon navigating the channels and file folders with alacrity. Meetings no longer took place in court buildings but in a virtual world and, if anything, were more numerous than before. The Judicial Executive Board, for example, met twice daily for the first few weeks.

The first of the tribunals to go fully digital was the Health, Education and Social Care Chamber (HESC). It achieved its launch on 23 March using the Kinly platform rather than Teams.

Online hearings likely to continue post COVID-19

Using Skype, the Court of Appeal held a completely online hearing early on. It was an 'end of life' hearing in the Court of Protection before Mr Justice Mostyn. Writing about the experience, Mostyn J said:

> *'The hearing was conducted almost like any other. Each witness was asked to swear or affirm their evidence. I ensured the witness could be clearly seen on everyone's devices. Each counsel could introduce themselves, so the witness knew who was asking the questions, and expert witnesses were dealt with in the same way. Using Skype allowed parties to share video evidence, and documents could be shared on screen and discussed. The hearing was recorded and shared with all parties.'*

Feedback from those involved in the hearing was interesting and provides some useful lessons. Lawyers and experts, it seems, were pleased with how well it had gone. However, reports suggest that the ordinary witnesses and relatives were less impressed, having the impression that the judge and the lawyers were self-congratulatory, *'patting themselves on the back for good use of technology'*. Concerns were also expressed by some that they felt unappreciated, left out and disregarded.

However, balanced against this, it is necessary to consider how the responses of the relatives would have differed, if at all, if the hearing had taken place in the traditional, formal court setting. For those who have only experienced online video communication in the form of chatting with family on Facetime, it is, perhaps, not surprising that they should find they have a very different experience when taking part in a virtual court hearing.

Surprisingly, some judges found that parties prepared better for online hearings than they did for conventional ones. Others, though, reported that some participants were too casual. An American judge had the rather surreal experience of a shirtless advocate sitting by the pool!

Recording becomes the norm

By Easter, many Tribunals were holding hearings by telephone or video link. It was made clear that no hearing would take place using these methods unless it was recorded, so that it could be reviewed later and made available to the Press or Public if it became appropriate to do so. This is to protect the parties, to preserve transparency and the public interest, and also to protect the judge.

Some judges have expressed concern that these new practices give parties the means and opportunity to use mobile phone cameras, or other electronics, to record and distort what has been said. There is also the risk that individuals will utilise recordings of proceedings in tweets and other internet and media platforms.

Such behaviour does remain a contempt of court and is punishable as such, but it is not possible to say at the moment how much of an issue this is likely to be. (Coincidentally, we start a two-part series on covert recording on page 6.)

In April, the Nuffield Foundation produced a table estimating the numbers of audio and video hearings in March and April 2020. The Foundation reported that Tribunals had been able to hear approximately 60% of their usual workload, and that some Tribunals, including HESC, had achieved close to 100%.

A more in-depth research project was undertaken by the Nuffield Family Justice Observatory to provide clearer guidance for family courts. Its report was produced on 6 May 2020. The research looked at the experience of remote hearings of more than 1,000 respondents. The findings can be summarised as follows:

- Video hearings were considered more successful than telephone hearings from the parties' point of view.
- Not having face-to-face contact made it difficult to read reactions and communicate in a humane and sensitive way.
- It was sometimes difficult to ensure a party's full participation in a remote hearing.
- There were issues of confidentiality and privacy, particularly in cases involving domestic abuse, parties with a disability or cognitive impairment, or where an intermediary or interpreter was required.
- There was incomplete access to appropriate technology (for parties and professionals), and variable levels of technological capabilities, even among professional advisors.
- It was not always clear who was responsible for setting up and supporting the administration of hearings.

The range of experiences was wide and diverse. Some professionals working in the court system declared themselves very happy with remote working and found it actually improved their efficiency. However, others reported a negative impact on their health and well-being.

Of course, not all cases will be suitable for remote hearing. For example, what should be the court's approach to people with a disability? The Equality and Human Rights Commission has provided some guidance on dealing with disability when considering whether to direct a telephone or video hearing. Similarly, there have already been several cases in the family courts that were deemed unsuitable. The extent of the live evidence to be heard is also a factor[1]. Two cases in the family court dealing with remote hearings have reached the Court of Appeal[2,3], and in both cases the decision to proceed by way of remote or hybrid hearing was upheld.

The Technology and Construction Court has taken a robust approach and is likely to consider that the majority of its cases are suitable for remote hearings[4]. More guidance from the Court of Appeal is expected soon.

Necessity is the mother of invention

We have reported previously on attempts by the Ministry of Justice (MoJ) to move to more remote online working, and the mixed – well, frankly, disastrous – results of such efforts. Now that those who work in the court system have been forced to use this technology and have, to some extent, become comfortable and familiar with the concepts, it is highly likely that the justice system will continue with remote hearings, even when the current lockdown is behind us. In the justice system, the 'new normal' will be fundamentally different from what was commonplace before.

The technology advisor to the Lord Chief Justice, Professor Richard Susskind, said in December 2019 that those who were planning to be litigators should know that:

> *'... most disputes in the future will be resolved in online courts rather than in physical hearings. Other than in high value and complex cases, oral advocacy will diminish in significance as the years go by.'*

Post-pandemic, his predictions will have even more resonance. When the pandemic began, Remote Courts Worldwide (*https://remotecourts.org*) was launched by Professor Susskind. Its stated aim is to help the global community of justice workers to share their experiences of 'remote' alternatives to traditional court hearings. *Carpe diem*, Professor Susskind!

Of course, the greater use of technology is not confined to court hearings. MedCo (the portal for lower value personal injury claims resulting from traffic accidents) has indicated that remote video medical consultations would be acceptable during the pandemic, subject to its guidance. The Association of British Insurers issued a statement to say that this approach has been extended to medical reports falling outside MedCo's remit. The statement recommends conducting medical examinations by remote video examination where the injuries are capable of being assessed by a GP and clinical psychologist or psychiatrist. The statement adds that other categories of examination will be considered on a case-by-case basis and 'agreed wherever possible'.

The opportunity before us

Experts will have to get used to some new ways of working. This crisis has brutally exposed the 'digital divide'. There are some who have already invested in technology and are familiar with its use. They have minimised paper records in favour of digital ones, have systems in place for the efficient recording of their working time, and have installed advanced technology for digital communication. Such folk will have made the adjustment to efficient home working with ease, and will adapt seamlessly to new practices.

Those who have not will find the transition more difficult, and this may impact on their productivity and the profitability of their work.

Experts will be wise to ensure that they (and anyone they employ) are **properly equipped** and **trained to maximise productivity**. What better time for such reflection on future practice? Experts might also consider performing a **technology audit** to fully understand what additional technology might benefit their practice and enable a more complete digital solution. **Securing a competitive advantage may well involve ensuring that mobile working becomes an everyday part of their practice**, not just a temporary fix.

Conclusion

When the present crisis is over, the Ministry of Justice is likely to stand back and see what has worked, and what has not. From what we have seen, we strongly suspect that **remote hearings and the other digital working practices are here to stay**.

Crisis has brutally exposed the 'digital divide'

References

[1] For example, *Re P (A Child: Remote Hearing)* [2020] *EWFC* 32[2].

[2] *A (Children) (Remote Hearing: Care & Placement Orders)* [2020] *EWCA Civ* 583.

[3] *B (Children) (Remote Hearing: Interim Care Order)* [2020] *EWCA Civ* 584.

[4] For example, *Municipio de Mariana -v- BHP Group plc & Others* [2020] *EWHC* 928 (*TCC*)[3], although this case didn't itself involve live evidence.

The world has changed over the cour

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YOUR WITNESS

Newsletter of the UK Register of Expert Witnesses

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WELCOME TO OUR FIRST ISSUE

'THE RING OF COMPETENCE'

Your Witness Issue 1

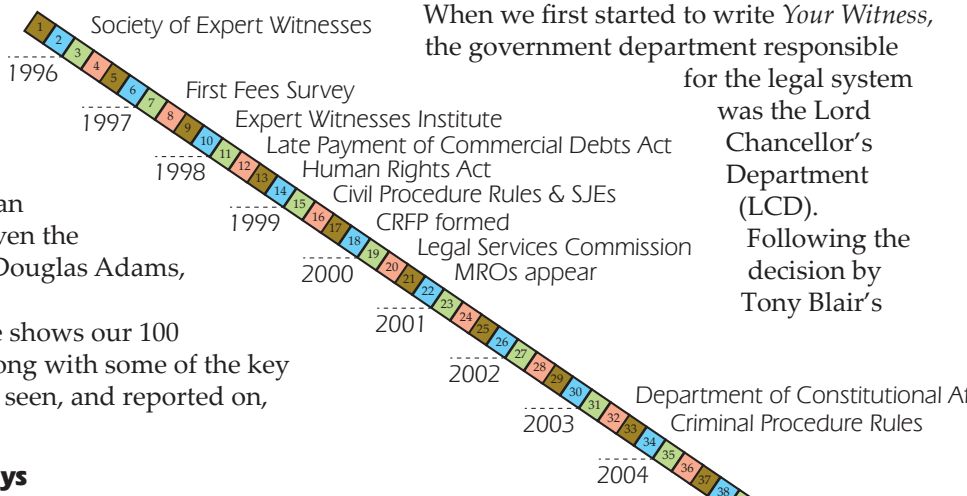
Your Witness has reached the milestone of its 100th issue. That is 25 years of covering everything surrounding expert witness practice in the UK.

Back in September 1995, the world was a very different place. Just how different is shown in this extract from issue 10 of *Your Witness*:

> *'If you recall the article on the World Wide Web published in the July 1997 edition of* Your Witness, *you will remember that it concluded with two points. The first was that a recent survey conducted by the Law Society revealed that only 7% of solicitors' practices have Internet access, and the second was that the World Wide Web is a powerful and enabling technology that everyone should embrace.'*

Yes, back when we began writing *Your Witness*, even the internet was, to quote Douglas Adams, 'a pretty neat idea'!

The graphic alongside shows our 100 issues on a timeline, along with some of the key developments we have seen, and reported on, over the past 25 years.



Expert witness surveys

We ran our first expert witness survey, focused on expert fees, in issue 9, September 1997. Since then, we have undertaken our survey every other year, with the most recent one being our 13th, in the summer of 2019. This series of snapshots of the expert witness arena has proven its worth over the years, with a number of government consultations being informed, and civil servant misconceptions corrected, through the insights the surveys provide.

Consultations galore

Whilst on the subject of consultations, the past 25 years has seen many come and go. The Legal Aid Board changed its name to the Legal Services Commission (LSC) during 2000, and then to the Legal Aid Agency in 2013. But in all its guises it's been keen on consultations. We were involved in a number of 'steering boards' and the like, but eventually came to recognise that such boards were far more about them being able to say how widely they had consulted than taking much notice of what their consultees had to say! We contributed to, amongst others:

- The Woolf Reforms during the late 1990s
- Civil Justice Council – *Accreditation of Expert Witnesses* in 2005
- Criminal Rules on Expert Evidence in 2005
- LSC consultation – *The use of experts* in 2005
- HM Revenue & Customs – *Review of the scope of the VAT exemption for medical services: the expert witness dimension* in 2006
- Ministry of Justice Consultation – *Legal Aid: Funding Reforms* in 2008
- Forensic Science Regulator's Consultation – *A review of the options for the accreditation of forensic practitioners* in 2009
- Ministry of Justice Consultation – *Legal Aid: Funding Reforms* (Jackson Reforms) in 2009
- Law Commission's Consultation – *The admissibility of expert evidence in criminal proceedings in England and Wales – A new approach to the determination of evidentiary reliability* in 2009
- Family Justice Review: *Expert Witnesses in the Family Court* in 2010.

The changing legal landscape

When we first started to write *Your Witness*, the government department responsible for the legal system was the Lord Chancellor's Department (LCD).

Following the decision by Tony Blair's administration to separate out the many roles of the Lord Chancellor, in 2003 the LCD was recast as the Department for Constitutional Affairs (DCA). But that didn't last long, as the DCA took control from the Home Office of probation, prisons and the prevention of re-offending, and was renamed the Ministry of Justice (MoJ) in 2007.

Meanwhile, many key cases were decided that had important consequences for expert witnesses. To pick out just two that had profound impacts, we had *GMC -v- Meadow* in 2005 and *Jones -v- Kaney* in 2011.

The *Meadow* case was one from a string of cases arising from baby death prosecutions. The fall out gave rise to the Crown Prosecution Service's *Record, Retain, Reveal* guidance about the handling of unused evidence. But it also shone a spotlight on the whole issue of expert evidence, how expert opinion evidence interacts with factual evidence, and, crucially, the importance of staying within one's area of expertise.

The *Kaney* case caused an enormous amount of interest in 2011. It revolved around the behaviour of an expert psychologist whose last-minute change of opinion caused those who had instructed her to sue her for damages following the collapse of their case. Until then, the presumption was that expert witnesses were immune from suit, as are other witnesses, as a matter of public policy. The case was bumped up

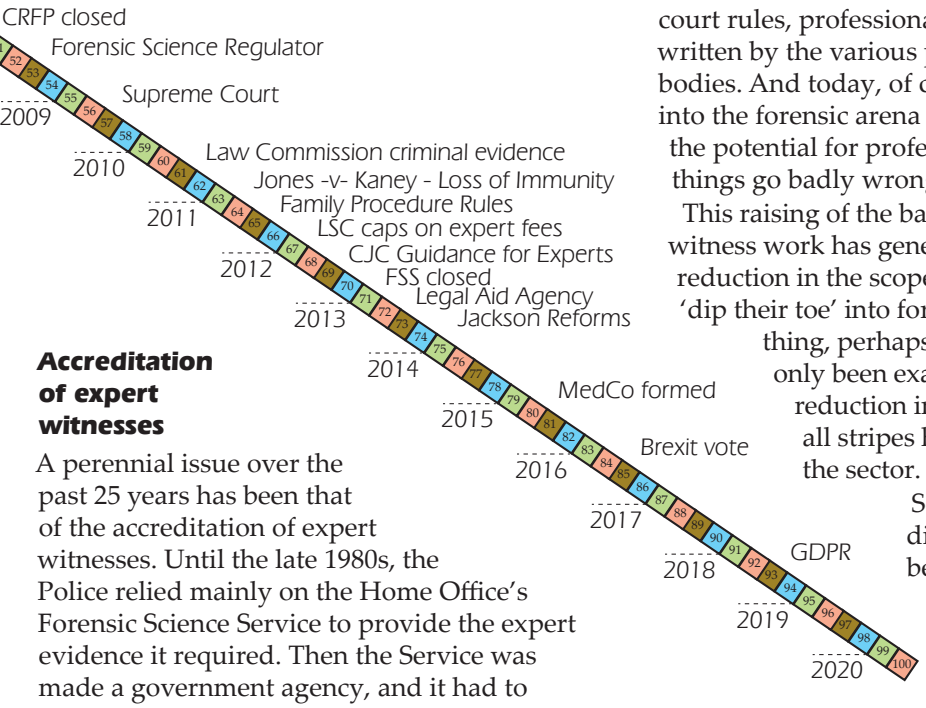
Massive changes in expert witness landscape over 25 years

rse of 100 issues of Your Witness

to the recently formed Supreme Court. By a split decision of 5:2, the Court decided we all had that wrong. Expert witnesses could indeed be sued for damages by those who had instructed them.

There was much concern in the run up to the judgment that it would have a chilling effect on the supply of professionals willing to take on the role of expert witness. We had already seen with *Meadow* that a sideline in forensic work could jeopardise an entire professional career. (Professor Meadow was struck off the medical register by a GMC panel, though that sanction was never applied.) Now we had experts open to money claims by disgruntled claimants. But the reality was that most professionals are well used to carrying professional indemnity insurance for their day job, so adding in cover for expert witness assignments wasn't that much of a change.

Kaney did, though, prompt us to introduce our bespoke *Professional Indemnity Insurance* scheme for members of the *Register*. It has saved hundreds of expert witnesses many thousands of pounds in insurance premiums in the period since *Kaney* was decided. It also acted to keep premiums from other providers lower than they might have been. With the option to buy a run-off policy when an expert retires from active expert witness work, the scheme provides 6 years' protection against any claim that arises on completed cases.



Accreditation of expert witnesses

A perennial issue over the past 25 years has been that of the accreditation of expert witnesses. Until the late 1980s, the Police relied mainly on the Home Office's Forensic Science Service to provide the expert evidence it required. Then the Service was made a government agency, and it had to start earning its way and competing for work with independent forensic scientists. Many of these independent experts were, of course, top-notch, but sadly not all. Doubtless it was this, in part, that prompted the Home Secretary to promise in May 1998 financial support for the establishment of the Council for the Registration of Forensic Practitioners (CRFP). This body lasted nearly a decade until, in 2007, having failed to build itself a sustainable funding base, the Home Office abruptly pulled its funding and instead set up the office of the Forensic Science Regulator. Meanwhile, many had, and indeed still do, call for the mandatory accreditation of expert witnesses. The calls became so loud that the Civil Justice Council convened a forum in 2005 to consider whether mandatory accreditation was desirable. The Forum was clear that it wasn't. But that hasn't closed the issue, as those who would be accreditors continue to call for accreditation of one type or another. I still ponder what exactly there is to accredit in an expert witness's ability to form an opinion and bear witness to it.

A deeply regrettable (for us, at least) codicil here was the closure of the Forensic Science Service in 2012. The attempt to replace it with a purely market-based system has many critics.

Huge growth in regulations and loss of immunity

Dipping the toe no longer an option

When we began writing *Your Witness*, the rules and regulations covering expert witness work were fairly well encapsulated in just a few short paragraphs from Cresswell J, in his decision in the shipping case known as the *Ikarian Reefer*... and nobody could sue you if things went wrong! But even those 'seven pillars of wisdom' were not all that secure, as Anthony Speaight QC explained in an invited piece way back in issue 7... and it's still worth reading today. All issues of *Your Witness* are available at *jspubs.com/yw*.

Now our bookshelves are weighed down with court rules, professional guidance and protocols written by the various professional regulatory bodies. And today, of course, when experts step into the forensic arena they open themselves to the potential for professional or civil sanction if things go badly wrong.

This raising of the barriers to taking on expert witness work has generated a significant reduction in the scope for busy professionals to 'dip their toe' into forensic work. That is no bad thing, perhaps, but it is a trend that has only been exacerbated by the relentless reduction in fees that governments of all stripes have imposed on parts of the sector.

So, the 1990s was a very different time, and not just because the World Wide Web was a powerful and enabling technology to be embraced!

A big 'thank you' to you, our loyal reader!

Thank You

Finally, we wouldn't have written for 25 years without the support of the thousands of expert witnesses who have been part of the *Register*'s life. We would like to thank you, thank them, and give an extra-special mention to the 174 stalwart experts who have been with us all the way!

Covert recording – Part 1: Cutting the

Ease of digital recording opens can of worms

We are living in an electronic world, a world in which seemingly there is an app for every occasion. Almost everyone now carries a mobile device in the form of a smart phone with which high-quality digital video and audio recordings can be made with ease. Microphones and cameras are everywhere, and most people can make recordings either overtly or covertly. For some litigants, the ease with which covert recordings can be made has proved to be a temptation too strong to resist.

Covert recordings in the civil court

Evidence in the form of a recording can be very useful and probative. But its increasing employment, the ease by which covert recordings can be made and the near trivial ability to make 'deep fakes' give rise to a number of ethical questions. It is perhaps surprising, then, that there have been only a few cases where the admissibility or desirability of such evidence has been considered directly by the courts.

The family court has ruled on just a handful of cases involving the covert recording of children, and a few cases that have involved the secret recording of interviews with professionals. We will look at the family court's approach in detail in Part 2 of this short series, but for now we will turn our attention to the civil courts.

When pondering the desirability of such evidence, the court will consider a number of factors and may look beyond the content of the recording itself, to what the recording says about the person making it.

Mustard -v- Flower

The issues posed by covert recording were considered in *Mustard -v- Flower*[1]. The claimant in a personal injury case had sustained injuries in a rear-end shunt for which the defendant was liable. The severity of the impact was in issue. The claimant, who had a complex medical history, was said to have sustained injuries leaving her with cognitive and other deficits. However, there were marked differences between the expert witnesses as to her presentation and the interpretation of her medical records, imaging and history. According to the defendant's experts, the claimant had suffered no, or only minor, brain injury. Meanwhile, the claimant's experts said that she had suffered a serious brain injury with subtle manifestations. The claimant's solicitors advised her to record her examinations by the defendant's medical experts. In two cases, including an examination by the defendant's neuropsychologist, those recordings were made covertly. The neuropsychologist had agreed to the recording of the clinical examination but not of the tests.

Data protection and level playing field arguments fail

Evidence from the British Psychological Society (BPS) was adduced to show that the dissemination of test materials was regulated for reasons relating to the continuing validity and efficacy of the tests, which would be impaired if released into the public domain, and for copyright reasons. The claimant did not record examinations by her own experts.

The defendant insurer applied for an order excluding evidence from the covert recordings. The claimant resisted the application, claiming that they revealed serious errors by the neuropsychologist in the administration of the testing.

Data protection concerns waved aside

The defendant raised objections to the admitting of the recordings on the grounds that they were unlawful under both the Data Protection Act 2018 and Regulation (EU) 2016/679 and gave rise to an unequal playing field, given that only the defendant's experts had been recorded. It was further contended that 'covert' evidence:

'*a) raised issues regarding the proprietary rights in the tests, which were not for release into the public domain*

b) rendered the claimant herself essentially 'un-assessable' on any future occasion

c) undesirably conferred on the claimant's solicitors 'insider knowledge' of the content and methodology of the tests, and

d) by reason of the foregoing, raised professional conduct issues.'

Dealing first with the lawfulness or otherwise of covert recordings, the court noted that the BPS documentation specifically contemplated the release of test materials in the context of litigation and under controlled conditions. There was no contention that the manner of obtaining the recordings should, of itself, lead to their exclusion. The court had to consider the means employed to obtain the evidence, together with its relevance and probative value, as well as the effect that admitting or excluding it would have on the fairness of the litigation process and the trial.

The court found that Article 2(c) of the EU Regulation provided that it did not apply to the processing of personal data by a natural person in the course of a purely personal activity. The court was satisfied that recording a consultation with, or examination by, a doctor fell into that category. The fact that the claimant supplied the recordings to her legal advisers did not alter that conclusion. Further, the data related to the patient, not the doctor. Therefore, while the covert recordings lacked courtesy and transparency, they were not unlawful.

The civil court, then, is taking the view that the data protection argument can be largely dismissed on the ground that such recordings fall into the 'personal activity' category.

Probative value of covert recordings

Turning to the probative value, the court found that the recording of the neuropsychologist's evidence was probative and highly relevant. The conduct of her examination, and her administration of the neuropsychological tests, had been brought into doubt. It would be highly

artificial for the claimant or the experts to give evidence without reference to those matters.

On fairness

Addressing the question of fairness, the court was mindful that the claimant's stated reason for wishing to record her examinations with the defendant's expert witnesses was to protect her interests, having regard to the vulnerabilities she maintained had resulted from the accident. It was understandable that such motivation, if genuine, applied with particular force to the defendant's expert witnesses and not her own. The idea that there was not a level playing field was merely theoretical because the defendant had not raised any query that a recording of the claimant's expert witnesses would assist in resolving. This implies that, had the defendant done so, the court would have needed to consider the question of inequality. In the circumstances of this case, the balance favoured admitting the evidence, and the court ordered that the test papers used in the testing of the claimant were to be disclosed in redacted form to one expert witness only.

Judge calls for routine recording

Although it did not form part of the formal judgment, the judge said, as an aside, that it was **in the interests of all sides that examinations conducted by medical experts in personal injury claims were recorded so as to provide a complete and objective record** of what occurred in the event of disputes. Such recordings should be made in accordance with an **agreed industry-wide protocol** and be subject to appropriate safeguards and limitations on use. While that may be a desirable thing, as matters currently stand there is no useful guidance or safeguard in place.

In *Mustard*, a witness statement had been prepared by Professor Gus Baker, Member of the Executive Committee of the BPS's Division of Neuropsychology and former Chairman of its Professional Standards Committee. Professor Baker had co-authored a Position Paper on '*Guidelines for the recording of Neuropsychological Assessments*', which advised that:

> *'... neuropsychologists should not allow patients to make their own recordings and should, indeed, discontinue the assessment if covert recording came to light'.*

However, testimony was heard that such recording was actually commonplace, a point reinforced by evidence that the General Medical Council and other medical defence organisations in the UK had come to accept that patients can legally make covert recordings of their consultations with a doctor. Master Davison deliberated that, even though the application concerned a 'thorny topic', recording by covert means was not very susceptible to general guidance that could be applied across the board. The matter therefore needed to be resolved on a case-by-case basis.

Given the lack of faith exhibited by some litigants in experts and other professionals, recording has the ability to address the 'balance of power' and obviate the need for what would otherwise be blind trust. However, having a recording (whether overt or covert) does not necessarily assist in, for example, validating a psychiatric examination, and may well introduce further variables. For example, a psychiatrist assessing a claimant's temperament and volatility by pursuing sensitive lines of enquiry may be wary of pressing a claimant to answer a question, or be reluctant to be assertive in their questioning, due to concerns that this could be deemed, from a recording, to reflect badly on them, particularly if the claimant becomes upset or angry.

What of 'deep fakes'?

There is another aspect to covert recording, or recordings made by one party only, and that is the growing ability for digital audio or video recordings to be altered by the method known as 'deep fake' technology. The deep fake video of former President Obama, which literally put words into his mouth, is well known. Despite the amusing aspects of deep fakes, they have a more sinister side. The technique has been used to falsify recordings in at least one family law case. Family lawyer Byron James reported that voice forging software was used to create a fake recording of his client threatening another party to a dispute. The recording was convincing and difficult to disprove. Byron James points out that **although the more high-profile hoaxes can be exposed quickly by mainstream media, lawyers and judges, who are used to taking recorded evidence at face value, are less likely to question such footage in day-to-day practice**.

Guidance is needed, but until then...

It is clear that some form of guidance is needed urgently. Until then, **experts should, perhaps, act on the assumption that they are being recorded**. It would make sense for medical consultations and assessments, for example, to be recorded as a matter of course, preferably with the consent of all concerned. This is notwithstanding that the act of recording can, in itself, give rise to some unwelcome and problematic consequences. It must be better to deal with those than risk being ambushed by a covert recording. The recommendation of Master Davison is that an agreed protocol is the way forward. There would then be no need or incentive for covert recording, so that such cases would be unlikely to arise in the future. If they did arise, the protocol would guide the outcome of an application. He expressed the hope that the relevant organisations would give attention to this. Although his recommendations were made in relation to personal injury cases, we suggest that the benefit of guidance and protocols will be welcomed in all jurisdictions that might have similar experiences.

Assume you're being recorded and act accordingly

References

[1] *Mustard -v- Flower* [2019] *EWHC* 2623 (*QB*).

Services for registered experts

UKREW PI Insurance

Expert witnesses listed in the *UK Register of Expert Witnesses* have exclusive access to our bespoke professional indemnity insurance scheme. Offering cover of, for example, £1 million from around £220, the Scheme aims to provide top-quality protection at highly competitive rates. Point your browser to *www.jspubs.com/pii* to find out more.

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 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 72). 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 regular 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. Point your browser at *www.jspubs.com/books* to find out more.

Court reports – FREE

Full access to the complete *ICLR.3 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.

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