Your Witness

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R v Pabon – an update

In the last issue of *Your Witness* we reported on the case of *R -v- Pabon* [2018] *EWCA Crim* 420 in which the Court of Appeal was asked to adjudicate on whether unsatisfactory expert evidence given in a fraud case was sufficient to render a conviction unsafe.

In a judgment that was elegantly reasoned, the Court dismissed the appellant's appeal against his conviction for rigging the London Interbank Offered Rate (LIBOR), despite concerns as to the expertise of a witness. The expert's evidence had been seriously deficient. He was criticised by the court for, among other things, straying into areas that were beyond, or at the outer edge, of his expertise; failing to inform the Serious Fraud Office (SFO), or the court, of the limits of his expertise; obscuring a colleague's role in preparing sections of his report; and flouting the judge's instruction not to discuss his evidence with third parties when he was still in the witness box.

The issues raised by the case have since resulted in a further development that is worthy of mention. In a letter to the Chair of the Justice Select Committee (JSC), the Director of the SFO confirmed that the appeal raised questions about the SFO's processes for instructing expert witnesses. Consequently, the SFO had taken the opportunity to review its relevant processes and, as a direct result of that review, it was planning to introduce the following modifications:

- front-loading certain **due diligence checks** prior to formal evaluation of prospective expert witnesses
- requiring such **individuals to confirm their understanding of their legal duties and disclosure obligations** at an early stage
- ensuring **consistency of approach to formal evaluation** by scoring prospective expert witnesses against standardised criteria (together with other case-specific requirements) to assess their suitability and expertise, and
- enhancing **conflict checks** of the preferred candidate prior to engagement.

It seems to us that this smacks of a knee-jerk reaction by the SFO to anticipate and head off any criticism that might come its way, while any objective analysis of the proposed modifications leads one to question the procedures that were already in place. Naturally, it should be expected that the SFO employs some sort of process for the vetting and selection of suitable experts, but the proposed steps outlined in its communication with the JSC are so obvious and basic that one is left to wonder what they have been doing up to this point and whether they had any cohesive assessment procedure at all!

Paediatricians as expert witnesses

On 7 August 2018, the Family Justice Council and the Royal College of Paediatricians and Child Health jointly published *Paediatricians as expert witnesses in the Family Courts in England and Wales: Standards, competencies and expectations* (the Guidance) which is intended as a companion document to be read with the standards and expectations contained in the practice directions to Part 25 of the Family Procedure Rules 2010. The Guidance covers:

- the role of paediatricians as expert witnesses in family proceedings
- the role of the paediatric team when assessing the child with suspected maltreatment
- the role of the professional witness
- regulation and codes of conduct
- issues in relation to competencies
- supervision/peer review, and
- quality of service.

The Guidance explains the process of being a court-sanctioned expert witness and the need and desirability for expert witness training. We provide a summary on page 5 of this issue. As the Guidance suggests, much of the information it contains could be applied equally, and will have relevance, to medical expert witnesses working in other fields.

Revision to CrimPR for expert reports

The Criminal Procedure Rule Committee received representations from the Forensic Science Regulator that among forensic science providers the current Criminal Procedure Rule 19.4 was being interpreted thus: to require an expert witness to identify in his or her report every assistant who has contributed in any way, however small, to the outcome of a test or experiment – by preparing laboratory equipment, for example – and not just those assistants on whose representations of fact or opinion the expert relies. In the Committee's view such an interpretation of the rule goes beyond what the rule or section 127 of the 2003 Criminal Justice Act requires. To clarify the intention of the rule, the Committee has adopted the language of the Act itself in the revised rule 19.4 (which came into force on 2 April 2018).

The text of the revised rule can be found at *www.justice.gov.uk/courts/procedure-rules/criminal/docs/2015/crim-proc-rules-2015-part-19.pdf*

Chris Pamplin

Regrettable politicisation of the just

Cost-driven assault on the justice system continues

The last two decades have been characterised by an unrelenting quest by the Ministry of Justice (MoJ) to make ever greater savings and to pare to the bone the service the ordinary litigant may expect from the courts. In the eyes of many, this is a scandalous state of affairs that should have no place in a free and democratic society.

The MoJ funding cuts are really no different from those exercised over the railways by the now much denigrated Dr Beeching. Responses to short-term problems often have undesired and long-term consequences. In Beeching's case, our rail system was scarred permanently by his cuts and is unlikely ever to recover without massive State intervention and investment. The same is probably true of the under-funding of our health services, and there is every sign that our justice system is going the same way.

The problem is that the funding cuts at the MoJ form part of a political agenda. The provision of justice, and the decisions made in relation to it, therefore become politicised, and this colours every decision taken from the top down. Over time, the political agenda assumes paramount status that pervades the decisions of civil servants, judges, tribunals and government agencies.

To further political objectives, government departments employ advisers and managers (with no background or expertise in the department's area of responsibility), often at huge salaries, purely to administer the cuts and savings. And most government departments also employ boards of non-executive directors, many of whom are drawn from this management tier. Their lack of knowledge and understanding renders them incapable of seeing the real long-term damage being caused.

A lesson from Beeching

Dr Beeching was a classic example of a political appointee with an agenda. He was a physicist with no practical knowledge of railways, and an affiliate of the political party in power at the time. He was appointed as the first Chairman of the British Railways Board by the then transport minister, and his task was to return the railways to profitability. This he did by making large-scale cuts that ultimately resulted in Britain losing some 6,000 miles from its railway network as well as many of its railway stations.

History shows politically driven cost cutting can cause real damage

Beeching's critics accused him of making gross errors in his calculations (or even of massaging them to fit political will), ignoring the social consequences of his proposals, encouraging greater car and road use, and ignoring other possible economies that might have saved lines and stations. Indeed it has been suggested that, in reality, his action was a conspiracy against the railways involving politicians, civil servants and the road lobby. And what was his reward? A then unprecedented salary which was more than double that of the incumbent Prime Minister!

Any suggestion that the UK has a truly independent judiciary must be viewed with a fair degree of scepticism. Indeed the traditional concept of the separation of powers has come under the stress of increasing government intervention across a range of social and legal issues.

Expert witnesses are not immune from the effects of politicisation. Experts have seen the erosion of legal aid, the restriction of access to the courts for whole swathes of Society, the capping of fees and myriad other measures seemingly designed to save money with scant regard for continuity, quality of service and accessibility to legal services.

Chris Pamplin (Editor) has first-hand experience as a consultee to the MoJ. When consultees were asked to consider the suggestion of introducing caps on expert witness fees, the civil servants were not interested in listening to ideas about how cost savings could be realised from smarter working practices. In fact they just wanted the (for ministers) easy-to-understand cap, regardless of the risks to access to justice.

Asylum Tribunal

Recently, the case of Dr Alan George has served to highlight one of the least palatable examples of an exercise of political will by the court system and government agencies.

There has long been a concern expressed by the Government at the number of asylum cases called before the courts. There is undoubtedly a political will to reduce these numbers, and to increase the number of rejected asylum cases. It appears that, at least in one case, the Asylum and Immigration Tribunal has overstepped the mark in what is acceptable in achieving such a reduction.

Dr George, an expert on the Middle East and an academic of Oxford University, had been invited to provide evidence in the case of a woman who was due to be deported to Lebanon. In a judgment published on its website, the Tribunal made adverse comments about Dr George and warned that in future the accuracy of his evidence should be treated with caution. The warning was seized upon by another tribunal in which he was involved, concluding that it was entitled to have 'fears about his objectiveness'. Dr George alleged that the Legal Aid Agency (LAA – the funding body in these tribunals), presumably in response to the comments of the tribunals, had unfairly denigrated his character, unfairly reduced, capped and refused his fees, and unfairly subjected his work and fees to excessive assessment, review and audit from spring 2011 until autumn 2013.

Following complaints by the expert and accusations of libel made against the Tribunal, the comments made by the Tribunal were withdrawn. Indeed, the Tribunal admitted that its remarks had been inappropriate.

In a case that, as far as we know, is the first of its kind, the Tribunal agreed to issue a public apology and to pay costs and libel damages to the expert. The LAA was ordered by the Parliamentary and Health Service Ombudsman to apologise to the expert and pay £10,000 for causing him distress by excessively auditing his bills.

Justice Select Committee weighs in

As might be expected, these events caused something of a stir in Westminster. The House of Commons Justice Select Committee asked the LAA to provide assurances that lessons had been learnt from the handling of the complaint. In response, LAA Chief Executive, Shaun McNally, wrote to the Committee in June 2018 to confirm that **the Agency has re-evaluated its complaints-handling process**.

The legal press reported McNally's assurances. Following the creation of a new team to scrutinise and investigate complaints of a similarly complex nature, there will be greater objectivity by the LAA when complaints are investigated. He said that record-keeping has been improved by increasing digitisation across case management. Dedicated email addresses have been established for external stakeholders, and assurance processes have been updated and guidance issued to staff to make it clear how they are expected to handle concerns regarding requests for funding.

Of course, this is precisely the sort of Orwellian newspeak 'blah' we have all come to expect. It is difficult to see quite what it means in practice, if it means anything at all! There is, though, an underlying and, on the face of it, quite sinister side to this, and it deserves fuller investigation.

It was reported in *The Guardian* newspaper that some experts say the incidents involving Dr George are but the latest examples of unacceptable measures taken by immigration judges seeking to reject asylum claims. This raises questions about the integrity of the asylum appeals system itself. Dr Sabah al-Mukhtar, a specialist on the Middle East who has been instructed as an expert in a number of asylum cases, said that '**impartiality is a non-existing concept**', and the **political agenda to reduce the number of immigrants tends to colour the view of those sitting in judgment**. Another expert said that there has been a **desire by the adjudicators to fall in line with the Government's anxiety about asylum**.

It also seems that Dr George's experience is not unique and that the Tribunal has made public statements about other experts. In one instance, the Tribunal implied that an expert was biased and his evidence had been influenced by payment. That expert told *The Guardian* that 'it beggars belief that the court can create such extraordinarily invidious comments in a public document.'

This unhappy state of affairs prompted a number of prominent academics to write a letter to Sir Henry Hodge, the President of the Asylum and Immigration Tribunal. In that letter, the academics accused the tribunal of allowing expert witnesses to be 'harangued, unreasonably and abusively, over matters that are self-evidently irrelevant'.

It was reported that the experts were dismayed that **the Home Office, when confronted with expert reports it could not challenge, would routinely resort to attacking the integrity and credentials of the experts**. The judges, they said, did not usually intervene to support and protect experts from such abuse. The experts also drew attention to the regrettable practice that had evolved where, in their written determinations, **judges often recorded the unjustifiable attacks** on the experts, thereby conferring a degree of legitimacy upon them.

Expert witness evidence is often crucial in asylum and immigration cases. The specialist knowledge of conditions prevailing in a particular part of the world is knowledge a judge or tribunal will rarely possess. Consequently, independent and objective expert opinion will be of considerable assistance to the tribunal in reaching a correct and just determination. However, according to Dr George and others, unwarranted attacks on experts are now a relatively frequent occurrence and call into question the motives of those judges who indulge in such conduct. As a result, there are now real fears that an increasing number of experts will withdraw from giving evidence before the Tribunal to protect their reputations.

In relation to the conduct of the LAA, Dr George told the *Law Society Gazette* that the Agency's proposed procedural changes were welcome. Nevertheless, he expressed concern that fundamental deficiencies had been identified and addressed only as a result of the ombudsman's investigation. This, he said, did not reflect well on an organisation that spends an annual £1.7bn of public money.

On the broader issues posed by the remarks made by the tribunal, it must, of course, be acknowledged that tribunals should be able to criticise experts when there are flaws in the expert's work. However, it is quite **unacceptable for adverse and unwarranted criticism of an expert by one tribunal to be used by a second tribunal to discredit the expert**. A more egregious example of 'playing the man, not the ball' is hard to conceive.

Speaking to *The Guardian*, Dr George said that 'this sort of attack can have very serious consequences for one's reputation and on one's livelihood, but ultimately it's justice that is going to suffer.' The writer echoes and concurs heartily with that view.

Philip Owen

Asylum experts are at the sharp end of the politicking

In the end, it's the justice system that will suffer the most

Experts on the carpet

Fair process suggested before the court can criticise an expert

The ability of the court to report a failing expert to a professional body with a view to considering disciplinary procedures is long established. But it is less common for the court to conduct its own investigation into an expert's conduct. As officers of the Supreme Court, solicitors can face a formal procedure in which they have to show why they should not be referred to their regulatory body. It has been suggested in a recent case that expert witnesses should be subject to a similar procedure.

The circumstances in which solicitors can be made subject to such formal enquiries and the steps that can be taken by the court are set out in *Hamid*[1] as refined in 2018 by the High Court in *Sathivel*[2]. Both were immigration cases.

In *Hamid*, a Bangladeshi national had been served with removal papers. His representations through immigration advisors were rejected. Following further unsuccessful applications, his solicitor filed a last-minute application for removal to be deferred on the day before it was due to take place. In breach of regulations, the application contained no statement of the reasons for urgency. The court decided that this was an application without merit designed simply to buy more time.

How courts deal with time-wasting lawyers

The Judge, Sir John Thomas, took the view that late applications made with no merit were an intolerable waste of public money, a great strain on the court's resources and an abuse of a service offered by the court. Furthermore, they could amount to professional misconduct. The most vigorous action would be taken against any legal representatives who failed to comply with the rules. He established that failure to provide the information required, and in particular the lack of any explanation for the urgency claimed, would result in the solicitor from the firm responsible, together with the senior partner, being called to attend in open court. Persistent failure to follow the procedural requirements should be referred to the Solicitors Regulation Authority (SRA).

In *Sathivel*, Sharp LJ followed *Hamid* and further strengthened the sanctions and procedures. The case involved an investigation into the actions of three different firms of solicitors, all of which had potentially fallen short of the required professional standards. Sharp said that when making applications, solicitors:

- had to **act candidly** and **bring to the court's attention gaps in their evidence**
- had to **avoid delaying the bringing of urgent applications**, and
- **should not advance grounds where they were wholly without merit** with the aim of causing delay.

He said the court should make use of a 'show cause' letter. It was envisaged as a precursor to a formal reference to the SRA and should require the recipient to show cause why a referral to the relevant professional body for disciplinary proceedings should not be made.

'Show cause' extended to expert witnesses

In a further development earlier this year, the procedures advocated by *Hamid* and *Sathivel* have been extended to cover the conduct of expert witnesses. In *Gardiner & Theobald LLP -v- Jackson*[3], the Upper Tribunal considered the extent to which conditional and other success-related fee arrangements were compatible with an expert witness's obligation to the tribunal to act independently. While it did not determine whether the approach in *Factortame*[4] should be followed by tribunals, it indicated that it was **unacceptable for an expert witness, or the practice for which he worked, to work on the basis of a conditional fee arrangement without having declared that fact to the tribunal and the other parties at the outset**.

Following the ruling in *Hamid*, the Upper Tribunal convened a hearing to give the expert an opportunity to make representations in response to its concerns about the accuracy of declarations made in his expert report. The tribunal ruled that **where an expert had, or might have, failed to comply with a professional code of conduct or the tribunal's procedural rules, the tribunal could, exceptionally, hold a hearing to allow the expert to explain what had happened. If the expert report was found to contain declarations that were materially incorrect, or appeared to be in breach of the expert's professional code of conduct, the tribunal was likely to take that matter into account in relation to costs and refer it to the expert's professional body.** Any notion that the declarations in an expert's report were a mere formality had to be dispelled.

Sir David Holgate said **experts owed the same duty of candour to the court as solicitors**. Following the example set by the High Court in *Hamid*, the Upper Tribunal would, if necessary, require them to provide written explanations for their behaviour. The *Hamid* procedure and the issuing of a show cause letter, said Sir David, provided an opportunity for the expert concerned:

- to propose an explanation for what occurred
- to identify the lessons learnt and the actions taken, and
- to give assurances about steps that will be taken to prevent similar issues arising again.

He thought that a statement of that nature might satisfy the court in some cases without the need for a referral to a professional body.

Sir David went on to pay tribute to the great majority of experts who discharge their obligations impeccably. He said that the tribunal relied heavily on the independence, diligence, expertise and skill of the wide range of experts who appeared before it. He acknowledged that the use of the *Hamid* procedure should only be considered necessary in exceptional circumstances. However, the availability of this option does reinforce the fact that all professional representatives and experts must comply fully with their obligations.

References

[1] *R (on the application of Hamid) -v- Secretary of State for the Home Department* [2012] *EWHC* 3070 *(Admin).*

[2] *R (on the application of Sathivel) -v- Secretary of State for the Home Department* [2018] *EWHC* 913 *(Admin).*

[3] *Gardiner & Theobald LLP -v- Jackson (Valuation Officer)* [2018] *UKUT* 253 *(LC).*

[4] *Factortame Ltd -v- Secretary of State for the Environment, Transport and the Regions (Costs) (No 2)* [2002] *EWCA Civ* 932, [2003] *QB* 381.

Guidance for paediatricians

Paediatricians as Expert Witnesses in the Family Courts in England and Wales: Standards, competencies and expectations[1] (the Guidance, see page 1) is divided into eight sections, the first of which contains a general introduction to its scope and application.

Part 2 identifies the **role** of paediatricians as expert witnesses in family proceedings and the **duty owed to the court**, the majority of which will already be familiar to expert witnesses. The guidance stresses the importance of experts **staying within their own clinical field** when giving expert evidence.

Part 3 contains specific **guidance on the role of the paediatric team when assessing a child with suspected maltreatment**. It points practitioners to the standards for assessment and makes recommendations regarding who should lead the team, the qualification for those carrying out the assessment and the degree of supervision. The Guidance identifies the nature of the assessment and the procedures likely to be involved. It also recognises that the clinical assessment is a skilled process combining scientific evidence and evidence-based guidelines with a clinical and forensic interpretation of findings. The treating paediatrician will often have worked within a multidisciplinary team and drawn on the clinical expertise of others.

The Guidance **differentiates the role of the treating clinicians from the expert witness** and outlines the work that a treating team should have conducted when dealing with a potential child protection case. Part 4 of the Guidance illustrates how treating paediatricians may be called as a *professional* witness to give evidence in relation to their clinical role in the case.

Conversely, Part 5 of the Guidance deals specifically with the regulation and codes of conduct for the expert witness. Stress is placed on **the need for expert witnesses to adhere fully to Part 25 of the Family Procedure Rules (FPR) and its Practice Directions** (PDs) and to comply fully with all standards set down regarding those providing expert opinion. The Guidance recognises, however, the inevitable tension between the need for quality and rigour against the time and costs allowed by the court and funding. It acknowledges that 'quality' is dependent on a suitable number of hours and resources being available to complete the work in an ethically sound manner.

The Guidance gives a steer on the information that should be provided to the court so it can make an informed decision regarding the permitted scope and range of data made available and any consequences therein.

Part 6 imposes a requirement that **all paediatricians giving expert opinion must maintain current GMC registration** which includes annual appraisals and five-yearly re-validation to maintain clinical practice in their field of expertise.

The Guidance also highlights the requirement for expert witnesses to **agree the questions and remit of the letter of instruction**, ensuring that they are providing evidence within their expertise. Expert witnesses are reminded that the Practice Directions require that a draft letter of instruction is provided to the court for approval.

Part 7 deals with the **need for supervision and/or peer review**. The Royal College of Paediatricians and Child Health (RCPCH) states that **it is best practice for paediatricians working in the child protection field to engage in regular supervision and/or peer review in relation to all aspects of their professional activities** as this helps to ensure practice is current, reflective and of an appropriate and consistent standard. It also expects them to obtain regular support, especially in relation to complex matters or new areas of application.

The final part of the Guidance deals with **'quality of service' and the court's expectations** of a paediatrician acting as an expert witness. In particular, it sets out in some detail the nature and extent of the information that should be provided in the **expert's CV** and the need for the expert witness to respond to questions on all aspects of this to ensure clarification with regard to regulation and professional competence in the relevant matter.

As stated previously, the Guidance expects that experts will work within the relevant codes of conduct as well as the PDs and FPR. This may include, for example, raising concerns regarding **ethical considerations**, including where the guidance or instruction indicates too few hours to complete the requested expert assessment. Experts must be **transparent** in their dealings and should clearly **set out details of their fees, hours of work and time-frame of the assessment**. They will be expected to **communicate any variation promptly** throughout the assessment process.

Other requirements include, for example, the need for all paediatricians to be **registered with the Information Commissioner's Office** through the organisations they work for and **compliance with data protection legislation**.

Experts who are not qualified or eligible for paediatrician status, or membership of the RCPCH, but who may have relevant child health knowledge may still be appointed at the court's discretion. However, it should be made clear that these individuals are not being appointed as paediatricians but under the auspices of other professional frameworks, such as health visitors, school nurses and nurse practitioners with additional child health or child development expertise and training.

Legal practitioners have been advised that they should ensure that a letter of instruction to a paediatrician either provides a copy of the Guidance or directs the expert to the online version of the Guidance.

New guidance published for paediatric experts

References

[1] *Paediatricians as Expert Witnesses in the Family Courts in England and Wales: Standards, competencies and expectations*, August 2018, Family Justice Council and the Royal College of Paediatricians and Child Health. *https://www.judiciary.uk/publications/paediatricians-as-expert-witnesses-in-the-family-courts-in-england-and-wales-standards-competencies-and-expectations/*

Whiplash claims – role of the expert

Whiplash claims continue to vex the courts and ministers

In the field of personal injury (PI) claims, the whiplash injury remains amongst the most common and the one most likely to cause controversy. Of course, it is essential in any PI claim that the claimant should be able to adduce cogent expert evidence to successfully pursue a claim and achieve the best possible settlement. That said, the expert (particularly in a whiplash claim) has an additional role to play in minimising the risk of fraud.

Fraudulent whiplash claims

In *Molodi*[1], the claimant was seeking damages for a whiplash injury he claimed to have suffered when his car collided with a van driven by an employee of the defendant. The defendant accepted liability for the accident but challenged causation, alleging that the collision was so minor that it could not have caused the claimant any injury. Although the claimant saw his GP the day after the accident, he did not seek any treatment thereafter. Indeed, in his claim notification form he said that he had not taken any time off work nor sought any medical treatment as a result of the accident. He was examined by a doctor instructed by his solicitors. The resulting medical report indicated that he had an ongoing whiplash injury, he'd had to take time off work as a consequence, and he had been involved in only one previous accident.

Although the defendant was challenging causation, the court did not follow the special directions applicable to 'low velocity impact' cases. Instead, the case was allocated to the fast-track and the defendant was not permitted to have the claimant examined by a medical expert of its choosing. At trial, the defendant pointed to a number of inconsistencies in the claimant's case. In particular, it was able to demonstrate that in the 2 years before the accident, he had been involved in at least five (not one) previous road traffic collisions. Further, although he was seeking £1,300 to cover the cost of repairing his car, the repairs had actually cost £400. Nevertheless, the judge found that it was plausible that the claimant had suffered a whiplash injury as a result of the accident. However, he found that the claimant had exaggerated the seriousness of the injury to some degree. He awarded £2,750 for pain and suffering, and £400 for the repair of the car.

Green light to prosecution of fraudulent whiplash claimants

The defendant appealed, arguing that even though it had not pleaded dishonesty, the judge should have found fundamental dishonesty on the part of the claimant and should have dismissed the claim pursuant to the Criminal Justice and Courts Act 2015 s57. The appeal was upheld and the judge commented that medical evidence was at the heart of whiplash claims, and the history given to the medical expert had to be as accurate as possible. The history in relation to previous accidents went to a fundamental question of causation: whether any ongoing symptoms were attributable to the index accident, previous accidents or some idiopathic condition. Moreover, if a claimant had been involved in many previous accidents, the medical expert might want to look more closely at whether the injuries were in accordance with the reported circumstances of the accident.

It will be apparent that the role of the expert in whiplash PI claims is a very important one. Perhaps uniquely amongst PI claims, whiplash poses its own particular problems where deliberate deception is becomingly increasingly prevalent, and exaggeration of claims is widely believed to be relatively commonplace. Consequently, the role of the expert is, in some respects, not merely clinical, but will also include the need to remain vigilant to the possibility of fraud. Where appropriate to do so, experts should communicate any concerns they have to their instructing lawyer.

While it is indeed desirable that expert witnesses help the court to detect fraudulent whiplash claims, one does wonder how exactly a GP is supposed to determine whether the history the claimant has given is complete and accurate!

Whiplash fraud to contempt proceedings

In *Abellion London*[2], Mr Justice Martin Spencer identified an:

> *'industry which appears to have grown up to make fraudulent claims arising out of road traffic accidents, and in respect of which all members of the public pay, whether through their increased insurance premiums for road insurance or, in the case of this particular applicant, in the form of increased bus fares.'*

In *Abellion*, the original claim was for personal injury resulting from an alleged collision between the claimants' stationary car and a bus. The claimants said that this had resulted in whiplash injury and 4–5 weeks of severe pain. Initially, the expert witness had said that soft tissue injury could have occurred as a result of the collision, but later recanted his opinion after seeing CCTV evidence showing that the car had hardly moved. Dismissing the original claim, the judge found the claimants were '*fundamentally dishonest*'.

Unusually, the bus company then made application for committal of the former claimants for contempt of court. It was argued that, in making their claims, the claimants had conspired to bring a fraudulent claim by convincing the medical expert that the accident had been more serious than it was, and that this was then perpetuated through witness statements and evidence given in court.

Allowing the bus company's application, Mr Justice Martin Spencer said there was a significant public interest in allowing contempt cases such as this to proceed and to send a clear message to the public that this sort of fraudulent behaviour is not to be tolerated. The judge rejected the argument that having to pay for the cost of the proceedings had been, in itself, a punishment and that it would be unfair to

punish them further with contempt proceedings. He also rejected the respondents' argument that bringing the application 14 months after the original ruling was oppressive.

This case effectively gives the green light to the prosecution of fraudulent whiplash claimants for contempt of court. The fact that the original claimants in this case had chosen to persist in their claim after the CCTV footage was disclosed and after the expert had recanted his previous opinion meant, in the judge's view, that they should not be entitled to have notice or warning that such action might be taken against them.

Although the expert in *Abellion* had withdrawn his original opinion after seeing the CCTV evidence, it was acknowledged that he had been hoodwinked by the claimants. This highlights the need for such experts to consider the surrounding history of the event as well as the clinical examination.

MedCo fails to deliver

In an effort to improve the standard of medical evidence in claims for traffic-related whiplash injuries, MedCo was introduced in April 2015. The MedCo system is intended to facilitate the sourcing of medical reports in soft tissue injury claims brought under the Civil Procedure Rules Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents. The system was intended to provide a means for the allocation of experts to claims with the aim of removing potential conflicts. From April 2015, any claim notification form must be commissioned from a medical expert or medical reporting organisation (MRO) sourced through the MedCo website. Until the launch of MedCo, claims management companies or solicitors could use their own retained doctors to write reports. Some such 'examinations' were even conducted by telephone. Under the 'new' system, MROs must register with MedCo and confirm they have no financial links with claims firms or personal injury law firms, so that claimants can be referred to them on a random basis. Although MedCo has limited the choice of experts, it is debatable whether there has been any significant improvement in the nature or quality of the evidence.

Questionable claims continue to be made. Such is the resulting cost to the courts, insurers and their clients (i.e. you and me) that, in future, stronger measures relating to whiplash claims and their settlement are likely to be enacted. The Civil Liability Bill (HC Bill 240) is currently before Parliament, Part 1 of which is concerned entirely with whiplash claims. This is of particular interest and importance to medical experts engaged in the field.

Civil Liability Bill – no panacea

The Bill proposes a number of fundamental changes in the way whiplash claims are conducted, the nature of the medical evidence and the settlement of such claims. Amongst other things, the Bill contains rules prohibiting the settlement of whiplash claims before a medical report has been obtained. It proposes that a person regulated by the rules would be in breach if he or she has reason to believe that a whiplash claim is being made and that, without seeing appropriate evidence of the whiplash injury:

a) invites a person to offer a payment in settlement of the claim
b) offers a payment in settlement of the claim
c) makes a payment in settlement of the claim, or
d) accepts a payment in settlement of the claim.

This would mean that in no case would any settlement be made of a whiplash claim without an approved medical report. While at first sight this would appear to be good news for experts engaged in such fee-paying work, there is a sting in the tail. The Bill goes on to provide that the Lord Chancellor may, by regulations, make provision about what constitutes appropriate evidence of an injury.

Section 6(4) states that the regulations may in particular:

a) specify the form of any evidence of an injury
b) specify the descriptions of persons who may provide evidence of an injury
c) require persons to be accredited for the purpose of providing evidence of an injury
d) make provision about accrediting persons, including provision for a person to be accredited by a body specified in the regulations.

This would hand a huge amount of power to the Ministry of Justice (MoJ) in deciding exactly what will constitute allowable expert evidence in whiplash cases.

The consultation document issued by the MoJ attracted much adverse criticism within the legal profession. Many legal practitioners expressed the fear that the proposals unduly favoured the insurance industry, and that innocent and genuine claimants will be prevented, or dissuaded, from making legitimate claims. The then Minister, Liz Truss, was urged to rethink the proposed reforms. The *Law Society Gazette* reports that the Bill has now been delayed until September 2018 at the earliest.

While it remains an undoubted problem, the solution to fraudulent whiplash claims is not an easy one. The expert's role is, we suggest, difficult enough without being hide-bound by excessive regulation that actually does little to help. Perhaps the way ahead lies in the reasoning behind the decision in *Abellion*. The deterrent effect of prosecution for contempt or perjury in the worst cases of fraud might work the oracle. But, the risk of more miscarriages of justice, and the fact that legitimate claimants might be scared off by belligerent insurance companies, leaves one feeling uncomfortable about the combined effect of *Abellion* and the approach contained in the new Bill.

Is it fair to ask medical experts to detect fraud?

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