

## ‘Experts are forever’ or ‘You only live once’? A Cautionary Tale of Duty and Temptation in Compensation Litigation

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### Introduction

I have been inestimably assisted by experts in the widest range of disciplines over 22 years of practice: from handwriting (in a forged-will case), forestry health (in an airliner-crash case), lichen and digital photography (in a tripping case) and enteropathy (in a goat-starving case).

More prosaically, I have seen experts of the highest quality assisting the parties and the court in the widest range of medical disciplines, from a failed attempt at penis enlargement, to leg-saving advice from an orthopaedic expert whose e-mail address was ‘traumawarrior@’.

This article is not about those experts, or about you (or most of you)! It is about the parameters and pitfalls of providing the court with opinion evidence.

### The general part

The role of the expert in personal injury litigation may be summarised as:

A duty to provide a neutral opinion, informed by relevant expertise, indicating the potential range of opinions in the field, and giving reasons for preferring one’s own opinion.

There are other requirements; for example, experts should not take it upon themselves to promote the point of view of the party instructing them or engage in the role of advocates (Civil Justice Council (CJC), 3.2.3).

Also, importantly, ‘where there are material facts in dispute experts should express separate opinions on each hypothesis put forward’ (CJC, 3.7.13).

As Sir Stephen Sedley explained in the Court of Appeal only last year:

... if it was intended here to suggest that the doctor’s role is routinely that of a sleuth, I must express my respectful disagreement. *Forensic medical practice has been disfigured* in the past by practitioners who took on such a role ... (*Charnock v Rowan* [2012] EWCA Civ 2, 9)

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Recent examples of the ‘sleuth’: a psychiatrist who personally employed an inquiry agent to ‘spy’ on the claimant, or a rheumatologist who made evaluative comments on the financial health of the claimant’s employer company, to promote a thesis that she would have been made redundant but for the accident.

An allied failing is the lure of tendentiousness, which is equally easy to expose, and equally harmful to the reception of your opinion. Classic examples are experts who misquote, selectively quote or fail to quote notes or factual evidence contrary to their opinion.

It is true that many experts ‘get away with it’ because such a high proportion of cases settle. Some experts seem prepared to ‘roll that dice’ with their reputation – perhaps, unsurprisingly, these experts are often in the twilight of their clinical practice.

### So what if an expert tries to ‘help his/her side’?

It is trite that professional reputations of all kinds are precious, and can (witness Professor David Southall and Sir Roy Meadow) be lost or tainted in next to no time within criminal or civil litigation.

In civil claims, the dangers may be more marked, usually because ‘popular’ experts give evidence time and again for one or other side, who perceive that they will give an opinion which accords with that side’s case.

Sometimes, experts simply cannot increase the balance of their instructions because, despite impeccable neutrality, they are ‘seen’ as a ‘claimant’ or ‘defendant’ expert. Such experts ought to be more careful than ever about the neutrality of their opinion.

### Is it difficult to be an expert?

The expert’s task is – relatively speaking – straightforward:

- adhere to the clearly stipulated duties;
- provide an opinion about a subject in which you excel; and
- receive payment whether a claim is successful or not.

Key difficulties in the litigation context are:

- resisting improper pressures upon your opinion in any given case; and
- avoiding the temptation to indulge your own peccadillos or ‘amplifiers’.

### Resisting pressure

It is worth remembering the rule of thumb that your opinion ought to be identical whichever party instructs you.

That does not mean refusing to discuss your opinion with your instructing client, or ‘clamming-up’ in the face of suggested amendments to a report, or answers to questions. It does mean drawing the boundary between your role and that of your

client, and ensuring that your evidence contains your clear, comprehensive, CPR-compliant opinion.

Ultimately, it is you, not s/he who will face cross-examination and criticism if you cannot justify your opinion (and/or fail, for example, to take proper account of aspects of the evidence, or acknowledge/explain a range of opinions).

Before you sign off any document, have a final reflection whether a fly-on-the-wall judge would feel confidence in the neutrality and expertise it contains.

### Peccadillos or amplifiers

I was interested by Dr Bass's comments that injured individuals often bring to bear certain 'amplifiers' within litigation.

My concern – and experience – is that experts are just as predisposed to bring to bear their own 'amplifiers', or perhaps peccadillos.

It may seem an obvious point, but experts ought to resist the temptation to make any, let alone every, medical report a crusade to promote a particular approach or opinion – something the court may be persuaded is a 'hobby-horse' rather than a fact-specific expert opinion.

However, if you do take that approach, or consider that your predilection actually fits with the facts of the case, then state that that is what you are doing, give detailed reasons for your approach and set out the range of opinion more assiduously than ever.

## The specific part

### Two recent personal experiences

#### Peccadillo?

In a case which settled recently, the defendant's psychiatric expert, Dr Christopher Bass, preferred to describe a claimant's clinical condition as '*disproportionate pain and disability* following an accident', commenting that 'the diagnosis of CRPS Type 1 is controversial and a diagnosis of uncertain reliability' – despite the specific diagnosis having been made by:

- two specialist treating clinicians (Dr Rajesh Munglani and Dr Adnan Al-Kaisy);
- the defendant's own occupational physician, whose clinical examination 'leaves me in no doubt that [CRPS] is the correct diagnosis'; and
- *both* medico-legal pain experts (Dr Charles Gauci and Dr Jon Valentine).

It struck me that, as a psychiatric expert, that expert was unusually strident in his opinions about CRPS, as well as being impervious to any point in the claimant's favour. The case settled for close to £500,000.

## Trying too hard?

In a 2012 case, in the context of a bitter orthopaedic dispute, the defendant's orthopaedic expert, Mr Ved Goswami, attempted (for the first time in the joint statement) to deal with the absence of pre-accident shoulder symptoms by arguing (and thereby suggesting sufficient expertise to comment) that the claimant's gout medication masked such symptoms. The court permitted the claimant to rely upon a rheumatologist, Dr Ray Armstrong, whose report explained that the 'expert':

was asked to produce evidence to support his assertion that allopurinol could have analgesic properties that might mask symptoms of a rotator cuff problem. He has provided no credible evidence to support this position. He has simply extrapolated from the results of laboratory tests on mice to suggest that allopurinol could have analgesic properties in humans. There is no justification for this conclusion at present. I think the fact that [he] relies on this document illustrates the weakness of his position.

Once again, the case settled successfully, for £75,000.

## Examples of judicial evaluation of expert evidence

Just because there are so few reported cases in personal injury practice, the legal community pays great heed to those in which experts have been assessed by the court. In the field of rheumatology and pain medicine, there have been some pointed judicial comments.

It is worth noting again how rare it is that cases are contested in court. When they are, judges often eschew direct criticism of experts except in the clearest cases.

The following cases might be considered a master class in how to and how not to assist the court.

In *Balsom v Smith* (2008) Northampton County Court, Mr Recorder Clark compared the evidence of two rheumatologists, Dr George Struthers and Dr Robert Bernstein, in a 96-page judgment.

The judge commented that Dr Struthers, the claimant's expert, 'brought a healthy skepticism to his assessments' (p. 69) and 'at every stage I felt completely satisfied regarding his total objectivity, his willingness to reconsider matters in the light of new material and his desire to do his best to assist the court' (p. 68).

There were a host of issues which concerned the Court about Dr Bernstein's evidence, which the judge stated were 'not appropriate for the Court to comment', in relation to 'the wider implication of Dr Bernstein's comments on his profession' (p. 79). Those had included the following:

- 'He explained that he "bent over backwards" to avoid a diagnosis of Fibromyalgia ...' (p. 76).
- 'He appeared at one point to cast doubt upon the legitimacy of the labeling of the condition by the American College of Rheumatology ("ACR") suggesting that there

may have been professional advantages for rheumatologists if they were able to point to a specific recognized and named condition (a “marketable condition”) as a means of generating work’ (p. 76).

- In cross-examination, he ‘asserted that the ACR were creating work’ (the judge went on to quote him). ‘It justified rheumatologists getting work ... it is a marketable disease so they could have private patients come to their practice’ (p. 78).
- ‘He completed his evidence in chief with an observation that “half of those who come from their doctor with a diagnosis of Fibromyalgia, don’t have it” ’ (p. 78).

The judge referred to those (and other) issues because he was ‘satisfied that they have influenced the manner in which he has approached the case’ (p. 79). Then the judge’s criticisms deepened:

It is clear that Dr Bernstein was suspicious of the Claimant before he examined her. Although I am satisfied that he did tell the Claimant that he did not know much about the case, as he acknowledged in cross-examination: ‘I formed a suspicion from what I read – her account was on the bounds of reality before I met her.’ (p. 80)

As far as *his examination* was concerned, he did not obtain the same results from a tender-point test as had other doctors, including Dr Struthers who was ‘surprised that Dr Bernstein had not reached the same conclusion’ (p. 74).

*As regards the surveillance*, when asked to comment on the claimant remaining at home, Dr Bernstein commented that the claimant could be doing ‘what some of my patients term “lying low”’. When the claimant was observed using a stick or crutches, he preferred to suggest that it was a psychological prop, or ‘an aid to deception’ – indeed the judge found that he did not ‘entertain the possibility the Claimant might have genuine need of such aids’ (p. 81).

The judge went on to comment on *aspersions cast by Dr Bernstein* on the claimant’s solicitors (p. 82) and even upon a treating rheumatologist, Dr Sprya.

The judge then went on to comment on evidence which the whole court had heard, and Dr Bernstein’s reaction to it, commenting:

I was surprised that, having listened to the consistent accounts given by her family and friends about her decline since the accident, the only point Dr Bernstein relied upon was a comment by Mr Renwick which Dr Bernstein interpreted as possibly undermining the claimant’s case. [...] I do not think the evidence was capable of doing so). (p. 84)

I think that Dr Bernstein’s approach is illustrated also by his response to the evidence of Iris Steadman (p. 84, resumed on p. 86 after that evidence was reviewed by the judge) ... viewed objectively, that appears to be very

significant evidence ... That Dr Bernstein remained unwilling to attribute significance to this is of concern. (p. 86)

Furthermore, 'Dr Bernstein appeared unnecessarily defensive' (p.86).

The judge 'found his accentuation of what he considered negative aspects of Ms Balsom's case, and his unwillingness to acknowledge its positive aspects (including her efforts to get better), to be of concern' (p. 87).

'I do not accept the evidence of Dr Bernstein regarding the absence of reaction by the claimant to his examination' (p. 88).

'I think it likely that Dr Bernstein had come to a conclusion early on that the Claimant was malingering and/or adopting a sick role' (p. 88).

Perhaps most tellingly of all was the judge's turn of phrase at the outset of his review of Dr Bernstein's evidence when he said that he had 'no doubts regarding his sincerity in *pursuing his cause ...*' (p. 75) (my italics).

In *Warren v Jennings* (2008) Cardiff County Court, HHJ Seys Llewelyn considered evidence from Professor Jayson (defendant's rheumatologist) and used a telltale phrase – '*To put it at its kindest* to Professor Jayson, this [the severity of the claimant's pompholyx at the time of examination] may have led him to a preoccupation with pompholyx as being the predominant or ongoing cause of the symptoms from which the Claimant suffers' (para. 66).

In *Connery v PHS* [2011] EWHC 1685 (QB) HHJ Platts:

'Dr Munglani gave his evidence with considerable authority and was impressive' (para. 48).

Dr Webley (rheumatologist) 'gave much more considered evidence than ... Dr Bernstein, who it seemed to me was somewhat skeptical of the diagnosis of CRPS generally, not only in this case, and was striving, without much success, to find some other explanation for the Claimant's symptoms [...] I did not find his reasoning nor his evidence persuasive' (para. 49) (the judge did not consider Dr Bernstein had been 'partial', but then again, he was not shown the judgment in *Balsom*).

I found Mr Boston [defendant's orthopaedic expert] to be hesitant, and it did not assist my impression of him that he had not read the literature referred to by Dr Munglani before trial, and I was certainly not impressed by the way he purported to be skeptical about it without having considered it (para. 49).

'Dr El-Assra's [defendant's psychiatric expert] opinion [was] extreme' (para. 51).

## Final word

The foregoing are merely examples. There are plenty more in relation to experts in different disciplines (Dr John Searle, within road-traffic reconstruction, for example), to say nothing of adverse judicial comment concerning barristers and other lawyers (no doubt the author included).

The simple point of this article is that experts are the bedrock of personal injury claims. If your evidence is not of the highest quality, and neutrality, the system will fail. If you follow the requirements of the rules (while being as robust as you like), you will help to promote earlier resolution of claims, and considerably reduced costs, to the benefit of all concerned.

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