# Expert witnesses in personal injury cases: a lawyer's perspective

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As readers will be aware, the foremost duty of an expert witness is owed to the court, and this overrides any obligations to the instructing party and/or their insurers.

The importance of providing expert evidence in court proceedings cannot be underestimated. Lawyers and judges are hugely dependant on expert evidence, and it undoubtably forms a significant role in determining the outcome of a case.

Identifying the problems commonly associated with expert evidence and considering how to overcome them, can assist lawyers to better prepare cases for trial, and help position an expert witness as one of the key 'go to' and respected experts in their field.

Helpfully, the role of expert witnesses has been reviewed in recent cases and these decisions shed light on what the courts expect from experts. We have analysed some of these decisions and key themes arising below, along with offering some practical considerations from a lawyer's point of view.

## Unconscious bias

**Palmer v Mantas & Liverpool Victoria Insurance [2022] and Mustard v Flower & Flower & Direct Line Group [2019]**

Experts should remain aware that the language, and even the tone, used in their reports can indicate a level of unconscious bias. This issue was raised by the Judge in the case of **Palmer v Mantas** [2022]. The claim followed a road traffic accident in which the defendant drove into the back of the claimant's stationary car on the M25 motorway. Anthony Meltzer KC awarded damages of £1.6 million, and critically commented on the testimony of two of the second defendant's experts in particular.

Lawyers' views on the role and duty of an expert witness in personal injury claims.

The Judge found that one of the second defendant's expert reports was "littered with judgemental and rather scathing comments", and that her references to the claimant being "self-pitying" and "histrionic" (which she agreed in oral evidence is a term that she would not have used to describe a man) were unnecessary and inappropriate. The Judge indicated during the trial that the way the expert expressed herself went "beyond language which is appropriate for an expert to employ" and suggested "a level of unconscious bias". Interestingly, the court also referenced the previous case of **Mustard v Flower & Flower & Direct Line Group** [2019], where the same expert had used similar language.

Another expert in the case conceded the language he had used was "over-zealous", and on reflection, he "could have been a little bit more reflective and kinder and provided a little bit more range of opinion".

The Judge stated that, while it is acceptable for experts to express a lack of belief in the claimant's symptoms based on the evidence, they should not depart from their duties under the Civil Procedure Rules (CPR) Part 35, "either intentionally or recklessly".

Ultimately, the court will compare the strength of expert evidence in proceedings. In this case, the court compared the experts in question to their opposite numbers and commented that the latter had provided a more balanced opinion by acknowledging the broader, more positive aspects of the claimant's employment records and the opinions of her colleagues, rather than focusing on smaller, more negative details.

## Experts are not a member of a party's 'team'

**Muyepa v Ministry of Defence [2022]**

In the case of **Muyepa v Ministry of Defence** [2022] the Judge criticised the care expert instructed by the claimant, reminding experts and their instructing lawyers that throughout the litigation process experts should not consider themselves part of the claimant's or defendant's 'team'.

Mr Justice Cotter dismissed the claim for damages of £2.9 million for non-freezing cold injuries (NFCI) sustained by the claimant, following a three week trial involving 29 lay witnesses and 10 experts, on the basis of fundamental dishonesty. The defendant secured a body of surveillance footage showing the claimant working a significant number of hours, shopping at two supermarkets with very little issue and no assistance from his wife, and mobilising without a walking stick with a normal gait at more than one social event. The case involved experts in the fields of neurology, psychiatry, pain management, care/ occupational therapy and employment.

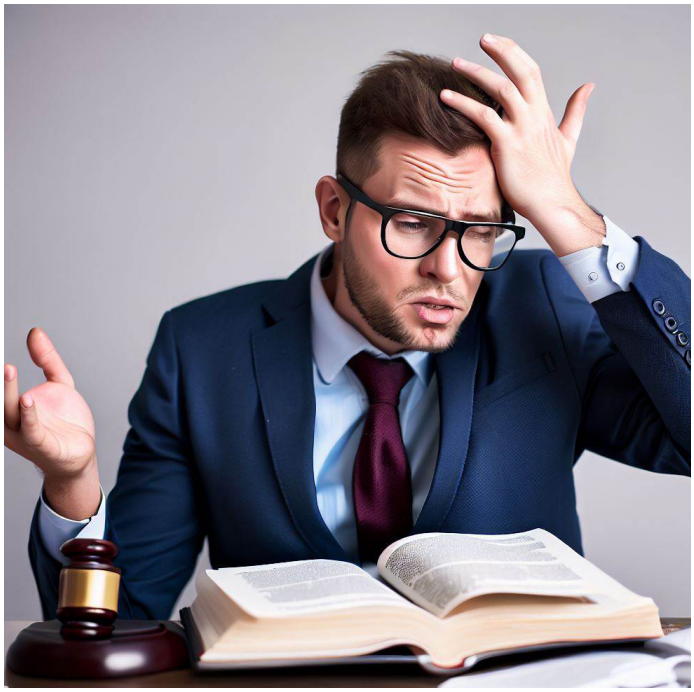
Whilst the Judge considered that the claimant had indeed suffered a minor NFCI while in service, he had gone on to exaggerate his symptoms and prognosis in order to facilitate his discharge from the Army, and to grossly inflate the value of his legal claim. The court judgment commented on the medical evidence submitted by some of the claimant's experts, which was a times "partisan". By contrast, the independent opinions of the defendant's experts painted a more accurate and measured picture of the claimant's "conscious, deliberate, prolonged and significant exaggeration." The walking stick used by the claimant was held to be little more than a "prop" for example. The failure of the claimant's care/occupational therapist in particular to acknowledge and incorporate the surveillance footage into her opinions created a factual conflict of evidence at trial. The CPR requires experts to assess all material facts, including changing facts that may alter their opinions. The occupational therapist in this instance did not allow the emergence of the new surveillance to influence her opinion. The report she provided was held to be designed with the intention of maximising damages for the claimant and the Judge commented that it did not adhere to the "balanced and objective application of the relevant principles".

## Lack of awareness of the legal tests/failure to analyse the facts

**Harris v Johnston [2016]**

Whilst an older case, this judgment is nevertheless a crucial read for expert witnesses; the upshot being that it is essential that experts are aware of the relevant legal tests (where applicable) when providing their opinions.

In the 2016 clinical negligence case of **Harris v Johnson**, the claimant's expert neurosurgeon stated that the claimant's spinal cord had been negligently damaged based on the misassumption that the claimant's treating surgeon had used a sharp retractor rather than a blunt dissector. Mrs Justice Andrews commented that the expert had not "read the material before him with an appropriate degree of care or asked the questions one would have expected him to ask to obtain clarification". He had failed to give appropriate consideration to the evidence at hand, and further, when forced to make concessions, he insisted on holding on to the opinion he had initially adopted.



In addition to his failing to appropriately analyse the evidence, the expert had also failed to understand the relevant legal test for negligence in this context. Instead of asking whether a particular surgeon fell below the standards expected of the reasonably competent surgeon, he equated professional negligence with the competence required to pass a surgical examination, which the Judge commented was "unsatisfactory". An expert became similarly unstuck (and even had a significant wasted costs order made against

them) in the case of **Thimmaya v Lancashire Teaching Hospitals NHS Foundation Trust** [2020], when he couldn't articulate the relevant legal test to be applied to determining breach of duty.

## The positives

Judges will, of course, also praise experts where appropriate, and judicial endorsement is an invaluable addition to an expert witness' CV.

The clinical negligence case of **Preater v Betsi Cadwaladr University Health Board** [2022] concerned the insertion of a vaginal mesh and allegations of fundamental dishonesty. The Judge commented that both parties' pain experts were "persuasive and compelling". The Judge added that the claimant's pain expert's evidence was "balanced and considered. He made realistic concessions and was unshaken in cross examination. He was an impressive witness", and that the defendant's pain expert was "very balanced and thoughtful. He made realistic concessions and impressed me that he was doing his utmost to present a fair opinion". The Judge did, however, make various criticisms of some of the other experts in the case.

## Key takeaways - from a lawyer's perspective

The cases above reiterate experts' duties in personal injury claims. We have summarised some of the key themes to be taken away below, together with some more practical points which we consider would assist in ensuring lawyers and experts can continue working as efficiently and collaboratively as possible:

- As a starting point, any expert witness should obviously ensure that they are competent in the area they are instructed to give expert evidence in. They should also be familiar with Part 35 of the CPR and accompanying Practice Direction, as well as the Civil Justice Council's Guidance for the Instruction of Experts in Civil Claims. Personal injury claims can often involve rare conditions or complicated facts. If asked to provide evidence in a matter they are uncomfortable with or do not feel they have the necessary expertise, there is no shame in promptly flagging this to those instructing. Where an expert legitimately gives expert opinion in a matter, but the claim later develops beyond their scope, they must also advise their instructing solicitors. An expert who attempts to provide expert evidence in an area beyond their expertise, is likely expose themselves to various problems.
- Expert reports can sometimes be unavoidably lengthy due to the complex nature of the issues in question. However, experts should bear in mind the guidance given by the **High Court in Harman v East Kent Hospitals NHS Foundation Trust** [2015], namely that experts should avoid reciting too much of the history or narrative, and focus instead on providing their analysis and opinion. This assists lawyers and the court on concentrating on the key issues in dispute and avoids unnecessarily increasing costs.
- Taking into account the authorities referred to in this article, we would strongly recommend ensuring that reports do not contain over-zealous, emotive language or speculative comments, without contextualising them at least. Such language may be interpreted by the courts as irrational or one-sided. Ultimately, an expert's role is to assist the court, not to fight a party's case or take up the role of an advocate.


*"following the COVID-19 pandemic... claimants became accustomed to being examined by way of video conference from the comfort of their own home"*

- Experts should approach the evidence objectively and be open to the emergence of new evidence, even in instances where they doubt or disbelieve the claimant or defendant. A balanced approach should be encouraged to avoid criticism by the court. An unbalanced stance can be indicative of bias, even if it is unconscious. The CPR also requires experts to state where there is a range of opinion.
- Be realistic at the outset about how long the report is likely to take and stick to agreed deadlines (or flag at the earliest opportunity if more time is required). Lawyers chasing reports adds to the cost of litigation, and in recent years, court deadlines have generally become more difficult to extend. Once the report is provided, it still needs to be carefully considered by the lawyers and instructions need to be taken from the client, before it can be served.
- Where an appointment date has been provided in order to examine a claimant, we suggest it is held for a reasonable period and notice is given (if necessary) before it is offered to someone else. It can sometimes take some time to clarify if a claimant is available for an examination and there may be logistical issues to sort first. If a date is offered by an expert which quickly becomes unavailable, it can lead to a lot of confusion amongst the parties which in turn increases costs due to unnecessary communications.
- Perhaps a trend following the COVID-19 pandemic (where claimants became accustomed to being examined by way of video conference from the comfort of their own home), but we are now seeing increasing requests from claimants insisting on home appointments, on the basis they're unable to travel (even fairly modest distances) for various reasons. Defendants will no doubt push back where appropriate, but experts who are prepared to undertake domiciliary visits when needed are becoming more valuable.
- If time permits, we recommend considering the evidence and medical records ahead of examining a claimant, rather than waiting until writing the report. This allows the claimant to be questioned on particular entries of relevance, and an opportunity to assess their answers.
- If upon considering instructions, an expert considers there are key documents missing (for example, certain medical records or radiological imaging or reports), we suggest these are flagged to the instructing party as soon as possible. The expert may be asked to hold off providing a report until those documents are obtained, rather than produce a 'provisional' report followed by an addendum.
- Litigation, particularly in higher value and complex claims, is often very fluid. Disclosure is ongoing and unexpected issues commonly occur. Lawyers appreciate diaries can be busy, but experts who are responsive, able to make time for conferences at short notice, ad hoc telephone calls and e-mail queries are very much appreciated.
- It sounds obvious, but all the issues an expert is asked to address within the letter of instruction should be carefully considered and dealt with where possible within the expert's report. Many will be standard queries, but lawyers will often also ask questions which are very specific to the issues in the case. This can save a lot of time going back and forth later.
- Experts should ensure that their knowledge remains up to date, and they are familiar with the latest literature, studies and developments in their field. As an example, experts in the fields such as care/occupational therapy, rehabilitation and prosthetics should ensure they are familiar with the latest rehab technology in the market.
- When considering a claimant's account of an accident and their injuries, experts should assess whether or not what they have been told is likely, and/or corroborated by medical records or other evidence. Any inconsistencies should be raised (and an explanation provided, if there is one). An expert who simply accepts what they are told, when there is strong evidence to the contrary, may find it difficult to later support their opinion.
- Everyone makes typos. There may even be some in this article. But a report littered with typographical errors can cast doubt over the care taken to prepare it and can lead to both the parties and the court losing confidence in the expert. This is more so where the mistake is relevant to the issues in dispute. Common examples we see are incorrect key dates, the wrong sided limb being referred to and inaccurate quotations from medical records and other evidence.
- Everyone has their own style, but we think the best approach to reviewing medical records is to provide a summary of the key issues rather than simply repeating or copying the medical entries themselves.
- On the rare occasion that an expert is to be cross-examined at trial, they should make sure they are properly prepared and answer questions honestly and impartially. Experts should not be evasive and should ensure they are able support their answers as required.