USE OF RECORDINGS OF MEDICAL APPOINTMENTS IN INJURY LITIGATION

PETERHOUSE 2019 PRESENTATION

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Admissibility of overt recordings in litigation

1. There is little doubt that overt recordings of medical appointments are admissible in litigation, subject to relevance and proportionality. Why might they be relevant?

(1) To correct a mistake by the expert in the history taking; for example:

- Misquoting the patient's history; e.g.: accusing the patient of making sexist comments when in fact all sexist references all came from the expert's mouth.
- Transposing the patient's history of snapshots of memory and absence of memory when conducting a PTA assessment, then concluding that the patient was dishonest because she had 'forgotten her story';

(2) **To highlight an omission in the history taking or methodology;** for example:

- Failing to make enquiry of past medical history and then later, upon reviewing the medical records, criticising the patient for failing to volunteer that history;
- Failing to conduct a structured PTA history by reference to the Rivermead Protocol and then discounting the presence of PTA;
- Failing to make any enquiry of a patient's belief patterns about her medical history and then diagnosing her as presenting with a Somatic Symptom Disorder;
- Failing to screen for PTSD or OCD before excluding both diagnoses;
- Failing to ask the patient to remove her clothing to conduct an examination before concluding that there was no evidence of muscle wasting around the brachial plexus and upper right limb.
- Failing to examine for fibromyalgia trigger points by applying 4 lbs of pressure and subsequently excluding the diagnosis.

(3) To demonstrate a difference in the methodology employed; for example:

- Truncating a PTA history by stopping the time of the first reported recollection;
- Screening for possible signs of DAI and/or PTSD pathology by asking a single open-ended question: "*List your symptoms to me*";
- Conducting a neurological assessment by focussing solely on the physical symptoms associated with focal brain injury, ignoring all possible cognitive, behavioural and psychological symptoms;
- Completing a neurological interview and examination in a complex DAI claim in 15 minutes.

(4) To highlight alleged malpractice; for example:

- Asking a patient what he had been advised his case was worth;
- Asking a patient what he considered to be a large sum of money;
- Intimidating a patient with a greeting '*if you lie to me, I will know and you will lose your case and may go to prison*'
- Advising a patient that it was in his best interest and that of his family to drop his loss of earnings claims because they would be torn to shreds in the witness box.
- Failing to adhere to the International Test Commission guidelines regulating the administration of the Wechsler Adult Intelligence Scale IV (WAIS IV) neuropsychological tests, which generated a pattern of test scores that was materially worse than those obtained by the patient's own expert, and positing as a likely explanation deliberate underperformance by the patient, thereby paving the way for a Fundamental Dishonesty defence.

2. None of the above examples is hypothetical.

Admissibility of covert recordings

3. Such recordings are admissible in other areas of the law away from injury litigation, notably:

(1) Family Law – for example:

- *Re F Care Proceedings: Failures of Expert* [2016] EWHC 2149 (Fam) - the shortcomings of a psychological expert entrusted to assist the Court on whether a child should be permitted to live with his mother, were exposed only because the mother covertly recorded her assessment sessions with him. Hayden J stated:

"*Common law principles of fairness and justice demand, as do Articles 6 & 8 of the ECHR, a process in which both the children and the parents can properly participate in a real sense which respects their autonomy*."

"the overall impression is of an expert who is overreaching his material, in the sense that whilst much of it is rooted in genuine reliable secure evidence, it is represented in such a way that it is designed to give it its maximum forensic impact. That involves a manipulation of material which is wholly unacceptable ... his disregard for the conventional principles of professional method and analysis display[ed] a zealotry which he should recognise as a danger to him as a professional ..."

- *Medway Council v A & Ors* [2017] 1 FLR 1304 - a mother made covert recordings of the abusive and racially insensitive foster carer who she was living with along with her baby; until the recordings were played she had been disbelieved. Without the recordings that would have remained the case.

- *Re B* [2017] EWCA Civ 1579 – where Sir James Munby (President of the Family Division) permitted a covert recording into evidence and invited the Family Justice Council to consider the whole question of covert recording from a multi-disciplinary viewpoint. This they did with Baker LJ chairing a debate on 03.12.18 entitled "*Nothing to hide – what's wrong with covert recordings?*" where he acknowledged that it was time to "*revisit prejudices*" about covert recording.

- The central messages from the debate were "*covert recording is a maladaptive strategy to deal with fear and a lack of trust ... our attempts to record or prevent recording are ultimately about control of information*" and "*The starting point is professionals really shouldn't be afraid of any conversation undertaken in their professional capacity being recorded*".

(2) Commercial Court

- *Singh v Singh v Others* [2016] EWHC 1432 HHJ David Cooke sitting in the High Court said the following regarding the covert recording of a business meeting to shed light on what was agreed with regard to share ownership:

"In this case however I have the direct evidence of the recordings made by the Claimant. It is true to say that these must be approached with some caution, as there is always a risk that where one party knows a conversation is being recorded but the other does not the content may be manipulated with a view to drawing the party who is unaware into some statement that can be taken out of context. But there can be great value in what is said in such circumstances, where the parties plainly know the truth of the matters they are discussing and are talking (at least on one side) freely about them."

(3) Employment Law

- *Chairman and Governors of Amwell View School v. Dogherty* UKEAT/0243/06/DA – where the EAT permitted covert recording evidence of a disciplinary meeting into evidence on the basis that the employer (a Board of Governors) had no expectation of privacy.

(4) Injury litigation

- The issue of lack of trust mentioned by Baker LJ in December 2018 was most memorably illustrated and exposed in the judgment of *Williams v. Jervis* [2008] EWHC 2346 where Evans J stated:

  "*in my judgment he* (the expert) *approached the case with a set view of the claimant and looked at the claimant and her claimed symptomology through the prism of his own disbelief"*

  "On this occasion, the transcript indicates the inaccuracy of Dr X's (sic) *report on a central feature of the case. How could the Claimant have protected herself against the obvious adverse inference which would have been drawn against her had the transcript of her recording not been available?"*

- Such recording evidence was instrumental in the outcomes of the cases of *Siegel v Pummel* [2014] EWHC 4309, *Mann v. Bahri* Lawtel 24.04.12 and *Clarke v Maltby* [2010] EWHC 1201 (QB) that went to trial, and many more cases that never made it to trial, in part because of the recording evidence exposed errors and misunderstandings and brought the parties closer together.

- One shouldn't forget that Courts bend over backwards to allow insurers to rely on surveillance, irrespective of whether the law has been broken to obtain it – see *Jones v. Warwick University* [2003] EWCA Civ151.

Data Protection Act 2018 and the GDPR

4. Reliance may be placed on these new pieces of legislation to resist the admissibility of covert recordings. The argument raised is that service of a transcript and a recording is a data breach.

5. This is not the view of the GMC or the MDUS; the latter published the following on 13.06.19:

> *"It is also worth noting that covert recordings are admissible as evidence when judged as relevant to a legal case"….The legal provisions which apply to recording consultations or other contacts include the Data Protection Act 2018 (DPA 2018), the General Data Protection Regulation (GDPR) and the Telecommunications Act 1984. A data subject, in this case the patient, is entitled to their personal information – including the information from a consultation. Once in the hands of the patient, it is at their discretion as to what they do with that data. They are not bound by the same ethical obligations as a doctor and so, if they want to post their consultation on social media, there is no legal prohibition against it."*

6. It may be argued that experts are also a 'data subjects' because they can be identified by their voices, or names if they have introduced themselves on the recording. This is a moot point because Article 4 of the GDPR defines "*personal data*" as meaning "*any information relating to an identified or identifiable natural person*"; it is a matter of fact as to whether there is any information 'relating to' the expert on a recording, as it is the patient's data. However, a European Court decision in *Buivids* C345-17 dated 14.02.19 suggests a wide interpretation should be given to the interpretation of 'personal data'.

7. The GDPR and the DPA 2018 include a number of exceptions to prevent their restrictions being used by claimants to suppress surveillance evidence or by defendants to suppress covert recording evidence. Articles 6 1(c) to (f) of the GDPR and Article 23(j) provide for exceptions which were codified in Section 5(3)(c) of Schedule 2 of the DPA (pp. 234-235) "*The GDPR provisions do not apply to personal data where disclosure of the data is otherwise necessary for the purposes of establishing, exercising or defending legal rights*". The net effect is that Courts have a discretion

which should be exercised by reference to considerations of relevance, proportionality and the overriding objective.

8. In *Bridges v. Chief Constable of South Wales* [2019] EWHC 2341 (Admin), on 04.09.19 the Admin Court dismissed an application to judicially review a Police Force's use of Automated Facial Recognition ["AFR"] technology on the ground that it contravened the DPA 2018 and the Applicant's Article 8 Rights, finding that it was necessary for the Police's legitimate interests taking account of the common law obligation to prevent and detect crime.

9. An argument raised by Ds is that such recordings do not provide a level playing field because claimants invariably don't record their own experts, thereby depriving Ds of the forensic advantage of reviewing Cs' expert evidence with the same rigour. The response to that is that there are inherent imbalances in litigation; for example Cs have the legal and evidential burdens of proving their claims. Ds have the forensic advantage of employing covert surveillance and poring through Cs' social media. Ds have the benefit of alleging fundamental dishonesty, often on the flimsiest of pretexts, in the knowledge that the risks of litigation are stacked heavily against Cs in the post FD age. It is Cs who is on trial, not Ds' experts. Cs have the ability to remedy factual misunderstandings with their experts. Cs have the opportunity of instructing experts whose methodology they trust but have no such discretion to vet the independence or competence of Ds' nominated experts.

Recording of neuropsychological testing

10. This is controversial, principally because of the paramount importance of protecting the proprietary nature of the materials of the WAIS test materials owned and administered by the Pearson Group. If those materials were to fall into the public domain, it would undermine their efficacy in clinical practice.

11. The British Psychological Society ["BPS"] and the Pearson Group have both issued approved Guidelines that neuropsychological materials will, in prescribed circumstances, be capable of judicial scrutiny by putting in place sensible safeguards to prevent the proprietary materials from entering the public domain. The BPS Guidance concedes: "*A court may legally request details of materials and such disclosure is allowed within the Data Protection Act*".

12. The BPS is in the process of considering updating its Guidelines to institute a flat out prohibition on recordings under any circumstances. Those draft Guidelines are currently under consideration. They have an obvious twin attraction to the profession of safeguarding the proprietary materials and protecting their members from outside scrutiny. The downside is that they provide no protection for the patient from possible malpractice, or arguable sub-optimal application of the test materials. By way of hypothetical example:
    (1) Material deviation from scripted instructions for the tests; e.g.: paraphrasing seven sentences of instructions into a single sentence; by shortening the instruction, the practitioner may deprive the patient the opportunity to scaffold their understanding of what is required of them.
    (2) Modifying the instructions to the point of misleading the patient; e.g.: an instruction that they should pronounce every word, even if they are unsure what it means could be misconstrued if the substance of the instruction is changed to only pronouncing words if they know what they mean.
    (3) Missing out practice tests which enable the patient to familiarise themselves with what is expected of them. This is especially important on the arithmetic tests.
    (4) Starting the patient on the more difficult arithmetic tests depriving them of the opportunity to build their confidence as they progress through the levels.
    (5) Failure to use correction on tests that require it – e.g.: on the Line Orientation Test.
    (6) Providing coaching on tests that prohibit this – e.g. the Brixton Test.
    (7) Getting the timings wrong on tests where timings are crucial.
    (8) Rushing the patient through the testing process, thereby depriving them of the opportunity of maintaining their stamina and concentration – for example completing a full battery of tests that ought to take at least 2½ hours in less than an hour.
    (9) Failing to offer bespoke breaks when a patient reports a crashing headache or is struggling to concentrate because a PTSD trigger has been activated.

13. These would arguably, all be hypothetical examples of sub-optimal practice. Any single one would, in theory, invalidate the testing process, and should be recorded by the examiner. In a clinical setting such failings would be identified in time as patients are generally treated by a team of neuropsychologists who have access to each other's notes and raw test scores and often observe each other during testing. In clinical practice most practitioners submit themselves to periodic peer review as part of ongoing validation of competence. That is frequently done by reviewing recordings or viewing assessments through two way mirrors. In medico-legal practice, there is no such scrutiny. It is a concern that there is no check and balance.

14. The only way to address that lacuna, is to put in place safeguards whereby any recording of testing were embargoed from the patient and the legal advisers and forwarded directly to the other party's neuropsychologist with the report for review; the neuropsychologist should comment on it in such a way that the proprietary material never enters the public domain. If there were material disagreement between the neuropsychologists on the interpretation of the recording, then the Court would be empowered to provide directions including safeguards that struck a balance between preserving the mystique of the proprietary materials and ensuring that justice was done, and seen to be done.

Closing comments

15. Experts are not afforded exemption from scrutiny by the Courts merely because they are experts and owe an overriding duty to the Court and not the party instructing them; indeed, quite the contrary; courts subject experts to a rigorous scrutiny. Earlier this year, in the case of *Liverpool Victoria Insurance Company v. Zafar* [2019] EWCA Civ 392, a committal appeal where the Court of Appeal was invited to imprison a dishonest medico-legal expert, it stated that a CPR 35 statement of truth commanded greater respect in the eyes of the Court than a standard statement of truth, because of the gravitas imbued in an expert's status. It went on to state:

> "*Without seeking to lay down an inflexible rule, we take the view that an expert witness who recklessly makes a false statement in a report or witness statement verified by a statement of truth will usually be almost as culpable as an expert witness who does so intentionally. This is so, because the expert witness knows that the court and the parties are dependent on him or her being truthful, and has made a declaration which asserts that he or she is aware of his or her duties to the court and has complied with them. To abuse the trust placed in an expert witness by putting forward a statement which is in fact false, not caring whether it be true or not, is usually almost as serious a contempt of court as telling a deliberate lie. ... Moreover, as the present case illustrates, the culpability of a contemnor who acts recklessly will be increased if he or she knows of circumstances which cast doubt on the accuracy of the relevant statement, but nonetheless makes it without caring whether it be true or false.*"

16. The nirvana in this debate would be a joint initiative from APIL, FOIL and PIBA to establish a protocol in all cases likely to involve damages claims in excess of £200,000, systematically to

record and exchange digital recordings with the reports, both Claimants and Defendants. Such a protocol in and of itself would eliminate most, if not all of the deficiencies thrown up by recordings summarised at §§ 1 & 11 above, which currently permeate the mistrust that exists in some cases.

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