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Forensic insights for litigators

In this issue...

ForeSight

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Demise of the MRO?

With MROs under attack, how would you cope if they disappeared?

Dr Chris Pamplin, Editor, UK Register of Expert Witnesses

Recent court rulings in the cases of *Earle -v- Centrica* and *Wollard -v- Fowler* could spell trouble for medical reporting agencies. Put simply, the agency fee, as distinct from the doctor's fee, was found to be one the lawyer had to meet from his or her own pocket. Will you use agencies if you cannot recover the associated costs? There is, of course, a well-tried alternative for locating experts around the UK, but the funding will be the real problem — unless the insurers see sense.

There has been controversy recently over the nature of the commission charged by medical reporting organisations (MROs), both in the way that this element of the cost should be interpreted by the courts and the 'hidden' nature of what is often a considerable mark up on the clinician's fee.

In the case of *Earle -v- Centrica plc*, District Judge Bazley-White held that MRO fees could not be claimed as a disbursement. Effectively, they represented work done on behalf of the instructing solicitor that could just as easily have been done him- or herself. Consequently, MRO mark ups should be viewed as part of the solicitor's profit costs and should not be recoverable inter-parties.

Whilst, in *Claims Direct Cases Tranch 2 Issues* (2003), Senior Costs Judge Hurst agreed that 'there is no principle that precludes the fees of a medical agency being recoverable between the parties provided it is demonstrated that their charges do not exceed the reasonable and proportionate costs of the work if it had been done by the solicitors', it appears that the decision in *Earle* has been echoed in at least one other recent case in the High Court.

Master Seager Berry in *Wollard -v- Fowler* (so far unreported) appears to have confirmed that MRO agency fees are not separately recoverable, this being despite indications to the contrary that the Civil Justice Council (CJC) had given on their website. According to a message posted there on 1 February 2006, it seems that the question is now to be referred to the Chief Executive of the CJC. We wait to see what advice (if any) is to be given.

It appears to us that the only alternative would be for the MROs to render an entirely separate bill to the instructing solicitor. This would lift the rather murky veil that currently shrouds these costs. If the *Earle* and *Wollard* cases are not just a couple of judicial blips, but rather the start of a trend, they spell the end for MROs.

Locating experts across the UK isn't tricky...

Finding experts without using an MRO is easy. By way of example, the *UK Register of Expert Witnesses* can offer you access to **vetted** expert witnesses from a wide range of disciplines from across the UK – from accountancy to zoology, acupuncture to youth psychiatry. And if you can't find the expert you need in the book, on the CD-ROM or on-line, then simply call us and we''ll locate one for you – all for less than the MRO mark up fee for one case.

So that just leaves the funding problem...

But, of course, MROs have been mainly about funding the expert report. The answer to this problem is not to look for ways of delaying payment to the experts – which is what fuelled the growth in MROs in the first place. This approach is based on a flawed business model, and hence doomed to eventual failure. The longest credit tail a commercial factor will agree is 120 days. So when an MRO offers 9 months or more, you know something ain't right!

Whilst doctors could offer delayed payment terms directly to lawyers (a much better commercial proposition than credit tails to flaky MROs), the real answer lies with the insurers.

In most personal injury cases there are insurers on both sides. At present, the losing insurer ends up paying a large (in percentage terms) hike in the medical report cost for the benefit of the claimant lawyer's finances. It seems self-evident that the claimant insurer would be better off agreeing to meet the claimant's (directly instructed) expert's fee in the normal course of business – at a cost of something like half the MRO-sourced report fee – and then to recover this from the defendant if the case is won.

With the financing issue out of the way, the driver for lawyers to use MROs would largely dissipate, and lawyers would be free to rebuild proper professional links with the experts they instruct.

Just four numbers nearly changed her life

Retail theft – the big picture

Richard Emery, Retail, Logistics & IT Consultant

If you ask most people about retail theft they will probably think you mean shoplifting. But this is only the tip of the iceberg. Theft and fraud can by executed by customers, staff, suppliers and anyone else who sees and seizes the opportunity. There is no such thing as either a typical fraud or fraudster, but this article highlights some of what goes on, the evidence that may prove the case and why that evidence is not always what it first appears.

To illustrate the variety of retail theft in operation, let's take a look at four cases studies and then draw some broad conclusions about the nature of the prosecution's case and how the defence responded.

Case Study 1: Shoplifting

Background

The defendant was found with £300-worth of goods in the boot of his car. He had no proof of purchase and no explanation of where the goods had come from. His car was in the car park of a retail store that sold all of the items.

Prosecution case

The prosecution case stated that the goods must have been taken from that store because:

- the bar codes on the goods were identical to those in the store
- the security tags on the goods were identical to those in the store
- a stocktake showed that there were stock differences on the items in question.

Defence case

The expert report prepared for the defence included three key statements:

- The bar codes on the products in question were not unique to that store. In fact, the same bar codes would appear on those items irrespective of where they were sold.
- The security tags on some of the items were in use in all major retailers of this type.
- The stocktake was not performed correctly, so its results could not be relied upon.

Figure 1. Three cereal boxes and their bar codes. Left is a Tesco's own-brand product; middle and right are two Kellogg's products.

Outcome

The Crown Prosecution Service dropped the case when their barrister read the expert's report.

Comment

Proving beyond reasonable doubt that the items had been taken from the store in question was clearly fundamental to the Crown's case. The issue of the bar codes and security tags is quite simple. The statement about the stocktake deserves some further comment.

The correct procedure in a case like this is for a member of staff to undertake a thorough search of the store and record all of the stock of the specific product. Then, and this must be done after the count has taken place, a different member of staff, ideally a manager or supervisor, should check the computer record to see how many of the items the computer system thinks there should be. In this case, the staff had worked out how many items they were expecting to find before they undertook the count. They had assumed the theft had taken place. So when they had found the 'right' number, they stopped looking.

Case Study 2: Selling seconds

Background

For several years the company sold its 'seconds' to a market trader who collected them from the warehouse every Thursday evening. The Board then decided that this was not a good idea and instructed the warehouse manager to arrange for the seconds to be destroyed instead. Everything appeared to be fine until the Logistics Director worked late one Thursday evening and noticed an unmarked lorry in the yard being loaded with goods.

Prosecution case

The warehouse manager was selling the seconds to the market trader and pocketing the money paid.

Defence case

There was no defence.

Outcome

Pleaded guilty.

Comment

This case demonstrates, if it needs demonstrating, what some people think they can get away with. Some companies insist that all members of staff take their annual holiday entitlement because any ongoing fraudulent activity is more likely to come to light when the person is not there to manage it.

Case Study 3: Evading Fuel Duty and VAT

Background

'Red diesel' is a special formulation of standard diesel for agricultural use and is duty- and VAT-free. It has both a red dye and a chemical 'fingerprint' to ensure that it is not sold or used outside of the agricultural environment. If the diesel can be returned to its original state by removing the dye and the fingerprint

Glossary

Bar code: a series of black bars and spaces that represent the product code or description. There are many varieties of bar code, but in retail the most common is 13 digits long and contains a country code, a supplier's ID number and a product code.

In Figure 1, the left-hand item is a Tesco's 'own brand', so this bar code would only ever appear in a Tesco store. The other two are Kellogg's, so they have the same Supplier ID (000127). These codes will appear wherever these Kellogg's cereals are sold.

CCTV: a useful deterrent to shoplifting and other forms of theft. CCTV systems must be properly set up and maintained to ensure that footage is date and time stamped and fully synchronised across all cameras.

Chip and Pin: All credit and debit cards now use a microchip to store information on the card. The user must enter their 4-digit PIN to authorise transactions.

EFT: Electronic **F**unds **T**ransfer systems allow a customer to put their credit or debit card into a card reader, enter their PIN number and transfer funds to the retailer electronically.

EPoS: Electronic **P**oint **o**f **S**ale systems are widely used by retailers to record details of sales made. They can scan bar codes, look up the item description and price, calculate special discounts and keep a record of the amount of cash and other payments in the draw.

Seconds: Goods that are not of 'perfect' quality are sometimes sold as 'seconds'. Some firms keep them until the annual sale, others dispose of them through special 'discount shops'.

Security tag: There are many different types of security tag. In clothing they are most commonly a two-part device pinned through the garment. In other sectors the security tag is a flat, stick-on label, sometimes disguised as a bar code label. It is deactivated by passing it over a special device when it is scanned by the EPoS system at the time of the sale.

Stocktake: All retail outlets undertake a physical count of their stock from time to time. This is to correct mistakes that have been made on the computer system and to calculate the losses that have occurred from theft or damage.

Swipe card: a plastic card that has a magnetic strip. They are normally issued to sales assistants who have to 'swipe' them through a card reader on the EPoS system to identify who is using the system at any given time.

Void transaction: 'Void' means to cancel a previously completed transaction. For example, you have just completed a transaction which you paid by credit card when you realise that you have been overcharged. Rather than create a 'refund' for the overcharged amount, the store will probably 'void' the original transaction and start again.

then it can be sold as normal diesel, but those supplying and selling it will avoid payment of both the duty and most of the VAT, thereby making substantial profits.

The case in question, brought by HMRC, concerned red diesel that was being 'cleaned', supplied to a normal service station and then sold to unsuspecting customers.

The initial trial resulted in a combination of several guilty pleas and guilty verdicts. However, the jury failed to return a verdict on two people, one of whom was the owner of the service station where the 'now-white' diesel was being sold.

Prosecution case

When the fuel was sold it would have been recorded through the Pump Management and Electronic Point-of-Sale (EPoS) systems. Credit card payments would have been recorded and any cash placed in the cash drawer. If the cash that represented the sales of the 'now-white' diesel was removed from the cash drawer then it would not have been possible to reconcile the amount expected with the amount banked. Therefore the site owner must have been actively involved in the evasion of the duty and VAT because he was receiving the daily reports from the EPoS system and would have investigated any significant cash shortfalls.

Defence case

It is possible to separate the Pump Management system from the EPoS system such that anyone with the appropriate knowledge and skill (which the site manager could easily possess) would have been able to sell the fuel without recording the sales through the EPoS system. Therefore, the site manager could have been selling the fuel and pocketing the cash without the site owner's knowledge.

Comment

This element of the case revolves around the audit trail created by the Pump Management and EPoS systems. A member of staff may be acting fraudulently, but the question is: 'Would the owner have necessarily known and been party to it?'

Case Study 4: Fraudulent voids

Background

Within the retail industry the term 'void' refers to cancellation of a previously completed transaction. For example, you have just completed a transaction which you paid by credit card when you realise that you have been overcharged. Rather than create a 'refund' for the overcharged amount the store will probably 'void' the original transaction and start again. Voiding should only be performed to cancel incorrect transactions. However, it can be done fraudulently.

If a customer pays cash for an item, then the system expects the number of those items in stock to reduce by one and the amount of cash in the till to go up by the correct amount. But what if the sales assistant voids that transaction after the customer has left? To the system, this means that the item was never sold (and so is still in stock) and the money is not now in the till drawer. So if the sales assistant removes the money from the drawer, then the till will have the correct amount in it at the end of the day and the fraud may not come to light until a stocktake is performed many months later. To prevent fraudulent voids being processed, the voiding procedure usually requires the entry of a manager's password. Furthermore, the daily report from the EPoS system will show how many voids have been transacted so that the manager can check all of the paperwork.

Prosecution case

On 45 occasions, on 15 separate days when the defendant was working, over a 6-week period, sales that were paid for with cash were 'voided' and the cash taken from the cash drawer of the EPoS system. The original cash sales were performed using the defendant's ID and four-digit password. It was proposed that she must have obtained a manager's password and used it to authorise the void transactions so that she could pocket the money.

Defence case

The defence case focused on five points:

- A detailed analysis of the EPoS transaction history, including days when the defendant was not working, confirmed that one of the manager's passwords had indeed been compromised, as stated in the Prosecution's case.
- This analysis also found a fraudulent void that had been transacted on a day when the defendant was not working.
- Furthermore, it found that there was widespread abuse of the manager's password in respect of other transactions, such as refunds and cashing-up.
- Tests, undertaken by the Defence expert and agreed by the Prosecution expert before trial, proved that the defendant's ID and password

could quite easily have been compromised without her knowledge.

- The Defence expert also questioned whether the manager had been checking the paperwork every day. The company's Internal Audit Manager stated that this was required by company policy. However, whilst giving evidence, the defendant's manager was forced to admit that he had not been doing so.

In his summing up, the judge said 'I am sure that all of us will treat our four-digit PIN numbers far more carefully in the light of this expert's evidence.'

Outcome

After a trial lasting 5 days, the jury returned not guilty verdicts on all 15 charges.

Comment

On the surface of it, this case was clear cut. The defendant's ID and password were used for all of the original sales transactions, so she would have known which transactions to void to enable her to pocket the cash. But if this was what was happening, and if the store manager had been doing his job properly, then the fraudulent transactions would have been noticed the very first time they happened and the matter dealt with immediately.

We all need to recognise, as the judge said in his summing up, that passwords and PIN numbers can be compromised. Any organisation that does not have a parallel physical security system leaves itself wide open to this type of theft... and there's little hope of getting a conviction against the perpetrator.

Guide to assessing your case of retail theft or fraud

Defence reports should normally focus on two issues:

1 Did what is alleged to have happened actually occur?

2 Did the defendant really do it?

The nature of retail fraud and theft cases is so diverse that it is very difficult to define what one needs to look for to either prove or challenge these two issues. However, based on these case studies and personal experience, the following is offered:

Figure 2. A store security tag.

1 Does the information available, typically from a computer system, show that the alleged events happened only at the times highlighted by the Crown? If they also happened at other times, then what is different between the occasions included and those excluded?

2 Does the information available clearly show that one person was doing it? Does it prove who that person was, taking full account of the possibility of user IDs and passwords being compromised without the 'owner's' knowledge or consent?

3 Is there a parallel physical security system or record, such as CCTV or swipe cards? CCTV footage will need to be date and time stamped and fully synchronised across all cameras. If different cameras have different time settings it may prove impossible to correctly correlate their information with other data sources such as the EPoS system.

4 Are the products uniquely identifiable and/or traceable? Being able to prove that a specific item with a specific serial number was sold on [date] to [customer] but then apparently refunded some time later could be very significant.

5 What form of audit trail has been generated, either on paper or in a computer system? Is this consistent with the other elements of the evidence?

About the author

Richard Emery is an independent consultant specialising in the business use of information technology in the retail and logistics industries. He trained as an accountant, before moving into IT and working as a Programmer, Systems Analyst and Training Manager for a company developing EPoS systems. He then joined John Lewis Partnership, where he project managed the design, development and implementation of a £6 million EPoS system into all John Lewis department stores. This project covered 17 sites, ranging up to 25,000 m^2, and the complete system included 30 mini-computers and 1,300 EPoS terminals.

During the next 4 years he played a leading role in the development of new hand-held computing technologies for both retail and non-retail applications, including barcode reading and secure international data communications. Moving to ICL Retail Systems as a Business Consultant, Richard played a key role in the design, development and first installation of a new computer-based retail warehouse management system.

In 1990 Richard established himself as an independent consultant. In addition to his consultancy and training projects, he has undertaken a wide range of expert witness and neutral assessment assignments in the use and failure of information technology in retail and logistics.

Richard Emery is based in Bracknell but consults worldwide. He can be contacted by phone on 01344 484235 or via e-mail at richard@4keys.co.uk.

Why should mediation matter to you?

The fast, low cost, win–win process for client and lawyer

Chris Makin, Forensic Accountant & Mediator

In managing cases, the Court must encourage ADR and facilitate its use. What, then, is ADR? It stands for 'Alternative Dispute Resolution', not 'Alarming Drop in Revenue'! Those who refuse to follow ADR are running a risk, as shall be seen, whereas those who grasp the new environment with enthusiasm are more likely to prosper.

ADR can include negotiation, early neutral evaluation and other informal procedures. With arbitration and expert determination, the decision is in the hands of others, as with the judge in litigation. But by far the most popular form of ADR is mediation, and this article shows why.

Case law

From the early days of the Civil Procedure Rules Lord Woolf, as Master of the Rolls, made his position clear on ADR. For example, he chose to hear appeals that gave him the opportunity to stress the advantages of ADR. The first two were *Cowl & Plymouth City Council* (2001) *EWCA Civ.* 1935 and *Dunnett -v- Railtrack* (2002) *EWCA Civ.* 302, where the winning parties were not awarded their costs because of their refusal to countenance ADR.

Refusal to mediate penalised

Other cases followed on the question of costs where mediation had been refused by one party or the other. One of particular interest is *McMillan Williams & Range* (2004) *EWCA Civ.* 294. It concerned an appeal by an assistant solicitor against an employment tribunal finding. An application had to be made to the Court of Appeal for a hearing. In allowing that hearing, Tuckey LJ said: 'The costs of further litigating this dispute will be disproportionate to the amount at stake. ADR is strongly recommended.' (See point 7 in the *Halsey* checklist.)

At the end of the Court of Appeal hearing, Ward LJ, when told costs were £50,000, remarked 'My heart sinks!' He went on to say: 'In my judgment this is a case where we should condemn the posturing and jockeying for position… and thus direct that each side pays its own costs for their frolic in the Court of Appeal.'

Mediation at work

Dyson & Field, exors of Lawrence Twohey dec'd -v- Leeds City Council (*CofA* 22 Nov 1999) was one of the first cases in which the Court of Appeal emphasised the importance of mediation. The case started as a personal injury claim for asbestosis, but the claimant died and it became a loss of dependency case. The judge at first instance found for the defence medical expert, though without giving reasons; and then the judge died. Lord Woolf said that the case ought to be retried, but since the widow had waited so long for the matter to be resolved, ADR ought now to be followed. The Court used these words:

> *16 Damages are substantially agreed. …this is pre-eminently the category of case in which, consistent with the overriding objective of the CPR and the court's duty to manage cases as set out in rule 1.4(2)(e), [that] we should encourage the parties to use ADR…*
>
> *18 … I would also add the reminder that the court has powers to take a strong view about the rejection of the encouraging noises we are making, if necessary by imposing eventual orders for indemnity costs or indeed ordering that a higher rate of interest be paid on any damages…*

The stick and carrot could hardly have been clearer. Discussions were had with counsel on whether this heavy hint should be taken. It was, and the case was settled.

A more recent example is the case of *Burchell NF -v- Bullard & Ors* (2005) *EWCA Civ.* 358, a construction dispute concerning an extension to a house. A building surveyor had said that 'the matters complained of are technically complex and as such mediation is not an appropriate route to settle matters.' The Court made short shrift of that! Ward LJ stated that this was *par excellence* the kind of case that could lend itself to mediation. The defendants had been intransigent throughout, and costs of £185,000 had accumulated in a case where the eventual net award was only £5,000. Indeed, the Court considered making a costs award against the defendants. It appears they escaped that punishment only because a non-lawyer had advised against mediation, and because this was before *Halsey* gave guidance.

A justifiable refusal to mediate

In *Halsey -v- Milton Keynes General NHS Trust* (2004) *EWCA Civ.* 576 we are at last presented with a list of the circumstances in which a party may refuse ADR without a costs penalty (see panel). It is required reading for all litigators.

A good example of justifiable refusal to mediate is the case of *Daniels -v- The Commissioner of Police for the Metropolis* (2005) *EWCA Civ.* 1312. Fiona Jane Daniels fell off a horse at the Mounted Branch training depot. The Met was suspicious of the claim because a high

About the author

Chris Makin has practised as a forensic accountant and expert witness for 20 years, latterly as Head of Litigation Support at a national firm. He has been party expert, single joint expert, court-appointed expert and expert adviser in hundreds of cases, and given expert evidence about 70 times. He also performs expert determinations.

Chris is a Fellow of the Institute of Chartered Accountants, where he serves on the Forensic Committee and as an ethical counsellor. He is also a Fellow of the Chartered Management Institute, a Fellow of the Academy of Experts, where he serves on the Investigations Committee, and a qualified mediator.

He now practises as a freelance mediator from his home in West Yorkshire and his office at 3 Gray's Inn Square, London WC1R 5AH (telephone 020 7430 0333).

For more information on how to organise a mediation, surf to *www.chrismakin.co.uk*.

number of spurious claims had come from officers being trained at that depot. The claimant made several attempts to settle at reducing amounts, but the Met was determined to put a stop to the expectation that a nuisance payment would be made in such cases. The claim failed, and the Court awarded costs against the claimant. Hence it was shown that the defence did have reasonable grounds for refusing to countenance ADR or any other means of settling before trial; they felt they needed to establish a principle.

So, while there are cases in which a refusal to participate in ADR is justified, these cases are in the minority.

What, then, is mediation?

In a nutshell, it is facilitated negotiation. The mediator makes no judgments, and gives no advice. He or she merely assists the parties **to reach a solution they can both/all live with**. It is important to recognise that the parties are in charge throughout. They can abandon the process at any time, and their rights are preserved because everything discussed is without prejudice. Furthermore, the mediator promises never to be involved in any subsequent legal process.

Qualities of a good mediator

- Courtesy and respect for the parties in a stressful situation.
- The ability to grasp the major issues and avoid distracting detail.
- A working knowledge of the subject of the dispute; legal qualifications are seldom essential.
- The ability to identify the 'hidden agenda' and to suggest novel solutions.
- Above all, the mediator must be an excellent listener – one mouth and two ears is the right proportion!

Some examples

The power of mediation can be well illustrated with key points from a couple of case study mediations. The facts are altered so there is no risk of identifying the parties.

Case Study 1

Two business neighbours were so entrenched in their dispute that they had not spoken for 10 years! Before the mediation could start, they had to be persuaded to sit in the same room.

The case concerned 'gentrification' of a run-down area. There was a muddy yard between two old industrial buildings. On one side was a motor engineer, and his paint spraying booth had access from the yard. The other building was taken over by a smart architects' practice, and they tarmaced the yard. The trouble was, the paint booth was downhill across the yard, and whenever it rained, the paint booth was flooded and work had to stop.

The motor engineer had put in a claim for £100,000 loss of profit. It was greatly exaggerated, and clearly a cry for help. But the architects, in smartening up the yard, had also marked out parking spaces that blocked access to the paint booth, a fire exit and a right of way.

The parties were taken to the site on a cold and damp November afternoon, and they were kept busy measuring parking spaces until the blockages to the fire exit and the right of way were cleared. The architects agreed to construct a new drain to take water away from the booth doorway, and to pay a small amount in damages. Best of all, the neighbours shook hands at the end of a very long day.

This was such a good example of the benefits of mediation that the judge, without knowing how the solution had been reached, used it in a presentation to litigators on the power of mediation.

'... while litigation destroys relationships, mediation quite often rebuilds them.'

Case Study 2

Mother and son had been in partnership in a cash business for many years. The mother retired and the son bought out her share. He then noticed that the profits increased. A nasty dispute arose. When I met them, the parties had not spoken for 6 years!

The son had lodged a £250,000 claim and made allegations of fraud against his own mother. This was a very nasty business indeed. But the mother's concern was that she had lost a granddaughter through the dispute with her son, whereas the son's concern was to take a large lump of cash off his mother.

The mother had brought along for moral support another son, who happened to be a tax manager at a firm of accountants. The claimant had reached his £250,000 by methods similar to those used by tax

Halsey checklist

A checklist to establish whether refusal to mediate is acceptable

To compel the use of ADR would be an unacceptable obstacle to justice. The general rule is still that the winning party will be awarded their costs. But in assessing whether a party's refusal to use ADR is reasonable, these tests will be applied:

- Whether it is important to establish a principle or set a precedent (see *Daniels -v- The Commissioner of Police for the Metropolis*)
- The merits of the case, since a party who reasonably believes they have an unassailable case may reasonably refuse, but a party who holds that view unreasonably may not (see *Burchell NF -v- Bullard & Ors*)
- Whether other forms of ADR have been attempted, even though the Court recognises mediation as by far the most successful method
- The cost of ADR, which is normally modest but may be disproportionate for a small case
- Any damaging effects of delay, where for instance a trial is looming (note, though, that successful mediations have taken place within days of a trial, and even during a brief adjournment)
- Whether ADR has a reasonable chance of reaching a settlement
- How strongly ADR may have been encouraged by the Court (see *McMillan Williams & Range*).

Overall, the risk on costs rests with the party that refuses ADR.

inspectors. So I asked the tax manager to mark his brother's 'homework', and he found holes in the logic. It became clear that if the case came to court, the judge would report matters to the Revenue. Then the tax, interest and penalties due would be even higher than the £250,000 over which they were currently fighting. After stern words from the mediator to the parties, the matter concluded with the son withdrawing his claim but his mother paying the bulk of his costs. Thus, he had taken a lump of cash off his mother but she now had a chance of meeting her granddaughter again.

Mother and son went home satisfied, and a 4-day hearing the following week was prevented.

'Mediations are generally more successful if one doesn't get bogged down in legal arguments and technicalities. The parties don't need a closely reasoned judgment; they need a solution they can live with.'

Elements of a mediation

Mediation is so successful because **the parties are in charge of their own dispute**.

- They can abandon the process at any time.
- All proceedings are in private.
- There's no publicity.
- The mediator listens, but does not give advice or make any judgment.
- In private sessions, the mediator gently discovers the true nature of the problem, and attempts to find a solution acceptable to both/all sides.
- The mediator shares information only with express permission.
- Everything is without prejudice.
- Anything told to the mediator will never be repeated in subsequent hearings.

So, very often a mediation results in solutions a court could not impose. And while litigation destroys relationships, mediation quite often rebuilds them.

Mediation is surprisingly successful. Even allowing for those unwilling parties who are pressed into mediation, the average success rate runs at almost 80%, with particularly skilled mediators achieving upwards of 95%. And once a case is settled, there is nothing more to do, except inform the court that a hearing is no longer necessary.

Conclusion by Mr Justice Lightman

In 2003, Mr Justice Lightman made a speech entitled 'Mediation the First and Litigation the Last Resort'. His closing paragraph is particularly telling (emphasis added):

> *'The loss of a good night's sleep is a real price to pay for litigation, a price which practitioners and indeed the parties all too often forget or underplay when the decision to litigate is made. In the case of mediation everyone can be the winner; the costs can be small; a result may be achieved in a short passage of time; and personal relations may be salvaged. Mediation is not a universal panacea: it has its limitations and it is not always applicable. But* ***where it is available in my view no sane or conscientious litigator or party will lightly reject it if he fairly weighs up the alternative namely litigation****, and* ***any adviser who does so invites a claim in negligence against him****.'*

With impressive brevity he lists the main advantages of mediation:

- It's a win–win process.
- It is relatively low cost.
- Results are achieved relatively quickly.
- Personal and professional relationships can be rebuilt, rather than destroyed.
- Litigators who refuse ADR for their clients need to check their professional indemnity policy.

His noble words make quite clear why litigation should be the last resort, and why mediation truly should be considered first.

Finding a mediator

- Surf to www.jspubs.com, website of the *UK Register of Expert Witnesses*. The free on-line search facility enables those seeking mediators to specify expertise and 'mediation' as a requirement in any Keyword Search.
- A number of professional bodies and commercial organisations can suggest a mediator with appropriate experience. Many are listed at **www.venables.co.uk/adr.htm**, part of the legal resources site maintained by Delia Venables.

Wood: avoiding the pitfalls

How a basic understanding of timber technology can help to avoid problems in use

Roger Galpin, Timber Technologist

The uses for timber are almost endless. Its excellent environmental credentials, and widespread featuring in popular makeover programmes and lifestyle magazines, have led to something of a renaissance for wood in recent years. And it's a trend that seems set to continue.

However, to make the most of the unique appeal of timber in our homes and buildings we need to be aware of its natural characteristics. If overlooked, they can cause projects to fail and disputes to arise.

As one of the oldest materials known to man, wood has provided us with fuel wood, pulp and paper, utensils, furniture and a first-class, environmentally friendly building material. So, given our familiarity with timber, why is it that attempts to use it can result in expensive litigation?

In some cases it would seem that it is our very familiarity with the material that is the problem. So often, our failure to specify the correct species, treatment and condition of the timber can result in problems later. Likewise, poor manufacture, faulty installation or incorrect maintenance can result in timber projects falling short of expectation. As a consequence, it is often not the timber itself that is at fault, but **the way in which it is used**.

Properties of wood

An understanding of some of the basic properties of timber will help to ensure that it is used correctly. Whether it's a multi-million pound building or a weekend DIY project under consideration, the timber specifications need to be right.

Moisture content

One of the most important, and yet least understood, factors is that of moisture content.

Timber contains a large amount of water when it is freshly felled. The timber needs to be dried so that it can be used without excessive shrinkage and distortion. The amount of water in a piece of wood is referred to as its **moisture content**. It is expressed as a percentage of the dry weight of the piece, not of the total weight. Hence it is possible to have moisture contents in excess of 100%.

The amount of water in wood rises and falls in response to changes in temperature and humidity. So it is not possible to prevent wood from expanding and contracting in service. However, this movement can be minimised by drying the wood to a level that it is likely to achieve in service. This is referred to as its **equilibrium moisture content**. As an example, indoor furniture would be expected to have a moisture content of around 8–10%, whilst external decking would be expected to attain an equilibrium of around 16% moisture content. External levels would be subject to seasonal variations, becoming slightly higher in winter and lower in summer.

Susceptibility to decay

One other significant factor related to moisture content is the susceptibility of timber to decay.

Wood-destroying fungi are often responsible for timber decay in buildings and wooden structures. For them to become established and sustain their attack, these fungi require timber to have a moisture content in excess of 22% for a prolonged period. However, a higher moisture content is one of the factors required by the fungi for optimum growth. For example, the true dry rot fungus, *Serpula lacrymans*, favours a moisture content of around 30–40%, while many of the

About the author

Roger Galpin is a graduate in Timber Technology (BSc) and an Associate of the Institute of Wood Science. He has been involved with the technical issues of timber for more than 20 years, undertaking site and laboratory investigations. He has also advised industry professionals on the correct use and specification of timber through seminars, consultancy and representation on a number of technical committees (British and European Standards and Industry Association schemes).

Roger has been involved with the expert witness 'industry' for over 10 years, and has attended many of the training courses, promotional events and conferences that have been run by the relevant professional bodies. He is conversant with the requirements of CPR 35 and has gained broad experience in preparing legal reports, dealing with solicitors, conferring with counsel and giving evidence in court.

Roger established The Wood Shop in 2001 to bring together suppliers and users of quality wood products through an online directory, *www.thewoodshop.biz*. The website now attracts around 400 visitors daily. As a Timber Consultant, his daily involvement with different timber and wood processing companies enables him to offer an up-to-date view on industry best practice where timber is concerned.

Roger can be contacted through *www.thewoodshop.biz*, by email at roger@thewoodshop.biz or by telephone on 01480 469367.

Glossary

Growth Characteristics

Growth ring: Layer of wood produced in one growing season, consisting of softer 'early wood' formed during the spring, and more dense 'late wood' from the summer/autumn growth.

Hardwood: Timber from broad-leaved trees which produce seeds contained in an enclosed case, e.g. oak, beech and walnut. (It does not refer to a timber's density – balsa wood is a hardwood!)

Heartwood: Central part of the tree trunk that provides mechanical support for the crown.

Sapwood: Outer part of the trunk. It conducts water from the roots to the leaves. It is sometimes lighter in colour than the heartwood.

Softwood: Timber produced from mostly evergreen, coniferous or cone-bearing trees, e.g. pine, spruce and fir.

Timber Characteristics

Fissures: Longitudinal separation of the wood tissues resulting in 'checks' (which do not extend through from one face to another) and 'splits' (which do).

Moisture content: The amount of moisture present in a piece of wood expressed as a percentage of its oven-dry weight: mc% = [(weight wet wood – weight dried wood)/wt dried wood] x 100%

wet rot fungi require a moisture content of 50% or higher.

Other factors

Moisture content is, of course, just one factor when considering using timber. There is a wide range of industry standards and guidelines relating to timber specification to ensure that the correct timber is used in respect of durability, strength, appearance, movement characteristics, etc.

What can go wrong

The following case studies illustrate what can go wrong if care is not taken with specification, design and installation.

Case Study 1: Hardwood flooring and underfloor heating

In line with the growth in popularity of wooden flooring, the client wished to combine the traditional appeal of 200 mm-wide oak floorboards with modern underfloor heating. Following installation, the client began to notice gaps developing between the floorboards, coupled with distortion of the boards themselves. A dispute subsequently arose over the fitness for purpose of the flooring, in respect of its specification, manufacture from a solid section and condition at the time of installation.

The architect's specification referred to the correct British Standard but detailed the recommendation for intermittent heating of 10–14% moisture content, rather than a more appropriate condition of 6–8%.

By considering the known movement characteristics of oak, it is possible to first establish the existing condition of the flooring and then to determine, by calculation, the original condition of the flooring at the time of installation. It can then be established whether the flooring complied with the specification.

In this case, it was found that a 5% reduction in moisture content due to drying out of the flooring in service had resulted in shrinkage of 2 mm across each of the 200 mm-wide boards. This had produced unsightly gaps between the floorboards as well as distortion of the boards themselves.

Whilst the condition of the flooring was found to have complied with the architect's specification, the specification itself was found to be at fault. The architect had failed to take account of the low moisture content required for such an end use. The specification also failed to recognise the difficulties in installing solid, wide-section floorboards over underfloor heating. Either narrower boards or flooring made from an engineered, or composite, construction would have been more appropriate.

Case Study 2: Traditional joinery methods, but modern glazing systems

In recognising the environmental benefits of timber, an architect had opted for bespoke timber doors on a high-quality, residential warehouse redevelopment. There was no detailed specification for the doors, only outline drawings. The joinery manufacturer made the doors using these outline drawings and his 'expertise'.

Following the sale of these very upmarket riverside apartments, complaints were received from the occupants that the doors were hard to operate and leaked during inclement weather. The subsequent dispute between the main contractor and the joinery supplier focused on the quality of the doors and whether they were fit for purpose.

To comply with the levels of insulation required by today's Building Regulations, the use of insulating glass units (IGUs) has become standard for external joinery. The units are made in a factory, where two or more panes of glass are spaced apart and sealed, with dry air or special gases in the unit cavity.

In this case, 20 mm-thick IGUs were used. They were fitted into the doors which were made from 44 mm-thick timber sections. Traditionally, this section size is used for external doors with single panes of glass. It continued to be used when 14 mm IGUs were introduced, but is inadequate to accommodate the glazing seals and beads when 20 mm IGUs are specified. These wider units need a minimum timber section size of 56 mm.

Furthermore, an altogether more substantial door frame is required to support the weight of the IGU, particularly when large glazed panels are used. In this case, the weight of the glazing had caused the doors to distort, resulting in their binding on the frames and making them difficult to operate.

The doors had also been poorly glazed, and this had resulted in moisture ingress when it rained. Traditionally, glazing was achieved by fully bedding the glass in a glazing compound, such as putty. Whilst a solid bedding system can still be used with modern IGUs, care has to be taken to ensure that there is no danger of moisture coming into contact with the edge seal of the unit. Any moisture reaching this seal can cause the unit to fail, resulting in moisture development within the unit and moisture entrapment between the glass panes.

An alternative method of glazing is to leave a space around the edge of the IGU. This gives any moisture that may penetrate the glazing a means of escape by drainage and ventilation. Such provision needs to be incorporated into the joinery design, together with specification of the appropriate glazing seals and beads.

In this case, the method of glazing was neither a fully bedded system nor a drained method, but fell somewhere between the two. Poorly applied glazing strips permitted entry of moisture into the glazing space, which was only partially filled with glazing

compound. Thus moisture had been allowed to penetrate the property.

Due to inadequate specification, the quality of the doors relied heavily on the expertise of the joinery manufacturer. Unfortunately, the manufacturer attempted to accommodate modern methods of glazing within traditional methods of joinery construction. The result was that the doors failed in both their operation and their weathertightness.

Case Study 3: Timber decking and fitness for purpose

Promoted by numerous garden makeover programmes and lifestyle magazines, the growth of the timber decking industry in the UK in recent years has been dramatic – from less than £5 million in 1997 to an estimated £130 million in 2005 (Source: Timber Decking Association).

In this case, the householder had enlisted the 'expertise' of a decking company to install a simple ground-level deck in his garden. After only 3 years, excessive deflection was noted to one end of the deck. The householder found that the supporting joists appeared to have rotted where they had been partially built into the ground, necessitating replacement of the deck.

Although there is currently no formal British Standard for decking, there are a number of relevant Standards concerning the use of timber in external situations. In this case, where timber was used in ground contact, it should have been either of a naturally durable species or otherwise pre-treated with preservative applied by pressure impregnation (a commercial treatment process, not to be confused with brush-applied treatments).

Non-durable species, such as European whitewood and redwood (spruce and pine), are commonly used for decking and must be pre-treated with the correct levels of preservative for their end use. In this case, untreated timber was used in a high hazard situation where it rapidly attained a high moisture content that enabled decay fungi to flourish. The result was joist sections that failed in a relatively short period of time. The timber used, in its untreated condition, did not comply with the recommendations of the relevant Standards. Therefore it would not be considered fit for purpose.

Top 10 Checklist

Checklist for gathering background information in timber-related claims

	Issue	Evidence
1	What is the nature of the problem and when was it first noted?	
2	What product is involved?	Species of timber; type of wood-based panel (MDF, chipboard, plywood); engineered product, e.g. composite flooring, glued-laminated beam
3	What is the environment in which the timber is used?	External (sheltered or exposed); internal (heated or unheated)
4	If problems have occurred in service, what changes have there been that may have affected the timber?	New use for product; new occupancy; introduction of different heating regime, etc.
5	Is there a specification for the product to indicate how it should have performed?	Formal design specification; drawings; physical sample; manufacturer's description or brochure
6	Has the product been treated? If so, what is the name of the treatment?	Pressure impregnated preservative pre-treatment; application of surface finish
7	Who are the parties involved?	Designer; supplier; installer
8	Has any remedial work been carried out? If so, what?	
9	What records have been kept?	Photographs; samples; site records, such as moisture content readings; installation dates; records of ambient conditions – weather, temperature and humidity)
10	Is the problem still available for inspection?	

Timber distortion: Timber movement that results in warping of the section. Descriptions include cup (warp across the width of a board), bow (warp along the length) and twist.

Timber movement: Expansion and contraction of wood associated with changes in moisture content.

Wood rot or timber decay: Biological degradation of timber as a result of wood-destroying insects and/or fungal activity.

Malingering: are the client's symptoms genuine?

How to minimise the risks of being duped, and why you should care

David Gill, Consultant Psychiatrist

Malingering is the deliberate feigning or exaggeration of illness for gain, be it financial (compensation) or personal (time off work, drugs). Its presence in litigation cannot be denied, from the need to keep ill until the trial – perhaps a reflection of normal human behaviour and a keenly felt need not to let your side down – to the complete fabrication of an illness or injury for financial gain.

However, malingering is something of a Cinderella topic. Both lawyers and doctors are reluctant to discuss it openly, and there is little accurate scientific information available to support any theories. This article seeks to make suggestions about when the issue needs to be considered, and about how best to phrase letters of instruction to elicit an expert opinion on the matter. The role of special measures, such as surveillance, is discussed briefly, together with that of the various medical specialities, including psychiatry.

Background

Non-genuine claimants are a fact of life. Defendants fear unjust payouts. Claimant lawyers fear cases that collapse late, expensively and ignominiously, e.g. following disclosure of video surveillance evidence. On whichever side of the fence you sit, an understanding of the subtleties of the 'condition' will help you craft your letter of instruction and correctly interpret the sometimes cryptic expert reports received.

Malingering: a medical definition

Malingering can be defined as the **deliberate feigning or exaggeration of illness for external gain** (be it financial or personal). Obviously it is not an illness in itself. Nevertheless, medical doctors have been looked to as the experts in malingering because sorting out well from ill is central to the doctor's role.

The influential *Diagnostic and Statistical Manual of the American Psychiatric Association* **DSM-IV**[1] lists malingering under 'additional conditions which may be a focus of clinical attention', i.e. not as a mental disorder in itself.

DSM-IV: Malingering should be strongly suspected in any combination of the following:

- Medico-legal context
- Discrepancy between complaints and objective findings
- Uncooperative in examination and/or treatment
- Antisocial personality disorder

The definition has been criticised as imprecise, but the advice of 'strongly suspecting' malingering in the medico-legal context is useful.

Confusion with other disorders

It is important to distinguish malingering from two groups of recognised medical conditions – factitious disorders and somatoform disorders.

Malingering: the *conscious feigning* or significant exaggeration of symptoms for *personal gain*

Factitious syndromes: the *conscious production of symptoms*, apparently in order to receive medical care, but *not for external gain*

Somatoform syndromes: *symptoms* (e.g. pain) *without a physical explanation; presumed not to be feigned*

Does malingering really occur?

It would be convenient for everyone if malingering never occurred. Medical doctors are uncomfortable with the idea because it casts doubt on the trusting doctor–patient relationship. Lawyers are sensitive to the issue of falsely accusing a claimant of a criminal offence of dishonesty and becoming embroiled in subsequent secondary litigation.

But malingering does occur, and it can manifest itself in several ways.

- A **wholly fabricated medical condition**, with the client claiming to have a series of non-existent medical problems, e.g. amnesia of the assailant following a pub brawl or rape.
- An **exaggerated medical condition or injury** following an incident that results in financial and/or personal gain for the client. This usually presents as no improvement in physical symptoms after months of, for example, physiotherapy. It should not be confused with the genuine claim of a patient with injuries that fail to respond to conservative treatment.
- A **staged accident** so that the injury is caused deliberately.

Note that malingerers are not usually willing to undergo extensive painful diagnostic testing, treatment or surgery.

How common is malingering?

Medicine has a toolkit for assessing how common a medical condition is, as well as for specifying its causation and likely outcome (prognosis). It's called epidemiology. However, because malingering is not a straightforward medical condition, it is not readily susceptible to this approach. So there are no reliable studies and supporting data. Furthermore, legal cases are often compromised before the issue is tested, and

About the author

David Gill works as an NHS Consultant Psychiatrist with Hertfordshire Partnership NHS Trust at Stevenage. He specialises in general adult psychiatry and liaison psychiatry. He qualified from Oxford University in 1983, and has 15 years' continuous service in the speciality. He has also been providing psychiatric reports for lawyers, insurers and other professionals for more than 10 years. David consults in London, Oxford and Hertfordshire, and also visits other parts of the UK. He speaks regularly to audiences of lawyers and insurers.

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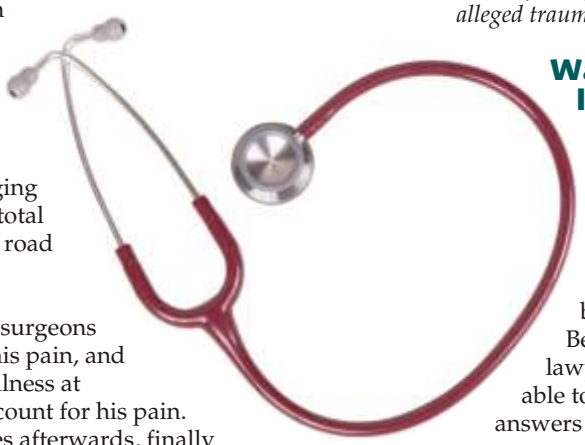
report writers seldom receive feedback about case outcomes. In the absence of quantitative studies, then, let's take a look at a couple of examples of malingering.

Case Study 1: Malingered PTSD

In 1983, Sparr and Pankratz[2] described five men who claimed to have been 'traumatized' in the Vietnam War. Three of the men claimed to have been prisoners of war. It turned out that none of the men had been PoWs, four had never been in Vietnam and two had never been in the Services.



Case Study 2: Malingered whiplash*

I saw a man in his fifties alleging severe neck pain and almost total disability from a fairly minor road traffic accident several years previously. Examination and investigation by orthopaedic surgeons found no physical cause for his pain, and there was no sign of mental illness at interview. I was unable to account for his pain. He contacted me several times afterwards, finally offering to 'split the damages' with me if I changed my report to suit. I had no alternative but to report this to the instructing solicitor, and the case was subsequently dropped.

First catch your expert

Treating doctors tend to see themselves as 'on the patient's side', and give the benefit of any doubt to the patient. This may be appropriate if the doctor only has treatment responsibility, but not if the doctor is instructed for medico-legal reporting. As an expert witness, the medic has a primary duty to the Court. Hence lawyers should avoid instructing a report from a treating doctor. Indeed, 'wearing both hats' involves a potential conflict of interest for the medic between duty to the patient and duty to the Court.

Instructing your expert

Lawyers sometimes forget that medical doctors are trained to a 'caring profession', to have 'unconditional positive regard' for their patients. Medical experts may not, therefore, naturally consider the possibility of malingering, and may even try to avoid the issue completely. A lawyer wishing to gain an opinion as to the likelihood of malingering in the client will need to instruct their expert explicitly to consider the issue.

Phrasing instructions

However, malingering is a loaded term, and lawyers would be wise to phrase their letter of instruction in a less aggressive manner.

While experts may have doubts about the validity of a claimant, they may be reluctant to set them down on paper in reports because the suggestion of malingering can be tantamount to an accusation of dishonesty – a criminal offence. And few experts will wish to go so far openly.

Instructing solicitors may be more successful in encouraging experts to address these issues if they use more neutral terms. For example:

'In your report, please comment on:

- *the reliability and consistency of the informant, with reasons for your opinion*
- *whether any injuries found are explicable in medical terms*
- *whether the injuries found are in proportion to the alleged trauma.'*

Warning signs for lawyers

It follows that consideration of the possibility of malingering, if only to discount it, must be part of every personal injury claim assessment by both doctor and lawyer. Below are 12 pointers for lawyers. The lawyer should be able to glean the majority of answers from existing reports and papers.

12 warning signs of possible malingering

1 Difficulty in corresponding with the client, including arranging appointments with the client, the client staying at different addresses and the client not returning calls, etc.

2 Any suggestion of 'coaching' of symptoms. For example, the famous Aleutian Enterprise case, in which crewmen were allegedly traumatised in an accident. 'Attorney coaching' helped to produce their too-perfect complaints of post-traumatic stress disorder[3].

3 Minor trauma with disproportionately severe effects.

4 Syndromes characterised by pain but with no agreed physical cause (e.g. whiplash, chronic pain syndrome, RSI, etc.)

5 Pre-accident social, health, employment and/or family problems.

6 Record of criminal and/or antisocial behaviour.

7 Inconsistency between or within interviews.

8 Expert reports and/or medical records containing terms such as 'functional', 'overlay', 'supratentorial', 'non-organic', 'secondary gains', 'over-reaction', etc.

9 Complaints inconsistent with the anatomical facts. Of particular use here are orthopaedic and neurological reports.

10 Alleged zero improvement in the condition or injury. Most genuine conditions will show at least some improvement or adaptation over time.

11 A history of accidents and consequent litigation.

12 Severe memory complaints after minor head injuries (with no skull fracture and no hospital admission).

Beware, though, that no one point is even suspicious in itself, let alone diagnostic.

Further investigations

No special tests (such as 'lie detectors') have yet established themselves in general use, at any rate in the UK, for the assessment of possible malingering. There are, however, numerous special **interview schedules and rating scales** at various stages of development that may become generally accepted in the future. They present tests of memory, for example, which appear difficult but are actually easy. If a subject – say with 'whiplash' – scores very poorly (below a score that would be obtained by random responding, or those achieved previously by persons with Alzheimer's or brain injury), it may throw doubt on their account[4].

Surveillance and background checks can be helpful, and the **internet** is increasingly used to research a client's history and current activities. For example, if the client is claiming a severe back injury but has been reported in the local press to have been a playing member of a recently victorious pub football team, then the case would unquestionably be undermined. The more thoroughly the background records are reviewed, the greater the opportunity to spot contradictions.

Case Study 3: Disabled but motivating

A man in his forties described to his psychiatrist symptoms of depression that had prevented him from working as a sales trainer for the past 2 years. His website, nevertheless, advertised his services as a freelance motivational speaker. Such an apparent inconsistency merits further investigation.

Video evidence can be informative, although in purely psychiatric claims it is usually not definitive unless the patient has made unusually strong claims (e.g. 'I *never* go out.').

Consideration can also be given to obtaining a report from a psychiatrist, ideally with experience in assessing patients with physical complaints (e.g. pain) unexplained by physical pathology. This branch of psychiatry is called **liaison psychiatry**. Psychiatrists do not, of course, have clairvoyant powers unattributed to other branches of medicine. But the psychiatric interview does involve an assessment of the personal and family history and current social circumstances of the individual. Such detail can help in understanding causation of the current problems. Indeed, sometimes an undiagnosed psychiatric illness is discovered, and that can explain some of the apparent discrepancies.

Case Study 4: Malingering? RSI? Example of psychiatric input

The author was asked to see a young man who was suing his employer for 'repetitive strain injury' due to an alleged poor workstation. Medical reports were polarised, with those for the claimant alleging significant disability, and those for the defendant emphasising the normality of examination and of special investigations such as blood tests and scans. Psychiatric assessment revealed a young man dedicated to his work, though of slightly rigid personality, who had had the strain of his partner's unplanned pregnancy and a recent house move. Re-organisation at work precipitated a chronic depressive illness characterised, as so often, by vague aches and pains. The depression seemed likely to account for much, if not all, of the overall picture. Treatment of the depression, combined with a gradual return to the work he enjoyed, after response to his concerns about his workstation, offered a way forward.

Conclusions

Malingering does occur, though how frequently is unclear. There is a vital role for commonsense and experience in assessment, by both doctors and lawyers, which must be overall and 'whole person'. Psychiatry can offer particular insights, especially in the presence of unexplained physical symptoms. However, most medical experts will probably

continue to refrain from the use of the word 'malinger', even if strongly suspected, as it is tantamount to an accusation of deception.

Experience suggests that any evidence that a claimant is non-genuine must be clear and introduced as soon as possible into the proceedings. Even clear evidence may be dismissed by the court if it is introduced so late as to not give the claimant a fair chance of responding.

**** Details of case reports have been changed to protect confidentiality.***

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Comment from the Editor

There is, of course, a difference between being able to spot malingerers through medical expertise and a solicitor who merely recognises them as a vexatious or avaricious litigant. The solicitor's job is to assess the strengths and weaknesses of the claim and to make sure that it will stand up to scrutiny. However, a solicitor should not suspect the client of malingering unless there is some external evidence to suggest this to be the case.

The courts do not really like allegations of malingering. It is all too easy to make such an allegation that a claimant is then obliged to respond to with attendant expense. In 2000 the judge in *Burgess -v- British Steel* actually reduced the costs a claimant was ordered to pay on failure to beat a payment into court. The reason given for reduction of the costs order was that the defendant had made an allegation of malingering that had subsequently been dismissed. This decision was, however, reversed on appeal, when it was held that the allegation that the claimant was a malingerer should not have caused the trial judge to depart from the normal rule that 'costs follow the event'. The case does, though, serve as an illustration that accusations of malingering should not be made lightly and are likely to incur the displeasure of the court unless supported by substantive evidence.

Contrasting this is the earlier case of *Ford -v- GKR Construction* (C.A. Lord Woolf MR, Pill and Judge L. JJ, *TLR* 5/11/99) in which the claimant failed to beat the payment into court. This was chiefly due to video evidence obtained by the defendant that came to light only during an adjournment in the case. The video tended to suggest that the claimant was able to manage substantially better than she had been prepared to admit. The defendants sought their costs on assessment on the basis that the claimant had failed to beat the payment in. The claimant was, nevertheless, awarded the costs of the action and the Court of Appeal dismissed the defendant's appeal. If allegations of malingering or exaggeration of symptoms were to be made, fairness demanded that the claimant should have a reasonable opportunity to deal with them, and that meant disclosure of the information needed to assess any offer made. In this case, no explanation had been given for why the defendant had found it necessary to carry out surveillance on the claimant after the trial had begun when the opportunity had been given earlier. The lesson to be drawn is that **evidence of malingering should be adduced at the earliest possible stage and the claimant must be given every opportunity to deal with such evidence within the pre-action protocols** for personal injury and clinical dispute claims.

There is an interesting distinction to be drawn between malingering and deliberate self-harm as a result of the condition known as Munchausen's syndrome (factitious disorder). In *Thomas -v- Tesco Stores Ltd* (unreported, Swindon County Court 2004) an employee had sustained a soft tissue injury at work. Medical evidence showed that, under normal conditions, the injury should have healed after 3 months. The consensus of the expert evidence was that the claimant had perpetuated the injury by deliberate self-harm as a result of a pre-existing medical condition, Munchausen's syndrome. Mr Recorder Lamb QC made an express finding that, in this case, the claimant was not malingering.

The importance of the distinction is that, had the claimant been found to be malingering, the trial would have collapsed immediately. However the court found that the claimant was not malingering but was in fact suffering from a pre-existing medical condition. This meant that the court had to consider whether the employer was obliged to take its employee as it found her, namely as a vulnerable person with a pre-existing medical condition that made her prone to self-harm.

Recorder Lamb referred to the judgment of Hoffman LJ in *Commissioners for the Metropolitan Police -v - Reeves* (2001; 1 *AC* 360). In that case the court ruled that it was 'sound intuition that there is a difference between protecting people against harm caused to them by third parties and protecting them against harm which they inflict upon themselves. It reflects the individualist philosophy of the common law. People of full age and sound understanding must look after themselves and take responsibility for their actions.' In *Thomas*, Recorder Lamb found that although the accident had given opportunity to the claimant for self-harm, the risk was too remote from the employer's original negligence for liability to be attached. *Tesco Stores Ltd* was found liable for the injuries for the 3-month period but was not liable for the continuing injuries sustained through the claimant's self-harm.

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