

## JANUARY 2023

I wish all of my readers a Happy New Year.

### Professor Andrew Sims

Andrew Sims died a week or so ago. He was not a forensic psychiatrist but those of you who grew up with the big blue book (*Principles and Practice of Forensic Psychiatry*) will recall his chapter on 'The phenomenology of neurosis' with its section on 'Special syndromes with forensic implications' and I have occasionally quoted in reports his paper on autokabalesis published in *Medicine, Science and the Law*. I have good reason to be grateful to Andrew. He was my head of department when I was appointed senior lecturer and consultant in liaison psychiatry at St James's University Hospital, Leeds, in 1983. If he had not agreed that a prison session at HMP Leeds could be regarded as a form of liaison psychiatry, my career as a forensic psychiatrist would have had a much slower start.

If you knew Andrew, you might consider writing to Ruth (Dr Ruth Sims) at Church Farm, Alveley, Bridgnorth, Shropshire WV15 6ND.

### Apologies

I apologise to those of you who are no longer receiving this bulletin or do so only occasionally. For the last few months, within seconds of pressing 'Send', I am inundated with messages to the effect that it has not been received by some of you. Some of those messages contain simple untruths, such as that your email address does not exist (which I know to be untrue because I use it successfully for other email correspondence). Some of you seem only to receive emails sent from within the NHS – how insular. Some of the messages are to the effect that the email has been quarantined which strikes me as odd because I am not aware of anyone having caught a bacteria or virus from my bulletin even though I have had Covid and even though my wife had it when I sent out the last bulletin. Then a few days later I get a string of messages to the effect that the email has been in your queue too long and all I can say about that is that some of you are obviously too busy and need to reduce your workloads.

Seriously, I have been discussing (but for 18 months) the possibility of the RCPsych taking over the publication and dissemination of the bulletin but College machinery moves slowly. If you hear of someone who is no longer getting the bulletin, please forward it to them.

### Joint Statements

In clearing my in-tray, ready for 2023, I came across a reference to <https://www.maps-medical.co.uk/insights/where-joint-statements-go-wrong/>

This is worth reading. I did draw attention to *Aderounmu v Colvin* [2021] EWHC 2293 (QB) at the time so some of you have a summary of this.

### Judgments

Again, buried in my in-tray there were several quite old judgments that I thought worth bringing to the readership's attention, so not all of the additions to the attached digest are from the last month. They begin at page 43:

Expert Witness Matters, January – April 2023, Professor Keith Rix

*Re SV* [2022] EW COP 52 “Can an Irish citizen be sent to England for treatment of an eating disorder?”

*Lehman Brothers Holdings Scottish v Lehman Brothers Holdings Plc* [2021] EWCA Civ 1523 (CA) “Do experts give evidence of fact?”

*Wright v Rogers* [2022] EWCA Civ 1658 “Keeping a contemnor out of prison”

*Benford (A Child) v East and North Hertfordshire NHS Trust (Rev1)* [2022] EWHC 3263 (KB) “If only I had a crystal ball ...”

*Kaye v Lees* [2022] EWHC 3326 (KB) ‘What the psychiatrist needs to know about the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020’

*Andrews v Kronospan Ltd* [2022] EWHC 479 (QB) “When expert evidence turns to dust”

*Robinson v Liverpool University Hospital NHS Foundation Trust* (County Court at Liverpool, 9 September 2021) “How to avoid a wasted costs order”

*Re X, Y and Z (Children)* [2010] EWHC B12 (Fam) “Do as you are told”

*Re AB (Child Abuse: Expert Witnesses)* [1994] EWHC Fam 5 “The hazards of flying a kite in court”

*A Local Authority v S* [2009] EWHC 2115 (Fam) “More on the hazards of kite-flying”

*McCullough v Forth Valley Health Boards* [2020] ScotCS CSOH 40 “To amend or not to amend, that is the question”

*Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd* [2018] EWHC 1577 (TCC) “Trial by ambush”

### **Crime in Mind? Female Afghan judges**

I am grateful to Adrian Grounds, who spoke about the psychiatric consequences of miscarriages of justice at last year’s Grange Conference, for bringing to my attention the charity ‘Crime in Mind’ started by John Gunn and Pamela Taylor - <https://www.crimeinmind.co.uk/>.

The charity has recently published: <https://crimeinmind.co.uk/national-lack-of-secure-hospital-inpatient-provision-for-women-with-intellectual-disability-and-autism/>

The Family Law Bar Association is supporting the Azadi charity which has been helping female judges leave Afghanistan <https://azadicharity.com/>.

I provide this bulletin free of charge so if you would like to show your appreciation, please make a donation to one of these charities.

### **MAEP for psychologists!**

I developed *Multi-source Assessment for Expert Psychiatric Witnesses* (<https://www.rcpsych.ac.uk/improving-care/ccqi/multi-source-feedback/maep>) for psychiatrists. It

always bothered me that the name is a slight misnomer as it is a generic tool and it could be used by any expert witness. So I was pleased to receive this email from a psychologist last month:

since becoming aware of [your work] I have obtained the second edition of your book, registered with MAEP and had some helpful positive feedback from a range of instructing solicitors and Counsel involved in cases, all of which very helpful for my CPD and commitment to expert work..

So, whether you are a psychiatrist or psychologist, why not make it a New Year's resolution to sign up to MAEP.

My work on an adjunct to MAEP for soliciting feedback from the subjects of reports is at an advanced stage and I will be discussing this with the College MAEP people in February. If you have any thoughts about the questions that should be put to the subjects of reports (before they have seen the report you have written and immediately following your consultation with them), please let me know. MAEP was very much influenced by ideas put forward to those who attended The Grange Conference about a decade ago.

### **Save the Date**

And that reminds me to remind you to save the date of this year's Grange Conference: 26 – 28 September and again at Ripley Castle. This year's judicial lectures will be given by Mr Justice Maurice Collins of the Irish Supreme Court and Mr Justice David Williams of the High Court, Family Division, England and Wales.

### **Getting it right when things go wrong: The role of the expert witness**

For those of you who prepare reports in clinical negligence cases, the MPS has published a helpful policy paper:

<file:///C:/Users/keith/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/AS8D5GID/203103199---mp---uk---expert-witnesses-policy-paper-web.pdf>

It makes some good points about the role of systemic and organisational failures.

### **Expert witness training**

You can find details of Academy of Experts training at:

[https://academyofexperts.org/events/?mc\\_cid=1918860fe3&mc\\_eid=18ce42b476](https://academyofexperts.org/events/?mc_cid=1918860fe3&mc_eid=18ce42b476)

Courses shown take place online.

#### **Foundation course**

The Foundation Course is a valuable opportunity for all Experts:

- For Experts new to the profession it gives a solid grounding in the fundamental aspects of acting as an Expert Witness;
- For Experts about to undertake a large case it is the perfect opportunity to 'brush up' on little used techniques;
- For experienced Experts this a useful refresher and opportunity to keep up-to-date.

Expert Witness Matters, January – April 2023, Professor Keith Rix

**Tuesday - Friday**

17-20 January

**MORNING SESSIONS**

Members: £495+vat

Full Rate: £650+vat

**Into Court**

Wednesday 25 January

**FULL DAY**

Suitable for: **All Experts**

**WAIT LIST**

**Understanding Law & Procedure**

Wednesday-Thursday

1-2 February

**MORNING SESSIONS**

Suitable for: **All Experts**

**SPACES AVAILABLE**

The Expert Witness Institute also has a number of courses and training events taking place over the next few months. Go to: <https://www.ewi.org.uk/Training-and-Events>

**Hill Dickinson newsletters**

My attention has recently been drawn to the useful newsletters published by Hill Dickinson. They are mainly relevant to experts who report in clinical negligence cases and for inquests, but have a look at the list: <https://sites-hilldickinson.vuturvevx.com/5/3296/landing-pages/subscribe-email-blank.asp>

**Legal Aid rates**

I omitted a couple of months ago to share with you this email from Jan Wise:

I don't know whether it is useful for legal aid but as far as NHS work is concerned, as a union representative, and with work with the independent sector this URL has been useful.

<https://www.gov.uk/guidance/solicitors-guideline-hourly-rates>

In September I was asked if the increase in Legal Aid rates for expert applied to family cases. The disappointing answer is here:

See [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1106726/Guidance\\_on\\_the\\_Remuneration\\_of\\_Expert\\_Witnessesv7.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1106726/Guidance_on_the_Remuneration_of_Expert_Witnessesv7.pdf)

**Parole Board hearings**

Thanks to Paul Egleston: Just to confirm my experience that there is no swearing or affirming at parole board hearings – they are much like first tier tribunals (mental health) where evidence is taken without this process.

**ICD10 or ICD11?**

Q. Have a quick question on best practice, on behalf of my doctors that I hope you can help with! When preparing an updated report, where ICD-10 classifications were used in the first report, should the subsequent report use ICD-10 to maintain continuity, use ICD-11 with the ICD-10 criteria in brackets, or just use ICD-11 only?

A. I don't think it makes sense to be very rigid. There is over-reliance on ICD (and DSM) by the courts.

I suggest looking at the ICD11 description and, if it is not significantly different, I suggest continuing with ICD10 and add a footnote to the effect that you are aware that ICD11 has superseded ICD10 but it makes no difference in the instant case. On the other hand, if there is a significant change to the description that affects the interpretation of the facts and / or your opinion, this needs to be explained by reference to both descriptions. Cases where critical issues may turn on differences between various editions of one classification or differences between ICD and DSM ought to be few and far between but I was in such a case last week.

#### A podcast ....

Those of you who attended last year's Grange Conference were well entertained after the black-tie dinner by Barrister John McGuiggan and Professor Patricia Casey. John has recently sent me this email:

You might enjoy this podcast. The first case under discussion is on expert witnesses. Second and third case of no particular interest, followed by a talk by Judge Hogan on the trial and execution of Erskine Childers. <https://pca.st/nyk4dpxu>

In passing, to take your minds completely off expert witness work, I can recommend *Riddle of the Sands* by Erskine Childers.

## FEBRUARY 2023

### Recent judgments

The latest judgments begin on page 76 of the attachment. They are:

*Declan Colgan Music Ltd v Umg Recordings, Inc* [2023] EWHC 4 (Ch) "Are experts limited to giving evidence of opinion?"

*CNZ v Royal Bath Hospitals NHS Foundation Trust* [2023] EWHC 19 (KB) "What is the standard of care expected of a junior doctor?"

*Snow v Royal United Hospitals Bath NHS Foundation Trust* [2023] EWHC 42 (KB) "Who is responsible for providing the expert with copies of relevant medical and scientific publications?"

*Egan v Castlrea Co-Operative Livestock Mart Ltd* [2023] IEHC 16 "Can a medical expert see post-accident medical records in a personal injury case?"

*RGRE Grafton Ltd v Bewleys Café Grafton Street Ltd* [2023] IEHC 25 "What is a window?"

*Kaye v Lees* [2023] EWHC 152 (KB) "Need to know more about the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020?"

*Robinson v Liverpool University Hospitals NHS Trust v Mercier* [2023] EWHC 21 (KB) "Successful appeal against third party costs order made against expert."

The last two follow on from judgments summarised earlier in this cycle and *Robinson* will be reassuring to experts concerned that as a result of their shortcomings they may face a financial penalty.

*Snow* is a case in which one of the counsel, Dr Ellis, is a medically qualified barrister (ex-surgeon).

### **Glossary going for free**

For me one of the tedious end-stages of preparing a report is constructing the appendix that explains the medical and scientific terms that I have employed. Over nearly forty years I have compiled a master glossary which now runs to nearly a hundred pages. If you would like to have this, let me know. I am not going to attach it to this email as it is a 203 KB document and that will probably result in this email being blocked as spam. Let me know if you would like a copy. Please bear in mind that I cannot take responsibility for errors or inaccuracies. You will need to check and tweak each definition to make it your own (except for a few that come from the glossary in my *Handbook for Trainee Psychiatrists*) before you use it. Don't adopt the definitions wholesale or you will have to identify me as the source.

### **Extended agendas for experts' meetings**

Response to January item: "The joint statement worries me as i get the theory on saying no to extended agendas but i wonder how that would go in reality."

Answer: "It is indeed a matter of theory and practice (or more or less).

I've not done it but in England and Wales the Civil Procedure Rules provide for experts to seek directions (35.14(1)):

- 1) Experts may file written requests for directions for the purpose of assisting them in carrying out their functions.
- (2) Experts must, unless the court orders otherwise, provide copies of the proposed requests for directions under paragraph (1) –
  - (a) to the party instructing them, at least 7 days before they file the requests; and
  - (b) to all other parties, at least 4 days before they file them.
- (3) The court, when it gives directions, may also direct that a party be served with a copy of the directions.

I think that if both experts draft requests which they send to their instructing solicitors and to the adverse parties' solicitors, it gives the two firms seven days to decide whether or not to risk criticism by the court and possibly also one or both parties shouldering the costs of having the judge deal with the request.

I have used r 35.14(1) no more than two or three times but not for this purpose."

### **ICD-11**

Someone has asked about hard copies of ICD-11. I am not aware that it has been published and paper is now more expensive.

Last year, perhaps March, I provided a link to ICD-11 and attached a version. For those of you who missed this, it is attached again. I thought I would manage with just the on-line version but recently in court it would have been easier to have had a hard copy rather than having to go to a screen and also being unable to print pages away from home.

### **Membership of the Faculty of Forensic and Legal Medicine (MFFLM)**

Q. I would appreciate your advice on the benefits of Faculty of Forensic and Legal Medicine of RCP, have you found it particularly beneficial to your medicolegal work? I have been exploring the website and gone as far as filling in the application under the equivalent qualification section but hesitated in submitting it. I would value your thoughts on it.

A. I would encourage you to go ahead and get the MFFLM. First, it is a valuable credential/post-nominal when you are putting yourself forward as an expert or when a party wants the court to accept your evidence. Second, the FFLM is probably going to become the 'go to' faculty/college for medical experts. This is because (a) it has agreed in principle to host a microsite for all medical experts, i.e. not just those who are Faculty members and (b) there is now a move to establish it as the representative faculty (embryonic college) for not just forensic physicians/nurses, medicolegal advisors and coroners but also 'medical experts'. I hope and expect that it will be doing more for medical experts over the years than the RCPsych has been doing for psychiatric experts (although that may change if Lade Smith gets the Presidency).

For my part, I have put in more than I have got out of it. But for being a year too late in getting my LLM, I would have qualified for Foundation Membership when the Association of Police Surgeons, of which I was a member, became the FFLM. I had to wait until I was awarded the Hon FFLM in 2015 before I could get involved again and have since then put more into it than I have got out of it as I had to take on caretaker role as Mental Health and Intellectual Disability Lead, which has become substantive, and as I have since volunteered to be the Expert Witness Lead. If I had joined as an ordinary Licentiate or Member earlier in my career, I am sure that I would have got a lot out of it.

## **MARCH 2023**

### **Blacked out evidence**

One of you was in touch recently about a criminal case in which they had to read from their report but omit text which it had been decided should be withheld from the jury. I realised that this is not covered in my book so I think it is worth bringing to your attention.

As even a lay person knows, it is usual in a criminal trial to withhold from the jury a defendant's previous criminal record. Sometimes there is other information which the parties agree, or the court directs, should not be revealed to the jury. Remember that it is the court that controls the admission of evidence. It happened to me recently. I was asked not to refer to a particular matter and I did so without making the jury suspicious. The colleague who emailed me was not so lucky and a member of the jury asked what had been omitted. So, it is important to be careful about how you deliver your evidence in such a circumstance. What you must avoid is revealing something which is considered so prejudicial that the jury has to be discharged and a retrial ordered.

Readers may want to know what it was that we had to withhold. We cannot tell you! The information from our reports did not get into the public domain.

### **More on Scottish legal procedure**

Professor Bob Flanagan has helpfully written:

“The process of pre-trial access to each side's experts in criminal cases is called precognition and is a formal process with a record of responses to questions being taken.

“The other major difference to E&W is that the expert is treated as any other witness, i.e. he is not allowed to be present in Court other than to give evidence except by agreement with the opposing side and the judge - I've never known this to happen.”

### **Word document or pdf**

I thought that by converting my reports and joint statements from Word into a pdf I was ensuring that they cannot be altered. However, at the Family Law Bar Association Annual Conference there was a presentation by a barrister who demonstrated, using a letter from her own bank and a bank statement, that without any extra software using only software found on most computers you can edit a pdf. She referred to the case of the husband in a divorce case whose evidence included a bank statement with a transaction on 31 September. It was spotted in time and he said that it must have been an error on the part of the bank. So the next day he brought to court a letter from the bank admitting it had made a mistake. That also was a forgery. He's serving a prison sentence at this present time.

### **Deaths in custody**

Those of you who work in custodial settings should read the Independent Advisory Panel On Deaths In Custody (IAPDC) - Chair's End Of Term Report

Juliet Lyon, Former IAPDC Chair, has published her end of term report. There are two psychiatrists on the Panel: Jenny Shaw and Seena Fazel.

To read the full report, [click here](#).

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### **De Montfort University, Master of Laws**

I heard from one of you recently about their enrolment on the DMU LLM. May I commend it to all medical expert witnesses. I would say that it is also of potential value to psychology expert witnesses.

I did the DMU LLM over a decade ago and I value it greatly. The 'Mental Health Law' module includes everything that a psychiatric (or psychological) expert needs to know about psy evidence in criminal proceedings. The two 'Clinical Malpractice' modules, which one also includes professional regulation, are very relevant to personal injury litigation. There is a 'Capacity and consent' module clearly relevant to cases such as those in the Court of Protection where capacity is an issue. There's the option of a special study module so you choose your own topic. I chose the role of doctors in capital punishment. There are other modules possibly of less relevance to experts but experts in old psychiatry might consider the module on end of life issues and some might be attracted to the module on beginning of life issues. Importantly you also learn how to analyse legal judgments and understand how lawyers think.



This is the link for the distance learning LLM:

[LLM Medical Law and Ethics \(distance learning\) \(dmu.ac.uk\)](https://www.dmu.ac.uk/llm-medical-law-and-ethics-distance-learning)

Now that Covid is over, DMU may drop the distance learning option. But if you have to go to Leicester for an introductory weekend and then a few Saturdays in the year, you will benefit from mixing with other LLM students.

APRIL 2023

### **Important announcement about this bulletin**

As many of you know and as some may guess (because they do not receive the bulletin every month), the mailing list for this bulletin has grown too large. I am pleased to say that the RCPsych's College Centre for Quality Improvement (CCQI) is going to take it over. So the plan is that from May it will be sent out by the CCQI. There will be no attachments but what would have been the attached documents, and importantly the judgments document, will be posted on the MAEP part of the College website (along with previous editions of the bulletin) and the bulletin will include an appropriate link. It will not be necessary to be a subscriber to MAEP in order to utilise the resources on the MAEP microsite.

As I will be providing the RCPsych with recipients' contact details, you need to [let me know by Monday 24 April if you do not want your contact details given to the College.](#)

Probably about a quarter of you are psychologists. The RCPsych is pleased to offer this service to psychologists as well as psychiatrists but it does not mean that you will become members of the College entitled to add MRCPsych to your post nominals.

At least initially, it may not be possible to get the bulletin out on the first day of the month.

### **Urgent report required on a complainant**

The prosecution has to instruct a female psychiatrist to prepare a report on a female complainant for a trial which is scheduled for 21 August 2023. It will require an assessment of the complainant at her home in South Cumbria. If possible the report is needed by 21 April 2023 but it is recognised that this may not be realistic. If you might be able to assist, please let me know and I will facilitate contact with the officer in the case.

### **This month's judgments**

They begin on p. 110 and are:

D v S [2023] EWCOP 8 "What is the test for capacity to divorce?"

Barry v Ministry of Defence [2023] EWHC 459 (KB) "My methodology is to be preferred ..."

Zanatta v Metroline Travel Ltd [2023] EWCA Civ 224 "In the absence of evidence ..."

Selvarajah v Selvarajah (Re Estate of Selvarajah Sellathurai) [2023] EWHC 474 (Ch) "Have the experts seen the same documents?"

FGX v Gaunt [2023] EWHC 419 (KB) "PTSD resulting from publication of covertly recorded naked images"

McLaughlin v Dealey [2023] IEHC 106 "Engagement of medical experts in the Republic of Ireland"

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Cannon v Bar Standards Board [2023] EWCA Civ 278 “Assessing capacity to participate in disciplinary proceedings”

Dove v HM Assistant Coroner for Teesside and Hartlepool [2023] EWCA Civ 289 “The meaning of causation in the coronial jurisdiction”

Fawcett v TUI UK Ltd [2023] EWHC 400 (KB) “What is an expert?”

Skatteforvaltningen v Solo Capital Partners LLP [2023] EWHC 590 (Comm) “A very poor job or dishonesty?”

Dr S Bi v E-ACT [2023] EAT 43 “Vulnerable parties and witnesses in the Employment Tribunal”

### **Cancellation charges**

Q. If the solicitor informs me the day before a hearing, that the case has been adjourned, can I still charge for the day, as I had to clear my diary to attend court and have had loss of earnings.

A. It depends whether it was in your terms and conditions and signed by the solicitors before you undertook the work. But even then it may be difficult to justify it or enforce it as there is an assumption that if, suddenly, an expert has a free day, they can fill it with other fee-earning expert witness work.

### **Accounting**

Q. Is anyone using any accounting software to generate invoices and keep track of them? I’m finding it particularly onerous as a single joint expert where I sometimes have to invoice six or seven parties?

A. (From my bookkeeper). “With regards to accounting software I can recommend Quickbooks or Xero. They both have offers on at the moment too:

[https://quickbooks.intuit.com/uk/?&cid=ppc\\_G\\_QB\\_UK\\_GGL\\_B\\_Quickbooks\\_Core\\_Exact\\_Search\\_ALL\\_quickbooks\\_txt&gclid=Cj0KCQiAgaGgBhC8ARIsAAAYLfHYTEsFDNwlhAKqv4p7LFSq8JWUUIZyjhIBEzioikhvvnv38QVAfpuMaAnM8EALw\\_wcB&gclsrc=aw.ds](https://quickbooks.intuit.com/uk/?&cid=ppc_G_QB_UK_GGL_B_Quickbooks_Core_Exact_Search_ALL_quickbooks_txt&gclid=Cj0KCQiAgaGgBhC8ARIsAAAYLfHYTEsFDNwlhAKqv4p7LFSq8JWUUIZyjhIBEzioikhvvnv38QVAfpuMaAnM8EALw_wcB&gclsrc=aw.ds)

<https://www.xero.com/uk/>

The software allows you to invoice, keep track of payments in and out via digitally linking your bank account, complete Vat returns and Year End.

With regards to invoicing several parties for one case Keith is right about manually splitting out the expenses. The software will enable you to create an invoice and then duplicate it for the other parties amending details as necessary.

If you have an accountant for your year end preparation for self assessment it might be worth checking with them if they have a preference as you can link your accountant to the software.”.

More answers in the May bulletin?

### **Conflict of interest – always learning**

Those of you who use the report template in my book may have adopted this paragraph:

I do not know the Claimant professionally or personally. I do not know any of the parties involved. There are no conflicts of interest in respect to any of the identified parties. I have no other interest which might cause a conflict based upon the nature of the dispute.

It has recently been pointed out to me that this may land you in trouble if there is a conflict of interest (e.g. you have just brokered a loan .....!) and either you forgot about it (e.g. you brokered so many loans for prime ministers and heads of state that you forgot about this one) or you did not consider that it raised the issue of a conflict of interest (e.g. because the Cabinet secretary told you so).

So, I have now adopted this amendment:

I do not know the Claimant professionally or personally. I do not know any of the parties involved. **To the best of my knowledge and belief**, there are no conflicts of interest in respect to any of the identified parties. **To the best of my knowledge and belief**, I have no other interest which might cause a conflict based upon the nature of the dispute.

### **22<sup>nd</sup> Grange Annual Conference, Ripley Castle, North Yorkshire, 26<sup>th</sup> – 28<sup>th</sup> September 2023**

Booking is now open for this year's Grange Conference which you can attend in person or remotely.

This is the webpage: <https://educationandtrainingnetwork.co.uk/the-22nd-annual-grange-conference/> and this is the programme: <https://educationandtrainingnetwork.co.uk/wp-content/uploads/2023/02/2023-Programme-as-at-14-Feb-2023-for-publishing.pdf>

### **Indemnity**

Q. Hi all, I'm just sorting out expert witness insurance through EWI. Do people consider this is sufficient to cover the risks, or do people also carry MPS / MDU etc insurance?

A. Better safe than sorry ... belt and braces ..... I have MDDUS medicolegal supplement but it does not cover me for Ireland so if anything goes wrong with an Irish case I will depend on my Academy of Experts indemnity. Discovered that I never opted for the EWI cover. Perhaps I should have belt, braces and string.

### **CR193 Responsibilities of psychiatrists who provide expert evidence to courts and tribunals**

I am pleased to say that the revised College report on psychiatrists responsibilities as expert witnesses has finally got through the College machinery, only two years after it was meant to have been revised. Sadly in the meantime, one of its authors, Nigel Eastman has died, but Gwen Adshead and I have been joined by Nick Hallett and James Briscoe who are likely to have an increasing role when the next revision comes round. I did suggest getting a trainee on board and I hope that will happen with the next revision.

Should you read it? I heard a couple of weeks ago that a consultant psychiatrist and member of the College was asked in cross-examination if they had read the 2015 CR193. The answer was that the expert was not sure but they might have done. I have yet to hear what weight was attached to

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their evidence. So, read it now and don't get caught out as they did:

<https://www.rcpsych.ac.uk/docs/default-source/improving-care/better-mh-policy/college-reports/college-report-cr193.pdf>.

### **De Montfort University, Master of Laws in Medical Law, Ethics and Practice**

As some of you discovered last month, the link to DMU's LLM did not work and probably because the course is no longer offered as an entirely virtual experience.

Here is the correct link: <https://www.dmu.ac.uk/study/courses/postgraduate-courses/llm-medical-law-ethics-and-practice/llm-medical-law-ethics-and-practice.aspx>

The course structure has changed since I did it. But probably changed for the better, so I encourage you to consider it.

### **Mind your language ....**

... as some of you will know is Dot Wordsworth's column in *The Spectator* and last autumn my good friend Maurice Lipsedge invited me to lunch with 'Dot' when Maurice was on holiday here in Norfolk and I was intrigued to discover 'her' real identity. The title of the column came to mind as I deciphered a number of the redactions in Matt Hancock's Whatsapp messages (which was a somewhat easier task than deciphering redacted medical records). It made me think about communications with solicitors. Last year's judgments included *Pickett v Balkind* [2022] EWHC 2226 (TCC) where you may recall that correspondence between the expert and instructing solicitors, which was not intended for disclosure, got disclosed and including such phrases as "I have been through Daniel's comments" (where Daniel is the name of counsel).

Not being American, I never thought that I would ever begin communications 'Hi ...' followed by a forename but I have succumbed to the changing conventions of communication that have come about with the growth of email communication. I now find myself on first name terms with many more solicitors and barristers than in the pre-internet days and the revelation of the Hancock messages along with *Pickett* has made me think about the potential implications of the inadvertent disclosure of a thread of emails between solicitors, counsel and myself. I would hope that appearances are deceptive but there is always a risk that the informality, the chumminess, references to school holidays, grandchildren, etc will give the impression of an inappropriately close relationship with members of the litigation team and be used to call into question my independence and impartiality.

So, from now, I am reverting to the form of communication I used at the beginning of my medicolegal career:

J. Tickle and Company, Solicitors,

\*\*\*\*\*,  
\*\*\*\*\*,  
\*\*\*\*.

For the attention of Mr Tickle

Dear Sirs/Mesdames,

\*\*

Yours faithfully,

etc

and as I type all my correspondence I will not have to do what I did in the NHS and point out to secretaries that if the letter starts with 'Sir' or 'Madam' it ends 'faithfully' or 'truly' and not 'sincerely'.

### **Documents and materials seen**

Q. I've just done a report on a negligence case in which the solicitor made available to me three expert reports – one from a psychiatrist and two others. They did not include them in my list of documents or in my bundle of documents but they were freely available on the website to which I had access.

I included reference to all three in my report – I simply summarised them.

After they got my report they wrote back and said could I omit reference to one of the three reports as they weren't relying on it!

I said I (obviously) couldn't selectively omit one but might consider omitting all three (in fact they sent me another one on e mail which they wanted me to refer to).

I said that if I admitted all three then in the list of documents I would reference them but say I had not relied on them for my opinion (I suspect they would not want that). Alternatively I would consider saying I "relied on the following" in the list of documents but not mention the three reports at all. As the fourth one was sent openly, I can look at that one.

I spoke to the solicitor and said I could not be selective and could not unsee what I had seen. If asked (in Court) I would obviously say I had seen them .

A. (a) You need list only documents on which you have relied, (b) whether they like it or not, if there is something on which you have relied, the document has to be listed, (c) be careful that nothing you have read in the documents they do not want listed has affected your thinking.

(C) is the reason why you should avoid looking at anything you are asked not to disclose. But you can selectively not refer to one of them provided that it has not influenced your view of the case. This also begs the question as to why you thought it necessary to summarise any of them. Were they part of your material instructions (in which case you have to mention them) or, even if not part of your material instructions, was there something in them on which you have relied or which has influenced your opinion (ditto)?

### **Discussing cases in supervision**

Q. In a case that is not completed yet, is it permissible to discuss it with my psychotherapy supervision group to reflect on it?

A. If supervision is in your job contract it is permissible. However, you should reveal only sufficient details as are necessary for the purposes of supervision.

Why psychotherapy supervision? If it is in order to inform your psychodynamic understanding of the case, you will need to refer to this in your report, name the members of the supervision group and identify their specific contributions to your understanding of the case. They will need to give their permission and be aware that they will be named and know that there is a theoretical risk that they

may also be called to give evidence. If they are not willing to give you permission, they should not contribute to the discussion and, arguably, should absent themselves from the group while you discuss the case.

If, as happens in psychotherapy supervision, discussion is around counter transference matters, and the group contributes nothing of substance that will inform your analysis of the facts or your opinion, then probably you do not have to mention the supervision in your report.

This advice is based on my understanding of the implications of *R v Pabon* [2018] EWCA Crim 420, [2018] 3 WLUK 279, [2018] Crim LR 662 and *Pinkus v Direct Line Group* (EWHC QB, unreported, 2 January 2018) both quoted in my book.

### **Statutory Code of Practice for Forensic Science Activities**

Under the Forensic Science Regulator Act 2021, s 2, the Regulator is required to prepare and publish a code of practice and this was published on 13 March 2023 ([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1141863/FINAL\\_Code\\_of\\_Practice.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1141863/FINAL_Code_of_Practice.pdf)). The code applies to persons or bodies performing a forensic science activity (FSA) which is “an activity relating to the application of scientific methods” for purposes which include “the preparation, analysis or presentation of evidence in criminal proceedings in England and Wales”. My assumption is that for ‘scientific’ do not read ‘medical’ or ‘clinical’ so not all medical experts will have to comply with the Code. However, I assume that some medical experts, who use scientific methods to ascertain facts will have to comply, for example a neuropsychiatrist who uses polysomnography.

There are some sections of general interest: ‘Standards of Conduct’, ‘Independence, impartiality and integrity’, ‘Confidentiality’, ‘Document control’, ‘Evaluative opinions’, ‘Competence’, ‘Peer review’, ‘Electronic information security’, ‘Types of report in the criminal justice system’.

### **Prosecution reports in criminal cases**

When my medicolegal career began in the early 1980’s, other than in murder cases where the police and then the CPS routinely requested reports that were prepared by prison visiting psychiatrists, I was only occasionally instructed by the prosecution so, asked about my balance of prosecution and defence cases, this was generally loaded in the direction of defence cases. If you are on the National Crime Agency’s list of experts, this may enable you to achieve a balance of prosecution and defence cases but not all psychiatrists are on the NCA list. Increasingly now the police seek to instruct experts through SFR Medical which is run by a London-based toxicologist, Johann Grundlingh. He would like to have more psychiatrists to whom he can refer prosecution instructions. He has provided me with the following details:

*SFR Medical is a specialised medical reporting organisation which was started to solve the complex issues of medical evidence to investigate and prosecute violent crimes. We work with most UK Police forces and are often asked to obtain both professional and expert medical evidence in criminal cases. Our remit is now expanding into civil law, but we are currently the biggest UK provider of professional medical evidence for UK Police forces. This places us in a unique position to be often firstly approached by the Police for mental health related expert evidence. We are keen to learn from our clients and I am hoping this is a good opportunity to gain more experience in providing expert opinions for the Police or Prosecution. Please feel free to contact us on [sfrmedical.expert@nhs.net](mailto:sfrmedical.expert@nhs.net).*

Expert Witness Matters, January – April 2023, Professor Keith Rix

Good wishes,

Keith

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