ARTICLE

Lessons for expert psychiatric witnesses from recent judgments and updated procedural rules

Abiha Bhatti & Keith Rix

Abiha Bhatti, MBBS, BSc, MRCPsych, is a specialist registrar in forensic psychiatry with the Essex Partnership University NHS Foundation Trust, Essex, UK. **Keith Rix**, MPhil, LLM, MD, FRCPsych, Hon FFFLM, is a visiting professor of Medical Jurisprudence in the Faculty of Medicine, Dentistry and Life Sciences, University of Chester, Chester, UK, an honorary associate professor at Norwich Medical School, University of East Anglia, Norwich, UK, and a retired forensic psychiatrist.
Correspondence Abiha Bhatti. Email: abiha.bhatti1@nhs.net

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SUMMARY

The past 5 years have seen numerous court judgments and changes to rules and procedures that relate to the work of expert psychiatric witnesses in the British Isles. This article outlines these changes, pointing out their implications for the expert witness, and highlights pertinent judgments in over 100 court and tribunal cases.

LEARNING OBJECTIVES

After reading this article you will be able to:

- understand and be able to respond to changes since 2019 in rules and procedures affecting expert psychiatric evidence
- understand the significance of the judgments of courts and tribunals that relate to expert evidence
- appreciate the implications that recent legal developments have on the role of an expert witness.

KEYWORDS

Psychiatry and law; procedural rules; expert witness; medico-legal; education and training.

Since *Rix's Expert Psychiatric Evidence* (Rix 2020) went to press in 2019 there have been a number of court judgments and changes to procedural rules of which expert psychiatric witnesses in the British Isles need to be aware as they seek to assist the administration of justice. This article highlights many of these. In doing so it presents many of the duties of the expert witness and the medical expert reporting process: for a more detailed update see Rix (2023). Summaries of these judgments are accessible through the Multi-source Assessment of Expert Practice pages of the Royal College of Psychiatrists website by free subscription to the monthly Expert Witness Matters newsletter (https://www.rcpsych.ac.uk/improving-care/ccqi/multi-source-feedback/maep/maep-newsletter-resources). Each newsletter has a link to the annual compendium of judgments and to which summaries are added each month.

The expert medical witness

A fundamental question in the law of expert evidence is what qualifies someone to be an expert witness. In *AHA v The Secretary of State for the Home Department* [2021] the court held: 'Expertise may be derived from, either in isolation or combination, qualifications and experience'. The category of your specialist registration with the General Medical Council (GMC) may be relevant when considering whether you have the appropriate expertise for a case (*The Public Guardian v RI* [2022]), but what are determinative may be your qualifications and experience, about which you must provide the court sufficient information (*DPP v IG* [2021]).

Undergoing higher training in forensic psychiatry is not a requirement for acting as an expert witness in a criminal case (as found in the case of Dr X; see example tribunals on Medical Practitioners Tribunal Service, n.d.), and it is not necessary to have continuing 'hands on' experience if you have other relevant qualifications, training or experience, a detailed knowledge of policies and procedures, continuing involvement in the provision of care or a line management role for senior clinical practitioners (*LK* [2020]).

Although experts are commonly recognised as providing opinion evidence, they may also give expert factual evidence to enable the court to understand the factual background (*Lehman Brothers Holdings Scottish v Lehman Brothers Holdings Plc* [2021]), educate the court in technical or scientific matters, collate and present to the court in an efficient manner the knowledge of others in their field of expertise and identify particular facts which only a person with a particular skill is capable of doing (*Declan Colgan Music Ltd v Umg Recordings, Inc* [2023]). So doctors who provide such evidence are giving expert evidence.

In *Muyepa v Ministry of Defence* [2022], the judge explained what 'complete' means when it qualifies professional opinions in the statement of truth required by the Civil Procedure Rules (CPR) (of England and Wales):

> 'Experts should consider all material facts, including those which might detract from their opinions and […] deal with any range of opinions on the matters covered within the report […] An expert must not solely pick out pieces of evidence or entries in documents which provide support for the conclusion he/she has reached whilst not addressing material that points, or may point, the other way' (para. 290).

In the same case the judge referred to how experts 'should constantly remind themselves through the litigation process that they are not part of the Claimant's or Defendant's "team"' (para. 284), or as it was put in *Sweeney v VHI* [2021], an expert 'can properly be considered part of the litigation team, but only as an expert, obliged to give their independent opinion' (para. 91).

Closely related to team membership is bias, the risks of which are illustrated in *Palmer v Mantas* [2022]. One expert had to admit in evidence that he formed the view from the outset that the claimant was not telling the truth, so the judge was troubled by the extent of his departure from his CPR Part 35 duty. The report of another expert was 'littered with judgemental and rather scathing comments' (*Palmer*, para. 79), which the judge said suggested a level of unconscious bias, so he found it difficult safely to rely on her expertise.

A case in which the court ruled inadmissible the extraordinary evidence of a toxicologist (*Duffy v McGee* [2022]) who demonstrated a total lack of understanding of, or respect for, the duties of an expert witness is a timely reminder that an expert should leave debate about legal doctrines to the lawyers, not give evidence outside their field of expertise and avoid accusing litigants of outright dishonesty.

Experts who fail to comply with procedural rules risk judicial criticism (*BDW Trading Ltd v Lantoom Ltd* [2023] ('*BDW*')) or even having their report deemed inadmissible (*MQ, R (On the Application Of) v Secretary of State for the Home Department* [2023]). However, there is quite a high threshold to be reached for an expert to be found in flagrant disregard of their duties as an expert (*Robinson v Liverpool University Hospitals NHS Trust v Mercier* [2023]).

Likewise, *Radia v Marks* [2022] is reassuring. Dr Marks accepted that it was a mistake to have missed a particular reference to weight in the claimant's hospital notes, but the judge did not find that it was a breach of the standard of care. The volume of records was large, they were provided to him late in the day, they had not been organised, no chronology was provided, and no attempt was made to help him navigate his way through the emailed tranches of records.

Courts, laws and procedures

Amendments to the Criminal Procedure Rules (of England and Wales) include an addition to rule 19 (Box 1).

As the court found in *United States of America v Assange* [2021], an application to the court under this rule would have been a solution to the dilemma faced by a psychiatric expert when concerned about the consequences of identifying in his report Mr Assange's partner and the mother of two of his children.

As amended with effect from 31 January 2022, Part 3AA of the Family Procedure Rules (FPR) concerns vulnerable persons and their participation and evidence in family proceedings (Home Office 2023a). This may be applicable in a case of a party or witness who 'suffers from mental disorder or otherwise has a significant impairment of intelligence or social functioning' and also with regard to their age, maturity and understanding (Home Office 2023a: 3A.7(b)). *M (A Child: Private Law Children Proceedings: Case Management: Intimate Images)* [2022] illustrates how important it is to relate the nature of the vulnerable person's mental condition to the demands of the court proceedings.

HA (Expert Evidence; Mental Health) Sri Lanka [2022] ('*HA*') includes a reminder that Practice Direction 10 ('Expert Evidence') of the Immigration and Asylum Chamber of the First-tier Tribunal and the Upper Tribunal (of England and Wales) begins:

> 'A party who instructs an expert must provide clear and precise instructions to the expert, together with all relevant information concerning the nature of the appellant's case, including the appellant's immigration history, the reasons why the appellant's claim or application has been refused by the respondent and copies of any relevant previous reports prepared in respect of the appellant' (Courts and Tribunals Judiciary 2018: para. 10.1).

In clinical negligence cases, you must be familiar with the relevant legal tests, such as *Hunter v Hanley* [1955], *Bolam v Friern Hospital Management Committee* [1957], *O'Donovan v Cork County Council* [1967] and *Bolitho v City*

BOX 1 Criminal Procedure Rules: rule 19.9

'Application to withhold information from another party

19.9. – (1) This rule applies where–

(a) a party introduces expert evidence under rule 19.3(3);

(b) the evidence omits information which it otherwise might include because the party introducing it thinks that that information ought not be revealed to another party; and

(c) the party introducing the evidence wants the court to decide whether it would be in the public interest to withhold that information.'

(Criminal Procedure Rules 2020 (SI 2020/759): www.legislation.gov.uk/uksi/2020/759/part/19)

and Hackney Health Authority [1998]. There is often evidence in the form of protocols, policies and guidelines. Guidelines are the weakest in this trio (*Thorley v Sandwell & West Birmingham Hospitals NHS Trust* [2021]). It may not be a breach of duty to fail to comply with guidelines if a Bolam/Bolitho group of responsible medical practitioners can be identified who would do otherwise, and this is capable of withstanding logical analysis (Rix 2017). A clinical negligence case concerning ototoxicity resulting from the administration of gentamicin assists as to the status of guidelines in clinical negligence cases (*O'Brien v Guy's & St Thomas' NHS Trust* [2022]): the court concluded that although guidelines are relevant, and departure from these may require explanation, they are no substitute for clinical judgement and expert evidence, and what ultimately matters is whether the conduct fell within a Bolam-compliant practice supported by a responsible body of medical opinion (see also Samanta and Samanta 2021).

Business matters and negotiation of instructions

A Medical Practitioners Tribunal (MPT) case in the UK that resulted in a psychiatrist's registration being suspended illustrates the importance of ensuring that your contract is with an appropriate instructing party, preferably a solicitor, so as to avoid, as far as possible, issues as to the subject's capacity to enter into an agreement regarding payment of fees and their vulnerability to exploitation (Medical Practitioners Tribunal Service n.d.).

At the earliest stage possible, declare any possible conflicts of interest. As the treating doctor, your evidence is not inadmissible, but this may affect the weight that it can be given (*Doyle v Nagyhabib* [2021]). Prior involvement in a case does not prevent a practitioner from providing expert evidence in subsequent proceedings provided that the evidence given is balanced, fair and consistent and demonstrates a high degree of professionalism (*LK* [2020]). In another MPT case, the court found that being acquainted with a party to the proceedings did not prevent an expert from giving objective and unbiased expert evidence (*Towuaghantse v General Medical Council* [2021]).

Dudley Metropolitan Borough Council v Mailley [2022] ('*Dudley*') illustrates how it is sometimes a good idea, when asked for an addendum, or revisions or the consideration of further material, to ask whether the extra work, and consequent cost, is proportionate. In *Northampton General Hospital NHS Trust v Hoskin* [2023], where the costs of expert reports were in issue, the judge held that the receiving party is under a duty to provide a sufficiently detailed fee note of any expert instructed.

Make it crystal clear to your instructing solicitor if you have been unable to access crucial material (*Hertfordshire County Council v Mothers* [2022]). If you are provided with legally privileged material that is relevant to your expert analysis of the facts or to your opinion, make it clear that you will have to list the material and so it may lose its legal privilege (*Martlet Homes Ltd v Mulalley & Co Ltd* [2022]).

Beware how you express yourself in correspondence with your instructing solicitors, being particularly careful to avoid 'we', as this will call your independence into question (*Gallagher v Gallagher (No.2) (Financial Remedies)* [2022]; *Wigan Borough Council v Scullindale Global Limited* [2021]).

The medico-legal consultation

Whatever your reaction to the subject, their behaviour or what they are alleged, or known, to have done, approach them with sympathetic objectivity, as a hostile attitude will hamper the forensic analysis and betray what may be perceived as bias and lack of independence (*FL (by His Children's Guardian) v EN* [2020]). Aim to win the trust of the subject (*DPP v Abdi* [2022]).

If you assess the subject remotely, your mental state examination can include the difficulty, or otherwise, that the subject has with the technology (*Lisle-Mainwaring v Charles Russell Speechlys LLP* [2020]).

An opinion as to premorbid personality will carry greater weight where assessment is based on collateral histories (*The Government of the United States of America v Assange* [2020] ('*Assange*')).

It should be axiomatic to record, retain and be prepared to reveal the records of your psychiatric assessment of the subject. Failure to do so in *R v Grusza* [2021] resulted in an expert being named in a critical ruling by the trial judge. And be prepared for a comparison between your notes and the contents of your report (*Assange*).

The report, amendments, answers to questions, experts' meetings and conferences

The length and content of reports

Experts continue to be criticised for the length of their reports, which can sometimes make it challenging for the claimant and the court to navigate,

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digest the substance of the expert's opinions and respond to these (*BDW*).

The criticisms of four experts in *R v Fitzsimmons* [2022] and *BDW* are salutary reminders of the expert's duty to set out the substance of all material instructions, written or otherwise, retain the letter of instruction and keep a record of all communications with instructing lawyers. However CPR 35.10(3) does not require the expert's statement of instructions to be complete, but only to state 'the *substance* of all *material* instructions, whether written or oral' (*Pickett v Balkind* [2022]: para. 81; emphasis in original) and not every communication between experts and those instructing them is part of their 'instructions' for the purposes of this rule. The criticism of an expert by the judge in *Grusza* is a reminder to specify the material that you rely on with sufficient particularity for it to be possible to discern that on which you have relied and, if instructed by the prosecution, to create a schedule of any unused material and provide this to the prosecution (Crown Prosecution Service 2023).

Fact-finding

Expert opinion is based on facts, and the case of *Zanatta v Metroline Travel Ltd* [2023] is illustrative of how fact-finding is ultimately an issue for the court. Except for facts within your own knowledge, or facts already found by the court, it is advisable to refer to all other facts as 'assumed facts'. Medical experts have the opportunity to seek corroboration of some of those facts in the subject's medical records (*Chabra v Secretary of State for the Home Department* [2023]; *JAI v Secretary of State for the Home Department* [2023]). But opinion can be based on facts put forward to the expert by the subject of their report; whether or not those facts are accurate will be for the court to decide (*DPP v IG* [2021]). If it appears that your evidence has been based on what is asserted is, or is found to be, a false narrative, be prepared to provide alternative opinion based on the alternative scenario (*Cloonan v The Health Service Executive* [2022]).

The contents of records should be analysed objectively and care is needed in deciding the extent to which their contents should be reproduced in reports. If you consider factual evidence to be irrelevant, even if you do not consider it to be important, you must say so and explain why and not just ignore it (*Selvarajah v Selvarajah* [2023]; *ZZZ v Yeovil District Hospital NHS Foundation Trust* [2019]).

Diagnostic classification systems

The use of diagnostic classification systems occurs repeatedly as an issue (*Assange*). In *Dudley*, the judge was not impressed with the idea that if a condition is not in the ICD, you cannot make a diagnosis, and in *D v The Bishop's Conference of Scotland* [2022], the court referred to an earlier judgment to the effect that whether it is right to attach the label post-traumatic stress disorder (PTSD) is perhaps less significant than to assess the symptoms actually suffered. Reference was also made to a judgment of Lord Reed, now President of the Supreme Court, who said that what constitutes a recognised disorder is a matter for expert evidence and he was prepared to proceed on the basis that the classifications given in those systems are not necessarily conclusive. In *Barry v Ministry of Defence* [2023] ('*Barry*') the court said it is for expert witnesses in each individual case to select and deploy diagnostic criteria as they consider appropriate. Difficulties sometimes arise in court when diagnoses are based on formal criteria, and in *TW v Middlesbrough Council* [2023] an issue was whether TW had an intellectual disability (referred to as a learning disability) 'within' or 'outside British Psychological Society Guidance'; it raised, but did not answer, the question whether a diagnosis of intellectual disability should be made without Wechsler Adult Intelligence Scale (WAIS) testing.

Referencing and quoting supporting literature

Experts are duty bound to refer to or consider any material, such as publications, that may be relevant to the case. It is the duty of an expert to provide a list of published literature and provide copies of any unpublished literature relied on, and to have regard to relevant medical Royal College/faculty guidance and National Institute for Health and Care Excellence (NICE) guidance (*Snow v Royal United Hospitals Bath NHS Foundation Trust* [2023]). Reliance on Wikipedia may highlight gaps in your expertise (*Engie Fabricom (UK) Limited v MW High Tech Projects UK Limited* [2020]). If you are offering a 'high-level' opinion, or there is a vast literature, ensure you cite this so that your evidence is supported in an objective and concrete way (*Jarman v Brighton and Sussex University Hospitals NHS Trust* [2021]).

Have regard to whether the publication has been peer reviewed (*Duffy v McGee* [2022]). Bear in mind that it does not follow that the methodology applied in a particular case will be generally applicable (*Barry*). Be careful to make your own assessment of the methodology so as to assist as to the extent to which the court can rely on the conclusions of the researchers (*Mathieu v Hinds* [2022]), considering carefully the arguments for and against it being regarded as relevant in the instant case (*Thorley v Sandwell & West Birmingham Hospitals NHS*

Trust [2021]). Beware using the results of clinical trials to support propositions that have not been their object (*McCullough v Forth Valley Health Boards* [2020]).

When quoting literature in support of your opinion be able to justify your choice and be sure to refer to any publications that support a contrary opinion and explain why you discount them (*Jones v Ministry of Defence* [2020]; *Negus v Guy's and St Thomas' NHS Foundation Trust* [2021]). If there is a range of opinion, the expert's duty is to include it in the report. Failing to include it was regarded as a patent breach of the CPR in *BDW*.

Reasoning and evidence of expertise

The court needs sufficient reasoning to test your opinions (*Legal and General Assurance Society Ltd, Re* [2020]). If the reasoning is absent or deficient, this may affect the weight that is given to your evidence (*Griffiths v TUI UK Ltd* [2020]); you need to explain the reasons for and logic behind your opinion (*DPP v C* [2021]). In most cases the level of certainty with which you express your opinion is no more than the balance of probabilities. If you express your opinions with a high level of certainty, be able to justify doing so (*ECU Group PLC v HSBC Bank PLC* [2021]). If you do not have access to all of the evidence to which you would expect, or be expected, to have access, make it clear that your opinion is qualified *(Z v University Hospitals Plymouth NHS Trust* [2020]).

Include your *curriculum vitae* (CV), as you need to provide information sufficient to prove your expertise in the appropriate field (*C v DT* [2021]; *GKE v Gunning* [2023]). The court needs to see how your opinions are derived from the experience you have identified (*Omooba v Michael Garrett Associates Ltd (T/A Global Artists)* [2020]). If you have publications relevant to your expert evidence, bear in mind that the adverse party's experts and counsel are likely to have read them (*Cloonan v The Health Service Executive* [2022]). Ensure that the CV is up to date and not false or misleading.

Amendments to reports

There are permissible and impermissible amendments to reports. Do not accede to a request to exclude references to statements that are material to your opinion *(McCullough v Forth Valley Health Boards* [2020]).

Experts' meetings are now becoming the norm in criminal and Parole Board, as well as civil, proceedings. Ensure that you have the same documentary evidence as the other expert(s) (*Good Law Project Ltd, R (On the Application Of) v Secretary of State for Health and Social Care* [2021]; *McQuaid v McQuaid (Re Estate of Terence Benedict McQuaid)* [2022]). Be prepared to delay the experts' meeting if you do not.

In *Andrews v Kronospan Ltd* [2022], it became apparent that an expert solicited input from their instructing solicitors during the process of drawing up a joint statement. The court considered it appropriate to revoke the claimants' permission to rely on the expert's evidence, and quoted *The White Book* (Coulson 2024: para. 35.12.2):

> 'Joint statements should aid the understanding of the key issues and each expert's position on those issues. It should set out the issues on which they agree, and on which they disagree'.

An expert may, if necessary, provide a copy of the draft joint statement to the solicitors (*Pickett v Balkind* [2022]) but the expert should not ask the solicitors for their general comments or suggestions on its content. As set out in the King's Bench Division Guide (Courts and Tribunals Judiciary 2024: para. 10.48) there may be exceptional cases where legal representatives may draw the attention of all the experts and parties to some material misunderstanding of law or fact contained within the joint statement.

Reports for criminal proceedings and in prison cases

Vulnerability and reliability

So long after the passage of the Police and Criminal Evidence Act 1984 (of England and Wales) (PACE) it is now rare for the Court of Appeal to hear appeals relating to the 'Judges' Rules' that preceded Code C of the Codes of Practice of PACE (Home Office 2023b), but *Tredget v R* [2022] reminds experts that vulnerability does not equate with unreliability in a police interview and infringement of the Judges' Rules and the associated directions does not necessarily render the interviews inadmissible; the test was (and is) whether the admission of the evidence would be unfair in the context of the proceedings as a whole.

Expert reports in support of applications for an intermediary have to address not only the difficulties experienced by the defendant, but also the way in which those factors potentially relate to the particular proceedings (*R v Thomas (Dean)* [2020]).

The case of *R v Beggs* [2023] makes clear that where the issue is reliability, the expert's duty is limited to providing an opinion on the nature of the complainant's disability and how that might affect their reliability in the context of all the circumstances in which the evidence was obtained; reliability is for the court to decide.

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Article 8 rights

Where there is an application for a notification order under the Counter-Terrorism Act 2008 (of the UK), the test in terms of infringement of Article 8 rights (respect for private and family life; Human Rights Act 1998) is whether the effect of the order would be to undermine the individual's mental stability (*Commissioner of Police for the Metropolis v Bary* [2022]).

Mens rea

R v Keal [2022] was an unsuccessful attempt to persuade the Court of Appeal of England and Wales significantly to extend the law of insanity and to incorporate lack of capacity to control one's action (irresistible influence). In a case of drug-induced psychosis, it appears that the court will be likely to have regard to what is generally known about the effects of the drug and what the defendant knew or should have known about the drug's adverse effects on mental state (*R v APJ* [2022]).

Autism spectrum disorder (ASD) is often raised in medical evidence. In *R v BRM* [2022] it was established that expert evidence that ASD could lead a defendant to misunderstand the signs being given by another is potentially relevant and admissible where it relates to a live issue in the case. However, be specific about whether or not the defendant can form a theory of mind, and relate any attendant difficulties to the actual defendant (*R v Dunleavy* [2021]). The *Dunleavy* case also makes the general point that if you rely on a specific diagnosis when addressing the ability to form *mens rea*, be able to make a link between recognised psychopathological features and the ability to form the specific *mens rea* for the offence. Where the issue is the presentation of a defendant who has a mental disorder, indicate how, if at all, the mental disorder might affect their presentation (*R v Murphy* [2021]).

Custodial versus mental health disposal

Several cases now assist further as to the sentencing of mentally disordered offenders. *DPP v RT* [2021] illustrates how a thorough history and mental state examination can identify relevant mitigating factors that can be used to assist the sentencing judge. Mental disorder or intellectual disability, age and/or lack of maturity are mitigating factors but the mitigating effect of mental disability will be reduced if exacerbated, or caused, by substance misuse (*R v Brazil* [2020]). *DPP v MR* [2022] provides a useful checklist of the matters that should be included in an expert psychiatric report that is intended to assist a sentencing court. For psychiatrists fulfilling this role in Ireland, it is essential reading.

R v Nelson (Keith) [2020] and *Westwood v The Queen* [2020] demonstrate some of the practical differences between, and advantages and disadvantages of, a 'hybrid order' under section 45A of the Mental Health Act 1983 (MHA) and a 'hospital and restriction order' under sections 37/41. In a case where the court has to choose between a custodial sentence and a mental health disposal, *R v Miller* [2021] has identified factors that may be in favour of a mental health disposal (Box 2).

R v Crerand (Rev1) [2022] has identified matters to be considered where the court has to choose between life imprisonment and a hospital order with restrictions.

Extradition proceedings

In extradition proceedings, a person's mental condition may be grounds for adjourning the proceedings and be a bar to extradition if it makes it unjust or oppressive to extradite the requested person to stand trial in another country. In considering whether it would be oppressive, have regard to the seriousness and permanence of the effects of extradition on the subject's mental health, to how they have already coped in custody, to any evidence of significant self-harm or suicide risk in custody and whether prison authorities in the requesting jurisdiction are willing and able to provide appropriate medical care (*Bullman v High Court In Dublin (Ireland)* [2022]; *Walaszczyk v Regional Court of Law in Czestochowa, Poland* [2020]).

Where the mental condition is linked to a risk of a suicide attempt if the extradition order were made, there has to be a 'substantial risk that the [requested person] would successfully commit suicide' and

BOX 2 Factors that may be in favour of a mental health disposal when sentencing a mentally disordered offender

- A Mental Health Act section 41 restriction order will ensure that the offender is subject to continued supervision of their mental disorder and that they remain under treatment for that disorder.
- The mental health pathway enables the offender to be required to take medication as a condition.
- Mental health services are better able to assess when a mentally disordered offender is becoming unwell and when intervention including readmission to hospital is necessary.
- Those supervising patients under a section 41 restriction are equipped to assess and manage both their risk of relapse of mental disorder and risk of committing further violence.
- If the offender is recalled under the criminal justice system, they will be returned to prison, which could result in further deterioration of the mental disorder, an increase in their risk and a considerable delay in receiving suitable treatment.

(After R v Miller [2021])

'[t]he mental condition of the person must be such that it removes his capacity to resist the impulse to commit suicide' (*Turner v Government of the USA* [2012]: para. 8(viii) and para. 28). *Modi v Government of India* [2022] (at para. 129) has established that *Turner* 'should be read in a common-sense, broad-brush way' giving full effect to the question whether the act of suicide would be the person's voluntary act'; this approach does not require proof of 'impulse' as the word is used by clinicians, but can be given the lay meaning of 'compulsion', 'wish', 'desire' or 'intentions'. 'Capacity' in this context is synonymous with 'ability' or 'capability' and it does not import the provisions or workings of the Mental Capacity Act 2005. Have regard to impulsivity, as in *Fletcher v Government of India* [2021], it was the 'strong element of impulsivity which he is unable to control' which was the basis for the court deciding that the risk of completed suicide derived in substantial part from a mental disorder which 'removes his capacity to resist the impulse to commit suicide' (para. 41(c)). Evaluate carefully previous incidents of self-harm so as to determine whether they were concerted suicide attempts (*Farookh v Judge of the Saarbrucken Regional Court (Germany)* [2020]).

Reports in personal injury cases

In personal injury cases where the injury is psychiatric, the term 'psychiatric damage' can encompass mental illness, neurosis and personality change, but mental health problems falling short of psychiatric illness or psychological condition can form part of the award of compensation (*D v The Bishop's Conference of Scotland* [2022]). In Ireland in personal injury cases (and where there is a claim under the Garda Síochána (Compensation) Acts 1941 and 1945) the courts, as in England and Wales, are more interested in the symptoms actually suffered rather than the formal diagnosis and in independent evidence being sought to avoid relying only on the account of the claimant (*Foley v The Minister for Public Expenditure and Reform* [2021]).

A nervous shock/secondary victim case (*King v Royal United Hospitals Bath NHS Foundation Trust* [2021]) illustrates some of the challenges for the psychiatric expert. It is necessary to separate the effects of PTSD attributable to nervous shock from pathological grief (which is not actionable) and to make a comparison between the secondary victim's actual history and the hypothetical position they would have been in if they had not suffered PTSD but their child had still died, with all the effects on both the claimant and spouse arising from that tragedy. In any case where grief is unresolved, identify the risk of the full symptoms re-emerging in the future (*Zeromska-Smith v United Lincolnshire Hospitals NHS Trust* [2019]).

In personal injury cases, as indeed in ordinary everyday clinical practice, one of the most difficult issues is prognosis. *Benford (A Child) v East and North Hertfordshire NHS Trust (Rev1)* [2022] illustrates that experts should express an appropriate range of views, so that damages are 'based upon a comparison between an estimate of what the "but for" position would have been and what the "future actual" position will be' (para. 48), acknowledging the uncertainty present in such an exercise.

Where causation is an issue, *CNZ v Royal Bath Hospitals NHS Foundation Trust* [2023] provides a useful classification to inform the causal analysis.

Reports for family proceedings relating to children

Child abduction cases to which the 1980 Hague Convention on the Civil Aspects of International Child Abduction applies require the expert to have regard to the test that the child's return would expose them to a grave risk of physical or psychological harm, or otherwise place them in an intolerable situation (*A (Article 13(b): Mental Ill-health)* [2023]; *B v A* [2020]). Matters to be considered include the impact on the child's well-being of domestic abuse, parental mental ill health, and physical or psychological abuse or neglect. The report has to set out the evidence as to the abducting parent's mental health with sufficient detail and particularity to enable the judge to decide, if the child is returned to the other parent, whether the abducting parent's mental health will create a situation so intolerable for the child that the child should not be returned.

Reports in cases involving capacity

As mental capacity is decision specific, there is an infinite variety of decisions that may require scrutiny of the courts. The Supplementary material (available online at https://dx.doi.org/10.1192/bja.2024.45) lists some of those decisions for which recent judgments assist as to the approach to assessment.

Two important points were made in *Martin v Salford Royal NHS Foundation Trust* [2021]: have regard to 'real life' evidence as well as the results of neuropsychological tests; and bear in mind that vulnerability to suggestion by others on its own does not necessarily render a person lacking in capacity and in any event the court will have regard to

whether or not, in a brain injury case, it pre-dates the brain injury.

DP v London Borough of Hillingdon [2020] illustrates the importance of clearly explaining the purpose of the capacity assessment. The European Court of Human Rights in *Sýkora v The Czech Republic* [2012] identified that expert medical reports should provide sufficient detail regarding the impact of the applicant's incapacity to understand actions and the consequences of these.

A Clinical Commissioning Group v AF [2020] illustrates the value of the chronology. It was used to decide when capacity was lost and this enabled the best interests decision to take into account the weight to attach to expressed wishes before and after this point in time. Where capacity fluctuates or can be predicted to become lost, set out the circumstances in which it may be lost and how that loss will affect certain decisions (*Guys and St Thomas' NHS Foundation Trust (GSTT), South London and Maudsley NHS Foundation Trust (SLAM) v R* [2020]).

Reports in immigration and asylum cases

In asylum and immigration cases there is no rule that experts are disabled by their professional role from considering critically the truthfulness of what they are told and from expressing the opinion that the subject is not fabricating their account (*MN v The Secretary of State for the Home Department* [2020]). They should not take the appellant's account at face value, without engaging in any of the evidence that is contrary to those claims, and although they must avoid giving evidence as to whether an account is credible or as to the materiality of any inconsistencies, they may express a view as to the detail and content of the account given as a necessary step to reaching a diagnosis (*JMPS v Secretary of State for the Home Department* [2022]; *R v AAD* [2022]).

For expert psychiatric evidence to support a defence under the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, it is necessary to show not that the person's mental condition made them unwilling to participate in the process but that it made them unable to do so (*R v AAD* [2022]).

HA is now of crucial importance for experts in that where your opinion differs from the general practitioner records, you are expected to say so in the report and explain why.

The case of *HA* also assists as to the application of the *Paposhvili* test (*Paposhvili v Belgium* [2017]): substantial grounds have to be shown for believing that the deportee, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or a significant reduction in life expectancy.

In an asylum case, have regard to the effect of being separated from protective factors such as a support network, medical or practical support (*MTT v Secretary of State for the Home Department* [2022]). When considering the difficulties that asylum seekers and victims of trafficking have in telling their stories, it is useful to consider their experiences of trauma, distrust of authority and entanglements in deceptions that are difficult to escape, which may lead to inconsistencies and late disclosures (*MN v The Secretary of State for the Home Department* [2020]). Even if a subject's reported symptoms support their case that they were persecuted or trafficked (which the case may be), consider other possible causes of those symptoms.

Going to court

When you are asked if you adopt your report as evidence, take the opportunity to correct any errors (*ECU Group PLC v HSBC Bank PLC* [2021]).

Beware late emergence of evidence. This happened in *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd* [2018], causing the court to point out that experts of like discipline should have access to the same material, and where late material emerges close to a trial that may warrant further analysis, notice should be given to that expert's opposite number as soon as possible. Save in exceptional circumstances where it is unavoidable, no expert should produce a further report during a trial that takes the opposing party completely by surprise. In *Scarcliffe v Brampton Valley Gp Ltd* [2023] an addendum report was produced by an expert after a very marked change in another expert's opinion became apparent only during cross-examination. It did not fully address the impact of the change on his previously expressed views, it still left many obvious issues unanswered and it introduced late evidence that was devoid of any adequate analysis. So, if you are asked at the last minute to provide an updated or addendum report, do not be rushed; take as much time as you need.

However complex the subject matter of the report, it is the role of the expert to make it sufficiently simple for the court to understand (*BDW*).

Be prepared to make concessions where appropriate and to re-evaluate opinions in the light of changing factual evidence; unwillingness to do so will suggest partiality (*Freeman v Pennine Acute*

MCQ answers
1 c 2 a 3 b 4 a 5 b

Hospitals NHS Trust [2021]). Your evidence will carry more weight if you gain the respect and confidence of the court, giving short and direct answers to the questions raised and acknowledging where a good point is made (*Qatar Investment & Projects Development Holding Co v John Eskenazi Ltd* [2022]). Be like the marine engineering experts in *Arnold v Halcyon Yachts Ltd* [2022], who 'listened carefully to questions, did not try to avoid or deflect them, gave considered answers and made concessions where appropriate' (para. 20).

Criticising an architect in *RGRE Grafton Ltd v Bewleys Café Grafton Street Ltd* [2023], the judge said:

> 'It is important that experts should give their evidence dispassionately. Their duty is to assist the court […] Rather than taking umbrage at the questions, they should attempt to answer questions posed on cross-examination as fully and helpfully as they can' (para. 139).

It is important not to introduce in oral testimony opinion that has not hitherto been submitted whether in a report, in a joint statement or in answers to questions. This will risk judicial criticism (*Cloonan v The Health Service Executive* [2022]; *Ogonowska, R v (Rev1)* [2023]; *Stansfield v British Broadcasting Corporation* [2021]). Any change of opinion should already have been communicated to the court (*ECU Group PLC v HSBC Bank PLC* [2021]).

Supplementary material

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Data availability

Data availability is not applicable to this article as no new data were created or analysed in this study.

Author contributions

K.R. was responsible for the conception and initial drafting of the manuscript. A.B. was responsible for redrafting and making substantial revisions to the final manuscript prior to submission. Both authors have given final approval to the manuscript, and agree to be accountable for all aspects of the work.

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Declaration of interest

None.

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MCQs

Select the single best option for each question stem

1 The Criminal Procedure Rules, rule 19.9:
- a was introduced as a result of the case of *United States of America v Assange* [2021]
- b does not apply to the omission of information that a party introducing it thinks ought not be revealed to another
- c applies to information that a party wants the court to decide whether it would be in the public interest to disclose
- d concerns the ability of vulnerable persons to participate in criminal proceedings
- e provides a definition of 'public interest'.

2 As outlined in the Civil Procedure Rules, it is *not* necessary for an expert witness to:
- a set out their instructions in full
- b retain the letter of instruction
- c retain a record of all communications with the relevant instructing parties
- d retain a record of the psychiatric assessment
- e make evidence sufficiently simple for the court to understand if it is highly complex evidence.

3 Which of the following is *not* a clinical negligence case:
- a *Hunter v Hanley* [1955]
- b *Dudley Metropolitan Borough Council v Mailley* [2022]
- c *Bolam v Friern Hospital Management Committee* [1957]
- d *O'Donovan v Cork County Council* [1967]
- e *Bolitho v City and Hackney Health Authority* [1998].

4 The Turner proposition, clarified in *Modi v Government of India* [2022]:
- a is concerned with the question whether suicide would be the result of a voluntary act
- b provides a clinical definition of impulsivity
- c refers to capacity within the meaning of the Mental Capacity Act 2005
- d was subsequently rewritten on the request of leading counsel
- e should be interpreted in a meticulous way.

5 In immigration and asylum cases:
- a the expert should give an opinion as to whether an account is credible
- b the expert should consider the truthfulness of what they are told, as outlined by the judgment in *MN v The Secretary of State for the Home Department* [2020]
- c in order for expert psychiatric evidence to support a defence under the Asylum and Immigration (Treatment of Claimants etc.) Act 2004, it is necessary to show that the person's mental condition made them unwilling to participate in the process
- d the judgment in *HA (Expert evidence; mental health) Sri Lanka* [2022] is no longer of crucial importance to psychiatric experts
- e where a subject's reported symptoms support their case that they were persecuted or trafficked, it is not necessary to consider other possible causes of those symptoms.

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