KNOWLEDGE GAP

Giles Colin outlines an unusual case in which costs were awarded against a poor expert

In the immediate aftermath of the publication of HHJ Claire Evans' judgment in *Thimmaya v (1) Lancashire Foundation Trust (2) Mr Firas Jamil* on 30 January 2020 (a case in which I acted for the defendant trust), a colleague at the Bar came to me asking for some advice as follows: 'Giles, I represent the claimant in a catastrophic birth injury case in 2015. The medico-legal expert that we rely on for breach of duty retired from clinical practice in 1998...'

To my mind, it is astonishing that, even today, the Courts continue to see medico-legal experts with little or no regard to their important and significant duties to the Court, pursuant to Part 35 CPR 1998.

After all, these significant and important duties as an expert are also reinforced in the General Medical Council Guidance 'Good Medical Practice.'

Yet there are experts who continue to give expert opinion on matters outside their expertise, when they are not appropriately qualified, and when they have not had proper regard to their duties to the Court.

Giving expert evidence in Court is not easy. It takes a great deal of commitment, education and learning.

Giving evidence and being subject to cross-examination is, by its very nature, highly pressurized and daunting. It is much more difficult than everyday working practice.

That is precisely because it is not something that the expert encounters every day or submits themself to daily.

The *Thimmaya* case

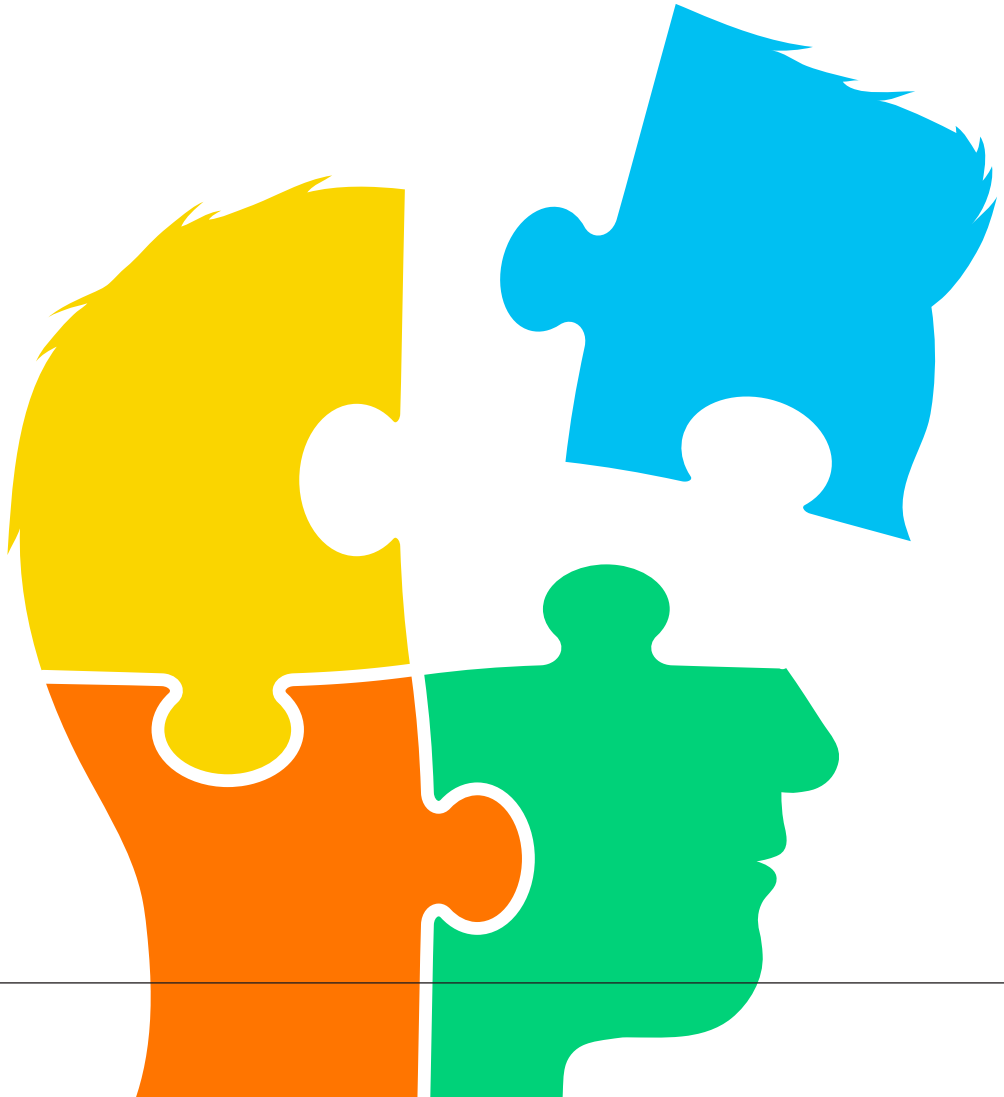
In this case, Mr Jamil has discovered that the consequences of failing in your duties to the Court can be very expensive indeed.

He has not only a costs liability to meet in favour of the defendant trust, but also damages and costs liabilities in professional negligence proceedings brought against him by the claimant and the claimant's solicitors in the original action.

In the original action, the NHS Trust was the defendant in clinical negligence proceedings brought against it by Mrs Thimmaya.

For the purposes of those proceedings, Mrs Thimmaya relied on the expert evidence of Mr Jamil, consultant spinal surgeon, with a specialist interest in rehabilitation.

The claim alleged breaches of duty against the surgeon who performed surgery to Mrs Thimmaya's cervical spine, and breaches of duty in relation to follow ups at various appointments over a two-year period, and undertaken by a number of consultants and specialists.



Proceedings commenced in December 2015. Throughout, the defendant trust repeatedly highlighted concerns about the competence of Mr Jamil as an expert.

Part of those concerns were evident from the observations of Mrs Justice Andrews (about Mr Jamil) at paragraphs 65 to 71 of her judgment in the case of *Sumner v Royal Surrey County Hospital NHS Foundation Trust* [2015] EWHC 293 (QB). That case was heard by the Court between 27 January 2015 and 2 February 2015.

I recognise that there will be commentators aware of this case who may well criticise the claimant's solicitors for running Mrs Thimmaya's case to trial on the basis of the evidence of Mr Jamil.

That, in my view, is unfair. Indeed, subsequent disclosure, in the course of the third party costs proceedings, demonstrated that Mr Jamil was questioned on a number of occasions by the claimant's solicitors as to his suitability to give evidence.

It is also clear from that same disclosure that Mr Jamil provided reassurance, both as to his competence as an expert, and as to his suitability to give expert evidence.

Indeed, at no point did Mr Jamil advise the claimant, or her legal advisers, of his mental health difficulties.

Mrs Thimmaya's claim was eventually heard by HHJ Claire Evans on 11 March 2019.

The trial was listed for five days. Mr Jamil gave evidence on 12 March 2019.

During cross examination, he was 'wholly unable to articulate the test to be applied in clinical negligence proceedings.'

He was given a number of opportunities by counsel and the Court to explain it, and he was asked the question in different ways by counsel and the Court.

Ultimately, Mr Jamil informed the Court that he did not know the legal test to be applied in such cases.

Some forewarning of that had been given when Mr Jamil had referred to 'best practice' in the joint statement prepared with the defendant trust's expert. Of course, 'best practice' is not what is required of a doctor to avoid being found to have been negligent.

Mrs Thimmaya had no real choice but to discontinue the claim.

Qualified one-way costs shifting (QOCS) meant that there were no costs consequences for the claimant.

However, the defendant trust incurred significant costs in defending the claim through to the conclusion of the trial.

It is right to observe that both the lawyers and the doctors involved in the case on behalf of the defendant trust felt very strongly that this situation should never have arisen.

Therefore, unusually, and exceptionally, in the circumstances of this particular case, I was asked to seek a third party costs order against Mr Jamil.

Costs order

At the hearing of the defendant trust's application against Mr Jamil, it was asserted by the defendant trust that he was not *generally* competent as an expert; that he was not competent to be an expert *in this case*, having carried out the surgery about which the complaint was made only twice and then under supervision; and that he was not competent, *in any case*, because he did not know the legal test in clinical negligence cases.

There are experts who continue to give expert opinion on matters outside their expertise

It was also contended by the defendant trust that Mr Jamil should not have been giving any written, or oral, expert evidence because, by his own admission (only evident in the third party costs proceedings), he was suffering from psychiatric difficulties which meant that he was on sick leave from his clinical work in the NHS from November 2017, before retiring from the NHS in May 2018.

On that basis, it was argued that Mr Jamil should have realised that he was not competent to act as an expert witness.

In his witness statement, dated January 2020, Mr Jamil accepted, with hindsight, that he was not fit at the trial to give expert evidence due to mental health difficulties and problems with cognition, memory and concentration.

Mr Jamil alleged that he had an adverse reaction to myself, alleging that I resembled and reminded him of an interrogator who had previously interrogated him in Iraq.

He asserted that, previously, he had reported in many clinical negligence cases and that on those occasions he had proper regard to the *Bolam / Bolitho* test.

It is of note that in the subsequent case of *ZZZ v Yeovil District Hospital NHS Foundation Trust* [2019] EWHC 1642 (QB)(paragraphs 87 to 89), a trial in May 2019 before Mr Justice Garnham, Mr Jamil was also unable to explain the test for breach of duty.

In that case, when asked about what happened in Mrs Thimmaya's case, Mr Jamil gave an explanation of having suffered a 'mental block.' In trenchant terms, Mr Justice Garnham rejected that explanation as 'palpable nonsense.'

In the event, and for the reasons set out in the judgment, HHJ Claire Evans rejected Mr Jamil's explanation for his failings in March 2019.

She determined that Mr Jamil was unable to assist the Court because of his general cognitive difficulties caused by his mental health illness.

She stated '... he should not have continued to act as an expert witness, whether in Court, or in writing, or in conference at a time when he was unable to work in clinical practice due to his mental health problems.

'He should have taken leave from his medico-legal practice at the same time as he did from his clinical practice in November 2017.

'As it was, he did not even inform the claimant or her advisers of his medical condition.

'Those are all significant failings which amount in my judgment to improper, unreasonable, or negligent conduct, such that the jurisdiction to make a costs order against Mr Jamil is engaged.'

In *PI Focus* December 2019, December 2019 (on page 30), it is reported that Sally Howe QC recently commented that 'The best experts are those who are on the hospital wards every day and who have recent experience with patients.'

Broadly, I agree with that statement. However, I would qualify it with the rider 'at the time of events about which complaint is made.'

Certainly, in clinical negligence cases, there may be occasions where the Court is asked to consider the standards of care applicable many, many, years in the past.

In such circumstances, it is perfectly appropriate to rely on an expert who was in clinical practice at that time, and who may now be long since retired from clinical practice.

In her judgment, HHJ Evans observed that, on her reading of his reports, Mr Jamil 'was not a very good expert.'

She also stated that 'there are plenty of not very good experts around.'

For my part, I do not understand why this should be the case and / or why such experts should continue to give evidence in Court without sanction.

The reasons why this matters are obvious: a claimant can lose their entitlement to have their case tried on the merits; Court time is wasted; and as in this case, there can be considerable costs consequences for the NHS, which by virtue of QOCS has no recourse to recovery of costs in a case that is defended, successfully.

In conclusion, HHJ Evans stated: 'Whilst it would not be right to use him as an example to send a message to experts, it is right that experts should all understand the importance of their duties to the Court, and the potential consequences if they fail in them.'

I hope that this judgment does weed out those experts who should not be giving expert evidence, either in writing, or orally.

I hope that this judgment does, in fact, serve to highlight to experts the potential consequences of failing in their duties to the Court.

At the very least, I hope that the judgment gives experts cause to reflect on their evidence.

There are too many experts who think that giving evidence is easy and straightforward, and that cases are likely to settle, in any event, such that the best quality evidence is not given.

Instead, they must focus on giving high quality expert opinion in accordance with their duties to the Court.

Ongoing self-review of the ability of an expert to give expert evidence must also take place.

Although this is an unusual, and exceptional, case, experts in Court proceedings must learn valuable lessons from it.

Mr Jamil should have informed his legal team that he was off sick from his clinical practice and / or that he was not able to give expert evidence.

Plainly, it is unattractive to cease working for the NHS for mental health reasons, but at the same time to continue to provide expert evidence for considerable remuneration.

And the advice that I gave to my colleague? The reader will understand that my advice is not fit for publication.

Giles Colin is a barrister at 1 Crown Office Row who acted for the defendant trust in the Thimmaya case above