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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
11th October 2019

B e f o r e :

MASTER DAVISON

Between:
SAMANTHA MUSTARD

Claimant

- and -

JAMIE FLOWER (1)
STEPHEN FLOWER (2)
DIRECT LINE INSURANCE (3)

Defendants

Mr Marcus Grant (instructed by Dickinson Solicitors Ltd) for the Claimant
Mr William Audland QC (instructed by BLM) for the Third Defendant
Hearing date: 29 August 2019

HTML VERSION OF JUDGMENT

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Introduction

1. This is my reserved judgment on cross-applications that came before me on 29 August 2019. Mr Marcus Grant represented Samantha Mustard, the claimant. Mr William Audland QC represented Direct Line Insurance, the third defendant. (The other defendants were not present or represented.) I am very grateful to counsel for their helpful and economical submissions.

2. The claim arises out of a road traffic accident which took place on 21 January 2014 in Milton Keynes. The claimant's stationary Honda Jazz vehicle was struck from behind by a Fiat Punto vehicle driven by the first defendant. Liability is not in issue. The claimant was then 34 years of age and employed as a quantity surveyor. She had a complex medical history. She claims that in the accident she sustained a sub-arachnoid brain haemorrhage and a diffuse axonal brain injury such as to have left her with cognitive and other deficits. But there are marked differences between the experts as to her presentation and the interpretation of her medical records, imaging and history. In part, these differences depend on, or may be influenced by, the court's finding as to the speed of impact. Essentially, the third defendant (hereinafter "the defendant") says that the impact was relatively minor, whereas, on the claimant's case, it was at least a "medium velocity impact". In turn, the defendant's medical experts say that the claimant suffered no, or only minor, brain injury, whereas the claimant's experts say she suffered a serious brain injury – albeit that the manifestations of that injury are "subtle".

3. The main directions were given by Deputy Master Bagot QC on 26 July 2018. He restricted the number of factual witnesses to 10 in total and gave permission for expert medical evidence in the fields of:

    Orthopaedics

    Neurology

    Neuropsychology

    Neuropsychiatry

    Audiology

    Neuroradiology

    Neurosurgery

    Engineering

4. On various dates in the second half of 2017 and the first half of 2018 the claimant was examined by the defendant's medical experts. She had been advised by her solicitor, Mr Christopher Dickinson, to record the examinations on a digital device. She did so. In the cases of Mr Matthews, the defendant's orthopaedic surgeon, and Mr Kellerman, the defendant's neurosurgeon, the claimant recorded the consultations covertly. In the case of Dr Torrens, the defendant's neuropsychologist, the claimant asked if she could make a recording. Dr Torrens agreed that she could record the clinical examination but, for reasons I will come to, not the neuropsychological testing. The claimant accepted this and, on her account (and audible from the recording) tried to switch off her device. But (again, on her account) she mistakenly failed to do this and the machine went on recording. She inadvertently recorded the whole of the consultation with Dr Torrens. There are therefore recordings by the claimant of all her consultations with the defendant's medical experts. Additionally, three of those experts, Dr Grace, neuropsychiatrist, Dr Surenthiran, audio-vestibular physician, and Dr Torrens made their own recordings.

5. Because the defendant was aware that Mr Dickinson advised his clients to record their examinations with the other side's medical experts and because they wanted to establish a level playing field in this regard, the claimant was invited by the defendant to record her examinations with her own medical experts. She gave no undertaking or indication that she would do so and, in the event, she did not. There are, as I understand it, no recordings made by the claimant's experts either.

The two principal applications

6. Strong objection has been taken to the covert recordings and the defendant invites me to exclude the evidence pursuant to CPR rule 32.1(2). That application is resisted and, by way of cross-application, the claimant has filed a supplementary statement from Professor Morris, her neuropsychological expert. The thrust of that statement is that the transcript of the consultation with Dr Torrens reveals that she made serious errors in her administration of the neuropsychological testing such as to render it of doubtful value. Thus, the court is presented with the problem (more familiar in the criminal and family jurisdictions than it is in personal injury litigation) of evidence which may have been obtained improperly or unfairly but which is nevertheless relevant and probative.

7. The other main application concerns Part 35 questions to the defendant's experts. Such questions were served on 3 June 2019. With their appendices, they fill two ring binders. In order to illustrate their length and complexity I have annexed the questions to Dr Torrens to this judgment. A combination of the questions and the covert recordings prompted 6 of the defendant's experts to write to the Court seeking directions. I summarise their objections to the questions below, but, in essence, their complaint is that the questions would take a disproportionate amount of time to answer and that they amount to cross-examination. Some of the experts have felt sufficiently strongly about the questions and, more particularly, the covert recordings to have involved their professional bodies. Notwithstanding the claimant's advisers' attempts to shorten and simplify the questions and their suggestions as to how the experts may wish to approach them, the defendant has applied for an order setting aside the questions or directing that the experts are not obliged to answer them. This too is resisted.

The covert recordings

8. In his witness statement filed in opposition to the application, Mr Dickinson has stated that the claimant "elected to record her appointments both to provide herself with a reference as an aide memoire of what was said and to provide herself with evidence to demonstrate any misunderstanding as to what was actually said, if required". To this, Mr Dickinson added that his experience of this cohort of his clients (those with subtle brain injury) demonstrated that many have problems of memory and fatigue. They could answer questions clumsily, their answers could be misinterpreted and this could then be the foundation for allegations of dishonesty. He has pointed out – correctly in my view – that Dr Torrens has characterised the claimant in this litigation in terms that stop only just short of an allegation of outright dishonesty.

9. Whatever her intentions and whatever guidance may have been offered to her by Mr Dickinson, the claimant did not in every case inform the relevant expert that she intended to record the consultation. In the cases of Dr Cockerell, Dr Grace and Dr Surenthiran, she announced her intention and they all agreed to the recording. In the case of Dr Torrens, she told Dr Torrens what she was doing or proposed to do and Dr Torrens told her she could record the clinical interview but not the neuropsychological assessment. Both were nevertheless recorded – the claimant says by accident. In the cases of Mr Matthews and Mr Kellerman, the recording was covert. However, in his client's defence, Mr Dickinson has pointed out that all the defendant's experts had been forewarned by their own instructing solicitors that the claimant was likely to be recording the consultations and the claimant assumed that they knew.

10. By way of qualification to the foregoing, Dr Surenthiran, although taking no issue at the time, has nevertheless also complained that the recording was covert. Both he and Mr Matthews have drawn attention to an additional feature of the recordings, which is that they began in the waiting room and picked up extraneous material, including the name of one of Dr Surenthiran's consultant colleagues.

11. Both Mr Matthews and Dr Torrens have complained in very strong terms about the covert nature of the recordings. Mr Matthews has said that he feels that the claimant's actions were wanting in honesty, transparency and common courtesy, that his permission should have been sought and that he feels sullied by what took place. Dr Torrens has said that she feels professionally violated, distressed, angry and disillusioned. Further, the recording of the neuropsychological testing had (a) raised issues regarding the proprietary rights in the tests, which were not for release into the public domain, (b) rendered the claimant herself essentially "un-assessable" on any future occasion, (c) undesirably conferred on the claimant's solicitors "insider knowledge" of the content and methodology of the tests,

(d) by reason of the foregoing, raised professional conduct issues. She also complained that because her consultation with the claimant had been recorded and Professor Morris's (her counterpart) had not, she was unable to scrutinise any shortcomings in his approach and operating methods in the same way, (though she emphasised that she considered that such scrutiny when based upon a covert recording was unprofessional and that she would not, herself, wish to undertake it).

12. Before coming to the substance of these complaints, I should set out what became of the recordings once made. I was told that the claimant herself did not listen to them but released them to Mr Dickinson. Mr Dickinson then followed what I understand to have been his usual practice. He did not himself listen to them or have them transcribed until he and his client saw the reports when they were disclosed by the defendant. I was told that it was at that point that he and the claimant formed the view that the reports had not in every case set out accurately the history given by the claimant and that there were other defects also. The recordings were then[1] transcribed and that of the examination by Dr Torrens was sent to Professor Morris for comment. That exercise generated a supplementary report from Professor Morris dated 14 May 2019 (and also formed the basis of a component of the Part 35 questions put to Dr Torrens). The stated purpose of Professor Morris's supplementary report was to "appraise the accuracy of the neuropsychological assessment" by Dr Torrens. It runs to some 21 pages and is expressed in careful, moderate and respectful language. At the outset, it confronted the obviously delicate feature of his instruction, which was that it was based upon a covert recording and had, at least partially, brought into the public domain test materials that were intended to remain confidential. Having given the matter careful and anxious consideration, Professor Morris stated that his duty to the court and to the claimant and his own conscience obligated him to draw to the attention of the court "my impression of deviations from correct procedure because, if correct, it may affect the weight to be attached to any formulation that relies in whole or in part on [the claimant's] test scores". What then followed was an analysis of Dr Torrens' technique and methodology on the occasion of her examination of the claimant which threw into doubt her conclusions. Mr Audland QC did not dispute that this evidence from Professor Morris was relevant and probative because it was capable of defeating or qualifying the adverse conclusions that might otherwise be drawn against the claimant based upon her test scores with Dr Torrens.

13. Shortly before the hearing, there was a last round of evidence concerning the recording issue. This was, in part at least, provoked by a Subject Access Request dated 10 July 2019 to Dr Torrens from the claimant in which she sought her neuropsychological test data. Dr Torrens responded to this request on 9 August 2019, declining it on grounds that to do so would breach the guidance of her professional body, the British Psychological Society, and Pearson Clinical, the providers of the test materials, which were protected by copyright. On 22 August 2019, Dr Torrens made a witness statement exhibiting this correspondence and the guidance from the BPS and Pearson. This guidance took the form of:

    - Statement on the conduct of psychologists providing expert psychometric evidence to courts and lawyers (BPS)
    - Communicating test results: Guidance for Test Users (BPS)
    - General Policy For Reproduction And Dissemination of Pearson's Test Materials (Pearson)

    I will not reproduce the guidance or the policy. It is enough to say that the documents seek to regulate the dissemination of the test materials for reasons relating to the continuing validity and efficacy of the tests (which would be impaired if released into the public domain) and for copyright reasons. But release in the context of litigation and under controlled conditions was specifically contemplated.

14. The defendant also deployed a witness statement dated 20 August 2019 from Professor Gus Baker, a member of the executive committee of the BPS's division of neuropsychology and previously the chairman of its professional standards committee. Professor Baker was the co-author of a document (which he described as a Position Paper) entitled "Guidelines for the recording of Neuropsychological Assessments". He said that these guidelines represented an overall agreed position within the department of neuropsychology, although "there will be some members who do not necessarily agree

with it". The Guidelines were soon to be published, (though it is not clear that they have yet reached their final form).

15. With slight differences of emphasis, Professor Baker and Dr Torrens made the same general points about recording of neuropsychological examinations. These were (1) that in a medico-legal context recording was capable of changing and distorting the nature and dynamics of the examination and therefore the results and (2) recording could render patients un-assessable in the future. The proposed BPS Guidelines on recording advised that neuropsychologists should not allow patients to make their own recordings and should, indeed, discontinue the assessment if covert recording came to light.

16. The claimant responded to these statements by way of a further supplementary report from Professor Morris dated 27 August 2019. The report (expressed with the same care and moderation as his report of 14 May 2019) is detailed and, for present purposes, it is enough if I summarise his response to points (1) and (2) in the preceding paragraph. As to point (1), Professor Morris acknowledged that recording of examinations introduced a dynamic of its own. However, there was little empirical evidence as to the effect of that added dynamic and there were potential benefits as well as potential disadvantages. He pointed out that recording and observation of clinical examinations were commonplace. Whilst he deprecated covert recording, he doubted that it impacted greatly on the assessment. As to point (2), he agreed that there was a risk of the patient being rendered un-assessable in the future, but this was a risk that could be mitigated. More generally, he pointed out that the Guidelines, whilst helpful, did not address the "elephant in the room", which was that if they were strictly adhered to then incompetence or malpractice on the part of a neuropsychologist administering the tests would go undetected. This could lead to an injustice and could also have clinical repercussions for the patient. His report, at paragraph 1.24, contained the following suggestion for the future:

> "There are different views about recording amongst clinical neuropsychologists. One alternative view is that there should be routine recording by the examining clinical neuropsychologists, this not being different in kind from clinical practice. The records would be kept by the clinical neuropsychologists and exchanged if anything untoward was detected and needed to be potentially addressed within a closed court."

17. To add to the material from the above-named experts, my attention was drawn to an article in the Medico-Legal Journal by the neurologists Michael Gross, Len Doyal and Michael Swash entitled "The covert recording of medico-legal consultations"; see 2018, Vol 86(4) 202-207. This article stated that the General Medical Council and medical defence organisations in the UK "have come to accept that patients can legally make covert recordings of their consultations with a doctor". The article criticised the stance of the GMC on this matter. For reasons closely aligned to the views expressed in this case by Professor Baker and Dr Torrens, the authors suggested that the issue required wider debate and that covert recordings "should not be regarded as acceptable in evidence put before a court". An editor's note to the article offered a further suggestion as to future conduct:

> "As experts are instructed as a matter of contract it should be clearly stated in the contract that no covert recordings may be made at any time. The contract might state, for example, that recordings of any consultation or examination can only be made with the express consent of all the parties concerned and when acting jointly. Similarly, there may be stated restrictions on the use and dissemination of such recordings and transcripts."

(Given that the contractual relationship would be between the expert and the solicitor instructing the expert, as opposed to the person undergoing the examination, the suggestion has not been fully thought through. However, as with Professor Morris's suggestion, there is clearly scope for agreement of a general protocol covering the recording of medico-legal examinations.)

Discussion

18. Mr Audland QC's submission had broadly two limbs which were (1) that the recordings were unlawful under the Data Protection Act 2018 and the General Data Protection Regulation 2016/679 and (2) that they should be excluded (a) because of the unlawful (or, at the very least, improper) manner in which they had been obtained, (b) because they had impaired or undermined the validity of Dr Torrens'

testing, and, (c) because they gave rise to an uneven playing field or an inequality of arms as between claimant and defendant in that only the defendant's experts' examinations had been recorded in this way.

The test to be applied

19. It is important to note that Mr Audland QC did not contend that the manner of obtaining the recordings should, of itself, lead to their exclusion. He accepted the proposition that evidence that had been unlawfully or improperly obtained might still be admissible. What was required was that the court should consider the means employed to obtain the evidence together with its relevance and probative value and the effect that admitting or not admitting it would have on the fairness of the litigation process and the trial. The task of the court was to balance these factors together and, having regard to the Overriding Objective, arrive at a judgment whether to admit or exclude. To put it slightly differently, the issue was whether the public policy interest in excluding evidence improperly obtained was trumped by the important (but narrower) objective of achieving justice in the particular case. This approach, from which Mr Grant did not dissent, seems to me to be fully in line with the authorities to which I was referred and which I need not set out. I do, however, note that in the majority of such cases the balance has been struck in favour of admitting the evidence.

Conclusions

20. I have decided that I should admit the evidence in this case.

21. I reject the proposition that the recordings were a breach of the Data Protection Act or the GPDR and I do not propose to give the submission detailed attention. Article 2(c) of the GPDR provides that the Regulation does not apply to the processing of personal data "by a natural person in the course of a purely personal … activity". Recording a consultation with or examination by a doctor would seem to me to fall into this category. I do not think that the claimant supplying the recordings to her advisers took it out of the category. Further, the relevant data relate to the patient (the claimant) not the doctor. (I mention that this is apparently the view of the General Medical Council – see the article in the Medico-Legal Journal referred to above – and also the Information Commissioner's Office, whom Mr Dickinson consulted on this matter). Both the Act and the GPDR contain exceptions or "carve-outs" for data which is gathered or processed or disclosed for the purposes of exercising or defending legal rights, (I use that expression loosely and compendiously). The provisions are contained in Article 6 as read with section 8 of the Act and in section 5 of Schedule 2 and, if recourse to them were needed, would apply in this case. I note that all objections based on the legality of the recording were abandoned in the case of *Chairman & Governors of Amwell View School v Dogherty* UKEAT/0243/06/DA, which was similar on its facts to the present one. Although the data protection regime was then contained within the 1998 Act, I have not been alerted to any material difference so far as the point under consideration is concerned. Finally, I note that if Mr Audland QC's submission were correct it would have the very surprising and undesirable consequence that covert video recordings of claimants by insurers would be equally unlawful.

22. Mr Audland QC placed some reliance on the decision of the CJEU in the case of *Buivids* C-345/17. That case is of no assistance. Mr Buivids, a Latvian citizen, had published on YouTube a video he had taken of Latvian police officers performing their duties in a police station which he had attended in the context of administrative proceedings brought against him. He considered that the officers had behaved unlawfully and wished to expose that conduct to the general public. It is obvious that the data protection breach (which it was found to be) was the uploading to and publication by FaceBook of the video recording; see paragraph 39 of the judgment. That is entirely different from the facts of this case and, in particular, the provision of the doctors' data (if such it be) to the claimant's solicitor and her own medical experts.

23. The position is therefore that the covert recordings were not unlawful. In the case of the recording of the examinations by Mr Matthews and Mr Kellerman, the recording was reprehensible and perhaps deserving of some of the epithets which Mr Matthews has himself applied. In the case of the recording of the examination by Dr Torrens, the evidence from the claimant is that the recording was unintentional. She had meant to turn off her digital device and through clumsiness or unfamiliarity had

failed to do so. Turning a digital device on and off is an easy enough thing to do. However, it would not be fair or proper for me to reject this explanation on a paper application and I will therefore proceed on the basis that the explanation is correct. If it were not correct, then the covert recording of Dr Torrens' examination would be more reprehensible than that of the examination by Mr Matthews because it would have involved frank misrepresentation and subterfuge. There is also the added dimension that the materials she was recording were subject to copyright. Wherever the truth of this may lie (and I repeat that I am proceeding on the basis that the claimant's explanation is correct), I do not think that the covert recordings were so reprehensible as to outweigh the considerations that I set out in the following paragraphs. The claimant acted on the advice of her solicitor and her motives were, in the context of adversarial litigation, understandable. Whilst her actions lacked courtesy and transparency, covert recording has become a fact of professional life. As foreshadowed by Professor Morris and as Mr Grant suggested in the course of his submissions, the sooner that there can be some kind of protocol agreed between the Association of Personal Injury Lawyers and the Forum of Insurance Lawyers which governs the recording of medico-legal examinations the better. It is the interests of all sides that examinations are recorded because from time to time significant disputes arise as to what occurred. In that situation, it is important to have a complete and objective record of the examination, which is subject to appropriate safeguards and limitations on its use. It is desirable that the parameters of such recording should be on an "industry-wide" agreed model which caters for the many issues capable of arising and, I might add, which pays careful attention to the containment of the costs that might potentially be generated.

24. I turn then to the other considerations: first, the relevance and probative value of the recordings. For the reasons given by Professor Morris, the recording of Dr Torrens' examination is and is accepted to be relevant and probative. It seems to me to be highly relevant. Further, there is a related factor which was regarded as important in the case of *Jones v University of Warwick* [2003] EWCA Civ 151. A question mark has been placed against Dr Torrens' conduct of her examination of the claimant and her administration of the neuro-psychological tests. That matter is now known. It cannot be unknown. It would be highly artificial and unsatisfactory to expect the experts to conduct their joint meeting and for them to give evidence without reference to these matters. A similar artificiality would apply to the claimant's evidence. To coin the well-known expression, it would be difficult to put this particular genie back in the bottle.

25. I have not overlooked Mr Audland QC's submission that the effect of the claimant's covert recording was to impair or degrade the results of the neuro-psychological testing by Dr Torrens. But this is a marginal factor in the decision on admissibility. Plainly, the thrust of Professor Morris's supplementary report is that the true impairment and the reason for it lie in Dr Torrens' own technique and methodology. He would not agree that the covert recording contributed to any or any significant degree. This, on the face of it, is a matter to be resolved at trial.

26. Although argument at the hearing concentrated on the recording of Dr Torrens, the covert recordings of Mr Matthews and Mr Kellerman are also accepted to be relevant and probative – specifically in relation to the claimant's account to them of her pre-accident history, the progression of her symptoms and (in the case of Mr Matthews) in relation to whether the Waddell sign from the axial loading test was correctly reported as positive.

27. I emphasise that I am making no finding that any of the criticisms of the defendant's experts based upon the recordings are correct or justified. The extent of Mr Audland QC's concession and the extent of this part of my decision is that the recordings have raised legitimate questions and such criticisms as there are may or may not be substantiated.

28. The other factor to consider is the effect of admitting the evidence on the overall fairness of the litigation process: what Mr Audland QC called the "level playing field" point. The claimant's stated reason for wishing to record her examinations with the defendant's experts was to protect her interests having regard to the vulnerabilities and frailties she maintains have been the result of the accident. If that was her motivation (which I am not in a position to question on a paper application and which is, anyway, plausible) then it is understandable that it applied or applied with particular force to the defendants' experts and not those instructed on her side. She gave no undertaking that she would record her examinations with her own experts and none was sought. As Mr Grant observed during the

course of his submissions, the defendant has not pointed to any aspect of the examinations by the claimants' experts that has raised a query that a recording would assist to resolve. To that extent, Mr Audland QC's level playing field point is merely theoretical.

29. Weighing these matters in the light of the Overriding Objective, I have come to the clear conclusion that the balance favours admitting the evidence. (I deal separately below with the discrete question of the test materials.)

30. It is conceded that those parts of the recordings which have picked up conversations in the waiting rooms of the experts concerned should be erased and excluded. The persons concerned would appear to have been the receptionists employed there and the conversations merely social interactions. Although I regard this as an unfortunate feature of the covert recordings, there has been no wider publication of these parts and the claimant and Mr Dickinson never intended that there should be.

The Part 35 questions

31. The relevant part of the rule is in these terms:

> "35.6 - (1) A party may put written questions about an expert's report (which must be proportionate) to –
>
> (a) an expert instructed by another party; or
>
> (b) a single joint expert appointed under rule 35.7.
>
> (2) Written questions under paragraph (1) –
>
> (a) may be put once only;
>
> (b) must be put within 28 days of service of the expert's report; and
>
> (c) must be for the purpose only of clarification of the report,
>
> unless in any case –
>
> (i) the court gives permission; or
>
> (ii) the other party agrees."

32. The rule in its original form did not include the requirement that questions must be "proportionate". The mandatory requirement for proportionality was intended to address the practice that had arisen in some quarters of serving lengthy, complex sets of questions that were, in reality, a form of cross-examination.

33. Mr Audland QC's attack on the questions was that they were wholly disproportionate and that they were not for the purposes of clarification only. They ran to many, many pages and included a mass of enclosures (listed at the foot of each set of questions) comprising variously a transcript of the recording of the examination, academic or research literature, witness statements and so on. In some cases the questions and exhibits served consisted of a whole file of material. The sheer volume was unprecedented. In addition to the foregoing, the letters to the court from the experts themselves made the following points:

    - some issues would be dealt with more proportionately in the joint discussion and the joint statement that would be the outcome of that discussion;
    - some required close regard to a mass of literature (not always literature that the particular expert had referred to in his or her report);
    - to answer the questions would take many hours of work (in some cases as much as two or three working days) with costs implications that required no elaboration. Dr

Torrens added that to answer the questions would result in a document as lengthy as her original report;

- they perceived them to be cross-examination;

Mr Audland QC observed further that:

- some questions sought to go behind matters which would be privileged;
- some questions were based on statements by the claimant the reliability of which was likely to be tested at trial, so were premature.

34. The initial response of the claimant's advisers was to re-visit and modify the questions. In some cases the question was withdrawn; in others the question was followed by some words of explanation as to its basis or what had prompted it; in others the expert was given the option, if preferred, of leaving the question to be dealt with in cross-examination at trial. By way of further modification or concession, the claimant's advisers' position by the time of the hearing was that the defendant's experts should answer those questions which they felt appropriate to answer and in other cases should decline to answer, but giving reasons so that the claimant's advisers could then consider whether or not to press the question by way of an application for an order. There was some support for such an approach in the notes to CPR 35.6 in the White Book, which said that if an expert received a set of questions which (s)he considered went beyond the spirit of the rule, the right approach was to "answer the clearly relevant questions and only to decline to answer the remainder if (i) to do so would be clearly prejudicial to the instructing party's position, or, (ii) the time and cost of replying to the questions was disproportionate". Mr Audland QC's response to these modifications was that they did not answer the basic objections to the questions and quite impermissibly placed a burden on the experts to decide what were and were not proper questions.

35. In his submissions, Mr Grant pointed out that the expert evidence was detailed and complex (running to some 900 pages). It was therefore scarcely surprising that the claimant's questions were also detailed and complex. A significant component of the questions dealt with an oversight on the part of the defendant's experts, which was that they had not clarified their opinions in the light of the expert evidence which dealt with the speed of the collision – an important point in the case. They had not, he submitted, dealt or dealt sufficiently with the claimant's pre-existing vulnerability or with a crucial letter from the hospital which treated her in the aftermath of the collision and which supported her case that she had suffered a sub-arachnoid haemorrhage as a direct consequence. (He separately observed, with justification, that this letter, albeit helpful, had been improperly obtained by the defendant and then simply listed as an anonymous document at item 25 of their list for the claimant to discover – conduct which did not reflect well upon the defendant.) Mr Grant drew attention to the authority of *Mutch v Allen* [2001] EWCA Civ 76. In that case the Court of Appeal allowed a question to the claimant's expert which went beyond simple clarification. (Mr Audland QC and Mr Grant referred to this type of question as a "question by way of extension".) This authority does not, to my mind, take matters much further in that it is clear from the rule itself that such questions may, in a proper case, be put by agreement or with the court's permission. Lastly, Mr Grant took me skilfully through a representative section of the questions. He submitted that the questions were relevant, that they were carefully and moderately drafted and that they would elicit evidence in a way that was collaborative, expeditious and cost-effective.

Discussion

36. Notwithstanding the cost and effort that have gone into the questions and notwithstanding that the motives of Mr Dickinson and Mr Grant have simply been to advance their client's case to the best of their ability, it is obvious that I should disallow the questions. I do so essentially for the reasons offered by Mr Audland QC. As I observed to him at the hearing, I have never before encountered a set of questions to experts even remotely approaching the scale and complexity of these and I have never known questions to provoke letters to the court from an expert or group of experts phrased in terms such as the present. (Indeed, letters of any kind from experts to the court seeking directions under CPR rule 35.14 are very rare. I consulted the longest serving Master, Master Yoxall, on this matter. He had received questions from an expert on just two occasions in 18 years.) I acknowledge that the questions

are relevant. I acknowledge also that in part they address what are accepted to be areas of omission in the defendant's experts' reports. But none of this changes the plain facts that the questions (i) are wholly disproportionate, (ii) are overwhelmingly not for the purposes of clarification and (iii) amount to cross-examination. Where there are omissions in the experts' reports, these are, in this case, best addressed by supplementary reports and/or by the process of joint meetings and joint statements. Such reports and joint statements are likely to render whole swathes of the questions redundant, (which is, of course, an additional reason why questions such as the present ones are discouraged). As to the claimant's modifications to the questions, I agree with Mr Audland QC that it is undesirable that the experts themselves should be forced to make a value judgment about the appropriateness or proportionality of a question, or set of questions, before choosing whether to answer. It is equally undesirable that they should have to formulate and express reasons why they choose not to answer. Questions should not be framed in a way that requires such judgments or explanations, which are the province of the lawyers not the experts. To the extent that the commentary to CPR 35.6 suggests otherwise, I respectfully disagree. (Although it does not arise in this case, I disagree also with the proposition that an expert could refuse to answer a question because it was "prejudicial to the instructing party's position". If a question was relevant, proportionate and for clarification only, then the fact that the answer might be prejudicial to the expert's instructing party's position would be no reason at all to decline to respond.)

37. Although Mr Grant, understandably, did not invite it, I have considered whether I should embark on some sort of process of editing and refining the questions so as to bring them within the scope and spirit of the rule. I have decided not to do so. As already noted, many of the questions will likely be answered by a different route and in a different format in due course anyway. But even if that were not the case, the questions are wholly disproportionate and it is not appropriate to attempt a rescue operation, which would certainly be contentious and involve further cost and delay. In the context of this claim and of litigation more generally, the policy interest in discouraging questions such as these is better served by giving them a swift and decisive *quietus*.

38. When it comes to drawing up the order reflecting this judgment, I invite the parties to consider a further matter. This is that I would wish to avoid these questions finding further life and expression in any agenda for the joint meetings of the experts. The directions do not, in fact, provide for agendas. (Even in those cases where they do, they are never mandatory.) My provisional view is that there should be no agendas unless the experts, with reason, ask for them and, in that case, they should be drafted in the most direct and concise language.

Other directions

39. I will not lengthen this judgment with detailed consideration of the other matters that were in issue, but which were less contentious. My rulings on these matters are as set out in the following paragraphs.

(i) The test papers which were used in the neuropsychological testing of the claimant by Dr Torrens. I will direct that these are to be disclosed in unredacted form to Professor Morris (and only Professor Morris) prior to the joint meeting of neuropsychologists. No copyright issue arises. The BPS Guidance and the Pearson Policy referred to in paragraph 13 above envisage the release of test papers in controlled conditions. Further, Mr Dickinson has been in correspondence with Pearson Education Limited on this subject and release in this way is sanctioned by them. I fully understand Professor Morris's wish to be able to consider the test papers in his own time before the joint meeting with Dr Torrens and I do not think that there can be any reasonable objection to this. To the extent that the covert recording contains details of the material contained within the test papers, (which is not clear to me), that part of the recording should be redacted or erased. How the test materials are dealt with at the trial is a matter for agreement and, failing that, direction of the trial judge. Related to this issue were the letters written by the medical experts to their medical bodies and the legal advice received by Mr Matthews. These documents are not the defendant's to disclose (and the legal advice would, additionally, be privileged). But if they were disclosable, nothing would be served by so ordering and I would decline to do so.

(ii) The witness statement of Ms Levett. Ms Levett is the claimant's treating psychologist. The claimant has served a statement from her dated 9 March 2019. The statement runs to 40 pages. Its ostensible purpose was to provide a record of her treatment of the claimant and her clinical findings. But she was shown the expert evidence before compiling her statement and the statement contains opinion evidence on matters such as whether the claimant suffered a loss of consciousness following impact, the significance of that and of post-traumatic amnesia. The statement was, indeed, served with the claimant's expert evidence rather than with her factual evidence. I have no hesitation in excluding it. It is clearly intended to have the effect of acting as support for the claimant's expert evidence. So far as Ms Levett's treatment of the claimant is concerned, her (Ms Levett's) clinical notes are a sufficient record of that. I reject the proposition that the notes require or would benefit from an accompanying statement to make them more digestible. I fear that the effect would be the reverse.

(iii) The witness statement of Mr Trevitt. This adds little or nothing to the expert evidence of Mr Henderson, the claimant's engineering expert. I will exclude it.

(iv) The report of Professor Sharp. Professor Sharp is a neurologist at the department of brain sciences within the medicine faculty of Imperial College. He has provided a brief report dated 25 April 2019 on some neuroimaging which was commissioned by the claimant's solicitor in November 2018 and carried out on 8 January 2019. The report is titled "medico-legal neuroimaging report" and it was, at least initially, accepted to have been a medico-legal instruction. At the hearing, Mr Grant told me that that was an error and that the instruction had been paid for by the claimant from her personal funds – its primary purpose being clinical. The imaging has been reviewed by Dr Butler, the claimant's neuroradiologist, in a letter dated 15 July 2019. It has also been reviewed by Dr Stoodley, the defendant's neuroradiologist, in letters dated 29 July 2019 and 21 August 2019.

The report from Professor Sharp is a medico-legal report in both form and substance. The contrary does not seem to me to be arguable. Given that the claimant already has an expert neurologist, Dr Allder, I have no hesitation in excluding Professor Sharp's report. However, it would be artificial to exclude the imaging itself which the instructed neuroradiologists have considered and commented upon, and likewise their reports. However unsatisfactory the commissioning of the imaging may have been, this is another genie that cannot easily be put back into the bottle.

(v) Paginated bundles. The issue is whether this should be done now or during the trial preparation phase. In either case it falls to the claimant's solicitor to do it and the cost is a budgeted cost. Whilst I sympathise with the fact that Mr Dickinson's firm is a niche practice lacking the resources of a national firm, this a case where there are some 10 lever arch files of documents and records and a paginated bundle is required for the experts' joint meetings and, indeed, for the further general progress of the claim. It seems clear that that work should be done now and it falls to the claimant's side to do it.

40. I invite counsel to agree and submit an order reflecting the above.

Postscript

41. I add some very brief further observations about the covert recordings. At the stage when the application was to be listed, the claimant's solicitor suggested that it be referred to a High Court Judge for determination and for the giving of general guidance on the issue. The defendant thought that unnecessary and I refused to refer the application in that way. Although covert recording is a thorny topic, it falls to be decided on a case by case basis. It follows that it is not very susceptible to guidance that could be applied across the board. I doubt that a High Court Judge would attempt to give general guidance, (which would, anyway, require the involvement of the President of the Queen's Bench Division). In personal injury cases, I have suggested that an APIL / FOIL agreed protocol is the way forward. Such a protocol would provide an agreed scheme for the recording of examinations and for

the reception of such evidence. There would then be no need or incentive for covert recording so that such cases would be unlikely to arise in the future. If they did arise, the protocol would dictate or steer the outcome of an application such as the present one. I hope that the relevant organisations can give attention to this topic in the future.

Further postscript

42. Some time after the hearing, I was supplied with further material on the status of the BPS Guidelines on recording. That material merely confirmed the view that I had already formed of their status and it has not been necessary to refer to it.

Annexe – The questions to Dr Torrens (as amended)

Dear Dr Torrens

RE: Sam Mustard Part 35 questions

This expert accuses the Claimant of factitious disorder (making up her symptoms) and dishonesty, based in part on her neuropsychological test results. Specifically, she concluded of the Claimant:

"*She is at best a hypochondriac, possibly somewhat work shy or struggling at work, but, worse, I think that the extent of her willingness to submit to invasive procedures and investigations does raise the possibility of Factitious Disorder. It has been a lifelong problem for her.*" (p. 67 of her 1st report)

"*Further, if one considers her medical history, I would suggest to the Court that she is possibly an unreliable witness with regard to her propensity to get over-sensitised to her medical symptoms and problems*." (p. 8 of her second report)

"*To do so, I suggest, tends to radically alter the impression and formulation of this young woman's difficulties who, as things stand, is either being caused iatrogenic psychological harm via incessant reinforcement of her illness seeking behaviour or is simply wasting precious resources and money by deliberately exaggerating/falsifying her complaints with a view to personal gain.*" (p. 4 of her 5th report)

"*Further, once Ms Mustard seems to have decided, or had it suggested to her, that Dr McCulloch's opinion was not necessarily helpful to her, I find it disappointing that she then appears to be trying to make Dr McCulloch out to have carried out an inadequate assessment preferring and endorsing the ministrations of a practitioner who has been struck off the HCPC Register. I think that Ms Mustard is a potentially quite a "dangerous" woman*." (p. 48 of her 6th report)

"*I would suggest that these are not the only, or the important, reasons for failure and, again, that Ms Mustard either deludes herself or is deliberately manipulating the truth and/or withholding relevant information when she offers them as reality. ... I think that Ms Mustard was probably punching well above her weight in her job, given her well documented lack of academic aptitude. She got by not with her professed "talent and ambition" but by "buddying up" and being over-familiar and inappropriate in terms of professional boundaries with some of her seniors to the point where they felt that they "owed" and/or could not challenge her. Anyone who did ran the risk of being "seen off"*." (p. 49 of her 6th report).

Please answer within the next 28 days the following Part 35 questions on your reports.

You are now provided with two important documents that have not been provided to you by the defendant. The engineering report of Mr Mutch that confirms that the impact speed was between 9 and 20 mph, and the letter from the Milton Keynes hospital dated the 15.3.18. You also provided with the Claimant's occupant displacement evidence from Mr Henderson. You are also provided with a transcript of your assessment with the Claimant which you are invited to consider. Because this transcript contains a recording of the neuropsychological testing, that part has not been supplied to

your instructing solicitor. We are conscious of the importance of preserving the integrity of the test materials which is why that part of the transcript has only been supplied to you. Please do not send a copy of the transcript to your instructing solicitor without first obtaining an undertaking from them to keep that part which relates to the neuropsychological testing confidential and not to disseminate it within BLM or to allow circulation or publication of it in any way. We will seek a similar undertaking from BLM including an agreement that any future court hearing where the details of the neuropsychological tests may be considered, is to be held "in camera". As the Claimant recorded the testing by mistake, she has not listened to it and she has destroyed her recording after sending it to ourselves. We have only discussed those very limited aspects of it with her that are necessary in order to take her instructions. A copy has been supplied to Professor Morris.

Health before the accident

1. In the conclusion of your first report you stated "*It is also for the Court to decide the extent to which Ms Mustard also reported the vast majority of the symptoms which now attributes to the accident prior to it.".[67]* . You refer to the GP letter dated 22.3.13 to Dr Smith at the Saxon Clinic [12], but there does not appear to have been any attempt by you in your conclusion to analyse the symptoms that the Claimant was reporting in 2012 and 2013 and to consider whether these might be related to the bacterial and viral infections that were diagnosed by physicians and the time and treated satisfactorily before the accident.

   Specifically, she had a period of poor health in the autumn of 2012 when she was feeling run down with a bacterial and/or viral infection diagnosed variously as (i) pneumonia; (ii) URTI; (iii) UTI & (iv) sinusitis which carried on through into the first six months of 2013. She missed some time off work over this period, as confirmed at § 6 of the statement dated **2.11.18** of **Joanne Pottinger**, Head of HR at BAM, her employer. On **22.2.13** she presented to A&E with a **viral illness**. A consultant physician, **Mr Windsor** removed a small benign polyp from her rectum on **18.03.13** which may have been responsible for some of her complaints; there is no doubt that she was afflicted by a viral infection at that time because a blood test on **6.4.13** came back positive for "*Chlamydia pneumoniae*" according to the report of **Dr Gowda**. she was referred to an **ENT surgeon**, **Mr Gurr** because it was felt that her malaise and recurrent infections were attributable to sinusitis; Mr Gurr discovered, and on **4.7.13** removed a large bulbous nasal polyp in a septoplasty procedure, following which her symptoms of malaise lifted and he previous energy levels were restored. On **1.10.13**, 3.5 months before the accident (and the last significant entry in her medical records pre-accident), **Mr Gurr** recorded: "*most of her symptoms have settled down apart from some slight stuffiness on the left side*".

   Please clarify

   (1) whether at the time of writing your report the various symptoms recorded in the Claimant's medical records may have been related to the period of ill-health set out above, which resolved once Mr Gurr had removed her nasal polyp in July 2013[2]. If not so please clarify why the events set out above are unlikely to be the explanation for the symptoms the Claimant was reported in 2012 and 2013; and

   > **This is an important "extension question"[3] not covered in the report. Dr Torrens attributed the post-accident symptoms to those reported before the accident. This is the crux of the Claimant's case on explaining her poor health between September 2012 and July 2013. It is a legitimate use of Part 35 to ask Dr Torrens an open clarification question seeking her opinion on the point.**

   (2) If you consider that this septoplasty did not bring about a satisfactory end to those problems, please point to the post-accident entries in her medical records to suggest that these became chronic and debilitating problems for the Claimant?

   > **This is an important extension question not covered in the report that follows on from the last question.**

(3) Whether you accept or reject the proposition that the presentation of the Claimant's (a) headaches and (b) dizziness were entirely different[4] prior to her accident; specifically her pre-accident headaches had no postural or orthostatic elements to them, they were constant and not throbbing. The pre-accident dizziness had no specific trigger in contrast to the post-accident dizziness which is triggered by sensory overload of visual stimuli, fatigue, and exacerbations of headache. Further, before the accident she did not suffer tinnitus, which now occurs when she is in a recumbent position.

This is an important extension question: the issue is not addressed by the expert in her report

2. Irrespective of your answer to Q 1, from your review of all the materials in the case (including importantly the statements from her managers), are you satisfied that the various health concerns that troubled the Claimant between September 2012 and July 2013 did not keep her away from work for long, and that she was back working effectively long before the accident?

This is a straightforward factual clarification question capable of a short answer and important to the Court given that the claim is principally about her lost earning capacity following the accident.

3. In the conclusion of your first report you stated: "*I would highlight, too, the emerging picture with injuries and complaints not being raised until some time after the index accident and complaints seeming* ***to get progressively worse instead of better as we might anticipate****" (our emphasis). [67].* You are invited to review the following history that the Claimant provided to you, most of which you acknowledge in your report. She describes her headaches as having a worse intensity initially and to be "*constant"* (29.21) with "*exacerbations"* (29:16) with the background headache being "*constant"* (30:12), having periods where she couldn't feel her hands or legs to have resolved on their own after nine months (24.27); her vestibular symptoms to have stayed the same (32:00), that *"my neck actually is better than what it was"* (38:02); of chiropractic treatment "*I'm now trying to push it out to every month. I'm actually due for another round of injections with Chris Jenner*"; that her back was "*constant*" (41:10); that her coccyx pain "*comes and goes"* (41:52); in relation to anxiety: *" I've got a little bit of driving anxiety, which is understandable, but as I say, that's been treated by Gillian Levett, and that's gotten a lot better" (1.07.52),* and that she was at the stage of managing her symptoms *"as best as I possibly can*" (1.02.31) Please clarify:-

(1) That the Claimant's report to you in interview was not of specific complaints getting progressively worse?

If Dr Torrens prefers to leave this question to cross-examination, the Claimant can live with that.

(2) That her comment "*it was getting worse*" at (51:02) was her explanation of what happened to her headache and cognitive functioning when she returned to work and tried to carry on as normal? and

Ditto.

(3) If the court finds that the Claimant sustained a SAH, vestibular injury and head injury, whether you would expect her headache and cognitive functioning to become more prominent as she attempted to drive herself harder in the workplace?

This is a straightforward factual clarification question capable of a short answer

Mechanism of injury

4. In your 1st report (p. 64) you appeared to accept the First Defendant's account of his speed at the time of the accident at no more than 3 – 5 mph, and with him having "rolled into" the Claimant's car (p. 67) causing "*no damage whatsoever to the Defendant's car*" (p. 64) and no damage to the underlying structure of the Claimant's car [2nd report p.6]. We note that you didn't question the Claimant about the

speed of the collision yourself. Please clarify whether your conclusions in this case have been coloured by your apparent acceptance of the First Defendant's account of the circumstances of the accident.

This is a straightforward factual clarification question capable of a short answer. Dr Torrens may wish to avail herself of the opportunity of commenting on the expert biomechanical evidence that was not provided to her before she signed off her 7th and final report, given her obligation to address the range of opinion in the case[5].

5. If the Court were to be persuaded by the occupant displacement experts and the neurologists in the case that the mechanism of this accident fell above the threshold capable of causing:

   (1) an acceleration-deceleration whiplash injury to the soft tissue injuries of the spine; and/or

   (2) a concussion of the vestibular system; and/or

   (3) an acceleration-deceleration DAI; and/or

   (4) a traumatic SAH,

   please clarify whether this would affect your neuropsychological formulation and opinion in the case?

   This is clearly a question of clarification and capable of a short answer to each limb.

   Subarachnoid haemorrhage ["SAH"] (traumatic as opposed to aneurysmal).

6. In your report you stated variously: *" I note the specific advice, sought from Neurosurgeons in Oxford, that Ms Mustard should not be treated as though she has sustained a subarachnoid haemorrhage despite the lumbar puncture findings"*.. and ..*"by July however, the subarachnoid haemorrhage is being talked about as though it were fact, despite the initial advice of Oxford Neurosurgeons."* [62], *"It is for medically qualified professionals to advise the court with regard to whether or not they consider Ms Mustard to have sustained a subarachnoid haemorrhage in the index accident. However, my own understanding of the severity of the accident leads me to suspect that the impact was not sufficient to have given rise to such an injury"* [67] In your report you misquoted the Milton Keynes entry dated 28.1.14 as: " *Xanthochromia possibly result of micro trauma"* when the entry stated: "*xanthochromia + result likely to be the result of micro trauma at the time of the accident"*. You also overlooked from your review of the documents a letter dated 5.2.14 from Miss Bojanic consultant neurosurgeon at the John Radcliffe that stated: *"All results have previously been discussed with both the neurosurgical and neurology team at the John Radcliffe Hospital and it was felt with the history of trauma that the positive lumbar puncture was secondary to trauma alone*". You are also now provided with the letter from the Milton Keynes hospital dated 15.3.18 responding to questions posed by the Defendants which confirmed that the level of bilirubin found was: "*strongly indicative of a bleed occurring several days prior to the sample collection, as the oxyhaemoglobin is reduced having been converted to bilirubin by normal biological pathway*".

   In order that the court may understand the range of your opinion in the case, please clarify whether you would provide a wider range of opinion if the neurologists and neurosurgeons in the case concluded that the Claimant did sustain a traumatic SAH in the accident.

   Dr Torrens ventured outside her area of expertise in commenting on the *Xanthochromia* result, and in doing so she has transposed the word "likely" for "possible". She should be afforded an opportunity in Part 35 Answers to remedy that error and clarify her range of likely opinion in light of it.

   Post traumatic amnesia ("PTA") history

7. When you asked the Claimant about the accident you stated: *"so as I understand it then there was a rear end shunt* [5], *Right okay so start, start and tell me then what did happen so that I'm clear"* [6]. Please clarify: -

a. if as part of your neuropsychological assessment you attempted to take a retrospective PTA history from her?

This is a straightforward factual clarification question capable of a short answer

b. whether you consider it possible using the Rivermead Protocol for a reliable PTA history to be taken several years post-accident?

Ditto

c. If your answer to (2) above is 'yes', why on this occasion, before you conducted an assessment of PTA, you failed to warn the Claimant of the importance in distinguishing between her knowledge and recollection of events, in order to guard against her eliding the two and invalidating the assessment?

If Dr Torrens prefers to leave this question to cross-examination, the Claimant can live with that.

d. Why each subsequent question asked of the Claimant whilst dealing with her memory of the accident was not preceded with the question "*what is the next thing that you can recall*" (as recommended under the Rivermead Protocol) to protect against eliding knowledge and recollection.

Ditto.

e. Why you asked her so many leading questions about possible memories?

Ditto.

8. Please review your notes and/or p 10 of the transcript and clarify whether you understood the frequent references to the Claimant "*knowing*" that she (1) went to her GP; (2) ended up in hospital (3) rang the Direct Line (the First Defendant's insurance company) were events that she knew happened but had no recollection of, or were her recollections, and clarify the basis of your understanding.

If Dr Torrens prefers to leave this question to cross-examination, the Claimant can live with that.

9. On page 7 of your second report dated 11.9.17 you stated: "*This is not the behaviour of someone in post-traumatic amnesia, who would have been vague, confused and disorientated"*. Please clarify to the Court that you understand that PTA cannot exist in the absence of confusion and disorientation.

This is a straightforward factual clarification question capable of a short answer

10. In relation to the 2006 RTA, you note that: "*Ms Mustard presents over the following 9 months complaining of whiplash, fatigue… migraine and dizziness*."[60] Please clarify whether these could be symptoms consistent with a head injury being sustained, and if so whether this accident and the "*previous RTAs, far more serious in terms of impacts and speed"* (3rd report p. 8), could have rendered her more vulnerable to subsequent cerebral injury.

This is a straightforward factual clarification question capable of a short answer. It is relevant as an extension question not covered in the report, because the Claimant's vulnerability to cumulative head trauma is an issue in the case.

Recording

11. A page 65 of your report you stated: *"it is obviously entirely inappropriate for Claimants to record the cognitive testing part of a neuropsychological assessment because confidential test material then becomes available in the public domain invalidating what are a limited number of tests which we have at our disposal as Neuropsychologists. Had I not asked Ms Mustard about this, it would not have come to light and she would in-deed have recorded the entire session."* Please clarify:-

(1) ~~why you did not warn the Claimant about this at the start of your assessment when you expressed no concern about her recording and proceeded to record yourself? And~~, **The Claimant no longer requires this question to be answered**

(2) ~~allowed the first neuropsychological test be recorded and started to explain the next test before asking her to stop recording?~~

Ditto

Neuropsychological Testing and rapport.

The following questions have been asked with the benefit of a recording / transcript of the entire assessment. Dr Torrens accused the Claimant in her reports of dishonesty, *inter alia* because she performed worse than expected on neuropsychological testing. Prof Morris's report, reviewing Dr Torrens' methodology, confirmed that she has substantially departed from the standard test instructions and rushed the Claimant; those were more plausible explanations for her poorer test scores. A further contributing factor would have been the severe headache that the Claimant reported at intervals was getting worse throughout the assessment. That should have given rise to an enforced break or of the testing being terminated and resumed on another day. Dr Torrens made arithmetic errors in recording her results. It is a proportionate and fair use of Part 35 clarification questions to afford Dr Torrens an early opportunity of addressing these concerns.

12. Your clinical interview lasted one hour 20 minutes. There was no break save for a two-minute toilet break. The testing then commenced and the Claimant asserts that the testing lasted for no more than one hour. At the start of your interview, when referring to the neuropsychological testing, you said: *"I'll try to keep that as brief as I can"* [5] and *"It's less in depth than ideally I would have done*"[57]. Please clarify:

    (1) Whether you would agree that only 57 minutes was devoted to neuropsychological assessment (excluding administering mental health questionnaires)?

    (2) Why in alleged head injury case, with a Claimant reporting severe headaches under cognitive loading and punitive fatigue, if you were not going to ensure a lunch break or other significant rest breaks, for example, you did not perform the neuropsychological testing first, followed by a break and then the clinical interview last?

    (3) Please clarify why you did not enforce a rest break at one hour 20 minutes after your clinical interview?

    (4) Please clarify why you did not conduct a full in depth neuropsychology assessment including relying so much on the RBANS which was developed as a dementia screening test?

    (5) Please clarify why you failed to administer the full alternative intellectual testing, given you had opted to use the Wechsler Abbreviated Scale for Intelligence?

    The answers to these questions are likely to save costs during the joint discussion phase. If Dr Torrens were to concede that her neuropsychological test scores were unsafe because of the irregularities identified in Prof. Morris' report, she may concede that it would be safer for her to engage in the joint discussion on the basis of his test scores alone.

13. Please clarify whether you believe you established a rapport with the Claimant. We are mindful of the following comments in your report: "*Ms Mustard went on to say that, as I could tell, she was angry. She said that she disliked having to come and see me to talk about it when "all the medical evidence is there"* [50]. *She was coherent and clearly agitated and really quite brittle and angry in her affect.* [50] *Ms Mustard went on to describe her ensuing and continuing symptoms in dramatic terms. She said that she thought the assessment was all a bit of a waste of time* [55] *She came across as very angry and she was somewhat grandiose* [65]".

This is a straightforward factual clarification question capable of a short answer

14. Please clarify whether any lack of rapport can have an effect on neuropsychological test performance and results?

    Ditto.

15. You expressed concern in your report that the Claimant had been tested 3–4 months earlier. Please clarify why you say a 3-4 months gap is insufficient for repeated tests if practice effects are taken into account?

    This is an obvious extension question that arises from the report.

16. When you tested the Claimant's premorbid ability you scored her as getting 30/50 words correct. This part of the assessment was before you asked her to stop recording. Our understanding is that she correctly scored 36 words. Please check your notes and clarify which words she got right and which words she got wrong and **exhibit your raw test materials** if they have not already been supplied.

    This is an important clarification question that explores a perceived recording error. Despite repeated requests, Dr Torrens has not yet provided her raw test materials, that are commonly exchanged between experts to ensure transparency, and to which the Claimant is entitled under the Data Protection Act as the data subject of those materials.

17. ~~Please clarify whether you departed significantly from any of the standard instructions. If so please set out which instructions were departed from and why. Please exhibit your test sheets/notes in respect of any significant departures to these replies.~~

    The Claimant withdraws this question, accepting that it is worded too openly and is too onerous to answer.

18. Please clarify whether departing from the standard instructions can affect the Claimant's responding and/or performance

    This is a straightforward factual clarification question capable of a short answer

19. At p. 55 of your report you stated that the Claimant complained that her *"head is starting to …"* and observed that she needed to "*steady herself on the table edge*", and at p. 56 that the Claimant said that her head was *"starting to kick off but I'll push through as a I normally do"*.

    (1) ~~Please clarify at what point/time of the assessment and on what tasks these complaints occurred?~~

    This can be ascertained from the transcript and the Claimant does not need to trouble Dr Torrens to answer.

    (2) ~~Please clarify whether you made a record of any further occasions when the Claimant complained of a headache, and if so please specify when and on what task(s)?~~

    Ditto

    (3) Please clarify why you did not terminate the testing, or at least enforce a rest break after the Claimant reported experiencing difficulty from a severe headache?

    This is a straightforward factual clarification question capable of a short answer

    (4) Please clarify whether a severe headache could have affected her performance on the tests, and if so, why you did not terminate the testing at that point?

    Ditto.

(5) Please clarify whether in similar circumstances in a clinical (as opposed to a medico-legal) setting, you would have terminated the testing process and repeated it on another day when the patient was fresh and unencumbered by an intrusive headache?

If Dr Torrens prefers to leave this question to cross-examination, the Claimant can live with that.

20. On the 21 item test the Claimant appears to have scored 10, one below the cut-off.

(1) Please clarify whether it is safe to use the 21 item test as a *single* screen for effort given its poor record in terms of validity, and when it does not discriminate brain injury patients selected to have no incentive to malinger from a simulation group of normal people, instructed to malinger?

(2) Please clarify that you administered the 21 item test after the point at which the Claimant complained that her *"head is starting to…,"* and *"head was 'starting to kick off'?*

(3) Please clarify whether it was safe to rely on the result of the test given that the Claimant reported a bad headache?

(4) Please clarify if this patient was likely to perform worse on a test of validity if that test was administered towards the end of the neuropsychological assessment during which she had repeatedly complained of a headache?

The above 4 questions are important extension questions, not addressed by Dr Torrens in her report. The claimant's case is that administering a validity test at the end of the assessment when the claimant had reported a severe headache on three occasions is unsafe. The expert relies on this validity test as evidence that the claimant was not applying optimal effort, to support a conclusion of dishonesty. It is evidence that is likely to assist the court.

21. On the arithmetic test, it appears that the practice trial has not been given and the questions get harder and then easier towards the end.

(1) Please clarify why the practice trial was not administered and why two of the easier questions were given to her at the end and not at the start as prescribed?

This is a straightforward factual clarification question capable of a short answer. Prof Morris explains that the methodology used by Dr Torrens invalidated this test's results which she relied on to question the Claimant's veracity. It is right and just that Dr Torrens should provide the clarification sought ahead of the joint discussion.

(2) Please clarify whether it is safe to rely on the results of this test given the departure from the standard procedure?

This is a straightforward factual clarification question capable of a short answer.

Please exhibit your original test sheets/raw test materials and any notes made to your part 35 replies if these have not already been disclosed.

22. On the Matrix Reasoning test, it appears that the first three test items were not given. Please clarify why you elected not to administer these items, whether you made a note of this, and whether this would have invalidated this test.

This is a valid clarification question, the answer to which is not covered by Dr Torrens in her report. Failing to administer the first three test items invalidated this test, and yet Dr Torrens relied on it. It is right and just that Dr Torrens should provide the clarification sought ahead of the joint discussion.

Please exhibit your test sheets/notes to these replies.

23. For the first subtask of Cancellation (WAIS-IV) it appears that you missed out the demonstration item, gave incomplete instructions for the sample item that was capable of confusing the Claimant, provided incomplete instructions, then following the practice item, failed to go through seven sentences of instruction and incorrectly informed the Claimant how long she would be doing the test for. On the second subtask it appears you failed to give the demonstration item and the sample item and then used a one sentence instruction where seven sentences should have been provided. Please clarify:-

    (1) Why you departed from the standard procedures in this way, and whether you made a note of that departure? **Please exhibit your test sheets/notes to these replies**.

    Please see the explanation at 22 above.

    (2) Whether administering the tests in this way has invalidated them?

    Ditto.

    (3) Whether administering the tests in this way is likely to have lowered the Claimant's performance on these tasks?

    A valid extension question not covered by the expert in her report.

24. You stated at p. 57: "*she is right handed but held her pencil in a very odd manner towards its base as though she were not really engaging with it*." Please clarify if this is the same test where you record that the Claimant copied the figure "*perfectly*" (p. 57)?

    The expert's choice of words is pejorative, hence the reason for the clarification. If Dr Torrens prefers to leave this question to cross-examination, the Claimant can live with that.

25. At p. 45 of your report you stated: "*Rather late in the day, she told me that she had been assessed very recently by another neuropsychologist. She was seemingly unable to tell me what tests she had undergone"*. You asked the Claimant at 01.29.34 on the transcript: "*Can you remember what, what sort of things you did?*" to which she replied *"It had to do with words and blocks and bits and bobs like that"… "I think there was probably some memory stuff as well*". Given the implied criticism of the Claimant, please clarify what was unsatisfactory about her answers and why you didn't probe for more detail if you considered it important?

    The expert's choice of words is pejorative, hence the reason for the clarification. If Dr Torrens prefers to leave this question to cross-examination, the Claimant can live with that.

26. On the mood score you stated that the Claimant obtained "*the rather unlikely score of 0/63 on an anxiety questionnaire*" please clarify why this is unlikely when the Claimant reports no current anxiety. ~~Please clarify whether you are familiar with the enclosed BAI paper that confirms that 20% of a normative population obtain a score of zero~~.

    This statement by the expert appears to seek to undermine the claimant's credibility and is a legitimate source of enquiry. Whilst Dr Torrens will doubtless be familiar with the BAI paper, the Claimant does not require her to address the second limb of this question.

    Medical records

27. At p. 64 of your report you referred to the Milton Keynes A&E neuro-ophthalmic record and suggested that it was probably inaccurate for the Claimant to suggest that she sustained an ocular haemorrhage. Please clarify that the same record also states "*fundoscopy showed what looks like bleeding in the lower part of disc looks, deviated to medial side"*?

    This is a valid extension question. Dr Torrens appears to have overlooked a medical entry that contradicts her statement and it is proportionate and in the interests of justice to have the clarification as soon as possible.

28. In your first report you note that the GP record dated 19.05.09 states "Nine months **PAT (Paroxysmal Atrial Tachycardia).** Please clarify that this is an error and the record states: **TATT (tired all the time)**.

    This is a straightforward factual clarification question capable of a short answer. Dr Torrens ought to be glad of the opportunity of correcting a transcribing error.

    Cognitive symptoms

29. At p. 66 of your report you stated*: "She made no spontaneous reference to cognitive symptoms but, when I asked directly about them, she stressed their severity."* On reviewing the transcript you asked the question at 29 minutes*: "Yeah, let's do a list, so let's, so persisting things, difficulties*", at which point she started by telling you about her physical symptoms; first , her various headaches, then her dizziness, then her neck and back, how those conditions affected her activities and then she moved onto the cognitive symptoms at 46:59 without prompting by you (p. 28 of the transcript). Please clarify whether you accept that, now you have the benefit of the transcript to prompt you?

    If Dr Torrens prefers to leave this question to cross-examination, the Claimant can live with that.

30. By reference to your notes and/or the transcript, please clarify whether or not you accept that she volunteered the following cognitive difficulties:

    - Accelerated fatigue (p. 28 of the transcript)

    - Becoming muddled and confused to the point of needing assistance from colleagues to check emails before she sent them (pp 28-30 of the transcript);

    - Taking 3 days to do drawings that would have taken ½ hour before the accident because she couldn't process the information and needed to check it repeatedly (p. 31 of the transcript);

    - Being unable to run a meeting with 12-15 people in it and needing her boss to take over (p. 29 of the transcript);

    - Impaired ability to cope with mental arithmetic; (p. 55 of the transcript);

    - Impaired ability to spell; (p. 55 of the transcript);

    - Word finding difficulties (p. 55 & page 74 of the transcript);

    This is a reasonable extension question as it relates to cognitive symptoms mentioned by the claimant in interview but not recorded by the expert in her report

31. Please clarify that you did not explore other possible cognitive deficits (such as those recorded by other experts in the case) with a mixture of open and closed questions?

    If Dr Torrens prefers to leave this question to cross-examination, the Claimant can live with that.

32. Please clarify that the cognitive symptoms volunteered by the Claimant, as identified at 29 above are consistent with the cluster of symptoms reported by patients with DAI?

    This is a straightforward factual clarification question capable of a short answer.

    Alcohol intolerance

33. At p. 53 of your report you recorded that the Claimant: "*did not drink and could not take it because she was intolerant and it went straight to her head".* She also told you, though you did not record it explicitly: *"I used to have a healthy appetite for it, but now one sip and I'm gone"* (see p. 42 of the transcript). Please clarify whether such marked alcohol intolerance is consistent with DAI, and confirm whether it is a feature associated also with purely psychological pathology, and if so which purely psychological pathologies?

This is a reasonable extension question given the history the claimant provided regarding alcohol intolerance that has not been addressed by the expert.

34. At p. 52 of your report you stated: "*she was able to spell the names, with no hesitation or difficulty, of the various people involved*". Please clarify if you detected that she spelt 'Math**a**ru' incorrectly spelling it 'Math**u**ru'. Also on the transcript of her appointment with Dr Surenthiran she spelt 'Cad**o**ux-Hudson' Cad**a**ux-Hudson' (p. 54, 50:31)?

A reasonable clarification question when the transcript confirms the Claimant demonstrated problems with spelling.

35. You stated at p. 41 of your sixth report dated 18.12.18 when referring to the Claimant's email to Dr McCulloch describing her functional cognitive deficits that these: *"would be "real" only in the most severely brain injured or dementing patients. They are simply not credible".* Please clarify which of her reported symptoms would only be present in a patient that had been severely brain injured?

This is a reasonable clarification question given that Dr Torrens suggests that the symptoms reported by the Claimant would only be present in the most severely brain injured patients.

Reliability

36. At p. 65 of your report you stated: "*She implied that her husband was offshore. It then emerged however that he had dropped her at the station and she said that he had things to do to prepare for going away the following day"*. Please clarify how she implied that her husband was offshore, and how it then emerged that he had dropped her at the station when she told you at the start of the interview was: "*Unfortunately my husband's driving up the road so he won't be coming with me*" (p. 1 of the transcript)?

This is a reasonable clarification question given that it appears that Dr Torrens mis-recorded the history provided to her.

37. In your second report dated 11.9.17 you stated that the Claimant failed to tell you that she failed her 11+ and failed to mention her childhood dyslexia (information she volunteered in both her witness statement & Schedule made available to you before your examination). Please clarify whether you accept that your focussed questions on this period of her life did not afford her the opportunity to volunteer these matters to you because you didn't ask her any questions about her academic progress, save in relation to her degree? Please clarify by reference to the transcript at what point during your assessment you say she ought to have volunteered these matters?

This is a reasonable clarification question given that the Claimant is asserting that Dr Torrens has been unfair to her.

CBT

38. On p. 68 of your report you stated: "*What Ms Mustard herself is most in need of, to my mind, is some sensitive, skilled and fairly lengthy psychological help. I am not sure however that she would share my opinion."* Given the likely importance you would invite a Court to attach to this closing paragraph in your report, please clarify whether at the time you made the comment, you recalled that you had discussed CBT with Ms Mustard during your assessment and that she told you that the CBT therapy she was having with the psychologist, Miss Levett, that had been "*very helpful*" (see p. 38 of the transcript). **A reasonable clarification question when the expert has been unfair to the claimant in recording her history**

POTS

39. You stated at p.52 of your report that POTS is an interesting condition that is commonly associated with other conditions considered to have at least a partly functional basis. Please clarify whether as a non-medically qualified psychologist you consider POTS to be within your area of expertise or

whether you defer to the neurological and neuro-surgical experts in the case? **A reasonable clarification question given that Dt Torrens is venturing outside her apparent area of expertise.**

QUALIFICATIONS

40. In your sixth report (p. 18) when you summarised the Claimant's GCSE's you omitted her grade C for English-speaking and listening. At p. 20 you didn't acknowledge her 'First diploma' in 1998 that she achieved a distinction for, nor do you acknowledge the distinction she obtained for her 'National Diploma' in 2000. You stated at p. 20 that her GCSE grades "*look to me as though they were fails*" and "*I'm exceedingly surprised that she managed to admitted to a degree level qualification at a prestigious university*"

    (1) Please identify which of the Claimant's GCSE grades you understood to be fails, or whether on reflection you acknowledge that these were all pass grades.

    (2) Please clarify whether you would accept that a distinction grade for her BTEC First Diploma is the equivalent of three GCSEs at 'A*' Grade (merit = Grade B, pass = Grade C)? If not please clarify what your understanding is of the equivalent GCSE grades.

    (3) Please clarify whether you would accept the Claimant's National (second) Diploma for which she was awarded a distinction, was the equivalent of three A Levels at a good grade? If not please clarify what your understanding is.

    These questions are reasonable clarification or extension questions given that the expert was wrong to suggest that the Claimant's GCSE Grades were fails; further, it is fair and just that Dr Torrens should acknowledge the significance of the Claimant's two diplomas for which she obtained distinctions to provide balance to her comments on her academic capabilities.

    Witness statements

41. When you came to sign off your first report, you had only reviewed three of the 10 witnesses statements in the case. You reviewed the remainder in your sixth report dated 18.12.18, including the statements from her managers and colleagues and concluded from them that the Claimant "*was punching well above her weight in her job"* [6,49]. Please clarify whether the cognitive and behavioural symptoms described by those witnesses are consistent with brain injury?

    This is a reasonable extension question given that Dr Torrens failed to comment on the reports of cognitive and behavioural symptoms by the witnesses. The Court is entitled to know her opinion on the range of likely opinion in light of those materials.

42. Please clarify whether those statements, in your view, support the observation that there was a step-wise change in her ability to function in the workplace and in her home life immediately following in the index car accident?

    This is a straightforward factual clarification question capable of a short answer.

43. Please clarify whether you were able to identify any alternative traumatic insult, unrelated to the direct or indirect consequences of the index accident, that could be said to be the trigger for the decline in her levels of function after that point in time?

    This is a straightforward factual clarification question capable of a short answer. The Court would want to know as early as possible if Dr Torrens was offering up an alternative trigger for the sudden decline in the Claimant's health.

    Factitious Disorder & malingering.

44. At p.67 of your first report you stated: "*She is at best a hypochondriac, possibly somewhat work shy or struggling at work, but, worse, I think that the extent of her willingness to submit to invasive procedures and investigations does raise the possibility of Factitious Disorder*". Please clarify if you

carried out a mental health assessment for Factitious Disorder, and if so, please confirm where on the transcript that assessment can be reviewed and what your findings were in relation to the DSM-5 criteria 1-4 of that disorder.

It is reasonable to seek clarification from the expert on whether the DSM V criteria were satisfied, as this is not addressed in her report.

45. Please review the conclusions of Dr Surenthiran (the Defendants' audio-vestibular surgeon) that the Claimant presents on objective testing with two self-standing and potentially disabling audio-vestibular diagnoses ("*migraine variant balance disorder* and "*BPPV*") which account for many of her reported cluster of enduring symptoms. Please clarify whether such objective and scientifically verifiable diagnoses effectively exclude Factitious Disorder and/or malingering as a differential explanation?

    This is a reasonable extension question, the answer to which will likely rule out factitious disorder, thereby narrowing the ambit of dispute and saving costs.

46. Please review the conclusions of Mr Kellerman (the Defendants' neurosurgeon) who concluded that she presented with a SAH on 23.01.14 (unrelated to the accident) which accounted for many of her reported cluster of enduring symptoms. Please clarify whether such a diagnosis effectively excludes Factitious Disorder and/or malingering as a differential explanation?

    Ditto.

47. In your fifth report dated 28.8.18 you stated that the Claimant "*is either being caused iatrogenic psychological harm via incessant reinforcement of her illness seeking behaviour or is simply wasting precious resources and money by deliberately exaggerating/falsifying her complaints with a view to personal gain.*" The allegation that the Claimant may be deliberately falsifying her complaints in order to defraud an insurance company is a serious allegation and should not be made lightly. Please clarify precisely each complaint that the Claimant has made that you say that she is falsifying deliberately.

    This is an appropriate clarification question given the seriousness of the allegation, the expert should specify each complaint the claimant it is alleged to be deliberately falsifying.

Yours faithfully

DICKINSON SOLICITORS LTD

Encl. BAI paper

Transcript Dr Surenthiran & Dr Torens

Medical records review

Engineering evidence from Mr Mutch and Mr Henderson

Letter from the Milton Keynes hospital dated 15.3.18

Note 1 The dates that some of the transcriptions bear are, in fact, earlier and this discrepancy was unexplained. [Back]

Note 2 1:22:49 transcript (Claimant referring to the Nasal Polyp): *" they took all of those out, everything cleared up, and there was no problem at all."* [Back]

Note 3 Per Mutch v Allen [2001] All E R D121 [Back]

Note 4 33.58 (transcript): *"I had migraines, uh, probably for a couple years, but nothing like this, completely different… I've maybe had one, one in about every six months, and it would maybe only last two hours. I mean, these are like, just, off the planet"* [Back]

Note 5 See § 59 & 60 of the Civil Justice Council: Guidance For The Instruction Of Experts In Civil Claims August 2014 [Back]

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