

Success for Marcus Dignum on his last day as junior counsel: RORY MACDONALD (BY HIS LITIGATION FRIEND LINDSAY MACDONALD) v SIMON BURTON (2020)

Following on from *Mustard v Flower* [2019] EWHC 2623 (QB) and against a background of the parties having agreed that all other disciplines should be recorded (with prospective reciprocity from the Claimant), Martin Spencer J had been asked to decide whether a claimant had a right to record the defendant expert's neuropsychological examination, including testing or alternatively whether the Court should exercise its case management powers and order the same, when the Claimant had not recorded his own expert.

He declined to permit or order it as to do so would have created an unlevel playing field and precluded any like for like comparison of test results. He also did not wish to issue general guidance in advance of post-*Mustard* BPS guidance which was due for publication later in the year, albeit he expressed some views on the topic.

Importantly, he held that where both the claimant and the defendant record the defendant's experts, the claimant's recording cannot attract privilege (because there could be nothing confidential contained on it, both parties having the same document). However, where the claimant recorded his own expert's examination and subsequently disclosed the report, privilege over the recording was waived.