Traps for the unwary - The pitfalls and management of expert evidence

BELLA WEBB
OLD SQUARE CHAMBERS

OLD SQUARE CHAMBERS

Medical expert evidence plays a central role in most clinical negligence claims. It is of course required that, where any allegation of professional negligence is pleaded, the allegations must be supported in writing by a relevant professional with the necessary expertise.

The court will rely upon the evidence of experts when determining issues of breach of duty, causation and condition and prognosis and the view that the judge at trial takes of the expert evidence is frequently the difference between success and failure at court. As such, medicolegal expert evidence assumes a significance far greater in this field than in many other areas of the law and that makes it all the more important to ensure that the expert evidence is not just as cogent as it can be, but that the experts themselves are appropriate, reliable, credible, persuasive and well versed in the requirements of acting as a medico-legal expert.

It can be easy to forget the basic premise upon which expert evidence is given in civil proceedings through the desire to instruct an expert who will likely be most supportive of your client's case. CPR 35.3 is the starting point and provides that:

"(1) It is the duty of experts to help the court on matters within their expertise.

(2) This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid...."

Moreover, CPR 35.10 in conjunction with PD 35 provides strict requirements for the content of any expert report and the general requirements of expert evidence. In particular:

(a) Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.

(b) Experts should assist the court by providing objective, unbiased opinions on matters within their expertise and should not assume the role of an advocate.

(c) Experts should consider all material facts, including those which might detract from their opinions.

(d) Experts should make it clear when a question or issue falls outside their expertise and when they cannot reach a definite opinion – ie: if they lack sufficient information.

(e) If, after completing their report, an expert's view changes on any material matter, that should be communicated to **all** parties without delay and when appropriate to the court.

The report must:

(a) Be addressed to the court and not the instructing party.

(b) Include a statement at the end to the effect that the expert has understood and complied with their duty to the court and includes a statement of truth in the form set out in PD35.

(c) State the substance of all material instructions, written or oral on the basis of which the report is written.

(d) Give details of the expert's qualifications and details of any literature or other material relied upon.

(e) State the substance of all facts and instructions material to the opinions expressed.

(f) Make clear which facts stated are within the expert's own knowledge.

(g) Say who carried out any examination, test etc: which the expert has used when writing the report, and include details of that person's qualifications and whether the expert supervised the test.

(h) Where there is a range of opinion on the matters dealt with in the report they must summarise that range, give reasons for their own opinion and summarise the conclusions reached. If the opinion is subject to a qualification that must be stated.

Many of those more basic provisions are often overlooked and can lead to unnecessary and unhelpful criticism at trial. As such, it is imperative that the more substantive considerations of the evidential content of the report aside, one should always use the practice direction as a checklist to ensure that the report is compliant. I have little doubt that every clinical negligence practitioner will have dealt with many a report where the content is good but the details of qualifications/CV, statement of instructions, literature relied upon or even the statement of truth are missing.

There are a plethora of cases dealing with criticisms of expert evidence. In more recent years, a few have highlighted some of the pitfalls of which practitioners should be wary. In *Robinson v (1) Liverpool University Hospital NHS Foundation Trust (1) Dr Mercier* (2021) 9WLUK 400, a first instance judgement of Recorder Abigail Hudson at Liverpool County Court, the court initially made a third-party costs order against the Claimant's expert dental practitioner after the Claimant withdrew her claim at the conclusion of his evidence. The claim related to dental care afforded to the Claimant after referral by her dentist for extraction of her UL7 (and two lower molars) under general anaesthetic at hospital. The surgery was carried out and various allegations of negligence were made in relation to the actions of the oral surgeon conducting the extraction, principally relating to the decision to leave the UL7 in situ.

Recorder Hudson granted the Defendant's application for a third-party costs order. Cogent criticism was made of the expert in some of the strongest language I have seen. In essence, the Defendant asserted and the judge accepted that as a general dental practitioner it should have been clear to him that he could not comment upon whether an oral surgeon had made errors which could be deemed negligent on applying the *Bolam* test. Furthermore, throughout his evidence at court, he had failed to make any reference to the differences between his role and that of an oral and maxillofacial surgeon, and had failed to even address his mind to whether there were differences to which he could not speak. The Recorder therefore considered that he had shown a flagrant and reckless disregard for his duties to the court and had done so from the outset in preparing a report on subject matter in which he had no expertise.

It should be noted that the third-party costs order was successfully appealed on 11th January 2023 before Mr Justice Sweeting. In short, the judge did not consider that the case reached the high threshold of establishing that the expert had demonstrated a flagrant or reckless disregard of his duty to the court. However, in reaching that decision Mr Justice Sweeting did not agree that the expert had stepped outside the boundaries of his expertise. He did not need to be a maxillofacial surgeon to comment upon what should have been done based upon an examination which the surgeon should have carried out prior to extraction, or indeed to comment upon the viability of the tooth. Had it not been for the Claimant's fear of dental procedures the procedure would have been performed by a general dentist who could therefore opine about the performance of extractions, the taking and reporting of x-rays and assessment of tooth viability.

The appeal judgement notwithstanding, the case brings home the importance of assessing at the outset which discipline(s) of expert evidence are required to establish, or as a Defendant, to respond on breach of duty and causation. In doing so the nature of the injury will need to be carefully considered as will the expertise of the medics whose actions are under scrutiny. Even if the expert in *Robinson* was not a wholly inappropriate expert for the purposes of reaching the high threshold for making a third-party costs order, it must still be questioned whether he was the **most** appropriate expert to comment upon all of the issues which required consideration. Unnecessary weakening of the claim or distraction from the substantive issues is to be avoided. As such, at the outset of any case, practitioners should undertake a careful review of the records and ascertain the expertise of the medics whose actions are in question. Where there are multiple different disciplines expert reports may be required from more than one expert, in which case an ordered approach to obtaining evidence with an eye to causation and proportionality should be undertaken.

It should nonetheless be noted that the criticisms made of the expert in *Robinson* were not limited to whether he strayed beyond his expertise. The appeal court commented only in bland terms upon some of those other issues. The issues upon which criticism was focused included:

(i) That he had advanced arguments in evidence which were not in his report and had not explained adequately the basis for his opinions.

(ii) His report reached unsustainable conclusions upon the evidence.

(iii) He had seen a radiograph from September 2015 only on the day of the joint experts' meeting but had not gone back to reconsider his conclusions in light of it. It was suggested by the Recorder that he had stuck "*intransigently to his position*" and that he had inappropriately reached conclusions based upon evidence which he had neither

seen nor requested and upon the basis of incomplete evidence.

(iv) He demonstrated either a *"sheer unwillingness to consider other propositions or a fundamental lack of understanding of the legal test..."* with an opinion that *"fluctuates to whatever he feels will win the case...."*

As such, once you have determined what expertise you require, the thorny question of who to instruct within that field arises and in doing so, one is looking for an expert who is not only hopefully going to be helpful for your client's case substantively, but who is reliable and sensible with a good understanding of the legal tests underpinning the evidence they will be required to give. That was highlighted in *Robinson* (above) and also in *Thimmaya v Lancashire NHS Foundation Trust and Mr Jamil (30/1/20 Manchester County Court)* in which HHJ Claire Evans awarded a third party costs order against the Claimant's expert Spinal surgeon following a clinical negligence trial which was discontinued after the expert's evidence.

The facts of the case are unimportant for present purposes. The critical issue was that the expert was suffering from cognitive and memory issues which rendered him unfit to give evidence. He was unable to recall or explain the *Bolam* or *Bolitho* tests for negligence in spite of repeated questioning. In the circumstances he should not have continued to act as an expert and had not complied with his duties to the court. That notwithstanding the judge also commented, albeit not considering the same to amount to an exceptional failing for the purposes of making a wasted costs order, that the expert:

> *"... was not, on my reading of his reports and the file notes of the Claimant's solicitors, a very good expert. Whilst he did not have a great deal of expertise in carrying out this particular operation, having only done in twice (and then under supervision), he explained to the Claimant's solicitors that he was able to give an opinion as he had treated a lot of patients recovering from this procedure...."*

Whilst it can be tempting to opt for an expert who is known to do a very high proportion of only Claimant or Defendant work, that is not always helpful. Some decisions about who to instruct may be governed to a degree by time constraints and cost, but recommendation and personal (preferably recent) experience will always be the best guides. Consider whether you have observed the expert's work not just on paper but in conference and court. Is the expert still in clinical practise (or were they at the time of the alleged breach(es))? Do you need someone with a sub-specialism within the relevant discipline? It is always worth looking at recent case reports to ascertain whether experts have been commended, or found wanting at trial and ask around to see if your colleagues have experience of your proposed experts. If multiple experts are needed, it can be helpful to instruct experts who you know have worked well together before. Whilst it may sound obvious, always take time to check for any conflicts or links to any of the parties. In *Arrassey Properties Ltd v Nelsons Solicitors (unreported), 15 July 2022, (Central London County Court)*, albeit a professional negligence claim in the setting of a conveyancing matter, the court entirely rejected the evidence of an expert valuer who had not disclosed a conflict of interest and displayed little understanding of his duties as an expert. Similarly, in *EXP v Barker* (2015) EWHC 1289, the Defendant's lawyers used an expert witness personally recommended by the Defendant who at trial, was shown to be a colleague of the Defendant who had both trained and worked with him. It is for Instructing lawyers to ensure that the experts and their clients understand the relevant rules and requirements.

Hopefully, with a well-chosen expert, potential problems will be minimised. Nonetheless, once the report is in, it is imperative to test it in conference, and in clinical negligence claims in particular, it is sensible to start with an early conference, before the claim is pleaded, as well as before / after exchange of evidence. It is important not only to check compliance with the basic CPR requirements set out above, but to examine in depth the conclusions reached and the reasons for them against any literature (which should be requested and read in detail – it is amazing how many times literature does not in fact say what the expert says it does!).

Check the expert's understanding of the legal test and that it is properly formulated in the report. Ensure that the expert has and has considered and referred to all material documents (and been updated accordingly after ie: a defence has been served, where new evidence such as witness evidence or additional documents become available – for which see *Arksey v Cambridge University Hospitals NHS Foundation Trust* (2019) EWHC 1276 (QB) in which the Claimant's served neurosurgical reports were extraordinarily prepared prior to the service of proceedings and without the expert having reviewed the defence and amended defence or the Defendant's witness evidence). Take time to check with the expert whether they consider that any expected records or other documents are missing and get those gaps plugged early. Ensure that they have dealt upfront with any issues which might be considered detrimental to the case presented, and that any relevant range of opinion is addressed. Check that the expert has not strayed beyond their expertise. Look for excessive

partisanship or over rigidity. Dealing with some of these matters at the earliest stage and before identification and necessary disclosure of expert evidence can of course, allow any deficiencies to be remedied early and maximise the chances of successful settlement or success at trial. Take care therefore to consider the appropriate frequency and timing of expert conference when budgeting the case.

The cases of *Scarcliffe v Brampton Valley Group Ltd* (2023) EWHC 1565 (KB) and *Beatty v Lewisham and Greenwich NHS Trust* (2023) EWHC 3163 (KB) illustrate the pitfalls of omitting these steps. In *Scarcliffe*, it was the Claimant's care expert who came under fire. Mr Justice Cotter stated:

"Ms Lewis, who gave expert evidence as to care will have found it a very uncomfortable experience indeed as obvious mistakes and omissions were pointed out. Significant parts of her evidence were unsatisfactory and/or ill thought through. I find it very concerning indeed that such evidence underpinned a very large, and when properly tested, in part clearly unsupportable claim within the schedules. Worryingly it is not the first time that I have had very real concerns about the approach to care evidence in a high value claim…The analysis of the complex issues in this case was not sufficiently thorough and matters which obviously required further investigation had not been followed up…."

Whilst the Defendant's expert was more careful generally, she also displayed a partisan approach on one issue. Mr Justice Cotter went on to refer to the case of *Muyepa -v-Ministry of Defence* [2022] EWHC 2648 (KB) in which he stated:

*"Experts should constantly remind themselves throughout the litigation process that they are not part of the Claimant's or Defendant's "*team*" with their role being the securing and maximising, or avoiding or minimising, a claim for damages…"*

In the *Beatty* case, a clinical negligence claim in which the Claimant alleged a failure to diagnose an embolism which resulted in below knee amputation, Mr Justice Jay found the Claimant's vascular expert to be unsatisfactory. He noted:

*"He was combative in answering some of Ms Hughes' perfectly fair and reasonable questions, and betrayed at several points in his evidence a degree of partisanship which came close to advocacy…Further, there are mistakes…Mistakes such as these should not be made in expert reports… More importantly, nowhere… do we see any attempt to identify the key issue in this case or to supply any reasoning directed to the conclusion that the standard of care was inadequate… The adjective "*optimal*" is not a synonym for "*mandatory*"…most egregious shortcoming was to reach an opinion in his main report without properly analysing Mr Aston's witness statement… answers to Qs. 13 and 14 in the joint agenda were unacceptably terse. An expert is required under the CPR to set out the reasoning for his conclusions. This obligation exists even if the reasons seem blindingly obvious to the maker of the opinion…."*

The expert was even referred to a previous case in which his evidence had been criticised, to which he responded that the judge did not understand the evidence. Never helpful.

After thoroughly testing ones' experts, it is crucial to prepare properly for the joint statements. Ensure that the expert is clear on the issues and has familiarised themselves again with the relevant tests, their reports, and all of the material evidence. Ensure that nothing is missing and that they are aware of the need to fully explain the reasoning for conclusions. Where appropriate provide a clear agenda, but be careful not to seek to influence the expert. In *Andrews v Kronospan Ltd* (2022) EWHC 479 (QB), a group litigation nuisance case relating to the emission of dust, noise and odours from a wood manufacturing plant, the court revoked permission for the Claimants to rely on their expert's evidence, where he had been in continuous contact with their solicitors over the content of the joint discussions and the draft joint statement, with them offering him advice and suggestions on repeated occasions, without the Defendant's knowledge.

If and when one finally gets to trial, take time to consider how best to deal with the opposing parties' expert evidence. Look for the very failings in compliance with the CPR, partisanship, failure to deal with all of the evidence or prior criticism that one has already tried to exclude in one's own experts. Don't jump too soon – in *Fawcett & Ors v TUI UK Ltd* (2023) EWHC 400 (KB) the Claimant's attempt to exclude the Defendant's expert evidence prior to trial upon the basis that he did not have the appropriate expertise and lacked impartiality, was unsuccessful. Mr Dexter Dias KC considered that such matters were for the trial judge to consider after hearing evidence. And yet, don't be tempted (although unlikely in a clinical negligence case) to leave criticism of an expert to closing submissions without serving contrary expert evidence or cross examining the opposing expert at trial where one considers an opponent's report to be seriously deficient. In *Griffiths v TUI UK Ltd* (2023) 3 WLR 1204 the Supreme Court confirmed the general civil rule that a party must challenge by cross examination the evidence

of any witness, factual or expert, of the opposing party on a material point which they claim should not be accepted. That rule was there to ensure fairness. There were some circumstances where that rule might be relaxed including where there was a bold assertion of opinion in an expert's report without any reasoning to support it – a bare assertion, or where the expert had been given a sufficient opportunity to respond to criticism of, or otherwise clarify their report. The defined exceptions should be read in full, but it seems to the author that it would be a brave or perhaps foolish lawyer to risk not responding to opposing expert evidence in most clinical negligence trials.

Finally, at trial, and where possible, get your experts to hear not only the other side's experts at least of equivalent discipline, but also the witness evidence of the relevant issues. At the very least ensure that the expert has a full note of any such evidence (without comment) in advance of them giving their own evidence.

It is to be hoped that with comprehensive management throughout the life of the claim, your experts will be the help that you and the court require, rather than the hindrance that poor management can lead to.