

REVIEW OF CIVIL LITIGATION COSTS

COMMENTS ARISING FROM PRELIMINARY REPORT WITH SPECIFIC REFERENCE TO CLINICAL NEGLIGENCE LITIGATION

IN RELATION TO : EXPERTS

The Preliminary Report deals with the issue of expert evidence in Chapter 42.

Issues raised in report:

- **Claimant serving liability evidence with pleadings**
- **Sequential exchange of liability evidence**
- **Cost of experts**
- **Single experts on quantum**
- **Limiting expert evidence**
- **Expert discussions**

Preliminary comments

Whilst there are perhaps some procedural and practical refinements that could be made in relation to the obtaining, provision and clarification of expert opinion, overall the system works reasonably well in the field of clinical negligence litigation.

The Defendant entity (Hospital or medical practitioner) who has allegedly injured the Claimant holds all the cards. Not only does it control the documentation (records, protocols, theatre and admission registers, statements made by staff following identification of an adverse incident having occurred), but also has immediately available to it a plethora of in-house medical and expert opinion on the potential medico-legal issues that arise as a result of the injury.

By contrast, the individual Claimant often knows very little. The adverse incident might have taken place whilst the patient was under a general anaesthetic and will certainly have resulted in serious trauma. The Claimant might know what has happened to them and how it has impacted upon everyday life, but often very little more. In fatal cases, the litigant may know nothing about the factual background to the claim.

In the field of Clinical Negligence Litigation independent expert advice based upon all of the relevant documentation is fundamental to the entire process of the litigation. Without it, the Claimant is disempowered and their access to restitution and justice fettered.

There remain considerable problems for Claimants in accessing independent medical liability expert evidence in terms of cost, locating suitable experts who are willing to provide such opinion and delay in receiving that advice. These problems must be born in mind before changes are made to the system which could impact upon the willingness or ability of experts to co-operate with Claimants' advisors in particular.

**Issue: Should Claimant serve liability evidence with pleadings?
(Ref: para 14.1, chapter 42, page 414)**

It is unclear from the report how this proposal would lead to a saving of cost.

This proposal, will in effect, be the re-introduction of sequential exchange of liability evidence in clinical negligence cases. We are opposed to a return to a process of sequential exchange of expert evidence for reasons set out below under the sub-heading relating to that.

We refer to the preliminary comments made above about Clinical Negligence being an area of Litigation in which all the relevant sources of factual and expert information is concentrated in the hands of the Defendant from the outset.

Currently, the Particulars of Claim are based upon expert evidence drafted on the basis of disclosed medical records. That evidence is then reviewed and refined in the context of issues raised in the Defence and the contents of the factual evidence of medical and nursing personnel exchanged in accordance with directions and upon which the Defence seeks to rely. As a consequence of that process, expert evidence on liability issues which is served within the action is based upon and given in the context of all relevant and disclosed records and factual evidence. It is thus focused upon the relevant pleaded issues which remain in dispute.

Initial pre-action liability reports obtained by the Claimant are by necessity under our current system, preliminary reports based on incomplete material and facts. This is because whilst they are likely to be based upon the Claimant's disclosed medical records, they will not be based upon or take account of the factual witness evidence which the Defendant will seek to rely upon at Trial. Claimants' experts should not be asked to serve effectively draft reports prepared on the basis of incomplete evidence. To ask them to do so could well jeopardise their duty to the Claimant and to the Court and may result in experts being less willing to accept instructions from Claimants.

If Claimant liability evidence is to be disclosed on service of proceedings, the Defendant will have the advantage of being able to obtain expert advice based upon not just the records, but also on the factual evidence of the relevant medical and nursing personnel upon which it will seek to rely and whose evidence has been obtained in the context of the pleaded allegations.

How is the Claimant to determine whether the Defendant's expert evidence is simply tailored to addressing and defending the points raised in the Claimant's expert report? To resurrect a sequential process for service of liability evidence (which is what happened prior to the *Naylor* case (see below) could induce the Defendant expert to provide a less than full opinion to the Court.

It is unclear whether it is intended that the Defendant's liability evidence is served with the Defence or whether it is served after disclosure of factual evidence (as occurs currently). In the absence of disclosure of the Defendant's factual evidence how is the Claimant to assess the merits and strength of the Defendant's expert evidence?

It is unclear when or whether it is proposed that the Claimant should serve expert evidence addressing the factual evidence. Presumably a 3rd and later stage of sequential exchange is anticipated. Surely, that can only lead to delay and additional cost and would put the Claimant's expert at huge disadvantage in cross examination in particular.

Issue: Should there be sequential exchange of liability evidence
Ref: para 14.1, chapter 42, page 414

Following the Court of Appeal decision in 1987 in *Naylor v Preston Area Health Authority*, Clinical Negligence cases have proceeded on the basis that expert evidence on liability issues should be disclosed and that this should be by way of mutual simultaneous exchange.

This approach ensures that the issues are identified prior to Trial and thus Trial by ambush and consequential lengthy Trials are avoided. Further, it ensures that cases are litigated on the basis of the issues and independent and objective expert assessment of those issues. The almost inevitable consequence of sequential exchange of expert evidence is that it encourages expert evidence which is tailored to meet the opposing expert report (as opposed to the factual and expert issues) and thus Trial by expert report. Such a system risks the re-emergence of the partisan expert.

We believe that to return to sequential exchange of expert evidence would be to jeopardise the potential for:

- early identification of the expert issues in dispute between the parties,
- cost and time efficient resolution of cases prior to Trial or by limiting the issues to be tried;
- independent and objective expert opinion;
- equality of arms between the parties.

Issue: Cost of expert evidence and limiting expert evidence

Clinical Negligence Claims are claims which are dependent upon expert advice on each of the issues of breach of duty, cause of injury and quantification. Expert advice is thus an inevitable part and cost of this litigation.

Claimants are already subject to funding limits on the costs of expert reports imposed by funders (whether the LSC or insurers). As a consequence, there are some experts who will not advise Claimants because they are being asked to do so at rates which are lower than those paid by Defendants.

Permission to rely on expert evidence is already under the control of the Court and the fees charged by experts (and thus recoverable interpartes) can be (and are) the subject of challenge by Defendants and thus assessment by the Court. Further restriction is not necessary.

Under the provisions of CPR Part 35.1, the Court has a duty to restrict expert evidence *“to that which is reasonably required to resolve the proceedings.”* In our experience, generally, if there is to be separate (not joint) instruction of an expert the Court will only permit one expert per party.

The issue of when and whether a party will be permitted to call more than one expert per area of specialism was reviewed in detail by the Court of Appeal in the case of *ES v. Chesterfield and North Derbyshire Royal Hospitals NHS Trust* [2003] EWCA Civ 1284. In that case, the Court of Appeal indicated that:

“The governing rule, therefore, limits expert evidence to that which is reasonably required to resolve the proceedings in issue. What is reasonable in any particular context will inevitably be fact sensitive. It would be wrong to approach this question with the predetermined belief that to instruct more than one expert in the same discipline will always be excessive. In addition to considering the facts, the court will need to remind itself in any contentious case of the principles underlying the overriding objective in CPR 1.1. In the present context the most important of the considerations set out in CPR 1.1.(2) appear to be:

- (a) *ensuring that the parties are on an equal*
- (c) *dealing with the case in ways which are proportionate –*
 - (i). *to the amount of money involved;*
 - (ii). *to the importance of the case;*
 - (iii). *to the complexity of the issues;*
 - (iv). *to the financial position of each party.*

. . . Anybody watching the trial would be bound to be impressed by the fact that there was only one consultant obstetrician giving evidence for the claimant, while there would be three giving evidence for the defendant hospital trust, and those three would cover a much wider spectrum of personal experience than the single expert permitted to the claimant . . . I do not

moreover consider that the extra time and expense that would be introduced into the trial by the calling of a second expert for the claimant would be disproportionate in a case of this monetary value and importance.”

However, it was made clear in ES that permission for more than one expert per discipline was to be the exception “*Nothing in this judgment must be taken to give any sort of green light to the calling of two experts in a single discipline in any case which does not have exceptional features. On this appeal the presence of three consultants on the defendants’ side constitutes such an exceptional feature. . .*”

By no later than the first Case Management Conference, the Defendant should be required to identify which and how many professional witnesses of fact it proposes to call. Where there is more than one Defendant it will be important for the Court to ascertain whether each Defendant proposes to instruct its own experts or whether experts will be jointly instructed by them.

Issue: presumption that all quantum experts should be instructed on a single joint basis.

Ref: para 41.1, chapter 42, page 414.

It is unclear whether it is proposed that this proposal should include those experts advising on condition and prognosis. Since such expert opinion forms the bed-rock for the overall quantification of a claim we consider that it is inappropriate that such an important determiner of the overall quantum of a case should be left to one expert.

In cases for those who have suffered permanent and severe injury the quantification of life-time care needs is fundamental to reaching a resolution which goes as far as compensation can in putting the injured person back into the position they would have been in but for the injury. It is not uncommon for there to be differences of tens of thousands in the quantification of care needs between different experts. Single joint instruction of the care experts has the potential to create a financial lottery in terms of the way in which the care needs of the individual injured patient are met.

There are cases in which joint instruction of some quantum experts is appropriate and where that is the case, generally it is now agreed between the parties. If it is not, it is a case management issue for determination by the Court in the individual case.

There are other cases where joint instruction is not appropriate. For example, the advice of the physiotherapy and speech and language therapists may be essential advice without which other experts including those in life expectation, life time care and equipment needs and accommodation can finalise their views. In such cases, it is essential that there is the opportunity for those experts to have the opportunity to review and discuss the issues in

conference with those advising the Claimant, but arranging such an opportunity is a logistical nightmare when some experts are singly instructed and others are not.

If the Claimant's advisors are to ensure that the claim is properly and accurately quantified and under-settlement is to be avoided, it is essential that they have the opportunity to review all of the evidence with the relevant experts

It is often said that instructing an expert jointly leads to a saving of costs. This is not necessarily the case given the time that can be involved in agreeing which expert should be instructed, the terms of those instructions and the complexities and added costs caused by having to have separate conferences with those jointly instructed.

It is frequently the case that after careful review of the Claimants quantum evidence (sometimes coupled with carefully constructed CPR part 35.6 questions to experts) the Defendant is able to properly prepare its case without the additional costs of either a jointly or its own singly instructed expert being required.

Issue: Expert discussions - Part 35.12 CPR

Expert discussions can lead to a significant increase in expert costs. On the other hand, they can and frequently do, lead to a far more significant saving of the costs of pursuing the case or some issues to Trial.

There has perhaps been a tendency since the introduction of CPR to assume that expert discussions must take place and that the parties will be criticised by the Court at trial if they have not done so.

Expert discussions are costly part of the litigation process. They are also enormously burdensome for the experts concerned. The intention of expert discussions is to assist the Court and to limit the amount of Court time required in relation to expert evidence. If a discussion will add nothing to this process it is hard to see how the cost of a discussion can be justified or proportionate.

The Masters assigned to the Clinical Negligence work in the High Court in London have produced suggested Model Directions for use in the High Court. These address the issue of expert discussions and now provide as follows:

“Experts’ Discussions

Unless otherwise agreed by all parties’ solicitors, after consulting with the experts, the experts of like discipline for the parties shall discuss the case on a without prejudice basis by / /07.

Discussions between experts are not mandatory. The parties should consider, with their expert, whether there is likely to be any useful purpose in holding a discussion and should be prepared to agree that no discussion is in fact needed.

- (a) *The purpose of the discussions is to identify:*
- (i) *The extent of the agreement between the experts;*
 - (ii) *The points of disagreement and short reasons for disagreement;*
 - (iii) *Action, if any, which may be taken to resolve the outstanding points of disagreement;*
 - (iv) *Any further material points not raised in the Agenda and the extent to which these issues are agreed;”*

There are some cases in which the preparation of Agendas for expert discussion has become one of the most contentious parts of the litigation.

All too often Agendas (and thus expert discussions) have become too complicated, the process has become expensive, time consuming and slow and, in turn in some cases, is adding to rather than reducing the length of trial. There has been a prevalence of dual Agendas or multiple questions. This probably stems from a number of causes, perhaps most particularly:

- failure by Defendant and Claimant lawyers to understand what the issues are and whether they are in dispute,
- failure by Defendant and Claimant lawyers to accommodate within an Agenda the case being put by the other side
- an attempt by parties to use expert discussions either to cross-examine experts by Agenda or to see if advantage can be gained in some way
- An overly rigid adherence to questions proposed by Counsel/client leading to duplication of questions or questions that are so complex that they are incomprehensible.

With this in mind, the High Court Model Directions now provide the following in relation to Agendas:

“(b) Unless otherwise agreed by all parties’ solicitors, after consulting with the experts, a draft Agenda which directs the experts to the remaining issues relevant to the experts’ discipline, as identified in the statements of case shall be prepared jointly by the Claimant’s solicitors and experts and sent to the Defendant’s solicitors for comment at least 35 days before the agreed date for the experts’ discussions;

The use of agendas is not mandatory. Solicitors should consult with the experts to ensure that agendas are necessary and, if used, are reasonable in scope. The agenda should assist the experts and should not be in the form of leading questions or hostile in tone. An agenda must include a list of the outstanding issues in the preamble.

[Note : The preamble should state: the Standard of proof : the Bolam test : remind the experts not to attempt to determine factual issues : remind them not to stray outside their field of expertise and indicate the form of the joint statement. It will also be helpful to provide a comprehensive list of the materials which each expert has seen, perhaps in the form of an agreed supplementary bundle (it is assumed that experts will have been provided with the medical notes bundle)]

- (c) *The Defendants shall within 21 days of receipt agree the Agenda, or propose amendments;*
- (d) *Seven days thereafter all solicitors shall use their best endeavours to agree the Agenda. Points of disagreement should be on matters of real substance and not semantics or on matters the experts could resolve of their own accord at the discussion. In default of agreement, both versions shall be considered at the discussions. Agendas, when used, shall be provided to the experts not less than 7 days before the date fixed for discussions.*

[Where it has been impossible to agree a single agenda, it is of assistance to the experts if the second agenda is consecutively numbered to the first, i.e. if the first agenda has 16 questions in it, the second agenda is numbered from 17 onwards] “

The Expert's committee of the Civil Justice Counsel has proposed amendments to CPR 35, PD 35 which are closely based on the Model Directions. We believe that if the Model Directions were adopted across the country and CPR 35 and PD35 were amended as proposed, this would lead to a more cost efficient approach to the whole issue of expert discussions. We do not consider that further changes are required in this regard.

Issue: Hot Tubbing

Ref: para 14.2, chapter 42, page 415 and 593

The possibility of adopting the system known as “hot-tubbing” has been raised. We are firmly opposed to such a system. We do not consider that it will lead to any saving in cost since it follows an expert discussion and then occurs at the time of Trial. Thus there is a duplication of cost and it encourages delayed settlement.

We trust that this is of assistance.

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