2023: A Bad Year for (some) Part 35 Experts

CHRIS BRIGHT KC
NO5 BARRISTERS' CHAMBERS

Throughout 2023 there was a flurry of cases in which Part 35 experts were the subject of strong judicial criticism. The judgments may therefore be of passing interest in distilling the principles and approach that should avoid your experts suffering the same fate.

Medico-legal experts are paid to stick their heads above the parapet. In doing so, they are (or should be) fully aware of their duty to the Court as set out in paragraphs 2.1-2.5 of Practice Direction 35 as amplified by paragraphs 9-15 and 48-60 of the Guidance issued by the Civil Justice Council in August 2014. They sign a formal declaration that they understand that duty and have complied with it. Experts know (or should know) that, if the matter proceeds to trial, at best a judge will need to find a basis, even courteously, to prefer the views of one expert over those of another. Some will appreciate that, at worst and if judicial brickbats start to fly, Kevlar helmets may be the order of the day. Few however would expect the sort of criticism reflected in the 2023 cases.

For example, in his judgment of 13th January in the case *Snow v Royal United Hospitals Bath NHSFT* [2023] EWHC 42 (KB), HHJ Roberts gave Mr Luke Meleagros, Consultant Colorectal Surgeon, what might accurately be described as a thorough judicial 'kicking'. The judge described him as "*flying a kite*" in relation to his argument that the need for training, mentoring and supervision in and of the relevant surgical procedure only came about via the "*watershed moment*" of a particular clinical paper which, as the judge observed, Mr Meleagros had read for the first time only during the trial (paragraphs 82-84). His argument was therefore "*unsustainable and damaged his credibility*". Other views put "*a misleading spin on the NICE guidance*" (paragraph 110 (i)-(v)). In overall terms the judge found Mr Meleagros "*to lack the independence required of an expert and to be unreliable*" (paragraph 171(i)-(iv)). In his view Mr Meleagros had misunderstood his duties as an expert to obtain and read relevant medical literature, in not answering questions put to him and by seeking to defend reporting errors before then admitting them (paragraphs 172-177).

So, there it is - a neat experts' template of how **not** to do it.

In July in the case of *Jayden Astley (by his father and litigation friend Craig Astley) v Lancashire Teaching Hospitals NHSFT* [2023] EWHC 1921 (KB), the midwifery expert Linda Crocker-Eakins was for the defendant Trust and, to say the least, Mr Justice Spencer was not impressed. Bizarrely, in her final report for trial she addressed the initial allegations of breach of duty in the Letter of Claim, rather than the different and refined allegations in the Particulars (paragraph 28 (i)). Secondly and to the Judge's greater concern, "*...she failed to address adequately what was clearly the most important feature of the Claimant's case, namely the inconsistency between the fetal heart rate recordings from 15:05 and the agreed paediatric evidence that, during this period, the baby would have been severely bradycardic*" (paragraphs 28 (ii)-31), although the outcome of the case ultimately turned on the factual midwifery evidence and obstetric opinion (paragraphs 45-49).

Again in July, Mr Justice Ritchie handed down a CP quantum judgment in *CCC v Sheffield Teaching Hospitals NHSFT* [2023] EWHC 1770 (KB) (a 'must read' for those of us involved in CP/neonatal injury work), which contained criticism of the defendant's paediatric neurologist Dr. Peter Baxter, whom the judge noted had been employed by the defendant trust in the past and retained a close working relationship with his ex-colleagues there. Dr Baxter could not explain the absence of some important points from his main reports and why he had placed an undue emphasis on others in the experts' joint statement (see paragraphs 79-82). The judge "*found his answer in relation to these questions deeply unimpressive and formed the conclusion that he was being intentionally selective...*" and, in relation to another opinion expressed, said "*I gained the impression that he had not done a sufficient read through the medical notes, physiotherapy*

notes and indeed the eye therapy notes to reach that conclusion" (paragraph 80).

It is also worth noting that, as well as identifying wide ranging points of principle in the assessment of damages (paragraphs 103-141), under the headings *"Assessment of…"*, the trial judge set out his reasons for preferring one or other of the competing experts in care, OT, physiotherapy and accommodation (see paragraphs 89-90, 96, 101 and 161-162 respectively). In relation to the latter (Steven Docker vs David Cowan), the judge found differences in their approach in that, in his view, "*Mr Docker was driven by detail and principle and hard work*" but "*Mr Cowan's approach was remote, internet based, rather laid back and notional*" (paragraph 159). More worryingly, Mr Cowan's statement that a hydrotherapy pool was not recommended by the Defendant's therapists was not true or accurate and, as he himself accepted, *"was* "crystal ball gazing" *based on his knowledge from other cases"*, such that the judge concluded that Mr Cowan "*was pre-judging or fabricating evidence based on a hunch outside his field of expertise*" (paragraph 160), with, in addition, Mr Cowan's "*lack of detail and superficiality*" leading to him largely preferring the evidence of Mr Docker (paragraph 161).

In the case of *Parsons v Isle of Wight NHS Trust* [2023] EWHC 3115 (KB), the doubly unfortunate Ms Parsons was diagnosed with bowel cancer and then suffered significant intra-operative damage to her spinal cord during right hemi-colectomy when the epidural anaesthetic trocar travelled straight through the spinal-cord and out of the other side. In his judgment of 5th December 2023 Mr Justice Ritchie (him again) set out the guidance upon the duties and responsibilities of expert witnesses in civil cases at paragraph 81 of the judgment of Creswell J in the *"Ikarian Reefer": National Justice Compania Naviera SA v Prudential Assurance Co Ltd* [1993] 2 Lloyd's Rep 68 and the subsequent guidance of Fraser J at paragraph 237 of the judgment in *Imperial Chemical v Merit Merrell* [2018] EWHC 1577 (see paragraphs 17 and 18).

Mr Justice Ritchie found that the approach of Dr McCrirrick, the anaesthetic expert for the defendant trust, in substantially focusing on the evidence of the defendant's treating anaesthetist, *"rather disclosed… his thought process because it did not identify the issue, which was a factual one for the Court"*, but instead *"he presumed to determine that issue by accepting Doctor Rice's account despite her making no medical record. I refer back to the expert's duties set out above in the Ikarian Reefer"* (paragraph 79). In relation to the allegation of negligent technique, the judge found Doctor McCrirrick's contention that nerve injury does not in itself imply negligent care and his assertion that the claimant had provided no evidence to indicate a failure to exercise reasonable care to be *"a remarkable approach by an expert who was being asked to advise the Court* (the judge's emphasis) *on the evidence and the medical notes about whether there has been a breach of duty in relation to the technical standard required by professionals when carrying out epidurals"* (paragraph 80). In his view it was not the expert's job to assess the evidential sufficiency of the claimant's case of negligent technique, as opposed to advising on whether, in his opinion, there was a breach of duty on such technique. Further, under judicial questioning as to why he assumed that Doctor Rice's evidence was correct, Dr McCrirrick "*apologised for stepping outside his field of expertise and adopting the judicial function*" (see the end of paragraph 83). Ouch!

In his assessment of the expert anaesthetists the judge, perhaps somewhat charitably in the case of Dr McCrirrick, considered that *"both expert anaesthetists were doing their best in the witness box to assist the Court*", before largely preferring the evidence of the claimant's expert Professor Hardman and ultimately finding that a failure to obtain the claimant's informed consent was causative of the spinal cord injury and entering judgement for her (paragraphs 109-113).

Perhaps saving the best for last, in his judgment of 8th December 2023 in the case of *Beatty v Lewisham and Greenwich NHS Trust* [2023] EWHC 3163 (KB), Mr Justice Jay considered the factual and vascular expert evidence in relation to an alleged failure to diagnose an embolism leading to a BKA. Having reviewed the vascular expert evidence of Mr John Scurr (paragraphs 43-55), he extensively criticised Mr Scurr as not being *"a satisfactory witness"* in that he was "*combative*" in answering some of the defendant's counsel's *"perfectly fair and reasonable questions, and betrayed at several points in his evidence a degree of partisanship which came close to advocacy"* (paragraph 75). When asked about a previous case in which he was also the subject of judicial criticism for making mistakes and failing to justify his conclusions (paragraph 52), in a jaw-dropping display of hubris Mr Scurr explained to the court that the trial judge in that case had "*failed to understand the evidence*", and, when pressed, said that it was "*one of the few cases I was involved in we didn't win*" (paragraph 75)! Undeterred, Mr Justice Jay identified mistakes by Mr Scurr of the sort that "*should not be made in expert reports*" and, more importantly, that he made no or no adequate "*attempt to identify the key issue… or to supply any reasoning directed to the conclusion that the standard of care was inadequate*" (paragraph 76).

In particular, the judge considered that Mr Scurr did not establish "*a solid platform*" in his report for his conclusion that a CT angiogram was mandatory (paragraph 76), and that there was "*the same looseness of language*" in the joint statement, in that his acceptance of the adjective "*optimal*" was not a synonym for "*mandatory*" i.e. Bolam negligent. According to the judge however, "*...perhaps Mr Scurr's most egregious shortcoming was to reach an opinion in his main* (i.e. final trial) *report without properly analysing* (the treating vascular surgeon's) *witness statement*", as it emerged in cross-examination "*that he wrote his report before reading that statement but did not sign it off until he had done so*", saying that there "*was nothing in it to cause him to change his mind*" (paragraph 77).

Further, Mr Scurr's answers in the joint statement were "*unacceptably terse*" and contrary to an expert's duty under the CPR "*to set out the reasoning for his conclusions*" (paragraph 78), and in the judge's view it "*...was only in cross-examination that Mr Scurr began to develop a reasoned argument to support the proposition that CT angiography was mandatory*" (paragraph 79), which argument the judge ultimately rejected in, sadly but unsurprisingly, dismissing the claim.

So, some of the hard lessons to be learned in 2023? Know your duties as an expert and stick to them. Address the central issues and the entirety of the clinical and witness evidence fairly and non-selectively before reaching a settled view. Set out the reasoning for your conclusions. Don't fly a theoretical kite or attempt to spin the NICE guidance and/or clinical literature - at any time but certainly not at trial. Listen to and answer questions with care and courtesy. Stay within your area of expertise and defer where appropriate. Leave the trial judge to determine issues of fact, evidential sufficiency, and negligence. And, perhaps most importantly, a combative, partisan, arrogant expert is about as useful as an ashtray on a motorbike.

Ultimately however, these judgments speak for themselves, such that, to misapply the language of Mr Justice Jay in the case of Beatty, at least a brief review of them would be "*optimal*" if not "*mandatory*" for any lawyer or medico-legal expert with an interest in how **not** to give Part 35 expert evidence in clinical negligence cases.

Chris Bright KC is Head of the Clinical Negligence Group of No5 Barristers' Chambers, which in November 2023 was awarded the Chambers UK Bar Awards National Clinical Negligence Set of the Year.