Medical Assistance Required – Recent caselaw on expert medical evidence

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Introduction

It goes without saying that any clinical negligence case is only as good as the expert medical evidence supporting it. Having taught courses to medical professionals in respect of their duties and responsibilities pertaining to CPR 35 and beyond, I hold a great interest in seeing how the theory translates into practice. In the main, it does so perfectly, but every now and again, there are cases that identify issues in expert medical evidence. I have picked out a handful of recent decisions by the courts whereby the focus has been on the expert medical evidence, good and bad.Those chosen are illustrative ,and seek to identify some of the matters regarding expert medical evidence that have recently reach the door of the court.

Caselaw

Wilson v Ministry of Justice **[2024] EWHC 2389 (KB) HHJ Melissa Clark (sitting as a judge of the High Court).**

This is a personal injury case rather than a clinical negligence case, but identifies the issue of impartiality, sometimes found in clinical negligence cases. The seminal case on impartiality and independence of expert medical witnesses is of course, *EXP v Barker* [2017] EWCA Civ 63.].

The case arose from serious injury sustained by a prison inmate who was attacked by another prisoner. He suffered very serious injuries as a result. The issue revolved around the physiotherapy evidence, upon which there was initially quite common ground. Following the disclosure of video surveillance evidence however, the Defendant's physiotherapy expert produced a supplementary report, which led the judge to conclude that the expert could not reach the conclusions that she had from the surveillance evidence. One of the conclusions reached in the supplementary medical report was that the claimant had reduced reliance on a self-propelled wheelchair, notwithstanding that there was no use of a self-propelled wheelchair in the surveillance evidence. On questioning, the expert said that she was looking at the "*general picture*" of how he had presented in her original assessment of him and how he appeared in the surveillance evidence.

The judge considered that the defendant's expert was *"cherry-picking what she mentioned and failed to mention in order to paint a positive and improved picture of [the claimant] which was not one that could fairly be drawn from the video surveillance"* and that in producing her report she has *"departed from her fair and independent approach to [the claimant's] case as illustrated by her initial report and joint statement , to one which veers into a partisan approach"*.

The matters do not end here. This was a myriad case. In respect of other aspect medical evidence, the judge had to consider the evidence of expert spinal surgeons, and in doing so, she did not accept that the evidence of the defendant's expert was given in accordance with CPR Part 35. The surprising feature of the case, was that in cross-examination, the expert agreed that he had lost all independence and objectivity in the case (before later trying to resile). The Judge stated that she found the expert *"to be a partisan witness who, unusually agreed quite early on in his cross-examination..... with the contention that had lost all independence and objectivity in this case... I then asked [the expert] whether he understood that he had just accepted that he had not provided independent and objective evidence in accordance with his Part 35 duties to the Court, and he said that he did..... Although [the expert] sought to resile from this in re-examination I am satisfied that his earlier answers were the true and correct ones"*.

All in all, not a good day at the office for the defendant experts.

Biggadike v El Farra & Anor **[2024] EWHC 1668 (KB) HHJ Carmel Wall (sitting as a judge of the High Court).**

The Claimant had attended upon each of the Defendant Urogynaecologists concerning firstly, TVT-A implementation, and subsequently, exorcism of the mesh. The matter proceeded to trial and each of the parties relied on expert evidence. The judge heard evidence

from three expert urogynaecologists , each of whom was considered to be well-qualified and experienced in that specialisation.

During the course of cross examination, two of the experts , Mr Toozs-Hobson and Mr Robinson (to a lesser extent) were subjected to cross examination attacking their integrity as independent experts, it being suggested that they had some personal, professional and/or financial interest in the outcome of the trial. One area in particular, however stands out in terms of the allegations made, namely the attendance at and speaking at a seminar for urogynaecologists during the course of the trial. The seminar had been planned in advance of the trial and due to changes in the trial timetable, Mr Robinson was in the process of giving his evidence when the weekend seminar took place. Mr Toozs-Hobson had still to give evidence. Each of the experts indicated that they had told their respective legal teams of their commitment, but neither had informed the Court, nor the second defendant, or her lawyers.

The judge considered that it would have been preferable, in the interest of transparency, if the commitment had been volunteered to the court, and to the second defendant, but specified that had it been done, it would have been dealt with as a reminder to the experts not to discuss the case between themselves, and that Mr Robinson, who was in the process of giving evidence, should not discuss his evidence with any person. As matters transpired, the former was exactly what was done. The judge recognised that the sub-specialist world of urogynaecology is a small one (as is often the case in many medical sub-specialisms) and considered that "*it is entirely artificial to think that the organisation and attendance at the weekend seminar would have any efect or impact on their evidence I reject the suggestion that either Mr Robinson or Mr Toozs-Hobson has approached the task of giving evidence in this trial other than in accordance with the duties owed by an expert to the court*". Indeed, the judge went further in endorsing what was termed Mr Toozs-Hobson's "*pithy response*" to cross-examination attacking his independence, when he replied that "*this case isn't about me*".

An interesting and novel example of what could occur in the narrow world of medical sub-specialisms, where the clinicians are limited in number.

***Woods v Doncaster and Bassetlaw Teaching Hospitals NHS Foundation Trust* [2024] EWHC 1432 (KB) Lambert J.**

A practical application of the trial judge's preferring one expert's views over the other based, to a large extent, on the deficiencies of the defendant's expert report.

The case involved alleged negligence during the claimant's birth and in particular the consideration of two traces, the latter becoming the focus of the claim when brought in 2021. The defendant's expert acknowledged in evidence that his report of 2023 had been prepared by him without a recent review of the second trace, but had imported into that report the section from his earlier 2007 report ,which had set out his then interpretation of the second trace, which had then not been the subject of criticism, and albeit that a better and more legible copy of the second trace was now available.

The judge considered she was "*reluctantly driven to the conclusion that , in this case, [the defendant expert's] preparation has lacked the attention to detail which the case demanded [and] that I regret to say that the overall impression was of a rather casual approach to the issues in the litigation this is in stark contrast to Mr Hare [the claimant's expert] who gave the impression of having considered the issues in the case with real care and who provided thoughtful and measured responses to the questions posed*".

This case highlights the objective criteria that a trial judge will use to analyse the respective positions adopted by the experts in weighing up which evidence is to be preferred.

***PXE v University of Birmingham NHS Foundation Trust* [2024] EWHC 2025 (KB) HHJ Sarah Richardson sitting as a High Court Judge.**

This case is salutary in that there is no criticism of expert evidence that was placed before the court. Quite the opposite in fact. The claimant's claim failed not because of any misapplication of the CPR or the duties owed by an expert, but because the trial judge while recognising that each expert held logical and defensible positions, preferred the evidence of the defendant's expert, for a large part, because his practical experience of the circumstances and locus concerning the alleged negligence more closely aligned with the events that took place.

This was another birth delivery case . The case centred on a failure to classify the claimant's mother's pregnancy as high risk in that (1) she had a recorded history of cystitis: kidney scarring, (2) a failure to perform growth scans from 28 weeks and (3) to have delivered him earlier. Unfortunately, as events unfolded, the claimant suffered

foetal growth restriction, which was not recognised and addressed prior to delivery, and he suffered periventricular leukaemia and now has permanent brain damage.

The obstetric evidence on liability was provided by Mr Denbow on behalf of the claimant and Mr Tuffnell, on behalf of the defendant. Each were described by the trial judge as *"thoughtful and considered expert witnesses"* with a wealth of experience and each approached their tasks from their respective clinical backgrounds. Mr Denbow had always been a consultant in a large teaching hospital and acknowledged that he had a greater depth of resources available to him. Mr Tuffnell was a consultant in a large District General Hospital and was *"clearly more familiar with the working conditions that [the treating clinician] was facing in 2008 than Mr Denbow, who expressed genuine surprise in the witness box about the information that Mr Tufnell shared with him at the experts' joint meeting about the lack of scanning and other resources ..... in a District General Hospital in 2008"*.

Without going into each of the matters considered and determined by the trial judge on the expert evidence, the trial judge considered that for all the reasons that she had given the opposing views held by the liability experts amounted to a genuine difference of opinion. The view of Mr Tuffnell was logical and the conclusions reached defensible. It followed that the view taken by the treating clinician when reviewing the claimant's mother's case and agreeing that it *"was suitable to be managed on the low risk pathway was reasonable and was one that it was open to a reasonably competent obstetrician working in a District General Hospital in 2008 to make. In all the circumstances, the claimant must fail on establishing breach of duty ...."*.

This is an interesting case in that it promulgates consideration of instructing an expert conversant with the circumstances and setting of the alleged negligence.

Final Thoughts

Expert evidence and the duties owed by experts in its presentation will continue to involve the courts. While at first blush CPR Part 35 seems to effortlessly set out the duties owed by experts, its practical application is sometimes not quite so accommodating. Clinical negligence cases are not immune to issues involving experts duties, and will continue to be. In the main however, the vast majority of clinical negligence cases are seamless in the application of duties performed by hugely knowledgeable and vastly experienced experts, of which the ***PXE*** case presents as a prime example.