Author

Thomas Crockett

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Clinical Negligence Briefing

Some 2018 Guidance from the High Court on Experts and Evidence

In the first half of this year the courts have provided the practitioner with some useful and practicable guidance in relation to evidence in clinical negligence cases. This briefing intends to do little more that summarise some interesting cases, the published judgments of which, bear closer study.

The facts in ***Saunders v Central Manchester University Hospitals NHS Foundation Trust*** **[2018] EWHC 343 (QB)** are not important for our purposes. The claimant brought a claim for damages against the Defendant Hospital Trust alleging he sustained an iatrogenic injury pursuant to surgery for the reversal of an ileostomy. He failed to make out his case on the facts and on the basis of the available expert evidence.

The practical lesson the case caused Mrs Justice Yip to propound (in a judgment handed down on 23 February 2018) was on the subject of the Parties' expert colorectal surgeons' joint reports.

The Parties' legal teams clearly had been unable or unwilling to agree a joint agenda for discussion. Thus at trial the court was furnished with (in addition to the experts' individual reports, addenda and Part 35 answers) a joint report consisting of some 60 pages, containing many repetitive questions.

This was held to do little to realise the objective stated in paragraph 9.2 of the Practice Direction to CPR 35 *"to agree and narrow issues"*. Yip J held that *"Parties should adopt a common sense and collaborative approach rather than allowing this stage of the litigation to become a battleground"* and commented that "[p]*erhaps greater input from Counsel may have assisted"*.

It may well be that this sage dicta will be utilised by litigants facing difficulty in obtaining cooperation from their opposite number when seeking to agree joint agendas, and potentially form the basis for submissions in respect of the seeking of issue-based costs orders in due course?

Moylett v Geldoff & Anor **[2018] EWHC 893 (Ch)** was not a clinical negligence case; rather it was an intellectual property case litigated between members of the Boomtown Rats about the authorship and copyright of a hit 'I don't like Mondays'. It is a salutary example that unless obviously or grossly inappropriate, such that it should not be permitted to form the basis of a party's case at trial, the courts are liable to allow such expert evidence as a party wishes to adduce and leave the question of weight to the trial judge.

In this case, the first defendant applied to strike out parts of the Claimant's expert report dealing with the significant issue in the case: namely whether the music was more likely to have been composed on a guitar or a piano. The Claimant's report was objected to on the alleged ground that it contained opinions from professional guitarists, for which permission

had not been granted by the court. It was further argued that the report went beyond what was permissible by expressing an opinion on the ultimate question in the proceedings.

Mrs Justice Carr gave judgment on 14 March 2018. In relation to the first issue, she held that she should apply the ratio of *Rogers v Hoyle* [2013] EWHC 1409 (QB) and hold "*it is much preferable for the court, rather than picking through expert reports, seeking to excise individual sentences and engaging in an editing exercise, to allow the trial judge to consider the report in its entirety, assuming that it is genuine expert evidence, and to attach such weight as it sees fit at the trial to those passages in the report.*"

In the instant case, she held that the Claimant's expert had been entitled to rely upon professional guitarists and was obliged to set out that he had done so in his report. It was held that although one paragraph was on the margins of admissibility, in the context of the whole report, the expert was forming his own view based on what had been demonstrated to him and not pursuant to any suggestion that the professional guitarists themselves were providing expert opinion upon which anything turned.

As to the second question, Carr J was forthright in holding that this expert be allowed to express himself as he wished to and the weight to be placed upon such evidence be a matter for the trial judge. Insofar as it dealt with whether the music was more likely to have been composed on a guitar or a piano it was admissible evidence and might well be the subject of expert opinion in reply.

In the case of ***Calderdale & Huddersfield NHS Foundation Trust v Atwal*** **[2018] EWHC 961 (QB)**, Mr Justice Spencer determined a novel application by the NHS Trust to commit the Defendant for contempt of court (judgment handed down on 27 April 2018). It was alleged that the Defendant had pursued a grossly inflated and thus fraudulent claim for compensation pursuant to some admittedly negligent treatment at one of its hospitals. Having sustained two fractured fingers and a lacerated lower lip, the Defendant claimed compensation of £837,109, predominantly constituted as claims for past and future lost earnings. Two months prior to trial, the Defendant purported to accept a very early Part 36 Offer made by the NHS Trust of £30,000.

Inconsistency in the Defendant's medical records formed an important portion of the case against the Defendant. The court considered the evidential status of such documents insofar as they contained narration of anything said by the Defendant to treating clinicians as distinct from statements giving rise to the allegations of contempt made to medical and other experts who gave evidence by way of affidavit. This question had been considered by Buxton LJ in *Denton Hall Legal Services v Fifield* [2006] EWCA Civ 169, which the NHS Trust cited as potentially precluding the court from relying on such statements as evidence of the truth of their content.

It was held that if notes formed part of an agreed bundle for a hearing, the documents were admissible at that hearing as evidence of their content under paragraphs 27.1 and 27.2 of the Practice Direction to CPR 32 and the concern expressed in *Denton Hall* relating to a practical difficultly would not arise. It was held that such evidence would be classed as hearsay and thus under section 1(1) of the Civil Evidence Act 1995, they were not to be excluded even should procedural rules requiring notice to be given to any party against whom such evidence were to be used, were not adhered to, but may be taken into

account when considering its weight and more generally, case management and costs.

In the instant matter, Spencer J held that caution should be applied in relying on medical records as proof of deception by the Defendant (it being said what is recorded as him telling his treating clinicians being true as contrasted with what he told the medical experts). It was held that it was not unreasonable that the NHS Trust had not sought to prove the statement by calling the person to whom it was made; that it was unambiguous information unlikely to have been misunderstood or invented and thus could be admitted as hearsay evidence of the truth of what the Defendant had said and not simply that he had said it.

This case is liable to have wider application in a range of contexts where there is an apparent disparity in contemporaneous medical records and reports and/or opinions of medical experts.

Thomas Crockett *has a busy clinical negligence practice acting for both claimant and defendant parties in all manner of cases concerning the liability of medical personnel, with a particular emphasis on surgical and oncology cases.*