

Jacqueline Webb Annual Conference “Liability Reports”

by

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THE EXPERT IS THE BACKBONE OF THE MEDICAL NEGLIGENCE ACTION

Loveday v Renton
[1990] 1 Med LR 117

- Stuart-Smith LJ set out ten attributes of an expert that assist the court in assessing the weight to be attributed to that expert's opinion.

The list would not be out of place in today's rules:

- eminence;
soundness of opinion;
internal consistency and logic;
precision and accuracy of thought;
response to searching and informed cross-examination;
ability to face up to logic and make concessions;
flexibility of mind and willingness to modify opinions;
freedom from bias;
independence of thought;
demeanour.

The Ikarian Reefer [1993] 2

Lloyd's Rep 68 at 81

Cresswell J said:

- that the expert witness had a duty to give independent evidence, uninfluenced as to form or content by the exigencies of litigation, and to provide objective unbiased opinion to the court on matters within his expertise, never assuming the role of advocate.

In *Sharpe v Southend Health Authority*
[1997] 8 Med LR 299, Cresswell J
commented further:

- *“An expert witness should make it clear in his or her report that, although the expert would have adopted a different approach or practice, he or she accepted that the approach or practice adopted by the defendant was in accordance with an approach or practice accepted as proper by a responsible body of practitioners skilled in the relevant fields.”*

THE CIVIL PROCEDURE RULES (CPR)

- The Civil Procedure Rules now enshrine the foregoing jurisprudence into a formal code, providing that it is the duty of an expert to help the court on the matters within his or her expertise and that that duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid (r 35.3).

'Expert'

- It should be noted that 'expert' is defined by r 35.2 as an expert:
- *'who has been instructed to give or prepare evidence for the purpose of proceedings'.*

A preliminary report

- A preliminary report for a potential claimant at the investigative stage is never intended for disclosure, and so should not be considered to have been prepared for the purpose of court proceedings. The notes to r 35.2 make clear that a distinction is to be drawn between advisory experts (at any stage of the claim) and experts instructed to provide written reports for the court.

Rule 35.3 and Practice Direction 2.1, 2.2 and 3.1 make clear that the court expert's overriding duty is to the Court:

- If an expert merely advises a party and never advances a view, in person or in writing, to the Court then the duty will not arise - but it is a distinction without much of a difference, since the Claimant will not be well served by any advice that seeks to please the patient or the family and does not meet the criteria for court evidence.

Expert's Declaration

- By r 35.10, the report must contain a declaration that the expert understands his duty to the court and has complied with that duty. The expert is also required to state the substance of all material instructions, written or oral, on the basis of which the report has been written and to verify the report with a statement of truth; a set form of words is provided in paragraph 3.3 of the most recent version of the Practice Direction (effective from October 2009).
<http://www.academy-experts.org/exdec.htm>

CPR Rule 35 PD para 3.3:

- An expert's report must be verified by a statement of truth in the following form –

“I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.”

r 35.14

- It should also be remembered that the Court expects an expert to take responsibility for his or her role in the process and to be proactive.
- There is an under-used power under r 35.14 for an expert to ask the Court for directions

CODES OF GUIDANCE

- The Civil Justice Council produced a very detailed authoritative code and draft guidelines produced by the Clinical Disputes Forum, was used as the basis for a formal Protocol for the instruction of experts to give evidence in civil claims, which has now been approved by the Master of the Rolls and now forms part of CPR 35. Its provisions should be carefully studied and experts should be provided with a copy. http://www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part35.htm

THE LAWYER EXPECTS THE EXPERT TO:

- take their cases as seriously as they do themselves, and
- exhibit the same level of courtesy and
- commitment to the lay client.
- appreciate that if s/he accepts instructions s/he must review the treatment the patient has received carefully, thoughtfully and in full detail.

To agree to act is to:

- commit to the case,
- undertake to take it seriously,
- complete work within a reasonable time throughout the currency of the case;
- only in an emergency plead supervening clinical commitments to explain late delivery of reports or
- inadequate preparation for a conference.

THE LAWYER DOES NOT EXPECT THE EXPERT TO:

- Be determined to support the claim, regardless of the facts.
- What is needed is a clear, authoritative, well-grounded opinion on the issues on which the expert is instructed to comment, whether or not that provides the patient or relative with a case. If it does not, it should wherever possible provide him or her with a greater understanding of what happened, the need for which is often the primary motivation for seeking legal advice.

General Points:

Before you start writing make sure you:

- are the appropriate expert
- don't have a conflict of interest
- that your fees are clear!
- have a detailed letter of instruction
- have all the relevant papers.

The Report

- An expert will be expected to write clearly, grammatically and as succinctly as possible, with sub-headings and numbered paragraphs and pages for ease of reference. The report will be expected to read consistently: The conclusions must tally with the observations and argument in the main body of the report.

One basic structure can be used for most reports:

- Qualifications
- Instructions
- Facts
- Commentary and opinion
- Medical papers, where appropriate.
- Conclusion
- “Woolf” declaration

Expert's qualifications and experience -

- the level of detail needed will vary with the complexity of the case; often it is sufficient to state the specialism and append a curriculum vitae.

Instructions

- A summary stating when asked to advice, by whom, on behalf of which party and on what issues.

The Salient Facts

- The history may be as per the medical records or as per the patient's account, as the two are not always consistent. The expert needs to set out the salient extracts from both (with page references - bear in mind questions may be asked about the report months or years after it was written), and must draw attention to any important discrepancies without assuming either source to be right. Exceptionally, an expert may be able to say from clinical experience or medical knowledge that only one version of events is capable of belief; in that case only, it is appropriate to express that view, explaining the medical basis for it.

The expert's commentary and opinion

- The expert's commentary and opinion can take the form of observations appended after each section of the facts has been set out, or it can simply be by way of an opinion section at the end of the report. In either case, it should be clear to what fact (or variant version of the facts) the opinion relates.

Medical papers, where appropriate.

- Conclusions need to be supported by appropriate reasoning and, where relevant, texts (N.B. texts published later than the incident will normally only help on causation, not on liability). Full copies of the sections of relevant texts relied on should be supplied and the significant passages highlighted, to enable the lawyers to explore their own understanding of the background literature and to raise any necessary points with the expert.

At trial:

- Try and attend for the evidence that is important for your opinion;
- the expert has to explain the medical/care/etc case to the judge, whether in person or on the page, so the ability to communicate in writing and orally is crucial.
- An expert must also be able to explain his or her opinion verbally in conference with sufficient clarity and jargon-free English that both the lawyers and the lay client can understand; if this proves a problem, the expert will flounder in the witness box when trying under considerably greater stress to explain his or her opinion to the judge.

Thank you