Caution !

Dangers and Pitfalls in Drafting the Experts' Agenda

Since I posted my Top Ten Tips for experts' meetings, the recent decision by Mrs Justice Yip in **Welsh v Walsall Healthcare NHS Trust 2018 EWHC 1917 QB** has given some useful further guidance on drafting agendas for experts' joint meetings.

Welsh v Walsall was a bariatric surgery case in which the Claimant claimed negligence in the surgery and post operative management in a gastric bypass operation, resulting in the 40 year old claimant having to undergo a reversal of the bypass and ileostomy with long term ongoing disability.

At the liability trial (the Claimant won), of the joint statements, Yip J stated –

"35. As I observed during the trial, the joint statements in this case were not as useful as they might have been. The difficulty was caused by the inability of the parties to agree a single agenda for the experts' consideration. This is not the first time that I have expressed concern

about this and counsel confirmed that it is a problem that appears to be arising more frequently. When I enquired as to why that might be, Mr Counsell, having sought instructions, referred to the model direction for clinical negligence actions which provide for the claimant's solicitors and experts to prepare a draft agenda to be sent to the defendant's solicitors and experts for comment and for the defendant to then agree the agenda or propose amendments within 21 days. Paragraph 13 of the model order says:

"7 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."

36. It was suggested that the form of the model order encourages more than one agenda to be sent to the experts. I cannot agree with this. The standard direction makes it clear that the solicitors are required to do their best to agree a single agenda. In the vast majority of cases, any disagreement ought to be capable of resolution through a bit of give and take. It may be appropriate to insert some additional questions into the draft at the defendant's request. It certainly should not become routine to provide two versions which, as here, travel over much of the same ground. That approach tests the patience of the

experts (and frankly of the court); produces a lengthier joint statement; potentially increases costs and is simply not the best way to focus on the issues. I do not think that anything further needs to be said or done in this case. However, if this worrying trend continues, parties may find that courts begin considering costs consequences."

Yip J's reference to this not being the first time she has criticised the lack of a single agenda refers to her judgment earlier this year in another surgical case - **Saunders v Central Manchester University Hospitals NHS Foundation Trust 2018 EWHC 343 QB**. This was a claim for alleged negligence in the performance of an operation to reverse an ileostomy (see my previous post – "Top Ten Tips for Expert Meetings") in which she stated–

"their joint statement was disappointing. It was 60 pages long and did not fulfil the purpose identified in CPR 35PD 9.2 "to agree and narrow issues". It seemed to me that the difficulty may have arisen not through the fault of the experts but in the way the agendas were drafted. I say "agendas" because, for reasons not explained to me, there had apparently been two separate agendas that the experts were required to consider. Both involved repetitive questions for the experts

and far from producing a focus on the real issues, the result was a document that served only to confuse rather than assist.

I can see no good reason why the parties were unable to agree a single agenda in this case. Perhaps greater input from Counsel may have assisted. The joint statement is an important document. It ought to be possible to read it and understand the key issues and each expert's position on those issues. Sometimes less is more as far as the agenda is concerned. Parties should adopt a common sense and collaborative approach rather than allowing this stage of the litigation to become a battleground. Frankly, the approach to the joint statement in this case achieved nothing of value".

Yip J was an experienced specialist clinical negligence and personal injury silk before the bench and this is now the second time in a matter months she has criticised doubled up lengthy agendas, so those of us specialising in clinical negligence (and personal injury for that matter) would do well to sit up and take notice.

In respect of her final comment of the risk of costs consequences if a party does not act appropriately in preparing an agenda, this reminds me of the case of **Cara v Ignotus**, a case management decision by Master Yoxall on 7th October

2015 (reported on Lawtel) in which the Master did impose a costs sanction over an agenda.

In that case the Defendant asserted that the Claimant's proposed agenda contravened para 9.3 of the practice direction to CPR 35 which states –

"*The agenda must not be in a form of leading questions or hostile in tone.*"

In that case the Claimant's questions had generally been in the form of "*Is it agreed that …*" followed by the Claimant's case on a particular issue.

Master Yoxall agreed with the Defendant that the questions were leading in contravention of the practice directions and awarded costs of the application against the Claimant. He stated –

"if a party formulates an agenda using leading questions contrary to the practice direction at 35.9.3, then that party runs a risk. And so I take the view that the Claimant should pay the Defendant's costs today."

I have to admit that I have often used the initial wording "*Is it agreed that …"* and have never had objection taken to it. I suspect Master Yoxall's greater concern may have been that this was then combined with the Claimant's case rather than more neutral wording.

In addition, in contrast to the situation raised by Yip J, I have had a case where a defendant refused to agree an agenda or to the meeting proceeding with two agendas which resulted in a protracted delay to the timetable and a further directions hearing. On that occasion the Defendant was the subject of the adverse costs order and was criticised by the Judge for failing to follow the default position set out in the standard directions – the expert meeting proceeds with both agendas.

So, what should we take from all this ?

I suggest –

1. As Claimant, ensure your agenda for each specialism covers the key issues in the case for those experts, not

peripheral ones. This means it is more likely to have 10 questions than 50.

2. Try to keep the wording balanced, neutral and objective – anticipating objections from the Defendant. This means it will not simply be a list asking the experts to agree all of your client's best points – that is the job of your closing submission at trial.

3. As Defendant, try to make as few amendments as are required to ensure the key issues are covered – the fewer the amendments, the more likely one agenda can be agreed. This means not being pedantic over language.

4. Also, if at all possible try to propose extra questions rather than changes to existing questions – these are far more likely to be agreed by the Claimant than if you propose changes to existing questions.

5. Claimant and Defendant – you are expected to be reasonable in trying to agree one agenda. Demonstrate this in correspondence by offering concessions. Justify any

objection you have to any proposed questions. You may need to refer to this on costs later.

6. However, don't feel you have to agree at all costs, especially if it means replacing your carefully crafted ten questions which will explain the case perfectly to the trial judge (and anyone else who cares to read it) with a dog's dinner which leaves the reader more confused about the case than enlightened.

7. If you need to, don't be afraid to revert to the default position anticipated by the standard direction – the meeting proceeds with the experts addressing both agendas, especially if otherwise the other directions and even the trial are being put at risk by the time being take to agree the agenda. You may be criticised and penalised in costs for failing to agree an agenda, but it is far more likely if you cause a trial to be adjourned through not adopting the default position in the directions.

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