Expert Meetings – Top Ten Tips for Lawyers

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Yip J's comments in the recent case **Saunders v Central Manchester University Hospitals NHS Foundation Trust 2018 EWHC 343 (QB)** are a great reminder of the importance of the experts' Joint Statement in any case and in particular those that get to trial. Her comments have particular authority in light of her many years' specialism as a silk in PI and clin neg cases before she went on the High Court bench.

Of the experts' joint statement Yip J said –

"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 statment 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".

Experts' meetings are *the* most crucial part of a case, so it's worth making sure you do everything you can to make sure your expert does a good job of it.

Here are my top ten tips for experts' meetings -

1. Have a standard proforma agenda ready to go. The preamble (telling the experts how to go about the meeting) is standard for pretty much all cases. Mine (email me if you would like a copy) tells them essentially what legal test to apply, the standard of proof and reminds them of the differences between issues of fact and opinion.

2. Don't be tempted to give the agenda a Claimant's bias or a Defendant's bias (whoever you represent). If you do, the other side will only object and you won't look very good in front of the trial Judge (and see Yip J's comments above on collaboration). Obviously cover the points which help you but much better to put a document in front of the Judge that is clearly a genuine attempt to put all the issues before the experts and the Court in a relatively neutral and objective manner.

3. Keep it simple. In even the most complicated or high value case the number of key issues in case can usually be counted on the fingers of one hand. Ask yourself "what are the key issues for the judge to decide in this case at trial ?"

4. Less is more. I have seen agendas with fifty questions on them. Hopeless. The purpose of a joint statement is to clarify the issues not complicate them.

5. Agenda questions should be drafted by the lawyers, not the experts. You know the issues in the case far better than the experts. Don't let over confident experts tell you which questions to put.

   And - use Counsel. I know you will say "he would say that wouldn't he", but remember Yip J's comments. In addition, it will be Counsel presenting the issues to the Judge at trial a few months later, so only really fair to let them identify those issues for the agenda. And if the judge is critical of the agenda, they are critical of Counsel and not you.

6. Don't feel that you absolutely must agree one agenda with your opponent. If it means a few extra or amended questions, that's fine

and lawyers, experts and judges all prefer one agreed agenda. But if their questions would turn your balanced focused document into a dog's dinner, tell them no – standard directions provide for such disagreement, with each party to draft their own and both are considered by the experts at the meeting.

7. Diarise a telecon with your expert before the joint meeting. Make sure they have all the papers they need. Go through the agenda and their opinion on each of the issues. This also ensures they have read the papers before they meet their counterpart. I appreciate this should be assumed, but I never fail to be amazed at how poorly some experts prepare for joint meetings – not reading the relevant papers or not even having them to hand to refer to during the meeting.

8. Don't speak to the experts during the "meeting". Most meetings in fact are a series of telephone calls and emails between the experts. Experts may ask for your view on a draft joint statement – tell them no. Until the joint statement has been signed off, you should not speak to or email the expert about the issues covered by the agenda.

9. When the joint statement is available check that your expert has done a decent job, included the key points in the joint statement and also given their reasons where they disagree.

10. *If* your expert has failed to address the questions in the agenda properly, failed to give their reasons or if they appear to have executed an unexplained U turn from their previous opinion, speak to them on the phone ASAP, ideally with Counsel, and get them to produce an addendum you can disclose to explain themselves if necessary. In this circumstance you may also need to consider advising your client as to whether they have a potential **Jones v Keaney 2011 UKSC 13** claim against the expert for failing to take proper care in the production of the joint statement - never a happy place to be and hopefully avoided with proper preparation.

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