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TEN POINT CHECKLIST

FOR

FINALISING EXPERT REPORTS FOR EXCHANGE

The recent case of **Arksey v Cambridge University Hospitals 2019 EWHC 1276 QB** is a useful reminder of the pitfalls of finalising expert reports for disclosure. The Judge criticised the Claimant's expert neurosurgeon, Mr Sandeman, in a number of respects, most of which stemmed from his disclosed report predating the pleadings and therefore not taking account of the pleaded Defence or the statements from the treating doctors.

Arksey is a useful case to read anyway (quite short and concerns the negligent discharge from the Emergency Department of a patient suffering a sentinel subarachnoid bleed who then suffers a major re-bleed at home - a well trodden path in clinical negligence) but in particular as a learning exercise on expert evidence for lawyers and experts alike.

It made me think of other potential pitfalls on expert reports which I have learnt over the years - here is my ten point checklist for getting it right when it comes to finalising expert reports for exchange.

1. Has the expert put the current date on the report ?

Sounds obvious, forgive me, but it's amazing how often experts fail to re-date their finalised report from the draft they did the year before. Embarrassing and tells the other side how long ago their draft report was prepared.

2. Has the expert set out the nature of their instructions ?

This can be as brief as "*I have been instructed to provide a report on liability.*" - but it has to be there. If not, the expert is in breach of CPR 35.10 and the Court can order disclosure of the letter of instruction. Not a good start to cross examination of your expert in the witness box.

3. Has the expert set out their qualification to provide an opinion specifically on the issues arising in this particular case ?

I have lost a case because our expert explained (completely to our surprise and in the witness box for the first time) that although a spinal surgeon, he did not operate at the level which was the subject of the claim.

Experts need to confirm in their report when they are qualified to give an opinion on the specific issue in the present case.

4. Has the expert set out the legal tests which they have been asked to address ?

I have had an expert asked in cross examination what test he was applying to breach of duty. A lot of lawyers might struggle to run off the full Bolam/Bolitho test without hesitation or deviation; experts certainly can't do it, and nor should we expect them to. It was an easy point against our expert and one which cannot be scored if they have set it out at the start of their report.

Remember - "Bolam is Dead. Long live Bolam !" - my favourite topic. There are an increasing number of scenarios where Bolam is not the right test to use so make sure you tell your expert the appropriate test for that specific case.

Also - don't forget causation - have they set out what is meant by the but for test and material contribution ?

5. Have they set out all the documents with which they have been provided ?

Best to refer to other experts' reports simply as draft reports, rather than the date of every draft. Is the list complete ?

6. Specifically – have they included the pleadings and witness statements in the list of documents ?

The main difference between a draft report and a final one.

This was what handicapped Mr Sandeman in Arksey. The pleadings and, more importantly, the witness statements are likely to be crucial to the expert's final opinion.

7. Have they identified issues of fact ?

A common error is for experts to make assumptions in their report about the facts upon which they base their opinion, when those facts are actually one of the issues in the claim. Experts need to be alert to such factual issues, be alerted to them by their lawyers and identify them in their report.

8. Have they deferred to the Judge on issues of fact ?

Experts give their view on issues of expert opinion, not on issues of fact. However this does not mean that they cannot comment on issues of fact. They can and indeed should comment on issues of fact where their expertise enables them to assist the Court with that determination – for example by interpreting medical records and explaining medical issues. As long as they qualify their view by stating that they appreciate that issues of fact are ultimately a matter for the Court.

9. Have they given reasons, reasons, reasons ?

I had a very eminent professor of vascular surgery who completed a report (in that case a joint statement) with simple yes/no answers giving no reasons for his views or why the Court should prefer his to his counterpart's.

Experts and lawyers forget that the report and joint statement will stand as evidence in chief at trial. If a point is not contained within

the reports, the likelihood is you will not be able to adduce it in evidence in trial. A point can be as powerful as you like, but if it's not in the report it's useless.

10. Finally - is the report balanced ?

An expert's duty is to provide independent unbiased objective expert assistance to the Judge trying the case. The report should be drafted in a manner which demonstrates that.

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