How not to be an expert witness: important lessons from a recent Court case

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Any orthopaedic surgeon involved in medico-legal work is aware (or at least should be aware) that after Jones v Kaney in 2011[1] their immunity to prosecution has been removed and if their evidence is found to be substandard they may themselves be sued.

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Therefore, it behoves all of us involved in providing expert reports to ensure that we are aware what is required of us as expert witnesses. This applies to work both in personal injury and in medical negligence. In trying to take a sensible, sustainable view in a medical negligence case I have always considered that there are five cardinal rules:

- Impartiality: the report is for the Court not the instructing party
- Stick to your own area of expertise
- Reasonable practice/ management, not Olympian or gold standard, is the benchmark
- Try to analyse prospectively from the position the treating surgeon was in at the time rather than retrospectively with 20/20 hindsight
- Analyse all the relevant information provided. A lot of irrelevant information will be provided. The devil is in the detail.

A recent case has been brought to my attention where the expert in a medical negligence case was severely criticised by the judge for failing to observe the basic rules outlined above and I thought it was worth reviewing the case and highlighting some of the pitfalls that we should avoid falling into ourselves. The case is instructive in as much as it highlights some other areas that are worthy of consideration in addition to those listed above.

The case of Harris v Johnston[2] last year involved a neurosurgeon and complications which occurred after a revision C7 foraminotomy. The claimant, a 61 year old woman, had over the years undergone a large number of spinal operations under the care of both orthopaedic surgeons and neurosurgeons. The initial operation of posterior C7 nerve root decompression was carried out in May 2010 and the revision in November 2011 by the same neurosurgeon. The fundamental issue was whether the neurological injury that occurred at the time of the revision procedure was due to negligent performance of the operation or whether it was an "unfortunate accident" i.e. a recognised and unavoidable complication of surgery of that nature. Eminent, practicing, teaching hospital neurosurgical experts were instructed on each side. Arguments were around whether the first operation had been correctly performed and the standard of consent prior to the revision procedure, in addition to the competency of the performance of the revision procedure.

However, there were a number of areas where the quality of the claimant's expert evidence was found to be seriously lacking, resulting in criticism by the High Court Judge Mrs Justice Andrews. The expert for the claimant was critical of the operating surgeon because he had not performed an MRI scan before the first C7 decompression. He ignored the fact that because of previous failed lumbar spine surgery there was a spinal cord stimulator in situ which precluded an MRI scan. There was also an issue in relation to the actual cause of neurological injury at the

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second operation where the claimant's expert appeared to confuse a Cobb dissector with a retractor. When reviewing the documentation provided to him he had not considered all the relevant material. The judge opined that he had, "based his opinion on a mistaken factual premise". She was very critical of the fact that at the time of the preparation of a joint statement with his opposite number he had not seen fit to further consider or revise his position on these issues.

The claimant's expert gave the opinion that the first C7 decompression had been carried out in a negligent fashion for three reasons. The first was because the operation only took 30 minutes, the second because the post-operative CT looked little different to the pre-operative scan and thirdly because the symptoms had recurred. When cross-examined in the witness box by the defence barrister on each of these issues separately, he agreed that although 30 minutes for a cervical foraminotomy was quick, it was within the range of what one might expect from a reasonable and competent neurosurgeon. He also agreed that following a successful foraminotomy there may not be a great deal of difference between the pre- and post-operative scans. When questioned he accepted that there could be recurrence of symptoms after a competently performed operation. He argued that it was the combination of these three factors which led him to the conclusion that the first operation was performed negligently.

When pressed on this in the witness box he introduced the analogy of a road traffic accident in which a motorist crashed at 59mph in a 60mph speed limit area in fog and wet road conditions. He reasoned that the road traffic investigator would assimilate all these factors in concluding that the driver was driving unsafely. The judge concluded, "Whilst this is true, the analogy is flawed. The point demonstrated in the traffic accident scenario, by looking at the whole picture, is that the driver's speed was excessive bearing in mind the factual conditions on the road, but in this case the experts agreed that the speed of the operation was not excessive. That being so, the speed of the operation cannot be transformed into negligence by two obviously neutral factors, namely the return of symptoms within a year and the inability to see on the CT scan that a significant amount of bone was removed". On this matter Mrs Justice Andrews concluded, "This stubborn adherence to a position which was logically indefensible was one of a number of factors which substantially undermined his credibility".

The judge also took issue with the claimant's understanding of the Bolam test[3]. In cross-examination when asked about the performance of the first C7 decompression his comment was, "I think that the operation was not carried out to a standard that would be expected of, for example, an exiting exam individual". Despite assaults on Bolam elsewhere after the Montgomery ruling[4] it appears that the judiciary still rely heavily on it in cases such as this. She commented, "That led me to question in my own mind whether he had ever addressed his mind properly to the principles set out in Bolam. He should have asked himself whether what the surgeon did fell below the standards to be expected of the reasonably competent experienced neurosurgeon performing that operation on this patient, not whether an examiner would have failed a student who had done what the operating surgeon did".

During cross-examination of the claimant's expert the defence barrister played a 'fastball' by questioning him on an earlier negligence case where he had acted as an expert in order to discredit his standing as an expert in this case. The questioning was allowed because there were clearly concerns about his veracity as an expert witness. Therefore, during the trial it came to light that the expert had been criticised by a County Court Judge in a similar case a few months earlier. On that occasion he had been accused of making factual assumptions about key matters without taking any steps to check that his assumptions were correct. As a result he had to be recalled to the witness box after the erroneous assumptions were demonstrated. In the earlier case the opposing expert had accused him of "poor attention to detail". The judge concluded, "I would have expected someone of his standing, who regularly appears before the Court in cases of this nature, to be mortified by that criticism and therefore to have taken great pains to ensure that he could not possibly be said to have made a fundamental factual error in the future by checking and double checking. It beggars belief that he would allow this to happen a second time".

Two further criticisms were made of the claimant's expert evidence in the judgement. The first was that when cross-examined on the question of the

neurological injury that occurred in the revision procedure he came up with two new possible mechanisms which had not previously been raised with either legal team or his opposite number. These differed from the mechanisms outlined in his report on liability and had not been raised in the joint statement nor put to the surgeon who was accused of negligence. These further hypotheses were therefore discounted by the judge and taken as further evidence of his unreliability as an expert witness. The second was his failure to comply with part 35 of the Civil Procedure Rules (CPR). The declaration at the end of his written report and in the joint report indicated that he had done his best in the report to be accurate and complete, but, according to the judge, "he had plainly done nothing of the kind".

Therefore, in light of all these factors Mrs Justice Andrews concluded, "His general intransigence, his sloppy attention to detail and his failure to abide by his duties as an independent expert did not just lead me to question his reliability, it left me with no confidence in him. It is bad enough that he fell so far short of the standards to be expected of an expert witness in this case, but what makes it particularly serious is that he did so against a background where another judge had said for very similar reasons that her confidence in the reliability and impartiality of his evidence had been so severely undermined that she would treat it with great caution. This therefore was not an isolated aberration". On this basis she dismissed the claimant's expert evidence and relied on that of the defence expert who she described as, "The model of an independent and impartial expert, balanced, fair and objective". The claim for damages, set at £725,000, was dismissed.

There is much to learn from this case. We are not immune from criticism, rebuke or litigation. Within an adversarial system as exists in this country, each side will seek, wherever possible to discredit the expert evidence of the other side. In Harris v Johnston it appears that the claimant's expert evidence made this relatively straightforward for the defence legal team. Therefore, on the basis of this case there are further rules that we can add to those outlined above:

- Don't take logically indefensible positions
- Don't have an intransigent mind set
- Understand the legal tests and processes that will be applied to the issues under consideration
- Learn from errors or mistakes. Mature reflection is part of the appraisal process in clinical practice and can be equally well applied to expert witness work
- In reality, fewer and fewer claims of this nature seem to end up in Court. Sensible, well thought through, impartial opinions from experts who are familiar with the territory should continue to ensure that this is the case. ■

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References

1. Jones v Kaney (2011) UKSC 13
2. Harris v Johnston (2016) EWHC 3193
3. Bolam v Friern Hospital Management Committee (1957) 1 WLR 582
4. Badenoch J A doctors duty of disclosure and the decline of the Bolam test: A dramatic change in the law on patient consent (2016) Medico-Legal Journal 84: 5-17