Conferences in medico-legal cases - don't get ambushed

Michael A Foy

I want to tell you a story. In my 28 years as a consultant I have provided a lot of expert reports in both personal injury and clinical negligence cases. Therefore, invariably, I have attended a lot of conferences with solicitors, barristers and other experts. This area is covered in the BOA "Code of Practice for Orthopaedic Surgeons Preparing Reports in Personal Injury and Other Cases" (2014).

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This is downloadable in a pdf from the Association's website (link in reference). As discussed therein, the purpose of such meetings is usually to clarify issues in relation to the veracity of the claim (or defence) and to ensure that the legal team properly understand the nature of the medical issues involved.

Conferences may take place over the telephone, via video link or in person. It goes without saying that the expert should spend some time thoroughly familiarising himself with the facts and opinions provided in the case ahead of any conference as the barrister no doubt will have done so. The legal team usually want the expert to attend in person, but they understand that busy clinicians can find it difficult to take a half day or day out of their schedule and will usually settle for attendance over the telephone. Sometimes they will insist on the expert attending in person. This is when the antennae should come out. On most occasions this is either because the issues in the case are particularly complex, sometimes in clinical negligence cases the legal team want the expert in the same room as the claimant or accused clinician. However, most often in my experience it is because the barrister wants to "test" the expert to see how well he is likely to stand up to vigorous questioning from his opposite number in the witness box if the case proceeds to Court.

This leads in quite nicely to the story that I want to tell you; the other reason for attendance in person is to ambush the expert! I was recently asked to attend a conference in person in a personal injury case where I had provided an expert report for the defence (via the solicitors acting for the insurers).

The case involved a claimant who had quite severe (potentially life-threatening) injuries including spinal fractures. When I read through the file and documents a few days before the conference I was surprised that I was being asked to attend in person because the issues seemed relatively straightforward. I asked my secretary to check with the instructing solicitor that they definitely wanted me there in person as it was a four hour round trip. They confirmed that they did. As it was in the diary and therefore clashed with no other commitments I thought no more of it and went ahead. As one does in the 21st century I picked up my mobile telephone

to check my emails at 10pm before wandering off to bed.

I was intrigued to see an email (sent at 9.30pm), from the solicitor who had instructed me whose name I recognised as I was familiar with the file having recently reviewed it. My first thought was that the conference was cancelled or they had decided that there was no need for me to attend in person. But no, the email had an additional expert report attached to it that I had not previously seen. The report had already been disclosed to the other side and was dated some months earlier. The report was from a speciality allied to my own (pain management). The solicitor apologised profusely for the late disclosure indicating that the barrister wanted me to see it ahead of the conference which was due to take place the following morning. I didn't think too much about it but resolved to read it on the train the following morning en route to the conference. I duly did this and noted that there were no major differences between myself and the allied expert, except that his prognosis (already you will recall disclosed to the other side) was, shall we say, a little more optimistic than the prognosis given in my own report. Still a rat was not smelt by yours truly.

At the conference were myself, barrister, solicitor, solicitors' assistant and the pain expert. The pain expert was on the speaker 'phone. A little strange I thought. I had not been told (and had not asked) but was informed that my report had not yet been disclosed and the legal team would like me to "tidy it up a bit" prior to disclosure to the claimants solicitors. It soon became abundantly clear that what they actually wanted was for me to remove significant paragraphs of flowing prose and defer to the pain expert in terms of prognosis, given that the claimant was no longer under the care of an orthopaedic/spinal surgeon. The pain expert's report was obviously significantly more favourable to the insurer in terms of the compensation that would be paid to the claimant.

The barrister politely explained that the Courts were easily confused and liked evidence >>

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to be compartmentalised as much as possible. Judges apparently find it difficult if there is overlap or conflicting opinion from experts on the same side. I explained that whilst I sympathised with this approach it did not accord with reality. I explained that in clinical practice we have regular multi-disciplinary team (MDT) meetings because of the failure of clinical problems to compartmentalise themselves. I also explained that I did not believe that it was appropriate to remove tracts of flowing prose and defer to my allied expert colleague when my opinion on the prognosis differed from his. A rather heated exchange took place if truth be known. The conclusion of this episode was that I presented them with two options, sack me and instruct someone else in my field or allow me sufficient time to consider the expert pain report in more detail and, if I felt it appropriate to do so, modify my report in light of that consideration. The latter course was eventually agreed.

What can we learn from all this? Am I suffering from paranoia? Clearly there are two possible explanations for the disclosure to me of a report pivotal to a face-to-face conference that was due to take place approximately 12 hours later. The first of these is gross incompetence on behalf of the solicitor +/- barrister. Obviously the correct course of action would have been to send me the allied expert report in good time ahead of the conference so that I could properly consider its contents and either comment upon it or amend my report as appropriate. Over the years I have seen a lot of incompetence in the legal management of medico-legal cases and no doubt the legal profession can point to a lot of similar incompetence from their experts. This would be the charitable interpretation of events, simple incompetence. The second explanation is the one alluded to above (the paranoia scenario) that is they wanted to throw me a last minute fastball in order for me to agree to changes/concessions before I had a proper chance to consider the evidence. I think I favour the latter scenario.

Strangely enough, since drafting the above, I have been involved in another conference over the telephone on a complicated spinal infection/cord compression case where in my liability and causation report I had recommended that an expert spinal/neuro radiology report should be commissioned to help clarify some of the issues. I was asked for my views on the report and how it had impacted on my opinion when I had not been provided with it! Paranoia was not a consideration in this case as it was clearly incompetence given the discomfiture between the solicitor and barrister during the conference.

Therefore :-

1. Beware receipt of last minute information before meetings, conferences etc. Raise the antennae, be paranoid. In view of the second case described above, don't assume that the solicitors will necessarily send you all the relevant information, you may occasionally have to request it.

2. Remember your instructing solicitors are not always on your side, nor necessarily should they be. They represent their client (insurer or claimant) and will probably do whatever they reasonably can to change your view so that it is as supportive as possible to their clients' case.

3. Remember that the Civil Justice Councils "Guidance for the Instruction of Experts" (2014) does state that experts should not be asked to amend, expand or alter any parts of reports in a manner which distorts their true opinion, but may be invited to do so to ensure accuracy, clarity, internal consistency, completeness and relevance to the issues.

4. Follow the BOA guidelines, but still expect the unexpected. ■

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References

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