

Getting the Right Experts at the Right Time in RTA/PI Claims

Chris Bright QC

1.1 A Solicitor's Perspective/Checklist

Initial Decisions

When to instruct/on what issues/in what specialisms?

- Breach of duty (e.g. RTA or engineering) & causation.
- Condition and prognosis.
- Life expectancy.
- Start with the weakest link?
- Know your specialisms e.g. urology, renal, nephrology.
- Overlapping specialisms? Advice from colleagues/Counsel.
- Orthopaedic/Spinal Surgeon/Neurosurgeon.
- Psychologist/Psychiatrist/Neuropsychiatrist.
- Orthopaedic foot surgeon/Podiatrist.
- Research the expert:
 - Recommendation/references.
 - CV.
 - Review published papers/Google them e.g. evidence in Court.
- Firm database/APIL/Counsel/fellow Solicitors/other experts.
- Reduce uncertainty by asking the expert:
 - Discipline/qualifications/status.
 - Are they aware of recent advances (e.g. life expectancy).
 - Waiting list/cost/geography.
 - Reporting/court experience.
 - Are they conflicted e.g. "my Registrar."

Permission

Will permission be given in accordance with the overriding objective of the CPR?

- Is it relevant matter which is in dispute between the parties?
- Is it reasonably required to resolve the proceedings?
- Does the expert have expertise relevant to the issue on which an opinion is sought?
- Is that expertise appropriate that value, complexity and importance of the case?
- Can these objects be achieved by the appointment of a single joint expert?
- Examples: (1) Permission for accident reconstruction experts may or may not be given, but is more likely in a high-value claim or one with multiple vehicles or the issue of reduction of injury as well as avoidance of collision. (2) Permission for an employment expert is now less likely, save in particular circumstances; see case of **Turner v Walsall Hospital NHS Trust** [2013] EWHC 1221 (QB), relevant to the

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grant or refusal of permission to rely upon an employment expert. Mr Justice Globe upheld the decision of a Master in refusing the claimant permission and indeed indicated that, in the circumstances, he would have exercised his discretion in exactly the same way. (3) Permission for care experts may not be granted in cases involving only calculations of past care (possible from witness statements/accepted hourly rates, etc.) and limited future care.

In relation to the expert I choose:

- Have I used them before?
- Do they come recommended?
- Has someone seen them give evidence at trial?
- Specialism?
- Experience?
- Cutting edge?
- Robust?
- Fair and balanced?
- Outside their discipline?
- Too junior/over the hill?
- Known to be partisan e.g. mix of work (cf respected by defendants)?
- School of thought?
- Vacillate under pressure?
- Conflicted?
- Will they be proactive in responding to my instructions/asking questions in relation to key points?
- Will they contact me personally, particularly if something goes wrong?
- Will they confirm any missing documents, x-rays or scans that they require?
- Will they answer the questions I ask of them in their report?
- Can I be sure that they will give me a realistic timetable, keep me updated and comply with it? Or will they over promise and fail to deliver?
- Will they stick to their budgets/cost estimates?

Letter of Approach

- 1 page.
- Background.
- Issue(s).
- Hospital where treated re potential conflicts.
- Are you the correct expert?

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Letter of Instruction

- Hourly rate, estimate of/cap upon total fee.
- Timescale.
- Enclosures.
- Summary of facts.
- Summary of medical evidence.
- Relevant law.
- Pagination/literature.
- Identify missing documents.
- Specific questions.

Seeing things from an expert's perspective

- I am often approached but less often instructed.
- The medical records are a mess and incomplete.
- I report.
- I hear nothing for six months.
- I receive a list of detailed questions with a deadline of a week.
- My spelling, explanations, and views are all criticised.
- I hear nothing for a year and am then asked to cancel my holiday for trial!
- I don't know the result of the claim and am still waiting for payment.

In summary, remember that good expert evidence is key.

- Treated well, experts will:
 - Accept instructions.
 - Help screen cases for free.
 - Understand when you make mistakes.
 - Help you get the best possible result.

1.2 An Expert's Perspective/Checklist

Clear lessons to be learned/rules to follow:

- Read and be familiar with your duties to the Court as an expert as set out in the judgment of Mr Justice Creswell in the *Ikarian Reefer case [1993] 2 Lloyd's Report 68*.
- Take on board the key issues of not being an advocate in the case and of declining instructions where a conflict-of-interest may arise, or at least immediately and openly identifying that possibility.
- Be familiar with at least the basics of law, evidence and procedure.
- Identify clearly your qualifications and experience, both in summary and via a

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CV.

- Identify and be ready to justify the split of your instructions/reports.
- Do read all of the papers provided, and record that you've done so.
- Don't stray outside your field of expertise.
- Aim to write a report that you yourself would find to be clear, balanced, comprehensive and logical.
- Do refer to/rely upon your clinical/therapeutic experience and views, but cite your support e.g. from professional bodies and guidelines, etc.
- Don't be dogmatic or have a preconceived view or develop unscientific prejudice.
- Don't be selective in the evidence you identify to support your opinion.
- Don't be too technical; keep it simple and comprehensive.
- Be professional e.g. rigorous in your use of medical literature and particularly research.
- Be consistent in your opinion, especially between your written and oral evidence.
- Ensure that you can support any opinion proffered.
- Be able to keep calm and lucid in court, listening carefully to the question and giving short but clear answers whilst asking for clarification or permission to elaborate briefly if necessary.
- Don't change your response (or even your demeanour) because of who's asking the question, and don't become an advocate in the case.
- Be balanced; acknowledge the counter-argument and defer to the expertise of others, even if you disagree with them, and do so willingly, not begrudgingly.
- Be ready to make concessions, if and when appropriate.

1.3 Experts' Meetings

- Make sure that the experts prepare thoroughly for the joint discussions, even when conducting them by telephone.
- Consider having a brief telephone conference with them immediately before.
- Make sure that they are clear about the objectives of the joint meeting, and particularly that it is to identify those matters on which there is agreement and disagreement, with a summary of the reasons for each, but not for them to arrive at a compromise view or otherwise attempt to "settle the case".
- Make sure that they have all the relevant documentation, if necessary in a newly organised electronic or paper bundle.

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- Remind them of what is admitted/denied and the issues in the case, and to use them as a starting point, rather than reopening any issues.
- Remind them of what views they have previously expressed in their reports as exchanged, if necessary supplemented by any further views given in conference.
- Ensure that, if there are different versions of the facts, each version is addressed.
- Encourage them to be firm, but to listen to argument, and to take a careful note, irrespective of who is drafting the joint statement (although encourage them to do so in order to retain control of the process).
- Identify any deadlines for receipt/service of the joint statement.
- Remind them that, once the discussion is completed, the circulation of the draft joint statement is to record what was said, not to give their opposite number (or them) a 'second bite of the cherry'.
- Remind them of the basic legal principles.

1.3 A Judge's Perspective

Judicial Checklist:

- Specialism/experience.
- Admits anything outside experience etc.
- Comprehensively identifies/states facts and assumptions.
- Takes account of all relevant matters e.g. history/records/witness statements.
- Identifies limitations on research.
- Provides copies of clinical literature/CV/photographs etc.
- Acknowledges/communicates any change of view.
- Independence.
- Objectivity.
- Mere expression of opinion insufficient.
- Evaluation of reasoning.
- Internal consistency and logic.
- Underlying hypotheses.
- Foundational facts, i.e. 'pillars.'
- Demeanour in witness box.
- Response to cross examination.
- Preparedness to concede bad/weaker points.
- See ***Scott v Bloomsbury H.A.*** [1990] 1 Med LR 214 Brooke J re Eric John Radley Smith (1910-2003) neurosurgeon. *"He is now an old man. He was very free with his allegations of professional negligence against a number of doctors and surgeons, all of which have been shown to be without foundation. These*

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allegations were in my judgment found on a superficial reading of the relevant notes and records and a totally inadequate appreciation of matters, which were well known to those who have up to date responsibility for the day to day care of patients suffering from the long-term effects of spinal injuries, but which were unknown to him.”

- See ***Briscoe v University Hospitals Coventry*** [2004]. The expert:
 - Failed to acknowledge the range of views found in the literature.
 - Relied only on his clinical experience for preferring one view to the others.
 - Selective and inaccurate in his written evidence.
 - Inaccurate assessment of power in B’s left calf.
 - Difficulty interpreting MRI scans and using the light box.
 - Unfamiliar with current thinking on denervation.
 - Lacked clear command of terms used to describe disc protrusion.
- See the “*high temperature*” case of ***Janis Williams v Calvin Jervis*** [2008] EWHC 2346 (QB) (paragraphs 9-11, 83-88 and 96-97 re Mr Robert Hay, Consultant Orthopaedic Surgeon, and 101-119 re Dr Michael Gross, Consultant Neurologist).
- See the consequences of adopting polarised/extreme positions in ***Huntley v Simmons*** [2010] EWCA Civ 54 (paragraphs 5-11 and 30-34).
- See Maggie Sargent preferred over Gazala Makda in ***Love v Dewsbury*** [2010] EWHC 3452 (QB) (see paragraphs 48-59 and 53-54 and 58).
- See the trenchant criticisms of Professor Barnes in the Annex to the judgment of Mr Justice Kenneth Parker in the case of ***Kristopher Loughlin v (1) Kenneth Singh (2) PAMA & Co Ltd (3) Churchill Insurance Co*** [2013] EWHC 1641 (QB).
- See the dangerous consequences of a failure to declare a potential conflict-of-interest in ***EXP v Dr Charles Barker*** [2015] EWHC 1289 (QB) (see paragraphs 5-19, 32, 40, 45-65 and 72-74 re Dr Andrew Molyneux, Consultant Neuroradiologist).
- See the observations of Mr Justice Turner in ***Ben Harman v East Kent that NHS Foundation Trust*** [2015] EWHC 1662 (QB) in relation to overlong reports and narrowing the issues (paragraphs 31 and 32).
- See the consequences of a “*shifting position*” in the case of ***Robshaw v United Lincolnshire Hospitals NHS Trust*** [2015] EWHC 923 (see paragraphs 168-177 re Hazel Tuckfield).
- See again Maggie Sargent v Liz Utting on the issue of ‘double up’ care in ***Lamarieo Manna v Central Manchester University Hospitals NHS Foundation Trust*** [2015] EWHC 2279 (QB) (paragraphs 192-219; guess who wins again?!).
- See ***Melissa Rich v Hull & East Yorkshire Hospitals NHS Trust*** [2015] EWHC 3395 (QB) (see paragraphs 78-84 re Mr Richard Porter, Consultant Obstetrician and

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Gynaecologist having “*failed to give objective and independent evidence to the Court on a number of important matters*”, such that Mr Justice Jay directed that he be sent a copy of his judgment and a summary of an expert’s obligations in the *Ikarian Reefer* case). Ouch!

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Appendix 1

Identifying the Right Experts (in TBI/Spinal Injury claims)

Which Clinical Disciplines?

- Orthopaedic
- Neurosurgical
- Neuro-rehabilitation/Neurology
- Neuropsychology
- Psychiatry/Neuropsychiatric rehabilitation
- Gastroenterology (percutaneous endoscopically-guided gastrostomy (PEG) tubes for long term feeding; likely duration of use, extent and cost of daily care/potential complications and further monitoring/treatment).
- Ophthalmology/Audiology/ENT (sight/hearing/smell and taste).
- Urology and colorectal (consequences of long-term indwelling catheter/vaginal fistula/bladder/bowel problems/need for related surgery).
- Maxillofacial.
- Plastic surgery (i.e. for facial or other scarring).

Orthopaedic Issues

Particularly relevant in TBI cases with a concurrent spinal injury:

- Complete v. incomplete SCI
- Indications for surgical/neurosurgical intervention
- Mobilising v. wheelchair use
- Bladder and bowel management
- Deterioration of mobility in later life
- Autonomic dysreflexia and/or syrxinx
- In any event, contractures and maintenance physiotherapy to maintain mobility and therefore quality-of-life

Neurological Issues

- Injury severity
- Capacity
- Convulsion risk
- Life expectancy

Neuropsychological Issues

- Cognitive deficit
- Behavioural problems
- Potential for independence

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- Potential to work
- Mental capacity.
- 'Malingering'(Effort testing/SVT).

Quantum Experts

Disciplines:

- Orthopaedic/neurosurgery (re: severity of injury, ongoing management and pain levels).
- Urology (bladder and bowel function and care).
- Neurology (injury severity/capacity/life expectancy).
- Pain management (e.g. consequential CRPS).
- Rehabilitative medicine (particularly for initial “catch up”/intensive rehabilitative therapy, in order to counter months or even years of under-provision and arguably in the interests of both parties).
- Brain Injury Care and Case Management.
- Occupational therapy.
- Physiotherapy.
- Speech therapy.
- Maxillofacial/cosmetic surgery.
- Accommodation/disability architect.
- Assistive technology.
- Probably not employment, save in particular circumstances. The case of **Turner v Walsall Hospital NHS Trust** (reported on Lawtel on 11/04/13 - doc no. AC9201105) is relevant to the grant or refusal of permission to rely upon an employment expert. Mr Justice Globe upheld the decision of a master in exercising his discretion to refuse the claimant permission and indeed indicated that, in the circumstances of the case, he would have exercised his discretion in exactly the same way.

Basis of Instruction

Clinical experts are usually instructed singly, as will be Care/OT and accommodation experts. Consider (and/or the Court may raise) the instruction of less contentious experts on a single joint basis (e.g. orthopaedic - on a Claimant and/or their parents/ carers - gastroenterology and urology/colorectal, SALT and even physiotherapy if a home pool does not arise). Employment and assistive technology experts may be more controversial (see **Turner** above).

Note however that a clinical case manager owes duties to the patient alone and has to make decisions in the best interests of the patient. Post the Rehabilitation Code, the

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appointment of the case manager should arguably not be made by the parties jointly; see *Rebecca Wright (by her Litigation Friend Karen Fay) v. Kevin Sullivan* [2006] 1WLR 172 CA. If they are called to give evidence, it follows that they are a witness of fact and are not giving evidence of an expert opinion.

The Court of Appeal considered that the representatives of both parties and their expert witnesses should have liberty to communicate with the case manager, who owes duties to the patient alone. In addition, the clinical case manager should be free to attend a conference with legal advisors under privilege of which the court had no power to direct a waiver or to prevent attendance. They cannot do so if jointly instructed. Claimant solicitors should therefore be wary of defendants appearing to want to act in the patient's interests by the funding of a joint case manager but actually seeking to be involved as a way of gaining information and control.

The Big Quantum Issues

- Care - Regime e.g. one or even two resident carers or a team of rota carers? Care at home or institutional care? The nature and extent of night care.
- Care - Public funding.
- Life expectancy.
- Provisional damages.
- Lump Sum and PPO or just Lump Sum?

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Appendix 2

Sample Agenda - Notes for Guidance

Objectives

Your discussions should be face-to-face if possible but by telephone/video conferencing if not. They are without prejudice to the interests of the parties, but the statement which you subsequently agree and sign is likely to be made available to the Court at trial.

You are reminded that your overriding duty is to the Court, and not to the party instructing you.

The purpose of the meeting is for you, pursuant to that duty, to identify points of agreement and residual points of disagreement between you which will require the resolution of the Court on the evidence. You may also wish to identify any steps which might reasonably be taken to resolve the outstanding points of disagreement. No attempt should be made by any expert to deal with matters outside that expert's particular area of expertise.

It is not intended that the experts should arrive at a compromise view during the discussion or otherwise attempt to "settle the case".

Documentation

Please ensure that you have available to you all relevant documents, including pleadings, witness statements, experts' reports and medical records.

Unless stated otherwise, references are to your respective reports of X and Y.

Issues

E.g. breach of duty is not in dispute but issues of causation, condition and prognosis, etc. remain in dispute.

Agenda/Joint Statement

This agenda is intended to provide a framework for your meeting. At the conclusion of the meeting the parties expect you to draw up an agreed and signed statement setting out your views in relation to each question. If the meeting is via telephone/video conference, please appoint one of you to keep a verbatim note and to prepare and circulate a first draft. In doing so, please first state in full each of the questions before setting out your answers.

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If you feel that you cannot answer a question as drafted, you should feel free to begin your comments by re-framing the question. The questions are intended to assist and should not restrict your consideration of other material issues. If there are such issues, please discuss them and, as in all cases, note points of agreement and disagreement, and succinct reasons for the latter.

If your opinion is based on disputed facts, then the Court will determine the facts. Please set out your opinion on each disputed factual basis, for example: "*We note that the evidence on this point is disputed, in that..... If the facts are found to be X then my/our opinion is A, B, and C; if the facts are found to be Y then my/our opinion is (D, E, and F or unaltered).*"

A copy of the joint statement should be signed by both experts and forwarded to their instructing solicitors within 7 days of the experts' discussion.

Basic Legal Principles

The standard of proof to be applied before a fact is established is "*the balance of probabilities*". A fact or matter is treated as established in law if it is more likely than not i.e. there is a greater than 50% chance of it being correct. It is not a matter of a 100% probability, a certainty, or of being "*sure*".

When expressing an opinion on breach of duty, please refer to (e.g. all relevant regulations, industry standards and research papers).

In terms of causation, the Court has to be satisfied that a particular act or omission has caused or materially contributed to an injury or damage suffered.

A "material contribution" to injury or damage is a contribution which is not "de minimis" and is therefore a contribution which is of more than trifling importance;

As to the probability of any particular past event having occurred or the chance of an event occurring in the future, please express your views as to past events in terms of balance of probability (i.e. more likely than not) and your views as to future events in terms of chance expressed as a percentage.