Are you sure you've read everything?

By Paul Newman

3PB

We are often told the devil is in the detail. It is difficult to be a good lawyer if you have no taste for detail. Equally, it is crucial for an expert witness to be on top of the detail. It is easy for an instructing lawyer to take an expert on trust – assume being busy equals competence and that they are up to date with research papers alongside their own clinical practice. There are no prizes for cutting corners or for any failure to stress test preconceptions. Equally an expert needs to know when to change their opinion and have the courage to do so.

A month or so back in his excellent blog, *Civil Ligation Brief*, Gordon Exall remarked about the dozen or so cases he had already identified in 2022, dealing with what might be described as expert witness mishaps. That suggests that experts are still getting it 'wrong' on a fairly regular basis.

The judgment of HHJ Richard Clarke in *Hertfordshire CC v Mother & Father & Others [2022] EWFC 106* is a helpful read. The case concerned a fact-finding hearing in child care proceedings, where the local authority had brought care proceedings. A seven week old child suffered brain injuries in a fall from a height of four – five feet. The proceedings followed a report prepared by Dr N, a consultant neuroradiologist, who could not '*recall ever having seen such an injury as a result of an episode of domestic impact trauma*.' The local authority's case was that the injury was non-accidental. Dr N did not appear at Trial. Expert witnesses at Trial included a distinguished professor of neuroradiology at Edinburgh University, Professor Sellar (the judge permitted his name to be disclosed) and Dr AM, a consultant paediatric radiologist. During the course of the Court proceedings Dr AM, changed her view, when challenged with relevant literature. Professor Sellar was given the opportunity to reconsider his evidence, but chose not to do so. That left him as the only expert still maintaining the injury could not be accidental. He was cross-examined on his duty to the Court and the factual and other deficiencies in his evidence.

Not reading the Papers

In cross-examination Professor Sellar accepted that he had not read the papers fully. He had received almost 1,000 pages of medical records late on. According to the judge [96] – *'He*

referred to the huge amount of literature and the limited amount of time to do these cases. He later spoke about the fact that in an ideal world you would read every line of every note before you come to court. When asked why he had not requested more time he stated he was continually hassled to produce reports as soon as possible.' He also offered the explanation he had not been able to open a particular electronic file.

Being Exposed

Cross examination of Dr Sellar was obviously aimed at discrediting him. According to the judgment [119] – *'Professor Sellar accepted in evidence that he knew there would have been reports from the scans at GOSH. He knew he was missing reports he had specifically been asked to comment on, yet he provided his report without seeking those reports or specifically stating he had not seen them. This was despite his certification that he had done his best, in preparing the report, to be accurate and complete, and that he had drawn attention to all matters, of which he was aware, which might adversely affect his opinion.'*

Payments of Experts

In his letter of instruction Professor Sellar was told that if his hours were likely to exceed 45 hours, he was to notify his instructing solicitor so that additional funding could be sought. There was no record of him seeking additional fees. The expert then charged the full 45 hours yet had considered just over 300 pages at the date of his report. He produced a 45 page report, including appendices. The actual report was 27 pages long, but of those only seven pages included substantive comment. That led to allegations of overcharging.

Shutting your Eyes

Professor Sellar had disregarded the existence of a range of reasonable opinion that the child's fall could have been accidental [120]. It was a complex fall with different gravitational and rotational forces.

Missed Sources

Not only did Professor Sellar fail to read all the information he was sent, but he also omitted reference to the main research literature and misquoted other literature. Unlike Dr AM he stuck to his guns when presented with the relevant research literature that clearly pointed to a change of opinion.

During the course of argument father's counsel made a number of criticisms of Professor Sellar. Those can be summarised as good practice points –

i) Read the material provided

ii) Tell the instructing solicitor immediately if some electronic files are corrupted

iii) Follow the instructions and seek clarification

iv) Verify sources

v) Do not assume other experts have all the facts

vi) Consider contrary propositions properly

vii) Do not mislead the Court by misquoting other experts or research

viii) Understand the research in the relevant discipline

ix) Avoid preconceived opinions and be willing to change opinions to meet the evidence

In short, a new twist on an old theme and a timely reminder that the Ikarian Reefer remains 'good law'.

08 December 2022

Paul Newman

Barrister
3PB

0117 928 1520
paul.newman@3pb.co.uk

3pb.co.uk