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King's Bench Walk

Success for David Sanderson: Paying the price of expert shopping – Burke v Imperial Healthcare [2019] EWHC 3719 (QB)

David Sanderson successfully appeals against a case management order inadvertently permitting expert shopping.

The judgment of Tipples J serves as a sharp reminder to parties who seek permission to change experts that they will be expected to notify the other party of their intention in advance of the hearing. Failure to do so will impose on them a duty to make full and frank disclosure and to ensure that all material information, both as to the law and the facts, is placed before the court. It is necessary to remind the court of the general rule that a party who seeks to change experts will be permitted to do so only on condition it discloses all the written evidence obtained from the former expert. To displace this general rule, the court will need to be satisfied that there is no hint of expert shopping and no attempt to withhold relevant information.

Background

This appeal is born out of a claim of clinical negligence in connection with a partial nephrectomy performed on 10 February 2015. At the first CCMC, no directions were given for expert evidence as mediation was anticipated. Mediation failed and, at the second CCMC, the Master gave the defendant permission to adduce expert urology evidence from Mr Mark Sullivan, in place of Mr Christian Brown, who had been named in the Defendant's Directions Questionnaire. No condition was imposed requiring Mr Brown's reports to be disclosed, because the Master was satisfied, on the basis of defendant counsel's submissions, that there had been no expert shopping.

Grounds of Appeal

David Sanderson for the claimant was given permission to appeal by Mr Justice Stewart on two grounds:

1. The decision of the Master to permit the defendant to allow the expert urological evidence of Mr Mark Sullivan in place of that of Mr Christian Brown was unjust because it was made in response to an oral without notice application, unsupported by evidence, and without hearing full legal argument;
2. The master was wrong to refuse to require the defendant to disclose all written expert evidence obtained from Mr Christian Brown as a condition of being granted permission to rely upon the expert urological evidence of Mr Mark Sullivan.

The Facts

The Claimant underwent an open partial nephrectomy in February 2015. During the surgery his bowel was perforated by the operating surgeon. The injury went unrecognised at the time and for a week following the operation. After significant pain and abdominal distension, the Claimant underwent an emergency laparotomy to remove the damaged section of bowel and to carry out a defunctioning ileostomy, forming a stoma in the abdomen. The Claimant wore a one piece stoma system for 3.5 months after which the ileostomy was reverse in a further operation. Thereafter, the Claimant developed a complex incisional hernia that required a further surgery to fit a mesh, and he has continuing intrusive symptoms that have prevented a return to work and greatly reduced his quality of life. His allegations are three-fold:

1. The surgery was poorly performed leading to the perforation of the bowel;
2. The post-operative care was poor which led to a delayed discovery of the perforation and unnecessary pain and suffering

3. The Claimant was not properly consented for the partial nephrectomy because the alternative minimal access surgery (robotic partial nephrectomy) was not discussed.

The Defendant (i) denies the first allegation, and contends the Claimant was advised as to the risk of a bowel perforation; (ii) admits that post-operative care was poor; and (iii) admits that the alternative surgery was not offered, but denies breach, in that minimal access surgery was not an option because the only suitably qualified member of staff was unwilling to perform the operation in view of the location of the tumour.

The Legal Principles

Tipples J set out the basic principles about which any court hearing an application on a without notice basis should be informed. These can be broken down as follows:

- Per *Coyne v Morgan* (2016) HHJ David Grant, the court has a wide and general power to exercise its discretion whether to impose terms when granting a party permission to adduce expert opinion;
- Per *Edwards-Tubb v JD Weatherspoon PLC* [2011] EWCA Civ 136 that a power to impose a condition of disclosure of an earlier report is available where the change of expert occurs pre-issue as it is when it occurs post-issue. It is a matter of discretion which should usually be exercised where the first expert reported after the parties engaged with each other in the process of the claim;
- Per *Vilca v Xstrata Ltd* [2017] EWHC 1582 (QB), the object of imposing a condition that reports of previous experts should be disclosed is to prevent expert shopping and to ensure that full information is available. If there is a hint of undesirable expert shopping, or that significant relevant material is being withheld, the imposition of the condition will be the usual order.

The principal issue in the case was then whether or not the court should depart from the usual order and allow the change of expert without an order for disclosure of the original expert's reports. That being so, Tipples J gave the following guidance:

- In line with *Coyne*, the court's discretion as to whether to impose a term when giving permission to a party to adduce expert opinion evidence arises irrespective of the occurrence of expert shopping;
- When the court chooses not to impose a condition giving permission to adduce expert evidence, the court must understand why it has departed from the general rule and the factual basis for that. Without a full explanation from the applicant making clear there is no expert shopping, there will always be a suggestion of expert shopping which is itself sufficient to give rise to the imposition of a condition requiring disclosure of the previous expert's report;
- Any application to change experts should be notified to the other party in advance, so that party has the requisite opportunity to consider the proposed application and respond appropriately.
- Where a party does not put the other side on notice and seeks to make an application for the first time at a CMC, that party is under a duty of full and frank disclosure. For the purposes of this appeal, that duty extended to all matters necessary to show the court that there was no hint of expert shopping, nor withholding of relevant information.

It was common ground that, on appeal against a case management decision, the appeal court cannot interfere unless the decision is plainly wrong. Per Lord Neuberger in *Prince Abdul Aziz* in the Supreme Court [2014] UK SC64, it must be shown that the decision was outside the generous ambit where reasonable decision makers would agree. The Claimant did not dispute that the defendant should be entitled to instruct a second expert in place of the expert originally instructed, the only dispute was as to the terms on which the defendant should be permitted to do so.

The Chronology

Tipples J produced a procedural chronology which focusses on the extent of the Defendant's relationship with Mr Brown. The judge made explicit reference to each point at which the Defendants sought the expert advice of Mr Brown. These were:

- 19 October 2016 – to respond to the original the letter of claim;
- 18 April 2018 – to respond to the second letter before claim;

- 29 November 2018 – to prepare the Defence.

Thereafter the following dates were relevant for the same purpose:

- 14 December 2018 – the Defendant completed and served the directions questionnaire. It answered the question 'have you already copied any expert report(s) to the other parties?' by ticking the 'no' box. Mr Brown is then identified in section E of the form as the expert urologist;
- 21 December 2019 – the Defendant's cost budget included costs relating to an expert urology report;
- 14 January 2019 – the first CCMC produced an order expressly stating that, if mediation fails, the next CCMC would be on 30 July 2019;
- 21 June 2019 – the Defendant held a conference with counsel and Mr Brown at which Mr Brown confirmed he had very limited experience of robotic partial nephrectomy as a consultant;
- 24 June 2019 – Mediation failed;
- 24 July 2019 – the Claimant's solicitors sent draft directions the Defendant's solicitors;
- 25 July 2019 – The Defendant's solicitors replied to the extent that they cannot agree the directions and will revert with further draft directions. The Claimant's solicitors responded that they were surprised that Defendant could not agree areas of dispute and informed that they intended to rely upon an expert histopathologist;
- 30 July 2019 – the second CCMC took place, at which, towards the end of the hearing, the Defendant for the first time gave no notice that they wished to instruct Mr Sullivan in place of Mr Brown. The Defendant's counsel assured the Master that "there is no issue of expert shopping, this matter is simply beyond his expertise and he cannot assist the court. His current report is not Part 35 compliant." The Master accepted these submissions and did not impose a condition that Mr Brown's report be disclosed.

The Judgment

Tipples J highlighted that:

1. The Defendants had provided no substantive response to the Claimant's draft directions before the hearing;
2. The Defendant had not informed the Claimant that it no longer wished to instruct Mr Brown as a urology expert at trial, but wished to instruct Mr Sullivan, although it knew of this intention before the hearing.

The judge was satisfied that the information provided to the Master by Defendant's counsel was "incomplete, wrong and, as a consequence, misleading": The Defendant's counsel told the Master that:

1. Mr Brown was not sufficiently experienced to prepare a part 35 liability report that would provide useful expert evidence to the court;
2. Mr Brown's involvement was very limited and only at a very early stage of proceedings "in responding to the letter of claim";
3. Mr Brown's involvement added nothing to the case.

The true extent of Mr Brown's expertise and his involvement in providing expert evidence to the Defendant contradicted these submissions. The evidence before Tipples J revealed that: (i) in the five year period before February 2015, Mr Brown performed over 250 radical and partial nephrectomies and over 800 robotic operations (albeit no robotic partial nephrectomies as a consultant); (ii) Mr Brown's urological colleague at Guy's Hospital, Mr Ben Challacombe, is the highest volume surgeon for robotic partial nephrectomies; (iii) Mr Brown had attended hundreds of multi-disciplinary team meetings with Mr Challacombe and gained much experience relating to the appropriateness of robotic surgery for particular kidney tumours.

Tipples J held that the Master had been misled into making an order which was wrong. Allowing the appeal she held that there was "more than a hint of expert shopping", and that the court should impose the usual condition requiring disclosure of all the written evidence produced by Mr Brown, as a condition of being permitted to rely on the evidence of Mr Sullivan.

David Sanderson and Samuel Cuthbert

The full judgment can be found here:

Full judgment