Pitfalls in Clinical Negligence Claims: A Case Study

On 18 December 2019, Her Honour Judge Melissa Clarke, the Designated Civil Judge sitting at Oxford Combined Court, handed down judgment in *Docherty v Oxford University Hospitals NHS Trust* (Unreported, 25, 26 & 27 November 2019). This was a clinical negligence claim in which the Claimant made various allegations in respect of her immediate post-natal care which led to her sustaining a serious ankle injury when she fainted due to anaemia caused by blood lost during an instrumental delivery the previous morning.

The judgment is worthy of consideration. Although this was a matter which eventually turned very much on its own facts, there are aspects of the way the Claimant's case was prosecuted and presented which was subject to comment from the judge, and ultimately led to the case being dismissed in respect of breach of duty and causation.

These are issues which litigators would do well to bear in mind when considering the strengths and weaknesses of a claimant's case.

Beware the overly long and over-lawyered witness statement

The Claimant's witness statement was some 30 pages long. It pertained to events which occurred some five and a half years prior to trial when the Claimant had just been through a far-from-easy birth before sustaining a nasty and painful injury. This volume of material provided the Defendant with fruitful material for cross-examination as not only was some of it not consistent with other documents, but there were internal inconsistencies within the statement too. Whilst the judge found (as the Defendant submitted she should) that the Claimant was essentially a credible and honest witness in her oral testimony, the Court found that *"there were some parts of her witness statement which she did not understand and which were not in her own words"*. Thus, the Court concluded that it did *"not find her a particularly reliable witness, for reasons which are no fault of her own".*

The obvious lesson for the litigator is the one which is currently subject to recommendations from a working group considering recommendations for reform of rules in relation to witness statements in the Business and Property Courts: beware of overly long and over-lawyered statements! In *Docherty,* the issue was it was clear that the Claimant's recall of the index events was extremely poor, thus her assertions in her statement that she specifically remembered not being told certain things caused more than a judicial eyebrow to be raised, leading to the conclusion that the Claimant's recollection, however honestly held, could not be relied upon. The inclusion of legal submission, some attempts at litigation 'point scoring', and purported justification of certain quantification of special damage is also inappropriate and is rarely likely to do anything than do harm to the perceived value of a witness's testimony.

Beware the expert who assumes disputed facts

In cross-examination the Claimant's midwife expert conceded that if the Trust's witnesses' evidence were to be preferred on certain points, she could not criticise the

relevant care received by the Claimant. In her report and in the joint report, she failed to consider the Trust's version of events at all. The Court declined to criticise her for this and held that to some extent the Trust's midwife expert had done likewise, at least in the Joint Report.

It remains the case however, that had it been agreed that the question of breach of duty from the midwifery perspective had wholly depended on the factual outcome found, the course of the litigation may have been different. From a practical perspective, there may not have been any need to have called these experts to provide oral evidence; and from a litigation perspective, this may have allowed both Parties to better assess this case as one likely to turn on the facts and assess their risks accordingly. It may be speculated that this may have led to a reassessment of the quality of the Claimant's lay evidence.

Likewise, it was a feature of HHJ Clarke's judgment that she was not persuaded by the Claimant's obstetrician expert when he appeared to disregard nursing records which suggested the Claimant was outwardly well at all times post birth by saying that *"in my experience, not everything which is said is recorded in the notes"*. The submission in closing from the Trust was that this was demonstrable partisanship, and although the judgment did not go as far as this, the expert was held to have shown a *"certain fixity in* [his] *position"*.

The lesson must be that experts must consider competing versions of facts when producing their reports and rather than assume those of the party by whom they are instructed must be correct, should provide their opinion based on either potential eventuality being found to be correct. Of course, they are open to doubt the accuracy of a factual account and/or contemporaneous records, but this will be most persuasive when it is reasoned, not just because the same is inconvenient to a conclusion.

Beware the expert who may need to speculate in order to justify conclusions

An issue in *Docherty* was whether the Claimant's blood loss during labour was reasonably estimated, in circumstances where it was accepted that it must have been underestimated during an instrumental delivery. The Claimant's obstetrician expert maintained that the opening of a pack containing clamps suggested these were needed and used, suggesting a more significant episiotomy repair was required and speculated that the perineum was a likely source of significant bleeding. This caused him to criticise the note-taking in addition to the estimate of blood loss.

The learned Judge was robust in holding that *"The court does not readily indulge in speculation"*, particularly where, as in this case, there were other instruments unwrapped which were certainly not used. It was held that negligence is for a claimant to prove and there was nothing to suggest that further steps were required to arrest the Claimant's bleeding in this case such as which would support the Claimant's allegation in relation to the same or the estimate of blood loss.

Beware the expert who is isolated in his or her opinion

In *Docherty,* the Trust submitted that the Claimant's obstetrician expert was isolated in his opinion that in every case where a woman suffers a postpartum haemorrhage, a full blood count was required six hours afterwards. This was disputed by the Trust's obstetrician expert. Nor was this supported by the evidence of the Trust's midwives nor the expert evidence of either midwife expert. The same was not mandated in the relevant NICE nor RCOG Guidelines. On the face of it, a contention premised upon such expert opinion is likely to prove to be difficult to prove, and this became harder still when, in cross-examination, the expert was far from forthright in answering the simple question as to whether such a timescale was mandated: *"That is my interpretation of common practice"* was not held in *Docherty* to have been particularly persuasive.

Isolation in an expert's opinion is all the more difficult for a party relying upon that opinion, should it have been given on a subject outside of that expert's strict area of expertise. The Claimant's obstetrician expert found the Court considering him isolated in his criticism of the index post-natal midwifery care, despite the views of the Claimant's midwife expert. This was not a persuasive basis for the Court to consider allegations arising out of the same to stand proven.

Conclusion

Docherty is a case where a lot went wrong for the Claimant at trial. However, these difficulties may have been foreseen by demanding more from the Claimant's medical experts, particularly in consideration of the alternative facts averred by the Trust and consideration that an expert's confidence, adamance and forthrightness in his or her opinion will rarely eclipse that of the more considered, careful and dispassionate expert.

Legal commentaries probably rarely quote modernist architects, but litigators assisting witnesses prepare their statements could learn something from the aphorisms of Ludwig Mies van der Rohe by remembering: *"Less is More"*, and perhaps also that *"God is in the details"*.

Thomas Crockett of Hailsham Chambers acted as counsel for the successful NHS Trust. He was instructed by Oliver Brady of DAC Beachcroft LLP, Winchester.

12 February 2020