Medicolegal

Ending "forensic blind man's buff"

CLARE DYER

A decision of the Court of Appeal last month[1] could pave the way for more settlements in medical negligence cases and shorter (and therefore cheaper) trials for those cases that do go to court. The ruling, ordering advance mutual disclosure of experts' reports in four claims against health authorities, comes at a time when the whole system of civil justice is under review, with far reaching proposals to cut costs and delays.

Though there has been a steady move towards more openness, the parties in the English legal system have traditionally kept many of their cards close to their chest, showing their full hands only at the trial. The drawbacks of this game of "forensic blind man's bluff" (Lord Justice Mustill's words) were starkly illustrated in a case which went to the Court of Appeal last year, Wilsher *v* Essex Area Health Authority.[2] In that case, in which a premature baby's blindness was alleged to have been caused by the administration of excessive amounts of oxygen, the Master of the Rolls, Sir John Donaldson, described the result of non-disclosure as "total disaster."

A case fought in the dark

In his judgment Lord Justice Mustill described what happened: "The parties realised, soon after the case began, that they had misunderstood what the case was about. As was stated before us, it was fought 'in the dark.' It lasted four weeks instead of the allotted five days, which not only imposed great pressure of time on all concerned, but meant that the scheduling of the expert witnesses was put quite out of joint. The judge had nothing to read beforehand except some pleadings which told him nothing. The evidence of the plaintiff's and defendants' witnesses came forward in no sort of order, sometimes by instalments. Nearly 150 pages of medical literature were put in, without prior exchange, or any opportunity for proper scrutiny. All this could have been avoided if there had been adequate clarification of the issues before the trial."

In that case the judges called for an urgent review of the Supreme Court rule on advance disclosure of medical reports. The rules of the Supreme Court, which govern high court litigation, distinguish between medical negligence claims and other personal injury claims. Early disclosure of medical reports is a matter of course in "ordinary" personal injury cases, but where there are allegations of medical negligence disclosure will not be ordered unless the court considers it desirable. Under an earlier version of the rules the mere fact that medical negligence was alleged could justify the court in refusing to order disclosure, but this was dropped in 1980, and it is now simply for the court to decide whether it is desirable.

However, it continued to be the practice not to disclose reports in medical negligence cases despite the change in the rules. In 1980 in the case of Rahman *v* Kirklees Area Health Authority the Court of Appeal decided that early disclosure of medical reports should not normally be ordered in a medical negligence case.[3] Although courts were no longer bound to follow this decision, because it was decided just before the rules were changed and was therefore based on the earlier version, it was still widely considered to be the nearest thing to a binding decision.

Last month's Court of Appeal decision has swept aside this blanket claim to privilege in medical negligence cases. The decision concerned four continuing cases in which patients appealed against the refusal of two judges to order disclosure of medical reports. The first, Naylor *v* Preston Area Health Authority, was described by Sir John Donaldson, Master of the Rolls, as "a personal injury case in a hospital context" rather than a classic case of medical negligence. The issue was the duty of care owed to a woman with a history of epilepsy, admitted to hospital for the birth of her baby, who drowned in the bath during an epileptic fit. The second, Foster *v* Merton and Sutton Health Authority, was a claim over an anaesthetic death, the third, Thomas *v* North West Surrey Health Authority, a case of brain damage after the administration of a solution of oxygen and dextrose to a patient admitted for a termination of pregnancy, and the fourth, Ikumelo *v* Newham Health Authority, a claim over brain damage of a mother and the death of a baby after epidural anaesthesia.

Ordering that the substance of the plaintiffs' and defendants' expert evidence should be simultaneously exchanged, the Master of the Rolls said that in deciding whether to order disclosure, the court had to have regard to all the circumstances. The exercise of discretion had to be approached on the basis that the basic objective was always the achievement of true justice, which took account of time, money, and the anguish of uncertainty, as well as of a just outcome. The procedure of the courts must be, and is, intended to achieve the resolution of disputes by a variety of methods, of which a resolution by judgment is but one, and probably the least desirable. Accordingly, anything that enabled the parties to appreciate the true strength or weakness of their positions at the earliest possible moment and at the same time enabled them to enter on fully informed and realistic discussions designed to achieve a consensual resolution of the dispute was in the public interest.

The general rule nowadays, Sir John said, was that while a party was entitled to privacy in seeking out the cards for his hand, once he had put his hand together the litigation was to be conducted with all the cards face up on the table. This was the product of a growing appreciation that the public interest demanded that justice should be provided as swiftly and as economically as possible.

The duty of candour

He added that he personally thought that in cases of professional negligence, particularly medical negligence cases, there was a duty of candour resting on the professional man. This was recognised by the legal professions in their rules requiring their members to refer the client to other advisers if the client appeared to have a valid claim

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for negligence, and it also appeared to be recognised by the Medical Defence Union, whose view was that "the patient is entitled to a prompt, sympathetic and above all truthful account of what has occurred."[4] This was a factor to be taken into account when the court was exercising its jurisdiction under the rules on disclosure.

The Supreme Court rule committee was proposing to put medical negligence cases on the same footing as other personal injury cases in relation to disclosure of expert reports. The urgency has been removed by the Court of Appeal's decision in these four cases, but the committee is now considering an even more radical change, providing for advance disclosure of the substance of expert evidence in all civil cases unless the court considers there is sufficient reason for not ordering disclosure.

The Court of Appeal also ordered that disclosure of the substance of the experts' evidence in the four cases should be accompanied by identification of any medical or scientific literature, published or unpublished, to which the experts intended to refer, though Sir John emphasised that if the experts were taken by surprise during the trial and wished to refer to other literature they would still be able to do so. As a barrister speaking at the 1987 medical negligence seminar put it: "The photocopying confetti syndrome in which such literature is thrown by each side at the other at trial is superficially entertaining but not conducive to clear thinking and adequate analysis at trial."

In its major review of the system of justice in England and Wales, aimed at cutting the cost, delays, and complexity of civil litigation, the Lord Chancellor's department wants to achieve full pretrial disclosure of evidence, both expert and non-expert.[3 5] Changes to the rules in 1986 breached for the first time the principle that neither the identity of non-expert witnesses nor the substance of their evidence need be revealed before the trial. Currently, the rules apply only to the Chancery Division, which deals with trusts, wills, and tax; the commercial and admiralty courts; and official referees' business (mainly complicated building disputes). But the department is proposing to extend pretrial exchange of non-expert witnesses' statements to all cases and to speed up litigation by giving the court direct control over the timetabling and progress of cases.

References

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Medicine and the Media

THE CENTRAL flaw in *World in Action*'s programme on whether the drug industry could be trusted to police its own promotional activities (and the answer, although never stated directly, was of course "no") was Dr Frank Wells, medical director of the Association of the British Pharmaceutical Industry (ABPI). Investigative journalism—just like a fairy story—demands baddies, and to cast amiable Uncle Frank as the monster from the deep was bad miscasting. As well as being the sort of general practitioner that everybody wants, Frank was the doctor who got rid of the overprescribing of barbiturates and amphetamines (and, for all I know, was probably the hero of some earlier *World in Action* programme). Most of *World in Action*'s audience probably would buy a secondhand car from Frank but might well think twice before buying even a loaf of bread from some of those cast as the goodies, not least because one of them appeared only in shadowy profile. The public is getting to distrust people who don't look into the camera.

World in Action argued that the drug industry could not be trusted to control its own promotional activities on the basis of two cases familiar to doctors (and *Guardian* readers): the misleading advertisements for tiaprofenic acid produced for Roussel, which led to its successful prosecution under the Medicines Act; and the "bogus trials" that led to Bayer being suspended from the ABPI. As well as the inevitable Dr Joe Collier, the clinical pharmacologist who keeps the ABPI code of practice committee in business, the programme's star witnesses were a former medical director, who talked about the commercial pressures on doctors in the drug industry, and a former drug company representative, who opted for anonymity because he might want to work again as a drug rep. (I found myself wondering why he wanted to return to the trade if it was as dishonourable as he was suggesting.)

Bits of the interview with Dr Frank were spliced in between these two gentlemen. After the former medical director described the intolerable pressures on drug company doctors, Frank cheerfully said that all the drug company doctors that he knew, which was many, were thoroughly good chaps. Then, in response to the offscreen reporter from *World in Action* handing him a document that seemed to show that Bayer had misled the ABPI, the noble Frank told "Eamonn" that he wasn't interested in particular cases or details—and somehow he didn't sound evasive. Nor did he seem put out: his many performances on breakfast, lunchtime, and midnight television on behalf of the BMA stood him in good stead.

Here then was a television programme that fell victim to the limitations of the medium (in addition probably to the lawyers). Not only was the "bad guy" much more appealing than the "good guys" but also the programme was essentially restricted to two cases—and in both cases the companies had been punished. Either a much more careful and comprehensive case had to be constructed (which would be difficult in a half hour programme that must have pictures) or powerful pictures were needed—weeping victims, doctors gorged on immoral earnings, or a real baddy from the drug industry (they are to be found). The closest the programme makers came to shocking us was the disheartening list of what various anonymous doctors had demanded in exchange for putting so many patients on to a drug—colour televisions, Debenham's vouchers, photographic equipment, and trips to foreign conferences. Maybe the doctors are worse than the drug companies. The programme didn't dwell long enough on that theme.—RICHARD SMITH, assistant editor, *BMJ*.

Eating garlic daily is believed to prevent colds and influenza. Has this claim been tested scientifically and could there be any truth in it?

I am not aware of scientific evidence that regularly eating garlic prevents respiratory viral infections. Its effects as a "prophylactic" against infections are not clear and perhaps warrant more study as there are anecdotal claims that it may act in this way. There does not, however, appear to be a lower incidence of colds and influenza in countries such as India, where garlic is consumed regularly. Regular consumers may be less likely to come into close contact with others (who may be shedding virus).—ERIC WALKER, lecturer in infectious diseases, Glasgow.