Compass Chambers

Dealing With Medical Evidence

A Junior's guide (Junior Counsel for Junior Solicitors)

Yvonne Waugh

Compass Chambers

Dealing with Medical Evidence

- MEDICAL RECORDS – The devil is in the detail
- MEDICAL REPORTS - Good and bad practice
- EVIDENCE IN COURT – The good, the bad and the ugly
- HOT TOPICS

Compass Chambers

Medical Records - The Devil is in the Detail

- Recover all the relevant records from the relevant institutions – are pre injury / pre accident records required?
- Read the records thoroughly
- Consider items which may be missing and how to recover those items. E.g MDT Meeting minutes, samples
- (as an side make sure all records numbered and if double sided that copied)

Compass Chambers

Medical Records - Records and the Client

- Compare the records with what your client is saying
- Do not take what the client says at face value
- Do not be afraid to push

Compass Chambers

Medical Records – The Cautionary Tale

- *MICHAEL GOODMAN v. FABER PREST STEEL* [2013] EWCA civ 153
- "The only evidence that Mr. Goodman had experienced pain in his knees and his back immediately after the accident came from him. Although much emphasis is quite properly placed on the advantage given to the trial judge of seeing and hearing a witness give evidence, it is generally acknowledged that it is difficult even for experienced judges to decide by reference to the witness's demeanour whether his evidence is reliable. Memory often plays tricks and even a confident witness who honestly believes in the accuracy of his recollection may be mistaken. That is why in such cases the court looks to other evidence to see to what extent it supports or undermines what the witness says and for that purpose contemporary documents often provide a valuable guide to the truth." [Paragraph 17]

- "In the present case the judge was well aware of Mr. Goodman's medical history…..but she appears to have accepted Mr.Goodman's assertion that he had experienced knee and back pain immediately following the accident without testing it against the medical records and other documents (including the email) which tended to contradict it. She appears to have placed some reliance on the fact that Mr. Goodman's obtained an automatic car as a replacement immediately following the accident, but, given that he must have been shaken up by what had happened, that may not take the matter very far. One is left with the clear impression that she was swayed by Mr. Goodman's performance in the witness box into disregarding the important documentary evidence bearing on what had become the central question in the case. It may have been open to her to prefer what he had said in the witness box, but if she was minded to do so it was incumbent on her to deal with the documentary evidence and explain why Mr. Goodman's oral evidence was to be preferred" [Paragraph 18]

Compass Chambers

Medical Reports – Good Practice

- Expert evidence can make or break a case. Worthwhile investment getting into good shape.
- "Guidance for Instruction of Expert in Civil Claims". [courts and tribunal judiciary website]
- Ensure the correct expert is instructed.
- Instructions should be clear and provide all relevant documentation and materials required.
- Ask focused and relevant questions but don't necessarily be too prescriptive.
- Make sure that all relevant points are addressed.

Compass Chambers

Medical Reports – Good Practice

- Importance of layout and structure including page numbering
- Grammar and typos
- Reference to relevant guidance for professional bodies e.g SIGN Guidelines
- Local protocols
- Relevant literature - in appendix and lodging?
- Send a copy of the draft report to client to check for factual accuracy

Compass Chambers

Medical Reports – Common Mistakes or Pitfalls

- The expert strays outwith his area of expertise
- Lack of objectivity
- JUBAIR ALI v. CATON AND MIB [2013] EWHC 1730 [QB]
- "*I have reviewed the evidence of Dr W. in detail….In the course of that review I have identified the numerous occasions in the course of his cross-examination where Dr W. was obliged to withdraw or qualify important and unjustifiable observations in the written reports. In my judgment, having identified early on that there were apparent inconsistencies in Jubair's presentation, Dr W. lost the objectivity that is essential for a witness who is requested to provide independent expert evidence to the court. Particularly damaging, in my view, was his willingness to enter into areas where he lacked any valid expertise. This included his mistaken questioning (in his May 2012 report) of the validity of Dr Bradley's views about Jubair's hearing of voices, and his progressive hardening of view on the question whether Jubair would have been able to obtain and maintain a career in the police force. Equally damaging was that, although he asserted that a neuropsychologist could not express any reliable opinion in the light of Jubair's response to the SVTs and appeared to dismiss the value of clinical observations as a basis for clinical judgment, he was prepared to express his opinions in terms which left no room for doubt that Jubair was a malingerer (in the broad and pejorative sense of being someone who was knowingly feigning his disabilities in order to promote a fraudulent claim)*" [paragraph 229]

Compass Chambers

Medical Reports – Common Mistakes and Pitfalls

- Expert has not read all of the relevant papers or misread / misinterpreted the records.

- *HARRIS v. JOHNSTON [2016] EWHC 3196*

Compass Chambers

Medical Reports – Common Mistakes and Pitfalls

- Not disclosing a conflict of interest
- *Thefaut v. Johnston [2017] EWHC*
- The excessively long report
- "*expert reports should be succinct, focused and analytical….but also be evidence based*"
- The report not clear on guiding future actions e.g. failure to confirm the number of psychological sessions required and the cost.

Compass Chambers

Medical Reports – Common Mistakes and Pitfalls

- The expert has not clearly expressed the reasons for their conclusions
- Harman v. East Kent Hospital NHS Foundation [2015] EWHC 1662 (QB)
- "*It was therefore disappointing that the expert evidence in some respects fell short, particularly on paper, of providing the Court with a level of assistance commensurate with the seriousness of the issue." [Paragraph 31]*
- *"I would make the following points, some general and some specific to this case……*
- *ii) Against the background of longer and longer reports there is, however, little sign, in some cases at any rate, that the care and attention spent on analysis and opinion, as opposed to history and narrative, is being given commensurate attention and priority.*
- *iii) Experts should deal with the issues raised by the other side promptly. In this case, the defendant makes a legitimate point in emphasising that neither the claimant's care expert nor educational psychologist dealt with the option of continued residential care in their reports until the joint statements and even then the matter was dealt with in an over concise way. One inevitable consequence of this was that the reasoning of the experts was only finally fleshed out in oral evidence during the hearing. This should not happen*" [Paragraph 32]

Compass Chambers

Medical Evidence – Court
Putting the Preparation into Practice

- Medical reports as principal evidence?
- Use of joint minute to agree uncontroversial evidence.
- Use of statements of treating clinicians?
- Use of Joint Expert Meetings.
- Ensuring that you are completely on top of all the medical evidence.
- Is the expert out to kill you?

Compass Chambers

Hot Topics

- Expert Witnesses – when is it appropriate to attack their professional standing or independence?
- Treating doctors – who can approach them?

Compass Chambers

Contact

Compass Chambers
Parliament House
Edinburgh
EH1 1RF
DX 549302, Edinburgh 36
LP 3, Edinburgh 10
www.compasschambers.com

Yvonne Waugh, Advocate
Mobile: 07921 131373
Yvonne.waugh@compasschambers.com

Gavin Herd
Practice Manager
Phone: 0131 260 5648
Fax: 0131 225 3642
gavin.herd@compasschambers.com