SURGICAL EXPERT LTD

October 2019

1. Introduction

1.1 *Litigation*

The NHS spends up to £2 billion per year on litigation and complaints. This is likely to increase. Not only are patients or injured parties actively encouraged to complain and seek compensation, but, in addition, the nirvana of a no-blame culture simply does not exist. Surgeons are particularly vulnerable. Notwithstanding ever increasingly complex consent procedures, rafts of information sheets, videos and DVDs, and armies of specialist nurses and support groups, the fact remains that if a complication occurs following a surgical procedure, then a significant minority of patients will assume the surgeon to be at fault.

The first step in the long road to compensation in the civil courts, sanction by the GMC or reassessment by the NCAA is receipt of a letter from the claimant's solicitors. Invariably, they will have been advised by "a medical expert". There is increasing unease, both in this country as well as in the United States, that there is an inconsistency in the standards of reports produced by medical experts. Inaccurate reports, or those which are inappropriately critical, inevitably fuel the flames of discontent making resolution of disputes more difficult. The consequence is for the accused doctor to fall back to their defence union and the involvement of another "medical expert". Not surprisingly, medical expert report writing has become big business and a lucrative sideline for a few.

1.2 Medical experts

In this country, as well as many others, there are remarkably few restraints on doctors of any speciality writing an expert report. Responsible solicitors, particularly those who work closely with the defence organisations, will usually only instruct doctors who are regarded as experts, have a CV to confirm this and have a track record of producing cogently argued reports. Unfortunately, however, there are many firms of solicitors, some of whom work exclusively for the complainant on the basis of 'no win no fee', in whom the standards of medical expert is less than ideal. Solicitors can easily access the names of doctors willing to write expert reports from a number of freely available websites. There is no policing of this activity. The GMC has issued guidelines on medical report writing but it is extremely uncommon for doctors to be reported to the GMC for breach of duty in this regard.

There is an increasing realisation among barristers that one way of destroying their opponent's case is to discredit their expert witness. This is easily achieved if the witness has no academic or professional pedigree justifying their role as expert in the particular case.

1.3 The predicament of the expert witness

There is no doubt that the role of the expert witness has become much more exposed in recent years. Quite apart from the plethora of explicit obligations that the law imposes to ensure fairness and with which experts must comply, the nature of the evidence that they give has changed. In old the days of the Bolam test the role of the expert witness was to describe the intellectual landscape in which he found himself. If he told the court that there was a respectable school of thought that would have acted as the defendant acted, even if he did not agree with it himself, that was the end of the case whether it was under civil or criminal law, because the doctor would not have been guilty of negligence of any sort.

In the case of Bolitho, the House of Lords said that the expert's view had to "stand up to analysis", it had to be reasonable. Although they also said that it would be very rare that the court would reject an expert's view as not respectable, in practise it has meant that every expert now describes the school of thought and then defends it against a hostile cross examination. In short, he or she has had to become an advocate as well as a witness, so that whilst remaining studiedly fair and impartial, the experts also have to argue their corner.

We have also discovered through the case of Sir Roy Meadow v The GMC that an expert witness has no immunity in regulatory law from being struck off the Register, even though he cannot be prosecuted in the criminal court unless guilty of perjury. The immunity from paying damages in the civil court has also been lifted by the decision in Jones v Caney by the UK Supreme Court in 2011. Recently another distinguished practitioner faced proceedings before the GMC in respect of evidence that she gave in defence of mothers accused of causing shaken baby syndrome.

In other words, the expert witness may be criticised by the court, they may be referred to the GMC even when there has been no complaint by the trial judge, and they may be liable in damages.

1.4 A register of medical experts

As far as we know, neither the Royal Colleges nor the relevant medical craft organisations hold any lists of their members who offer to act as expert medical witnesses in civil and criminal courts, coroners' courts, and employment tribunals. Thus, when individual persons or external bodies (quite legitimately) seek this kind of information, there is none available. Many other professions such as architects do hold such lists of their members.

Further, there is no independent organisation which can act on behalf of medical experts who are themselves subject to criticism

2. Proposal

To establish the concept of "Surgical Expert" the aims of which are outlined below.

3. Aims

- to provide a list of surgical experts from all specialities which would be made available to third parties upon request and on receipt of an appropriate search fee.

- to help coordinate indemnity schemes from different specialities to facilitate economies of scale and a single voice in public debate

- to provide a forum for medicolegal opinion

- to provide independent professional advice to members subject to disciplinary procedures, litigation in the civil or criminal courts, or GMC enquiries

- to provide independent professional advice to members subject to criticism whilst working in the role of medical expert

4. Membership

4.1 Surgical Expert will be part of the Confederation of British Surgery (CBS). Membership is available to all who work in surgery or in surgically related professions. Medical qualification is not a prerequisite of membership. Membership is open to all workers without distinction of race, ethnic origin, religion, age, gender, disability or sexual orientation.

4.2 Any eligible person may apply for membership of CBS by completing the appropriate application form and will then be entitled to all the possible benefits of Surgical Expert.

5. Register of accredited "medical experts" "*the list*"

5.1 **"**Surgical expert" will hold a register of surgeons prepared and accredited to act as "medical experts". **Not all who subscribe to be members of CBS may wish to be on this list. S**urgeons wishing to have their names entered onto "the list" will have to be proposed and seconded by established surgical colleagues who can attest to their expertise in a particular area.

5.2 All applicants to be included in ***the list*** will be required to complete an application form in which they specify, and justify, their area of expertise.

5.3 All applicants must hold Full Fellowship of one of the 10 SAC defined surgical specialities or recognised subspeciality (e.g ACPGBI, AUGIS, BAETS, VS, etc) as relevant to their stated expertise. This ensures the professional credibility of the individual.

5.4 All applicants must provide some corroborative evidence of expertise in writing reports. This might include some or all of the following:
- copies of three medical reports which the surgeon has produced in the past

- confirmation that they have attended a relevant and appropriate training course
- testimonial from legally qualified individual

5.5 Applicants must submit an up-to-date copy of their full academic CV.

5.6 All surgeons on the list should have been Consultants in full or substantial part-time active clinical practice for a minimum of ten years

5.7 All applicants should be in active clinical NHS, university, or equivalent practice either full time, or part time at a rate of 50% FTE, or be within 5 years of retirement from clinical practice.

5.8 Be aged less than 75 years

5.9 Applicants must declare a willingness to act in this capacity in a timely and impartial fashion.

5.10 Applicants must be of good professional standing.

- No convictions in a UK civil or criminal court on a serious professional matter during the last five years which might compromise the practitioner's perceived independence in disciplinary matters.
- No conviction by the GMC on a serious professional matter during the last five years which might compromise the practitioner's perceived independence in disciplinary matters.
- No *formal* conviction of a serious disciplinary offence by their employer in the last five years which might compromise the practitioner's perceived independence in disciplinary matters.
- Not involved in a *formal* investigation or actual disciplinary process.

6. Approval process

It is proposed that for a period of 12 months after initial invitation to be part of the list that a "Grandfather" clause exists whereby applicants are accepted subject to fulfilling the eligibility criteria above without the need for independent approval from the Advisory Board or the Management Board.

After the first year all applicants will be independently reviewed by an Advisory Board.

7. Governance

It is proposed that there be two tiers in the governance structure that oversees and operates Surgical Expert: An Executive Board and a series of speciality Advisory Boards.

7.1 Executive Board

7.1.1 The purposes of the Executive Board will be to:

- Oversee the governance, legal and fiscal elements of "Surgical Expert".
- Strategic Management.
- Oversight of performance.
- Appointment of Members of the Advisory Board.

7.1.2 The Executive Board will meet twice a year

- The Chair will be elected by the Board.
- The Chair will serve for between one and five years.
- Executive Board Members will initially be nominated by Speciality Presidents through the FSSA. Thereafter, new appointments will be by unanimous agreement of sitting Board Members.
- Executive Board Members will normally serve for three years but their appointment may be renewed by unanimous agreement of the Board.
- The Board will be administered and managed by its own administrative staff
- To advise on publicising the company.
- To advise on relationships with Professional bodies and the media.

7.1.3 Membership of the Executive Board will comprise a small body of respected figures from the surgical, legal and lay communities.

7.2 Advisory Boards

7.2.1 The purposes of the Advisory Boards will primarily be operational. They can be summarised:

- To consider all applications for inclusion on "the list".
- To recommend, to the Executive Board, additions to the list.
- To provide professional independent advice to members involved in medicolegal issues. The advisory Boards will select appropriate members or relevant expertise to provide this advice. A professional fee will be paid to those formulating advice.

7.2.2 The Advisory Board will meet twice a year.

- Members of the Advisory Board will be appointed by the Management Board from nominations made by surgical specialty organisations and from other organisations whose expertise can, in the opinion of the Board, positively contribute to the company.
- Members of the Advisory Board will be expected to sign a confidentiality agreement.

- Nominated deputies will be accepted in special circumstances but must first sign a confidentiality agreement.
- Observers may only be accepted with the express written permission of the Management Board, and after signing a confidentiality agreement.

7.2.3 Members of the Advisory Board will be selected for their expertise and ability to assist in the operation of the company. It is not expected that all advisers will attend every meeting, but all have agreed to advise the Management Board formally or informally as necessary.

7.2.4 Possible advisers from non-surgical organisations may include:

- Medical Defence Organisations (MPS, MDU, etc)
- The legal profession

7.2.5 Other Advisers may be appointed by the Executive Board as necessary.

8. Modus Operandi

Surgical Expert would circulate all leading firms of solicitors as well as defence organisations informing them of the existence of Surgical Expert and "*the list*".

Requests for names of appropriate surgical experts would be referred to the Advisory Board. The Advisory Board will provide two names of surgeons from the appropriate speciality and different region.

9. Removal from "the list"

9.1 Automatic removal:

- Upon retirement from active clinical NHS, university or equivalent practice or the practitioner's 75th birthday, whichever occurs sooner.

9.2 Voluntary removal:

- On application/request by a listed member.

9.3 Enforced removal:

- On conviction in a UK civil or criminal court on a serious professional matter, which might compromise the practitioner's perceived independence in medico-legal matters.
- On conviction by the GMC on a serious professional matter which might compromise the practitioner's perceived standing in disciplinary matters.
- On conviction of a serious disciplinary offence by their employer which might compromise the practitioner's perceived standing in disciplinary matters.
- Upon receipt by the Management Board of serious adverse comment about a "list" member relating to issues of honesty, integrity or accuracy in their

performance in the writing of reports or behaviour in criminal or GMC proceedings.

9.4 Appeals

- All enforced removals from the list will be subject to an appeals procedure mediated by the Management Board.

10. Reinstatement to "the list"

10.1 After voluntary removal:

- Immediate reinstatement, on application, provided the entry requirements are fulfilled.

10.1 After enforced:

- Practitioners may apply for reinstatement on the list once five years have passed from the event that occasioned erasure.
- At that time the Management Board shall have discretion over the timing of such relisting. This discretion shall be subject to the Board's appeal mechanism.

11. Selection of a "List member"

11.1 Request for an expert will be passed to a nominated member of the Executive Board of Directors, who will determine the relevant specialist area in consultation with a surgical member of the Advisory Board.

11.2 For requests appertaining to medical expert reports, the selection shall be based on the concept of matching "like with like" (insofar as this is practicable), and avoiding conflicts of interest. Thus, ideally, the chosen expert should:

- Be in a practice matching that of the accused person i.e. large / small hospital, NHS / university, full-time / part-time.
- Have no close personal or professional ties with the accused.
- Be able to participate in the required process within a reasonable period of time.
- Be able to secure leave of absence from their own workplace to take on this duty.

11.3 Once the name of the proposed "List" member has been selected, the instructing solicitors, and any surgeon they are acting for, should be asked whether he/she has any valid objection to this person becoming involved. Any objection should be considered by the Management Board, whose decision shall be final.

11.4 For requests for an opinion only (from the media, independent investigative tribunals or similar), selection of an appropriate expert will be made by a lay and surgical member of the Management Board.

12. Appeals Mechanism

It shall be open to any surgeon to appeal against any of the decisions of the Executive Board. Such appeals shall be decided by an Appeal's Group comprising the President or representative of a speciality association, an ordinary member of the Association, and a lay member of the Executive Board.