



Acting as a medical expert witness

Being a recognised expert



There is a wide range of different types of medical expert witness reports which will assist a court or tribunal to come to a decision. One of the most common types of expert report is on current clinical condition and prognosis following injury in a road traffic or industrial accident.

Other reports will focus on the question of the standard of care offered by another practitioner, the question of causation, the apportionment of blame when more than one party has contributed to the negligence, and/or quantum which is the amount of money which would properly compensate a victim of negligence.

The role

A court, tribunal or committee may require the opinion of an impartial medical expert witness experienced in the relevant specialty to assist them in making a decision about the case. This is where the expert witness can be a key player. As a consultant, you may feel that you have sufficient skills and experience to become an expert witness and here, we outline the expert's role, duties and required background.

Who is an expert witness?

Expert witnesses are practitioners with sufficient experience in their chosen field to be able to give a reliable and informed opinion to a court about the particular issues in a case. In the medical field, this means a doctor sufficiently experienced in their specialty to be able to give such an opinion to a court or disciplinary hearing.

A medical expert witness differs from a medical professional witness (also known as a witness to fact) in several important respects.

- The professional witness has normally already seen the patient for clinical purposes, whereas the expert witness is normally first approached by a solicitor or claims handler after legal proceedings have been contemplated.
- A professional witness is normally not in a position to decline to provide a report for the court because they are a witness to fact. On the other hand, an expert witness may at the outset decline to act.
- Professional witnesses are normally paid a fixed fee, whereas expert witnesses may negotiate a fee which they feel is appropriate. (A solicitor will normally agree with the expert in advance what the general scale of the fee might be).

- The expert may be expected to attend a trial or hearing and listen to evidence given by other witnesses before giving evidence themselves, whereas the professional witness will almost always be precluded by the court or tribunal from listening to evidence given by others in advance of their own evidence.
- This list of differences is not exhaustive and sometimes the roles of the expert witness and professional witness overlap.
- Ultimately, it is for the court or tribunal to decide on a case-by-case basis who is an expert and who is not.

How does a doctor become an expert witness?

A good expert witness combines training, skill and experience. A practitioner with at least 10-15 years experience in the field may have the necessary background knowledge and could reasonably propose himself or herself as a potential expert.

In order to become an expert witness, a doctor needs to compile a CV detailing their general and specific medical experience, including any teaching posts, publications and lectureships. A number of bodies such as the Expert Witness Institute¹, produce directories of experts in the UK. These provide the details of the expert and how they can be contacted and may list any high-profile cases in which they have been involved.

Many doctors who intend to become expert witnesses attend training courses run by companies that specialise in training experts in report writing, the legal process generally and court appearances in particular. Once an expert is known and respected in their field, they may expect to receive regular instructions from solicitors and others.

References

¹ www.ewi.org.uk

The duties of an expert witness

GMC guidance on acting as an expert witness

In March 2013, the GMC published guidance for doctors who wish to act as expert witnesses. Acting as a witness in legal proceedings gives enforceable guidance relating to the role and duties of doctors who act as witnesses and expands on the core principles set out in *Good Medical Practice* (2013). All expert medical witnesses must be familiar with these publications.

The GMC makes clear that doctors who act as an expert witness must ensure that the instructions they are given are clear and unambiguous and that they restrict any statements to areas where they have relevant knowledge or direct experience and which fall within the limits of their professional competence.

You are expected to include all relevant information and give a balanced opinion. However, if there is not enough information to reach a conclusion on a particular point, the GMC says that you must make this clear.

Other key points of the GMC guidance are as follows.

- Whether you are acting as an expert witness or a witness of fact you have a duty to the court and this overrides any obligation to the person who is instructing or paying you (paragraph 4).
- If you change your view on a material matter, you have a duty to ensure that appropriate persons are made aware of this without delay (paragraph 15).

- You should not disclose confidential information, other than to parties to the proceedings, without consent, unless obliged by law, ordered by the court or tribunal or the administration of justice demands it (paragraph 22).
- The appropriate persons must be made aware of any potential conflicts of interest you may have without delay (paragraph 23).

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As an expert witness you must be familiar with the Civil Procedure Rules (Rule 35.3).

Once instructed to advise in a medico-legal case, an expert's duties can include the following:

- clinically examining the patient
- writing reports with reference to the facts of the case, which may be drawn from the medical records, witness statements and any other relevant material
- carrying out literature searches in support of opinions expressed in their report
- discussing those reports with the instructing solicitor/claims handler and – if the case progresses – meeting the claimant or respondent in conference with a barrister and the solicitor
- meeting with other experts to discuss the case and find areas of agreement
- attending court or, for example, an Employment Tribunal or a regulatory body to give oral testimony about their chosen field in the context of the case.

Report writing

Report writing is the key starting point of an expert's involvement in any case. Once they have considered the documents made available and possibly examined the patient, they will have to write a carefully considered report, which must express an opinion about the medical issues in an independent fashion.

For civil cases, experts have to ensure that their reports comply with the requirements of the Civil Procedure Rules², which govern the conduct of all civil cases. These rules were designed to ensure that experts are independent and that they write their report for the Court, not for the party requesting it. At the end of the report the expert is required to sign a declaration confirming that they understand their duty to the Court and that they have complied with that duty.

Failing to observe the spirit of the Rules may leave an expert vulnerable to criticism and reduce the credibility of their evidence.

Literature search

This is an integral part of writing a robust and comprehensive report. The expert will need to back up their opinion with supporting evidence from published articles in case journals and textbooks.

Discussing reports

Discussing reports and the case generally with lawyers and others involved provides an opportunity for identifying any weaknesses in a case and uncovering other medical issues. Hence, the expert acts as a sort of compass in the case, as the lawyers will base their decision on how to proceed largely on the expert's advice.

References

² <http://bitly/civilprocedure>

Meetings of experts

This is a key part of the civil litigation process. The experts instructed by the various parties involved will meet in order to discuss the case, to see whether some aspects can be agreed. This helps to narrow down the issues that have to be heard at trial, and may result in one side or the other shifting ground, so that the case can be settled or discontinued at that point.

Attending hearings

In most cases, an expert will never make it into the witness stand, because the case will be resolved long before trial. However, in those few cases that do reach trial, the expert is really put to the test. They will need to be fully conversant with the contents of their report and able to answer, competently and credibly, the other party's cross-examination questions.

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Some experts will start off well in the witness stand, but if they are not sure in their arguments, may begin to revise their position under cross-examination, which can undermine their credibility. Those who provide a well-reasoned opinion, have considered alternative views but nonetheless stand by their opinions will do well in court.

Appearing in court can be an intimidating experience, but the more practice an expert has had, the better they may become.

Medical expert report writing and revalidation

Some doctors undertake medical expert report writing after they have retired from normal clinical practice. To maintain their credibility in court, such doctors retain a licence to practise medicine and to do that they have to revalidate with the GMC. There are special issues involved in this process. Disclosing even anonymised copies of medico-legal reports for the purpose of an annual appraisal may breach the rules of legal privilege. This may be self-evident in high profile cases, but may apply to other cases too. This means at the very least that the informed, written consent of the instructing solicitor is required before an anonymised report can be disclosed³. If in doubt, members may contact us for advice on individual cases.

References

³ www.fflm.ac.uk/revalidation/FAQ

For medico-legal queries

24-hour advisory helpline

Call **freephone 0800 716 646**

Email **advisory@themdu.com**

Visit **themdu.com**

This information is intended as a guide. For the latest medico-legal advice relating to your own individual circumstances, please contact us directly.

Our medico-legal team are available between 9am-5pm Monday to Friday and provide an on-call service for medico-legal emergencies or urgent queries 24 hours a day, 365 days a year.



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