

The role of the expert witness

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An increasing number of medico-legal complaints against doctors in South Africa heightens the need for guidelines, standards, training and accreditation of expert witnesses.

The ideal situation would be for an independent expert witness to jointly advise all parties on specialised medical matters to assist the court in arriving at a just decision. However, expert witnesses are usually contracted by one of the parties and often caught between opposing factions. Expert witnesses have even been sued on grounds of faulty evidence.¹

This article seeks to summarise guidelines in other countries and to delineate the Medical Protection Society process in respect of a complaint.

Definitions of an expert witness:

"Men of science educated in the art, or persons possessing special or peculiar knowledge, acquired from practical experience."²

"An expert is anyone with special knowledge, skill, experience, training or education in a particular field or discipline that permits them to testify to an opinion that will aid a judge or jury in resolving a question that is beyond the understanding or competence of laypersons. An expert witness is an expert who makes his or her knowledge available to a court (a tribunal or any other forum where formal rules of evidence apply) to help it understand the issues of a case and reach a sound and just decision."³

Historical Perspective

Concern about the credibility of medical expert testimony in malpractice litigation is not new. Despite efforts by medical and legal authorities for the past two centuries, cooperation between the two professions frequently degenerates and acrimony between physicians and attorneys is commonplace. An editorial in JAMA as far back as 1892 addressed this sad state of affairs and its impact on the quality of expert medical testimony by lashing out at the "disgraceful exhibition of medical experts who are hired...[to give] paid theories and opinions".

Harvard Law Review 1897 also made reference to the low esteem in which expert medical testimony was held by creating a hypothetical opening statement from an attorney to a jury: "Gentlemen of the jury, there are three kinds of liars: the common liar, the damned liar, and the scientific expert!"⁴

The Expert Witness: The Legal Perspective

Many things in our society have changed, but concerns about the quality of medical expert testimony and the low esteem in

which many expert witnesses are held, remain as strong as ever. Expert witnesses are still referred to by certain legal scholars as "jukebox experts...who sing the tunes they are paid for", or "plaintiffs'



whores". Attorneys work in an adversarial system and look to sway the trier of fact with the most articulate, understandable, presentable, and persuasive expert, rather than the best scientist. In contrast, science requires that the expert focus solely on the evidence without the influence of the parties' goals.

Recent rulings in the USA^{5,6}, and UK⁷ have redefined the courts role in ensuring that the quality of expert testimony. In Australia expert witnesses have to undergo training and accreditation.⁸

The Expert Witness: The Medical Perspective

Codes of conduct to which medical experts should adhere and the goals to which they should aspire are clearly spelled out by representative medical organisations in the USA, UK and Australia. The following is a condensation of similar statements on medical expert witness by professional representative bodies in the USA (the American Medical Association⁹, American College of Surgeons¹⁰, the Society for Vascular Surgery¹¹ and American Academy of Pediatrics¹²).

Recommended qualifications for doctors acting as an expert witness:

- Doctors have an obligation to testify in court as expert witnesses on behalf of the plaintiff or defendant as appropriate. The physician who acts as an expert witness is one of the most important figures in malpractice litigation.
- Have a current, valid and unrestricted license to practice medicine and recognised specialty qualifications.
- Be knowledgeable by recent and substantive experience or demonstrated competence appropriate to the subject

matter of the case. Should limit testimony to their sphere of medical expertise. Be able to demonstrate evidence of continuing medical education relevant to the specialty or the subject matter.

- Medical witnesses should be adequately prepared and should testify honestly and truthfully to the best of their medical knowledge. The medical witness must not become an advocate or a partisan in the legal proceeding.
- Be familiar with the standard of care provided at the time of the alleged occurrence and should be actively involved in the clinical practice of the specialty or the subject matter of the case during the time the testimony or opinion is provided.
- Be prepared to document the percentage of time that is involved in serving as an expert witness, as well as willing to disclose the fees or compensation obtained for such activities and the total number of times he or she has testified for the plaintiff or defendant.

Recommended guidelines for behaviour of the doctor acting as an expert witness:

- Review all the relevant medical information in the case and testify to its content fairly, honestly and in a balanced manner. May be called upon to draw an inference or an opinion based on the facts of the case. In doing so, the expert witness should apply the same standards of fairness and honesty.
- Distinguish between negligence (substandard medical care resulting in harm) and unfortunate medical outcome (recognised complications due to medical uncertainty).
- Review the standards of practice prevailing at the time and under the circumstances of the alleged occurrence.
- Be prepared to state the basis the testimony or opinion and whether it is based on personal experience, specific clinical references, evidence-based guidelines, or a generally accepted opinion in the specialty and be prepared to discuss important alternate methods and views.
- Compensation of the expert witness should be reasonable and commensurate with the time and effort given to preparing for deposition and court appearance. It is unethical for an expert witness to link compensation to the outcome of a case.
- The expert witness is ethically and legally obligated to tell the truth. Transcripts of depositions and courtroom testimony are public records and subject to independent peer reviews. Moreover, the expert witness should willingly provide transcripts and other documents pertaining to the expert testimony to independent peer review. The expert witness should be aware that failure to provide truthful testimony exposes the expert witness to criminal prosecution for perjury, civil suits for negligence and revocation or suspension of his or her professional license.



In the UK, the Civil Procedure Rules encapsulate the roles and responsibilities of medical expert witnesses.¹³

- Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced by the exigencies of litigation.
- An expert witness should provide independent assistance to the court by way of objective and unbiased opinion to matters within this expertise. (Under the Civil Procedure Rules, it is an express requirement that the expert's duty to the court over-rides any obligation to the person from whom he has received his instructions or by whom he is paid).
- An expert witness should never assume the role of an advocate.
- An expert witness should state the fact or assumptions on which his opinion is based. (Under the Civil Procedures Rules, it is an express requirement that an expert's report states the substance of all material instructions on the basis of which the report was written).
- An expert witness should not omit to consider material facts which could detract from his concluded opinion.
- An expert witness should make it clear when a particular question or issue falls outside his expertise.
- If an expert's opinion is not properly researched because he considers that insufficient data are available, then this must be stated.
- If, after exchange of reports, an expert changes his view on a material matter, having read the other side's expert's report or for any other reason, such change of view should be communicated to the other side without delay, and when appropriate, to the court.

Expert witness for whom? "The expert witness should never be a party's advocate, but a person who, having understood the parties' relevant allegations, can see whether they correctly define the issues to which the expert's expertise is directed, and - pinpointing any discrepancies - can put that

expertise impartially at the disposition of the judge to assist in performing the task of rightly deciding an issue before the court. A genuine readiness to accept another's view is essential in an expert; unqualified loyalty to one's own opinion is not acceptable."¹⁴

In Australia, there are legislated requirements that all expert witness need to agree to before giving their opinion and the expert is considered to be the court's expert.^{15,16}

Medical Protection Society (MPS)¹⁷

Expert witnesses commissioned by MPS must conform to a number of principles. They should be of a high standing in the medical profession, and have a reputation for being independent and unbiased in their views. Many experts, if they are fair and unbiased, will have their services called upon by claimants as well as defendants from case to case. In some cases, it may be

necessary to instruct more than one expert, particularly in complex issues of causation. Experts may themselves request supplementary expert opinion to assist them in their determinations.

MPS recognises three categories of experts MPS when dealing with a claim of medical negligence.

Breach of duty

These experts are asked for their opinion on the standard of care provided by the MPS member. In essence, a doctor is considered not to be negligent if he has treated the patient in a way that accords with the practice of a reasonable body of fellow practitioners (Bolam test). If the care provided was outside the range of treatment that a reasonable body of practitioners would have provided, the doctor will be considered to have breached his or her duty of care to the patient.

The breach of duty expert will consider, by reference to the medical records, the claimant's health problems, the treatment that should have been given and the treatment that was given. They will then provide a report assessing these matters and giving a view on whether or not the care given to the claimant fell below the standard regarded as reasonable.

This is assessed on the basis of what the doctor knew, or should have known, at the time in question. To enable a 'like with like' comparison, breach of duty experts are drawn from the same specialty as the defendant doctor. The exception to this general rule occurs when the defendant is practising outside of their own specialty. For example, if a general surgeon carries out a cosmetic procedure without having received specialist training, and is then the subject of a complaint, the expert consulted on breach of duty will be a specialist in cosmetic surgery rather than a general surgeon.

Causation

Proving the existence of a breach of duty is not in itself sufficient to obtain compensation. Even if the expert's report suggests that there has been a breach of duty, the claimant must still demonstrate that this negligence led to injury or harm. The causation expert will be asked for an opinion on whether there was a causative link between the standard of care provided by the defendant and the eventual outcome for the patient. Selecting the appropriate expert to provide an opinion on causation is often considerably less straightforward than is the case with breach of duty. In cases where causation is uncertain, opinions from a number of experts across different specialties may be needed to help us establish whether, on the balance of probabilities, a causative link exists.

In many cases, the causation expert will have to consider a long medical history and then attempt to unravel a complex chain of cause and effect, consider what the natural progression of the underlying condition or illness would have been, and attempt to determine what the probable outcome

would have been if non-negligent treatment had been given. Most pertinently, the causation expert will give an opinion on what difference - if any - the doctor's negligence has probably made.

In cases of clinical negligence, the law requires evidence of probability rather than possibility - in other words, a chance greater than 50% (the 'balance of probabilities' test). A doctor who has breached his duty by failing to diagnose a fatal illness, for example, will have a causation defence if it can be demonstrated that, on the balance of probabilities, a correct diagnosis at that time would not have altered the course of the illness.

Quantum

Where it appears likely that the claimant may have a strong case on both breach of duty and causation, MPS may seek the opinion of a quantum expert to assist in determining the size of the financial settlement that may have to be made to the claimant in compensation for the injury or harm they have suffered. Calculating quantum may be far from straightforward, as it is based on educated speculation of what the future holds, and may have held, for the claimant - again on the balance of probabilities. If the claimant is not deceased, then it is likely that a condition and prognosis report will be required. An expert will examine the claimant to determine the chances of improvement or recovery. Where the claimant alleges that they have been left with a reduced capacity to work, we may seek the views of an employment expert. In complex issues of quantum, psychologists and occupational therapists as well as other technical experts may be consulted in order to determine a financial settlement that would reflect the day-to-day care requirements, loss of amenity or impact on future employment prospects of the claimant.

MPS process

An expert may become involved in a claim at various stages of the progress of a case. Generally speaking, they will first become involved after MPS has received a statement from the member in response to a claim. This statement, along with the claimant's hospital, is made available to the breach of duty and causation experts. Once the experts' reports are available, they are discussed by an internal MPS committee. At this point, a decision to settle the claim may be made, but only after consultation with the MPS member.

If a settlement is not sought, and the claimant continues to pursue the claim, an exchange of witness reports between both parties will take place. Following this, the court may then order a meeting of experts, who will respond to questions according to an agenda that has been agreed by both parties. Once they have met, the experts provide the court with written notes on what they have agreed and disagree upon, and why.

At any stage in the progress of the



case, a conference with counsel maybe held in an attempt to determine complex issues of liability, and to test the evidence of the member and the experts. Such conferences will involve an advocate, the experts and the MPS member.

It is nowadays rare for a case to proceed all the way to the courtroom. But in the event of it doing so, experts may be required to give evidence in court in support of their written statements, and possibly face cross-examination by the claimant's legal team. It is in these circumstances that experts need to display additional qualities, including the ability to present themselves as authoritative witnesses who understand their duties to the court.

Indemnity: the views expressed in this dissertation are those of the author and represent extracts from the available literature and local opinions. The function of this article is to stimulate debate with the view to developing South African guidelines for expert witnesses.

References

1. Bishop MC. The negligence of medical experts. *BMJ* 329:1353, 2004.
2. Garner BA (Editor). *Black's Law Dictionary, 7th Edition*, West Publishing Company (1999).
3. From the web site of the Society of Expert Witnesses, <http://www.sew.org.uk>. Accessed 01 Sept 2006.
4. Berlin L. Bearing false witness. *AJR*. 18: 1515, 2003.
5. Cecil JS. Ten years of judicial gatekeeping under Daubert. *Am J Public Health*. 95:S74, 2005.
6. Kassirer JP. Inconsistency in evidentiary standards for medical testimony. *Disorder in the Courts JAMA* 288:1382, 2002.
7. Editorial. Roles and responsibilities of medical expert witnesses. *BMJ* 331:7512:305, 2005.
8. Vinen J. Negligence of medical experts. *BMJ* 330:1027, 2005.
9. American Medical Association. Guidelines for expert witness

qualifications and testimony.

www.asahq.org/publicationsAndServices/standards/07.pdf.

Accessed 01 Sept 2006.

10. American College of Surgeons. Statement on the physician acting as an expert witness. http://www.facs.org/fellows_info/statements/st-8.html. Accessed 01 Sept 2006.
11. Society for Vascular Surgery. Guidelines for testimony by vascular surgeons serving as expert witnesses in litigation. http://www.vascularweb.org/_CONTRIBUTION_PAGES/ISVS_About_US/Policies/Expert_Witness.html. Accessed 01 Sept 2006.
12. American Academy of Pediatrics. Guidelines for expert witness testimony in medical malpractice litigation. *Pediatrics* 109:974, 2002.
13. Civil Procedure Rules 1998. Practice directions to Part 35. http://www.dca.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part35.htm. Accessed 01 Sept 2006.
14. Lundberg GD. Expert witness for whom? *JAMA*, 252: 251, 1984.
15. Federal Court of Australia. Guidelines for expert witnesses in proceedings in the federal court of Australia. http://www.fedcourt.gov.au/how/prac_direction.html. Accessed 01 Sept 2006.
16. Australian Medical Association. Guidelines for doctors acting as expert medical witnesses. [http://www.ama.com.au/web.nsf/doc/SHED-5FTUBF/\\$file/legal_pp_ps_expert%20med%20witness.pdf](http://www.ama.com.au/web.nsf/doc/SHED-5FTUBF/$file/legal_pp_ps_expert%20med%20witness.pdf). Accessed 01 Sept 2006.
17. Newton R. The role of the expert witness. *MPS Africa Casebook*, March 2003.

Additional references

- Lectric Law Library. Guidelines for the expert witness. <http://www.lectlaw.com/files/exp27.htm>. Accessed 01 Sept 2006.
- Lectric Law Library. Preparing the plaintiff's medical expert witness for trial. <http://www.lectlaw.com/files/med35.htm>. Accessed 01 Sept 2006.

The GIT Clinic of Groote Schuur Hospital was fortunate to have more than one esteemed visitor on one day :

Dr Charles Lightdale from the USA and his daughter Jennifer who is a paediatric gastroenterologist as well as Prof Joseph Sung from the Chinese University of Hong Kong. Back: Deepu George, Sabelo Hlatshwayo, Gill Watermeyer, Solly Marks, Charles Lightdale, Jennifer Tworetzky, Ganief Adams. Seated: Harold Bloch, Andy Girdwood, Joseph Sung

