



The ideal and impartial medical expert: tips and tricks for a safe medicolegal practice

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Abstract: There is no doubt that in recent years our profession has witnessed a steady increase in the number of complaints it receives regarding patient treatment. Patients and families raise such complaints having considered that the treatment offered by clinicians was substandard. Although many of these are resolved with direct correspondence from the hospital and meetings, several others lead to legal proceedings. Legal teams and judges, when cases reach court, rely heavily on medical experts. The wise men, who can offer an advice on the specific case and assist Justice. It is then obvious that the role of clinicians as medical experts becomes vital. In fact, their true role is of paramount importance not so much for the successful outcome of a case but mainly for the provision of justice for both claimants and defendants. The article will try and identify the challenges that medical experts face in the current litigation climate and with the opinion of a thoracic surgery expert, will tease out important elements which are necessary to drive a modern and safe clinical and medico legal practice.

Keywords: Medical expert; medicolegal practice; negligence; allegations; litigation

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Introduction

Over the last decade the number of clinical negligence and injury claims against doctors and Insurances has risen constantly (1).

In the UK, hospitals under the National Health System (NHS), paid more than £1.4 billion in clinical negligence cases in 2015. In 2008, the amount paid was £583 million, an almost 140% increase in 7 years. It is estimated that the amount of 'pay outs' will reach £2.6 billion a year by 2022 (2).

It is therefore important that an expert team now governs any litigation process. Medical experts are now required from the inset of the case, as they can assist in concluding a negligence case early enough to prevent continuous financial bleed, inappropriate waste of resources and skills and false expectations from claimants.

The medical expert

Various statements regarding the correct definition of a medical expert saturate the literature (3).

In simple terms a medical expert needs to fulfil these simple criteria:

"To be competent as an expert, a witness must have acquired by reason of study or experience or both such knowledge and skill in a business, profession, or science that he is better qualified than the jury to form an opinion on the particular subject of testimony."

The interpretation should be simple; in other words, if you have experience in the specific field, relevant to the case, you are entitled to voice an opinion.

Courts have though expanded the definition, cushioned with further examples on experts such as: *"(A) physician (is) not incompetent to testify as an expert merely because he is not a specialist in the particular branch of his profession involved."*

(A) chiropractor (is) competent to testify as medical expert to the extent of his knowledge and experience. (A) nurse (is) competent to testify in medical malpractice action against physician as to standard of care in keeping sterile a needle used to draw blood. (An) orthopaedic surgeon (is) competent to testify against podiatrist where orthopaedic and podiatric methods of treatment are same and witness has knowledge of procedure used by podiatrist."

Looking at the previous examples a clinician can in some cases act as a medical expert if he exercises common sense or voices an opinion based on similar experience he might have with the case to be examined and challenged.

Unfortunately, such practice attracts risks in the current litigation landscape for reasons we will try and comment upon.

The inexperienced medical expert who undertakes a complex negligence case with multiple breaches of duty

This can be a common scenario imposing several risks to a medical expert. In complex cases, or cases with little evidence in the medical literature, a medical expert will be asked to produce an opinion bolted with expertise and perhaps evidence.

He should then have the appropriate expertise to drive and support an opinion when challenged by the opposing party or even more by a judge or a barrister in Court. Such opinion should stand criticism and be able to be defended.

There is nothing worse in a case, which has progressed substantially to witness a medical expert who suddenly retracts from his initial opinion. This can have disastrous consequences as it:

- (I) Opens criticism for the credibility of the medical expert;
- (II) Can lead to severe damage to the medical expert's reputation;
- (III) Can lead to legal proceedings against the medical expert if he/she was found that he/she was misleading the legal team;
- (IV) May have financial implications for the medical expert as he/she might be asked to compensate for the litigation process expenses and the Claimant's eventual damage on the perceived outcome of the case.

The medical expert who challenges dogmas and established evidence in the literature

Let us look at the following illustrative case and comment

upon it:

Dr. Squier was a medical expert in the UK. In 2003 she challenged the existing evidence in cases of shaken baby syndrome (4,5). This led to allegations against her that she challenged the existing medical evidence, but also referred to papers in her report which did not in fact support her opinion in their conclusion section, but contained within the script only 'supportive' elements.

Although the outcome of the case can be considered as positive the medical expert put herself in a challenging position and was criticised for failing to exercise her duty as an expert, disregarded other experts' views and allowed herself to become biased and subjective in her judgment.

It is therefore imperative to remember that whenever established opinions or evidence is to be challenged in a report, the medical expert needs to:

- (I) Exercise duty in presenting appropriately the range of opinions that exist in the field;
- (II) Cite appropriately the medical evidence without 'filtering' extracts from articles that lead to the wrong assumption or seen as someone who is trying to 'craft' a report;
- (III) Remain unbiased and truthful on existing medical evidence and accept and state the absence of such evidence;
- (IV) Prepare for facing resistance in Counsel meetings or in Court. In such cases the strength of supporting his/her opinion rests on the quality of the medical report, the knowledge of the case and the appropriate and skilled ability to give evidence when cross examined.

Medico legal practice and financial benefits

There are now several articles written by experienced lawyers and judges, who raise concerns of 'professional' medical experts (6).

In all honesty the ideal and safe medical expert is a senior practitioner with sufficient eminence in his field, who has the ability to offer an independent opinion based on common sense, skills and experience.

There is nothing worse than a medico legal practice driven by financial benefits.

The risks are obvious and affect several individuals. A medical expert who is driven by 'cash flow' often:

- (I) Does not spend time in 'studying' the case and provide a robust report;
- (II) Might prolong the 'litigation' process by misleading

the instructing solicitors;

- (III) Contributes to the financial 'bleed', experienced in the modern litigation system;
- (IV) Might mislead claimant or defendant and set the wrong expectations regarding the outcome of a case;
- (V) Opens himself/herself to potential criticism by the judicial system and even prosecution;
- (VI) Becomes a prime bad example for the whole medical expert fraternity.

What experience has taught us is that respectful medical experts insist on quality rather than quantity, have a reasonable financial plan in their practice and will drive excellence by evidence not by figures. These are the experts who keep themselves up to date on Civil Justice changes, insist on detailed instructions and provided details and do not take instructions from firms which seek a positive outcome rather than Justice or truth no matter who tells it, as Malcolm X once said.

One then needs to ask pertinent questions regarding engagement of suitable experts in appropriate cases:

- (I) Should a medical expert trained in a Speciality accept instructions on all pathology affiliated to the speciality or specifically to the pathology he/she specializes or is comfortable at?
- (II) Are there cases of general interest, which can be managed by all and certain others, which need a key opinion leader in the field?
- (III) Should all medical experts have an active clinical practice?
- (IV) Is medicolegal practice an acceptable activity for retired colleagues in our field?

The experienced medical expert has the ability and wisdom to accept instructions in cases that he/she considers relevant to his/her expertise. In my opinion, it is unwise to engage in a litigation process on a challenging case when one feels he can get easily out of depth. Remember, that litigation involves a fair amount of dispute and lawyers do not express success in figures as in medicine but use 'the balance of probabilities'. In a patient who dies due to delayed surgical lung cancer treatment clinicians would have considered an otherwise 5-year survival of 40% as satisfactory. In the legal world the question an expert is asked to answer is 'but for the negligence, would the deceased have a 51% chance to survive 5 years had he had the surgical treatment without delay'?

It is therefore imperative that knowledge of the specific pathology and constant up to date information on medical

literature is of paramount importance. I find it therefore difficult for a medical expert to retain such knowledge and skills, especially in clinical malpractice when one is distant from daily clinical practice.

It is though acceptable and perhaps beneficial that in certain cases the retired senior and wise members of our group can offer advice and offer a sound opinion, assisting solicitors and judges to understand the particulars of a challenging and complex case.

Challenges for the modern medical experts

Rules of engagement and relationship between medical expert and instructing Solicitor

A sound medical expert always sets and respects his/her rules of engagement. Medical experts quite often start their quest by attending a couple of training sessions and engage in negligence cases where an opinion is required.

Setting up the appropriate rules of engagement is of paramount importance. Contrary to common belief, solicitors and law firms prefer experts who have a robust practice, set rules and respect them. It is a testament of professionalism and a proof that one takes this task seriously, within reasonable and set deadlines. We need to remember that law firms have their own rules of engagement and modern justice requires a structured approach to litigation where finances and deadlines are agreed prospectively to avoid future dispute and grievances. Even more, delays in delivering agreed tasks can lead to penalties from Courts and jeopardise a case as well as an expert's reputation and credibility.

Medical experts can be on occasion flexible with their terms and conditions and this is where active communication with law firms and instructing parties becomes necessary and important. The general rule of engagement though and my advice is that once an episode has started it should be concluded at reasonable time as in complex cases the amount of notes and auxiliary documents provided is large and often not delivered in chronological order. Best reports are produced when facts from records are recent.

Medical experts, also, should not underestimate the medical knowledge of solicitors. Some have a large cumulative experience in certain pathology i.e., mesothelioma and weak reports or superfluous opinions will be easily criticised by the instructing party, additional queries will need to be addressed and the future of the relationship between the law firm and the medical expert

Table 1 Always ask such questions when receiving instructions and before you complete an opinion. If in doubt discuss the case with the instructing party and accommodate any changes to the report before it is released

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- | | |
|-------|---|
| (I) | Are instructions relevant to the case? |
| (II) | Are instructions complete or are there any points that need to be addressed? |
| (III) | Are all questions relevant to your expertise? |
| (IV) | Are the supplied documents and evidence relevant and complete or are there any records missing? |
| (V) | Is there evidence that the instructing party has been misled and therefore instructions are misleading as well? |
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will be put at risk.

Quality of instructions and expert's responsibility

Professor Pat Price in a recent article has elaborated elegantly in this issue (7). Medical experts must not accept instructions, which are incomplete or generic. Large volume (in other words complex negligence) cases must not be delivered with instructions on a template letter. With time and experience it is easy to understand what the case is about, whether instructions are appropriate and complete, and if not, whether further queries will be anticipated either by the instructing party or the opposition or even the court.

Good medical experts can read through the case, add points on the instructions and assist solicitors in finding the truth. There is nothing worse to respond to incomplete instructions passively with an 'incomplete' opinion, without been proactive and picking up all elements which confirm or exclude allegations having a thorough and detailed look at the notes. A responsible medical expert will identify details on a bundle of medical notes which are crucial for a negligence case. Such experience comes with time but will never be gained if attention to detail is not paid with each and every case undertaken.

It is the expert's duty then to discuss additional points or concerns with the instructing party and include such in his/her report. We need to remember that our duty is to the Court and we are not called to 'craft' suitable reports but state the facts, which will assist in finding the truth no matter what that is.

I have summarised in *Table 1* a list of question we need to ask as medical experts before finalising a report.

Structure, depth and preparation of opinion within the report

This is the most crucial aspect of the report. I have found that sometimes it does not necessarily connect seamlessly with the rest of the report. When we structure a report, we follow a logic order of understanding, the questions to be addressed, extract all important and relevant information from the supplied documents, frame, edit and finalise an opinion and support it with own experience and evidence in the literature.

In my opinion, there are two major components which are necessary in order to achieve a thorough understanding of how to provide a solid, evidence-based opinion:

Adequate training

Many law firms and official Institutions offer training sessions. It is important to choose one that is credible, adapted to your needs and the type of cases you are about to engage with. Following training comes experience and development of own style in expressing an opinion.

Speak and think as a solicitor and a judge

What experts sometimes forget is that their opinion will not be read by peers but by legal experts. It is therefore important to adopt a language understood by lawyers and not clinicians. Equally important are the citations in the opinion. There is no need to 'drown' a report with citations without referring to the relevant parts and explaining in simple terms why they are used to support the conclusions. It should also be clear where an opinion or conclusions are based mainly on experience and common sense.

Additionally, although an expert opinion is personal it needs to remain unbiased. A medical expert needs to retain integrity even if a case resurrects memories from his own clinical practice. In other words, it is an art and an honour to remain objective, seek the truth and develop adequate emotional intelligence; a safe passage through the 'Symplegades' of the modern litigation landscape (8).

We need to remember that modern clinical practice is riddled with protocols, standard operating procedures and guidelines. Such have become a challenge in offering patient treatment, with the old good fashioned common sense, and a weapon in the hands of some law firms to attract allegations and question negligence. As a result of this, it is now more important to build an opinion with significant experience and scientific acumen. Any deviation

Table 2 If any of these questions are not answered positively it is imperative to have a second look at your conclusions and strengthen any identified weak points

- | | |
|-------|---|
| (I) | Would you dispute the expert's opinion if you were a solicitor or a judge and if so, which part? |
| (II) | Is your opinion solid and 'water tight'? |
| (III) | Would you feel comfortable to support it and defend it during cross examination or if you were to provide a joint report? |

from protocols will be challenged by the opposition; hence, it is crucial to be able to support an opinion, no matter how logic it is, if it deviates from such protocols.

Table 2 summarises questions that need to be raised while an opinion is framed within a report.

The protective net of modern clinical and medicolegal practice

The provision of a good quality report requires presence of adequate information (facts). All these are sensitive personal data and recent changes in General Data Protection Regulation encourages a good understanding of how such data should be handled (9). Furthermore, medical experts are now required to prove that they have all infrastructure available to receive, handle and safely dispose data upon completion of a report.

It is therefore imperative to have appropriate and adequate IT support to handle such sensitive information with adequate insurance in place.

One cannot emphasize enough that communication with subcontracted parties, law firms and case handlers has to be executed through secure encrypted channels and the modern medical expert must not accept communication through unsecure network channels and insist on reciprocal secure communication.

Conclusions

The current litigation landscape calls for modernisation and adaptation of the existing medicolegal practice. Becoming a medical expert is an exciting but rigorous journey.

Every law firm would wish to be supported by an appropriate, unbiased and emotionally intelligent thoracic expert as every patient would wish to be operated by an experienced, safe, key opinion leader in Thoracic surgery.

The modern medical expert is now faced with increasing scrutiny and constantly challenged in a similar way that he is

at his daily clinical practice. Despite challenges, his presence is much more essential in an ever-expanding litigation field.

What remains axiomatic is the need to retain the values of an experienced professional and remain morally correct and loyal to his main duty; the search for the truth in each and every case he receives instructions for.

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Footnote

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