

British Medical Association expert witness guidance

October 2007

1. Expert witness practice

What is an expert witness?

An expert witness is a person who is qualified by his or her knowledge or experience to give an opinion on a particular issue(s) to a court.

The expert doctor's role was considered in Scotland, namely to assist the Court by providing independent opinion. The role of an expert was summed up in *Davie v Edinburgh Corporation* 1953 SC 34 at page 40, where the expert evidence was scientific in nature, and the comments of Lord Justice-Clerk Cooper still hold good:

"Expert witnesses, however skilled or eminent, can give no more than evidence. They cannot usurp the functions of the jury or Judge sitting as a jury, any more than a technical assessor can substitute his advice for the judgment of the court....Their duty is to furnish the Judge or jury with the necessary [scientific] criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence. The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case, but the decision is for the Judge or jury. "

Role of the expert doctor ([reference a](#))

As an 'independent' expert witness the doctor will not be the treating doctor who gives evidence primarily on fact (such as what the patient stated, what symptoms were reported, what examination was undertaken, and what advice or treatment was offered). The expert witness provides an opinion on the facts of the case, either as provided in written form, or based on the expert doctor's own examination of the patient. This is at the request, almost always, of one or other party to a claim, or a case once in court. The report, however, is for the benefit of the court, and is entirely independent of that party. Whilst a party can make a request for an opinion on certain specified questions, and it is legitimate to comment upon the answers given and to ask for matters to be considered further, or reconsidered, the opinion must both be and be seen to be independent, objective and unbiased. It is liable to be tested in cross examination. The independence of thought of an expert witness must be jealously guarded.

The opinion will be based on the doctor's expertise (i.e. his or her technical knowledge and experience) and will assist the court in deciding the matter before it. The expert doctor's role is to assist the court by providing independent opinion, and his or her opinion may be used to diminish the other side's case. The qualification and knowledge of the expert doctor must be established in court. Often, but not always, there is a competing opinion prepared on behalf of the opponents of those who instructed that doctor.

What is the difference between an expert and professional witness?

Members have sought clarification on the differences between expert and professional witness work. As a result, the medico-legal committee prepared a guidance note, [Guidance for doctors preparing professional reports and giving evidence in court](#) (July 2005) to assist medical practitioners in dealing with instructions from solicitors, particularly in relation to the writing of professional reports and giving of professional evidence in court.

A related learning module was also prepared by Dr Jan Wise in June 2005 by BMJ Learning entitled, Professional and expert witnesses: what is the difference? www.bmjlearning.com/planrecord/servlet/ResourceSearchServlet? You will need to login to the BMJ Learning website in order to access this learning module. To login or register use the above link.

With professional report writing and associated activities, the medical practitioner is requested to testify solely on the observed facts of a matter. This contrasts with expert witness work where the medical practitioner is requested to provide an expert medical opinion on a matter.

The key distinction is between expert opinion and those giving evidence on fact who may or may not be professional witnesses. An expert opinion is usually provided by a professional person, but not always. In the case of an expert doctor's opinion, he or she is obviously a professional witness. A doctor may also be asked to give factual evidence, and in doing so may be classified as a professional witness, for example, to speak to clinical notes when treating a patient, the symptoms reported and treatment given. That is factual, not opinion, evidence and the witness will not be an expert but a professional witness. The distinction is not always clear as witnesses can speak both to fact and opinion depending on the circumstances of the case.

In some cases, the witness will provide evidence solely upon the basis of documentation. An expert is entitled to ascertain facts by hearsay. For example, in many cases of alleged professional negligence by a doctor, an opinion is provided solely upon the basis of case notes, case histories, and other documentation. On other occasions, particularly when considering issues of causation, the extent of an injury that has been caused, and a prognosis for the future, the documentation requires to be supplemented by an examination of the Claimant.

There are dangers for any expert witness giving an opinion. Firstly, it is important to be clear as to precisely what questions are being asked. If this is not set out adequately in the letter of instruction, it is appropriate to seek clarification. Secondly, it is important to be aware that any opinion given in the context of a claim, whether at that stage in Court or not, may later be lodged in Court and as a result the expert doctor providing that opinion can be called to give evidence, and be cross examined about it. Thirdly, it is always important to ensure when giving an opinion that you are properly qualified and experienced to do so. If an opinion is sought on a subject in respect of which the expert doctor does not consider that he or she has adequate experience or expertise, it may be appropriate to decline the instruction.

Qualities required of an expert witness ([reference b](#))

Expert evidence should be – and should be seen to be – independent, objective and unbiased. In particular, an expert witness must not be biased towards the party responsible for paying his or her fee. The evidence should be consistent regardless of who is paying for it. In the event of any connection with any party to a claim or case, that might be considered to be prejudicial to any degree to impartiality, that ought to be disclosed.

An expert witness should have the following qualities:

- A sound knowledge and practical experience of the subject matter in dispute. In the majority of cases the clinician should be in practice or at least in practice at the time of the incident in question.
- The ability to communicate findings and opinions clearly, concisely and in terms adapted to the Court or Tribunal before which evidence is being given. He or she must be able to analyse detailed and lengthy documentation, write clear statements that are intelligible to the Court or Tribunal hearing the case, to the parties involved and all of whom are lay persons in the medical context.
- Flexibility of mind and self-confidence to modify opinions in the light of fresh evidence or counter-arguments.
- The ability to 'think on one's feet', necessary in order to cope with appearances in Court.
- A demeanour that is likely to express and command confidence, particularly in court appearances.

Practical issues and general questions to consider ([reference c](#))

Before taking on a case, it is important to find out exactly what is being asked: is the doctor to provide expert opinion, or is he or she a (professional) witness to fact?

What is the nature of the case under consideration?

There are a very wide variety of matters, ranging from considerations of breach of duty for a clinical negligence claim, an opinion on liability and causation, to examine a Claimant and assess and report on his or her symptoms both past, current and future, and the treatment that has been or could be offered. For example increasingly, opinions are sought on whether a person is disabled under the terms of the Disability Discrimination Act 1995.

Without the following information, a doctor cannot decide whether it is appropriate for him or her to agree to become an expert witness for a specific case.

- On whose behalf is the doctor instructed, e.g. Claimant or Defendant / Pursuer or Defender / Claimant or Respondent in an Employment Tribunal?
- Is it to advise one or other party on the merits of the case?
- Is it to prepare a report for the court and, if so, is it as an expert acting for one or other party or as a single joint expert? (Experts can be appointed by the Court directly in cases in Northern Ireland, although this happens infrequently. There are no provisions for single joint experts to be used in Northern Ireland. Although it is rare in Scotland for an expert to be acting jointly, if that is suggested, written confirmation from each side should be sought).
- What are the timescales involved, has any date been set for a Court or Tribunal Hearing, and has the fee scale been agreed?
- An expert may be examined and cross examined on any matter relevant to the case, including his or her own experience, expertise and qualifications. Should an opinion be tendered in any area where the witness does not have sufficient expertise, he or she may then face professional and/or judicial censure.
- The expert should also provide references that authenticate his or her evidence. Any consultancies or funded research that may be relevant to the matter must be declared. Anything that indicates a potential conflict of interest or a perceived disposition to one view or another is liable to be subject to rigorous cross examination.
- Experts should consider undertaking training on report writing, and courtroom presentation skills and in particular dealing with examination and cross examination.

Other matters to consider include:

- Will you be providing services at the instruction of the court, the prosecution or the defence?
- What written material will be available to you prior to taking the witness box? How much time is the court case likely to take?
- What implications for you are there if the Court does not accept your evidence and obtains expert evidence of its own, and if so have you seen this?

It may be appropriate to make specific arrangements for payment of a fee, as opposed to agreeing its amount. In Scotland, some Pursuers seek to have the fees payable at the conclusion of the case, when they will seek to recover the expense of it from the opposition, if successful. Such proceedings can, and frequently do, take two or more years to conclude, and that is a matter that the expert may wish to bear in mind.

Reports - Scotland

In Scotland, whilst the format and structure of a report is essentially at the expert's discretion, it is normal to set matters out incorporating the following aspects:-

1. The qualifications, experience and expertise of the writer.
2. The documentation that was made available.
3. The facts upon which the opinion is given or any assumptions that were made.
4. The specific questions being asked.

5. The answers to each of those questions.
6. The reasoning that led to those answers.
7. Any further comments that occur to the writer (whether asked or otherwise).
8. Documentation referred to (for example, research publications or other documents that support the opinion being tendered which must be produced where it is practicable to do so and where the article is being relied upon by the expert).

If an examination of a Claimant has been undertaken, the details of this should be included. If investigations were then conducted, reference to this should also be included. In the event that the expert wished further investigation to be undertaken but for whatever reason could not be attended to, it is normally appropriate to include reference to this.

In addition to providing the report itself, an expert will often be requested to attend a meeting either with the Solicitor who is to conduct the case, or with the Advocate and Solicitor, at a consultation. The purpose of a consultation is to review the expert opinion, the documentation in the case, the opinion evidence relied upon by the opponent and to consider any further preparation, investigation or reconsideration of the opinion that may be thought appropriate.

Whilst the rules of court require a party to lodge in advance any report relied upon, the opponents to the party instructing you may decide not to do so, but lead only oral testimony of their expert, and cross examine you upon it without you having detailed advance notice. Similarly an academic journal may be put to an expert even though it has not been lodged – Roberts v BRB 1998 SCLR 577.

Code of Practice and Directory of Expert Witnesses - Scotland

The Law Society of Scotland has produced a Code of Practice which sets out helpful and detailed advice and policy. It is found at www.expertwitnessscotland.info/.

The Law Society of Scotland has also endorsed a comprehensive directory of expert witnesses in Scotland, England, Wales and Northern Ireland. The directory is published jointly between the Law Society of Scotland and W Green.

2. Civil law guidance England and Wales

The Civil Procedure Rules

April 1999 saw the introduction of Civil Procedural Rules (CPR 35) which embodied the so-called 'Woolf Reforms'. www.dca.gov.uk/civil/procrules_fin/contents/parts/part35.htm

The Practice Direction for Experts and Assessors (PD35) outlines the instructions and the use of experts by the parties and the powers of the court to order their use.

www.dca.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part35.htm

Practice Direction Part 35

The Practice Direction Supplement of CPR, Part 35 gives guidance on the general requirements of expert evidence, the form and content of an expert's report, the information that should be provided and details relating to instructions, questions to experts, the single joint expert, orders and the function of an assessor.

Civil Justice Council's Protocol

In addition to the Practice Direction, there exists 'a Protocol for the Instruction of Experts to give Evidence in Civil Claims'. Experts and those instructing them are expected to have regard to the guidance contained in the Protocol.

http://www.civiljusticecouncil.gov.uk/files/Protocol_for_the_Instruction_of_Experts.pdf

The Protocol offers guidance to experts and to those instructing them in the interpretation of and compliance with Part 35 of the Civil Procedure Rules (CPR 35) and its associated Practice Direction (PD 35) and to further the objectives of the Civil Procedure Rules in general. The existence of this Protocol does not remove the need for experts and those who instruct them to be familiar with CPR35 and PD35.

Non-compliance

In addition to professional conduct questions arising from:

- (i) giving evidence outside of one's expertise (as illustrated in the Professor Sir Roy Meadow case);
- (ii) evidence given in bad faith, and
- (iii) 'seriously defective' evidence (in the words of Mr Justice Collins in the High Court and the Professor Meadow case),

If an expert fails to comply with the Court's requirements both as to formalities and timescale, the Court has the power to penalise instructing parties in costs, and even, in extreme cases, order that the evidence may not be used. Additionally, in a 2004 case, it was decided in principle that an expert witness can be joined as a party to proceedings for the purposes of an adverse order for the costs. *Phillips & Ors v Symes & Ors* [2004] EWHC 2330 (Ch) (20 October 2004) available at <http://www.bailii.org/ew/cases/EWHC/Ch/2004/2330.html> However, this would of course be an exceptional situation and would require proof that the expert had gross and reckless disregard for his duties.

Scotland

The provisions in Scotland are very different from those that apply in England and Wales. Whilst they are undergoing review, the tendency remains for each side in a litigation to have its own expert evidence, rather than joint evidence instructed by solicitors, or under order of the Court.

In Scotland, the system is adversarial. It is therefore for each party to decide whether or not to call expert evidence and, if so what documentation to lodge or otherwise. Normally, any document that a party is to rely upon must be lodged 28 days prior to the Proof. The Proof (the Scottish equivalent of a Trial) is the stage when all evidence is given, under oath. In some procedures medical reports being relied upon must be lodged at an initial stage.

In Scotland the practice is also for witnesses who are to be giving evidence not to be present in Court to hear the evidence of those being called before them. There is an exception in the case of expert witnesses giving opinion evidence, who can, with the Court's authority, hear the evidence of prior witnesses (particularly the Claimant). In some cases, accordingly, an expert witness can be required to attend Court not simply for his or her own evidence, but for the evidence of other witnesses extending over a number of days.

There is no rule of Court requiring an expert report to be provided in any particular written form, or indeed in writing at all. There are occasions, particularly where evidence is sought late in the day, where an expert witness is asked to provide his or her evidence without having a written report prepared earlier available to refer to in Court. That is far from best practice and should be avoided wherever possible.

Whilst it is extremely rare to do so, the Court does retain a residual power over expenses, and where the evidence of a witness is considered to have been substantially outwith the area of expertise, given in bad faith, or is otherwise seriously deficient, the Court has the power to award expenses either against the party instructing that witness, or (potentially at least) the witness him or herself. The writer is not aware of any such order for expenses having been granted against an expert witness.

The principal Scottish Court is the Court of Session, based in Edinburgh. In addition, there are Sheriff Courts throughout Scotland. Ordinarily the Pursuer chooses which Court to litigate in. In the Court of Session, it is possible to seek a Trial involving a Jury in some but not all cases. In the Court of Session, Advocates (the Scottish term for Barristers) appear for the parties, or solicitors with rights of audience called Solicitor Advocates.

In the Sheriff Court, Advocates, Solicitor Advocates or Solicitors may appear.

The procedure in Employment Tribunals is rather more flexible. Normally documents are exchanged within two weeks of the date of a Hearing, but can be permitted to be received at any time within the Tribunal's discretion. There is no bar on who may appear as a representative.

Northern Ireland

The Civil Procedure Rules referred to do not apply to Northern Ireland, so the first 3 paragraphs under the England & Wales section above, do not apply.

There was however a practice direction in 2003 (Practice Direction No 1 of 2003) which required all expert witnesses from 1 January 2004 onwards to contain a declaration in their report which is set out in the body of the practice direction. Please refer to sample declaration attached in Appendix B.

This practice direction is a useful guide to what is expected of experts by the Northern Irish Courts when they are preparing reports.

Aside from this practice direction, the usual common law duties of experts still apply in Northern Ireland as set out in cases such as *The Iberian Reefer* 1993 2 Lloyd's Rep 68. This included the following passage by Creswell J, and was subsequently adopted in the Court of Appeal by Stuart-Smith LJ.

Cresswell, J.

"B. The duties and responsibilities of expert witnesses.

The duties and responsibilities of expert witnesses in civil cases include the following:

1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation (*Whitehouse v. Jordan*, [1981] 1 WLR 246 at p.256, per Lord Wilberforce).
2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise (see *Polivitte Ltd v. Commercial Union Assurance Co. Plc.* [1987] 1 Lloyd's Rep. 379 at p.386 per Mr Justice Garland and *Re J* [1990] F.C.R. 193 per Mr Justice Cazalet). An expert witness in the High Court should never assume the role of an advocate.
3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (*Re J* sup.).
4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one (*Re J* sup.). In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the Report (*Derby & Co. Ltd. and Others v. Weldon and Others*, *The Times*, Nov. 9, 1990 per Lord Justice Staughton).

6. If, after exchange of Reports, an expert witness 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 (through legal representatives) to the other side without delay and appropriate to the Court."

There is no exchange of witness statements in Northern Ireland, nor is it common practice to send detailed letters of claim (there is no pre-action protocol), hence cases frequently take longer to process in Northern Ireland due largely to the lack of exchange of information in the early stages of cases.

The other significant difference between Northern Ireland and England and Wales with respect to expert medical evidence is that there is no requirement for disclosure of medical evidence in cases for personal injury or death arising out of medical or surgical negligence except in cases where liability has been admitted.

Regarding the decision of the High Court of England and Wales in *Phillips v Symes* [2004] EWHC 2330 (Ch), there is no reason to think that a similar approach would not be taken in Northern Ireland although it is worth noting that part of the reasoning of Peter Smith J in that case was that the expert in question could have been in no doubt as to the extent of his duties which were clearly defined in the CPR which do not apply in Northern Ireland.

3. Criminal law guidance

The following section contains guidance for experts who provide evidence for cases that are heard under criminal law.

England & Wales

The Criminal Procedure Rules 2005 ('the Rules') took effect from 4 April 2005. The Rules apply to all courts within the criminal jurisdiction. The courts and everyone involved in criminal cases are required to pursue the 'overriding objective': to deal with cases justly (Rule 1).

The Rules can be found on the Department of Constitutional Affairs website.

www.dca.gov.uk/criminal/procrules_fin/rulesmenu.htm

The Rules governing expert witnesses are as follows:

1. Rule 1 - i.e. the overriding objective.
2. Common Law - most of which is in practice derived from previous court judgements (precedent).
3. Rule 24 - the obligation to disclose expert evidence. Note: it is the responsibility of the parties to proceedings to comply with Part 24 and this obviously also impacts on the experts involved. www.dca.gov.uk/criminal/procrules_fin/contents/rules/part_24.htm
4. Part 33 - these regulate expert evidence and came into force on 6 November 2006. www.dca.gov.uk/criminal/procrules_fin/contents/rules/part_33.htm

Experts who undertake prosecution work must also be familiar with the Crown Prosecution Service (CPS) Disclosure Manual, especially:

1. Annex K - Disclosure: Experts' evidence and unused material - Guidance Booklet for Experts. www.cps.gov.uk/legal/section20/chapter_a_annex_k.html

2. Chapter 36 - Expert witnesses - Prosecution disclosure obligations. www.cps.gov.uk/legal/section20/chapter_a.html

The Disclosure Manual applies to all investigations commenced on or after 4 April 2005.

The relationship between Part 24 of the Criminal Procedure Rules and Annex K to the CPS Disclosure Manual 'Disclosure: Experts' evidence and unused material' is that prosecution experts need to comply with both sets of requirements. The secretariat to the Criminal

Procedure Rule Committee has clarified that the committee took account of the CPS Manual in drafting Rule 33 so there should not be any clash between the two.

The UK Register of Expert Witnesses published a useful article in September 2006 on experts and disclosure: the new rules for prosecution experts.

www.jspubs.com/experts/ewire/itemtext.cfm?

Scotland

In Scotland the prosecution of crime is undertaken under the authority of the Lord Advocate, and either at the High Court of Justiciary or local Sheriff Courts. The Procurator Fiscal is responsible for prosecutions in the Sheriff Courts. Guidance should be sought from either the prosecuting authority, or the solicitor for the accused, on precisely what arrangements are required to be made, what form of report is required, and within what form of timescale. In both the Sheriff Court and High Court of Justiciary Trials can be heard with a Jury. In the Sheriff Court, Trials may also be heard by a Sheriff sitting alone.

There is a procedure in the Criminal Procedure (Scotland) Act 1995 whereby parties may seek to agree evidence by serving notices on each other, which can include the acceptance of expert evidence in the form of reports, but the norm remains for oral testimony to be given. In cases involving sexual offences it is now possible to admit expert psychological or psychiatric evidence for the purpose of explaining the behaviour of the victim or to rebut any inference that might be adverse to the credibility or reliability of the complainer, which might otherwise be drawn from that behaviour (section 275 (c) of the 1995 Act as amended).

A Fatal Accident Inquiry is also a procedure commenced by a Procurator Fiscal. It enquires into the death of one or more individuals in certain or unexplained circumstances, or in respect of which there is public interest. Instructions with regard to the same can be received either from the Procurator Fiscal or any other party who has an interest in that matter. It is not a criminal process, but similar to a Coroner's Inquest.

Northern Ireland

The Criminal Procedure Rules 2005 do not apply to Northern Ireland. Rules do however require advance notice of expert evidence namely:

Crown Court (Advance Notice of Expert Evidence) Rules (NI) 1989, and Magistrates' Court (Advance Notice of Expert Evidence) Rules (NI) 1997.

The Crown Prosecution Service Disclosure Manual does not apply to NI and the Public Prosecution Service of NI does not have a freely available equivalent. The PPS Disclosure Manual is however in very similar terms to the CPS Disclosure Manual, and in fact, the 'Guidance Book for Experts' contained at Annex K in the CPS Disclosure Manual is replicated in Annex I of the PPS Disclosure Manual.

Where experts are being instructed by the PPS they should be provided with a copy of the relevant guidance by the PPS.

Of course the duties set out above under the Civil Law section also still apply to experts in the Criminal field.

4. Likely implications of Professor Sir Roy Meadow's GMC case

On 26 October 2006 the Court of Appeal handed down its ruling on the appeal by the General Medical Council (GMC) against the findings of the High Court. (The Court of Appeal consisted of Sir Anthony Clarke (Master of the Rolls) and Lord Justices Auld and Thorpe). The High Court had previously overturned a decision by the GMC's Fitness to Practise Panel that Sir Roy Meadow was guilty of serious professional misconduct in his reliance on and misuse of statistics in the Sally Clark murder case. The Court of Appeal rejected the GMC's appeal on this point. The Court of Appeal did, however, overturn the High Court's finding that expert witnesses should ordinarily be immune from regulatory bodies' disciplinary hearings.

By way of background, expert witnesses have immunity from civil litigation in respect of evidence they give in court and statements that they make for the purpose of giving evidence. The High Court had extended that immunity to regulatory bodies, but that extension was itself overturned by the Court of Appeal.

The High Court's decision had been important for paediatricians and all doctors, nurses, teachers and other experts who may have to express difficult and sometimes controversial opinions in the course of giving evidence in Court. Following the Court of Appeal's rejection of the immunity referred to above, BMA medico-legal committee chairman, Dr Jan Wise, has noted that the High Court had said that such immunity was required for experts to be able to go about their work and that expert witnesses would now be concerned.

However, the Master of the Rolls Sir Anthony Clarke said, in the leading judgement, that the threat of fitness to practice proceedings is 'in the public interest'. 'It helps to deter those who might be tempted to give partial evidence and not to discharge that obligation to assist the court by giving conscientious and objective evidence. It helps to preserve the integrity of the trial process and public confidence both in the trial process and in the standards of the professions from which the expert witnesses come...the purpose of fitness to practise proceedings is the protection of the public.'

The judge specifically noted that the purpose of fitness to practise proceedings was not to punish the practitioner. He also noted that not only were regulatory bodies entitled, but that they might also be bound, to investigate fitness to practise matters for the protection of the public.

The judge was, however, sensitive to the problems relating to doctors' (and other health professionals') reluctance to act as expert witnesses, particularly within the family justice system. By way of solution, he proposes 'changes be made, including changes to the relevant rules governing the GMC.' He also notes that 'in particular...it should be possible to devise a scheme which reduces to an absolute minimum the risk of expert witnesses being vexed by unmeritorious complaints to regulatory bodies like the GMC.'

Indeed on 30 October 2006, the Department of Health published a report and consultation entitled Bearing Good Witness: Proposals for delivery of medical expert evidence in family law cases. The consultation period ran until 28 February 2007. [Read the BMA consultation response](#) The Court of Appeal also upheld the High Court's decision to find Professor Sir Roy Meadow not guilty of serious professional misconduct. As Dr Wise has commented, the judgement has given greater clarity as to what serious professional misconduct (as opposed to simple professional misconduct) means, and this may give some reassurance to expert witnesses. The BMA draws your attention in particular to the judgement of Lord Justices Auld and Thorpe, since the Master of the Rolls in fact found Professor Meadow guilty of serious professional misconduct. However, being in a minority, he was out-voted on this point.

The medico legal committee is studying the ruling in more detail and may at some point release a further statement on the implications of the judgement. The committee may take into account the Bearing Good Witness consultation at that point. Clearly this guidance will need to be updated in light of the results of the consultation.

The Court of Appeal decision is not binding in Scotland, but does have persuasive effect. It is therefore possible that the evidence of an expert witness in Court or Tribunal could be the subject of consideration by a regulatory body. That is, however, only likely to arise where that evidence has been given recklessly, maliciously, or grossly negligently.

5. Further information

If you are acting as an expert witness on behalf of the medical defence organisations, they will issue separate guidance before the commencement of the case. You could consider registering with one of the main list of experts available to act as witnesses for the legal community.

A number of useful contacts are given below. You may wish to visit the websites for further information.

- UK Register of Expert Witnesses - www.jspubs.com
- [The Law Society Directory of Expert Witnesses](http://www.lawsociety.org.uk)
- The Expert Witness Institute - <http://www.ewi.org.uk/>
- Academy of Experts - <http://www.academy-experts.org/>
- The Society of Expert Witnesses - <http://www.sew.org.uk/>
- The-Expert-Witness.co.uk - <http://www.the-expert-witness.co.uk/>
- The Law Society of England and Wales - <http://www.lawsociety.org.uk/>
- Department for Constitutional Affairs - <http://www.dca.gov.uk/>
- Civil Justice Council - <http://www.civiljusticecouncil.gov.uk/>
- Law Society of Scotland - <http://www.lawscot.org.uk/>
- Crown Office - <http://www.crownoffice.gov.uk/>
- Bond Solon - <http://www.bondsolon.com/>

Mail-shots can be sent to local law firms. It is also possible to advertise on the internet and/or in the legal press.

6. References

a Australian Medical Association 'Doctors acting as Expert Medical Witnesses', 1997

b Expert Witness fact sheet 2, UK Register of Expert Witnesses, February 2000

c <http://www.the-expert-witness.co.uk/>

7. Appendices

Appendix A: Code of Practice for Expert Witnesses engaged by Solicitors - Scotland

Introduction

This Code is intended to assist experts to ensure that they can effectively meet the needs of solicitors, so those solicitors can in consequence better serve their clients and the interests of justice. They are intended to be of general application and there may be additional requirements relating to cases in specialised areas of law.

Acceptance of instructions

1. Experts should ensure that they receive clear instructions from solicitors (in writing unless this is not practical) specifying the solicitor's requirements, which should cover:

(a) Basic information such as names, addresses, telephone numbers, dates of birth, and dates of incident

- (b) The type of expertise which is called for;
- (c) The purpose for requesting the report, and a description of the matter to be investigated;
- (d) Questions to be addressed;
- (e) The history of the matter, identifying any factual matters that may be in dispute;
- (f) Details of any relevant documents;
- (g) Whether proceedings have been commenced or are contemplated, the identity of the parties, and whether the expert may be required to attend to give evidence;
- (h) Whether prior authority to incur the estimated fees needs to be obtained by the solicitor before the instructions can be confirmed;
- (i) In the case of medical reports: where the medical records are situated (including, where possible, the hospital record number); whether or not the consent of the client/patient to an examination and disclosure of records has been given; and whether or not the records are to be obtained and provided by the solicitor;
- (j) In cases concerning children, a note that the paramountcy of the child's welfare may override the legal professional privilege attached to the report and that disclosure might be required.

2. Instructions should be accepted only in matters where the expert:

- (a) Has the knowledge, experience, expertise, qualifications, or professional training appropriate for the assignment;
- (b) Has the resources to complete the matter within the timescales and to the standard required for the assignment.

3. A time limit for the production of the report should be agreed. When the agreed time limit cannot be met, notice of the delay should be communicated at the earliest opportunity.

4. Experts should make clear to solicitors what can and cannot be expected on completion of the assignment. In particular, as soon as possible after being instructed, they should identify any aspects of a commission with which they are unfamiliar, or not professionally qualified to deal, or on which they require or would like further information or guidance.

5. If any part of the assignment is to be undertaken by parties other than the individual instructed, then:

- (a) Prior agreement must be obtained from the instructing solicitors;
- (b) The names of the individuals to be engaged and details of their experience and qualifications must be given.

6. Where a firm has been instructed, the names of the individuals to be assigned to the project and details of their experience and qualifications must be given on request.

Terms of Business

7. Experts should provide Terms of Business for agreement prior to the acceptance of any instructions. These should include:

- (i) Daily or hourly rates of the experts to be engaged on the assignment or alternatively an agreed reasonable fee for the project or services;
- (ii) Treatment of travelling time;
- (iii) Travelling or other expenses or outlays;
- (iv) Rates for attendance at court (note that this may be subject to a fixed limit);
- (v) Provision for payment of a specified fee in the event of late notice of cancellation of a court hearing;
- (vi) Provision for preferred timing of payment.

Professional conduct

8. Experts must comply with the Code of Conduct of any professional body of which he/she is a member.

Confidentiality

9. The identity of the client or any information about the client acquired in the course of the commission shall not be disclosed by the expert except where consent has been obtained from the client or where there is a legal duty to disclose.

10. A solicitor is usually under a duty to pass on to the client all information material to the client's case; exceptional circumstances where this may not apply, and where it will be necessary for the solicitor to decide whether to disclose such information to the client, include cases where it could be harmful to the client because it will affect the client's mental or physical condition (for example, a medical report disclosing a terminal illness).

Independence

11. Experts will bear in mind that:

- (a) When giving evidence at court, the role of a witness of fact, or an expert witness, is to assist the court and remain independent of the parties;
- (b) A solicitor must not make or offer to make payment to a witness contingent upon the nature of the evidence given.

12. Experts will disclose to solicitors at the start of each project any personal or financial or other significant circumstances which might influence work for the client in any way not stated or implied in the instructions, in particular:

- (a) Any directorship or controlling interest in any business in competition with the client;
- (b) Any financial or other interest in goods or services (including software) under dispute;
- (c) Any personal relationship/and or professional relationship, and the nature thereof, with any individual involved in the matter;
- (d) The existence but not the name of any other client of the expert with competing interests;
- (e) Whether the expert has worked with the expert instructed by the opposing party (if known).

13. Any actual or potential conflict of interest must be reported to the solicitor as soon as it is raised or becomes apparent and the assignment must be terminated.

Investigation

14. Experts should consider whether there is a need to see the client, visit a site etc, and if so, agree the practical arrangements with the solicitor in advance.

15. In the case of medical reports:

- (a) If the doctor has treated the patient before, ensure that the patient's consent has been obtained to the release of the information contained in the notes and that such consent is informed consent;
- (b) If the doctor has not treated the patient before, ensure that the patient's consent is obtained to the examination and to the disclosure of their records to the doctor; and, where practicable, consent of the other doctors involved in the care of the patient should be obtained before releasing information held by them.

Preparation of the report

16. The report should cover:

- (a) Basic information such as names and dates;
- (b) Purpose in presenting the report, and description of matter investigated;
- (c) The history of the matter;
- (d) Methodology used in investigation;
- (e) Details of any documents used;
- (f) Facts ascertained;
- (g) Inferences drawn from the facts, with reasoning;
- (h) Summary of the expert's qualifications and experience.

17. Plain English should be used and any technical terms explained.

18. Copies of any document or papers referred to in the report should be provided; any items referred to may be subject to recovery by commission in any court proceedings and experts should ascertain from instructing solicitors whether or not in view of that it is appropriate to refer to documents provided by the solicitor; it is unnecessary to copy widely and easily available documents.

19. The expert's final report should be dated and signed by the individual(s) who will if required give evidence in support of it.

Complaints procedure (if requested)

20. Experts should provide a procedure for resolving complaints by solicitors, including the following:

- (a) If there is a complaint, the expert must give the solicitor client the name of the person to contact in the event that they are dissatisfied with the service provided;
- (b) In the event of a complaint being made, the expert should:
 - (i) Tell the solicitor what the procedure will be for resolving the complaint;
 - (ii) Respond appropriately offering any appropriate redress in a timely manner;
 - (iii) If the solicitor remains dissatisfied, give them the names and addresses of any professional or trade bodies of which the firm or the individuals assigned to the commission are members;
 - (iv) Identify the cause of any problem and correct any unsatisfactory procedure.
- (c) In the event of allegations relating to an Expert's failure to adhere to the above Code of Practice or any breach of their contract with the instructing solicitors, The Law Society of Scotland and W. Green reserve the right to exclude such an Expert from any future edition of the Directory of Expert Witnesses.

References to the Directory

An expert listed in the Directory may describe themselves as so listed. The expert may not refer to this listing as a qualification or describe themselves as approved, accredited, or recommended by The Law Society of Scotland and W. Green.

Appendix B: Declaration – Northern Ireland

I.....declare that:

1. I understand that my primary duty in furnishing written reports and giving evidence is to assist the court and that this takes priority over any duties which I may owe to the party or parties by whom I have been engaged or by whom I have been paid or am liable to be paid. I confirm that I have complied and will continue to comply with this duty;
2. I have endeavoured in my reports and in opinions to be accurate and to have covered all relevant issues concerning the matters stated, which I have been asked to address, and the opinions expressed represent my true and complete professional opinion;
3. I have endeavoured to include in my report those matters of which I have knowledge and of which I have been made aware which might adversely affect the validity of my opinion.
4. I have indicated the sources of all information that I have used;
5. I have where possible formed an independent view on matters suggested to me by others including my instructing lawyers and their client; where I have relied upon information from others,
6. including my instructing lawyers and their client, I have so disclosed in my report.
7. I will notify those instructing me immediately and confirm in writing if, for any reason, my existing report or opinion requires any correction or qualification;

I understand that:

- (a) My report, subject to any corrections before swearing as to its correctness, will form the evidence which I will give under oath or affirmation;
- (b) I may be cross-examined on my report by a cross-examiner assisted by an expert;
- (c) I am likely to be the subject of public adverse criticism by the judge if the court concludes that I have not taken reasonable care in trying to meet the standard set out above.
- (d) I confirm that I have not entered into any arrangement whereby the amount or payment of my fees, charges or expenses is any way dependent upon the outcome of this case.

Signed:

Date: