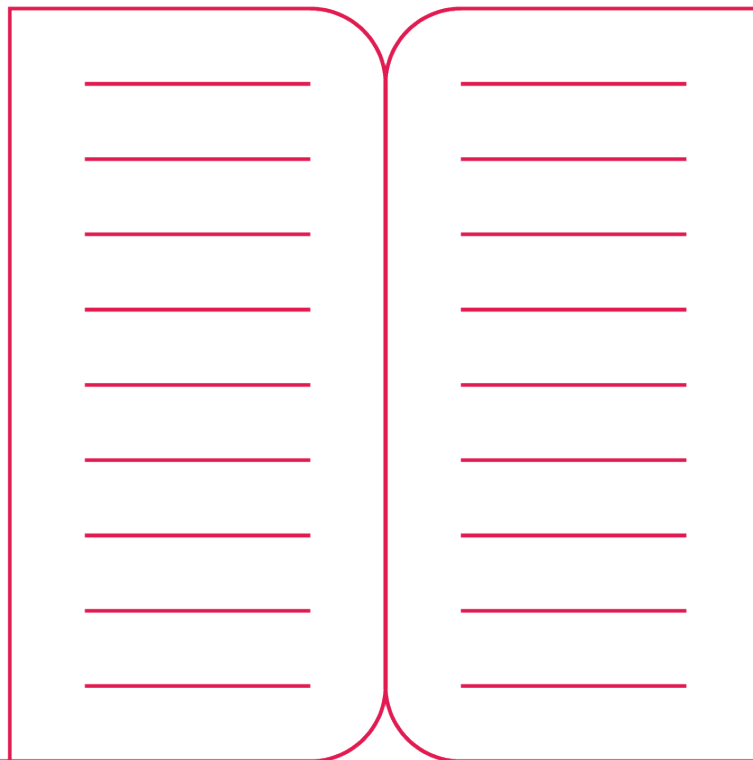


May 2019

Acting as an expert or professional witness

Guidance for healthcare professionals



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Introduction

This guidance has been produced by the Academy of Medical Royal Colleges and endorsed by the healthcare professional organisations listed at the end of the document following a recommendation from Sir Norman Williams's [Review of Gross Negligence Manslaughter in Healthcare for the Department of Health and Social Care in England](#) (Set out in Appendix A).

The Healthcare professional regulatory bodies listed have also confirmed that this guidance is consistent with their standards and guidance.

This guidance is aimed specifically at healthcare clinical professionals who provide an expert opinion or act as professional or expert witnesses in courts or tribunals. It is produced by clinical professional organisations and sets out the standards and conduct expected of a clinician acting in the role of a witness.

There are already official Civil Procedure Rules and the Criminal Procedure Rules covering requirements of witnesses. As well as guidance on the duties and responsibilities of expert witnesses [available from expert witness bodies, such as the Academy of Experts, the Expert Witness Institute and also from professional bodies].

There is also a range of training available for expert witnesses. Therefore colleges and professional bodies have not devised specific training in relation to this guidance and would not want to be prescriptive in terms of it. However, they would expect any training for expert witnesses to reflect and incorporate this guidance.

As voluntary professional bodies, the Academy, the Colleges and other professional bodies are not in a position to regulate or enforce compliance with this guidance. However, any healthcare professional acting as a witness who fails to meet the standards set out in the guidance is not considered to be meeting the expectations or demonstrating the values of their profession.

While the guidance arose from a report commissioned by the Department of Health and Social Care in England it is intended to apply on a UK wide basis. Although there are differences in the legal systems across the four nations, the principles which should guide healthcare professionals who act as expert witnesses or professional witnesses are the same.

Types of witness healthcare professionals can expect to be

Healthcare professionals asked to provide witness evidence may find themselves acting in two possible capacities – professional witness/witness of fact or corroboration, or as an expert witness – both are explained below.

It is important to understand and maintain the distinction between the two roles. When acting as a witness of fact, a healthcare professional should not offer expert opinion or views.

This guidance will concentrate on the expert witness role although the responsibilities as a witness apply equally to witnesses of fact.

Professional witness or witness of fact or corroboration

In these cases, the healthcare professional will generally have been directly involved in the management of the patient in the case being considered. The witness is expected to provide professional evidence of their clinical findings, observations and actions. Witnesses of fact must limit their evidence as far as possible to what is recorded or remembered and should not venture to give opinion or speculate on events. Being a witness of fact will generally be a requirement rather than a matter of choice.

Expert witness

The role of an expert witness is to assist the court on matters which are outside the knowledge and experience of the court and which, by virtue of their knowledge, training, or experience, are within the healthcare professional's field of expertise.

The expert witness will not, other than in highly exceptional circumstances, have been personally involved with the patient in the case and must declare any potential conflicts of interest. They are providing evidence [written or oral] because of their specialised knowledge of a specific field relevant to the case. It is a matter of choice for a healthcare professional as to whether to act as an expert witness [although occasionally it may be a requirement]. Normally, the expert will be asked by solicitors or other parties if they are willing to accept instruction to assist in the case by providing an expert report.

Value of acting as an expert witness

Healthcare professional bodies recognise that an expert witness undertakes an extremely important role in the administration of justice. It can provide interesting and valuable experience for a healthcare professional and at the same time, the performance and behaviour of an expert witness reflects not only the individual concerned but also their wider specialty and profession.

Professional bodies believe that acting as an expert witness should be recognised as part of a healthcare professional's revalidation or continuous professional development (CPD) process.

A professional's appraisal and professional development plan should cover their role as an expert witness. Healthcare professional bodies expect professionals to undertake training to become expert witnesses.

Sir Norman Williams' report recommends that employing organisations should be prepared to release staff when they are acting as expert witnesses. It is recognised that this can be a potentially onerous commitment and agreement will have to be reached with the employer over release and remuneration arrangements.

Settings where healthcare professionals may act as a witness

Healthcare professionals may have to act as witnesses in various settings where there are different requirements for the burden of proof. In essence in criminal cases the requirement is for proof “beyond all reasonable doubt” while in civil and family cases it is “on the balance of probabilities”.

Coroner’s Court (England, Wales and NI) and Fatal Accident Inquiry (Scotland)

Coroners inquire into violent and unnatural deaths, sudden deaths of unknown cause, and deaths that have occurred in state detention. The coroner’s inquiries may result in the holding of an inquest which is a fact-finding inquiry to establish who has died, when, where, how and in what circumstances. In Scotland the procurator fiscal investigates all sudden and unexpected deaths.

In 2018 following the [Maughan](#) case High Court judgement the standard of proof for a conclusion of ‘suicide’ or ‘unlawful killing’ in a coroner’s inquest was changed from “beyond reasonable doubt” to “on the balance of probabilities”.

The role of all witnesses [of fact or expert] at an inquest is to assist the coroner in determining the fact and circumstances of the death. Healthcare professionals will often be called as witnesses of fact in inquests. Coroners may also instruct expert witnesses where appropriate.

Criminal Courts

Healthcare professionals may be witnesses of fact or expert witnesses in criminal courts. Criminal cases come to court after a decision has been made, usually by the CPS/COPFS/NPS to prosecute for an alleged crime. In the vast majority of cases (over 95 per cent), magistrates (judges in Scotland) hear the evidence and make a decision on guilt. More serious cases will be considered in the Crown Court (High Court in Scotland) which will hear the evidence and may involve a jury trial.

Family Court

A family court hears cases involving domestic issues such as divorce, child custody and care proceedings. There will be occasions where healthcare professionals are called as witnesses of fact or as expert witnesses.

The Royal College of Paediatrics and Child Health (RCPCH) and the Family Justice Council have produced specific guidance on this entitled “[Paediatricians as expert witnesses in the Family Courts in England and Wales: Standards, competencies and expectations](#)”.

Civil Courts

A civil court handles legal disputes that are not crimes, for example claims of clinical negligence brought by patients. Healthcare professionals are called as witnesses of fact or expert witnesses in these instances. Cases involving clinical negligence or personal injury are heavily dependent on expert evidence from healthcare professionals.

Tribunals/Fitness to Practise Hearings and other settings

Healthcare professionals may also be called to act as a witness of fact or an expert witness in other circumstances such as official tribunals, fitness to practise hearings run by professional regulatory bodies (e.g. GMC, NMC, GPhC etc.), disciplinary processes by employing organisations or national or public enquiries.

Similar standards would be expected of healthcare professionals appearing in all these settings in terms of being aware of the relevant procedure, the purpose of the report, acting within professional competence and probity.

Providing an expert opinion

Prior to being called as an expert witness, healthcare professionals are usually required to provide an expert opinion.

There are various organisations which may seek expert opinion to help them determine whether to pursue a case and subsequently when taking forward a case.

These include:

- The police and Crown Prosecution Service in England and Wales (CPS), Crown Office Procurator Fiscal Services (COPFS) in Scotland and National Prosecution Service (NPS) in Northern Ireland
- Solicitors acting in civil cases and for defendants in legal cases
- Regulatory bodies
- Medical defence organisations
- Employing organisations in disciplinary matters.

This will normally take the form of a written report. Courts also require written reports or statements. Therefore an understanding of the structure and processes as well as the different declarations and standards of proof required in court procedure is important.

This guidance is not primarily about producing written statements. However, healthcare professionals are expected to follow the same standards for report writing whether acting as an expert witness or as a professional witness/witness of fact. Specifically, healthcare professionals should ensure:

- Any written or signed documents must not be false or misleading
- The report or opinion is neutral and intended to inform the court or CPS/COPFS/NPS – it is neither for nor against the patient or those being investigated. As such clinicians should be willing to accept instruction equally from prosecution and defence, and the report should treat the issues in the same way in either case
- That they are given adequate information and appropriate relevant documentation before commencing a report and record this in the report
- All reasonable steps must be taken to check that the information is accurate
- Relevant information must not be omitted. Omissions which may prejudice either party will result in a report ceasing to be unbiased
- All information and opinion must reflect the limits of the competence of the expert providing the report
- Reports should be based on reasoned opinion derived from information provided i.e. avoid speculation beyond the facts

- Specific rules such as the Criminal Procedure Rules, the Civil Procedure Rules or the Family Procedure Rules, or where there is guidance specific to the particular jurisdiction, must be followed
- Any report should recognise the standards of proof expected in the case (i.e. criminal, civil, regulatory, disciplinary, inquisitorial) and also state the standards of proof being applied to the evidence in their statement.

Although much of an expert witness' work is providing written reports, they should be prepared to give oral testimony which may include cross-examination assisted by an expert instructed by the opposing party.

Duties and responsibilities of an expert witness to the courts

Duties and responsibilities of witnesses and experts are set out in various set of rules and official guidance. In England and Wales these include:

[Criminal Procedure Rules Section 19 Expert Evidence](#)

[Civil Procedure Rules Part 35 Experts and Assessors](#)

[Family Procedure Rules Section 25 Experts and Assessors](#)

[Guidance for the instruction of experts in civil claims](#)

[Guidance on the obligations placed on expert witnesses in the criminal justice system in England and Wales 2019](#)

[CPS Guidance on expert evidence](#)

Scotland and Northern Ireland have their own specific legislation and guidance:

[Crown Office and Procurator Fiscal Service Guidance booklet for expert witnesses](#)

[Use of expert witnesses in courts in Northern Ireland](#)

Clinicians acting as expert witnesses must be fully aware of these duties and the court will expect that these are properly understood and followed. Failure to do so could result in sanctions against the healthcare professional.

These rules and/or general good practice for witnesses state that:

- Irrespective as to whether acting as a witness of fact or an expert witness, it is the duty of the witness to help the court achieve the overriding objective of dealing with all cases justly. This duty overrides any obligation to the person from whom the expert receives instructions or by whom the expert is paid
- An expert witness has a duty to act independently and to be honest, trustworthy, objective and impartial and be able to state/explain the facts or assumptions on which they are based. A witness must not allow their personal views about a person, circumstances or situation to affect the evidence or opinion given
- Evidence should be based on recognised clinical evidence and guidelines/standards making clear what is relevant to the time of the incident and should be a part of the expert's evidence and judgement
- Where there is a range of opinions on an issue these should be summarised and an explanation given as to how the witness arrived at their view
- If an expert witness does not have enough information on which to reach a conclusion on a particular point, or if their opinion is qualified (for example, as a result of conflicting evidence), the witness must make this clear
- A witness must only give expert testimony and opinions about issues that are within their professional competence or about which they have relevant knowledge including, for example, knowledge of the standards and nature of practice at the time of the incident or events that are the subject of the proceedings
- If a particular question or issue falls outside the witness's area of expertise, they should make it clear that they consider the matter to be outside their competence and a witness with the appropriate expertise may be required.

Responsibilities as clinicians

The healthcare professional bodies endorsing this guidance have agreed a set of principles which healthcare professionals should follow when acting as a witness. These are the key undertakings for the expert witness as expected by professional bodies.

Demonstrating legitimacy

- Professional bodies expect that healthcare professionals giving expert evidence must hold the appropriate licence to practise/registration and be in, or sufficiently recently in, practice. This is essential if producing a report from direct assessment and/or examination of the patient
- If there are circumstances where this is not the case the healthcare professional must be able to demonstrate why it is appropriate for them to still act as a witness and that they have maintained the appropriate expertise
- If the case relates to historical events the healthcare professional should ideally have been in practice at the time of the events in question or be able to demonstrate understanding of the standards applicable at the time and the context of the incident.

Training and experience

- The healthcare professional should have the necessary clinical knowledge, training and experience to act as an expert witness. What this means in terms of role, qualification or length of experience will vary between professions. Individual professional bodies may choose to provide further guidance in respect of their profession. However, the Court will need to be satisfied that the professional has the level of expertise for their evidence to be accepted
- Healthcare professionals who act as expert witnesses should undertake specific training for being an expert witness and the expectations and responsibilities of this role. It should incorporate the principles of this guidance and be appropriate to the individual clinical profession and specialty. Training should be kept up to date with appropriate refresher courses or other activities
- Healthcare professionals must undertake and demonstrate appropriate activity relevant to their clinical expertise and legal aspects of the expert witness role as part of their continuing professional development (CPD) and this should form a part of their annual appraisal.

Scope

- The healthcare professional should only give evidence on issues within their scope of practice and competence and their areas of expertise. Giving evidence outside the professionals' scope of practice could lead to action from the professional's regulatory body
- Healthcare professionals who act as expert witnesses may comment on the actions of other healthcare professionals but should not seek to pass judgement on the standard of practice of another professional discipline outside of their own expertise.

Understanding the context

- The healthcare professional must have a full understanding of the wider context of the care delivery and how it impacts on the case including:
 - Familiarity with accepted normal and good practice in the specific area of clinical practice and specialism
 - The care delivery setting (rural, tertiary care, district general hospital, independent sector, primary care etc)
 - The historical context and circumstances (if relevant)
- The healthcare professional must understand the role and responsibilities of any individuals under review and circumstances of the case in question. The standards of evidence and proof relevant to the forum in which the case is being heard (criminal, civil, regulatory, disciplinary, inquisitorial) must be applied
- Healthcare professionals should be able to describe and explain the range or spectrum of clinical/professional opinion on the issue in question and indicate, with sufficient reasoning, where their own opinion fits into that spectrum.

Personal responsibilities

- Healthcare professionals are expected to demonstrate the personal responsibilities in relation to:
 - Probity
 - Impartiality
 - Declaration of interests
 - Acting within one's sphere of competence.
- It is important for expert witnesses to be transparent from the outset in terms of declarations and possible conflicts of interest, e.g. the relationship with the relevant trust or hospital or a particular member of staff however long ago. In Scotland this includes their relationship with the expert or experts instructed by the opposing party
- Healthcare professionals acting as expert witnesses should make a self-declaration as to their scope of practice, professional development, training, special interests, areas of expertise both in general and in relation to the specific case and any conflicts of interest that could impact on their evidence. They should appreciate that if they are found to have provided misleading information after such a declaration, they could be liable to professional misconduct proceedings in addition to the possibility of any criminal sanction
- There may be additional standards or principles relevant to particular professionals or specialties produced by individual professional bodies or regulators. Healthcare professionals should be expected to follow the guidance of their own professional bodies and regulators as well as this generic guidance
- Healthcare professionals can be sued in respect of their actions as expert witnesses. This is a relatively recent development – see [Jones v Kaney 2011](#). Healthcare professionals who provide expert evidence independently or outside their contract of employment with their employer, should have professional indemnity insurance which specifically covers medicolegal work.

Further guidance

Further guidance is available from many sources including professional regulators, defence bodies, expert witness organisations and individual professional bodies. Some guidance will be aimed at specific professional groups and may not be relevant to all healthcare professionals.

Examples include:

[MDU consultant pack, Acting as an expert witness](#)

[GMC Acting as a witness in legal proceedings](#)

[BMJ How to be a medical expert witness](#)

[BMA Being an expert witness/working as an expert witness](#)

[RC Pathologists Code of conduct for expert witnesses](#)

[RCN witness advice guidance](#)

[College of Optometrists expert witness guidance](#)

[RCPCH Paediatricians as expert witnesses in the Family Courts in England and Wales: Standards, competencies and expectations](#)

[Faculty of Forensic and Legal Medicine Code of Practice on Expert Evidence](#)

[RC Psychiatrists Responsibilities of psychiatrists who provide expert opinions to courts and tribunals](#)

[Law Society of Scotland Expert Witness Code of Practice](#)

Supporting organisations

This guidance has been endorsed by the following healthcare professional organisations

- Academy for Healthcare Science*
- Academy of Medical Royal Colleges*
- Allied Health Professions Federation*
- Association of Optometrists
- British Dental Association
- College of Optometrists
- Royal College of Midwives
- Royal College of Nursing
- Royal Pharmaceutical Society

The following professional regulatory bodies have also confirmed that the advice set out in this guidance is consistent with their standards and guidance

- General Dental Council
- General Chiropractic Council
- General Medical Council
- General Pharmaceutical Council
- Health and Care Professions Council
- Nursing and Midwifery Council
- Pharmaceutical Society of Northern Ireland

*The Academy for Healthcare Science represents

- Association for Clinical Biochemistry and Laboratory Medicine (ACB)
- Association for Respiratory Technology and Physiology (ARTP)
- Association of Anatomical Pathology Technicians (AAPT)
- Association of Biomedical Andrologists (ABA)
- Association of Clinical Embryologists (ACE)
- Association of Gastrointestinal Physiologists (AGIP)
- Association of Neurophysiological Scientists (ANS)
- Association of Renal Technologists (ART)
- British Academy of Audiology (BAA)
- British Blood Transfusion Society (BBTS)
- British Heart Rhythm Society (BHRS)
- British Society for Clinical Electrophysiology of Vision (BriSCEV)
- British Society for Echocardiography (BSE)
- British Society for Histocompatibility and Immunogenetics (BSHI)
- Institute of Biomedical Science (IBMS)
- Institute of Medical Illustrators (IMI)



- Institute of Physics and Engineering in Medicine (IPEM)
- Society for Cardiological Science and Technology (SCST)
- Society for Vascular Technology of Great Britain & Ireland (SVTGBI)
- Society of Critical Care Technologies (SCCT)

***The Academy of Medical Royal Colleges represents**

- Royal College of Anaesthetists
- Royal College of Emergency Medicine
- Royal College of General Practitioners
- Royal College of Obstetricians and Gynaecologists
- Royal College of Ophthalmologists
- Royal College of Paediatrics and Child Health
- Royal College of Pathologists
- Royal College of Physicians & Surgeons of Glasgow
- Royal College of Physicians of Edinburgh
- Royal College of Physicians of Ireland
- Royal College of Physicians of London
- Royal College of Psychiatrists
- Royal College of Radiologists
- Royal College of Surgeons of Edinburgh
- Royal College of Surgeons of England
- Royal College of Surgeons in Ireland
- Faculty of Dental Surgery
- Faculty of Forensic and Legal Medicine
- Faculty of Intensive Care Medicine
- Faculty of Occupational Medicine
- Faculty of Pharmaceutical Medicine
- Faculty of Public Health
- Faculty of Sexual and Reproductive Healthcare
- Faculty of Sports and Exercise Medicine

***The Allied Health Professions Federation represents**

- British Association for Music Therapy (BAMT)
- The British Association of Art Therapists (BAAT)
- British Association of Dramatherapists (BADth)
- The British Dietetic Association (BDA)
- British Association of Prosthetists and Orthotists (BAPO)
- British and Irish Orthoptic Society (BIOS)
- Royal College of Occupational Therapists (RCOT)
- Chartered Society of Physiotherapy (CSP)
- The College of Paramedics
- The College of Podiatry (CoP)
- Royal College of Speech and Language Therapists (RCSLT)
- Society and College of Radiographers (SCoR)

Appendix A

Recommendation from the Sir Norman Williams Review

"The Academy of Medical Royal Colleges, working with professional regulators, healthcare professional bodies and other relevant parties, should lead work to promote and deliver high standards and training for healthcare professionals providing an expert opinion or appearing as expert witnesses. These standards should set out what, in the Academy's opinion, constitutes appropriate clinical experience expected of healthcare professionals operating in such roles.

Healthcare professionals providing an expert opinion or appearing as an expert witness should have relevant clinical experience and, ideally, be in current clinical practice in the area under consideration. Additionally, they should understand the legal requirements associated with being an expert witness (including the requirement to provide an objective and unbiased opinion).

Healthcare professionals should be supported and encouraged to provide an expert opinion where it is appropriate for them to do so. Healthcare professional bodies, including Royal Colleges and professional regulators, should encourage professionals to undertake training to become expert witnesses, and employing organisations should be prepared to release staff when they are acting as expert witnesses.

Professional representative bodies and regulators should recognise acting as an expert witness as part of a healthcare professional's revalidation or continuous professional development (CPD) process.

Although our terms of reference were limited to gross negligence manslaughter, we heard evidence of more general concerns about experts. This should be reflected in the Academy's work to develop training for healthcare professionals acting in this capacity."

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