

The Importance of Recognising the Different Kinds of Expert Surgical Evidence

Giles Eyre

It is generally assumed that surgeons instructed to provide expert reports for use in court are hired only in order to provide expert opinion evidence, and only for that purpose. That assumption is wrong. Expert evidence is multi-faceted, and recognition of that fact will impact on the approach to report writing and the manner in which the report is constructed by the expert.



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Expert opinion evidence is only one aspect of expert evidence

Typically an expert is instructed in litigation to provide opinion evidence – has the standard of care fallen below that reasonably to be expected of a reasonably competent expert in that field, or has any injury, loss or damage been caused by a breach of duty, or what is the extent of injury, loss or damage resulting from an accident or other adverse event? But that is not the full picture and there are other types of expert evidence which may be just as important to lawyers and to judges hearing the cases, and which are frequently contained within an expert's court report.

It is important to be aware of the different roles that an expert may have as a court expert and the separate, but often overlapping, reasons why the expert may have been instructed. The recent Supreme Court decision in *Kennedy v. Cordia (Services) LLP*¹ was concerned with the evidence of an engineer in relation to a slipping case and although dealing with an appeal from Scotland, the Court's observations are equally applicable to England and Wales and to medical experts.

The Kennedy v. Cordia case

The case itself was relatively straightforward in medical terms. Tracey Kennedy, a home carer,

slipped on an icy path fracturing her wrist while visiting an elderly patient. She claimed damages against her employer. An expert witness on Health and Safety opined that she probably would not have slipped and fractured her wrist if she had been provided with a clip on attachment for her shoes called "Yaktrax". He was of the opinion that Cordia had not properly assessed the risk of such an event occurring.

Cordia objected to the expert's opinion arguing that it was inadmissible as he had no relevant special skill or specialised learning. The initial court ruling was that Cordia were liable but this view was overturned at appeal and Ms Kennedy and her legal representatives asked the Supreme Court to overturn this ruling. The Supreme Court obliged.

The expert as witness of fact

Like any other witness the surgical expert may be an expert of fact giving evidence of what he or she observed, so long as it is relevant to a fact in issue in the case. So a surgeon may give evidence of an examination of

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∞ *WHAT IS ALWAYS ESSENTIAL IS THAT THE EXPERT EXPLAINS THE BASIS OF HIS OR HER EVIDENCE WHEN IT IS NOT SIMPLY EVIDENCE OF PERSONAL OBSERVATION OR SENSATION. MERE ASSERTION CARRIES LITTLE WEIGHT.* ∞

the claimant, or the appearance or movements of the claimant on arriving or leaving the consulting room. Like any other witness of fact, it is important, particularly if the evidence may be challenged, that in addition to giving the factual evidence, the medical expert also gives evidence as to the circumstances in which the facts were ascertained. So, for example, in relation to the clinical encounter with the claimant, the report should include the time spent, together with any information supportive of the reliability of the experts account. In the case of other observations, information as to how long the claimant was observed, from what distance, whether the view was unobstructed and in what lighting conditions.

The expert as witness of expert facts

As a skilled witness, a surgical expert may also give evidence based on his or her knowledge and experience of a subject matter, drawing on the work of others, such as the findings of published research or the pooled knowledge of a team of people with whom he or she works. A medical expert may therefore, for example, give evidence as to how a joint functions and the potential impact on the joint or on bone of a particular fracture or disease, or of what is found to be present but not immediately apparent (for example by palpation). This may well not be opinion evidence, but evidence of facts known to and shared by similar experts. For such

evidence to be admissible from the witness, the same rules that govern admissibility of expert opinion evidence also apply. Therefore, to be permitted to give this evidence, the skilled witness must set out his or her qualifications, by training and experience, to give expert evidence (most probably in the CV section of the report) and also say from where he or she has obtained information if it is not based on his or her own observations and experience.

This expert factual evidence may be given by itself or in combination with, or as the basis for giving, opinion evidence.

The expert expressing opinion as to 'missing' facts

Sometimes the expert is required to, or identifies the need to, express opinion as to what the facts were (on the balance of probabilities). For example there may be missing observations or readings in the medical records or missing or absent x-rays or other images, the content of which might be important in providing an opinion. Based on other information or data, and expert knowledge, the surgeon may be able to express an opinion as to what that absent fact was (on the balance of probabilities).

To provide such an opinion as to the 'missing' fact the expert has to be able to justify his or her expertise to do so. That is probably covered by the

expert's standard CV section of the report, but if not, then the expertise must be expressly addressed.

The expert giving 'pure' opinion evidence

'Pure' opinion evidence, in contrast to expert factual evidence, will address, for example in medical expert evidence, condition and prognosis, causation or standard of care. This is what is normally thought of when referring to expert evidence.

Rules as to admissibility of expert evidence

Whether giving skilled evidence of fact or expert opinion the admissibility of the skilled evidence is governed by the same four considerations:

1. Will the evidence assist the court in its task?
2. Does the witness have the necessary knowledge and experience?
3. Is the witness impartial in the presentation and assessment of the evidence?
4. Is there a reliable body of knowledge or experience to underpin the expert's evidence?

But opinion evidence, in contrast to factual evidence, is only admissible if it is necessary, rather than merely of assistance, for the court to have such evidence in order to resolve the matter in dispute. Medical expert opinion evidence

to address condition and prognosis, causation or standard of care is normally necessary and that it is necessary is obvious. Medical expert opinion to address missing facts is not necessarily obvious and should be justified – the report should spell out why it is necessary to establish the missing fact, as well as justifying the expert's expertise to provide it.

Provide reasoning, not just assertions

What is always essential is that the expert explains the basis of his or her evidence when it is not simply evidence of personal observation or sensation. Mere assertion carries little weight. Quoting from a South African case in *Kennedy v. Cordia Services LLP* the Supreme Court stated:

'Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are [sic] disclosed by the expert.'

And quoting from a Scottish case, the Supreme Court stated:

'As with judicial or other opinions, what carries weight is the reasoning, not the conclusion.'

Writing the report

The surgical expert, in writing a court report, should bear these points well in mind:

1. When giving evidence of factual matters observed by the expert, then the circumstances in which they were observed, and therefore their reliability, should be spelt out. That may well include details of the length and circumstances of the clinical encounter with the claimant or the distance from which the claimant was observed when leaving the consulting room;
2. When giving evidence of factual matters known only as a consequence of having the particular skills for which reason the expert has been instructed, in addition to providing the appropriate expert credentials to justify the status as the appropriate expert, the expert must provide clear statements as to the reasoning process which led to each conclusion reached;
3. When giving an opinion on missing facts, in addition to providing the appropriate expert credentials to justify the status as the appropriate expert, and the ability to provide the opinion, the expert should explain the importance and relevance of the missing facts, and provide a clear explanation of the reasoning process by which the missing facts may be deduced;
4. When giving an opinion on condition and prognosis, causation or standard of care, in addition to providing the

appropriate expert credentials to justify the status as the appropriate expert, and the ability to provide the opinion, it is the reasoning process which carries weight with the judge and which must therefore be fully spelt out within the expert report².

Giles Eyre has recently retired from practice after 40 years as a barrister specialising in clinical negligence and personal injury claims. He is a contributing editor to 'Clinical Negligence Claims - A Practical Guide' (2015). He is a mediator and continues to sit as a Recorder.

Giles is co-author of a manual for medico-legal experts and those instructing them, 'Writing Medico-Legal Reports in Civil Claims - an essential guide' (2nd edition - September 2015) (www.prosols.uk.com). He frequently gives seminars and workshops, and provides training for medical experts and those instructing them in medico-legal report writing, giving evidence and other medico-legal issues.

Giles blogs as Medico-legal Minder on topics of interest to the medical expert witness.

Editorial Comment from Mike Foy

It is true to say that as experts we focus on causation, condition and prognosis in our personal injury reports as liability is not usually our preserve. In contrast, liability is of fundamental importance if we are asked to give an expert opinion in a case of alleged negligence.

Giles Eyre introduces us to another facet of expert evidence drawn from the recent Kennedy v. Cordia case. We would all, no doubt; give a clear and concise account of the claimant's description of the injury and our objective findings on examination. We would also, where appropriate, give our views on the claimant's veracity and any inconsistencies regarding their account of the past history and continuity of post-accident symptoms when cross referenced against the medical records. Currently, it is not common expert witness practice to record the time spent with the claimant.

The "missing facts" position is interesting. Sadly, it is not unusual for records to be incomplete. The more difficult scenario arises when the records are complete and there is no complaint of any relevant symptoms for a prolonged period of time despite the claimant insisting that problems persisted throughout. Here the expert needs to take an informed view on the basis of his experience of dealing with the condition under consideration in clinical practice together with his understanding of the pathophysiology and

epidemiology of that condition, the veracity of the claimant and the expected recovery period from the injury.

If assertion alone is insufficient without reasoning, how then do we rationalise the concept of advancement or acceleration of symptoms if that position on causation is believed by the expert to be appropriate? A bald assertion of six months, five years or twenty years is unlikely to help or satisfy the court unless some justification can be given for the reasoning behind the position that has been taken. Some guidance on this has appeared elsewhere³. Food for thought, indeed. ■

References

1. *Kennedy v Cordia (Services) LLP* [2016] UKSC 6
2. An extended discussion on the implications of *Kennedy v Cordia Services LLP* between Giles Eyre and Kevin Connor SC of New South Wales Kevin Connor can be found at <https://benchmarkinc.com.au/web/television/single/164358713>
3. Foy, M A: Advancement and acceleration in medico-legal practice. What's it all about? Bone and Joint 360 Apr 2016, 5 (2) 37-38

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