Should a Medicolegal Expert be certified?

Giles Eyre, barrister and author

In this article I argue, not that medically qualified professionals must be mad to provide their services in the legal forum, but that it is essential for litigants, their lawyers and the courts to be guaranteed a high level of competency in all those holding themselves out as providing medicolegal services and in particular in providing medical reports for the purposes of civil litigation.

Giles Eyre

Background

Medical evidence is crucial in injury claims, whether they be personal injury, disease related or clinical negligence claims. A lawyer cannot make a successful recovery, or effectively defend a claim, without medical evidence, and important parts of any case will be built on the foundations of the medical opinion.

Because of the requirement for independence on the part of the medical expert and the expert's duty to help the court under Part 35 of the Civil Procedure Rules 1998 (CPR), and because the expert evidence addresses matters outside the judge's knowledge, the court will place great reliance on the interpretation given to the words of the expert. Whether that correctly reflects the expert's intended message or opinion, and whether the expert has fully understood what it is the report should address, is not often considered by the judge or even the parties' lawyers.

Most claims never go to a disputed hearing, but those same reports, as interpreted or understood by the parties' representatives, will be used to assess the strength and value of a claim, and to negotiate settlement.

If the lawyer, having obtained a medical report, is dissatisfied with it and concerned as to the expert's understanding of the legal process, or the expert's ability to communicate effectively in relation to the relevant medicolegal issues, the court is unlikely to permit a change of expert for fear of encouraging 'expert shopping', or of allowing legal costs to grow or of delaying the claim should further evidence be obtained[1].

Is the report fit for purpose? This writer, who has the dubious privilege of reading dozens of reports in the course of a month's practice, would suggest that a significant majority of medical reports prepared for civil litigation are not fit for purpose. Those failings vary from the subtle to the gross. Let's consider some examples from the recent past:

1. *The quality of the scarring is outstanding*
2. *She will not make a recovery from these persisting symptoms within the foreseeable future*
3. *As, despite her limitations, she is managing in her job, in my view she is not at a disadvantage on the open labour market.*
4. *The left wrist will have a long term disability of ten per cent*
5. *There is a more than 50% chance that she will require a knee replacement during the next 10 years. She may then require a further revision of her knee replacement as she is relatively young*
6. *The doctor's examination was clearly incompetent and negligent in that, as the client reports, he did not ask her to undress and used a stethoscope through her clothing*

> *MOST CLAIMS NEVER GO TO A HEARING, BUT THOSE SAME REPORTS WILL BE USED TO ASSESS THE STRENGTH AND VALUE OF A CLAIM, AND TO NEGOTIATE SETTLEMENT*

What all of these examples demonstrate is the failure of the medical expert to understand the role of the expert in the claim in which they have been instructed. It is likely that the expert understands the requirements of the CPR (the Rules, Practice Directions and Protocol) and hopefully will have complied with the CPR by stating that fact and complying with those requirements. But those requirements do not address any of the matters which the experts have sought unsuccessfully to address in the above examples.

In example 1, the descriptive language is unclear and unhelpful to the lawyer, and may even give the opposite impression to that intended by the expert. Example 2 fails to give any indication as to how long the symptoms will persist and therefore damages cannot be assessed. Example 3 shows a failure to understand the head of claim for a handicap on the employment market and yet expresses an opinion on it and, in example 4, the expert provides an assessment which by using a percentage gives no insight into the nature of limitations or restrictions in the claimant's domestic and working life. In example 5 again it is impossible to assess what damages will be recovered without greater clarity as to the degree of risk and the timing for both operations. Example 6 fails to apply the *Bolam* test, ventures into the judge's area in the case in describing the incompetence as 'negligent', and in any event appears to address the situation only on the basis of one reported set of facts, a version which may or may not be accepted by the court.

It may be that a better drafted or more detailed letter of instruction would have avoided some of these issues. However the clinician, holding him/herself out as providing expert reports in civil litigation has -

- a duty to help the court on matters within the expert's expertise[2], a breach of which can result in sanction from the court;
- a duty of care to the client to use reasonable skill and care in providing their services in writing a report, a breach of which can result in a claim for damages suffered as a result of any failure on the part of the clinician[3]; and
- a professional duty under the GMC guidelines to be accurate and not to mislead, to understand exactly what questions the clinician is being asked to answer and to use language and terminology that will be readily understood by a non-medical audience, breach of which may put the clinician's registration at risk[4].

In helping the court to decide whether liability is established or what damages should be awarded the expert must address those matters the court needs addressed, applying the expert's expertise but also applying the appropriate legal test.

1. Is the scarring reasonably described as disfiguring or of cosmetic impact, is it visible at conversational distance, is it capable of improvement or will it fade with time or treatment?
2. How long will the present effect and consequences of the injury probably continue?
3. What restrictions in activity does the claimant have as a consequence of the accident and what is the likely impact on possible future employment of such restrictions?
4. As 3 above, but dealing in addition with the likely impact on all activities of daily living.
5. On the balance of probabilities, what is the percentage risk of requiring a knee replacement operation in a number of years from now, and, if necessary or helpful, giving the risk for different periods (say for example in 5 years, 10 years and 15 years), and the likely time thereafter before a revision operation is needed?
6. What in the circumstances would a reasonably competent doctor have done, what is the standard below which no reasonably competent doctor would have fallen and how does that compare with the evidence as to what in fact happened, for which there may be more than one possible version of events?

Selecting a competent expert

Every lawyer wants a competent medicolegal expert. No general accreditation system exists to guarantee that standard and to give lawyers confidence in the selection of an expert. A lawyer selects a medical expert by a number of different routes including:

- choosing a name from an in-house approved list of experts, entry to which may be more by anecdote than by objective assessment,
- a near random selection from a directory or
- by surrendering the selection process to an agency whose method of selection is unknown.

Medical experts holding themselves out as a court expert are not required to have any training or expertise as an expert witness and do not have to demonstrate any particular competency for that role, beyond the limited declaration under the Practice Direction to CPR Part 35 which must appear in the medical report[5]. The report is not required to state the expert's expertise as an expert, only 'details of the expert's qualifications' as an expert in the medical field in which an opinion is to be given[6].

To avoid the kind of issues outlined in this article, whether in the report or in the joint discussion, what is essential is a medical expert who has training and expertise in writing medicolegal reports and acting as a medical expert witness in civil claims and understands what the role entails.

> *A LAWYER INSTRUCTING A MEDICAL EXPERT SHOULD CONSIDER THE EXPERTISE OF THE MEDICAL EXPERT AS A COURT EXPERT DEALING WITH MEDICOLEGAL ISSUES*

Conclusion

A lawyer instructing a medical expert should consider the expertise of the medical expert as a court expert dealing with medicolegal issues. However, in the absence of a generally accepted standard, it is difficult for lawyers to have any assurance not only of the expert's ability to provide a report that the lawyers can understand (as is their right) but also of the expert's ability to understand and address all the relevant legal tests and the purpose of the report for the lawyers and the court. Competent and efficient case management requires this level of ability.

Medical experts can improve their position in the expert market by ensuring that they can display to those considering instructing an expert a public mark of the expert's understanding, not simply of the CPR, but of the requirements of high quality medicolegal work which adds real value to the party's position in the litigation.

Giles Eyre is co-author of a manual for medicolegal experts and those instructing them, 'Writing Medico-Legal Reports in Civil Claims - an essential guide' (2011) and co-presenter of the elearning programme 'Medico-Legal Report Writing (Core Skills)' (www.prosols.uk.com).

Giles is a barrister specialising in personal injury, disease and clinical negligence claims. He frequently gives seminars and workshops for medical experts in medicolegal report writing, giving evidence and other medicolegal issues. He has co-authored a book and an elearning programme in this area.

References

1 see, for example, *Jones v Kaney* [2011] UKSC 13 and *Guntrip v Cheney Coaches Ltd* [2012] EWCA Civ 392
2 CPR. 35.3
3 *Jones v Kaney* above
4 General Medical Council Guidance
5 35PD 3.2(9)
6 PD35 3.2(1)