Practical guidance for orthopaedic surgeons preparing expert medico-legal reports

British Orthopaedic Association

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INTRODUCTION

Surgeons working as expert witnesses need to be familiar with the Civil Procedure Rules (CPR) which set out the practice and procedure to be adopted in the Civil courts of England and Wales. Surgical experts need to be familiar with CPR Part 1, Part 35, Practice direction 35 and Guidance for the instruction of expert witnesses (2014).

The overriding objective is to enable the court to deal with the case justly and at proportionate cost. The British Orthopaedic Association recommends its members only to take on cases that they encounter as part of their routine practice ('stick to what you know'). It is also recommended that members who carry out medico-legal practice ensure that they have adequate indemnity to cover this aspect of their practice.

This document updates guidance from the BOA Professional Practice Committee, previously published in the Journal of Trauma and Orthopaedics in March and June 2015. Specific updates include a description of types of witness, consideration of the widespread use of online storage and download of medical records and imaging, the use of billing software, electronic rather than paper reports during and after the Covid-19 pandemic, conduct of the Joint Statement, and the rise of Medco for low value soft tissue injury RTA claims.

WITNESSES

Surgical witnesses can be factual, professional or expert.Factual witnesses give evidence, usually in writing, as to what they did or saw, often in the context of an adverse event. Professional witnesses give evidence to help the court establish the facts by giving evidence of their clinical involvement in a case. Expert witnesses, such as clinicians and pathologists, give expert opinion evidence as to what they know: it will usually be a necessary qualification that they did and saw nothing of the events of the specific case, so they will have been entirely uninvolved in the claimant / patient's clinical care. It is unwise in clinical negligence cases for the expert to have a close professional relationship with the accused surgeon, as this poses a clear conflict of interest and the expert's impartiality will be challenged. Expert witnesses cannot give evidence of fact, although their expert evidence may help the court to decide what probably happened. It is for the court alone to determine the facts as to what happened, when and why. The expert may have been instructed to give an opinion on long term condition and prognosis, or on the standard of care that the patient received.

The Jackson Reforms were introduced on 1 April 2013, which set out a number of procedural issues relating to solicitors and insurance companies. As far as the expert is concerned, the major points to note are:

1. The requirement for compliance with court timetables, with "sanctions" for experts who fail to do so.

2. Compliance with budget requirements and the need to provide a clear estimate of cost to the court at the time of receipt of initial instructions.

3. The introduction of "hot-tubbing", a technique developed in Australia to permit (but not require) experts of the same discipline to give evidence concurrently at the direction of the judge, i.e. without the necessity of the legal representatives agreeing to this. Barristers are permitted to put questions to the experts and the experts may question each other.

Following Jones v Kaney (2011), the expert witness is no longer immune from prosecution or retribution if the report or the opinion is flawed or deficient, and this is why it is important to have suitable indemnity to cover such eventualities.

DEALING WITH INSTRUCTIONS

A solicitor, insurance company or agency may initially send a letter of enquiry, to ascertain whether a case lies within the expert's area of expertise, whether they have capacity to see the claimant within a reasonable time frame, the expert's current ratio of claimant to defendant instructions, and requesting a copy of the expert's current CV and terms and conditions.Based on the responses, the solicitor, insurance company or agency may then follow up the initial enquiry with a formal letter of instruction. A formal letter of instruction should include:

1. Name, address, date of birth and contact details of the person that the report is to be provided on.

2. A brief description of the matter to be dealt with, i.e. date, nature of injury (single / multiple).

3. A complete list of the materials and documents being provided.

4. Whether it is necessary to interview and examine the claimant. Reports on breach of duty of care and causation may sometimes be prepared from clinical records and radiology only.

5. An outline of the main issues to be dealt with and whether the opinion is required on breach of duty, causation, or condition and prognosis.

6. An indication of the claimant's level of mobility, to indicate whether they will require any assistance to access the examination room.

7. An indication of the requirement for an interpreter if appropriate.

8. An assurance that there is no claim against the expert or their employer.

9. An assurance that all relevant medical records and imaging will be provided before the appointment.

10. A copy of the claimant's witness statement, if available, and any particulars of claim or defence available at that time.

11. Copies of other expert reports relevant to the case.

12. The instructing party's time frame for preparation of the report.

13. Any important court dates relevant to the claim. If a timetable has already been ordered by the court, the instructing solicitor should provide a copy of the court order with instructions. It is then incumbent upon the expert to ensure that they are able to manage diaries to comply with any deadlines, given the drastic repercussions for non-compliance (cases being struck out, or parties not allowed to rely on reports that do not comply with timetables).If there is any doubt about the expert's ability to comply with the timetables set, either the instruction should not be accepted by the expert, or enquiries should be made as to whether timetables can be varied to ensure compliance.

14. An agreement to the payment of the expert's reasonable fees with an agreed time frame.This may contain a provision that expert fees may be subject to a budget set by the court and agreement may be sought as to whether instructions will be accepted on that basis. In orthopaedics, rules of supply and demand may apply, such that except for some highly specialist areas, experts may be compelled to accept restriction of fees.

15. An indication that the report is being provided within the CPR 35 Protocols.

It is recommended that the expert should have written terms and conditions giving clear details of their fee structure, settlement terms, travel expenses for court attendance, conferences etc, and court attendance fees.It is recommended that the expert has these terms and conditions signed by the instructing solicitor before accepting instructions.

MEDICAL RECORDS / RADIOLOGY

It is the duty of the instructing party to obtain, at their expense, all relevant medical records including imaging, and to provide them to the expert in viewable format. Ideally, the clinical records should be indexed, ordered and paginated.

In recent times, most records and imaging are available via online storage facilities in downloadable format. The instructing party should ensure that the correct passwords are transmitted to enable straightforward access to the records.

Radiological imaging in complex cases in particular may take up several GB of memory, and so provision of imaging in compact disc format or other portable storage media may be an acceptable alternative, along with the correct password for access. Some larger firms of solicitors have their own online PACS system, which again may be acceptable.

The sending of hard copies of paper records is to be discouraged, on grounds of difficulties with storage, cost of postage, data security, inconvenience, cost of disposal, and cost to the environment.

All experts who carry out this work should be aware of their responsibilities under the Data Protection Act 2018 and GDPR, which has been incorporated into UK law following the United Kingdom's exit from the European Union. All experts should be registered with the Information Commissioner's Office, both as an individual and via any limited company through which they may run their medico-legal practice where appropriate.

All documentation should be deleted (electronic files) or destroyed (compact discs and any hard copies of records) after the conclusion of a case, in a secure manner.

RESPONSIBILITIES OF THE EXPERT

On receipt of a request to provide a medico-legal report the expert should:

1. Acknowledge the request and establish the scope of the instruction. It must be clearly understood whether they are being asked to report as a witness to fact, an expert witness, or to provide advice to the court on a particular matter. This should usually be clear from the letter of instruction. If in doubt the expert should immediately seek clarification from the instructing party.

2. Clarify whether or not there are any time constraints for provision of the report. This should be clear from the letter of instruction, but if in doubt, this should be clarified with the instructing party. If it becomes clear that the court has already timetabled the case, the expert should request a copy of the Court Order and ensure that they can comply with all the terms of that order. This means that the expert can comply not only with the date for the disclosure of the report and any supplementary reports, but also the dates for expert meetings, preparation of joint statements and attendance at trial.

3. The expert should provide a detailed breakdown of fees to include:

a. The estimate of the fee or range of fees for the report (including an hourly rate and an estimate of the number of hours to be taken) and any cancellation fees which may be incurred if the claimant fails to attend for assessment. The expert may have to justify the fee level by reference to the complexity of the case, the volume of records and imaging to be reviewed, any complex treatment requiring specific expertise and knowledge, major complications requiring additional treatment to be considered, and reports required at very short notice.

b. The estimated cost of any supplementary report(s) and responses to Part 35 Questions posed by either side.

c. The cost of any attendance at conference with counsel.

d. The cost of joint expert meetings and preparation of joint statements.

e. Fees for attendance at court, including late cancellation charges.

f. Details of travelling expenses, and any fees for subsistence or accommodation where applicable.

4. Keep a comprehensive time sheet, recording all work done in order to justify the fees incurred.

5. Arrange to interview and examine the claimant in a suitable clinical environment and allowing sufficient time to carry out a full assessment.

6. Ensure that at the time of the assessment, if appropriate, a chaperone is available.

7. Following the assessment, the completed report should be sent to the instructing party within six weeks of the appointment at the latest unless there has been prior agreement that it will be provided at an earlier date, or the date specified by the Court Order.

8. At the conclusion of the case dispose of / delete medical records and imaging in a secure manner, as set out above.

9. Ensure that they have suitable professional indemnity insurance in case of later litigation, following Jones v Kaney (2011).

10. The expert should ensure that they have appropriate clinical experience and knowledge to provide the report. For common conditions / injuries it would be expected that the expert would have regular exposure to such conditions in their clinical practice. For example, it would be inappropriate for a specialist hand surgeon to give an opinion on a low back problem, or a specialist spinal surgeon to give a hand surgery opinion. In such situations the expert may have to be prepared to defend their position when challenged by the other side's barrister or by the judge. Again, 'stick to what you know' and do not hold yourself out as an expert in an area where you are not. There are cases where it will be appropriate to help the court even where you have no direct expertise – such as where the prospective expert instructed by the other party has an expertise similar to your own and to advise about an unusual case in an emergency, or in a case where there are no recognised experts.

11. However, the expert should be aware that after the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO 2013), there will be increasing pressure from judges and / or from instructing solicitors, due to budget restraints, to restrict the amount of expert evidence that is permitted. This may mean that an orthopaedic expert is asked to provide an opinion on all orthopaedic aspects of a case and not only those within their areas of expertise. In such circumstances, the expert should seek clarification, and if concerned about their ability to provide opinions on all matters contained within their instructions, should write to their instructing party setting out their concerns regarding being asked to stray outside their expertise. This may give the instructing party the ability to go back before the judge for variation of the Order. If the judge refuses to vary and the expert proceeds with the instruction, the expert should express any concerns or reservations in the report itself.

12. In general terms, it is felt that experts should not give opinions on their own patients except on matters of fact. The treating consultant's primary responsibility is to their patient. The expert's primary responsibility is to the court. These differing responsibilities can cause significant conflicts of interest which are best avoided. Occasionally however, instructing solicitors may require a report from the treating consultant, either because the judge orders it, or because an initial needs assessment is required. In such cases, the consultant should clarify and ensure that the patient / claimant consents to the treating consultant acting as an expert in the case.

13. Under no circumstances should an expert accept instructions that are conditional on the success of the case. This would provide a significant conflict of interest and compromise the expert's independence. It is formally prohibited under Part 35 Rules.

FEES AND BILLING

There should be a clear understanding between the experts and the instructing party regarding the range of fees applicable to the case in question.This will be facilitated by:

1. Accurate instructions outlining the nature of the claim, any unusual issues and a clear idea of the volume of documentation including scans and radiographs that need to be reviewed.

2. Detailed terms and conditions provided by the experts, including expected time for settlement of the fee note.

Content of relevant terms and conditions has been set out in detail in Sections 5.3a) to 5.3f) above.

Consideration should be given to whether physical attendance is required at any conference with counsel, or whether attendance will be possible by telephone or video link.

It should be made clear if the expert's employer requires 6 to 8 weeks notice for cancellation of clinical commitments, and therefore ample warning is required for scheduling of court appearances etc during the normal working day.

There is a large range of what individual experts consider their time is worth, but the hourly rate should be set on an individual basis and may well vary according to experience, geographical location and specialty / sub-specialty. The hourly rate may be a major factor in determining instructions arriving, rather than experience or clinical appropriateness, and this needs to be borne in mind.

Experts should be aware that there have been agencies and even a large firm of solicitors that have gone out of business owing substantial amounts of money to experts. They should also be aware that in such circumstances they will be unlikely to receive any unpaid fees after insolvency of such agencies. Therefore, it is not sensible business practice to run a large deferred debt with one or two agencies or solicitors. It is recommended that invoicing is undertaken with the aid of modern software to enable regular debt chasing and to comply with existing and upcoming changes in HMRC regulations regarding electronic submission of accounts.

Experts should also be aware that agencies, insurers and solicitors are in the business of making money. Experts should also therefore set themselves up in a business-like fashion so that they too are similarly minded. They need to adopt a different mindset from routine clinical practice where their primary responsibility is to the patient. In medico-legal practice, the primary responsibility is to the court and the aim of the practice is to provide first rate expert opinions. However, it is important to be aware that in orthopaedics, with the exception of a very few specialist areas, there is potential oversupply of experts. Therefore, when setting up a medico-legal practice some compromises may have to be made until the practice and the reputation of the expert are established.

Experts should be aware that provision of expert medical reports is liable to VAT. The VAT threshold for compulsory registration for VAT in the United Kingdom is currently £90,000 but can change on a yearly basis. Therefore, once medico-legal income reaches this level, the expert will have to register for VAT and charge VAT at the prevailing rate.

To reiterate, under no circumstances should an expert accept instructions that are conditional on the success of the case. This would produce a significant conflict of interest and compromise the expert's independence. It is also contrary to CPR Part 35.

The issue of cancellation fees is, and will, remain controversial. Solicitors / insurers are reluctant to pay them especially in legal aid cases. Cancellation at least 72 hours before a relevant hearing or appointment is considered reasonable by the Ministry of Justice, with an assumption that experts can find alternate engagement in this time frame. It seems there is a lack of awareness on behalf of the MoJ that clinics and operating lists cannot be reinstated at very short notice, and that busy clinicians involved in NHS practice usually have to take annual leave to attend court / meetings in these cases. Generally, the situation is best managed with clear terms and conditions agreed and signed by the instructing party when instructions are accepted, and with close liaison with the instructing party in the weeks leading up to a court appearance.

With the advent of cost budgeting, it is increasingly common for experts to be asked to accept instructions on the basis of fixed fees set by the courts. Therefore, terms and conditions which require instructing solicitors to pay above budgeted fees are likely to be rejected in a climate where instructing solicitors own costs are restricted, and the claimant may not have the means to meet any shortfall. The increasing pool of orthopaedic surgeons undertaking medico-legal work is also a market driving force at least in straightforward personal injury cases. See Section 12 – Medco and low value soft tissue RTA claims – for more information.

THE MEDICAL REPORT

Prior to the Covid pandemic, the legal system almost universally demanded printed reports. Electronic service of reports was the exception, but this has now completely reversed. Most instructions are sent electronically, and it is considered appropriate to provide a report in a similar fashion. However, if a case proceeds to a court hearing, then physical printed bundles are still used and so the report should be produced in such a way that is compatible with this.

The report should be provided along the lines given below:

1. Format & Style:

a. Double spaced.

b. One side of paper only.

c. Decent margins on both sides of the text.

d. Paginated with paragraph numbers for ease of reference.

e. Clear, relevant section headings.

f. Comprehensible to a layman, i.e. technical / medical terms should be explained.

g. There should be a clear distinction between facts and opinions.

2. The general content and layout may vary, but should include:

a. Title page containing name, address, date of birth, employment status accident / incident date, assessment / examination date, date of signing report, details of instructing parties and their reference numbers, documents available to the expert.

b. Index with contents page, reference to appendices if appropriate, and expert's abbreviated CV. In respect of the CV, it is important that the expert provides a CV that specifically deals with why the expert is competent to deal with the case at hand, rather than relying on a general CV.

c. If the expert is a friend or has previously been a colleague of anyone involved in the treatment of the patient, or there is anything else that might be seen as representing a conflict of interest, as set out in Section 2 above, this should be explained.

d. Claimant's history of the incident / injury and their account of subsequent investigations and treatments. Plans for future investigation / treatment.

e. A detailed list of all relevant medical records, X-rays and scans that have been provided. It must be clear what documents and evidence have been available to the expert. It should be noted that while all records should be reviewed by the expert, the medical records will be available to all involved in the case and the court does not require a verbatim reproduction of the records. Reproduce in the report only those entries that are relevant to your analysis of the case.

f. Outline of the claimant's current condition and ongoing symptoms that may relate to the incident, including current medication.

g. The impact of the ongoing symptoms / disability on the claimant's ability to work. In particular, their ability to continue in their previous employment, was the time lost from work after the incident justified, are they disadvantaged in the open labour market, and will they be able to work until their normal retirement age?

h. The impact of the ongoing symptoms/disability on the claimant's ability to cope in the home and in their recreational / sporting activities. Is the situation likely to deteriorate in the future? Are there (or will there be) care requirements? Do they need help with certain tasks and chores in the home that they would not require but for the injury? It is appropriate for the experts to identify those tasks and chores that the claimant will have difficulty with, however these do not need to be quantified in detail, as this is the province of the occupational therapist or care expert's report.

i. Review of relevant past medical history and its importance with regard to injuries and ongoing disability.

j. Detailed clinical examination relevant to the injuries sustained.

k. Discussion section reviewing treatments and if appropriate considering further management. While the report is for the court, if it is obvious that further investigation / treatment is required which may clarify the reason for ongoing symptoms or potentially improve the claimant's condition, than it is reasonable to say so. Are further reports required from other experts?

l. A clear statement of the expert's opinion on the causation of the injuries presented. When causation is not obvious, or multi-factorial, it is important to point out that there may be a range of reasonable opinion amongst experts, and also to highlight on what factors you have based your own opinion. On the question of causation, the expert should provide an opinion on the balance of probabilities, i.e. whether it is more likely than not that the events in question caused or substantially contributed to the causation of the damage in respect of which a complaint is made.

m. A clear outline of the prognosis. Is the claimant able to continue working? Will they be likely to have to take premature retirement as result of injury? Will they need future surgery? Are they going to suffer from arthritis? Has a steady state been reached? Is a further report required in the future? Are there comorbidities which would have prejudiced the claimant's work prospects and the quality of life in any case? The court will wish to be guided by an estimate of the percentage chance of any of these issues arising.

n. Throughout the report the expert should avoid straying from their own area of expertise. Where they do so they should make this clear and explain why it is necessary, unless it is obvious.

o. The report should contain the standard declaration and statement of truth that is mandatory to append to all reports.

p. Following an amendment to Practice Direction 35 para 3.3, the statement of truth contained within an expert report must contain an additional sentence regarding contempt of court.

CLARIFICATION OF ISSUES IN A CLAIM, INCLUDING PART 35 QUESTIONS AND PREPARATION OF JOINT STATEMENTS WITH OTHER EXPERTS

1. CPR 35 outlines the instruction and use of joint experts by the parties and the powers of the court to order their use. If instructed as a single joint expert, the expert should:

a. Keep all instructing parties informed of any steps they may be taking, i.e. copy all correspondence to those instructing them.

b. Maintain independence and impartiality, remembering their duty to the court.

c. If necessary, request directions from the court.

d. Serve the report simultaneously on all instructing parties.

e. Not attend any meeting or conference which is not a joint one, unless it is agreed by all parties in writing, or the court has directed that such a meeting be held and who is to pay the expert's fees.

2. Where the value of the claim is likely to be in excess of a pre-determined level, or is a multi-track case, the court may permit each party to instruct their own expert where it is proportionate to do so. The court has powers to direct discussion between experts, and parties may also agree that discussions take place between their experts. In order to resolve the issues at any meeting of experts the instructing solicitor should provide multiple copies of all records disclosed in the action / negotiation to the experts, with a request that any points of difference be identified and countered upon in writing.

3. The purposes of the discussion between the experts should be to:

a. Identify and discuss the issues in the proceedings.

b. Reach agreement on the issues where possible and to narrow the issues in the case.

c. Identify the areas of agreement and disagreement and summarise the reasons for disagreement on any issues.

d. Identify action that may be taken, if any, to resolve the outstanding issues.

4. These arrangements for discussion should be proportionate to the value of the case. An estimate of fees should be provided before discussion. The majority of such meetings will take place by telephone or video link, but in some cases a face-to-face meeting may be required. The parties, lawyers and experts should co-operate in drawing up an agenda, although the primary responsibility lies with the instructing solicitor. The agenda should indicate areas of agreement and summarise these issues. It is helpful to have a series of questions to be put to the experts and, where possible, a joint agenda should be prepared.

5. If differences cannot be resolved in correspondence, experts should be encouraged to have a telephone discussion. If the differences are still incapable of resolution, experts should prepare, in light of the issues defined, a schedule of:

a. Resolved issues and reasons for agreement.

b. Unresolved issues and reasons for disagreement.

c. A list of further issues that have arisen that are not listed in the original agenda for discussion.

d. A record of further actions to be taken or recommended for example obtaining up to date radiology as necessary, and/or including a further discussion between experts.

Once the agenda has been agreed and the joint report process has started, it is essential that the communication is purely between the experts instructed by the different sides, without the involvement of either side's instructing solicitors, to ensure that there is no coaching or otherwise influencing of the joint statement content by the solicitors. It is worth noting that an agenda is not mandatory, and discussions may take place between experts and a joint statement prepared without such an agenda if the instructing parties are agreeable. One of the experts should agree to provide a draft joint statement outlining points of agreement and disagreement for consideration by their opposite number.

6. Whether “hot tubbing” will replace or occur in association with preparation of joint statements remains to be seen at the time of drafting this update. Hot-tubbing is another term for concurrent expert evidence, which is where both parties' experts give their evidence together in the form of a discussion chaired by the judge. The judge puts the same questions to each expert in turn, rather than each expert being examined and cross-examined sequentially.

7. From a practical perspective the question often arises as to who should dictate / draft the joint statement, the expert instructed by the claimant, or the expert instructed by the defendant. There are no hard and fast rules on this. Some solicitors suggest that the responsibility for preparing the draft should be taken by the expert instructed by the claimant. Some experts believe (perhaps erroneously) that by preparing the manuscript their point of view is more likely to prevail, while other experts prefer to sit back and select their words to respond to the first expert’s prose. In reality, it tends to be decided as an informal agreement, dependent on who has fewer commitments that week.

8. When preparing the joint statement, it is important to bear in mind:

a. If the expert significantly changes their previously expressed opinion, they should make this clear and explain why.

b. The importance of compliance with court timetables after Jackson.

9. Under section 35.6 of the CPR, either party may put written questions (‘Part 35 Questions’) to the expert, which must be’ “proportionate’ and for clarification of the expert’s report. It is the responsibility of the party who initially instructed the expert to settle the fees for response to these questions.

ATTENDANCE AT CONFERENCES / MEETINGS WITH SOLICITORS, BARRISTERS AND OTHER EXPERTS

Experts may be asked to attend conferences with the legal team that have instructed them, together with other experts in complex, controversial or high value cases. The purpose of these meetings is usually to clarify important technical issues and improve the legal team's understanding of certain medical matters (although it is often surprising how well briefed / informed some of the counsel and solicitors are in this area).

These conferences may take place over the telephone, by video link or in person. The expert should not attend these conferences without being thoroughly prepared, having re-familiarised themselves with the case. Experts are reminded that these are confidential meetings, may be recorded and should be performed in a quiet area. The conference is usually the first time that the legal team meets the expert, and they are often assessing how likely the expert's evidence will stand up under cross examination in the witness box. The time spent considering the documents prior to the conference should of course be added to the fee note for attending. The instructing party should already be aware of the likely fee range from the expert's terms and conditions.

ATTENDANCE AT COURT

The vast majority of personal injury or medical negligence cases will settle and will not proceed to court. However, the expert should always work on the basis that by accepting instructions, they are committing to attend court to present their evidence and their report. Never work on the basis that the case is going to settle, and therefore the report can be prepared without sufficient appropriate thought, care and skill.

If the case proceeds to a hearing:

1. The solicitor should

a. Ascertain the availability of experts before a trial date is fixed. Experts should keep an up-to-date list of unavailable dates and the solicitor should not agree to a hearing on one of those dates.

b. Notify the expert that the case has been set down for hearing.

c. Keep the expert updated with timetables, i.e. dates the expert is expected to submit their report, the preparation of joint reports, if necessary, and dates and times when the expert is to attend court and the location of the court.

d. Consider whether the expert may give evidence by video link.

e. Inform the expert if the trial date is vacated.

f. Arrange a meeting with counsel, the expert and other parties involved, where appropriate, prior to the hearing (see above).

g. Limit the time for court attendance to the minimum time necessary for the expert to give evidence.

h. Ascertain the fees for all preparatory work and for attendance at court and be in a position to pay that fee under the terms agreed.

i. Inform the expert of the outcome of the case.

2. The expert has an obligation to attend court if called upon to do so. The expert should:

a. Confer with counsel in advance of the hearing at a place to be agreed.

b. Attend court, whether or not by subpoena.

c. Normally attend court without need for the service of a witness summons but, on occasion, the expert may be served to require attendance (CPR 34).

The use of a witness summons does not affect the contractual or other obligations of the parties to pay experts' fees. Unforeseen circumstances may mean that the expert has to attend to a patient or other matters and not the court: if so, the expert will need the permission of the court if they will be in breach of a duly served subpoena. Such circumstances should be rare, and the onus must be upon the expert to justify their action. It should be noted that if an expert fails to attend trial, there will usually be cost consequences on the party who has instructed them. The expert's evidence may be disallowed. Non-attendance by an expert without exceptionally good reason may lead to the expert being sued.

It is the duty of the solicitor to forward immediately any court order to the expert. If a delay in forwarding a court order results in the expert's inability to meet the timetable it must be accepted that this is the responsibility of the solicitor and the solicitor alone.

THE CONCLUSION OF THE CASE

The instructing party should notify the expert if and when the case has been settled and the outcome. They should also pay any outstanding fees promptly and give the expert instructions regarding the disposal / deletion of the medical records. It is not acceptable practice at the conclusion of a case for the expert to have to chase the agency, solicitor or insurer for payment as it should follow automatically. All experts need a robust manner to keep accounts up to date for outstanding work.

It is often useful / instructional for the expert to have feedback from the solicitor or insurer on the outcome, particularly if there were certain controversial issues or significant disagreements between experts. This feedback can provide information as part of the appraisal process which should be declared in scope of practice.

MEDCO AND LOW VALUE SOFT TISSUE RTA CLAIMS

From 6 April 2015, amendments to the Pre-Action Protocol for low value PI claims in RTA cases required soft tissue injury claims to be supported by a fixed cost medical report commissioned via the MedCo Portal https://www.medco.org.uk/ from one of a randomly generated list of medical experts or medical reporting organisations. The Protocol contains the following definition of soft tissue injury: -

"… a claim brought by an occupant of a motor vehicle where the significant physical injury caused is a soft tissue injury and includes claims where there is a minor psychological injury secondary in significance to the physical injury."

The MedCo portal was introduced to remove the possibility of any financial link between those making a claim and those supporting it. MedCo – an industry-owned not for profit company – operates an accreditation scheme for medical experts and medical reporting organisations as well as operating the MedCo portal.

https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/659/65912.htm

On 31 May 2021 the government made changes to the claims process for low value road traffic accident (RTA) related personal injury claims, the majority of which are 'whiplash claims'. These changes give the opportunity for small claims (less than £5000) to be settled online without the need to go to the court or for legal representation.

https://www.gov.uk/government/publications/whiplash-reform-programme-information-and-faq/

Any surgical expert undertaking personal injury work for whiplash claims is encouraged to read the whiplash injury regulations 2021/642 to see the latest changes to the processing of such claims.

FURTHER INFORMATION

The surgeon as an expert witness
Royal College of Surgeons of England 2019
https://www.rcseng.ac.uk/standards-and-research/standards-and-guidance/good-practice-guides/expert-witness/

Part 35 Civil Procedure Rules and Practice Directions – Experts and Assessors
Ministry of Justice, accessed 5 May 2024
https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part35

Acting as an expert or professional witness
Academy of Medical Royal Colleges May 2019
https://www.aomrc.org.uk/wp-content/uploads/2019/05/Expert_witness_0519-1.pdf

Standards expected of an expert spinal surgeon witness in cases of clinical negligence
Society of British Neurological Surgeons and British Association of Spinal Surgeons, August 2019
https://www.sbns.org.uk/index.php/about-us/vacancies/announcements/standards-expected-of-an-expert-spinal-surgeon-witness-in-cases-of-clinical-negligence/

Acting as an expert witness
The Medical Defence Union, January 2024
https://www.themdu.com/guidance-and-advice/guides/acting-as-an-expert-witness

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