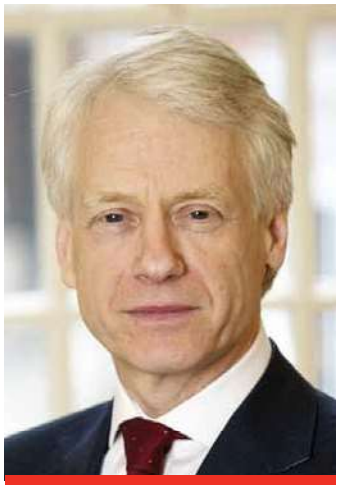
Where expert evidence goes (seriously) wrong: Recent lessons from the court room

Giles Eyre

Providing expert medical evidence for the purposes of civil litigation is an interesting and rewarding activity, intellectually and financially. It might appear an easy field of work to enter, and simple to maintain as a parallel practice to clinical work. However reported court decisions continue to act as a very public reminder, for some a painful one, of where things can go wrong.



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Although orthopaedic surgeons have not featured recently in this public 'naming and shaming', the learning points are very relevant to all. No surgeon seeking to develop, or to maintain, a medico-legal practice can afford to receive such a public lesson.

Independence

The expert must be independent[1]. An easy requirement to comply with, you might have thought, and yet instances continue to come to light, following evidence in court, in which a judge is left doubting the expert's independence, with the result that the expert's evidence is rejected in its entirety. An expert (a midwife) was found to be "overly keen to find arguments to support the Claimant's case", and to seek unfairly "to nit-pick at the care given the quality of note-taking without making any allowance for the fact that standards of note-taking etc. were somewhat different 24 years ago"[2]. An obstetrician "appeared to forget his duty to the court and seemed illegitimately to stray into creative advocacy for the Claimant's cause … tailored his evidence to argue the case … sought to side-step the evidence"[3]. Many a barrister has learnt that once under cross-examination there is little that can be done to control your expert witness, but the expert who understands that the written report should contain all of the points to be made, and the reasoning in support of them, should not enter into such dangerous "uncharted waters".

An expert who puts forward, in support of his/her opinion, a medical paper without revealing that it has subsequently been the subject of substantial criticism, particularly if that is a matter of which he/she must by implication have been aware, seriously damages any appearance of his/her independence[4]. While the legal team might not automatically carry out research to ascertain such criticism, the team's expert witness can be expected to (and should) do so.

Conflict of interest

Related to the need for independence is the need for the expert to avoid a conflict of interest or the appearance of possible bias. The specialist medical world is small and inevitably experts know one another or even know the doctor the subject of criticism in the litigation. It is therefore important for expert and lawyer alike to identify any potential conflict of interest. Not to reveal that the defendant's expert had worked with the defendant doctor for

many years and had "guided and inspired his practice" was unforgivable, even more so you might think where the defendant doctor had recommended the expert to his legal team. The burden is on the party instructing that expert to provide details of the connection "from the outset" - it is not for the opposing party to have to investigate for a potential conflict[5]. The expert must therefore reveal any such potential conflict to his/her legal team at the earliest opportunity. The consequence of such a conflict of interest could well be that the expert evidence will be ruled inadmissible, but in any event it is unlikely to carry much weight in the light of a conflict of opinion[6].

Legal tests

A clinical negligence claim stands - and falls - on the quality of the expert evidence, and more particularly, the quality of the expert him/herself. Sometimes weaknesses in the expert's evidence are apparent to the lawyers at an early stage in proceedings from the written report or in conference when the expert opinion is under close scrutiny from the barrister, or in the fallout from a joint discussion and an unsatisfactory joint statement. But sometimes, as reported cases continue to demonstrate, it is not until trial that it all goes wrong. It is reasonable to assume that in each of the examples referred to below the party seeking to rely on the expert believed, until that moment in the trial, that its case would be supported by the evidence of that expert.

That experts on occasions have difficulty with legal principle and in applying legal tests, and have difficulty in understanding what carries weight with the court and what does not, is not entirely surprising given the nature of the required training and qualifications of medical experts - nil training and nil qualifications other than medical (although some form of certification - described as 'accreditation' - will be introduced next year for low value whiplash claims). Part 35 to the CPR, the Practice Direction to Part 35 and the Guidance[7] do not address these issues. Experts therefore acquire this necessary knowledge through experience or through voluntary specialist training or self-study.

The *Bolam* test is of course at the heart of a clinical negligence claim if the standard of care is in issue. It is easy to state as a test, particularly in the process of writing a report, but somewhat more difficult to apply on the facts of any particular case. However, the test remains the test, and if seeking to establish that no reasonably competent doctor would have failed to take some particular step, it is not helpful if the expert explains, under questioning in court, that it would have been "wise" and consistent with the standard of a "good doctor" to do so, or that "it was not mandatory but the wise doctor would have done it"[8]. Many doctors, while critical of another doctor's actions or inactions, may find it difficult in court, orally and on oath, to castigate a colleague for failing to do something which no reasonably competent doctor in that field would have failed to do, whatever criticism they may have been prepared to make in their report or in conference. Therefore, it is essential to ensure that as an expert witness, however experienced, you really do understand *Bolam* and that the words of the test really reflect your opinion before asking the lawyers to rely confidently on your report.

Joint discussions

Joint discussions vary a great deal in their nature and, from a lawyer's perspective, in their usefulness. Whether it is through a lack of appreciation of the role of the joint discussion and statement, or because of communication issues at the meeting, the joint statement frequently fails to assist the lawyers to focus on, and to understand, the real areas of disagreement between the experts, and the logical basis for them.

Developing or expanding the expert's opinion at the joint discussion, let alone at trial, is rarely a good idea. The court and cross-examining barrister not unreasonably consider that the thinking should have been done and the reasoning provided before the joint discussion, even more so if there has been two previous reports from the same expert. An obstetrician (a different one from the one referred to earlier in this article) who, following two reports, introduced an important explanation and new concept (of "non-reassuring" and/or "atypical" accelerations) for the first time at the joint discussion (and who was unable or unwilling at the meeting to disclose the origins of these terms) cannot be surprised if the judge forms the view that all of that expert's evidence should be treated with "considerable caution", a position made worse by the expression of other non-orthodox views in evidence[9]. If you have something significant to add to the opinion reflected in your written reports, perhaps after seeing the other side's report, then that should be carefully considered, and provided in writing before the joint discussion[10].

Nature and manner

What for the advocate is perhaps most difficult to guard against is the expert's nature

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and manner, particularly when the expert is under pressure. Leading professionals in many fields are not always the easiest people to get on with, let alone disagree with, whether it is in a barrister's robing room, a multi-disciplinary team meeting, a joint discussion or the courtroom. Personal attacks on the other side's experts, failing to engage with the medical issues, obfuscation and withdrawal from the joint discussion are not to be recommended and a judge's finding that the expert's evidence "was not given in a manner consistent with an expert witness seeking to engage seriously with evidence being put forward" can only result in that expert's evidence being rejected by the court[11]. Failing to answer questions in the joint discussion and in cross-examination, however ill-formed or ill-informed the expert may consider them to be, will not endear the expert to the court[12].

The medico-legal mind

The medical expert must understand fully the role and the duties of a court expert, and must demonstrate a "medico-legal mind"[13]. Acting as an expert medical witness is not simply an extension of medical practice. An expert, and the legal team, would be well-advised to (re-) read the words of Lord Justice Stuart Smith in Loveday v Renton[14] which gives insight into a judge's decision making process when considering expert evidence, and which often causes surprise (and consternation) in experts when they see the wide range of factors a judge will take into consideration:

"The court has to evaluate the witness and the soundness of his opinion. … this involves an examination of the reasons given for his opinions and the extent to which they are supported by the evidence. The judge also has to decide what weight to attach to a witness's opinion by examining the internal consistency and logic of his evidence; the care with which he has considered the subject and presented his evidence; his precision and accuracy of thought as demonstrated by his answers; how he responds to searching and informed cross-examination and in particular the extent to which a witness faces up to and accepts the logic of a proposition put in cross-examination or is prepared to concede points that are seen to be correct; the extent to which a witness has conceived an opinion and is reluctant to re-examine it in the light of later evidence, or demonstrates a flexibility of mind which may involve changing or modifying opinions previously held; whether or not a witness is biased or lacks independence […] There is one further aspect of a witness's evidence that is often important; that is his demeanour in the witness box."

Conclusion

Accidents will of course (unfortunately) continue to happen, in expert witness work as in other fields. However, accidents can have serious consequences, and can prove fatal to an expert's medico-legal practice. It is not enough for the lawyers who are instructing medical experts to understand what should not happen. It is essential for the medical expert to have the skills, knowledge and understanding necessary to reduce the risk of them happening in the first place. ■

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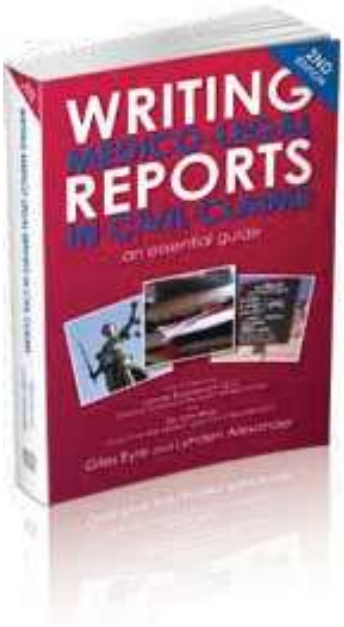
Giles is co-author of a manual for medico-legal experts and those instructing them, 'Writing Medico-Legal Reports in Civil Claims - an essential guide' (2nd edition - September 2015) (www.prosols.uk.com). He frequently gives seminars and workshops, and provides training for medical experts and those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

References

References can be found online at *www.boa.ac.uk/publications/JTO* or by scanning the QR Code.

Medico-legal Book Review: Writing Medico-Legal Reports in Civil Claims an essential guide by Giles Eyre & Lynden Alexander

Mike Foy



It seemed appropriate to review the second edition of Giles Eyre and Lynden Alexander's book when the senior author (an experienced barrister in the field of medical litigation) was contributing to the medico-legal section of the JTO. For newly appointed orthopaedic consultants trying to break into the medico-legal marketplace there is precious little guidance on the actual process of litigation or how to write medical reports and how to present expert evidence.

This book provides a good introductory background for the newly appointed consultant and is a good reference source for more experienced practitioners. It explains how the medico-legal mind-set is rather different from the conventional clinical mind-set. In clinical practice we are used to accepting what the patient tells us. In medico-legal practice we have to adopt a more forensic approach to the account given by the claimant.

The book covers the legal background to claims including an update on recent changes in the law. It contains an extensive section on the roles and duties of an expert witness which is essential reading, particularly for those new to medico-legal practice. There is a clear explanation of the differences in requirements for personal injury reports versus medical negligence reports. There are guidelines on report writing, including suggested templates for both personal injury and negligence. In the section on negligence, the importance of not analysing the case with the benefit of the retrospectoscope is emphasised, which in the reviewers experience, is an all too common failing of some experts.

Overall, I believe that this is an essential addition to the bookshelf of any orthopaedic surgeon who is carrying out medico-legal work. It will serve both as an introductory guide and a reference source.