



# Getting To The Truth, The Whole Truth And Nothing But The Truth

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## Nine Principles for Medico-Legal Practice

Personal injury fraud has reached unprecedented levels. This article examines some of the difficulties in getting to the truth in such cases and sets out nine indicators for ensuring medical experts are competent to discharge their responsibilities to the Court by overcoming some of the inherent challenges in working with claimants, their legal representatives and other experts.



Benjamin Franklin stated that there were two absolute certainties in life: death and taxes. Actually, there is a third and that is change. No matter what happens, life and its conditions will change. Nowhere is this more obvious than the accelerating rate of advances in science, and particularly in the field of medicine where the breadth and depth of knowledge are estimated to be doubling every nine months to a year. Against this background, it is impossible for any layperson to have a full understanding of the nature of medical evidence in complex medicolegal cases and Courts are becoming even more reliant on expert testimony to help guide their decision making.

Medicine is an art which requires to be heavily grounded in science. Therefore, the validity and reliability of expert medical testimony must be grounded on facts and opinions deduced from logical reasoning based on the knowledge, beliefs and experience of the expert.

Along the path from an incident to a court decision, there are multiple portals through which, advertently or inadvertently, the truth can become distorted. Unfortunately, facts, interpretation of those facts and opinions are all open to at least unintended misinterpretation and, at worst, intentional abuse.

In personal injury cases such as road traffic accidents, liability is usually a matter of fact. The causative relationship between the incident, the client's complaints and the likely "but for" prognosis, is the field of the medical expert. It is a very different story in cases of alleged medical malpractice, where the interpretation of factual evidence as to liability and causation may not be so obvious and relies almost entirely on the opinion of a medical expert. This is why initial screening by an appropriate expert is so essential in determining whether a case is likely or unlikely to succeed from the outset before, not just the claimant but also their legal advisers, become financially, and emotionally, invested in the outcome.

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the Association of British Insurers. While the popular press generally lays this at the door of the claimant, the role of an albeit small percentage of medical and

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legal professionals also has to be called into question in relation to their complicity with these matters. Both medical experts and lawyers are in business, both are paid for their services and, as in any business relationship, there will always be the potential for a conflict of interest.

Lawyers would argue, as advocates for their clients, their job is to obtain as much recompense as possible and they will tactically do their best to achieve that aim. Generally, however, they have a vested interest as the more the client receives in compensation, the higher the costs which may be awarded to the lawyer. 'Winning' cases may result in further business, either from the same client or by enhancing a lawyer's reputation through direct or indirect advertising in the media, social media or by word of mouth.

Similarly, there has been a long history of lawyers operating selection bias and picking from the so-called "beauty parade" of medical experts who have a history of providing the most favourable reports, that is those with the worst prognoses. Some medical experts have been challenged about changing the content of reports after discussion with lawyers. To be clear, if this is on the basis of new evidence it is reasonable to do so, providing there is transparency. However, in a number of recent high-profile cases, such change has been made at the request of lawyers in an attempt to present the client's evidence

more favourably than would otherwise be warranted.

The Jackson reforms were, at least in part, an attempt to deal with such issues. Moral and ethical challenges will always surface in a small minority of cases which, unfortunately, reflects and impacts on everyone else involved. While categorically asserting that intentional dishonesty occurs only in a small minority of clients, their medical advisers and legal advisers, the following will also look at the common sources of disinformation which medical experts and those instructing them need to be aware of and which can both jeopardise their credibility and contaminate the legal process.

### Client Factors in Medico-legal Cases

Any case is heavily dependent on the credibility and reliability of the client and the trustworthiness of their statements throughout the process. These must be consistent in terms of their recall and be corroborated by objective independent sources, such as police and ambulance evidence at the scene, contemporaneous medical records as well as any expert technical or engineering reports. They should also be in agreement with statements from other witnesses, although these are more subjective.

A client's version of events should remain consistent in their oral or written communications and must include full disclosure of all pertinent information about their past medical or claims history. Clinical progress over the long term should match clinical expectation, unless any significant deviation can be reasonably explained.

Obviously with any incident, there is liable to be an emotional response, which will be influenced by the client's inherent psychological makeup. Some tend to minimise issues while others have a more catastrophic mindset, which makes them prone to exaggeration. This is in their nature and is in contradistinction to malingering, which implies a conscious intention to fabricate or feign physical and psychological symptoms for external gain. There is a distinction, therefore, between a

tendency to exaggeration and fundamental dishonesty which is a deliberate attempt to fabricate or hide the truth. In fundamental dishonesty, it is the facts that are blatantly distorted, rather than the client's interpretation of how they are feeling. This is why client credibility is so important when set against objective evidence to substantiate a claim. Vague and changing evidence is a hallmark of a dishonest claim, as is evidence of downplaying symptoms from previous claims. Other "red flags" are late submission of a claim, an unwillingness to go to Court or pushing for an early settlement, which may be a sign of underlying financial issues.

#### The Lawyers' Role: The Impact of Dishonesty

As lawyers are expected to act in the best interests of their clients, this virtually automatically introduces a bias to proceedings, particularly as success breeds success in reputational and business terms, increasing the potential for further instructions. While most legal advisers are clear about the boundaries of good practice, some appear motivated to win at almost any cost, which can result in at least reckless, if not dishonest, preparation and presentation of evidence. Others may employ dubious tactics such as a tendency to bluff the opposition, right up to the doors of the Court, in the hope they will cave in and settle. The brief provided to their medical expert may be restricted, and pertinent information such as previous medical records may be withheld, unless they have been specifically asked for. There also may be undue attempts to coach or persuade an expert as to what might be removed from or amended in their report.

#### Medical Experts: What Should They Be Doing?

Over the last few decades, greater professionalism has been required from those acting as medical experts, not just in their knowledge of medical practice but also of the legal process itself. The need for objective unbiased opinion is one of the reasons a doctor who has treated the client is unlikely to be seen as a truly independent expert.

Many difficulties have been reported in relation to the quality of reports and appearances in Court by medical expert witnesses, who do not appear to appreciate the duties placed upon them under CPR Part 35 to act as an officer of the Court. Sometimes this is due to lack of experience

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or lack of preparation. Particular challenges arise when medical experts behave as if they are an advocate for their instructing party. This gives rise to concern about the potential impact of incentive-based fees and either the promise of further business or the possible threat of termination of a business relationship, all of which are entirely inappropriate.

Specialists in a particular field will naturally have a bias towards their own clinical practice. Unfortunately, this bias can lead to selective quoting of research papers which support one point of view without mentioning acceptable alternative approaches. Another common challenge is specialists who judge what was an acceptable standard of care at a point of time in the past, by current literature and standards. In providing expert opinion on a legal case, the doctor must be willing to consider all the reasonable range of opinions as regards to management or prognosis and to provide an intelligent and logical analysis as to why, in their opinion, one should be preferred over the other. Even within those preferences, they should be able to guide the Court as to whether the procedure followed and the aftercare was reasonable, in the context of the presenting circumstances.

Medical experts sometimes get caught out by accepting what the client states as fact

at face value and not checking the veracity of any statement against contemporaneous medical records. They also need to clearly distinguish between the established facts in a particular case and their opinion. In medical negligence cases, potential breaches of the duty of care and causation are likely to be matters of opinion in litigation, rather than matters of fact, and experts should not be pushed into reaching their conclusions based on inaccurate or incomplete information.



# WHAT MAKES A GOOD MEDICAL EXPERT WITNESS?

## NINE PRINCIPLES FOR PRACTICE

So, how are these potential problems with medico-legal testimony to be countered? The following are the nine core requirements for a credible medical expert. This is a checklist for all lawyers instructing a medical expert and an aide-memoire for doctors undertaking this role.

1

### Credo

The hallmark of a good expert is that they relish the intellectual challenge and engagement with the medico-legal process. This allows them to compare their practice with others and encourages self-reflection with continuing education to the betterment of their own clinical practice. Their purpose is to help clients, their legal advisers and the Courts more clearly understand the nature of medical evidence in individual cases so they can make better decisions.

2

### Field of Expertise

Expert witnesses require a specific set of skills. They must have relevant qualifications and experience, not just in their field but in their own particular niche. They must remain current with CPD and with advances in their speciality. They should be clear on what lies within their field of expertise and what does not and not risk being drawn into giving opinions outside their area of expertise.

3

### Professionalism

They must also demonstrate professionalism by having the training in all the skills required to be an expert witness including writing reports which are compliant with the rules of the jurisdiction, being proficient at giving oral evidence and, in particular, having a clear understanding of the legal process, especially their duties when acting as an expert witness.

4

### Assessment

Courts require medical experts to explain clearly in lay terms, the following:

- the nature and extent of personal injuries;
- the treatment provided;
- the relevant standards of care at the particular point in time;
- any relevant range of opinions;
- any ongoing treatment which may be required either at present or in the future;
- an accurate prognosis, in relation to the specific injury, condition or diagnosis and,
- an assessment of the effect of that diagnosis on the claimant's future ability to carry out the activities of daily living and their position within the labour market.

5

### Neutrality

Experts have to remain impartial, objective, and unbiased, remaining neutral and uninfluenced by the pressures of any outside party. They are obliged to make reasonable enquiry as to the facts presented and opine as to whether these resonate with what is likely to be a truthful and reasonable situation. They need to establish the mechanism or causation of a physical or psychological injury and determine whether or not this is likely to be attributable to the subject incident. Information gathering and, in particular, testing by the expert is vital in establishing the validity and reliability of the evidence, including the credibility and truthfulness of the client, all of which potentially overlap. The expert is checking for internal and external consistency in the initial complaint and the consequences, considering the effects of any pre-existing problems, the natural progression of any injury along with the long-term prognosis and likely effects on lifestyle.

6

## Empathetic and Discerning Interviewing Skills

Central to the medico-legal report in personal injury cases is the client interview, allowing the expert to assess first-hand the client's statements and undertake a clinical examination. The expert must listen to understand, by showing respect for the client and being empathetic but not sympathetic. From a physical point of view, the expert is undertaking a structured observation, looking for patterns on clinical examination which are either consistent or inconsistent with the symptoms expressed. Are the signs compatible with the nature of the injury and are the signs displayed under clinical examination the same as those displayed when the client does not feel they are being examined, for instance, on getting up from a chair, moving around a room, stooping and lifting something off the floor or taking off and putting on items of clothing? There are several clinical provocation tests such as those described by Waddell in relation to particular movements, responses to touch or palpation and areas of sensory deficit. Any single finding is not particularly relevant, but multiple inconsistent findings reveal a pattern which raises a level of suspicion.

7

## Written Communication Skills

The expert witness has to demonstrate to the Court the care and attention with which they have both considered and presented their evidence. The report has to flow and demonstrate reasoning and logic when coming to conclusions. The expert must, therefore, put in the time and effort to consider and prepare their report carefully both at the time of writing and when going into Court, remembering this may be many years after the initial report was written.

8

## Oral Presentation Skills

Experts need to be confident and assured when giving evidence and demonstrate consistency in their thought process. They must be thoroughly conversant with their notes and well prepared for any potential challenge. Having a personal bias towards a particular point of view is not in itself a problem -providing it is transparent and the expert can demonstrate they are prepared to consider and discuss the viability of other opinions. They do, however, require flexibility of mind to review their opinion if other compelling evidence to the contrary becomes available.

9

## Resilience

The expert must be able to robustly hold their opinion both in joint consultations or in the Court, and not be swayed by alternative views without good reason. Cross-examination is by nature adversarial. Experts must remain steadfast and unemotional in responding to questions and avoid becoming argumentative, even when provoked. Responses should be directed to the judge rather than counsel, and in circumstances where yes/no answers are requested, the judge should be petitioned to allow a fuller explanation if required.



## Conclusion

The role of the expert witness continues to evolve and, just as issues are becoming more complex, so are the duties of the expert to the Court, requiring perhaps a greater element of control within the Court system. This has been exemplified by the loss of immunity from the prosecution for doctors should their evidence fall below reasonable standards. It is important medical experts do not become emotionally attached to reports and do not try to defend the indefensible. They need to stay neutral, explain a range of opinions and options as appropriate and in particular, be aware of the potential for selective bias in the evidence they present. Not to do so, risks public censure, if not civil or even criminal action, which has wide-ranging implications in terms of their personal, professional, and financial wellbeing. From the lawyer's perspective, Courts are impressed by credible, impartial and articulate medical experts.



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