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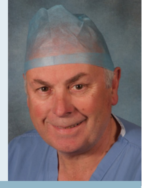

The orthopaedic surgeon as an expert witness: who, when, why and for how long?

An expert is normally defined as someone who has comprehensive and authoritative knowledge or skill in a particular field. The practice of obtaining expert medical opinion in either personal injury cases or medical negligence cases is largely unregulated in the United Kingdom. It is left to the instructing party to decide who to instruct on the basis (presumably) of the reputation of the expert, recommendation from other instructing parties or previous experience of working with the expert.

During the course of his career, an individual orthopaedic surgeon will develop the experience in certain areas of their clinical practice to give such expert opinion. Their position as experts will be based on their training, clinical experience, research, publications and wisdom. Their status may be enhanced by membership of organisations such as their national orthopaedic association and specialist societies. Their status may also be enhanced by membership of legal entities such as the Expert Witness Institute.

Many orthopaedic surgeons do carry out expert witness work. The medico-legal playing field in the UK has changed dramatically over the last 20 years. In order to cut costs and speed up the process, the use of orthopaedic surgeons as expert witnesses has decreased in favour of GPs, particularly in lower value cases of soft-tissue or whiplash injury.

There have been a number of medical reporting agencies in the UK that have appeared with the object of streamlining the claims process. However, this has introduced another link into the chain and in some respects, despite claims to the contrary, made the process more complex from the experts' perspective. Solicitors favour it because it takes a lot of the organisational work away from them but, more importantly, it helps their cash flow as the agency will frequently insist on experts deferring settlement of their fees. The agency will absorb the costs (with the aid of financial arrangements such as factoring) and will not be paid themselves until settlement of the case. It has been a "cutthroat" market with quite a number of agencies going to the wall (sometimes owing considerable sums of money to expert witnesses) while others have survived and prospered.

Following the interventions of the UK Government, whose agenda is to cut costs (particularly in whiplash cases) in order to reduce motor insurance premiums, the whole area has been given a higher public profile. There have been recommendations from the Ministry of Justice (MoJ), insurers and the Association of Personal Injury Lawyers (APIL), particularly with regard to whiplash. The situation is evolving quite rapidly. A number of working groups have been established by the MoJ to streamline the litigation process, particularly in low value claims. Reports will probably be provided by GPs or physiotherapists with specialist training in this field. There may be an initial screening questionnaire/neck disability index to quickly identify those with low disability. However, the final recommendations from this MoJ initiative are pending at the time of writing.

Given the absence of regulation in the expert witness field there are now suggestions that expert witnesses should have formal training and certification to allow them to act in that role based upon a model that has been adopted in France for the assessment of claimants following whiplash injury. In the UK there are a number of qualifications set by commercial and educational organisations such as Bond Solon, Pro-Sols and individual reporting agencies. The mainstream professional organisations have had little input into these qualifications.

Many orthopaedic surgeons plan to continue their expert witness practice after retirement from active clinical practice. However, the GMC's recently introduced policy on revalidation has cast some doubts on the position of retired orthopaedic surgeons and their status

when acting as an expert witness in retirement. It would be a great shame if the valuable experience and wisdom offered by senior and recently retired orthopaedic surgeons was lost to the personal injury and medical negligence process. Currently there are no rules governing the longevity of the expert's status, veracity, credibility or training requirements after retirement from clinical practice.

At the beginning of a senior orthopaedic career it is difficult for a newly appointed orthopaedic consultant or career grade doctor to "break in" to the expert witness market. The older practice of the treating orthopaedic consultant providing a report in a personal injury claim is now generally frowned upon because of the expert witness' duty to the Court and potential conflict of interest. If providing a report on a claimant the expert's primary responsibility is to the Court (not the claimant/patient.) Conversely, if an orthopaedic surgeon is providing advice or treatment to a patient, his primary responsibility is to that patient, hence the conflict.

Broadly speaking, there are two areas where expert opinion is provided by orthopaedic surgeons: personal injury and medical negligence. In any claim, two criteria have to be fulfilled for that claim to have any realistic chance of proceeding. The first is that someone must have breached their duty of responsibility/care to the injured person. The second is that the breach of duty must have caused injury or damage to that person. In personal injury claims, the orthopaedic expert will not usually have any input into the question of breach of duty, this will be a matter for witnesses to fact, occupational health experts, ergonomists, etc. The legal advisers and the Court will be interested in the causative effect of the breach of duty and its effect on the claimant's current condition and future prognosis.

In contrast, in cases of alleged medical negligence, the issue of breach of duty usually requires major input from the expert. The expert should remember at all times to confine himself to his own area of expertise, judge the management by reasonable and competent (not Olympian) standards, and analyse the situation prospectively and not with the benefit of 20/20 hindsight.

PERSONAL INJURY

If an expert witness is providing an opinion for the Court on a particular injury or anatomical region, they should have considerable experience of assessing and treating patients with such problems in the clinical setting.

It is difficult to support the position of experts with little practical experience of orthopaedic surgery/musculoskeletal medicine providing expert reports on back injuries, whiplash injuries, knee injuries, etc. if they have not had experience of managing patients with similar clinical conditions. It is generally held that appropriate clinical experience is gained in outpatient departments, wards and, where appropriate, operating theatres. It is not gained simply by seeing claimants. Extensive experience of assessing patients with similar problems in the clinical setting gives the expert witness greater perspective and credibility.

There is a requirement for honesty and integrity amongst orthopaedic expert witnesses. It is not appropriate for a hand surgeon who never sees patients with back pain in the clinical setting to give an expert opinion on a back problem. Equally, a spinal surgeon would not be expected to give an opinion on a complex hand problem. It is impossible to make hard and fast rules in this respect, but the orthopaedic expert witness must feel comfortable in justifying their position as an expert if challenged along these lines by a solicitor, barrister or judge.

The question arises as to how long an expert remains an expert after retirement from clinical practice. In the 21st century, many orthopaedic surgeons in the UK have a "phased retirement", bowing out of acute trauma at the age of 50/55 plus, perhaps retiring from government practice at 60 plus, and then continuing with private practice for a variable period of time afterwards. There is enormous variation governed by a number of factors including local issues, indemnity costs, etc.

It is perfectly acceptable for orthopaedic expert witnesses who have partially retired from clinical practice to continue with their expert witness work as long as they fulfil the appropriate requirement concerning appraisal, revalidation, etc.

Following full retirement from active clinical practice, the situation becomes less clear. If an orthopaedic surgeon in the UK is interviewing and examining claimants, they are required to maintain GMC registration, hold a licence to practice, be revalidated and undergo appraisal. They should (as part of the appraisal process) demonstrate continued accumulation of evidence of continuing medical education (CME) that would be acceptable to their appraising officer in order to demonstrate that they are keeping abreast of developments in their field of expertise. This can be demonstrated by attendance at meetings, courses, teaching and private study/reading. As discussed, it would be a loss to the medico-legal process if the Courts were denied the expertise and experience of senior, recently retired orthopaedic surgeons.

However, this begs the question of how long an orthopaedic surgeon can continue in expert witness practice after retirement from active clinical practice. It is probably reasonable that, as long as the above criteria are met, the orthopaedic surgeon should be able to continue for five years from the time of retirement from active clinical practice. However, if an orthopaedic surgeon has been out of active clinical practice for over five years their position may need to be reassessed. This is a matter that is under discussion at the British Orthopaedic Association at the present time.

MEDICAL NEGLIGENCE

The situation surrounding medical negligence is somewhat different and, to a degree, more straightforward. Expert witnesses in the medical negligence field tend to have much greater experience of the area on which they are providing their opinon than is generally necessary for personal injury reporting; that is to say it would not be unreasonable for a recently appointed consultant to give a medico-legal opinion on a whiplash injury, knee injury, shoulder injury, etc. However, it would be wholly inappropriate for a recently appointed consultant to give an opinion in a medical negligence case as they would not have the breadth and depth of experience to stand back and take an overview of the situation and

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decide what a reasonable and competent orthopaedic surgeon would be expected to do in a similar situation. Again, there are no hard and fast rules with regard to the timing of an orthopaedic surgeon moving into medical negligence practice. I believe that consultants probably need at least ten years' experience before they would have the depth and breadth of knowledge that would enable them to give opinions in medical negligence cases.

It is also important that, in addition to considerable clinical experience in the field on which they are giving an opinion, they should have been in active consultant clinical practice at the time that the alleged substandard treatment was carried out.

CONCLUSIONS

1. In personal injury claims, as long as orthopaedic surgeons are in active clinical practice in which they are exposed to the type of clinical problem on which they are opining and fulfilling appraisals/revalidation requirements, there should be no problem with them acting as an expert witness.
2. Following retirement from active clinical practice it is acceptable for an orthopaedic consultant to continue with personal injury expert witness practice for five years, as long as they maintain GMC registration, hold a licence to practice and go through appropriate annual appraisal and revalidation procedures. Beyond that timeframe, some form of assessment may need to be introduced and is currently under discussion. However, if the surgeon has been revalidated, continues to maintain a licence to practice and fulfils appraisal/CME requirements, this (assessment) should not be necessary.
3. In medical negligence practice, as long as the orthopaedic expert witness was in active practice in that sphere at the time that the alleged medical negligence was carried out it is appropriate for them to act as an expert witness in that case. However, if the consultant is being asked to see claimants to provide opinions on their current condition and prognosis, they would still need to maintain GMC registration, undergo revalidation at the appropriate time and hold a licence to practice for this purpose.