

Providing expert advice to the
court: guidance for members
and Fellows
Second edition

Board of the Faculty of Clinical Oncology
Board of the Faculty of Clinical Radiology
The Royal College of Radiologists

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Foreword

The Royal College of Radiologists (RCR) would like to thank Professor Peter Armstrong and Dr David Dodwell, with contributions from Dr Paul Symonds, Dr Amaka Offiah, Dr John Karani and particularly Ms Fiona France of the National Health Service Litigation Authority for updating the previous guidance to clinical radiologists and clinical oncologists who are asked to provide expert medical advice to the court. There have been changes to UK legal practice and while there are variations between the four nations we hope that all Fellows will find this guidance helpful. When doctors are asked to provide expert advice their behaviour is a reflection on themselves, their profession and specialty and also on the RCR itself. We believe this new guidance will be useful for many years to come.

The previous edition of RCR(05)3 *Providing Expert Advice to the Court: Guidance for Members and Fellows* has been withdrawn.

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1. Aims

- a. This document provides advice to clinical oncologists and clinical radiologists when asked to act as experts in civil litigation, coroners' inquests, and in matters of child protection. It does not address the conduct of doctors who are themselves defendants or witnesses testifying about events that they have observed or giving evidence regarding a patient they have treated.
- b. The advice is deliberately brief and in summary form. The law and practice varies slightly between England and Wales, Scotland and Northern Ireland. This document covers predominantly the procedures in England and Wales, but makes reference to variations in the other jurisdictions. It covers the duties of expert witnesses, acceptance of instructions to act as an expert witness, the preparation of expert reports, discussions with counsel and other expert witnesses, and attendance in court. The advice conforms to Part 35 of the Civil Procedure Rules and its accompanying Practice Direction.^{1,2} These rules set out the duties of experts and the procedures to be followed by all parties in civil litigation. They are essential reading for anyone considering acting as an expert witness in clinical negligence cases in all parts of the UK except Scotland, but similar guidance for expert witnesses engaged by solicitors in Scotland is provided in the Code of Practice provided by the Law Society of Scotland.³ The advice in this College document also conforms to the General Medical Council (GMC) guidelines *Acting as an Expert Witness*⁴ and the guidance from the Academy of Medical Royal Colleges.⁵

2. Procedures for clinical negligence

- a. A patient can make a claim for clinical (medical) negligence if he or she believes they have suffered damage as a consequence of inadequate or substandard medical treatment. The award of damages seeks to put the claimant in the position he or she would have been had the negligence not occurred. To be successful in court, the claimant has to prove to the satisfaction of a judge that there was quantifiable damage due to a breach of duty which can be shown to have caused the damage (causation). Compensation for the damage (quantum) is assessed in monetary terms.
- b. The first step in the procedure is normally for solicitors acting on behalf of claimants to prepare a claim by reviewing the records and commissioning expert advisory reports. They will then advise the claimant, having consulted a barrister if appropriate, on the chances of a successful claim. If the decision is to proceed, the parties should then follow the Pre-Action Protocol for the Resolution of Clinical Disputes.
- c. The Pre-Action Protocol sets out a timetable to be followed by the parties before proceedings can commence. There can be adverse costs implications if there is a failure to follow the Protocol. Under the Protocol, the claimant must set out the basis of his or her claim against the defendant in a Letter of Claim and the defendant should then respond substantively in a Letter of Response, within four months. As part of the procedure, each party is usually assisted by expert evidence.
- d. If the claim is not resolved by way of the pre-action procedure, the claimant will need to issue proceedings against a named defendant(s) – the NHS trust in the case of claims against NHS hospitals or their employees, or against individuals, such as general practitioners or doctors not employed in the NHS (for example, in private practice). The claimant sets out the basis of the claim in the Particulars of Claim (the allegations of negligence, what that negligence is said to have caused by way of injury and the likely damage to be claimed). Once served, the Particulars of Claim may only be varied by agreement of the parties or by order of the court. The defendant(s) must serve a defence within a specified period, often within 28 days, unless a court-approved extension is agreed; failure to do so will result in judgment being entered by the court against the named defendant. The court sets directions which include the timing of the exchange of witness evidence (statements of witnesses to be relied upon, for example, statements from the patient and individual clinicians involved in the patient's care), expert evidence, quantum evidence and a trial date window. Once experts have seen the exchanged witness statements, they should be given the opportunity to review their reports for subsequent disclosure.
- e. Very few cases are ultimately heard in court. Expert witnesses should realise that solicitors rely on expert opinions when deciding whether to pursue or defend a claim. Some claims are discontinued after evidence is exchanged, because it is apparent that the case will not succeed and many are settled 'out of court' following negotiations between the legal teams of the claimant and defendant(s). Negotiations can centre on liability (breach of duty and causation) or quantum or both. Quantum may be calculated according to what each side considers the likely outcome if the case were to go to court, bearing in mind the witness statements, expert reports and the potential outcome of cross-examination of witnesses and experts. Therefore, expert witnesses have an important role in advising solicitors acting for the claimant that cases are not pursued if there is little

prospect of success, and conversely, experts should provide appropriate advice for defendants and their legal team regarding whether a case should be defended.

- f. If an out-of-court settlement cannot be achieved, the case is heard in court by a judge alone. Put simply, the judge's decisions are based on case law, the judge's determination of the disputed facts and his or her assessment of the expert opinions.

Breach of duty

- g. The legal test used by the Court for breach of duty in clinical negligence cases in England and Wales is the Bolam test,⁶ namely a doctor 'is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical opinion, skilled in that specialty'. The words 'competent', 'reasonable' and 'respectable' to describe the body of medical opinion have been used subsequently in judgements using Bolam. The judge in the Bolam case also said, 'Counsel for the plaintiff put it in this way, that in the case of a medical man negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. That is a perfectly accurate statement, as long as it is remembered that there may be one or more perfectly proper standards; and if a medical man conforms with one of those proper standards then he is not negligent'. It is inherent in the Bolam test that the specialist is expected to achieve the standard of a reasonably competent specialist in the relevant field. A doctor is not, however, required to attain the highest degree of skill and competence, merely a reasonable level of skill. The skill level of a specialist in his or her field is expected to be higher than that of a generalist and the more skills a specialist possesses, the higher the standard of skill expected.
- h. The tests for negligence in Scotland and Northern Ireland are similar to the Bolam test. Scot's law uses the Hunter v Hanley test. In Hunter vs Hanley⁷ the judge said, 'In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of other professional men, nor because he has displayed less skill and knowledge than others would have shown. The true test in establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care. The standard seems to be the same in England'.
- i. The only major modification that has been added to Bolam is the judgement in the House of Lords in the case of Bolitho that if the body of expert evidence for the defence cannot be logically supported, the Court would be entitled not to use it as a bench mark.⁸
- j. Clearly, diagnostic conclusions or treatment which accord with accepted protocols or guidelines will be evidence to support proper practice.

Causation

- k. When considering causation the following important question needs to be asked, 'But for the doctor's negligence, would the claimant have suffered the damage of which he or she now complains?' (the 'but for' test). Once this test has been considered, the questions that need to be answered regarding causation are:
 - Did the breach of duty cause or materially contribute to the damage?
 - What difference did the breach of duty make to the eventual outcome?
 - Would the patient have suffered the same outcome in any event?
- l. It may also be necessary to consider hypothetical causation, namely what would have happened but for the negligence. For example, if an action should have been undertaken, but the action was not carried out, or imaging was not reviewed when it should have been, the expert may be asked what should, or was likely, to have happened and what the outcome would have been, and whether the claimant's injury could have been avoided in whole or in part. When considering the extent of the claimant's ongoing disability, experts may well need to consider and quantify the extent to which an underlying disability has been exacerbated by the specific acts of negligence.
- m. Causation questions are decided on the balance of probabilities or put another way 'whether something is more likely than not to have occurred' (which in percentage terms could be expressed as more than 50%). For example, in a case where it is claimed an angioplasty should have been performed to save a patient's leg on a particular day, the Court may decide it was a breach of duty not to have attempted the angioplasty, but may also decide that on the balance of probability the outcome would have been the same even if the angioplasty had been performed on the date in question.

3. Duties of medical experts

- a. All medically qualified experts should approach their medico-legal practice according to the GMC's guidance *Good Medical Practice*.⁹
- b. The duty of expert witnesses is to assist the claimant or the defendant(s) and the court on specialised and technical matters within their expertise. The advice and evidence given by experts will be relied upon by lawyers, judges and others who do not come from a medical background. Therefore, wherever possible, experts should use language and terminology that will be readily understood and not mislead.
- c. Experts have a duty to exercise reasonable skill and care to those instructing them, and to comply with relevant codes of ethics, but when instructed to give or prepare evidence for the purpose of civil proceedings in England and Wales they have an overriding duty to help the court on matters within their expertise. Their duty to the court overrides any obligation to the person instructing or paying them. This means that experts have a duty to act independently and not serve the exclusive interests of those who retain or pay them.
- d. A useful test of 'independence' is that the same opinion would be expressed had the same instructions been given by the opposing party. Experts should not take it upon themselves to promote the point of view of the party instructing them or to become advocates. As long as experts abide by Part 35 of the Civil Procedure Rules and its accompanying Part 35 Practice Directions when participating in Civil Proceedings, and exercise reasonable skill and care to those instructing them, they will fulfill their professional obligations to the parties.
- e. If experts do not exercise reasonable skill and care in the preparation of reports, and when giving evidence in court, they may be criticised by the court. Experts should be aware that any failure by them to comply with the Civil Procedure Rules or court orders, or any excessive delay for which they are responsible, may result in the parties who instructed them being penalised in costs and even, in extreme cases, being debarred from placing expert evidence before the court. In *Phillips v Symes*, Peter Smith J held that courts may also make orders for costs (under section 51 of the Supreme Court Act 1981) directly against expert witnesses who by their evidence cause significant expense to be incurred, and do so in flagrant and reckless disregard of their duties to the court. It is, therefore, important that experts recognise the often considerable amount of time required to fulfil their responsibilities. The Supreme Court recently decided that experts instructed in civil litigation no longer have immunity from suit where they have conducted themselves negligently.
- f. Experts should declare any possible conflict of interest as soon as they become aware of it. For example, they should make instructing solicitors aware if any allegations involve a former trainee, trainer or colleague. Also experts should take steps to guard against providing reports for both sides, which can happen if, for instance, the expert provided a report for a claimant some years before being asked to provide a report for the defence and does not immediately recognise the case. If in doubt they should seek advice.
- g. The RCR fully endorses the following additional advice in the General Medical Council's Supplementary Guidance *Acting as an expert witness*⁴ (July 2008):
 - 'You must be honest, trustworthy, objective and impartial. You must not allow your views about any individual's age, colour, culture, disability, ethnic or national origin, gender, lifestyle, marital or parental status, race, religion or beliefs, sexual orientation or social or economic status to prejudice the evidence or advice that you give.
 - You should make sure that you understand: how to construct a court-compliant report, how to give oral evidence, and the specific framework of law and procedure within which you are working.
 - You must take reasonable steps to access all relevant evidence materials and keep them safe. You should not disclose confidential information other than to the parties to proceedings, unless the subject consents (and there are no other restrictions or prohibitions on disclosure) or are obliged to do so by law, a court or tribunal.'

4. Advice regarding whether there is a claim

Solicitors may instruct experts to advise claimants whether there is a claim. The responsibility of the expert is to the 'client' and the expert bears liability for the accuracy of that advice. Even though such advice is not bound by the Part 35 Civil Procedure Rules, it is advisable for experts to adopt the same approach as for any other request for an expert opinion and to adhere to the Part 35 Rules. In many instances, the claim will proceed and the Part 35 Rules will then apply. In particular, experts should remember that:

- The objectivity of their advice may be crucial for the claimant's legal team when developing the Particulars of Claim
- Rigour in the presentation of facts and expression of opinions is just as important when writing their initial advisory report as for any other type of report.

5. Single joint experts

- a. A single expert may be instructed jointly by the claimant and the defendant to review test results (for example, imaging examinations) or undertake an assessment of a patient in the early stages of a dispute, especially where such matters are not, at that stage, expected to be contentious. The objective of such an appointment should be to agree or narrow issues. For instance, when the issue is compensation for exposure to asbestos, and the diagnosis of asbestosis is not in dispute between the parties, a radiologist may be asked to provide a report on the imaging findings.
- b. A single joint expert is a Part 35 expert and so has an overriding duty to the court. He or she is the parties' appointed expert and therefore owes the same duty to all parties. He or she should maintain independence, impartiality and transparency at all times. When necessary, directions from the court may be requested.
- c. A single joint expert should not attend any meeting or conference which is not a joint one, unless all the parties have agreed in writing or the court has directed that such a meeting may be held.
- d. A single joint expert should provide a single report simultaneously to all the instructing parties.
- e. Where single joint experts have been instructed but parties have, with the permission of the court, instructed their own additional experts, there may, if the court so orders or the parties agree, be discussions between the single joint expert and the additional experts. Such discussions should be confined to those matters within the remit of the additional experts or as ordered by the court.

6. Acceptance of instructions

- a. Experts should make sure they have the required expertise and should make clear if any issues fall outside their areas of expertise. Given the increasing subspecialisation in medicine, experts should ensure that they have expertise not only in their generic specialty but also in the relevant imaging or interventional subspecialty/clinical oncology site specialisation. Where appropriate, a specialist with a different area of expertise or a subspecialist should be recommended. Experts should be aware of, and where possible have experience of, the standards and nature of practice at the time of the incident(s) in question, because claims may be served many years after an incident. This will include the standards of care, types of technology available and degree of site specialisation in existence at the time of the incident(s). Knowledge of appropriate medical literature and policy/practice guidelines available at the time of the incident(s) will often be required.
- b. Experts are recommended to attend a course on providing advice for expert witnesses and an induction into expert witness work before taking on the roles and should maintain appropriate professional indemnity cover for expert report work.
- c. Experts should decide whether they can meet the proposed deadlines. They should realise they may be required to answer written questions within a strict time limit imposed by the court, and after having been consulted about potential dates for trial, will be expected to be available to the court on those dates.
- d. Experts should confirm as promptly as possible whether they agree to provide expert advice. Once they agree, they are accepting a professional appointment and entering into a contractual agreement with those instructing

them. They should inform those instructing them if they later become aware that they may not be able to fulfil any of the terms of appointment.

- e. If the instructions are unclear, inadequate or conflicting, experts should seek clarification from those instructing them. If clear instructions are not forthcoming, expert advice or opinion should not be provided. Experts may ask the court for help if ultimately required
- f. An expert's duty to the court precludes him or her from accepting instructions from parties that would pay the expert's fees on a conditional or contingency basis, as this would prejudice their independence as an expert witness and their overriding duty to the court.
- g. Experts should agree fees, time scales for reports, court cancellation charges and so on at the outset.

7. The preparation of reports

- a. Experts should confine their opinions to matters which are material to the disputes between the parties. They should provide opinions only in relation to matters which lie within their expertise. Experts should indicate without delay where particular questions or issues fall outside their expertise.
- b. Experts must be explicit when they do not have sufficient information on which to reach a conclusion on any particular point, or when their opinion is subject to qualification.

Contents of expert reports

- c. Some of the details in the following paragraphs are specific to the Part 35 Civil Procedure Rules and Practice Directions, but the principles are the same for Scottish reports.
- d. Model forms of Expert Reports are available to members of bodies such as the Academy of Experts or the Expert Witness Institute.
- e. All reports prepared for the Court must contain a statement of understanding, stating that the expert (i) understands his/her duty to the Court, and has complied and will continue to comply with that duty and (ii) is aware of the requirements of Part 35 of the Civil Procedure Rules and Practice Direction 35, the Protocol for Instruction of Experts and the practice direction on pre-action conduct.
- f. Expert reports must also be verified by a statement of truth. The current mandatory wording, which must not be varied, is: 'I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.'
- g. The details of an expert's qualifications should be given. It may be sufficient simply to state academic and professional qualifications. However, where highly specialised expertise is called for, experts should include the detail of particular training and/or experience that qualifies them to provide the required opinion. Experts usually append a copy of their curriculum vita to the report
- h. All material instructions must be stated. The imperative is transparency. The term 'instructions' includes all material which solicitors place in front of experts in order to gain advice. An expert is required to set out the basis upon which a report is written by referring to all material written and oral instructions.
- i. Experts should take into account all material facts before them at the time they give their opinion. Their reports should set out those facts and any literature or any other material on which they have relied in forming their opinions. They should indicate if an opinion is provisional, or qualified, or where they consider that further information is required or if, for any other reason, they are not satisfied that an opinion can be expressed finally and without qualification.
- j. Experts should address questions of fact and opinion separately. They must state the facts on which their opinions are based and must distinguish clearly between facts they know to be true and facts which are assumptions. Not infrequently, the facts of a case are disputed. The disputed facts can be commented upon by experts and, where appropriate, opinions given on what is likely. However, it is for the court to decide the facts of a case.
- k. Where there are material facts in dispute, experts should express separate opinions on each version. Experts should not express a view in favour of one or other disputed version of the facts unless, as a result of particular expertise and experience, they consider one set of facts as being improbable or less probable, in which case they may express that view, and should give their reasons.

- l. Experts must give a balanced opinion. If they have doubts about the robustness of the evidence supporting their view they must identify this at the time of the initial report.
- m. If there is a range of opinion on any question upon which experts have been asked to comment, they should summarise the range of opinion and explain how they arrived at their own view.
- n. Wherever possible, experts should present evidence that can be supported by the literature and most particularly by the literature contemporary to the event, including references to and copies of the literature. Reference to contemporary standard textbooks can be particularly useful.
- o. Where there is no available source for the range of opinion, experts may need to express opinions on what they believe to be the range which other experts would arrive at if asked. In those circumstances, experts should make it clear that the range in question is based on their own judgement and explain the basis of that judgement.
- p. A summary of conclusions is mandatory. The summary should be at the end of the report after all the reasoning. In complicated cases, it may be useful to also include a brief summary of conclusions at the beginning of the report to help the reader understand the logic of the contents.
- q. Although all communications between experts and instructing solicitors are privileged, it is possible that the court could order that they are disclosed to other parties to the litigation, including all letters of instruction and earlier draft reports.
- r. Where experts are asked to give advice or opinions about the clinical condition of an individual, they should list the sources on which their opinions are based including the clinical records and any general practitioner's case notes. Imaging examinations should be reviewed if appropriate. Any references supporting the opinions should be listed. To complete reports on condition and prognosis it may be necessary to meet with the claimant and carry out an examination. Any limitations regarding the expert advice or opinions should be explained.
- s. An aspect of particular relevance to many clinical radiologists when preparing reports is the attitude of courts to missed lesions. Experts should take into account the level of imaging misses reported in the radiological literature, but it is important to bear in mind (i) the wording of the Bolam judgement (see Section 2) which, while not excusing errors, refers to 'practice accepted as proper by a responsible body of medical practitioners' and (ii) the test for breach of duty is whether there is a failure to act in accordance with the standard of a reasonably competent practitioner at the relevant time.
- t. If experts have reason to believe that appropriate consent for disclosure of information has not been obtained (from the patient or client, or from any third party to whom their medical records refer) they should return the information to the person instructing them and seek clarification.
- u. Experts should ensure that any report they write, or evidence they give, is accurate and not misleading. This means that they must take reasonable steps to verify information and must not deliberately leave out relevant information. Careful consideration should be given to the initial report before submission. It will form the basis for all subsequent communication and while clarification may be requested, alteration (without any new material or evidence coming to light) of an opinion can potentially damage the credibility of the expert.

8. Amending reports

- a. Experts should amend their reports when necessary (giving reasons for the amendments):
 - To achieve accuracy, internal consistency or completeness
 - Following agreements reached at meetings between experts
 - Following disclosure of evidence or documentation not available at the time of the initial report.
- b. Experts should not, however, be asked to, and should not, amend, expand or alter any parts of reports in a manner which distorts their true opinion.
- c. When experts intend to or actually amend their reports, they should inform those instructing them without delay.

9. Meetings of experts

- a. If there is disagreement between experts, the solicitors may arrange, on behalf of the court, or the court may direct, a formal meeting between the relevant experts to determine whether these differences can be resolved. The questions to be answered by each expert in these meetings are usually agreed in advance by lawyers from the two sides, often having consulted with the experts regarding the scope and wording of the questions. The primary aims of the meetings are:
 - To define for the court whether and how differences can be resolved
 - Agree opinions whenever possible
 - To formally determine those points on which the experts continue to disagree and why
 - On the rare occasions that lawyers attend, they should not normally intervene except to answer questions put to them by the experts or to advise about the law.
- b. At the conclusion of any discussion between experts, a statement should be prepared setting out:
 - Answers to the questions posed
 - If necessary, a list of issues that have been agreed, including, in each instance, the basis of agreement
 - A list of issues that have not been agreed, including, in each instance, the basis of disagreement
 - A list of any further issues that have arisen that were not included in the original agenda for discussion
 - A record of further action, if any, to be taken or recommended, including as appropriate the holding of further discussions between experts.
- c. The outcome of a meeting of experts should be a single report, sent simultaneously to all the instructing parties. If conflicting instructions lead to different opinions (for example, because the instructions require experts to make different assumptions of fact), reports may need to contain more than one set of opinions on any issue. It is for the court to determine the facts.
- d. Where experts change their opinion following a meeting of experts, a simple signed and dated addendum or memorandum to that effect is generally sufficient. In some cases, however, the benefit to the Court of having an amended report may justify the cost of making the amendment.
- e. Meetings of experts are now part of standard procedure for many clinical negligence cases in England and Wales. They are encouraged in Northern Ireland, but rarely happen in Scotland.

10. Conferences with counsel

- a. In most clinical negligence cases, one or more meetings take place between a barrister, experts, solicitors and other interested parties before the case gets to court. In meetings on behalf of a claimant, the claimant/relatives may also be in attendance. In meetings on behalf of defendants, the individuals against whom allegations have been made will usually be in attendance. However, if no such meetings have been scheduled, experts can request a meeting with the barrister well in advance of the court appearance to discuss relevant issues.
- b. Experts should be helpful but robust in meetings with counsel. If experts need to modify views expressed in their reports, they should acknowledge the changes and be quite clear about the reasons for the modifications. Disagreements between experts from differing specialties may surface and may need to be resolved during the conference. Experts should not feel pressured by solicitors or barristers to alter their opinions.

11. Written questions to experts

- a. The Part 35 Civil Procedure Rules provide for the other party in the proceedings to put written questions to experts. They may only do this once and must do so within 28 days of receiving the relevant report and only for purposes of clarification. The answers form part of the expert evidence and are covered by the statement of truth.
- b. Experts have a duty to provide answers to written questions which are in accordance with Part 35 Civil Procedure Rules and should send a copy of their answers to those instructing them. Where they fail to do so, the court may impose sanctions, and if there is continued non-compliance, may debar a party from relying on the report.

- c. Where experts believe that the questions are not properly directed to the clarification of the report, or are disproportionate, or have been asked out of time, they should discuss the questions with those instructing them and, if appropriate, those asking the questions. Attempts should be made to resolve such problems without the need for an application to the court for directions.

12. Experts' right to ask court for directions

Experts may request directions from the court to assist them in carrying out their functions as experts. Experts should normally discuss such matters with those instructing them before making any such request. Unless the court orders otherwise, any proposed request for directions should be copied to the party instructing the expert at least seven days before filing any request to the court, and to all other parties at least four days before filing it.

13. Withdrawing from a case

Where experts' instructions remain incompatible with their duties, whether through incompleteness, a conflict between their duty to the court and their instructions, or for any other substantial and significant reason, they may consider withdrawing from the case. However, experts should not withdraw without first discussing the position fully with those who instructed them and considering carefully whether it would be more appropriate to make a written request for directions from the court. If experts do withdraw, they must give formal written notice to those instructing them.

14. Attendance at court

- a. Experts should take time to fully acquaint themselves with the case and relevant documents immediately prior to any Court appearance.
- b. All the evidence and opinions expressed must:
 - Be straightforward and not intentionally misleading or biased
 - Not omit material or information which does not support the opinion expressed or conclusions reached
 - Be as objective as possible
 - Avoid hyperbole and pejorative language.
- c. The quality and reliability of expert scientific and medical testimony should be complemented by an appropriate professional approach. Communication skills are important.
- d. Experts instructed in cases have an obligation to attend Court if called upon to do so and accordingly should ensure that those instructing them are always aware of their dates to be avoided and take all reasonable steps to be available. Solicitors instructing experts should ascertain the availability of experts before trial dates are fixed and keep them informed.

15. Procedures for coroner's court

- a. A coroner's court is an inferior court of record; the function of the inquest is limited to and consists of hearing evidence and making certain findings on the basis of such evidence. The coroner decides what evidence to call. He and any jury must avoid determining civil liability. The inquest is a fact-finding exercise, not a fault-finding exercise. It cannot grant remedies; for example, it cannot grant orders, award damages or make declarations.
- b. The coroner's function is generally to inquire into the cause of certain types of death on behalf of the Crown. The procedures, unlike civil litigation, are inquisitorial. There are 'interested persons' but there are no parties, which contrasts with the adversarial process of the civil courts, where there are parties and issues to be litigated between them. Coroners can decide who is to attend and can give narrative verdicts.
- c. The general principles for expert witnesses for a coroner's court are the same as for civil litigation, particularly the need to be honest, unbiased, trustworthy, objective and impartial and very importantly not to provide advice or opinions outside one's areas of expertise. It is advisable to be in clinical practice in the relevant specialty at

the time the evidence is given. It is good practice, even though not strictly required, to adopt the structure of a Part 35 compliant report, including a statement of truth.

- d. Coroners' inquests can provide the opportunity to investigate the detailed circumstances of a death where a failure of care has played a role. The inquest may assist in the exploration of issues which may subsequently form the basis of a civil claim for clinical negligence or criminal proceedings. Experts attending a coroner's court should be prepared to be questioned by the coroner and cross-examined by barristers.
- e. Deaths in Scotland are investigated by the Procurator Fiscal. Mostly, Fiscal enquiries are held in private. The Procurator Fiscal may order a fatal accident enquiry before a Sherriff and jury.

16. Child protection

- a. In cases of suspected child abuse, expert reports may be required for either family services or criminal proceedings and the expert may be instructed by the police, the Crown Prosecution Service or the legal team. Generally the procedures are as outlined above for civil litigation.
- b. It is important that within the report, dates and projections of all investigations are listed chronologically with pertinent findings and conclusions. For each identified injury, the report should include site, ages and where relevant likely mechanisms of injury. A comment should also be made on overall bone density, and the presence of any underlying disorder that might predispose the child to injury. Where available, evidence should be provided to support the statements; research results that appear to go against any statement should be mentioned. The reasons for reaching the conclusions should be provided. As with all expert reports it is vital to make sure that all opinions are within the expertise of the author. The Royal College of Radiologists and the Royal College of Paediatrics and Child Health have provided a useful overview in their joint publication *Standards for Radiological Investigations of Suspected Non-Accidental Injury*.¹⁰

Approved by the Board of the Faculty of Clinical Oncology: 1 July 2011
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www.expertwitnessscotland.info/codepract.htm
4. General Medical Council. *Supplementary Guidance: Acting as an expert witness*. London: GMC, 2008.
http://www.gmc-uk.org/guidance/ethical_guidance/expert_witness_guidance.asp
5. The Academy of Medical Royal Colleges. *Medical Expert Witnesses: Guidance from the Academy of Medical Royal Colleges*. London: AOMRC, 2005.
6. Bolam v Friern Hospital Management Committee. McNair J. [1957] 2 All ER 118 at 122
7. Hunter v Hanley Scotland, First Division. 1955 SC 200, 1955 SLT 213
8. Bolitho and Others v City and Hackney Health Authority Court of Appeal. [1977] 4 All ER 771
9. General Medical Council. *Good Medical Practice*. London: GMC, 2006.
10. The Royal College of Radiologists and Royal College of Paediatrics and Child Health. *Standards for Radiological Investigations of Suspected Non-Accidental Injury*. London: RCPCH, 2008.
http://www.rcr.ac.uk/docs/radiology/pdf/RCPCH_RCR_final.pdf

Useful information sources

- The Society of Expert Witnesses (www.sew.org.uk)
- Expert Witness Institute (www.ewi.org.uk)
- Academy of Experts (www.academy-experts.org)
- Action against Medical Accidents (www.avma.org.uk)

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