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Expert testimony in court. 2: In the witness box

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Abstract Thorough preparation is essential before going into the witness box as an expert witness. This involves, among other things, rereading all the case notes and other relevant documentation and being familiar with recent research in areas related to the case. Areas of probable disagreement between experts should be discussed during consultation with counsel, since cross-examination is likely to focus on these. A specific protocol applies in the courtroom, especially when in the witness box. The approach to examination-in-chief is outlined and the tactics used during cross-examination are described, as these can be used to undermine the evidence of the witness.

As psychiatrists are increasingly called to give evidence in court, both as professionals and as experts, it is crucial that there is stringent adherence to court and witness-box protocol.

Preparation for court

The expert must begin preparations several days before the court hearing. These will include re-reading the expert's own medico-legal reports as well as the reports of other specialists such as psychologists or occupational health consultants. The expert should also make sure that his or her own handwritten notes from the consultation with the patient are available and that they are clearly identified. It is essential that the expert is familiar with the areas of agreement and disagreement between the parties, as these will determine the likely line of cross-examination. If other experts have prepared reports, these must be carefully considered: the expert witness might be required to comment on them in the witness box if they touch on his or her particular area of expertise. The time and venue of the hearing must be confirmed and, if the expert has not conducted a recent examination of the patient, leave of the court may be sought in order to do so.

The judge

Before entering the courtroom, it is important to establish the form of address to the judge. This can be discussed with the solicitor or gained by listening to the legal team in court. Judges in the High Court are addressed as 'My Lord/Lady'; those in the circuit court as 'Your Honour'; and magistrates as 'Sir/Madam', or the older form, 'Your Worship'. In Ireland, the term of address to the judge is 'My Lord' in all courts except the district court, where the term is 'Judge'.

Court protocol

The key points of courtroom protocol are listed in Box 1. At a practical level, it is essential to check the location and the number of the court where the case is being heard. Judges usually make every effort to

Box 1 Courtroom protocol

- Pagers and mobile telephones must be switched off
- Movement must be unobtrusive and noise minimised
- Speaking with others should be curtailed: communication with counsel is best done by passing written notes through junior counsel or the solicitor
- All case notes and reports should be brought to court
- If the hearing is in session, bow before the judge when entering and leaving the courtroom
- Do not move or speak while witnesses and jurors are taking the oath or making an affirmation: a judge may require that the procedure be repeated if it is interrupted

For Part 1, see pp. 177–182 and for Commentaries, see pp. 187–189 and 189–190, this issue.

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accommodate medical experts and to avoid delaying them unnecessarily – this consideration should be reciprocated by arriving on time. Sometimes an expert is given short notice (at least in Ireland). This is not the fault of the patient or the legal teams and, where possible, a compromise should be reached rather than seeking an adjournment and a further delay in hearing the case.

It is essential that copies of all the notes, reports and medical records that have been provided are brought to court. If any of this material has been forgotten, a case may be adjourned and the expert instructed to collect it. However, any hospital records taken into court can be viewed by both legal teams and by the court and, in many cases, these will already have been copied and made available to both parties. This should be discussed with the legal team and, in some cases, advice may be given against bringing this material to court. The expert, in order to maintain independence and to avoid the embarrassment of not having the required notes in court if requested by the judge, might decide to disregard this advice.

For ease of referral, it is helpful to tabulate those parts of the notes that are likely to be of relevance to the case. This will confirm that the expert is well organised and professional. Although there is no difficulty about referring to the notes in court, it is advisable to ask permission to do so by a request such as, 'May I refer to my notes, My Lord?' followed by 'Thank you' when permission is granted.

Some cases, such as family cases, are heard in camera and entry is barred except to the parties directly concerned. There will be a notice on the courtroom door to this effect and expert witnesses will be allowed entry only if their evidence is about to be taken, unless they are required to hear all the evidence. All other cases are open to the public as well as to reporters. This can mean exposure in the media, especially in high-profile cases.

Taking the oath or affirming

This is a solemn moment. It is also the witness's introduction to the court and will create a first impression. On entering the witness box, the doctor will have to swear, either on a sacred book (such as the Old or New Testament or the Koran, depending on religious affiliation) or affirm, by repeating sentence by sentence the words as spoken by the court officer or reading from a card. Some training organisations recommend that the sacred book should be held in the right hand at shoulder level facing outwards and upwards but this does not find universal acceptance. The words must be enunciated clearly so as to create an aura of respect.

Witness-box protocol

In England and Wales, it is customary to stand when giving evidence, whereas in Ireland, the witness sits after being sworn in. The witness should stand or sit facing the judge and turn from the hips to look to counsel for the questions, turning back to face the bench when replying, even when the judge is taking notes. This is known as the 'turning technique' and it can be used effectively to minimise the risk of interruption from counsel when giving evidence (see below). If a jury is present, the witness stands (or sits) facing a point midway between the judge and the most distant end of the jury. Replies are directed to the judge and jury and it is important to establish eye contact with members of the jury, as this will facilitate their engagement, especially when the issue is a technical one.

'Dress up, shut up and speak up' is the aphorism that sums up the basics of witness protocol. Although it is not necessary to have a wardrobe adviser, casual dress such as sweater and jeans is frowned upon as this gives the impression that the witness is disrespectful to the court. On the other hand, excessive jewellery or flamboyant colours may distract the jury from the substance of the expert's evidence. Thus, dress that might be acceptable in some medical situations is unlikely to meet with favour in the court and may taint the value that is attached to the witness's evidence.

Although most courts have microphones in place, some witnesses do not use them correctly and frequent requests to speak up can cause irritation. Moreover, failure to hear the evidence clearly might compromise the case. Unfortunately, some courts have very poor acoustics, making audibility very difficult. If the expert is required to hear all the evidence but its clarity has been compromised, a request should be made for a transcript.

Water is provided in the witness box. If the expert anticipates being there for a lengthy period, he or she should pour some before beginning to give evidence. If the water runs out, more can be requested.

If an adjournment occurs during cross-examination of the expert or professional witness, no aspect of the examination or the case may be discussed, even with the instructing legal team, although this, of course, does not mean that the psychiatrist cannot have lunch with them or an expert instructed by the other side.

Dealing with the examination-in-chief

This is also known as direct examination, and it refers to the examination of the witness by the party

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that has called him or her and on whose behalf the expert or professional has been instructed.

The first question will be to outline the qualifications and expertise of the expert or professional. These have to be explained in terms that the judge and/or jury can understand: 'FRCPsych', for example, will mean nothing to most of those in court. Any relevant experience or publications in the area under investigation should be mentioned, not as an exercise in grandiosity but to establish one's expertise. This could be clarified at the pre-trial meeting: often counsel will already have a summary or full curriculum vitae for the expert, obtained at the time of appointment to the case.

When replying to questions, the expert must speak slowly and clearly. The court stenographer will be typing all the evidence verbatim, while the judge will take notes, either by hand or on a laptop computer. The stenographer or judge will indicate if the expert is speaking too quickly or if terms being used are not understood. Judges may sometimes tell a witness to 'watch my pen'. The expert may also be asked to spell some of the words used.

The next question will usually relate to the consultations the expert or professional has had with the plaintiff (or defendant) and the findings therein. Some witnesses read verbatim from their report: this is highly inadvisable as it risks annoying the judge since it presumes that he or she has not read it. It is best to describe the findings, briefly, in one's own words. Increasingly this is not required, as the report itself is regarded as evidence-in-chief and, once the qualifications have been established, the expert witness is handed over for cross-examination.

During the examination-in-chief, the expert cannot be asked leading questions, whereas this is permissible during cross-examination. Thus, questions will be phrased, 'And what did you find?' or 'What is your explanation for this finding?', rather than 'Was the patient suffering from depressive illness?' or 'Was this due to the accident?' Avoid jargon wherever possible; if it is used, it must be explained in lay language. On conclusion of the examination-in-chief, cross-examination will proceed, and following that the expert may be re-examined briefly on points which have arisen during cross-examination and require clarification.

Dealing with cross-examination

Witnesses often become defensive during cross-examination and this can heighten tension between counsel and the witness, causing unnecessary confrontation. A witness who is disrespectful or impolite will not win the respect of the court and could be reprimanded. An aggressive expert is more likely to offer non-expert opinion and make mistakes. If the expert focuses on his or her role of assisting the court rather than being partisan, contretemps are less likely.

During examination, and cross-examination in particular, counsel often interrupt each other and may interrupt the witness. The expert must be sensitive to this aspect of evidential protocol and pause rather than attempting to speak above the interruption. Although it is disconcerting and breaks the flow of thought, the interruption is not personal and may have foundation in law, as, for example, when there is objection to hearsay evidence. If the witness feels that what he or she has to say is relevant, the judge may be looked to for permission to continue by saying, '(Judge) May I address this matter, as I would like to clarify the position for the court?' If such a request is granted, following the reply, the judge will direct whether the answer is to be disregarded or not. Even when interrupted, it is important to continue to look at the judge although the temptation is to turn and face counsel. Moreover, during cross-examination, facing the bench reduces the risk of interruption, as the judge will be listening to and engaged by the expert's answers.

In general, answers to questions, especially during cross-examination, should be brief and clear. Complicated or tortuous responses afford a greater opportunity for challenge, and answers that are woolly or vague give the impression of evasiveness or a poor grasp of the issues, undermining the perceived competence of the expert.

However, it must also be borne in mind that the purpose of cross-examination is to plant doubt in the minds of the judge and/or jury, particularly when the burden of proof is the criminal one, 'beyond reasonable doubt'. This makes the cross-examination the most challenging and important part of the court appearance. It is difficult, but not impossible, to anticipate some of the questions that will be asked during cross-examination. Detailed discussion of these at the pre-trial meeting, careful preparation and rereading of notes and reports, and an awareness of the pitfalls of the case and of the tactics used in cross-examination will increase the expert's confidence.

During cross-examination, several tactics are employed that aim to undermine the expert or change the opinions offered during direct examination. These are summarised in Box 2 and described below.

Questioning the expert's expertise

Certain challenging questions are common and can be anticipated: how many publications does the expert have and where were they published? Has

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Box 2 Cross-examination tactics

- Questioning the witness's competence as an expert
- Querying the method of collecting unbiased information for report
- Providing new information to undermine the witness's position
- Using the yes / no trap
- Providing alternative explanations
- Questioning failure to provide standardised measures
- Hurrying the witness

the expert undertaken any recent reading on the subject and what is the source of that material? How many similar cases has the expert dealt with?

The expert will have been afforded the opportunity to emphasise his or her strengths when giving details of qualifications on entering the witness box. The impression held by the judge and / or jury will be dented if these are presented only in response to aggressive cross-examination.

Challenging the method used for gathering information for the report

Was there any collateral information and, if so, was it biased? How many assessments were made before writing the report? If the patient was seen only once and objective collateral was not obtained, how can the expert witness be sure of the veracity of the history? It is important always to adhere to best practice. If it has not been followed, the expert must offer an explanation: for example, that the informant was unwilling to be interviewed or that the general practitioner had died.

'If you had had this information would your opinion still be the same?'

Presenting new material not admitted to by the patient or that has subsequently come to light can significantly undermine the evidence. It is therefore essential to be well versed in the case. This means reading the notes and all reports in detail before giving evidence. The expert should enquire of the legal team about any new material that has come to light since the report was prepared or any new evidence that has emerged in court, of which the expert might be unaware. If the opinion might have been different in light of this new information, this must be acknowledged. If not, then the reasons should be explained. If the disagreement is a genuine professional one, the witness should state his or her prerogative to make a clinical judgement based on personal expertise and on the information gathered during the evaluation using best practice.

The yes/no trap

Lawyers like clear-cut evidence, and decisions are cast as absolutes. Questions such as 'Can you quantify the risk of this person relapsing?' or 'Will this person reoffend?' are very difficult to answer definitively. Although it might be helpful to cite research in this area, some judges will request that the expert confines his or her comments to this particular patient rather than providing theoretical answers. Sometimes, of course, it is possible to answer this type of question definitively and it will not be a trap. However, in complex cases it is essential to take time, having sought the judge's permission, to explain why a simple yes or no is problematic. This should be followed with the appropriate answer. The expert should not feel compelled to give a simple answer to a complex question.

Introducing alternative explanations

A further cross-examination strategy is to dent the conviction of the expert by offering alternative explanations that the expert might acknowledge as being reasonable in the circumstances. For example, the person who is suffering from a depressive illness, post-accident, may also have a marital problem that counsel will assert is the real cause of the symptoms. Careful preparation prior to the trial and during the pre-trial consultation allows the expert to anticipate such alternative explanations. These must be considered when preparing the report and expanded upon, if necessary, to assist the legal team. It also allows the expert to play 'devil's advocate' by introducing alternatives before the opposition raises them. A well-prepared witness will be confident of his or her position when confronted with these alternatives but should also be prepared to change his or her opinion in the light of new and convincing information.

Use of standardised measures

Some experts bolster their evidence by using standardised schedules that measure particular attributes such as symptoms or personality. These measures can give a spurious sense of science and confidence. Unfortunately, the fact that an expert has not applied standardised measures may be used to undermine his or her evidence in cross-examination. It is important to warn counsel of this in advance of the court appearance and, if it is raised

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as a deficiency during cross-examination, the limitations of such techniques must be outlined. These include recall bias, bias motivated by gain, social desirability and contamination of personality evaluations by mood. A further problem with structured measures is confusing their use as diagnostic tools with their use as severity measures: for example, a Beck Depression Inventory score of 17 is not diagnostic of depressive illness.

Hurrying the witness

This technique is designed to obtain contradictory evidence. When questions are being thrown in quick succession, it may be necessary to ask the judge's permission for time to consider the question carefully and reflectively. Establishing eye contact with the judge will also slow the pace.

Conclusions

There is a well-developed case law in relation to expert witnesses. At its core is the belief that the expert is there to assist the court in matters of expertise not directly available to it. The expert must be well versed in the topic under consideration, both clinically and academically. It is essential to undertake careful preparation before giving evidence and to observe the rules of evidence.

Multiple choice questions

1 The expert witness:
a has a right to be present at the hearing even when it is held in camera
b is the only witness who does not have to switch off pagers and mobile phones
c can always communicate verbally with senior counsel during the hearing
d can seek advice if there is an adjournment during his or her cross-examination
e cannot discuss his or her evidence during an adjournment of cross-examination.

2 In the witness box:
a the witness usually stands (in an English court)
b the witness always faces counsel
c the witness always faces the judge
d the witness will not be interrupted
e the witness may not drink water.

3 Examination-in-chief:
a begins by summarising the main findings on examination
b includes providing information about the witness's expertise in the area
c mainly comprises leading questions
d is best dealt with by reading directly from the medico-legal report
e prohibits the witness from referring to notes.

4 During cross-examination:
a the expert may have his or her expertise challenged
b the expert will never have his or her method of assessment questioned
c the expert should take umbrage if his or her conclusions are challenged
d the expert should seek the judge's permission to complete an answer if interrupted
e the expert should be prepared to change his or her mind in certain circumstances.

MCQ answers

1	2	3	4
a F	a T	a F	a T
b F	b F	b T	b F
c F	c F	c F	c F
d F	d F	d F	d T
e T	e F	e F	e T

INVITED COMMENTARY ON
Expert testimony in court

The Scottish courts

Patricia Casey's papers (2003*a*,*b*, this issue) cover the situation regarding expert witnesses in England and Wales and in Ireland. The situation in Scotland is outlined below.

Most psychiatrists in Scotland will gain experience of providing reports or appearing in court as part of their routine clinical work for the criminal courts, for non-judicial bodies such as the Children's Panel and in applications for compulsory detention under the Mental Health (Scotland) Act 1984. It

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