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Editorial

Doctor in court: what do lawyers really need from doctors, and what can doctors learn from lawyers?

Hugh Series and Jonathan Herring

Summary
Doctors and lawyers are usually well-educated, thoughtful people. Both groups have to assimilate large amounts of information and use it to make decisions. But the way that they do it is very different. Doctors have a better chance of helping courts to make good decisions if they understand exactly what courts need from them.

Declaration of interest
None.

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When doctors are asked to become involved in legal processes, either by writing reports, or by appearing in court, lawyers are usually in charge of how the process works, and they set the rules. If as doctors we understand what lawyers need from us, we can get our points across much better, and we have a better chance of helping the court to reach the right conclusion.

When lawyers ask for a medical report, for example, for an inquest, they may ask for a factual account of the doctor's involvement in a particular case. The doctor is acting as a professional witness of fact and not giving an opinion, except insofar as it relates to his own involvement in the case. The report should focus on what the doctor has seen, heard, read or done. It should not offer speculation or opinion. Alternatively, lawyers may ask for an expert report. Courts have strict rules about the conditions under which they will accept expert evidence. In England and Wales these are set out in rules of procedure.[1–4] Crucially, expert evidence is admitted only on matters that are within the expert's professional competence, and is 'restricted to that which is reasonably required to resolve the proceedings'.[1]

Key requirements of an expert report

The court will decide for itself whether it thinks that a person is qualified to be an expert on a particular issue, and so a report needs to set out the relevant experience and qualifications of the expert. The question of who is an expert came under scrutiny in the case of Dr Pool who was referred to the General Medical Council (GMC) for lacking appropriate expert qualifications, but then challenged the adverse GMC decision in the High Court.[5] Our College is currently preparing guidance on this issue. Experts should explain how they have reached their conclusions. Although respect will be given to experts, the court will not accept an expert's opinion simply because of his or her professional standing. It is important that the report is accurate. A barrister will pick up on the smallest inaccuracy to suggest that the report is unreliable. If one is unsure about something, it is best to say so.

The consequences of straying outside one's expertise can be catastrophic, not only for the expert, but for others affected by a judgment based on it. When Sir Roy Meadow, a paediatrician, gave statistical evidence in court that was eventually shown to be flawed, the consequence was a wrongful conviction (the defendant, Sally Clark, was later acquitted, although she died tragically, soon afterwards). Professor Meadow was struck off by the GMC, although later reinstated after appealing to the Court of Appeal.[6] Schneps & Colmez describe other examples of statistical abuses in court proceedings.[7] Dr Waney Squier was struck off by the GMC over evidence she gave in court disputing the validity of shaken baby syndrome, but was recently cleared by the High Court of acting dishonestly, and her licence to practise has been restored, albeit with restrictions. The status of shaken baby syndrome remains uncertain, and many experts in the field are no longer prepared to give evidence in court about it, leaving the justice system in difficulty in these kinds of cases.[8]

The expert's duty is to the court

The legal system in the UK, the USA and many Commonwealth countries is adversarial. There is a legal team on each side whose job is to put forward the best possible arguments for its client's case, and to undermine the arguments put forward by the other side. A lawyer's duty is both to his client and to the justice system. It might be thought that these duties inevitably conflict. However, our legal system is premised on the assumption that the best way to achieve justice is for a judge and, in some courts, a jury, to hear the best possible case that can be put on behalf of each side and to weigh them each against the other. Of course, the system does not always work: one side's legal team may not put the best case it could, or relevant evidence may not be presented. However, a lawyer will feel that if he has put the best case he can for his client he has 'done his bit' to achieve justice, even if other players in the justice system do not operate as they should and an injustice results.

In clinical work, a doctor's prime duty is to 'Make the care of the patient your first concern'.[9] In court, medical experts, although still subject to GMC regulation, 'should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate. Experts

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should consider all material facts, including those which might detract from their opinions . . . [and] help the court on matters within their expertise. This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid'.[1]

A useful test of this is for the expert to consider whether he would have given the same opinion if he had been instructed by the other side. If the answer is no, then he needs to reflect very carefully on why this is and, if necessary, to reconsider his position. The expert's duty is unambiguously to the court, not to the person who instructs or pays him. Not all people who hold themselves out as experts are careful to observe this rule, as a recent Panorama programme revealed.[10] It is increasingly common for a single expert to be instructed jointly by both sides together.

Weighing up probabilities

Doctors and lawyers use probabilities in very different ways. In court, a fact is treated as either proved and therefore true and able to be relied on, or not proved and therefore not able to be relied on. One judge described this as a 'one or zero' approach. In civil cases, the standard of proof is 'on the balance of probability'. If it is shown that there is a 43% chance that a doctor's mistake caused the patient harm, this will be treated as not being proved and so the doctor will have no liability. However, if there is a 55% chance that the doctor's mistake caused the patient harm, it is treated as proved, and hence his employer will be liable for damages. In criminal cases the threshold for proof is 'beyond reasonable doubt', much higher than in civil cases, although the balance of probabilities test still applies to some matters relevant to a criminal case, such as whether the defendant is fit to stand trial. Exactly what these terms mean is a matter for the court to determine in each case.

'Beyond reasonable doubt' is a very high threshold, and many decisions in medicine are made on much less certain findings. There is an important distinction between the level of probability required to establish from randomised controlled trials that a certain treatment is effective for a particular condition, and the probability that that treatment will help any given patient. Typically, a significant finding in a randomised controlled trial is considered to be one that has a probability of less than 5% of having arisen by chance. This is clearly much more exacting than the civil law standard of the balance of probability. However, once it has been established from treatment trials that a given treatment is effective, doctors are likely to offer it to patients on the basis of a much lower likelihood that the patient will benefit. Suppose that a meta-analysis of studies of a particular treatment has established that the overall likelihood is less than 1% that chance alone accounted for the observed treatment success in clinical trials; although this might be considered to be good evidence to support the use of the treatment, it does not mean that any given patient is more than 99% likely to benefit from it. On the contrary, even a treatment considered to be reasonably effective, such as antidepressants for depression, may have a number needed to treat (NNT) of, say, ten, which means that for every one patient who gets the intended treatment benefit, nine more do not, and all ten are exposed to the risk of side-effects.

Timescales

Legal processes generally move very slowly: courts can take months or even years to reach a decision, as readers of *Bleak House* will recall. By contrast, doctors are accustomed to weighing complex and often conflicting findings rapidly in order to decide on the spot what treatment to give. However, readers may be surprised to learn that there is an on-call judge and, in an urgent case that requires a court ruling, it is possible to get a judicial decision overnight or within a matter of hours by telephoning the Royal Courts of Justice and asking to be put in contact with a judge.

Expert work is fascinating and challenging, but it is greatly assisted by an understanding of how legal arguments are constructed, and what it is that courts need from doctors.[11]

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