

Medical
Protection



Your profession needs you. Supporting doctors to become expert witnesses

Policy paper



Foreword

One of the defining aspects of being a professional is to be accountable for the standard of work one performs. In medicine, it is of vital importance that established members of the profession are willing and able to express opinions on the standard of work of their peers. Whenever questions are raised about the level of care a patient has received, the role of the 'medical expert witness' is central to defining whether or not the care has fallen short of a reasonable standard. This is of importance to all concerned including the patient, their families, and the doctor.

Whether in a civil claim for alleged professional negligence, before the Medical Council, a Coroner, or occasionally in a criminal investigation, the standard a doctor will be measured against is set, to a very large extent, by the medical expert witness.

It is therefore important that all parties have access to appropriately trained and experienced doctors who can give balanced and fair reports on the work of their peers.

Concerns have been raised in a number of quarters about the difficulty of accessing such witnesses and the reluctance of many very able doctors to take on this role. The reasons for this situation are multiple and complex. Medical Protection believes that it is in the common interest to bring about change in this area of medical practice and to encourage all doctors to acquire the skills necessary to provide expert opinion. Such skills are important not just for expert work, but also when reviewing cases informally as part of clinical practice or in the early stages of a local investigation into an adverse incident. At the end of their training, all doctors should be in a position to provide a balanced opinion, based on up-to-date guidelines and current evidence, as to whether care provided was of a reasonable standard. Promoting the acquisition and use of such skills in routine practice will potentially benefit patients, healthcare professionals, and society as a whole.

This paper sets out the current situation, recent policy developments, and makes a range of recommendations to drive improvements and widen the pool of available experts.

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1. Introduction

Medical expert opinion can be crucial in coronial, criminal, and regulatory cases as well as in clinical negligence claims. It can determine the course of an investigation, and the standard doctors are held to. In the healthcare arena adverse opinion can have career implications lead reputational damage and in some cases, result in a custodial sentence.

When things go wrong, patients and families desire honest communication so that they can understand what has happened and seek reassurance that steps will be taken to reduce the risk of recurrence. Identification of all factors contributing to an adverse incident is therefore key to enhanced patient safety. It is also good for doctors. While individual doctors should certainly be held accountable for their performance, it is rarely the case that a single individual is solely 'to blame'; wider systems issues are often implicated and identifying the role of systems issues can also be important for reducing medicolegal risk for individual doctors while enhancing patient safety.

Given the importance of expert work, it is concerning that there are difficulties in finding appropriately qualified healthcare professionals to undertake it. The pool of experts isn't as wide as it could be, and there is no central register. Expert instruction often relies on word of mouth. Moreover, the barriers to undertaking expert work (including time constraints, and a wariness of and unfamiliarity with the legal system) mean that experts are often doctors at the end of their careers, some of whom have been out of clinical practice for a considerable time. Acting as a medical expert is an important part of a doctor's professional life and should be recognised as such. Individuals should be given adequate training and opportunities in order to be able to act as expert witnesses. Regulators, employers, doctors, and others all have a part to play in the process.

The aim of this paper is to review the existing literature and to make recommendations to increase the pool of available experts with appropriate current experience. A secondary aim of this paper is to encourage the consideration of systems issues when providing expert evidence. Acting as an expert will not only benefit peers and patients, but it will also reduce unnecessary delays in civil litigation, which we know is a problem for doctors, patients, and society as a whole.

2. Review of existing literature

An authoritative analysis of expert witness work was carried out by the Law Reform Commission in their 2008 paper on Expert Evidence¹. This followed a consultation which looked at the rules surrounding the admissibility of expert evidence in court and the role and function of expert witnesses. The project also involved an examination of the arrangements for ensuring the quality of expert evidence.

The Commission noted that in Ireland, there was no mandatory requirement for a person seeking to act as an expert witness to undertake any form of education about their role and applicable duties. The paper then summarised the advantages and disadvantages of mandatory training and accreditation and it provisionally recommended that the voluntary arrangements for training of expert witnesses, in which appropriate familiarisation training for experts is given, should continue and a mandatory system should not be introduced.

Likewise, the Commission provisionally recommended that a mandatory regulatory body for expert witnesses should not be introduced. There was however a provisional recommendation that the relevant professional bodies should be encouraged to introduce their own regulatory and disciplinary processes for professionals who wish to act as expert witnesses.

It is clear that there is a general consensus that the quality of medical expert witness work needs to be improved. Medical Protection believes that raising awareness of the importance of the role amongst the profession and ensuring the provision of high quality education and training would be important steps in the process of raising standards. When doctors with appropriate experience and training are then available to undertake expert witness work it would be helpful if an up to date register of them was available to all parties who require medical expert witness input.

Medical Protection does not believe there is any need for further regulation of doctors who act as expert witnesses because they are already fully regulated for their professional activities by the Medical Council.

1. Consultation Paper on Expert Evidence

Eight years later, in 2016, The Law Reform Commission issued the *Consolidation and Reform of Aspects of Law of Evidence Report*² which contained their final recommendations together with a draft Bill to implement those recommendations.

In this report they advised against a threshold reliability test for the admission of expert evidence preferring “a flexible approach [that] allows an organic development of standards in line with developing technology and judicial familiarity with modern science”³. The Commission did, however, propose that expert witnesses be under a statutory duty to state the facts and assumptions (and, where relevant, any underlying scientific methodology) on which their evidence is based.

Another key recommendation from this report was the recommendation that “the draft Evidence Bill should provide for certain key duties of the expert witness; the Commission further recommends that the Minister for Justice and Equality may publish codes of practice for expert witnesses” and “that expert witnesses would be required to comply with the contents of such a code of practice; and that any such code of practice shall, to the extent that it provides practical guidance for a court on an issue before the court, be admissible for that purpose”⁴.

Medical Protection understands that the Law Reform Commission has indicated that these recommendations have only been taken up in part, and none of the recommendations above regarding expert evidence have been taken forward by the government⁵.

The work of the Law Reform Commission has been the most comprehensive one so far. However, 14 years have passed and we believe there is a need to explore this topic further, and to do so taking into account the importance of medical expertise and consulting with medical organisations and bodies if any changes are to be introduced in legislation. The training of experts, the challenge of accessing high quality medical experts, and the consideration of system issues need to be part of any further reviews.

Medical Protection believes that there is scope for improvement in the quality of some medical expert witness work. We believe that raising awareness of the importance of the role amongst the profession and ensuring the provision of high-quality education and training would be important steps in the process of raising standards. We also believe that it would be helpful if the HSE could maintain a list of individuals with expertise in different specialities, without promoting anyone in particular but making it publicly available to improve accessibility.

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2. *Consolidation and Reform of Aspects of the Law of Evidence*

3. Ibid

4. Ibid

5. Implementation Table

3. The challenge of finding expert witnesses

There are undoubtedly a high number of well-qualified doctors who could provide expert opinion, however, not enough are choosing to become experts. Medical Protection believes that part of the reason why there aren't more doctors in Ireland putting themselves forward may be the belief that only those who have practised for many years can be considered as experts. In our view, established doctors who are in active clinical practice are best placed to understand the wider challenges of the environments in which doctors work, and to appreciate the systems issues that may have played into an incident. They should be encouraged and supported to provide expert opinion when necessary if they have the relevant experience and have been adequately trained.

Another reason why this type of work isn't often pursued may be the fact that expert work may be seen by many doctors, and by society in general as 'legal' work rather than 'medical'. It is notable that the *Guide to Professional Conduct and Ethics (8th Edition revised)* produced by the Medical Council of Ireland does not contain specific guidance for expert witnesses⁶. The Council have recently published some specific guidance to assist experts it has instructed to give an opinion on registrants, but nothing for registrants who may be required to give an expert opinion. In contrast, the GMC has guidance on *Acting as a witness in legal proceedings* which can certainly assist doctors when giving an expert opinion⁷.

Another barrier could be that it is also common for doctors to do a mix of private and public work, which could make it even more difficult for them to balance the demands on their time and working patterns. Other barriers to taking on expert witness work could include lack of ongoing support and mentoring available to clinicians, difficulties in incorporating expert work into a busy clinical timetable, fear of criticism, and perhaps a misconception of what constitutes an 'expert'.

We believe that it is this misconception of what constitutes an 'expert' that leads to many doctors avoiding the work, or only considering it at the end of their careers or post-retirement. Addressing this misconception would go some way to alleviating the current difficulties. Doctors who are in active clinical practice are best placed to understand the wider challenges of the environments in which doctors work, and to appreciate the systems issues that may have played into an incident. They will also be those with up-to-date knowledge and skills. If doctors writing the report are working in Ireland within the Irish system they probably will have a better understanding of any system issues which may have contributed to the adverse outcome and can give a more accurate view of the current situation. This will – to an extent – help to give a balanced expert report in which not only the actions of the individual doctor are described but also the context and the system in which those actions took place. Medical Protection believes that system issues should be considered when giving expert evidence.

6. *Medical Council, Guide to Professional Conduct and Ethics (8th Edition revised)* accessible at [medicalcouncil.ie/news-and-publications/reports/guide-to-professional-conduct-and-ethics-for-registered-medical-practitioners-amended-.pdf](https://www.medicalcouncil.ie/news-and-publications/reports/guide-to-professional-conduct-and-ethics-for-registered-medical-practitioners-amended-.pdf)

7. General Medical Council, *Acting as a witness in legal proceedings*, accessible at [gmc-uk.org/-/media/documents/gmc-guidance-for-doctors---acting-as-a-witness-in-legal-proceedings_pdf-58832681.pdf](https://www.gmc-uk.org/-/media/documents/gmc-guidance-for-doctors---acting-as-a-witness-in-legal-proceedings_pdf-58832681.pdf)

4. Recommendations

Our ultimate goal is for doctors to feel encouraged and empowered to act as expert witnesses. Medical Protection has a role to play. We have organised, jointly with other organisations, training courses for medical experts so that doctors are appropriately trained on how to provide an independent opinion in medical negligence litigation, inquiries, personal injury court cases or other tribunals. We also have an e-learning platform, as well as workshops, webinars, and other resources available to our members. We would be happy to work with the HSE, the Medical Council, and others on ensuring that training modules for doctors are developed.

We do not however have control of all the levers that would lead to more doctors becoming expert witnesses. For this to happen, doctors have to be supported by a range of organisations, and we suggest the below recommendations:

Recommendations for the HSE

- HSE should support healthcare professionals employed by the HSE to undertake training and participate in expert work.
- The HSE could create an open access 'core knowledge' module, focusing on the role and duties of the expert witness, hosted via the HSeLaND (the national online learning and development portal). This would require an undertaking from the HSE that colleagues operating exclusively in the private sector would be permitted access.
- HSE should maintain a list of individuals with expertise in different specialities, without promoting anyone in particular but making it publicly available to improve accessibility. This could be tied in with the training module so that those practitioners who are interested in undertaking the expert witness role could enhance their visibility and demonstrate to the courts and others that they have knowledge of the legal principles involved.
- HSE should give more support for this work by making adequate time in job plans and give reward as part of the excellence scheme.

Recommendations for the Medical Council

- The Medical Council should produce specific guidance for doctors acting as expert witnesses. This could be included in their revision of its *Guide to Professional Conduct and Ethics (8th Edition) 2016* under its 'pillars of professionalism' framework.

Recommendations for healthcare professionals

- Healthcare professionals should consider putting themselves forward to provide expert opinion if they have experience relevant to the area in which they are providing such an opinion; and ideally, while being in current clinical practice.
- Doctors should view case analysis and report writing as core competences and engage with appropriate training.
- When providing expert evidence, doctors should consider and identify any system issues.

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