Medical Protection

Getting it right when things go wrong: The role of the expert witness

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, a Coroner's Court, before the General Medical Council 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 have potential benefits for patients, healthcare professionals, and society as a whole.

This paper sets out the current situation, recent policy developments from recent inquiries, 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 is 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. For patients and their families there can be significant implications (including distress, anger, lack of closure and involvement in legal processes) if an expert report leads to unnecessary escalation of a case. For doctors adverse opinion can lead to loss of career or liberty. Medical input is also frequently sought in other legal arenas, including the Family Courts, where the well-being and lives of children are at stake.

Given the importance of expert work, it is concerning that many bodies (including courts and regulators) report difficulties in finding appropriately qualified individuals to undertake it. The pool of experts isn't as wide as it could be, and there is no central register. Attempts to establish one have been met with resistance, largely due to the associated administrative and governance burdens.

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. Everyone from regulators and employers to doctors has a part to play in the process.

The aim of this paper is to review the recent existing literature, much of which followed Dr Bawa-Garba's conviction for gross negligence manslaughter, and to make recommendations to widen the pool of available experts with appropriate current experience.

A secondary aim of this paper is to set out an argument for consideration of systems issues to be included as standard in expert reports. Too often, the current approach following an adverse incident places the emphasis on scrutinising the actions of an individual. However, it is rarely the case that a single individual is solely 'to blame'; wider systems issues are often implicated. The concept of 'blame' is not helpful in healthcare, it is better for all if a culture exists in which problems can be identified and addressed. Patient safety depends on this, and identifying the role of systems issues can also be important for reducing the medicolegal risk of individual doctors.

2. Review of existing literature

Two major reviews have been commissioned in the past three years which have issued tangible and clear recommendations on the topic of expert witnesses: *The Williams review into gross negligence manslaughter in healthcare* (the 'Williams review') and the *Independent review of gross negligence manslaughter and culpable homicide* (the 'Hamilton review').

Both of these reviews were commissioned following the case of Dr Bawa-Garba and the resulting questions this raised amongst the medical community and the criminal justice system. Most recently, the Final Report of the Working Group on Medical Experts in the Family Court also focuses on the issue of experts in a different arena.

1. Williams review

The 2018 Williams review was set up by the then Secretary of State for Health, Rt Hon Jeremy Hunt MP, to consider the wider patient safety impact resulting from concerns among healthcare professionals that simple errors could result in prosecution for gross negligence manslaughter, even if they occur in the context of broader organisation and system failings.[1]

The review was chaired by Professor Sir Norman Williams, past President of the Royal College of Surgeons of England and it made recommendations to support a more just and learning culture in the healthcare system. These were accepted in full by the Government.

It dedicates a whole chapter to the topic of expert witnesses, stating that "expert opinion is central to prosecutions of healthcare professionals for gross negligence manslaughter as well as to other offences related to clinical practice."[2] The review concludes that **"expert opinion is also key to fitness to practise cases considered by the healthcare professional regulators."**

The review made the following recommendations:

- **The Academy of Royal Medical Colleges, working with professional regulators, healthcare professional bodies and other relevant parties, should lead work to promote and deliver high standards and training for healthcare professionals providing an expert opinion or appearing as expert witnesses**.

1. assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/717946/Williams_Report.pdf
2. ibid

- **Healthcare professionals providing an expert opinion or appearing as an expert witness should have relevant clinical experience and, ideally, be in current clinical practice** in the area under consideration.
- **Healthcare professionals should be supported and encouraged to provide an expert opinion where it is appropriate for them to do so. Healthcare professional bodies, including Royal Colleges and professional regulators, should encourage professionals to undertake training to become expert witnesses**, and employing organisations should be prepared to release staff when they are acting as expert witnesses.
- **Professional representative bodies and regulators should recognise acting as an expert witness as part of a healthcare professional's revalidation or continuous professional development (CPD) process.**

The review also highlighted more general concerns about experts, and stressed that attention should be paid to the training of experts.

The then Secretary of State for Health and Social Care, Rt Hon Jeremy Hunt MP, accepted the recommendations from the Williams review into gross negligence manslaughter in healthcare in full.[3] Following the review, the Academy of Medical Royal Colleges (AoMRC) issued a statement committing to work on addressing the issues of ensuring "quality and consistency of medical experts in medicolegal practice".[4] They later acted by producing guidance for health professionals acting as expert witnesses.[5]

2. Hamilton review

In 2018, the GMC commissioned the *Independent review of gross negligence manslaughter and culpable homicide*[6] with the aim of understanding how these laws are applied to medical practice following the death of a patient.

This review was chaired by Leslie Hamilton and their final report included 29 recommendations for the GMC and a range of organisations across the UK, covering local, coronial, criminal and regulatory processes.

In this review, Leslie Hamilton made a number of recommendations in relation to expert witnesses. The review acknowledged the findings and recommendations proposed by the William's review, including the importance of the role of the expert witness. It endorsed the recommendation by Sir Norman Williams that colleges and specialty associations should encourage their members to participate in providing expert opinion. The GMC responded to the publication of the review by accepting the challenge of rebuilding trust with the profession and committed to taking forward all the recommendations.[7]

3. questions-statements.parliament.uk/written-statements/detail/2018-06-11/HCWS751
4. aomrc.org.uk/statements/academy-welcomes-publication-sir-norman-williams-review-issues-relating-gross-negligence-manslaughter/
5. aomrc.org.uk/reports-guidance/acting-as-an-expert-or-professional-witness-guidance-for-healthcare-professionals/
6. gmc-uk.org/news/GNMCH-independent-review
7. gmc-uk.org/-/media/documents/gmc-media-statement-in-response-to-indepedent-review-of-gross-negligencemanslaughter-and-c-78720869.pdf

The AoMRC responded by welcoming the report and publicising their guidance for health professionals acting as expert witnesses, which they developed following the Williams review.[8]

The review chaired by Leslie Hamilton made the following recommendations:

- **Recommendation 11**: Those providing expert witness reports and evidence should be required:
- To state in a specific section of their report the basis on which they are competent to provide an expert opinion on the matters contained within the report or evidence.
- To state in a specific section of the report where their views fit on the spectrum of possible expert opinion within their specialty.
- To calibrate their reports to indicate whether an individual's conduct was, in all the circumstances, within the standards that could reasonably have been expected, below the standard expected; far below the standard expected; or whether the individual's conduct was truly, exceptionally bad. They should also give their reasons for the views reached.
- **Recommendation 12**: Doctors should only provide expert opinion to the coroner, procurators fiscal, police, CPS, GMC or to the criminal court on matters which occurred while they were in active and relevant clinical practice.
- **Recommendation 13**: The GMC should make transparent its processes for recruitment and quality assurance of those doctors providing expert reports. It should also explore how it can support just decision making in other parts of the system by giving access to its pool of medical experts to the police, procurator fiscals, coroners, defence and prosecutors.
- **Recommendation 14**: Any decision to bring a misconduct case about clinical competence to the MPTS reliant on expert evidence should require the support of two expert opinions. The GMC should assess the efficacy and cost-effectiveness of using concurring expert opinion from two relevant medical experts to inform its fitness to practise investigations in cases raising questions about clinical competence.

3. Family Court Review

The 2020 Final Report of the Working Group on Medical Experts in the Family Courts, authored by Mr Justice Williams,[9] focuses on a different arena. It provides useful insights into the expert role, and provides stark examples of the adverse impact the shortage of experts is having on children and families. It explores the barriers preventing more doctors from undertaking the work, and importantly has generated enthusiasm for collaborative initiatives involving doctors and the courts.

8. aomrc.org.uk/news-and-views/independent-review-of-gross-negligence-manslaughter-and-culpable-homicide/
9. judiciary.uk/publications/the-president-of-the-family-division-working-group-on-medical-experts-in-the-family-courts-finalreport/

3. The challenge of finding expert witnesses

As both the Williams and the Hamilton reviews revealed, finding good quality expert medical opinion is challenging. It can be hard to identify a qualified individual willing to undertake expert work who has the relevant clinical experience as well as an understanding of the legal process and their role in it.

We believe that a misconception of what constitutes an 'expert' 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. Medical Protection believes that it should be mandatory for all experts to consider systems issues when providing an opinion. Changes to regulatory guidance may be helpful in achieving this.

There are undoubtedly a high number of well-qualified doctors who could provide expert opinion, however, it seems that they are choosing not to put themselves forward as experts. The report of the Working Group on Medical Experts in the Family Courts, chaired by Mr Justice Williams, explored the barriers to participation in expert work in detail.[10] These barriers include lack of support and training, difficulties in incorporating expert work into a busy clinical timetable, and fear of criticism. The Hamilton review also suggested lack of confidence in the system among doctors as a possible reason for non-involvement in expert work.[11]

Medical Protection plays a role in providing training to doctors to become expert witnesses. 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 online learning platform, as well as workshops, webinars and other resources available to members.

10. judiciary.uk/publications/the-president-of-the-family-divisions-working-group-on-medical-experts-in-the-family-courts/
11. gmc-uk.org/about/how-we-work/corporate-strategy-plans-and-impact/supporting-a-profession-under-pressure/independent-review-of-medical-manslaughter-and-culpable-homicide/why-have-we-commissioned-this-review

4. Recommendations

We fully agree with and support the recommendations from both the Hamilton and Williams reviews. Our ultimate goal is for doctors to feel encouraged and empowered to act as expert witnesses and to do so in a way that transcribes the reality of practice including system issues. For this to happen, doctors have to be supported, so, building on the recommendations from the Williams and Hamilton reviews we suggest the below:

Recommendations for NHS Employers and NHS England

- NHS Employers should support healthcare professionals employed by the NHS to undertake training and participate in expert work.
- NHS Trusts/Boards to act as points of contact for those seeking to instruct an expert. This will help obviate the need for a central register, and ensure that those with current, relevant experience are instructed. It will also mean that Trusts supporting expert work will benefit from a skilled, and up-to-date workforce.
- NHS Trusts/Boards to give more support for this work by making adequate time in job plans and give reward as part of the National Impact Awards.

Recommendations for the GMC

- The GMC should include in their Good Medical Practice guidance, a requirement for doctors to consider system issues when reviewing an adverse outcome.
- As recommended by the Hamilton review, the GMC should improve transparency in their process for the recruitment of experts and it should consider giving access to its pool of experts to other parts of the civil and criminal justice systems.
- As per the Williams review, the GMC should recognise acting as an expert witness as part of a healthcare professional's CPD process.

Recommendations for the AoMRC

- As recommended by the Williams review, AoMRC should promote training for healthcare professionals to give expert opinion, in collaboration with other organisations, including Medical Protection. This will ensure a more unified system.
- The AoMRC should support the Royal Colleges to encourage their members to undertake training to become expert witnesses.

Recommendations for healthcare professionals

- As per the Williams and Hamilton reviews, healthcare professionals should put 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. All doctors who have achieved CCT and who are on the appropriate register should possess the clinical knowledge to act as an expert within their field.
- Doctors should view case analysis and report writing as core competences and engage with appropriate training.
- When writing an expert report or reviewing an adverse event, doctors must consider and identify any system issues.

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