

# The need for good practice guidelines for expert witnesses

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Disputes in the healthcare sector between patients, healthcare professionals, and providers involve technical medical issues. Therefore, expert witnesses are needed to assist legal representatives, judges, and tribunals with specialised knowledge to better understand patient care and management, the standard of care provided, and to determine the issues in dispute.<sup>1</sup> Expert witnesses possess specialist knowledge, skills, experience, and training to provide expert opinions and testify in Court or before tribunals to assist in providing a better understanding of the factual and expert evidence and/or to determine the issues in dispute. Opinion evidence is generally not permitted to be given by factual witnesses. Expert witnesses assist the Court and tribunals by providing opinions to evaluate the factual and medical evidence and determine whether the standard of healthcare services was met or fell below the legal standard, leading to the alleged injuries and losses.

There have been a series of high-profile cases of gross negligence manslaughter in Hong Kong and the United Kingdom in recent years, which highlight the important role of expert witnesses in assisting in the administration of justice.<sup>2</sup> If an expert witness provides an unsound or biased opinion to a party in a dispute, it could potentially lead to lengthy legal and disciplinary proceedings against a healthcare professional, which could otherwise be avoided.<sup>3</sup> The purpose of a Medical Council Inquiry is to determine whether the conduct of the registered medical practitioner amounts to professional misconduct, rendering the registered medical practitioner unfit to practice and/or subject to disciplinary sanctions. Professional misconduct refers to misconduct in a professional respect and includes conduct which falls below the standards expected of members of the profession.<sup>4,5</sup> The legal standard of care is set out in the English case of *Bolam*,<sup>6</sup> where it held that a medical practitioner will not be negligent if s/he is acting in accordance with a practice accepted as proper by a responsible body of medical opinion, and the practice must be able to stand up to logical analysis.<sup>7</sup> Who will qualify as a responsible body of medical opinion? It ought to be persons with

knowledge, expertise, and training in the specific specialist area of practice as the subject medical practitioner.

A medical practitioner cannot rely on a so-called ‘reasonable doctor test’ for advice given to a patient in relation to informed consent issues. The Courts in some common law jurisdictions have increasingly adopted the principle of a ‘reasonable patient test’ as seen in the cases of *Whitaker*<sup>8</sup> and *Montgomery*<sup>9</sup>. In this respect, an expert medical opinion is still necessary to determine standard of care issues. The *Montgomery* case requires a doctor to take “reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments.”<sup>10</sup> Expert opinion is still required to determine if there are and if so, what are the reasonable alternatives or variant treatments available to patient, and what a doctor should reasonably know and advise on the significant risk(s) for that patient. In the recent case of *McCulloch*,<sup>11</sup> the Supreme Court of the United Kingdom unanimously agreed that the consideration of whether a treatment is a reasonable alternative should be an exercise of professional skill and judgement by a professional body of medical opinion.

Medico-legal reports by expert witnesses must meet the requirements of the legal process and are not merely medical reports prepared for clinical or treatment purposes. The integrity of expert witnesses is paramount and they should possess a unique skillset to provide an expert opinion with quality and substance, in addition to the specialist knowledge and skills in the relevant practice area. The primary role of the expert is to act independently and objectively in providing assistance to the court or tribunal in matters pertaining to the medical facts of the case. They are not a ‘hired gun’ for the instructing party. An expert report should include a clear articulation of all factual assumptions made and reasons for giving a particular opinion. These reasons must be supported by authoritative research.<sup>12</sup>

In Hong Kong, there is a demand for healthcare professionals to act as expert witnesses. However, there is a perceived reluctance to accept

instructions to act in this capacity due to concerns over uncertainty of the contents and format of expert reports for legal and disciplinary proceedings, large volumes of documents to be considered, and time needed to attend to communications with instructing lawyers and preparation for appearance before the Medical Council and Court.<sup>13</sup> The time-frame and lengthy legal proceedings, as well as fears over giving evidence in Court and before the Medical Council and being challenged during cross-examination by lawyers can be daunting.<sup>13</sup> To address these issues, the Hong Kong Academy of Medicine (the Academy) provides an online training course for Fellows and practitioners who wish to become competent expert witnesses.<sup>14</sup>

In addition, the Academy has published the Best Practice Guidelines for Expert Witnesses in October 2023, which provides concise and comprehensive guidance to medical and dental practitioners who are partaking or considering to partake the role of an expert witness.<sup>15</sup> The Guidelines provide a step-by-step approach to acting as an expert witness, beginning with practical guidance and a list of things to obtain upon receiving instructions. The Guidelines also include useful case studies illustrating how to assess suitability to act as an expert witness in specific clinical circumstances and address particular issues, for example, the difference between assessing the standard of care and causation of damage in law. Furthermore, the Guidelines provide practitioners with a better understanding of concepts such as standard of care, professional misconduct, and causation (the 'but for' test, the concept of the balance of probabilities, etc.) to formulate an expert medico-legal opinion. Since not all doctors and dentists are familiar with these concepts and required forms, a very useful appendix is included.<sup>15</sup>

The issues to be determined in various legal and disciplinary proceedings will differ, and so will the scope of expert reports. The Guidelines address disciplinary inquiry proceedings, Coroner's Court proceedings, and civil litigation defence proceedings. Healthcare professionals can also be asked to act as expert witnesses in criminal proceedings, in civil claims where they are instructed by plaintiffs, or upon the instructions of the Director of Legal Aid. A table can be used to summarise different types of proceedings with guiding notes for the issues that expert witnesses need to pay attention to.

The Guidelines emphasise the duties of expert witnesses and stress the importance of being impartial and independent in formulating opinions. The potential liabilities are also highlighted. The Guidelines serve as a valuable resource for doctors and dentists, enabling them to act as competent expert witnesses and avoid potential pitfalls. Critical appraisal of fictitious expert reports can illustrate what constitutes a good or bad report and assist doctors and dentists in mastering the skills, style, and content of medico-legal opinion reporting.

Appearance in court or disciplinary inquiries

can be stressful for expert witnesses. Observing actual proceedings, which are open to the public, can better prepare experts. Online demonstration videos can serve as useful resources.

There is a need for a larger pool of competent expert witnesses in Hong Kong, readily available to provide valuable input in different clinical disciplines and serve our community. The Guidelines are an invaluable resource that supports doctors and dentists in offering their services as expert witnesses.

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