Changes to the Bolam test and expert witnesses by Dr Simon Fox QC, medically qualified clinical negligence barrister, No5 Barristers Chambers

Dr Simon Fox’s presentation focused on the application of the Bolam test, which is the legal test for the doctor’s duty of care to their patient as well as the test used in court in cases of medical negligence for the past 60 years. Dr Fox informed that those acting as expert witnesses in medical negligence cases should be fully aware as to which legal tests are to be applied when providing expert evidence in court, as well as stating this at the start of their medico-legal report. While this is an evolving area of law, expert witnesses were advised to become familiar with the different legal tests used for breach of duty or standard of care in clinical negligence cases. With the Bolam test, a doctor is not negligent if they act in accordance with a practice which would be accepted as proper by a reasonable and responsible body of doctors in that field.

The presentation provided different case studies and past court cases to exemplify the application of different legal tests and the approach of giving and evaluating expert evidence. It was noted that classic applications of the Bolam test are found in those cases where choice of approach to management was questioned. According to Dr Fox, this will include actions taken during the diagnostic as well as treatment phase of a patient’s management if it involves the choice of approach to diagnosis as opposed to interpretation. Dr Fox however informed the audience that there are two exceptions to the application of the Bolam test. In 2015, the Supreme Court (Montgomery vs Lankashire 2015 UKSC 11) replaced the Bolam test with the ‘reasonable care test’ in cases related to consent; in which the doctor has to take reasonable care to ensure that the claimant was aware of the material risks involved in any treatment and of any reasonable alternatives, including no treatment. The second exception to the Bolam test presented by Dr Fox was related to the ‘pure diagnosis’ cases, which are highly prevalent in fields of radiology and histology eg what was present on the slide and in missing this did the doctor exercise reasonable skill and care?

Dr Fox ended the presentation by providing guidance and advice on the necessary preparations expert witnesses should consider when developing joint statements, the agenda and on the proceedings of expert meetings.
Session 2

Key cases and legislation for experts in civil, criminal and family courts by Dr Oliver Quick, Academic on medical law, University of Bristol

Dr Oliver Quick’s opened his presentation with three prominent cases in which the expertise of medical expert witnesses has been questioned by the court. This was used to highlight both the privilege and the power that an expert witness holds in influencing the decision of a court.

Dr Quick went on to expand on the definition of expert power and privilege, using Lord Hodge’s definition of 9 October 2017 that ‘An expert witness enjoys both privilege and also power. The expert’s specialist knowledge entitles him or her to give such opinion evidence which a lay witness may not. That is a privilege. The expert also has power… With the power which an expert has to influence the decision of a fact-finding tribunal, whether judge or jury, goes responsibility. As some controversial cases have shown, the abuse by an expert of the power which he or she is given can cause serious harm and injustice.’

Furthermore, Dr Quick noted that the expert’s remit was ‘to furnish the judge with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence.’ (Davie v Magistrates of Edinburgh (1953 SC 34, 40).

Dr Quick further discussed the remit of expert witness and the reliability of expert evidence, warning to the dangers of usurping the functions of the jury.

The presentation concluded by questioning the need for reform and more regulation for expert witnesses, pointing to the need for more judicial training and guidance being provided for expert witnesses, a reliability-based admissibility test and accreditation/certification/expert training. It was acknowledged that achieving more standardisation across expert witness could also have unintended consequences in reducing the pool of experts.

Session 3

Gross negligence manslaughter by Professor Sir Norman Williams, National Clinical Improvement Programme chair

Sir Norman Williams started the presentation by explaining the purpose of the rapid policy review into the issues pertaining to gross negligence manslaughter (GNM). The review was set up to consider the wider patient safety impact resulting from concerns among healthcare professionals that errors arising from wider system and organisation failures could lead to prosecution for GNM. In particular, there was concern that this fear had had a negative impact on healthcare professionals being open and transparent when they are involved in an untoward event as well as on their reflective practice, both of which are vital to learning from mistakes and improving patient care. The review found that a fear of prosecution and regulatory action for human errors inhibits openness which is essential to improving patient safety. Sir Norman Williams reported that there were very few convictions of healthcare professionals for gross negligence manslaughter – between 2013 and 2018, only 151 cases were investigated for GNM and there were only 7 prosecutions.

Sir Norman Williams then shared the recommendations of the review and these include:
- developing an agreed understanding of GNM that reflects the most recent case law;
- improvements to the way that healthcare professionals provide expert advice and evidence;
- consolidation of expertise in the Crown Prosecution Service, Police, Coroners etc
- improvements to local investigations into deaths in healthcare settings.
- appreciation of human and systemic factors
Session 4

Duties and liabilities of an expert witness by Mr Michael Horne QC, Clinical Negligence Lawyer at Serjeants’ Inn

Mr Michael Horne’s presentation opened with the distinction between independent expert witness and witness with expertise, emphasizing that while both have a duty to the client, the overriding duty of expert witnesses is to the court/tribunal. The ‘Ikarian Reefer’ principles were explained, stressing that expert evidence should be the independent product of the expert, an objective unbiased opinion in relation to their expertise and the expert should never to assume the role of an advocate.

Additionally, an expert witness should state the facts or assumption on which their opinion is based and should not omit to consider material facts which could detract from their concluded opinion. Another important principle of the Ikarian Reefer is that an expert witness should make it clear when a particular question or issue falls outside their expertise. If an expert’s opinion is not properly researched because they consider that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification that qualification should be stated in the report. If, after exchange of reports, an expert witness changes their view on the material having read the other side’s expert report or for any other reason, such change of view should be communicated (through legal representative) to the other side without delay and when appropriate to the court. Finally, where expert evidence refers to photographs, plans, calculations, analyses, measurements survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of report Doctors that act as expert witnesses were advised to consult GMC’s guide: Acting as an expert witness in legal proceedings. Furthermore, expert witnesses had a duty to comply with the principles in the procedural rules of the relevant court/tribunal.

Mr Horne then provided insights into the court’s approach and its assessment of expert evidence, using examples of court cases and scenarios when the evidence provided was refuted or attracted liabilities for the expert witness.

Session 5

Sharing good and bad practice of medico-legal report writing – by Mr Simon Robinson, Barrister and Mediator, Five Paper

Simon Robinson’s presentation focused on the hallmarks of good report writing, providing clear directions on how to address the points in the letter of instruction and on how to format a medico-legal report.

For example, a good report needs to be:
- clear and direct
- honest and trustworthy
- written for the intelligent layperson – explaining any technical key terms
- addresses the points in the letter of instruction/guidance
- highlights any additional relevant points.

Furthermore, the report needs to specify the documentation used – medical records (GP, in-patient etc) diagnostic imaging etc and refer to any relevant guidance. There also needs to be a clear chronological summary of facts and clear objective opinion – avoiding derogatory comments of patient or healthcare providers/professionals.
Mr Robinson then went through some of the ‘Don’ts of Medical Reports’ including:

– Don’t be partisan – your duty is to the court, not the parties
– Don’t be argumentative – but stand your ground (appropriately) if you feel confident in your professional opinion
– Don’t make assumptions
– Don’t be afraid to change your mind
– Don’t be afraid to agree points with the other side’s expert
– Don’t try to argue the law with lawyers
– Don’t go beyond your competence

Mr Robinson then revealed some of the most common mistakes prevalent in medico-legal reports and warned expert witnesses to be wary of these. Most importantly, Simon advised those wishing to act as expert witnesses to seek and undergo minimum of training in medico-legal report writing.

Session 6

Courtroom skills: dos and don’ts by Mr Augustus Ullstein QC, 39 Essex Chambers

Mr Ullstein provided a very practical session on courtroom skills for those wishing to act as expert witnesses. He advised that the preparation for court starts with the medico-legal report, stressing the importance of a well written report. This was followed by practical tips as to how expert witnesses should behave in court, how to present their testimony, the differences between criminal and civil court and what to look for and the technique lawyers use in cross-examination. Ultimately, it was stressed that becoming familiar with the culture of the court and its proceedings was fundamental for those wishing to perform well as expert witnesses at trials. Mr Ullstein put emphasis on preparation before making a court appearance including seeing the pre-trial process as preparation for a court hearing, understanding the relevant legislation, processes and procedures. He also advised on how to improve preparation for giving evidence by re-reading evidence, considering key issues and facts and becoming familiar with the practices and processes of giving evidence. If a doctor is summoned to the court after providing a report he/she should:

– familiarise themselves with the report or statement you provided;
– speak to the lawyers involved about any other documents they need to read in preparation;
– inform the solicitors about any mistakes or omissions in their written evidence; Practise their points so they are clear and concise;
– agree a place to meet on the day with the barrister or solicitor;
– do some information gathering on the opposition’s counsel if possible

Session 7

Bias in expert witness practice by Professor Nigel Eastman, St George’s University of London emeritus professor in law and ethics in psychiatry

The presentation delivered by Professor Eastman introduced the audience to different kind of biases we are all exposed – implicit, explicit and cognitive (unconscious) bias. He warned that those acting as expert witnesses should be aware of the values they might unconsciously bring to their clinical legal decision-making, pointing to values inherited from their upbringing, religion, moral views etc. It was further pointed that from the outset the relationship between the expert witness and its subject area is intrinsically biased, especially by the nature of interaction in the medical profession and the ‘ethic of care’.

Professor Eastman also revealed that the British adversarial system leads to biases such as vindication of opinion being identified with the winning side, including the yes/no questioning and answering process in cross-examination. He ultimately advised that complete objectivity is impossible to achieve, but expert witness biases can be mitigated through honesty, self-policing and safeguards, as well as mentioning peer-review as a key element.

Session 8

**Update on the work of the BMA’s medico-legal committee and closing remarks by Dr Jan Wise, BMA medico-legal committee chair**

Dr Wise provided an overview into the main priorities and the progress made against these by the medico-legal committee. The committee’s remit at the BMA was to consider and report on medico-legal issues of direct concern to the profession, including those referred to the committee by BMA council, the BMA policy directorate, other BMA committees and external bodies.

The committee led the work on BMA’s responses to the two reviews into the application of GNM in healthcare – the DH Review by Professor Sir Norman Williams and the independent review, commissioned by the GMC and led by Dr Leslie Hamilton. Dr Wise informed that the MLC continues to advocate for better training of expert witnesses by providing tailored courses on medico-legal reporting and courtroom skills. The BMA continues to work in partnership with Bond Solon to deliver robust courses on report writing and courtroom skills courses to help support professional development and provide expert guidance.

The MLC was working collaboratively with the legal industry to help identify causes and shortages of expert witnesses across various fields in the Family Law Judicial Court. This work would help identify any regional variations, identify causes and propose solutions.