*6*

# The Report, Amendments, Answers to Questions, Experts' Meetings and Conferences or Consultations

**Keith Rix**

> 'In his report, his answers in the Joint Statement and his evidence, Mr [O] set out with great clarity and persuasiveness the factors he considered relevant and why. He gave his opinion about the relative likelihood of the competing scenarios and weighed them. This is what the court expects from an expert.'
>
> Dexter Dias KC, sitting as a Deputy High Court Judge, in *Powell v University Hospitals Sussex NHS Foundation Trust* [2023] EWHC 736 (KB)

## The Report

Key principle 5

Where it is possible to do so without misleading anyone, you should use language and terminology that people who are not medically qualified will understand (including judges and jurors). You should explain any technical terms, and consider the use of visual aids, to meet the needs of the audience.

*Providing witness statements or expert evidence as part of legal proceedings*. General Medical Council (2023); 12.5[1]

In criminal proceedings expert evidence may be either in the form of a statement (Criminal Justice Act 1967, s 9) or a report. Expert *medical* evidence is usually admitted in report form, including in criminal proceedings.

The purpose of the report is to assist the court as to the matters in issue and enable it to do them justice. Acquiring competence in 'understanding how to write an expert report that meets the requirements of the court' is a specific responsibility of the medical expert (PWSEE, para. 20.b).

The expert has to be 'meticulous in both their analysis of the data and in their presentation to the court of their expert […] opinion' (*A Local Authority v S* [2009] EWHC 2115 (Fam) (*Local Authority v S*)) and thorough in the analysis of the documents provided. Care has to be taken about the language employed, avoiding, for example 'judgemental and rather scathing comments' (*Palmer v Mantas* [2022] EWHC 90 (QB) (*Palmer*)) or language which goes beyond that which is 'appropriate for an expert to employ and suggests a level of unconscious bias' (*Mustard v Flower* HQ17P00164 1 November 2019 (unreported)).

Consider the readership, usually the intelligent lay person with no medical knowledge. Use plain English. Make it comprehensible for the first-time reader and easy to follow. You can précis it in suitable language at a jury trial.

It is advisable, but not necessary, to use a model form of expert report. Those of TAE and the EWI have been drawn up by judges. At trial, the 'judge-friendly' format may be critical. Readers are assisted by easily navigable reports which can easily be

compared. Reports for the criminal jurisdiction in England and Wales have a number of 'necessary inclusions' (*R v B* [2006] EWCA Crim 417), all reflected here. But beyond the 'necessary', this chapter is not to be read too prescriptively, particularly if you have developed a style or format which you know is 'user-friendly'. Sometimes it may be necessary depart from the model format.

Different readers have different requirements; the same reader may have different requirements at different stages in the proceedings. The challenge is producing a report of as much assistance to a judge at an early procedural stage as to counsel preparing to cross-examine the adverse party's expert.

## Length of the Report

Judges prefer short reports and may reduce experts' fees for excessively long reports. His Honour John Cockroft said, quoting a Spanish saying: 'What is good, if brief, is twice as good.' Judges say that they have little time to read reports. They look for findings and conclusions. Some suggest that the facts, or assumed facts, upon which the conclusions are based, but which counsel need, can be confined to appendices. Arguably, any facts that are not linked to an opinion can be removed to an appendix.

Sir James Munby said:[2]

> '[T]oo many reports [. . ]. are simply too long, largely because they contain too much history and too much factual narrative [. . .] [E]xpert reports must be succinct, focused and analytical [as well as being] evidence based.'

In the Family Court there is a 40 page limit (FPR27A PD5.2A1). In Intermediate Track personal injury cases it is 20 pages (CPR 28.14(c). This is to include a description of the issues, conclusions reached and reasons for those conclusions but is to exclude

the expert's CV and 'any supporting materials to which the reasons for their conclusions refer and any necessary photographs, plans and academic articles attached to the report'.

Solicitors need shorter reports otherwise 'the parties and the Court [spend] a disproportionate time reading the reports which results in an increase in costs. Furthermore, the likelihood that important points are lost in the vastness of the context is unhelpfully increased' (*Harman (A Child) v East Kent Hospitals NHS Foundation Trust* [2015] EWHC 1662 (QB)). Solicitors constrained by costs budgets will instruct experts whose concise reports allow them to assess their opinions in the minimum of time.

## Structure

Organisation matters. A judge, who had to choose between the opinions of two experts, relied on one expert's report being far better organised and professional (*Tsui Ning Jacky v Wong Yat Sun* [2006] HKCU 133). 'The body of the report should be categorised, classified and sub-divided, preferably in numbered points or paragraphs to as great a degree as possible within the confines of the subject matter'.[3]

Points of presentation, content and style that are preferred, if not mandated, are set out in Box 6.1.

**Begin Box 6.1**

## Box 6.1 Presentation, Content and Style of the Report

- typed;
- first person;
- active voice;
- short sentences and paragraphs;
- headings and sub-headings;
- fact distinguished and separated from opinion;
- clear, concise, succinct, focused, analytical, logical, objective, reliable, evidence-based and of high quality;
- straightforward and not biased, intentionally misleading or false;
- not promoting the view of the instructing party or advocacy;
- transparent and not omitting material or information that does not support the opinion expressed or conclusions reached;
- it should be, and should be seen to be, the product of an independent investigator, regardless of the pressures of the litigation;
- showing the weaknesses as well as the strengths of the case;
- properly and fully researched;
- a 'stand-alone' document;
- good quality paper;
- margins wide enough for written comments – at least 5 cm;
- font size 11 at least (12 obligatory for family proceedings – FPR27A PD5.2A1);

- ‘Arial’ typeface;
- line spacing 1.5 (saves paper) or 2;
- numbered paragraphs (obligatory for family proceedings (FPR27A PD5.2A1) and for expert evidence set out in the form of a Criminal Justice Act 1967, s 9 statement (CrimPR r 16.2);
- paper hole-punched for use in a standard lever arch file or ring binder;
- a slide binder because it allows the report to be removed for copying and filing – avoid comb binders, staples and paper clips;
- plastic covers;
- front cover clear so that the title page can be read without opening the folder;
- printed on one side of the page only (obligatory for family proceedings – FPR27A PD5.2A1); and
- use of ‘headers’ and ‘footers’.

**End Box 6.1**

Headers and footers are less important than when expert reports were posted to instructing solicitors, photocopied and hole-punched and inserted in a trial bundle. Today communication is mostly electronic; hard-copy trial bundles are fast disappearing but they are not obsolete. A page can still go astray in the photocopy room; it may still be necessary easily to manipulate a hard-copy trial bundle. So the header zone (on all pages except the first) should set out at the right:

Report of: Dr E.T. Monro

Specialism: Psychiatry

On the instructions of: Messrs. Monteith and Company, Solicitors

Prepared for and addressed to: The Central Criminal Court

Because most people flick through the bottoms of pages when looking for a particular page or document in the trial bundle, the footer zone (on all pages except the first) should be set out as here on page 2 of the report:

R v DANIEL MCNAUGHTAN

Report of Dr E.T. Monro concerning Daniel McNaughtan 25 February 1843 2

If it is not the first report, it should state: 'Second report of . . .'.

Box 6.2 shows a suggested structure.

**Begin Box 6.2**

## Box 6.2 The Structure of the Report

Front Page

Contents Page

1. Introduction
    - 1.1 The Writer
    - 1.2 Synopsis
    - 1.3 Instructions
    - 1.4 Summary of Conclusions/Executive Summary (obligatory for family proceedings and a maximum of four pages – FPR27A PD5.2A1)

1.5 Disclosure of Interests

2. The Background to the Case and Issues

2.1 The Relevant People

2.2 Substance of All Material Instructions

2.3 The Issues (Questions) to Be Addressed (Answered)

3. Investigation of the Facts and Assumed Facts

3.1 Methodology

3.2 Interview and Examination/Basis of Report

4. Factual Analysis

5. Opinion

6. Summary of Conclusions

7. Declaration

8. Statement of Truth

Signature Block

Appendix 1: Qualifications, Training and Experience of the Writer

Appendix 2: Documents and Materials Studied

Appendix 3: Explanatory Notes

Appendix 4: History and Examination

Appendix 5: Chronology/Extracts from Medical Records

Appendix 6: Glossary of Medical and Other Terms

Appendix 7: References

**End Box 6.2**

## Front Page

The top section shows the title of the action:

- the court top left (e.g. 'In the High Court of Justice (Queen's Bench Division));
- the case number top right;
- the party/ies below and central (e.g. 'John Hector Bolam (Plaintiff) v Bolam v Friern Hospital Management Committee (Defendant)').

The second section identifies the addressee and author of the report (e.g. 'Report for, and addressed to the court / by / Dr. J. de Bastarrecha / Consultant Psychiatrist'). It can be omitted and incorporated in the fourth section, but it must stand out.

The third section should include:

- On the instructions of (name and address of those instructing the expert);
- Who act on behalf of (person or party, such as 'The Claimant');
- Their reference;
- Specialist field (e.g. 'Psychiatry');
- Subject matter (e.g. 'Psychiatric assessment of the Claimant');
- Date(s) of instruction(s);
- Date of report;
- Report reference;
- Date of assessment;
- Place of assessment; and
- Consent – 'Written', 'Verbal' or 'Not applicable'.

The fourth section should include:

- Name of expert;
- Post-nominal qualifications;

- Status/appointment;
- GMC/MC number;
- Contact details, including:
    - full professional/correspondence address;
    - telephone number(s);
    - email address;
    - name of secretary/personal assistant,
        - their email address; and
        - telephone number if different.

## Contents Pages

Help the reader to navigate the report. Most barristers say that a contents page is always required; many disagree that only in very short reports is this unnecessary. But up against a page limit, its omission can free a page or two. Use hyperlinks.

## Introduction

### 'The Writer'

> You must make clear the limits of your knowledge and competence.
>
> *Guide to professional conduct & ethics for registered medical practitioners*
> Medical Council (2024); 53.2[4]

Briefly introduce yourself sufficiently to orientate the reader and set out 'the range and extent of [your] expertise and any limitations upon [your] expertise' (*B v Nugent Care Society* [2009] EWCA Civ 827) (*B v Nugent*) that demonstrates your suitability as an

expert in the case (PWSEE, para 21). If complying with CrimPR 19.2(3)(a), you must define your area or areas of expertise. Other than in a very short and simple report, for which your present appointment and post-nominal qualifications will suffice, your full details should be in your report's Appendix 1. Identify any relevant area of which you have only a working knowledge and, if there are issues outside your expertise, but which might be thought otherwise, draw attention to its limits.

If referring to cases in which your expertise has been accepted or acknowledged or in which you have been complimented, you must, at the same time, refer to any cases, of which you are aware, in which you have been criticised; failure to place before the court such material in an even-handed way may reflect on the weight that will be given to your evidence (*SD (Expert evidence) Lebanon* [2008] UKAIT 00078) (*SD*).

*SD* was quoted in *HA (Expert Evidence; Mental Health) Sri Lanka* [2022] UKUT 00111 (IAC)) where an expert had failed to disclose that he had been suspended by the GMC for bringing the profession into disrepute as a result of plagiarism.

## 'Synopsis'

Set out concisely the general nature of the case in a sentence or two.

## 'Instructions'

Makes it clear at whose request the report has been prepared and for what purpose. It can be very brief.

**Commented [KR1]:** This is NOT to be linked to on-line Appendix 1. If it is linked it should be linked to Appendix 1 in the specimen report.

### ‘Disclosure of Interests’

Either state any actual or potential conflict of, or personal, interest which might be considered as influencing your opinions (see Chapter 4, ‘Qualified Acceptance of Instructions’) or state that there are none (see also the Declaration, below). Make it clear if you have treated, or are currently treating, the subject of the report (see Chapter 1, ‘Impartiality’).

## ‘The Background to the Case and Issues’

### ‘The Relevant People’

A *dramatis personae* is of use in a more complex case, such as a clinical negligence case, for example: ‘Dr Roberta Batty – on call specialty registrar’, ‘Florence Nightingale – charge nurse’.

#### ‘The Substance of All Material Instructions’

This is a background narrative of the facts provided by the instructing party because:

> ‘An essential element of the process is for a party to know and be able to test in evidence the information supplied to the experts in order to ascertain if their opinion is based on a sound factual basis or on disputed matters or hypothetical facts yet to be determined by the court’ (*Clough v Tameside and Glossop Health Authority* [1998] WLR 1478).

Recite the facts as received, even if they may not be accurate, so that the basis of your opinion is explained. Responsibility for any inaccuracy rests with those instructing you.

Include any information given orally. Omission of 'off-the-record' oral instructions is not permitted. Usually, this section is based on the letter of instruction.

Although some experts attach a copy, it is legally privileged, and needs the approval of the instructing party. Usually, it is not disclosed, but if there is reason to believe that your statement of the substance of the instructions is inaccurate or incomplete, or that you have misled the court as to your instructions, the court can order disclosure and allow cross-examination on the instructions.

'There is no requirement to set out all the information' (*Lucas v Barking, Havering and Redbridge Hospitals NHS Trust* [2003] EWCA Civ 1102), only 'the *substance* of all *material* instructions, whether written or oral' (emphasis in original) (*Pickett v Balkind* [2022] EWHC 2226 (TCC) (*Pickettt*)). It is not necessary to state the substance of all communications with those instructing you.

To avoid lengthening the body of the report, set out here only a very brief statement; the details can go in an appendix.

## 'The Issues to Be Addressed'

Take these from the letter of instruction. So, opinion is confined to matters material to the disputes between the parties or issues before the court. It avoids you wasting time and money or incurring criticism for dealing with other matters. If you think that another matter should be addressed, ask those instructing you. To avoid questions or criticism about matters on which you have not expressed an opinion, consider a footnote or include in an appendix: 'Unless indicated otherwise, these are the only matters I have been asked to address. Absence of an opinion on an issue does not mean

that I have no opinion on the issue. It means only that I have not been asked to address the issue.'

It may be useful to include a statement of the relevant law as you understand it. You are not proclaiming legal expertise, just indicating that you know the relevant legal test(s). If you get it wrong, you can be put right and asked to amend the opinion accordingly.

It may also be worthwhile referring to the standard of proof that you have applied. Usually this will be the balance of probabilities; 'more probable than not'. But bear in mind that, 'where the civil standard of proof applies, it is not necessary for every piece of the evidential jigsaw to fit' (*Montracon Ltd v Whalley* [2005] EWCA Civ 1383).

You may be required to give your opinion to the criminal standard of proof, 'beyond reasonable doubt'. For example, where a care worker is charged under the Sexual Offences Act 2003, s 30(1), the prosecution bears the burden of proof and so the expert has to opine as to whether it is beyond reasonable doubt that alleged victim has a mental disorder and lacks the requisite capacity or ability to communicate their choice.

If an issue falls outside your expertise, make this clear, although your instructing party should already know.

## Investigation (of Facts and Assumed Facts)

The purpose of this part of the report is to explain how as an expert you have investigated the facts of the case.

The first section is 'Methodology'. '[F]urnish the Judge or jury with the necessary scientific criteria for testing the accuracy of [your] conclusions, so as to enable the Judge or jury to form his own independent judgment by the application of these criteria to the

facts proved in evidence' (*Davie v Edinburgh Corp (No. 2)*, 1953 SC 34). In criminal cases, the Law Commission's proposals on the determination of evidentiary reliability[5] are embodied in the CrimPR (see Chapter 1, 'Reliability'). They might affect practice in other jurisdictions. Consider indicating that psychiatric practice depends partly on sound, scientifically based knowledge and partly on experience-based knowledge which has stood the test of time but lacks a robust foundation in rigorously researched 'evidence-based medicine'. Indicate that, in relying on both, you have done so in accordance with a responsible body of psychiatric practice.

If you rely on published diagnostic criteria, remember that:

> 'Diagnostic criteria are a tool that can be used by expert witnesses to provide an expert opinion to the court. It is for expert witnesses in each individual case to select and deploy diagnostic criteria as they consider appropriate, alongside a holistic view of the clinical picture. The criteria are not intended to operate algorithmically without expert interpretation' (*Barry v Ministry of Defence* [2023] EWHC 459 (KB) (*Barry*)).

Consider carefully whether justice will be served by reliance on DSM or ICD criteria[6]; be careful to avoid the misperceptions, misunderstandings and misuse that have bedevilled their use in legal proceedings.[7] Heed their warnings about such use. Use them flexibly and with clinical judgement. On-line Appendix 0 is a fact-sheet that can be appended to a report in which they are used. Judges and other lawyers may be alert to their limitations.[8]

In family cases, you must describe the process of differential diagnosis. Other courts may soon expect this.

Under 'Interview and examination', set out the details and the circumstances of the consultation; whether anyone else was present and, if so, what part, if any, they took *during* the consultation. Explain that, unless otherwise indicated, the history is that obtained from the subject *at the consultation*. It is hearsay, which will either be admitted or may have to be proved (see Chapter 1, 'The Role of the Medical Expert Witness'). Refer to any constraints, such as inadequate time or the potentially inhibiting presence of someone such as a partner or care worker.

If a trainee has assisted, name him and attach an appendix giving details of his qualifications, training and experience (see Chapter 3, 'Training in Report Preparation'). If you have obtained the views of colleagues, identify them. You must disclose the fact and nature of any discussion of 'the content of a proposed report in detail with another expert under a peer review arrangement' but only where they provide 'constructive input'; it does not apply to proof-reading (*Pinkus v Direct Line Group* [2018] 1 WLUK 3).

Make clear that, unless otherwise indicated, the only facts within your own knowledge are your findings on examination of the subject.

If an informant has been interviewed, identify them and explain this.

Occasionally, reports are prepared without consulting with the subject. If so, head this section 'Basis of Report'. Make clear that the report is based on a study of records or documents only. 'If you are asked to give an opinion about a person without the opportunity to consult with or examine them, you must explain any limit that this places on your ability to give an opinion. If you decide to proceed, you should be able to justify your decision' (PWSEE para. 28). Indicate a willingness to reconsider your

opinion following a consultation. Such a report may be ruled inadmissible or little weight attached to the opinion therein (*R v Ibrahim* [2014] EWCA Crim 121).

If someone has carried out tests, identify them and add an appendix setting out their qualifications and relevant experience. State whether or not you supervised the testing or investigations (CrimPR 19.4(1)(e)). *In Scotland*, in a criminal case, you have to notify the prosecutor as the court can admit such evidence as hearsay evidence.[9]

If documents are missing, illegible, redacted or otherwise incomplete, point this out. Identify materials that have not been produced with the report, such as copies of medical or other professional records. This may include any questionnaires completed by the subject, but good practice is to attach them as an appendix. Be prepared to reveal everything.

Where important documents have not been supplied or obtained, explain why, including your efforts to obtain them, and indicate their importance: how might information from them potentially make a material difference to your opinion?

If you rely on published or unpublished research or other authoritative material, state this under 'Research' or 'Authorities' and cross-refer to your Appendix 7, a list of references. These are references to cited work which support or undermine your opinion or the underlying reasoning. It is not a generalised list, but you can also list here any '[r]elevant extracts of literature or any other material which might assist the court' (*B v Nugent*). If you rely on unpublished work, provide a copy. Ensure there are sufficient pages from before and after an extract for it to be seen in context.

**Commented [KR2]:** In specimen report

## Factual Analysis

This section sets out facts and assumed facts: the grounds upon which your opinion will be based. Your opinion is only as strong as the facts upon which it is based.

'Before a court can assess the value of an opinion, it must know the facts upon which it is based' (*R v Turner* [1975] QB 834 (*R v Turner*)) and for which by 'informing the court of the factors which make up their opinion and supplying to the court the elements of knowledge which long study and experience has equipped them [...] armed with that analysis and the elements of arriving there, the court may be enabled to take a different view to their opinion' (*Condron v ACC Bank plc* [2012] IEHC 395).

'[U]nless a witness states in his or her evidence [. . .] the grounds and reasoning that have led to the opinion, the opinion is valueless' (*Cadbury Schweppes v Durrell Lea* [2007] FCAFC 70). Unless the court can prove that the facts underlying an opinion are true, it is deprived of 'an important opportunity of testing the process by which the opinion was formed, and [this] substantially reduces the value and cogency of the opinion evidence' (*Bell v F.S. & U. Industrial Benefit Society Ltd* (Supreme Court of New South Wales, [unreported] 9 September 1987)). Also, '[b]efore a court can act on opinion evidence, it must [...] be confident from the face of the expert's evidence that he has taken all relevant matters into account informing it' (*Ryan v Dengrove DAC* [2021] IECA 38).

If you have been provided with the reports of other experts and if either they raise issues as to the assumed facts, or their opinions are relevant to the formulation of your own opinions, mention them here. The court does not want a lengthy repetition of what will be in evidence anyway. Identify anything significant about the factual basis of the report. Insofar as their opinion has a bearing on your own, identify it and explain that your opinion could be affected by any finding that the court makes according to the other expert's opinion. What that effect might be can wait for your opinion section.

Ensure that, when setting out critical facts, you set out the facts fully and precisely; if the account 'is intended to constitute the bedrock for the subsequent opinion then accuracy is a virtue' (*McGuinn v Lewisham and Greenwich NHS Trust* [2017] EWHC 88 (QB)).

Separate headings are advisable to distinguish the history (assumed facts) and the examination and any tests or investigations you have carried out (facts).

Some facts will be agreed by both or all parties ('agreed facts'). Some may already have been decided by the court. Disputed facts have to be proved. They are 'asserted' or 'alleged facts'. You may not know which facts are agreed, so by using the term 'assumed facts' you acknowledge that some of the facts on which you rely may be agreed and others may not be agreed by the parties or found by the court. What the subject and any informant tells you, and what witnesses say, are assumed facts. They may be agreed facts or they may be asserted or alleged facts that have to be proved in evidence. The judge or the jury decides the disputed facts, not the expert. 'Where an expert relies on the existence or non-existence of some fact which is basic to the question on which he is asked to express his opinion that fact must be proved by admissible evidence' (*R v Abadom* [1983] 1 WLR 126 (*Abadom*)). 'Whether or not the expert believes in that sub-stratum of facts or knows them to be true or is satisfied that they are true, is completely beside the point.'[4] The corollary is that: 'If the doctor's evidence is based entirely on hearsay and is not supported by direct evidence, the judge will be justified in telling the jury that the defendant's case [. . .] is based on a flimsy or non-existent foundation' (*R v Bradshaw* (1986) 82 Cr App R 79) and '[i]f the expert has

been misinformed about the facts or has taken irrelevant facts into consideration or has omitted to consider relevant ones, the opinion is likely to be valueless' (*R v Turner*).

Hearsay evidence is any statement, which is tendered as evidence of the truth of matters contained within it, which is not made in oral evidence in the proceedings. Hearsay evidence takes many forms, such as a witness statement from someone who is unavailable to give oral evidence at trial, or a police officer's written record of an event.

The general rule is against the admission of hearsay because it has not been given under oath or upon affirmation and its reliability cannot be tested in court. However, there are statutory and common law exceptions to this. In civil cases, most hearsay statements are admissible, other than in Ireland.

*In Ireland*, medical records are admissible as evidence of the facts stated in them. The records must be admitted or proved in the usual way (*McGregor v Health Service Executive* [2017] IEHC 504) (see Chapter 1, 'The Role of the Medical Expert Witness'). In criminal cases, under the CJA 2003, s 114, hearsay is admissible if there is a statutory provision for its admission, if there is a common law exception to its inadmissibility, if all parties agree or if its admission is in the interests of justice. Where a medical expert gives evidence as to the condition of a person, she can report the symptoms she has elicited and rely on these to explain her diagnosis, but if their existence is in issue, they must be proved by admissible evidence. Likewise, although medical records are admissible in evidence, they are only evidence that the patient reported the symptom or that a doctor observed the sign. If there is an issue as to whether the patient had that symptom or sign, the symptom or sign will have to be proved by admissible evidence.

Where you rely on assumed facts, identify your source.

In this section, you may set out assumed facts which are not otherwise within the knowledge of the court, specifically the contents of medical records and, at least to some extent, the history you have obtained from the subject.

Usually, the only 'facts' to which you can testify are facts within your own knowledge, such as your examination and any investigation or test findings, your own experience, such as how psychiatry is practised, and facts taken from the work of other experts and from specialist literature or research within your field of expertise or of which you have a working knowledge.

Usually, relevant information from the medical records should be set out under 'Medical history as taken from medical records', or in an appendix. It should not be combined with 'Medical history as given by the defendant/claimant'. If much depends on the comparison of the subject's account with the documented history, or if it would otherwise be difficult to convey the relevant chronology, they can be integrated, but only so long as the different sources of information can be distinguished. The guiding principle is that different types of fact must be identified and distinguished, either by using different headings and, in particular, by separating what the subject has told you from what others have said or is in other documentary sources, or by using separate appendices. Avoid the reader being unable to distinguish between, for example, the accounts to you, the emergency department triage nurse, the admitting doctor and another expert of a claimant's reaction to a collision. If these are different accounts, the court can decide how much weight to attach to each one.

In, for example, a clinical negligence case, where a detailed chronology needs to integrate what staff recorded at the time and what they subsequently say they did at the time, different typefaces can be used for information from the contemporaneous

records and information taken from their witness statements or evidence at the inquest. If this is set out in a table, a column can be used to identify the source.

Set out information from medical records chronologically with information from general practitioner and specialist records integrated.

> In producing your report, you should distinguish clearly between facts identified and verified by you, and information provided to you by the patient or by others.
>
> *Guide to professional conduct & ethics for registered medical practitioners* Medical Council (2024); 51.4[4]

So that the source of each piece of information or quotation can be found in the records, include page references in brackets or as footnotes. If the medical records are not paginated, ask for paginated records. The model practice direction for clinical negligence cases requires all references to medical notes in any report to be made by reference to the pages in the paginated bundle of records prepared by the claimant's solicitors.

> Key principle 4
>
> You must make sure any statement or report you write, or oral evidence you give, is accurate and not misleading. This means you must take reasonable steps to check the accuracy of the information you provide, and to make sure you include all relevant information.
>
> *Providing witness statements or expert evidence as part of legal proceedings*. General Medical Council (2023); 12.4[5]

> In issuing certificates, reports and other formal documents, you must be accurate and make sure the document is legible.
>
> *Guide to professional conduct & ethics for registered medical practitioners*
> Medical Council (2024); 52.1[4]

Take care checking the facts and address the facts in issue. There is a risk of your instructing party being financially penalized for inaccuracies (*Williams v Jervis* [2008] EWHC 2346 (QB).

Summarise the findings of any investigations you have carried out or caused to be carried out; the details go in an appendix.

In this part of the report, where you rely on the opinions of other experts, make this clear so that their opinion is one of your assumed facts.

This section should usually end with the examination findings.

This is the launch-pad for the 'Opinion'. The reader will need to see how each and every opinion can be properly deduced from the facts in this section (or an appropriate appendix) supplemented, perhaps, by facts in the material instructions.

Include all material facts. 'You must not deliberately leave out relevant information' (GMP 2019) – for example, material that is inconsistent with, or does not support, your opinion. Cherry-picking facts which support a diagnosis that just happens to support the cause of the instructing party and failing to include the facts that hurt the cause can smack of partiality (*Frazer v Haukioja* [2008] CanLII 42207 (ON SC)). Do not mislead by omission. 'A trial is first and foremost, a forensic exercise and fairness to the parties demands, as a basic premise, that the experts will be accurate in their use of the source

material' (*Local Authority v S*). 'What the court expects from you is an objective, independent, well-researched, thorough opinion, which takes account of all relevant information and which represents your genuine professional view on the issues submitted to you'.[10]

> Key principle 6
>
> … You must make clear what is factual evidence, and what is your opinion based on your professional judgement and experience.
>
> *Providing witness statements or expert evidence as part of legal proceedings*.
>
> General Medical Council (2023); 12.6[1]

#### Opinion

The framework for the opinion is the section 'Issues to be addressed' so each issue has its own section in the 'Opinion'.

## Addressing Evidential Reliability

But first assess the quality of the evidence on which you rely, as your opinion is only as good as the information on which it is based, and 'take reasonable steps to check the information' (PWSEE para. 12.4). 'It is of the utmost importance that all experts, whether mainstream or not, read all the papers and where they have to rely on raw data that they check its veracity and accuracy in the medical notes' (*Local Authority v S*).

Experts in Scotland are told[6]:

> 'An expert witness should not provide the court with a statement of unqualified conclusions about the question of fact on which his/her opinion relies. If an expert witness does so, the effect of his/her testimony may well be diminished. It is therefore of the utmost importance that any expert witness carefully describes the source and assesses the worth of all material on which his/her opinion is based.'

The CrimPR require inclusion of 'such information as the court may need to decide whether the expert's opinion is sufficiently reliable to be admitted as evidence' (CrimPR 19.4(1)(h)). This is good practice in all legal jurisdictions. This section might therefore have as its first subheading 'Evaluation of evidence'.

Although it is ultimately a matter for the court to evaluate the evidence and the credibility of a party or witness, the court may be assisted by understanding upon what evidence you have relied and what weight, according to your clinical experience, you have attached to it. When as '[a] consequence of the fact that diagnosis in a psychiatric case depends on assessment of what is reported by the patient [it is necessary] for the psychiatrist confronted by a patient to consider whether or not to accept at face value what the patient reports' (*Turner v Jordan* [2010] EWHC 1508 (QB)). '[I]n cases involving the opinions of medical experts, the probative force of that character of testimony is lessened where it is predicated on subjective symptoms, or where it is based on narrative statements to the expert as to past events not in evidence at the trial' (*Mims v United States*, 375 F.2d 135 (5th Cir 1967)).

If you have not had access to the subject's general practitioner records, or only to limited records, make this clear; indicate that your willingness to reconsider your

opinions in the light of further documentary medical evidence. If you have asked for any records, and they have not been provided, explain what steps you took to obtain them and why you consider they may assist.

Have regard to the circumstances in which the medical records are made and the effects of 'distress, pain, the consumption of alcohol, doctors under pressure and patients' lack of communication skills' (*Graham v Sky In-home Service Ltd* [2002] ScotCS 328).

Your evaluation of the evidence should include, but not be limited to: the completeness and legibility of records, drawing attention to any redactions and their likely significance; the clinical plausibility of the subject's history with reference, if appropriate, to inconsistencies with other accounts and inconsistencies with or between other sources such as witness statements and Department for Work and Pensions (DWP) or similar records. But the Citizens Advice Bureau tells claimants to describe how they are on their very worst day and a judge said that the DWP Capability for Work questionnaire is 'merely a screening document before an assessment with a healthcare professional' (*Palmer*).

Assess the value of all of the material on which your opinion is based. The court needs to know to what extent, with regard to your medical expertise, you consider that you can rely on these assumed facts, albeit that the court will make its own findings as to fact. '[T]he basis for the asserted opinion must be sufficiently clear for its reliability to be properly assessed' (*Richmond LBC v B* [2010] EWHC 2903 (Fam)). Incorporate an acknowledgement that the evaluation of evidence and credibility is ultimately for the court and any opinion as to clinical plausibility refers only to your clinical judgement as to whether the subject's presentation rings true by reference to your clinical experience; it is not an opinion as to the subject's credibility or veracity in general.

If you have been provided with video or other covert surveillance evidence, indicate here to what extent, if at all, it assists. Almost always, this section is best concluded with a sentence to the effect that it is for the court to decide what the significance is of the surveillance and that you are prepared to reconsider any opinion in the light of the court's finding. Beware suggesting that if the court finds that the subject has been deceiving the court as to their functioning, they may have sought to deceive you. Courts have found claimants dishonest as to some matters but overall found them credible and decided cases in their favour.

Have regard to not only video surveillance evidence but also any social media evidence disclosed to you and how the subject of the report has presented to other experts.

Be careful, however, how you deal with contradictions and inconsistencies that do not require psychiatric expertise to identify. An expert in *Duffy v McGee* [2022] IECA 254 (*Duffy*), whose evidence was excluded, was criticised for purporting to identify 'contradictions' in the two plaintiffs' accounts. This is for the court.

## Addressing the Issues

Each issue, or question, becomes a heading. Under each, state your conclusion and show with clarity, logic and succinctness how this properly derives from the facts, and where appropriate how those conclusions or opinions are tied to the experience on which you rely; but try to avoid the repetition of facts and refer to them only so far as is necessary for your reasoning to be understood.

Your opinion has to be diligently researched, objectively sound, genuinely and honestly held and impartially presented. It should be based on evidence and not

unfounded assumption, on firm foundations and not on unspecified and unproven factors. You want the reader to accept your conclusion, so the important word, explicit or implied, will be 'because'; the conclusion or opinion has to be reasoned. 'No matter how obvious the answer may appear to [the expert] it is his responsibility to provide thorough reasoning and ensure that the report and his oral evidence are complete in its coverage of relevant matters' (*Mitrasinovic v Stroud* [2020] EWHC 914 (QB)).

Every opinion ought to be advanced in the expectation that it may not be agreed. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the opinion, including the premises from which the reasoning proceeds, is disclosed by the expert (*Griffiths v TUI (UK) Limited* [2021] EWCA Civ 1442). An important part of the trial court's assessment of expert evidence is the application of logic and common sense to the views of the expert (*Cloonan v HSE* [2002] IECA 129).

The old mathematics adage 'show us your workings' is often quoted in expert witness training; this can be a step too far. In *Re Legal and General Assurance Society Ltd* [2020] EWHC 2299 (Ch), although the court wanted sufficient information to assess the soundness of the expert's conclusions, it did not want to review the expert's 'workings'. The test is one of sufficiency.

Set out your opinion on the issue, or the answer to the question, as a stand-alone sentence (Canadian psychologist Stephen Hart, personal communication). Follow this by one or more sentences of clear and informed reasoning. Try to have just one such paragraph for each question or issue. When you produce your 'Summary of Conclusions', this will comprise the opening sentence from each paragraph in the 'Opinion'. This way you should be able to avoid what the Royal College of Surgeons

identifies as a common error: 'setting out subtly different statements in the opinion and conclusion sections of your report'.[11]

If you have made assumptions as to facts, or made any deductions from factual assumptions, make this clear. Occasionally, you are asked to adopt an assumption. Set this out fully. If it is unreasonable or unlikely, make this clear.

Leave the law for the lawyers. The toxicologist, whose evidence was ruled inadmissible in *Duffy*, was criticised for expressing views about the doctrine of *res ipsa loquitur*.

## Reliance on literature

> 'It is clear and well-established procedural law that experts provide a list of published literature and only provide copies of unpublished literature' (*Saunders v Central Manchester University Hospitals NHS Foundation Trust* [2018] EWHC 343 (QB)).

'It is part of [the expert's] duty to consider any material which may be available in their field, and not to draw conclusions merely on the basis of their own experience, which is inevitably likely to be more limited than the general body of information which may be available to them' (*Abadom*). This specifically applies to medical experts: 'the court relies on the witness for a professional opinion which takes account of contemporary knowledge and expertise [...] including reports of the experiences of other doctors and other published material' (*Royal Victoria Infirmary v B (A Child)* [2002] EWCA Civ 348). And bear in mind that your duties include obtaining copies of published medical or scientific literature; it is not the responsibility of other experts or instructing lawyers to provide them (*Snow v Royal United Hospitals Bath NHS Foundation Trust* [2023] EWHC 42 (KB)).

This means that you must make appropriate reference to published research, textbooks, authoritative guidance, consensus reports, *et cetera*, which can be admitted as specialist hearsay evidence. It includes ensuring that you refer not only to studies

that support your opinion but also to those which do not support it, and ensuring that you take into account any observations on the reliability of the studies.

Be careful about non-peer-reviewed work. In *Duffy* the judge quoted from a paper "Lawyers Beware! The Scientific Process, Peer Review and the Use of Papers in Evidence"[12]: peer review 'is an important but fallible filter, which tries to exclude from publication material that is trivial or uses flawed methods or draws conclusions unjustified by the tests used'. And be careful about a bespoke methodology; even if published in a peer-reviewed journal, it may be vulnerable to attack on the basis that its utility has not been replicated (*Barry*).

Be careful also to avoid relying on a publication which has been criticised. 'While the legal team might not automatically carry out research to ascertain such criticism, the team's expert witness can be expected to (and should) do so.'[13]

Have regard, and refer, to relevant clinical guidelines. You are required to do so (PWSEE para. 27). But consider carefully the arguments as to its relevance in the instant case. 'Relevant evidence is that which would make a determination of fact more or less probable than it would be without the evidence. The crux of relevance is whether the guidelines would assist the judge in understanding the evidence to be adduced or in determining a fact in issue.'[14] Samanta and Samanta have suggested subjecting the guidelines to a *Daubert* assessment (*Daubert v Merrell Dow Pharmaceuticals* (1993) 509 US 579): the theory and technique by which the guidelines were developed; the standards inherent in the evidence base; whether they were subjected to peer review; appropriate validation; proper reasoning and methodology; any known or potential error rates; and whether they have widespread acceptance within the relevant medical community.[15]

Reference to guidelines may not be possible. It may be helpful to point out that you have relied on approaches that have wide acceptance by psychiatrists and given weight to treatments for which there is the strongest evidence base with regard to effectiveness and safety. However, there are many treatments that are accepted as effective, but for which there have not been trials that satisfy the most stringent criteria of evidence-based medicine or have been endorsed by NICE.

Before relying on a publication, subject it to a critical analysis. If you do not do so, do not be surprised if the judge has done so in her pre-trial preparation or when cross-examination reveals that your opposite number has carried out the exercise and provided their analysis to your cross-examiner. When relying on clinical trials, have regard to sample size, population statistics, sensitivity, specificity, positive predictive values, the relevance of the study population to the case and the null hypothesis; beware using the results of trials to support propositions that had not been their object.

Make sure that you apply the findings accurately or correctly. Do not to 'cherry-pick'. In *Leach v North East Ambulance Service NHS Foundation Trust* [2020] EWHC 2914 (QB), where the claimant suffered PTSD following a subarachnoid haemorrhage, the judge was startled when an expert instructed by the defence asserted in cross-examination that up to 60 per cent of patients who suffer a subarachnoid haemorrhage go on to suffer PTSD. On closer questioning he said that the range was somewhere between 20 and 60 per cent. The judge observed that he had made no reference to any literature in his report and he produced no literature to support any of these data.

Beware using *Wikipedia* or, if you do, say so. CPR 35PD.3.2 requires the expert to 'give details of any literature or other material which has been relied on in making the report'. Reliance on *Wikipedia* can highlight the gaps in your claimed field of expertise (*Engie Fabricom (UK) Limited v MW High Tech Projects UK Limited* [2020] EWHC 1626 (TCC)).

## Achieving Balance

Highlight the strengths of your opinions, but also set out any material facts or matters that might undermine, or detract from, them and any points that should fairly be made against them. The latter are a 'necessary inclusion' (*B v Nugent*). Do not simply ignore what you consider unimportant or irrelevant. Do not simply reject relevant material. Explain why it does not affect your opinion. Identify any unusual, contradictory or

inconsistent features of the case. Take into consideration any relevant factors arising from ethnic, cultural, social, religious or linguistic contexts.

Avoid being over-dogmatic or using extreme forms of expression. Avoid wording that might be regarded as pejorative, prejudicial or pre-judgemental. 'A combative tone is inappropriate and only serves to undermine the likelihood of [the] conclusions being accepted'.[2]

## The Range of Reasonable Opinion

Where there is, and often there is, a range of reasonable opinion, summarise it. Give reasons for your own opinion and for not adopting other reasonable opinions. Identifying the weaknesses in the alternative opinions strengthens your own position, assists the court by providing the means of testing the validity of your opinion (and the other alternative opinions) and rehearses points that may arise in cross-examination. 'It also serves to discipline and check the thought processes of the expert himself, by putting even strongly held personal opinions into the context provided by other experts in the field' (*Omooba v Michael Garrett Associates Ltd (T/A Global Artists)* [2020] 11 WLUK 384). It may be regarded as a patent breach of CPR35 PD3.2(5) not to have summarised the range of opinion (*BDW Trading Ltd v Lantoom Ltd* [2023] EWHC 183 (TCC)).

Imagine the subject being presented at a case conference and imagine the most extreme views of your colleagues. If you have seen the other expert's report, explain why, if it be so, you do not accept their opinion. If you have not seen it, try to anticipate what it might be; provide the court with as much information as possible to allow it to

choose between competing opinions. Indicate what your opinion would be if the court accepts as a matter of fact their opinion.

Boyle uses the analogy of a tripod.[7] The range of opinion in a personal injury case must have three extreme points:

- that the claimant has all of the symptoms of which he complains and that they are all caused by the accident;
- that the claimant has all of the symptoms of which he complains, but none of them is caused by the accident;
- that the claimant has none of the symptoms of which he complains.

A pendulum suspended from a tripod with its feet at the extremes would, like the expert's opinion, come to rest somewhere in the triangle created. 'The Pendulum allows, indeed insists on, a contemplation and assessment of the alternatives.'

The range of reasonable opinion can depend on the facts admitted or decided by the court. Where there is a conflict of factual evidence, set out alternative opinions based on the different factual scenarios. Only express a preference if it depends on the application of your expertise. For example, there may be an inconsistency between the subject's reported symptoms and evidence from other sources which would not be obvious other than to a psychiatrist.

If you do not consider that another psychiatrist would reach any different conclusion(s), explain that this is why you have not set out a range of reasonable opinion.

## Addressing Unidentified Issues

Do not answer questions that have not been asked unless you have been invited to mention any other matters you consider relevant. It may be that a separate condition has intervened or occurred, which those instructing you may not know about or understand, that potentially changes the course of the case.

Where the questions or issues do not call for an actual diagnosis, it may be helpful to set out the diagnosis first as the basis for some of the other opinions. However, avoid 'straining the symptoms to fit a possible diagnosis when they [do] not fit naturally' (*Van Wees v Karkour* [2007] EWHC 165 (QB)). It may not matter. In *Noble v Owens* [2008] EWHC 359 (QB), it was held that 'the precise characterisation of Mr. Noble's [. . .] disorder does not signify. What matters are the symptoms of Mr. Noble's condition and the prognosis.'

It may be that the subject needs treatment and you have not been instructed to provide treatment recommendations. An action for negligence was brought against a psychiatrist who diagnosed with reactive depression a victim of the Hillsborough football disaster and diagnosing reactive depression; the judge found that as he was the first doctor consulted by the claimant after the disaster, he had an obligation to inform the claimant's general practitioner of his treatment recommendation (*Hall v Egdell* [unreported] 2004). In many personal injury cases you will have been asked to set out recommendations for investigations or treatment, which may in any event clarify the subject's condition. Whether or not asked to do so, make recommendations for investigation or treatment that accord with best practice, ask that they are passed to the subject's ordinary medical attendant and ask to be informed that this has been done. If the instructing party does not pass on the recommendation, seek legal advice as to

whether you should communicate the recommendation directly. Beneficence may override confidentiality. If you write to the subject's general practitioner, and if time permits, discuss this with your instructing solicitor, but be careful not to include any privileged information and do send a copy of any letter to the instructing solicitors. In *Cornelius v de Taranto* [2000] 6 WLUK 833, an action against a psychiatrist who had prepared a medical report in connection with alleged constructive dismissal, the claimant was awarded £3,000 for breach of contract. To arrange treatment for the claimant, she sent the report, which contained material defamatory of the claimant, to her general practitioner and another psychiatrist.

## Hypotheses

If advancing a proposition, make clear if it is a hypothesis, especially if it is controversial, or an opinion deduced in accordance with peer-reviewed and peer-tested technique, research and experience accepted as a consensus in the professional psychiatric community.

## Treading on the Judge's Toes

Do not to usurp the role of the judge, jury or coroner. Your assistance does, and generally should, stop short of supplanting the court as decision-maker on matters central to the case and deciding the ultimate issue which is for the court to decide – the 'ultimate issue' rule. However, in a civil case, such as a clinical negligence case, the judge will want your opinion on whether the doctor exercised the ordinary skill of an ordinary competent doctor exercising her art.

The underlying rationale for the ultimate issue rule is, as stated in *The Ikarian Reefer*, that it is a matter for the judge or jury. But this rule has weakened. Expert opinion on the ultimate issue is admissible in civil cases: 'where a person is called as a witness in any civil proceedings his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence' (Civil Evidence Act 1972, s 3(1)). In criminal cases abolition of the rule has been recommended, but never put into effect. Given the ever-increasing complexity of areas of expert evidence, there has been a blurring of the line between acceptable expert opinion *per se* and upon the ultimate issue. Indeed, in *R v Stockwell* [1993] 3 WLUK 119, Lord Taylor LCJ stated, as an aside, that 'since counsel can bring the witness so close to opining on the ultimate issue that the inference as to his view is obvious, the rule can only be [. . .] a matter of form rather than substance' and *Blackstone's*,[16] states: '[A]n expert *is* allowed to express an opinion on an ultimate issue, provided that the actual words he employs are not noticeably the same as those which will be used when the issue falls to be considered by the court' (emphasis in the original). There is no need to 'simply creep up to the opinion without giving it' (*Routestone Ltd v Minories Finance Ltd* [1996] 5 WLUK 237). What matters is how the opinion is expressed.

## Provisional or Final?

Make clear if this is not your final opinion, for example '[i]f you do not have enough information on which to reach a conclusion on a particular point, or if your opinion is qualified (for example, because of conflicting evidence)' (PWSEE para. 27). Perhaps critical records remain to be obtained. Perhaps account needs to be taken of the opinion of another expert. If appropriate, suggest the instruction of another expert. Rarely, be

prepared to recommend a second opinion on a key issue. If you are unable to reach a definite opinion on any issue, it is good practice to set out the reasons. In Jersey it is mandatory (PD RC17/09 sch.A(4)(b)).

### Summary of Conclusions

Finally, set out a summary of your conclusions.

### Declaration

*In England and Wales*, reports in most jurisdictions require a declaration that the expert understands and has complied with their duty to the court. So far, it is just the CrimPR which not only require the report to contain 'a statement that the expert understands an expert's duty to the court, and has complied and will continue to comply with that duty' (CrimPR 19.4(1)(j)), but also set out the terms of the declaration (CrimPRC(23)90(b) 7.2.1). However, in civil cases some solicitors are now asking experts to include declarations almost identical to that in CrimPRC(23)90(b). Such declarations are illustrated in the specimen reports (Appendices A and B).

*In Northern Ireland*, the required declaration for reports in the King's Bench Division, King's Bench Division (Commercial), Chancery Division and Family Division cases, other than clinical negligence cases, is set out in Practice Direction 7/2014. For clinical negligence cases it is set out in Annex A to Practice Direction 2/2021. There is no such requirement for criminal cases, but experts usually adopt the declaration annexed to Practice Direction 7/2014.

*In Scotland*, such a declaration is not required but in *Reactec Limited v Curotec Team Limited* [2020] CSOH 77, the court noted that the expert had made 'the customary declarations expected of a skilled witness'. Experts in Scotland should consider

acknowledging their familiarity with the Law Society of Scotland *Expert Witness Code of Practice*.[17] *In Scotland*, there has been a widespread practice of expert reports being signed 'on soul and conscience', failure to do so risking a fine of 'one hundred merks Scots' (about £500 today). Any legal basis for this practice today is hard to find. However, the High Court of Justiciary Practice Note No. 2 of 2018 Medical Certificates indicates that there is an alternative to a soul and conscience declaration in the form of a solemn and sincere affirmation.

*In Jersey*, PD RC17/09 sch. A(9) requires a statement from the expert to the effect that they have complied with Schedule A.

*In Ireland*, RSC Ord. 39, r 57(2) provides that every expert report delivered pursuant to the Rules or to any Order or Direction of the court, is to: (1) contain a statement acknowledging the expert's duty to assist the court as to matters within their field of expertise and which duty overrides any obligation to any party paying their fee; and (2) disclose any financial or economic interest of the expert. In addition, experts are advised to adopt the declaration set out in *O'Leary v Mercy University Hospital Cork Ltd* [2019] IESC 48 (online Appendix 12).

**Commented [KR3]:** The on-line appendices can be downloaded and used in templates.

*In England and Wales*, to comply with the CPIA, if instructed by the prosecution, you also have to include a declaration confirming that you have read and followed the guidance in *Expert guidance on disclosure, unused material and case management*[18] and recognise the continuing nature of your disclosure responsibilities (see Chapter 2, 'Disclosure Obligations'). This additional declaration (online Appendix 13) should be inserted in the CrimPR declaration.

The equivalent declaration in Scotland is: 'I confirm that I have read the guidance contained in the ACPOS Disclosure Manual which details my duties as an expert witness

in assisting the Crown to discharge its disclosure obligations. I have followed the guidance and recognise the continuing nature of my responsibilities.'

A function of the Declaration is to avoid experts acting in disregard of their duties to the court. This led to the issue of an application for a wasted costs order to be made against a psychiatrist for costs wasted by his misconduct, default or serious negligence (*Phillips v Symes (A Bankrupt) (Expert Witnesses: Costs)* [2004] EWHC 2330 (Ch) (*Phillips*). The basis was that he 'was in serious breach of his duties to the court by acting recklessly, irresponsibly and wholly outside the bounds of how any reasonable psychiatrist preparing an opinion for the court could have properly acted with regard to his duties'.

Similar complaints were made about an expert in *Hamed* who prepared a very weak report which failed to comply with the requirements of an expert report. He had signed a declaration that he was aware of the requirements of Part 35 and the practice direction. However, the court found that his failure to comply with these requirements amounted to serious failings, prompting the judge to urge him to undertake some further training in expert medico-legal report writing.

One declaration which is not often included, but can be very useful, is: 'This report is provided to those instructing me with the sole purpose of assisting the court in this particular case. It may not be used for any other purpose, nor may it be disclosed to any third party, without my express written authority or that of the court.' 'Although addressed to the court, the medical report is the property of the client' (*Barratt, Goff and Tomlinson and The Law Society as Intervenor v Revenue & Customs* [2011] UKFTT 71 (TC)) (*Barratt*). Such declarations are intended to prevent the report being used for a purpose for which it was not intended.

## Statement of Truth

*Reports in England and Wales and in the Isle of Man* in criminal, civil and family proceedings and for some tribunals require a statement of truth, without which a report may not be admitted in evidence (*Al Nehayan v Kent* [2016] EWHC 623 (QB)). The CrimPR require that a report must contain the same declaration of truth as a witness statement (CrimPR 19.4(1)(k)). Some of these are set out in Box 6.3.

**Begin Box 6.3**

### Box 6.3 Statements of Truth

Civil Procedure Rules and Family Procedure Rules:

> I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.
>
> I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.
>
> *And additionally in children proceedings:*

I also confirm that I have complied with the *Standards for Expert Witnesses in Children Proceedings in the Family Court* which are set out in the Annex to Practice Direction 25B – *The Duties of an Expert, the Expert's Report and Arrangements for an Expert to Attend Court*.

Criminal Procedure Rules:

I confirm that the contents of this report (consisting of ~ pages) are true to the best of my knowledge and belief and that I make this report knowing that, if it is tendered in evidence, I would be liable to prosecution if I have wilfully stated anything which I know to be false or that I do not believe to be true.

Isle of Man:

I confirm that insofar as the facts stated in my report are within my own knowledge, I have made clear which they are and I believe them to be true and that the opinions I have expressed represent my true and complete professional opinion.

**End Box 6.3**

Signing the declaration of truth is not a formality:

'The words "and complete" are there for a purpose [...] CPR 35 PD 2.3 provides that experts should consider all material facts, including those which might detract from their opinions and CPR 35 PD 3.6(6) refers to the need to deal with any range of opinions on the matters covered within the report. The court

should receive a comprehensive, objective analysis; including whether an alternative view to that held by the author is tenable. An expert must not solely pick out pieces of evidence or entries in documents which provide support for the conclusion he/she has reached whilst not addressing material that points, or may point, the other way. Where there is a contrary interpretation, analysis or view it should be set out in the report and it is a breach of the duties owed to the Court by an expert to leave such issues to be raised by an expert instructed by the other party' (*Muyepa v Ministry of Defence* [2022] EWHC 2648 (KB)).

Before signing the report, ask yourself whether your opinions are 'complete'.

## Signature Block

After the declaration comes the signature block. Add the date of the report.

## Appendices

Locate as much content as possible in appendices, especially in jurisdictions in which there is a restriction on the length of reports or when a judicial direction is given to similar effect.

Appendix 1 sets out as an abbreviated CV, in no more than a page, your qualifications, training and relevant experience in three sections: (1) academic and professional qualifications in full; (2) your expert witness training and your clinical training and experience in your specialty, beginning or ending with your current post or appointment(s), current employer and any current positions of responsibility in, or related to, the profession; and (3) details of research and publications. Tailor this to the

**Commented [KR4]:** Cross refer to the specimen report.

case so that it is clear why it is appropriate for you to give expert evidence. It will facilitate comparison of your expertise with that of the adverse party's expert. Even where your opinion is unopposed, counsel will use this to seek to persuade the judge or jury to accept your evidence.

Appendix 2 lists the documents and other materials provided or at least the 'documents, statements, evidence, information [. . .] which are material to the opinions expressed or upon which those opinions are based' (*B v Nugent*). They may include audiotapes, DVDs, photographic exhibits, etc. As 'instructions' include all materials sent to the expert, reports in civil cases prepared in compliance with the Guidance should include the dates on which they were received (para. 55). The list must be accurate.

Some counsel and solicitors say that everything should be listed. Others say that if you list everything, the other side is entitled to see everything and so you should not refer to documents that your instructing solicitors do not intend to disclose for the time being, such as draft witness statements or a report on liability and causation in a medical negligence case. The actual test is whether the court needs the document to understand your opinion or if you have used it as a significant part of the process of forming your opinion. The court in *Anglia Water Services Ltd v HMRC* [2017] UKFTT 0386 (TC) observed that CPR35 PD3.2(2) 'requires details only of material *relied upon*' (emphasis in the original). In *Lucas v Barking, Havering and Redbridge Hospitals NHS Trust* [2003] EWCA Civ 1102 it was held: 'There is no requirement to set out all [...] the material that has been supplied to an expert. The only obligation on the expert is to set out 'material instructions.''

Although you do not have to list in the report every document with which you have been provided, you need an accurate list. The 'File Front Sheet' (on-line appendix 5) can be used to compile a complete list of your communications with instructing solicitors. It constitutes an index to your records, it is a 'paper trail' and it enables you to locate any documents you are required to disclose.

In an application for disclosure of a document, the other side will probably succeed if you have seen it and relied on it, but not if you have seen it and definitely not relied on it. If you make clear that a particular document is not material to your opinion, it ought to remain privileged. An application for disclosure may succeed if there is some reason to believe that there is something inaccurate or misleading about your statement of the instructions you have received.

This appendix can be omitted if the documents are so few, and their content so straightforward, that they can be set out in no more than a line or two in the introduction to the report without taking the report beyond its page limit.

Appendix 3 is for any explanatory notes about such matters as assumptions adopted. These may be the assumptions that what the subject has said is true and that the contents of the medical records are accurate unless otherwise indicated. Beware, because in cross-examination 'probably the most useful grounds that [counsel] can focus on are the validity and merits of any assumptions applied by the expert'.[19] 'An expert report is only as good as the assumptions on which it is based'.[20] And, if you rely on assumptions, they not only have to be identified but justified (*Conway v Conway* [2024] IEHC 403).

Appendix 4 is the history taken from the subject, examination findings and any investigation results but in *Ireland and Northern Ireland*, this must not include 'information as to how [the] accident happened [...] *as to a matter of liability*' (italics added for emphasis) (*McDowell v Strannix* [1951] NIR 57) or '(c)onfidential information of a highly personal nature [...] when it is not relevant or material to the issues to be determined' (*Haywood v Ritchie (t/a as H Ritchie & Sons)* [2005] NIQB 42). It can include how the accident happened insofar as the expert's role is to try and relate symptoms and signs to potential causation in terms of the wrong complained of (see Chapter 5 – 'The history'). Information of a highly personal nature can be omitted but its inclusion should obviate both the need to answer questions about details of the history, examination or investigations that are not in the body of the report, and the need to provide a copy of your handwritten, audio-recorded or typed consultation notes. *In Northern Ireland*, you have to disclose any medical evidence resulting from examination to the plaintiff not later than 21 days after the report and before trial, so it is simpler to provide this in the report.

Appendix 5 is your chronology, usually of relevant entries in the medical and other records. In a straightforward case where the chronology of events does not matter, or one in which a few entries from the medical records, contained in the body of the report, will suffice, this appendix may not be necessary.

Appendix 6 is your glossary. Explain that you will highlight with **emboldening** any medical or technical term which will be included in a glossary that appears as your report's Appendix 6. The alternative is to give the definition or explanation as a footnote when it is first used. Before you leave the case, copy those terms into your 'master glossary' for use in future cases.

Appendix 7 is a list of the literature on which you rely. The list should correspond exactly to those cited in the report. If you rely on unpublished research, append copies to your report.

Add other appendices as appropriate.

Finally, a good proof-reader is worth their weight in gold.

In your covering letter (online Appendix 15), if you consider it inadvisable for the subject to read to the report (*Barratt*), you can explain why.

### After-Thoughts

If you change your opinion on any material matter, notify those instructing you without delay and advise the reason. In a civil case, responsibility for informing the other parties rests with your instructing solicitors (Guidance, para. 66). In a criminal case, if your report has been served as evidence, it is your responsibility to inform all parties and the court (CrimPR 19.2(3)(c)).

## Amendments

You may be asked to consider amendments. Remember that your opinion must be independent and uninfluenced by the exigencies of the litigation. Be prepared to remind those instructing you that the opinion is yours, and not theirs. However, provided that you are not asked to devise facts or opinions which may advance the party's case, or give an opinion which is no longer your own, it is quite proper to make amendments at the suggestion of the solicitors or counsel. Box 6.4 lists permissible amendments.

Begin Box 6.4

## Box 6.4 Permissible Amendments to a Report at the Suggestion of Solicitor or Counsel

- correction of material errors of fact;
- address legally relevant issues;
- remove references to issues outside expertise or on which evidence is not legally admissible (e.g. the ultimate issue);
- comment on new facts;
- ensure compliance with the appropriate procedural rules;
- presentational changes;
- annexation of relevant materials (e.g. publications);
- a form of words.

Hodgkinson and James 2020,[2] p. 242



End Box 6.4

It is also proper for counsel to seek to discuss, or annotate a draft report with observations and questions to be considered. If there are factual errors or new facts, consider carefully whether they affect your opinion: '[f]actual errors are bound to creep in to even the most careful of reports' (*Glancy v The Southern General Hospital NHS Trust* [2013] CSOH 35). Keeping opinions under review goes through all the way to trial.

Be sure that any amended opinions follow from the now different factual background and ensure that you are fully refreshed as to the totality of the facts lest any amendment, especially to your opinion, introduces inconsistency.

You can charge for amendments, but not for any which result from your faulty drafting.

*In Ireland,* experts should, however, be especially cautious about amendments as all reports are disclosable (if the evidence of the witness is to be relied on) and uncomfortable questions might arise on cross-examination in relation to amendments.

Refusal to reconsider your opinion may get you into trouble. This happened to the psychiatrist in *Phillips v Symes*. He was criticised because when he was sent further material, he refused to reconsider his opinion that Mr Symes lacked capacity. He refused to look at it until directed by the judge to do so at the trial. He was then forced to admit that Mr Symes was capable of managing his affairs.

The real difficulty is where instructing lawyers want you to change your opinion, or how it is expressed, or exclude material, in order better to support their case. In *Marsden v Amalgamated Television Services Pty Ltd* [2001] NSWSC 510, a psychiatrist admitted under cross-examination that at the request of his instructing solicitor he had removed significant material from his report. This only came to light when an earlier version of his report was accidentally passed to cross-examining counsel.

Lawyers' reasons may be persuasive, but be careful. You must not include anything in your report which has been suggested to you by anyone, including the lawyers instructing you, without forming your own independent view. If, after thorough and careful reflection, and after reminding yourself where your duty lies, you accept the suggestion, make the amendment and put the reasoning into your own words, then

sleep on it. Look at it afresh the following day. Sometimes, on further reflection, it appears that the best supported conclusion is the original one. If you go ahead and make the amendment, you need to be as confident about the reasoning behind it as you are about the rest of your reasoning. If not, express the amended opinion with whatever qualification is necessary to reflect your independence, impartiality and objectivity.

If you change your opinion, the reason should be crystal clear. If it is not and if the earlier version of your report has already been disclosed, or is disclosed inadvertently, or otherwise falls into the hands of another party, any change of opinion, especially if it suggests partiality, will go under the microscope and you risk being accused of being biased, partisan or a 'hired gun'. If, for good reason, you refuse to budge, this will enhance your reputation.

## Answers to Questions

Experts are not expected to answer questions that are not properly directed to clarification of the report, if they are disproportionate or are asked out of time, unless the court gives permission or the other party agrees. For these reasons and because the instructing solicitor may not have been sent the questions, or may consider that they call for more than clarification and they have not agreed to this, consult immediately with your instructing solicitor and advise as to the likely cost of doing so, as this informs any discussion as to the proportionality of the questions.

If the questions have been ordered by the court, the court order should specify the date by which the answers should be provided. If it is unrealistic, seek to negotiate an alternative date. If negotiation fails, you can apply to the court for additional time. If

no deadline is indicated, plan to provide the answers within two to four weeks; if this is not practical inform the party asking the questions and your instructing solicitor.

As the court can give permission for any questions that 'assist the just disposal of the dispute' (*Mutch v Allen* [2001] EWCA Civ 76), the questions may deal with issues that you have not addressed in your report.

The questions should have been framed carefully and your answers should match that care, even though this may involve a considerable amount of time reading the file. Only when your memory has been sufficiently refreshed, set about answering the questions that have been asked and not the questions that you think might have been asked. Pay careful attention to the clarity of your answer and the way in which you address any legal tests drawn to your attention. Beware questions that may superficially appear to be the same but on more considered analysis are subtly different.

The form in which the answers are sent should be a stand-alone document in which you set out each question followed by the answer; do not infuriate your readers by setting out a series of numbered answers which only make sense when they locate the list of questions.

Some solicitors request their expert to send them the answers in draft form; this may be appropriate and helpful. Sometimes, the form or content of a question may be influenced by a particular point of law or legal test which it is important for you to understand and without assistance you may misunderstand the question. The instructing solicitor may also advise as to factual inaccuracies. But be mindful of your duty to the court and avoid being manipulated into providing a partisan opinion.

Answers should be set out in neutral language and must not convey any annoyance you feel about being asked questions the answers to which you consider are

contained in your report or which you feel could have been answered in your report if you had been asked them in the first place.

Experts' answers to questions automatically become part of their reports. So, they are covered by the statement of truth and form part of their expert evidence but some solicitors expect that answers will conclude with the statement of truth.

Send answers simultaneously to the party that has asked the questions and to the instructing solicitors (Guide, para. 67). *In Northern Ireland,* the answers have to be sent through your instructing solicitors.

## Experts' Meetings

There is an expectation that, in deciding how the experts' meeting should take place, experts should have regard to the cost of the litigation. An exchange of emails may suffice and, if this is not a 'meeting' (of minds), there does not yet appear to be a case in which the court has decided otherwise. It is possible to meet by telephone but there is little or no difference in cost or convenience to meeting over a remote link. However, where you need to look at medical records in various physical or electronic files, an in person meeting may be more effective (and cost-effective).

Preparation should not include ambushing the other expert with a list of literature when there is insufficient time for them to obtain and consider the publications. 'If you want to talk to your opposite number about a particular publication, then disclose the text in full and in good time. Not to do so is impolite and unhelpful and thus not "good medical procedure".'[21]

Preparation must include comparing the materials that each expert has seen. Instructing solicitors should have advised which of the expert's reports, addenda, letters, etc. have been disclosed. Experts should have access to the same materials. *In*

*Northern Ireland* in clinical negligence cases, experts can expect to receive a 'properly collated, paginated, and indexed core bundle of documents, including any literature on which the experts need to rely, for use at the experts' meeting' and they can also expect to be informed which of the parties it has been agreed is to take the minute of the meeting (Practice Direction No. 2 of 2021; para. 42).[22]

If one expert has not seen documents that the other expert has seen, it is best to adjourn. An expert who identifies that the basis of his instruction differs from that of another expert must inform those instructing him (Guidance, para. 25; Northern Ireland *Pre Action Protocol for Clinical Negligence Litigation*, para. 27). An expert was criticised because at the experts' meeting, he had not had sight of a document relied upon by the adverse party's expert in his report (*McQuaid v McQuaid* [2022] NICh 18). He was unable to state why he had not asked for it.

Where there is disagreement on matters that have been quantified, such as causation, life expectancy, etc., it is important that the experts do not decide to 'meet halfway'. If you cannot agree, explain your respective positions and then the parties will agree or the court will decide. Your role is to assist the decision-making, not to make the decision. The parties have not agreed to 'trial by expert'.

Usual practice is for one expert to prepare a draft and send it to the other expert. Some solicitors are critical of this and may threaten to ask the court to order its disclosure. However, judges approve. Nevertheless, this must not inhibit meaningful discussion; some cases will call for such before any drafting. Preparing the draft can powerfully concentrate the mind.

If you are preparing the draft, and there is no agenda, copy and paste the summary of your conclusions. Then, for each issue, set out what the other party's expert's conclusion is. This will assist as to the extent to which you may reach agreement and it will assist as to those issues for which you will have to set out in detail

your reasons for disagreement, at least in preparation for the discussion. If the other party's expert has reached conclusions about which you have not set out a conclusion, you can then copy and paste their additional conclusions and set out your position on these. If an expert significantly alters his opinion, the joint statement has to include a note or addendum by that expert explaining the change of opinion and the reasons.

It is permissible, and in some cases it may be advisable, to send the joint statement to the instructing solicitors *in draft form*. It provides them with the opportunity to ensure that the questions have been fully and adequately addressed. Where a question may have been misunderstood or a point overlooked, it avoids a request for a second joint statement. However this should be done with the agreement of the experts, it should be sent to the instructing solicitors simultaneously and their response should be copied to the adverse party or parties. What is unacceptable is for one expert to share drafts, or to be in communication with their instructing solicitors about the content of the joint statement, without the knowledge of the other expert or experts. Although the Northern Ireland *Pre Action Protocol for Clinical Negligence Litigation* (para. 48)[23] specifically prohibits disclosure of the joint statement to anyone other than the participating experts prior to it being agreed and signed by them, this does not mean that a draft cannot be shared with the parties' solicitors.

This was an issue in *Pickett* where reference was made to the Technology and Construction Court Guidance at 13.6.3:

> 'Legal advisors should only invite the experts to consider amending any draft joint statement in exceptional circumstances where there are serious concerns that the court may misunderstand or be misled by the terms of

that joint statement. Any such concerns should be raised with all experts involved in the joint statement.'

Reference was also made to the judgment in *BDW Trading Limited v Integral Geotechnique (Wales) Ltd* [2018] EWHC 1915 (TCC):

'[T]he TCC Guide envisages that an expert may if necessary provide a copy of the draft joint statement to the solicitors […] There may be cases, which should be exceptional, where a party or its legal representatives are concerned, having seen the statement, that the experts' views as stated in the joint statement may have been infected by some material misunderstanding of law or fact. If so, then there is no reason in my view why that should not be drawn to the attention of the experts so that they may have the opportunity to consider the point before trial. That however will be done in the open so that everyone, including the trial judge if the case proceeds to trial, can see what has happened and, if appropriate, firmly discourage any attempt by a party dissatisfied with the content of the joint statement to seek to re-open the discussion by this means.'

Although 'an effective joint statement is best achieved by parties agreeing a single agenda for the experts' discussion' (*Saunders v Central Manchester University Hospitals NHS Foundation Trust* [2018] EWHC 343 (QB)), in many cases no agenda is provided. Box 6.5 suggests a structure for an experts' joint statement in a case where no agenda has been provided. This is not the place to recite the details of the case. The court will be aware of the facts of the case. Where there is disagreement, the reasons for disagreement must be clear and succinct. The courts are not assisted by copying sections from a report, especially if they do not include reasons, or writing 'Please see my report for reasons' and the more so if the reasons are not there. Where there is an agenda, the body of the statement will be the experts' answers to each question and, if appropriate, reasons for disagreement.

An alternative format for setting out the areas of agreement, disagreement and reasons is in the form of a Scott schedule (*Sainsbury's Supermarket Ltd v Winemark*

[2012] NIQB 45). In civil cases involving schedules of damages, a Scott schedule is a table mainly used for setting out competing claims for items of damage. So a joint statement would be set out in the following format, where, for example, the experts disagree as to the first question/issue and agree as to the second:

| **Question /issue no** | **Question / issue** | **Dr Freud** | **Dr Ferenzci** | **(Blank)** |
|---|---|---|---|---|
| 1 | *In full* | AAAAAAA | BBBBBBB | |
| 2 | *In full* | MMMMMM | Agreed | |

In a Scott schedule 'The last column is always reserved for the Judge's use.' Given the importance of the joint statement, a fifth blank column should be included so that counsel or the judge can use it to make notes.

**Begin Box 6.5**

Box 6.5 **Structure of an Experts' Joint Statement**

- title of the action;
- heading that identifies the document as an experts' joint statement and the specialty and names of the experts;
- brief paragraph identifying the experts and their instructing solicitors (with their file references), listing experts' reports by date and with confirmation that the experts have seen each other's reports;
- a paragraph confirming that the experts have seen the same documents and identifying any which have been seen by one but not the other expert (and the reason why);
- areas of agreement (if applicable – see Chapter 2, 'Pre-Hearing Discussion of Expert Evidence');
- areas of disagreement with reasons;

- any steps to be taken to resolve disagreement;
- a paragraph in these or similar terms:

  We each DECLARE THAT: (1) We individually here re-state the Expert's Declaration contained in our respective reports that we understand our overriding duties to the court, have complied with them and will continue to do so. (2) We have neither jointly nor individually been instructed to, nor has it been suggested that we should, avoid reaching agreement, or defer reaching agreement, on any matter within our competence.

**End Box 6.5**

## Conferences or consultations with counsel

> The conference is usually the first time that the legal team meets the expert and they are often assessing how likely the expert's evidence will stand up under cross examination in the witness box.
>
> *Practical guidance for orthopaedic surgeons preparing expert medico-legal reports*

You may be asked to attend a conference or consultation with counsel early in the proceedings or shortly before the trial. Whenever it is, prepare for it as if it is the trial itself. Dress as you would for court. Be as familiar with the case as you will expect to be the night before the trial. Have your file properly organised and complete or be able to navigate all the documents electronically. Practise your recital of the reasons for disagreeing with the other side's expert. Be ready to learn from the way in which the barrister tests your opinion. She should challenge you about your work. She wants to

know what you are going to say when cross-examined and your opinion is under attack. It is in her interests to explore any potential area of uncertainty or weakness. See it as a 'dummy run'. As the British Orthopaedic Association says, it is very likely that 'Counsel wishes to see the whites of the expert's eyes and put him on the spot to see how he is likely to stand up under cross examination in the witness box'.[24] She wants to see that you are '[c]onfident, personable, able to explain technical issues clearly and prepared to entertain alternative points of view [. . .] Or are [you] flustered, unsure, dogmatic and possibly just outraged at the tone of your questioning?'[25]

If it is the pre-trial conference, find out the questions you will be asked to address, how you will be expected to give your evidence, where you should sit, whether you will have to hear other evidence the time at which you are expected to attend. If you are going to have to base, or be prepared to modify, your opinion on facts proved by the evidence of other witnesses, it is usual to be allowed to be present for their evidence, but for this the judge may have to give permission.

A transcript will probably be made of the conference, but in any event retain your own notes. The draft conference note will be sent to you for you to check. Ensure its accuracy. Although the conference is protected by litigation privilege, its content may subsequently be disclosed. In *Harrison v Isle of Wight NHS Primary Care Trust* [2013] EWHC 442 (QB), a clinical negligence case arising from shoulder surgery, a verbatim record of what the claimant's expert said in a case conference about the complications of acromionectomy was admitted as evidence and reproduced in the judgment.

## Late evidence

If you are provided with material close to the trial and you consider that it is going to lead to any reconsideration of your opinion, advise your instructing solicitors immediately, so that they can give notice of this to the adverse party's expert as soon as possible (*ICI Ltd v Merit Merrell Technology Ltd* [2018] EWHC 1577 (TCC)).

*chapter-further-reading*

## Guidance and Further Reading

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