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Responsibilities of psychiatrists who provide expert opinion to courts and tribunals

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COLLEGE REPORT

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Executive summary

The Special Committee for Professional Practice and Ethics was asked by the Registrar of the Royal College of Psychiatrists in 2012 to develop new guidelines concerning the ethical duties of psychiatrists giving evidence as experts in different kinds of court. These new guidelines were intended in part to be a response to the duties of expert witnesses that were being formulated by the courts themselves in the context of review of the costs of expert testimony. They were also aimed at further acknowledging that giving evidence as a psychiatric expert is a competency that cannot be assumed, but has to be acquired to an accepted standard in order to meet revalidation requirements. Some recent cases brought before the General Medical Council (GMC) and the Medical Practitioners Tribunal Service (MPTS) that have found psychiatrists' fitness to practise impaired because of deficiencies in their work as expert witnesses also suggest that psychiatrists may need more explicit guidance on their duties as experts.

This guidance therefore sets out some ethical standards and expectations in regard to psychiatrists acting as expert witnesses. Given that different courts operate in different ways, and given also that each case is unique, they are not definitive. Neither are they legally binding, albeit they do seek to take account of some legal decisions regarding the definition of expertise. They do, however, represent the College's view concerning what would be the opinion of a body of responsible psychiatrists acting as experts.

Introduction

Courts require testimony on a huge number of issues that entail specialist knowledge. The vast majority of expert testimony in the courts is non-medical; and only a small proportion of medical expert work is psychiatric.

Psychiatric experts may be required to assist with a wide variety of medico-legal matters, in a variety of legal contexts; for example, in regard to:

- the state of mind of defendants in criminal cases, in relation to a variety of legal issues or tests
- the sentencing of offenders (usually in the context of mental disorder)
- psychiatric injuries that are at issue in personal injury litigation in the civil courts
- allegations of negligent psychiatric care
- the mental health of parents and children in family cases, including offering advice on safeguarding of children and young people and advice to parties in secure accommodation proceedings
- the risk of physical or emotional harm posed by parents with mental health problems to their children
- the effect of mental disorder on fitness to work or to parent
- professional regulation where the mental health of practitioners, or the professional conduct or performance of psychiatrists, is under investigation
- the mental capacity of people making various types of legal decision.

And clearly the foregoing list is not exhaustive.

There is a considerable body of guidance available to experts in general, including doctors and psychiatrists. Furthermore, all those who act as experts are required to comply with certain 'practice directions'. These practice directions for experts vary by court or 'jurisdiction' and are constantly evolving. For example, the current version of Practice Direction 25B, *The Duties of an Expert, The Expert's Report and Arrangements for an Expert to Attend Court* (Lord Chief Justice, 2014a), which relates to the family court jurisdiction, can be found on the Ministry of Justice website at www.justice.gov.uk/courts/procedure-rules/family/practice_directions. In addition, experts in civil claims must have regard to the Civil Justice Council's *Guidance for the Instruction of Experts in Civil Claims*, published in August 2014. Further, although the government has not acted on

the recommendation of the Law Commission (2009) that Parliament should publish a bill dealing with the admissibility of expert evidence, the Law Commission's recommendations have resulted in changes to the Criminal Procedure Rules, which came into effect in October 2014 (Ministry of Justice, 2014), along with an amended Practice Direction (Lord Chief Justice, 2014b); and these rule changes both place further responsibilities on experts in criminal proceedings and also will likely influence the approach to, and use of, expert evidence in the civil and other legal domains.

Finally, it is important to bear in mind that law and practice are constantly evolving. The time it has taken to provide this guidance is a reflection of the need to keep up with developments. As soon as this guidance is published there are likely to be further developments that may render some of it out of date. It is therefore important to read this guidance alongside information on developments in statute and case law and, where appropriate, formal legal advice as to the significance of such developments.

The expert's duties

The expert's duties to the court include:

- a duty to assist the process of justice
- a duty to act impartially, objectively and honestly
- a duty to reveal any actual or potential conflict of interest
- a duty to make clear the limits of their knowledge or competence
- a duty to give testimony only in their area or field of expertise
- a duty to state the substance of all facts and instructions given to them which are material to the opinions expressed in their report or on which their opinions are based
- a duty to indicate the source of factual information, including where they have no personal knowledge
- a duty to be accurate and complete
- a duty to mention all matters that they regard as relevant to the opinions they have expressed
- a duty to draw to the attention of the court all matters that might adversely affect their opinion
- a duty not to include in their evidence anything that has been suggested to them by anyone, including the lawyers instructing them, without forming their own independent view of the matter
- a duty to provide the court with evidence about the range of opinion, or reasonable opinion, in that area or field, including in regard to the case at hand
- a duty to make it clear if their opinion is in is any way qualified or provisional
- a duty promptly to communicate any change of opinion and the reasons for such change
- a duty not to enter into any arrangement where the amount or payment of their fees is in any way dependent on the opinion they have given or the outcome of the case.

Under the recently amended Criminal Procedure Rules (Ministry of Justice, 2014), additional duties are imposed on experts specifically in regard to criminal cases, such that the expert should:

- disclose any information capable of substantially detracting from their credibility
- define their area, or areas, of expertise
- include in their report such information as the court may need in order to decide whether their opinion is sufficiently reliable to be admissible.

The nature of expert testimony

In relation to medical testimony, it is crucial to distinguish between 'professional' and 'expert' testimony:

- *Professional witnesses* have, or have had, some professional involvement with one or more of the parties involved, or with witnesses. For psychiatrists, this will include people for whom they have provided clinical treatment or intervention. For example, if a psychiatrist is asked to give evidence as to the mental state of a person whose admission they recommended under the Mental Health Act 1983, they are giving professional evidence.[a]
- *Expert witnesses* give opinion evidence, and are necessarily qualified by study or experience to be able to assist the courts concerning matters that are outside the knowledge and experience of the court. Using the same example, a psychiatric expert witness may give an opinion as to the advisability of admitting such a patient and provide expert testimony about alternatives to admission.

a. Whether or not the patient was admitted under the Mental Health Act is a matter of fact. Although a psychiatrist could give evidence as to this fact by exhibiting the various Mental Health Act documents to a witness statement, and thereby would be a witness to fact, in practice this evidence is more likely to be given by the Mental Health Act manager or administrator.

The word 'expert' is a term of art in law and it derives its meaning from the common law of a number of jurisdictions. An expert can testify to a body of knowledge and experience that is sufficiently organised and recognised; of which the court or jury members would not have knowledge or experience; and that will be of assistance to the court.

An expert has sufficient knowledge of the subject acquired by study or experience; they may have professional qualifications in their subject, but professional qualification does not necessarily confer 'expert' status. The test is one of 'skill'. Skill is often acquired by study and the acquisition of professional qualifications, but it can also be acquired by experience alone, which amounts to repeated contact with the subject in the course of the expert's work. And such skill has to be paired with reasoning ability sufficient to inform the court or tribunal.

Specifically in the context of expert evidence given within professional regulatory proceedings, although on its own a failure adequately to explain an opinion might not amount to 'impaired practice' as an expert, as the case of *Pool v General Medical Council* [2014] illustrates (see p. 9), it may be relied upon, along with other matters, in deciding whether inadequacy of an expert's conduct was sufficiently serious to amount to misconduct.

Otherwise, the expert has to be able to communicate their knowledge in a way that is intelligible and convincing, as well as being robust enough to withstand testing under cross-examination.

The current legal approach to expert witness work supports the principle that, beyond being skilled as a result of study or experience in a particular medical domain, there is 'expertise in being an expert witness' (see the general thrust of Woolf, 1996). This includes being able to demonstrate an adequate understanding of the role and responsibilities of the expert witness and the ability to communicate effectively in a legal setting.

The courts decide whether expert evidence is required, or justified, and whether a particular 'expert' is qualified by study or experience to assist. Hence, just because someone is a consultant does not, for example, determine that they have the knowledge or experience that the particular case requires. This test of admissibility will usually consist of evidence that the expert has knowledge or experience of the disorder or issue at hand, acquired either through training, clinical practice or research.

The courts also require the expert to provide an objective, independent and impartial opinion. This can be challenging for a psychiatrist who purports to give testimony on a patient already professionally known them; and such relationship must be made clear to the court (see p. 13).

Identifying oneself as a potential expert

Giving expert testimony is part of medical practice and the General Medical Council (GMC) provides general guidance on this in *Good Medical Practice* (GMC, 2013). It also provides supplementary, and more detailed, guidance (GMC, 2008). It follows that the provision of expert psychiatric evidence may come under the scrutiny of the GMC, which can lead to a finding of impaired fitness to practise.

For example, as in *Kumar v General Medical Council* [2012], a psychiatrist whose acts and omissions as an expert witness are found to be reckless and misleading and who is found to have acted below the standard of a reasonably competent consultant psychiatrist acting as an expert witness may be subject to sanction. The sanction imposed by a fitness to practise panel of the GMC in the case of Dr Kumar was that his registration should be suspended for 4 months.

The case of *Pool v General Medical Council* [2014] concerns a psychiatrist who prepared a psychiatric report on a paramedic for fitness to practise proceedings. A fitness to practise panel of the Medical Practitioners Tribunal Service found that, prior to producing his report, Dr Pool did not make it clear that he was not an expert in the field of general adult psychiatry; and also he did not make it clear that his inclusion on the GMC's specialist register was in the specialty of the psychiatry of learning disabilities, rather than general adult psychiatry. The panel found that, in his report, he failed adequately to explain the basis of his opinion that the paramedic's fitness to practise was wholly and indefinitely impaired; he failed to restrict his opinion to areas in which he had expert knowledge or direct experience and to matters that fell within the limits of his professional competence; and he failed to state where a particular question fell outside his area of expertise. The panel also found that, at a hearing before the Health Professions Council, he displayed an inadequate understanding of the role and responsibilities of an expert witness; and he failed to admit to the Council that he did not have appropriate expertise in the field of adult psychiatry. The panel went on to find that such failures were sufficiently serious as to amount to misconduct, so it suspended his registration for 3 months.

On appeal, the finding of misconduct was upheld, although for the sanction of suspension was substituted a direction that, for 3 months, Dr Pool should be subject to a condition on his registration that he should not accept instructions to act as an expert witness in fitness to practise proceedings.

Whether or not a psychiatrist has the appropriate or relevant expertise for a particular case is for the parties and/or the court or tribunal to decide. However, in making this decision it has to be able to rely on the information provided by the potential expert; and in the criminal jurisdiction there is a requirement, within the Criminal Procedure Rules (Ministry of Justice, 2014), that the expert should define their area or areas of expertise.

In many cases a curriculum vitae (CV) should provide information sufficient to demonstrate required expertise. This should include the year of qualification as a doctor, the dates of postgraduate qualifications, section 12 status, specialist registration identifying the particular psychiatric specialty or specialties, posts and positions held, publications and, where applicable, contributions, for example, to Royal College of Psychiatrists reports, committees of inquiry, such as homicide inquiries, and reports for health or prison ombudsmen.

The judgment in *Pool* makes it clear that the court can expect an expert to be in the 'relevant' category on the GMC's specialist register;[b] so it is of critical importance that the specific category of psychiatric specialisation is identified in the expert's CV. As there will be cases for which more than one category of specialisation may be relevant, and cases where it is not obvious what the relevant specialty is, great care needs to be taken in explaining the training, qualifications and experience that are the basis of the doctor's registration, and in explaining why training, qualifications or experience outside that specialty may be appropriate in a particular case. Notwithstanding the judgment in *Pool*, the Royal College of Psychiatrists recognises that, although a doctor's category of specialisation on the specialist register is evidence of achieving skills and a particular level of competence, this may have been many years earlier and many doctors, over their careers, move practice and acquire considerable expertise in areas not recognised by their category on the specialist register, but evidenced through their continuing professional development and the processes of appraisal and revalidation.

b. The Postgraduate Medical Education and Training Order of Council 2010 lists five recognised psychiatric specialties in the UK: child and adolescent psychiatry; general psychiatry; forensic psychiatry; psychiatry of learning disability; old age psychiatry; and psychotherapy.

In some cases involving older persons the most appropriate expert may be a psychiatrist whose specialty is old age psychiatry; but in some such cases the most appropriate psychiatrist may be one whose specialty is forensic psychiatry. In the case of an older person with a learning disability (now more commonly known as an intellectual disability) who is involved in criminal proceedings, the most appropriate expert might be an old age psychiatrist, a forensic psychiatrist or a learning disability (intellectual disability) psychiatrist. In a personal injury case involving a working-age adult the relevant specialty might be general psychiatry or forensic psychiatry. In many cases there is a preference for forensic psychiatrists because their forensic skills are regarded as desirable, if not necessary, when evaluating evidence, but this preference may be based on a misunderstanding of the analytical skills of psychiatrists who are not forensic psychiatrists.

Again arising from the judgment in *Pool*, the instructing party needs to be clear as to the setting in which the expert works, or has worked (but see also concerning 'recency' on p. 26); this is because a psychiatrist who works in an in-patient setting, for example, and who has had no sufficiently recent experience of working in a community setting, may be considered as lacking expert knowledge of patients in a community setting. This may not matter if the issues are the same regardless of the setting; but if it is arguably the case then the psychiatrist should set out the reasons why they consider that they are qualified to provide an opinion in relation to a person being assessed who is in a different setting from that in which the psychiatrist works.

The potential expert ought also to disclose any information that could significantly detract from their credibility as an expert; notably, in criminal cases the parties are under an explicit duty to disclose such information.

The foregoing list of types and levels of experience is not exhaustive; and the provision of a full, detailed and accurate CV should be only the starting point of a written dialogue with the instructing party concerning the relevance and sufficiency of the psychiatrist's training, qualifications and experience for the particular case. Hence, the psychiatrist must ask, before accepting instructions, for sufficient information about the nature of the case and the issues to be addressed in order to be able to take an informed view as to whether they can validly be seen as 'expert' or are 'the right expert'. The psychiatrist should ask whether there is any further information, or any clarification, that can they can provide to ensure that the instructing party is sufficiently confident that they have identified an, or the, appropriate expert.

Hence, before finally accepting instructions the psychiatrist should ask the instructing party to confirm that they are satisfied, for reasons clearly identified, that the psychiatrist has the necessary training, qualifications and experience. It might also be advisable for the psychiatrist to state that, if the instructing party has any doubt as to the appropriateness of their training, qualifications or experience, they should make this clear. This should all help the psychiatrist to avoid giving evidence on matters outside their area or field of expertise.

If a psychiatrist is uncertain as to whether they are an appropriate expert then it may be advisable to seek the advice of a peer group member or a medical defence organisation.

If a psychiatrist has any persisting doubt as to the sufficiency of their training, qualifications or experience for a particular case, they should err on the side of caution and decline the instructions.

Sometimes a court or a tribunal needs to deal with the appropriateness of a proposed expert as a preliminary issue, as happened in the case of Dr Pool; and so it may hear evidence from the psychiatrist as to their training and experience. In such a circumstance it is important for the psychiatrist not to feel that their expertise as a psychiatrist is

being challenged. Even if the format is adversarial, with the parties' representatives, as well as the judge, chair, or legal assessor asking searching questions, the psychiatrist should see the process as necessary inquiry on the part of the court or tribunal in order to assist it in identifying the right expert, and where appointing the wrong expert might result in delay, added expense and, at worst, injustice or damage to the psychiatrist's reputation.

It is recommended that appropriately trained professionals be available to provide expert testimony in relation to children and adolescents, in the criminal jurisdiction, as well as in the family and civil jurisdictions. Psychiatrists who prepare reports for the courts in relation to children and adolescents under 18 years of age must be able to show that they have appropriate training and expertise, especially with regard to developmental issues and child-specific challenges. Evidence of such training and experience is inclusion on the GMC's specialist register in the category of child and adolescent psychiatry.[c]

c. This view was particularly endorsed by the Adolescent Forensic Psychiatry Special Interest Group of the Royal College of Psychiatrists during the consultation process for this report.

Not only do psychiatrists have a duty not to give evidence or opinion on matters outside their area or field of expertise, they also have a duty to give account of a full range of opinions on any issue; this is usually referred to as the duty to state 'the range of (reasonable) opinion'. There is then a subsidiary duty on the part of the expert properly to explain why their own opinion is to be preferred. This will include not only referring to evidence that goes against their opinion, but also explaining why that contrary evidence is not sufficient to invalidate their opinion. Where there is no available source for the range of opinion, the expert has to make clear that the range that they summarise is based on their own judgement, and also to explain the basis of that judgement.

It is not unusual for courts of any sort to ask doctors questions that are outside their expertise and more properly the province of a different expert witness. Psychiatrists giving evidence need to be clear what role they are performing in court, and be prepared respectfully to advise the court that the question would be more properly addressed to another expert, or that it is outside their area of skill or knowledge. In coroners' courts, mental health tribunals, childcare proceedings and criminal courts, doctors are often pressed in this way. If so pressed by a judge or coroner to answer, then the psychiatrist might decide to do so, although it would be wise to reiterate that they are answering reluctantly and to acknowledge the conflict with professional guidance.

The treating psychiatrist as expert

International codes of ethics and the GMC generally advise against the treating clinician giving expert testimony because of the potentially negative effect on the therapeutic relationship and/or because of the risk of lack of objectivity or the perception of such lack. For these reasons, it is generally good practice for treating psychiatrists not to provide expert testimony about 'their' patients.

However, in highly specialist fields of clinical care such as forensic psychiatric practice and secure care of some groups of patients, this guidance may be impossible to adhere to, either for practical reasons or because law effectively requires such evidence (for example, in regard to sentencing recommendations under mental health legislation).

Hence, the need for impartiality also needs to be weighed against the need to have the right professionals commenting on care; and there may also be human resource problems in highly specialised fields. Forensic psychiatrists working in secure settings may have long-term relationships with patients who are also defendants in criminal trials; and they may be the appropriate expert in relation to catchment area placements and treatment resources.

However, in relation to evidence going to verdict, for example, 'diminished responsibility' in a murder trial, it may well be advisable that the treating clinician does not accept instruction as an expert for either side.

The situation is therefore complex in relation to forensic patients and services.

At mental health tribunals, the treating psychiatrist in their 'responsible clinician' role arguably acts as both professional witness and expert witness. Whether giving evidence to the tribunal as a professional witness or as an expert witness, the treating psychiatrist needs to be aware of what is often a fundamental conflict between the interests of the patient, who wants to be discharged, and the interests of the treating psychiatrist, whose role is to argue in favour of the patient's continued detention. On the one hand, the treating psychiatrist has a duty to assist the tribunal, but on the other they have to maintain a positive therapeutic relationship with a patient with whom they must continue to work constructively once the hearing is concluded. There is a further potential for a conflict of interest if the treating psychiatrist

fulfils the role of the representative of the detaining authority. It is no longer the case that automatically the responsible clinician does represent the detaining authority (see *R (on the application of Mersey Care NHS Trust) v Mental Health Review Tribunal* [2003]), thereby giving them a right of 'cross-examination', but this can still occur. It is therefore important that the responsible clinician makes clear at the outset of the hearing that they do not represent the detaining authority (or, that they do, on such rare occasions). Where conflicts of interest cannot be avoided, being open and explicit about them is likely to defuse many potential problems (see Jones *et al*, 2013).

Where a psychiatrist has been asked to prepare an expert report on a patient in, or previously in, their care, it may be helpful to consider the following questions:

- At the outset of my involvement with this patient, was I in a position to obtain their consent to produce an expert witness report and did I obtain that consent?
- Does the patient now consent to my preparing a report for legal proceedings?
- Do any conflicts arise between my duties to my patient and to the court?
- Do these conflicts prevent me from fully complying with my duty to the court?
- Is it possible to restrict myself to specific issues that do not cause conflict?
- Would an independent expert be preferable for any of the instructions that are intended for me?

The ethics of being an expert

There is no doubt that, as a matter of ethics and law, the first duty of the expert is to the court and to the process of justice (for example, see Practice Direction 25B (Lord Chief Justice, 2014a).

As already indicated, psychiatrists called as experts have both ethical and legal duties to assist the court in its deliberations; and there is certainly no duty to assist the individual being assessed to win their case or to gain a good outcome. There is a duty only to work to a high clinical standard and to form an opinion fairly and honestly about matters relevant to the questions addressed.

However, psychiatrists must still pay attention to their medical ethical duties. In addition to dealing with the person they are assessing fairly and with respect, particularly respecting their autonomy, they need to have regard to the person's welfare (beneficence) and to the prevention of harm (non-maleficence), albeit they are seeing the individual in a legal context.

If they ascertain that the person they are assessing has a medical condition for which they are not receiving any, or any appropriate or any adequate, treatment they should inform the person and advise them to consult their ordinary medical practitioner. Reference to this advice should be made in the report and, as a safeguard for the expert, the report should include a recommendation that the person's ordinary medical practitioner be informed by those instructing the expert, and a request that the expert should be told if, for whatever reason, this advice is not followed. Occasionally the psychiatrist may consider it appropriate to communicate directly with the person's ordinary medical practitioner. This should be done with the person's consent and the psychiatrist should communicate only sufficient information for the doctor to act on the psychiatrist's findings; the expert report should never be disclosed. Except in cases of urgency, it is wise to advise the instructing solicitors before communicating with the person's doctor. In any event, a copy of the letter or email, or a note of the telephone call, should be provided to the instructing solicitor. Very exceptionally, for example where there is a risk of imminent serious harm to the person or others, it may be necessary to act without the person's consent or the approval of the instructing solicitors (Royal College of Psychiatrists, 2010). If time permits, it may be advisable, in such a circumstance, to take the advice of a medical defence organisation.

In relation to children, young people and vulnerable adults, any identified child protection or safeguarding issues should be clearly delineated, even though they may be beyond the issues about which opinion has been sought. The ordinary duties of disclosure applicable to such individuals will apply.

When children and young people are being assessed, consideration of psychiatric issues relevant to fitness to plead and how to promote their effective participation (in either criminal or civil proceedings) may also need to be actively considered, even when this has not been specifically requested by legal representatives. Other than in exceptional circumstances, psychiatrists who have not received specific training in child and adolescent mental health should not undertake assessment of a young person's fitness to plead, as this is a highly specialist area requiring considerable experience of child development.

If there are concerns that the expert's testimony could lead to a negative outcome for the person assessed (see pp. 18–19) the expert might wish to ensure that the person assessed has proper access to medical and psychiatric care and good legal representation.

It is recommended that experts give people to be assessed an information sheet about the nature and purposes of the assessment and the limits of confidentiality. Most assessing experts give verbal advice about the limits of confidentiality; a minority record this in their opinion, and an even smaller subgroup ask those assessed to sign a document that indicates that they have understood and consented. This is not yet an established standard, but it may be so in the future. Such a document can easily be combined with the information sheet.

Written consent obtained on a form that is part of a detailed document setting out the nature, purpose and potential consequences of the psychiatric evaluation may become particularly important in cases where, as a result of changed funding arrangements, people act without legal representation. Such 'litigants in person', as they are known, are increasingly common in the family courts. They are particularly likely to misunderstand the duties and role of the expert and believe that they are 'buying' an opinion favourable to their case. A well-constructed, and signed, consent form can assist both the litigant in person and their instructed expert in the event of a complaint.

Also in regard to litigants in person, for example where this arises because of lack of legal aid funding in a family court, clinicians may consider themselves to be on the horns of a dilemma in that they may find the lack of a legal intermediary to pose practical problems, and yet to refuse instructions from such litigants may result in their inability properly to obtain expert evidence that the court should hear.

It is a well-known aphorism that justice delayed is justice denied, and the courts' overriding objective of justice includes dealing with cases

expeditiously. Therefore the doctor's duty to the court determines that their report must be produced in a manner that not only addresses the questions asked by the court, but does so within a time scale that the court determines. This also applies to communications subsequent to the provision of the report.

Potentially negative testimony

Experts sometimes give testimony that leads to negative outcomes for those on whom they report: for example, in relation to sentencing for violent crime, an expert report might contribute to a judge's determination of the type and/or length of sentence; or in a child protection case, expert testimony may contribute to the decision permanently to remove a child from their parents (and this may be perceived by the parents as a negative outcome). Some psychiatrists may feel that giving such testimony conflicts with their ethical duties to benefit people whom they see and evaluate; but often, or usually, it will not be possible to predict the outcome until the evaluation is complete.

One perspective on this ethical tension has been to argue that those assessed for court proceedings are not 'patients'. Hence, several international codes of ethics have taken the view that the expert's relationship is not a therapeutic one, and therefore the person being assessed (whether a party in civil proceedings, or a defendant in criminal law or a claimant in a personal injury case) is not a 'patient', so that their welfare is not the expert's primary ethical concern. Hence, on this view the doctor acts not as a doctor but as a 'forensicist', it is argued. However, albeit the relationship is directed towards a legal purpose, as already indicated there remains always in the background the usual ethical medical duties (see p. 15). In addition, it is argued that all citizens, including doctors, have a duty to assist the pursuit of justice.

That is, even if the purpose of the interaction between the expert and the assessed is not directly therapeutic, this does not mean that none of the traditional medical ethical duties is operative, such as respect for autonomy (expressed by the obtaining of informed consent/refusal to evaluation and advising on the limitations of confidentiality).

Experts need to be aware that, even if they have informed the person being assessed that they are 'not being a doctor' in the ordinary way within the process of assessment, they will go on to use medical skills and techniques, and this is highly likely to override any initial understanding of the warning into which the person may have been drawn.

Psychiatrists may refuse to give expert testimony (unless made subject to a witness summons) in cases where they believe that their testimony may 'do harm' to an individual. However, they should advise instructing

solicitors or the court why they are doing so; and be prepared to recommend alternative experts in the area or field, even if they know they do not share the same view.

Since there will always be some risk of negative outcomes for the person assessed, and since the degree of risk of a negative outcome will often be unpredictable, there is a duty on the expert to make it clear to the person that:

- they can refuse evaluation or assessment
- the report is not confidential and might be seen by any number of professionals or legal bodies
- they do not have to answer all, or any, questions
- the expert is not there to provide them with treatment.

Information governance and confidentiality

The report, once completed, generally 'belongs' to those who have given instruction and not to the person assessed. In the criminal court, the defence, the prosecution or the court will 'own' the report. In the family court, where a single joint expert has been appointed, the report belongs to the court. In private law family proceedings and where the report has been obtained by a litigant in person (p. 15), however, the subject of the report may 'own' the report. In any event, the information within the report does still 'belong' to the person assessed, and experts should strive to respect the normal duties of confidentiality. This should include proper procedures for the secure storage of documents and records, and the use of passwords and/or encryption to ensure the security of electronic files. The duty of respect for the process of justice determines that experts should retain all their notes. Although the period required for this varies according to the nature of the case, for example ranging in criminal cases from 1 to, for serious cases, 20 years, records should be retained in all cases for at least 7 years in the event of complaint or litigation.

Reports should not be disclosed without the assessed person's consent and/or the consent of their legal representatives, or unless directed by a court. In many family cases only the court can consent to the disclosure of the expert's report. Where it is in the assessed person's interests, or where there are concerns about risk of imminent serious harm, it is justifiable to seek permission to disclose the contents of the report. However, experts are under a general duty of confidentiality not to disclose the content of their reports; and they may need explicit permission from the courts to disclose any material to any other party. For example, reports prepared by experts in the family court cannot be disclosed without express permission of the court, but in private or civil law proceedings, it might be sufficient for the assessed person to consent. If disclosure is sought by a third party, it is advisable, in any event, to seek the view of the instructing solicitors or court.

The consent of children should be assessed by a suitably qualified professional – capacity issues and specific caveats apply to those aged 16 and 17 (their decision-making processes might still be affected by developmental immaturity), and for those under 16, issues of Gillick competence will need to be addressed. Parental consent might also need to be considered.

Only in exceptional circumstances relating to the prevention of violence or harm to others, where there is an imminent significant risk of serious harm or where there is a duty to intervene immediately using statutory powers, should material from an expert report be disclosed to any third parties without consent or discussion with legal parties. Experts should expect to defend this decision legally and professionally (see also p. 15). Specifically, there is a right to breach confidence where there is a significant risk of serious harm to others in the absence of such breach (see *W v Edgell*, [1990]).

In all cases and legal settings, it is important to maintain respect for confidentiality, honesty and impartiality. The risk of breach of this may be greater in cases that have a high media profile.

Taking instructions and evidence bases

In terms of ethics and law, psychiatrists have a duty not to give evidence or opinion on matters outside their area or field of expertise, as well as a duty to give account of a full range of opinion, or reasonable opinion, on any issue, using the best-quality empirical evidence. It is therefore their duty to include an account of any evidence that goes against their opinion.

The expert should not take instructions that go beyond psychiatric expertise and evidence-based data: for example, responding to a request to determine whether an individual is telling the truth, or diagnosing a novel psychiatric condition for which there is no evidence base.

The standard for assessing the reliability of psychiatric testimony has not yet been tested in the courts. However, as the recently amended Criminal Procedure Rules, by way of their amended Practice Direction (Lord Chief Justice, 2014b), have imported the reliability tests proposed by the Law Commission (2009) it seems reasonable to advise psychiatrists to use the 'established psychiatric practice' test. This is because one of the tests is: 'whether the expert's methods followed established practice in the field; and, if they did not, whether the reason for the divergence has been properly explained'. In discussions of this matter as part of the Law Commission's working group, one of us (N.E.) suggested that this factor, in tandem with the need for the expert to provide an opinion as to why their opinion is sound, summarises 'particularly well what should be the approach to medical evidence which is psychiatric in nature'.

The duty of impartiality requires the psychiatrist to justify and explain any modifications they have made to ordinary clinical interview or other assessment technique.

The best ethical and legal guidance to date advises that it is the duty of any psychiatrist to assist the court to 'effect' justice and never to seek to 'affect' it. Hence, psychiatrists need to be able to reflect on how their own values might influence the opinions they give, to the detriment of their 'honesty' in giving such opinion.

Just as in publishing there is attention to competing interests, so psychiatrists may need to excuse themselves from giving testimony in cases where they have competing or conflicting interests – and commissioners and potential treating doctors will need to liaise at an

early stage to address any conflicts in advance. Psychiatrists who act as experts have duties additional to their general ethical duties: namely, to be honest, impartial and as objective as possible.

There have been recent attempts by the legal system to improve the quality of instructions to experts. Experts should say if they consider instructions to be insufficiently clear; and it is open to experts to refuse to take instructions that remain poorly worded or unclear. Instructing solicitors often welcome advice about how best to set out the questions on which an expert can comment.

Experts should also consider whether they can complete the report in the time given, say if the time frame is unrealistic and refuse the case if it is likely that they cannot comply with the time set. New rules for court proceedings mean that where people involved in legal actions are adversely affected by experts who cause delays, experts are at risk of financial penalties such as a wasted costs order.

Child protection cases

There has been media criticism of experts in child protection cases, both paediatricians and child psychiatrists. Although not all of the criticism is well founded, there are real concerns about psychiatrists who, specifically in relation to child protection cases:

- give evidence beyond their expertise
- give testimony that is out of date, not properly evidenced or lacking an empirical knowledge base
- address questions that are the province of the judge or other fact-finding body
- provide biased testimony, through intrusion of personal values into the substance of their expert testimony
- fail to understand that in criminal cases involving young defendants, there may be other child welfare and protection issues that might give rise to additional legal actions under child protection legislation.

The GMC offers guidance for doctors involved in expert testimony, including child protection procedures (GMC, 2012). Psychiatrists giving evidence in the family courts need to be able to show that they have the necessary training and expertise in this complex field. Adult psychiatrists cannot assume that they can validly comment on parenting capacity, and child psychiatrists may not be able validly to comment on risk in adults.

There are now established requirements (Lord Chief Justice, 2014a) that experts in family cases will have appropriate knowledge; be active in the area of practice or have sufficient experience of the issues; have relevant qualifications; have received appropriate training; and be compliant with safeguarding requirements.

Establishing expertise: appraisal, revalidation and licensing

Appraisal directed towards revalidation requires that all aspects of a doctor's work be assessed. And it is the responsibility of the 'responsible officer' reporting to the GMC to ensure that all such work has come within the appraisal process, including work conducted outside of any contract of employment with the organisation within which the responsible officer sits.

Hence, there is a duty on psychiatrists who give expert testimony to ensure that such work is included in their appraisal and revalidation (e.g. multi-source feedback could include responses from the instructing lawyers, counsel, the other party's expert(s) and the individuals assessed by the psychiatrist, as well as potentially including comment by counsel and judge on the quality of oral evidence given). There is also a duty on them to show that they have maintained their skills and competence in their field of expertise. They must be able to show to their responsible officer that they have demonstrable expertise in the field or fields claimed. Such requirements are now included in the standards for expert witnesses in children proceedings in the family court (Lord Chief Justice, 2014a).

It follows that expert witness work must, in its own right, be the subject of appraisal and revalidation, including via the panoply of appraisal methods such as peer review via case-based discussions of expert witness cases.

It could be suggested that it might not be necessary to hold a licence to practise in order to undertake expert witness work. However, since the basis for being permitted to give expert evidence is through the exercise of clinical skills, that would seem to suggest that good practice requires that such skills be subject to appraisal and possession of a licence to practise is evidence of this. Indeed, the standards for expert witnesses in children proceedings in the family court (Lord Chief Justice, 2014a) include a requirement that medical experts hold a licence to practise.

The medical defence bodies have not so far stipulated that they will not cover medico-legal work if the doctor is not licensed. The exception is the Medical Protection Society, which will not cover an unlicensed doctor where the legal issue under consideration is 'condition and

prognosis'. However, that would not seem to override the core ethical professional requirement of appraisal and licensing.

Where a psychiatrist uses clinical history-taking and examination skills in the course of a medico-legal assessment, it is the position of the Royal College of Psychiatrists that it would be ethically, even if not legally, unwise to do so without holding a license to practise. Indeed, notwithstanding the positions of the medical defence organisations, which are determined by insurance and indemnity considerations, the College's position is that, other than exceptionally (see below), psychiatrists who provide expert evidence, even in cases where there is no clinical contact in the form of history-taking and examination (such as in the preparation of some 'breach of duty' and 'causation' reports), should hold a licence to practise.

The possession of a licence also gives some assurance, via appraisal, that the psychiatrist is up to date with their continuing professional development and in good standing with their responsible officer.

The psychiatrist should also be able to demonstrate that they are active, clinically or academically, in the particular area of practice, or have been so sufficiently recently to allow for knowledge of any developments in the area, or otherwise have sufficient experience of the issues. This should be reflected explicitly in the psychiatrist's CV in order to inform the dialogue between potential expert and instructing solicitors that is necessary to ensure that the court gets the right expert.

Where the expert evidence does not relate to clinical care, the requirement of 'recency' might not apply in the same way; for example, where assessment is essentially in terms of diagnosis or solely applied to questions of criminal culpability or responsibility.

Exceptionally, for example in a case of alleged medical negligence, the most appropriate expert might be a retired and no longer licensed psychiatrist who was in practice at the time of the alleged negligence.

Trainees should undertake report writing only under direct consultant supervision. Their report should make this plain, and also clearly identify the supervisor and their supervisory relationship. The supervisor also needs to be fully aware of their own legal responsibility for the report's accuracy, reliability and validity.

A strict reading of *Pool* (see pp. 9–11 above) might suggest that being an expert witness is inconsistent with any status below consultant; yet such a reading would inhibit any training of junior psychiatrists in expert witness work, even those in higher specialist training in forensic psychiatry. Notably, the competencies that higher forensic trainees are required to achieve, as defined by the College, include receiving and negotiating instructions to prepare a report and preparing reports for courts of law, specifically coroners, criminal and civil.

Finally, expert witness work should not be taken up *de novo* after retirement without training and mentoring.

Psychometric testing

Some psychiatrists include psychometric testing as part of their medico-legal assessments. Where such tests have been carried out, the expert should state the methodology used and, if appropriate, by whom the tests were administered and under whose supervision, summarising their qualifications and experience. In practice, this means that, where tests have been carried out by a psychologist who is not preparing a report in their own right, the psychiatrist has to identify the psychologist, state under whose supervision they carried out the tests and summarise the psychologist's qualifications and experience.

Often, which is preferable, the psychologist will have been separately instructed by the lawyers in the case, usually on the advice of the medical expert, in which case the psychologist's report should be available to the court.

Experts have a duty to ensure that they obtain consent from the individual assessed for the use of any instruments, which should be scientifically validated and evidenced as reliable. This is particularly the case in relation to risk assessment tools. No expert should administer a psychometric tool for which they have not been properly trained; and the expert should be able to provide evidence of training if requested by the court. In practice, an expert who uses a published instrument or tool should be prepared to be cross-examined on its validity and reliability by a cross-examiner who is assisted by an expert who is qualified to administer the instrument and/or is familiar with the literature relating to that instrument.

Other ethical issues

If experts have concerns about the conditions in which a person being assessed is held, then they should report this to the official responsible for the detention placement and to those who provide medical cover to the establishment. However, they should still carry out the required evaluation, in the interest of the justice process, unless the circumstances would invalidate the assessment.

Psychiatrists may occasionally be asked to prepare reports without consulting with, or otherwise directly assessing, the subject of the report. These may be individuals who will not attend for assessment. This will often be ethically justifiable because it assists the court to achieve justice in the case. Except where the expert's opinion is sought outside the litigation process, for example in commenting on another expert's report, such a report should not be prepared without either the consent of the subject of the report, the agreement of the parties to the litigation or an order from the court. Where there has been no personal assessment of the individual concerned, the report should make this clear. It should also state that the report is an expert commentary on materials provided and not a psychiatric report about the individual as such. It is also advisable to point out that the psychiatrist is willing to consult with the subject of the report and, if appropriate, to amend their opinion in the light of their findings on assessment.

In some circumstances a psychiatrist may be asked not to provide a report for the court, but to offer a critique of the report of another expert from a solely 'adversarial' perspective, in the role of 'expert advisor'. Effectively this amounts to 'advice to counsel' (and not an 'expert report'). This is justifiable on the basis that lawyers for one side have a right to expert advice on the expert report of a doctor for the other side, given that the lawyers cannot know, for themselves, what errors or weaknesses there may be in the report. However, again, the document submitted should be clearly headed 'advice to counsel' and the preamble should make plain the adversarial nature of the exercise undertaken.

Psychiatrists concerned about potentially having a negative effect on litigants (thereby contravening the requirement 'first do no harm') may withdraw from particular classes of expert witness work. However, this may leave the courts increasingly reliant on a pool of experts who lack such qualms, putting justice at risk.

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