

After *Pool*: good practice guidelines for expert psychiatric witnesses[†]

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SUMMARY

Acting as an expert psychiatric witness can be rewarding, but there are potential costs and pitfalls, such that the role should be undertaken only in an informed manner. With reference to the recent disciplinary cases of Dr Richard Pool and Dr Waney Squier, and a judgment of the Supreme Court, advice is offered to potential expert psychiatric witnesses. Suggestions are made as to training, the negotiation of instructions, the citation of published literature, the construction of expert opinion and how to ensure compliance with the ethical duties of the expert witness.

LEARNING OBJECTIVES

- Understand how psychiatric trainees can be prepared for assisting the courts and tribunals in the administration of justice
- Appreciate the importance of engaging in a frank discussion with potential instructing solicitors, prior to instruction, regarding areas of expertise and working knowledge, providing a balanced interpretation of the psychiatric literature and giving reasoned opinions that withstand logical analysis
- Know what processes can be used to enhance compliance with the ethical responsibilities of the expert psychiatric witness

DECLARATION OF INTEREST

K.R. sometimes receives remuneration for conducting workshops on court procedure such as those mentioned in this article. The purpose of this remuneration is to defray expenditure on costumes and props and producing related educational materials.

In our previous article (Rix 2017) we provided reassurance to psychiatrists, and other doctors, that the expertise necessary to assist courts, tribunals and other similar bodies is defined legally not by status criteria, but by a sufficiency of skill, acquired through training or experience. In this article, we discuss mainly some of the practical implications of the cases analysed in our previous article. We do not offer a comprehensive consideration of all aspects of the role of the expert psychiatric witness, for which readers are directed to the Royal College of Psychiatrists' report CR193

(Rix 2015a) and to texts such as *Expert Psychiatric Evidence* (Rix 2011a), *Forensic Psychiatry* (Eastman 2012) and *Forensic Psychiatry: Clinical, Legal and Ethical Issues* (Gunn 2014).

Force or choice

All doctors are vulnerable to being called, even under subpoena, to give expert evidence of fact to courts. This is more commonly known as 'professional' evidence – evidence concerning factual findings about a patient they assessed and/or treated. By contrast, doctors choose whether or not to provide 'expert' evidence of opinion – to act as expert witnesses. However, for those who choose not to do so it should be emphasised that there is a view, well articulated in an early treatise on medical ethics (Percival 1803), that doctors as 'citizens qualified by professional knowledge' are obliged 'to aid the execution of public justice'. Hence, the circumstance may arise in which the court needs expert assistance in a highly specialised area about which few doctors have sufficient knowledge or experience, and where it is therefore necessary to call for that assistance from a doctor with little or no experience as an expert witness, including a doctor ordinarily not inclined to engage in such work. Refusal on the part of all of the few doctors qualified to assist might therefore reasonably be seen as 'unethical'.

For those who contemplate undertaking expert witness work as a matter of choice, it is worth considering the rewards, and also the costs and pitfalls.

First and foremost, for most experts there is the satisfaction of knowing that they have sought to assist in the administration of justice.

Further, the work is intellectually challenging and satisfying, including in terms of exercising both your expertise and your ability to communicate this under usually highly competent scrutiny, albeit at times it can be harrowing, a cause of self-doubt, and distressing.

It can also be financially rewarding, although some work is remunerated at uneconomic rates; the ethical expert needs to be willing to do some work *pro bono*, and, unless wholly self-employed, they may need to negotiate a reduced-hours

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[†]For a related article see Rix K, Haycroft A, Eastman N (2017) Danger in deep water or just ripples in the pool: has the *Pool* judgment changed the law on expert evidence? *BJPsych Advances*, 23: 347–57.

contract with their employer, or pay some of their fees to their employer. For most experts the major disadvantage is accommodating the work in an already busy diary.

Although in many cases lawyers are required to ascertain the availability of their experts at an early stage and take into account their clinical or academic obligations when fixing trial dates and deciding when to call them to give evidence, there will sometimes be inconvenience at least, especially in cases that have to adhere to strict timetables (such as family cases involving children). And it is more than just inconvenience if the expert has had to book leave from their employment for a court case which then settles at short notice.

For a thankfully small number of experts, the biggest and most serious cost encountered is to reputation, and even their whole livelihood, if they have performed badly or improperly and become subject to the ‘fitness to practise’ proceedings of the Medical Practitioners Tribunal Service (MPTS), by way of incurring judicial criticism or complaint by one of the parties to a case in which they were involved, or if sued by the party that instructed them in a case.

Training in expert witness practice

Knowledge of law and legal process

It is necessary to have more than just medical knowledge and experience in order to be a competent expert witness. It is necessary also to have an understanding of the distinctions between medical and legal constructs and process, in terms of the ‘frontier’ between what are two very different domains. That is, it is necessary to be a ‘frontiersman’ between the countries of ‘medical-land’ and ‘legal-land’; and to understand, and acknowledge, that medical evidence is admitted solely as probative of a given legal construct, or to address a purely legal question.

Hence, medical evidence, which derives from investigative science, is applied mainly to adversarial legal process^a within which ‘real’ medical constructs, which arise from medicine’s pursuit of human welfare, are applied to ‘abstract’ legal constructs that are determined solely by law’s pursuit of justice. That is, constructs from medicine are ‘mapped onto’ any given legal definition or test, where there is usually no natural ‘congruence’ between the two (Eastman, in press); consequently, there is much room for ‘miscommunication’ in the process of giving expert evidence. Finally, whereas doctors collect ‘data’, courts admit ‘evidence’. And some data that are important in determining medical opinion in a case may be excluded as evidence, on grounds of

fairness. That is, courts seek not ‘the truth’, but ‘a truth’, determined by what evidence is admitted, who bears the burden of proof and what is the standard of proof. And all of this seems alien to an investigative doctor grounded in science.

Hence, it is necessary to be familiar with some of the law of evidence, the role and responsibilities of the expert witness and the particular requirements of various courts or tribunals as to the receipt of expert evidence. Depending on the nature of the case, it may also be necessary to understand, and be able to apply your evidence to, the law as set out in statutes or precedent cases.

Opinions also need to be put forward with sufficient reasoning and explanation for the court to understand why the expert is of a particular opinion and is not elsewhere on the range of potential opinion. The rule, akin to the requirement in mathematics examinations, is ‘show your working’. In oral testimony, the expert witness needs to be able to communicate the ‘mapping’ just described to a lay audience, be it judge or jury, with appropriate professional demeanour; such evidence from psychiatry is often particularly difficult to ‘get over’ to a jury, especially in regard to ‘functional’ (rather than ‘organic’) disorder, such as personality disorder. Training therefore needs to be directed not just at ‘mapping’ of medical diagnoses and mental states onto legal tests, but at modes of communication of disorder. Indeed, the fact that some of the best expert witnesses are also excellent teachers makes the latter point.

To achieve all of this, training as an expert witness should begin during higher training, and with appropriate supervision, the nature and extent of which will depend on the trainee’s experience and the complexity of the case. Or, if not achieved then, it needs to be acquired at consultant level, for example through courses and mentoring.

Necessary competencies

The Royal College of Psychiatrists (2017: p. 31) has identified as skills to be acquired in advanced training in forensic psychiatry the abilities to:

- Prepare ‘reports for [...] Courts of Law (coroners, criminal and civil) [and] criminal justice agencies.
- Interpret legislation and explain the implications in jargon free language at a level for the specific situation.
- Receive and negotiate instructions to prepare reports.
- Develop a formulation of a case and write report to a high standard.
- Testify as an expert witness within limits of own expertise.’

a. Exceptionally, inquests are inquisitorial rather than adversarial.

Consultant forensic psychiatrists who are approved trainers and have substantial experience as expert witnesses are well placed to provide trainees with supervised experience in the negotiation of instructions, the preparation of high-quality reports and the provision of expert oral testimony. This is similar to the ways in which trainees learn to prepare reports for the First-Tier Tribunal, Health, Education and Social Care (Mental Health) under arrangements agreed between the Royal College of Psychiatrists, the Tribunals Judiciary and Her Majesty's Courts and Tribunals Service (Rutherford 2015). However, training in giving evidence to mental health tribunals is not adequate as training to give evidence in criminal, civil, professional regulatory, coronial or family proceedings.

Training in report preparation

The experience of preparing reports can begin for all trainees with writing expert opinions based on the facts (and assumed facts) in specimen reports, and the preparation of 'ghost reports'; higher trainees can then progress to reports prepared in the trainee's own name and countersigned by the supervising consultant (Rix 2011b) (Box 1).

Particularly where reports are prepared in accordance with court rules, such as the Civil Procedure Rules (CPR), the Criminal Procedure Rules (CrimPR) or the Family Procedure Rules (FPR) (collectively 'the Rules': <https://www.justice.gov.uk/courts/procedure-rules>), there are similar requirements to:

'say who carried out any examination, measurement, test or experiment which the expert has used for the report and—

- (i) give the qualifications, relevant experience and accreditation of that person,
- (ii) say whether or not the examination, measurement, test or experiment was carried out under the expert's supervision, and
- (iii) summarise the findings on which the expert relies' (Ministry of Justice 2015: r.19.4(1)(e)).

As this clearly applies where the consultant relies on a trainee's mental state examination of the subject of the report, it must also apply where the consultant relies on the history of assumed facts that is taken by the trainee. We therefore recommend that a consultant preparing a report on the basis of such assistance from a trainee should include a paragraph along the lines set out in Box 2 and, in addition to their own one-page curriculum vitae (CV), include a similar CV of the trainee. The consultant should refer to the distinction between their own mental state findings and those of the trainee, in order to 'make clear which of the facts stated in the report are

BOX 1 Training as an expert psychiatric witness: preparing medicolegal reports

- Prepare an expert 'opinion' based on a report from which the opinion section has been removed. This can be carried out as a group exercise; prior to the group discussion, trainees can exchange and assess each other's opinions. (Trainers should assemble a library of such reports covering the range of commonly encountered psychiatric issues, e.g. fitness to plead and fitness to stand trial, mental state at the material time, sentencing a mentally disordered offender, parental mental health, psychiatric injury following accident or alleged medical negligence, alleged psychiatric negligence, testamentary capacity.)
- Attend a medicolegal consultation with the training consultant and draft a report based on the consultant's consultation with the subject of the report and consideration of all documents and materials available to the consultant.
- Conduct a medicolegal consultation under the direct observation of the training consultant and draft the consultant's report ('ghost report'), incorporating any information elicited, or mental state signs identified, by the consultant.
- Conduct a medicolegal assessment 'solo' and present history and examination findings to the consultant, who should verify them; then draft the consultant's report ('ghost report'), incorporating any information elicited, or mental state signs identified, by the consultant.
- Conduct a medicolegal assessment 'solo' and prepare a report in own name and countersigned by the training consultant, who can, if necessary, arrange to clarify or confirm the trainee's findings.

within the expert's own knowledge' (Ministry of Justice 2015: r.19.4(1)(d)). In a report prepared under the Civil Procedure Rules this requirement is reflected in the obligatory statement of truth, which includes: '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'.

BOX 2 Consultant's statement: trainee's assistance in preparing an expert report

Suggested format for a consultant's statement as to their reliance on a trainee's assistance in preparing an expert report:

In preparing this report I have relied on an assessment of the [defendant*] carried out by Dr William Battie, Specialty Registrar in Forensic Psychiatry, who is attached to me for the purposes of his higher training in forensic psychiatry. Dr Battie's qualifications and relevant experience are set out in Appendix 2. The assessment was/was not carried out under my direct supervision, i.e. I was/was not present when Dr Battie carried out the assessment. I did/did not supplement Dr Battie's assessment with my own assessment in the form of my own enquiry and examination of the [defendant*]. In the section 'Psychiatric examination' I have set out Dr Battie's findings (and distinguished these from my own mental state findings, these being the only facts within my own knowledge) [if applicable].

BOX 3 Training as an expert psychiatric witness: giving live testimony

- Become familiar with court procedure by attending court as a member of the public, sitting on the bench as a judge's marshal and participating in a workshop on court procedure (e.g. 'An Act of Lunacy' and 'The Conman and the Card Trick' (<http://drkeithrix.co.uk/psychiatrists/index.html>))
- Become familiar with oral expert testimony by attending court when experts, preferably psychiatric experts, are giving evidence and attending any pretrial or trial conferences of counsel and psychiatric experts
- Give supervised oral evidence at a mental health tribunal hearing
- Give oral evidence in court under consultant supervision (solely in terms of 'feedback' afterwards)

Reports prepared by sufficiently experienced trainees must be countersigned by the supervising consultant trainer and should include, as an appendix, the consultant's own one-page CV.

BOX 4 Examples of countersignature statement by a consultant who has supervised a trainee's report

For a mental health tribunal report, this might include (with consultant attending the tribunal hearing):

I confirm that I have supervised Dr Andrea Duncan in her preparation of this report. I am the consultant psychiatrist to whom Dr Duncan is attached for the higher training that she is undertaking as the final stage of preparation for her appointment as a consultant psychiatrist. I am responsible for supervising her training and performance, and the opinion she has expressed is also my opinion. If Dr Duncan is called to give oral testimony I will be in attendance. If it becomes clear to Dr Duncan, the tribunal panel or me that she requires assistance to expand on or clarify her answers I will be able to do so and, if necessary, take over the role of giving evidence.

For a mental health tribunal report, this might include (with consultant not attending the tribunal hearing):

I confirm that I have supervised Dr Edward Monro in his preparation of this report. I am the consultant psychiatrist to whom Dr Monro is attached for the higher training that he is undertaking as the final stage of preparation for his appointment as a consultant psychiatrist. I am responsible for supervising his training and performance,

and the opinion he has expressed is also my opinion. If Dr Monro is called to give oral testimony I will not be in attendance. However, if it becomes clear to Dr Monro or the tribunal panel that he requires assistance to expand on or clarify his answers then I will make myself available; and, if necessary, take over the role of giving evidence.

For a court report, this might include:

I confirm that I am the consultant psychiatrist to whom Dr Alexandra Morison is attached for the higher training that she is undertaking as the final stage of preparation for her appointment as a consultant psychiatrist. Hence, I am responsible for supervising her training and performance; and I have acted in that capacity in her preparation of this report. However, the opinion expressed in the report is her own, albeit I have supervised her in coming to that opinion. Only in the event that a new question were to be raised within the case that is not addressed in the report, and which Dr Morison considers herself not competent to answer, would I expect to be required to give expert evidence to the court in my own stead; albeit of course a different competent expert could be called to deal with such a question. At all times we would both be guided by any relevant court direction. My own CV is to be found as Appendix 2.

Training to give live testimony

In Box 3 we set out suggestions as to how trainees can be trained to give live testimony. One of the best ways for trainees to familiarise themselves with court procedure and the giving of evidence is to sit on the bench as a judge's marshal, as this 'affords a unique "bird's eye view" of the legal system' (Vora 2016). Such experience is most easily organised where training scheme organisers establish a relationship with the resident judge or judges at their local combined court hearing centre(s).

Experience of giving oral evidence at a mental health tribunal hearing is invaluable, but must be gained in accordance with the Tribunals Judiciary guidance (Rutherford 2015).

Giving evidence to a mental health tribunal

Trainees should never give oral evidence a mental health tribunal in the absence of the overall supervision of their consultant trainer. Further, in the case of less experienced or less senior higher trainees, the consultant should always be present, both to give explicit 'feedback' to the trainee afterwards (see below) and also, if necessary, to take over the role of giving evidence if it is clear to the trainee, the tribunal panel or the supervising consultant that the trainee requires assistance to expand on or clarify their answers. (Of course, no expert witness, be they trainee or consultant, should ever give evidence in response to a question raised that they are not competent to answer.) Similarly, even in the case of a very experienced or senior trainee giving evidence in the absence of the consultant if it becomes clear during the hearing that they are not competent to answer a new question posed then the consultant should be required to attend in order to give direct evidence (even if that necessitates an adjournment). Finally, there should always be 'post evidence' feedback and discussion, whether or not the consultant was present during the giving of the trainee's evidence and whatever the level of experience of the trainee. We also suggest that explicit reference to this role of the supervising consultant is included in their countersignature statement on the report (Box 4).

Giving evidence to courts and other tribunals

Supervision of, and feedback concerning, both written and oral evidence to courts, including the Crown Court and High Court, need to be exercised in a different way, and the 'supervision wording' within the report therefore needs to be different (Box 4). This is because the trainee cannot avoid giving their 'own' opinion in the report, with a view to expressing or expanding on it in the witness box, and also responding to 'new

questions', especially under cross-examination. That is, both they must have been supervised in the preparation of the report and they should not express opinions within the report, or in oral evidence, which are not their own and which they are not 'fully competent' to express. Indeed, a core aspect of their supervision will necessarily involve ensuring that their opinions are reasoned and reasonable, and that they are competent to express them. And, if they are asked a question in evidence that they are not competent to answer, then, just like any other expert witness (however senior), they must decline to answer (even if this means calling another expert to court, who may or may not be the supervising consultant).

Hence, in summary, although it might be relatively easy for a supervising consultant, on occasion, to 'step into the shoes' of their trainee in a mental health tribunal hearing, which is investigative in nature, it would be very difficult to accomplish this within the adversarial proceedings of the general civil courts and Crown Court. And the court would have to give directions as to whether and how it might be allowed in the case at hand.

Trainer vigilance

What is most important is that the trainer keeps the trainee's competence under frequent review, so that at every stage they are satisfied that what is expected of the trainee is consistent with their level of experience and current competence, and matches the complexity of the case. The nature and amount of supervision will depend on the trainee's experience and the complexity of the case.

Learning to receive and negotiate instructions

Although the skill to 'receive and negotiate instructions to prepare reports' was dropped from the curriculum for higher training in forensic psychiatry approved by the General Medical Council in October 2014 (Rix 2015b) this has been restored to the recently revised curriculum (Royal College of Psychiatrists 2017). It is an essential part of training as an expert psychiatric witness (see below).

Training for non-forensic specialists

Higher trainees in subspecialties other than forensic psychiatry should be able to obtain similar training and supervision by secondment or attachment to consultant forensic psychiatrists or to other consultants who are approved trainers and have sufficient experience as expert witnesses, for example consultants who prepare reports in personal injury cases, for regulators' tribunals and for the family courts.

Pre-instruction dialogue and negotiations

If you decide to offer assistance as a potential expert witness you should maintain an up-to-date CV that details your training, qualifications and experience, including the nature and setting of your everyday practice. This might usefully include details of courses undertaken, lectures, case conferences or seminars attended, continuing professional development modules completed, placements undertaken, and engagement in case-based discussions and peer reviews of particular cases. It should be clear from this how much knowledge or experience you have of a case such as that in which your instruction is contemplated. This might include the number of such cases of which you have experience, the frequency with which you encounter such cases and when you last encountered such a case in clinical practice. It is also advisable to state the relevant jurisdiction for earlier cases (if civil, County Court, High Court or Court of Appeal; if criminal, magistrates' court, Crown Court or Court of Appeal). In addition, it is helpful to identify the source of earlier instructions, whether for the Crown Prosecution Service or defence in criminal cases, or claimant or defendant work in civil cases, and in each case to give an estimate of the relevant percentages.

It is important that you are provided with enough information about the case for you to be sufficiently confident that it falls within your area or areas of expertise and, if necessary, that you have a working knowledge of any related disciplines that are involved. In *Squier v General Medical Council* [2016] it was accepted, for example, that Dr Squier, a paediatric neuropathologist, had a working knowledge of biomechanics, paediatric neurosurgery, neuroradiology and ophthalmology/ophthalmic pathology. And psychiatrists can be expected to have a working knowledge, for example, of psychology, psychopharmacology, neuroanatomy, neuroradiology, epidemiology, psychology and statistics, to name but some of the sciences basic to psychiatry. However, an expert psychiatric witness must say when they need additional expert evidence from another specialist to enable them to express their own opinion 'in the round'. For example, in a case of alleged clinical negligence where rehabilitation is not the central issue, a general psychiatrist's working knowledge of rehabilitation might be sufficient. In a criminal case where antipsychotic treatment of an accused person is a consideration prior to trial, it may be necessary to have only a working knowledge of neuropharmacology. However, in such cases the expert must be prepared to defer to the opinion of an expert in rehabilitation or neuropharmacology

respectively, and to recommend the instruction of such an expert if it becomes apparent that a working knowledge of the discipline is not going to be sufficient; indeed, they should recommend appointment of such an expert. This likely will not ‘invalidate’ inclusion of the opinion, for example, of a forensic psychiatrist, who will have knowledge of criminal cases beyond that of a neuropharmacologist; rather, the two sources of evidence will operate in tandem. As a practical point, it is advisable to make clear to a potential instructing solicitor those areas of opinion within your core expertise and those of which you have a working knowledge on the periphery, and the reasons for this.

There is a clear obligation on an instructing solicitor and counsel to ensure that the expert is appropriate for the case and is aware of their duties (*Kennedy v Cordia (Services) LLP* [2016]). In the covering letter sent with your ‘terms and conditions’ you should therefore request that your potential instructing solicitors satisfy themselves as to the sufficiency of your knowledge and experience, and as to your suitability, before confirming instructions. If, on the information with which you have been provided about the case, you consider that there are aspects of your training, qualifications or experience that could mean that you might fall short of providing sufficient expertise, draw attention to these; or conceal them at your peril. If you are in any doubt as to whether the issues are within your expertise, discuss this with a colleague or consult your medical defence organisation.

Following further consideration of your knowledge and experience, the solicitors may decide that these are sufficient or they may decide that they are not sufficient. If you are asked to attend a preliminary hearing to decide on the admissibility of your evidence, you should not react to a searching enquiry of your knowledge and experience as a challenge or as criticism that puts you on the defensive, but as a further opportunity for the court to decide whether you have what is required to assist the court or tribunal.^b Be wary of holding yourself out as an expert in a particular area by persisting in a demand that you are accepted as an expert witness if it is put to you that your experience is insufficient (Rix 2015b). Notably, for example, there is evidence that when Dr Pool was questioned about his understanding of the role of an expert, the training and experience required to give expert evidence and his own qualifications and experience, he found this ‘uncomfortable’ because he could not answer the questions put to him (MPTS 2014, unreported). In explaining

what were alleged to have been ‘his rambling and unclear answers’, he said that he felt ‘shocked’ and ‘disorientated’ by what he felt was continuous and harsh questioning.

If you have provided full details of your relevant training, qualifications and experience, and have drawn attention to anything which might suggest that you are not sufficiently skilled for the particular case, you should be able to avoid criticism, or referral to the GMC, in the event that you are later found to have had insufficient skill for the particular case. In such a situation, one could argue that the solicitor or counsel should be criticised for not taking note of what you had advised about your expertise, not assessing whether you had the necessary expertise for the case and whether your evidence would otherwise be admissible. It may be little comfort to Sir Roy Meadow, Dr Richard Pool and Dr Waney Squier now that they might have avoided disciplinary censure if the counsel and solicitors who proposed to adduce their evidence had first assessed whether they had the necessary expertise and whether their evidence was otherwise admissible, and also made sure that they were aware of the duties imposed on an expert witness. That said, it should be emphasised that if you are acting as a potential expert you have a personal duty to ensure you are satisfied that you have sufficient expertise. Thus, if you form the view that you lack sufficient expertise to opine at all in a particular case you should decline to provide a report, and if you consider you cannot give a specific opinion on a particular issue you should make that clear in the report.

In Box 5 we suggest how these matters can be addressed in response to a letter of enquiry from potential instructing solicitors.

Reliance on published literature

It is often necessary for the expert to rely on published literature. Some of the perils associated with doing so are illustrated by Dr Squier’s case.

Dr Squier relied on published literature from a number of fields. There was no criticism of her for doing so, as this is permissible within bounds (see Lord Hodge and Lord Reed in *Kennedy*, where they cite *McTear v Imperial Tobacco Ltd* [2005]). The criticism that was upheld was of what can be described as ‘cherry picking’. Dr Squier quoted findings that supported her opinion and omitted findings that did not do so; and, in omitting reference to conclusions that were contrary to her opinion, she was found to have sought to mislead the court. She was therefore found to have failed to be objective or unbiased and, in seeking deliberately to mislead the court, was found to

b. In practice, court time often does not allow for such ‘best practice’, especially in criminal cases. Rather, challenge to expertise, or to the relevance of expertise, is usually addressed in cross-examination. This emphasises how important it is to ‘self-monitor’ your suitability to give expert opinion in a case.

have been irresponsible, although on appeal not dishonest.

The case of *Kennedy* includes some helpful guidance. So far as the regard the court should have to published material that was not within the expert's core expertise, Lord Hodge and Lord Reed said that this might 'depend on the nature of the expert's area of practice, which may or may not involve some working knowledge of related disciplines, and on the centrality of the published material to the matter which the court has to decide'.

An expert psychiatric witness can reasonably rely on published material from their discipline or subdiscipline. However, when relying on evidence from subdisciplines that are not your core area of expertise, this should be made clear. Also if evidence is admitted from experts in these subdisciplines, you should defer to their expertise. Although Dr Squier acknowledged, and deferred to, the expertise of the ophthalmologists, she was, for example, found to have expressed an opinion 'in the teeth of the findings of other experts, who were in a position to express an expert opinion' (*Squier v General Medical Council* [2016]).

An expert psychiatric witness, for example, should, where appropriate, be able to rely on evidence from the field of neuropharmacology. However, unless you possess special qualifications in this field, your opinion should be qualified with an acknowledgment that this is not your core area of expertise but a discipline of which you have a working knowledge. If the court receives assistance from another psychiatrist who has a special qualification or experience in neuropharmacology, you should acknowledge their superior knowledge or experience. Continuing with the same example, if it appears that neuropharmacological expertise is likely to be critical in resolving an issue in the case, because the central issue is neuropharmacological in nature, you should recommend the instruction of, and be prepared to defer to the opinion of, an expert in neuropharmacology.

Show your workings

One of the allegations made against Dr Pool and upheld by the fitness to practise panel was that he did not provide adequate reasons for his opinions as to the fitness to practise of the paramedic on whom he was reporting ('the reasoning allegations') (MPTS 2014, unreported). At his appeal, it was submitted on Dr Pool's behalf that he had, albeit briefly, set out the reasons for his conclusions about impairment; but Mr Justice Lewis did not accept this and found that Dr Pool had not provided adequate reasoning for his opinions as

BOX 5 An example of how a psychiatrist might respond to an enquiry from potential instructing solicitors in a personal injury claim

Thank you for your letter of [date]. I believe that I have the appropriate expertise. I am familiar with the duties of an expert.

So far as my expertise is concerned, I am a general adult psychiatrist and in my out-patient practice I assess and treat people with a range of common mental disorders. I have a working knowledge of rehabilitation, psychotherapy and substance use disorders. I note that your client was 64 years old at the time of the accident and is now 66. I am not registered as a specialist in old age psychiatry, but I have a working knowledge of old age psychiatry. I undertook an attachment in old age psychiatry as part of my general professional training. I provided a service for 10 years to older adults before the appointment of an old age psychiatrist in my locality and I frequently encounter older people when I assess psychiatric emergency cases in contemplation of admission or detention under the Mental Health Act 1983. Full details of my training, qualifications and experience are set out in my enclosed curriculum vitae.

If, when I have assessed your client, it appears to me that my own knowledge and experience are insufficient, I will inform

you immediately and, if possible, assist by suggesting other psychiatrists who can be approached, potentially either as an alternative or as an additional expert.

It is very important that you are confident that I have the necessary expertise and that you decide whether my evidence will otherwise be admissible. If you are uncertain, I will endeavour to provide further information. I am willing to attend a preliminary hearing to decide on the admissibility of my evidence if this will assist. If you remain uncertain, it would be advisable to seek a better qualified expert than risk my evidence being ruled inadmissible or given less weight than that of another expert.

With regard to the duties of an expert, I confirm that I am aware of the requirements of the Civil Procedure Rules Part 35 and Practice Direction 35, the Guidance for the instruction of experts to give evidence in civil claims, the Practice Direction for pre-action conduct in personal injury claims and the Royal College of Psychiatrists' report 'Responsibilities of psychiatrists who provide expert opinion to courts and tribunals'.

to the degree of impairment of the practitioner's fitness to practise, or how long it was likely to last (*Pool v General Medical Council* [2014]).

In our previous article (Rix 2017) we referred to various relevant judicial observations:

- in *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH* (1976): 'Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert';
- how Lord Hodge and Lord Reed in *Kennedy* quoted approvingly Lord Prosser, who pithily stated in *Dingley v Chief Constable, Strathclyde Police* (1998): 'As with judicial or other opinions, what carries weight is the reasoning, not the conclusion';
- even more pithy was the observation of Mr Justice Jacob in *Pearce v Ove Arup Partnership Ltd* (2002): 'If the reasons stand up, the opinion does. If not, not'. He made a similar point in *Routestone Ltd v Minorities Finance* [1997]: 'What really matters in most cases is the reasons given for the opinion.'

It is very easy when an expert has become absorbed in a case wherein the subject matter is so familiar to forget that they are writing for readers who are unfamiliar with the subject and to assume that what is obvious to them, and indeed to other experts, will be equally obvious to the 'lay' reader.

We cannot overemphasise the importance of a reasoned opinion capable of withstanding logical analysis. This is why the important word in an expert report is 'because', used as such or obviously implied by the structure of the opinion (Rix 2011a). Therefore, it is a good discipline, for each issue you have to address in your report, to try to have a paragraph that begins with a short, stand-alone sentence setting out the opinion on the issue, followed by the 'because' section. We suggest that this is in the form of one or more sentences of reasoning that leave the reader in no doubt as to why you have reached that opinion and, where appropriate, why you do not accept a contrary opinion, or an opinion that is somewhere else within the range of opinion that you are required to include in your report. Indeed, in coming to your opinion you should have gone through this process 'for yourself'. Having set out the opinion and the reasoning, it is then worth testing the reasoning against Albert Einstein's dictum: 'If you can't explain it simply you don't understand it well enough'.

In the covering letter that accompanies your report, indicate that you have done your best to provide reasoned opinions, and request your instructing solicitors to delay disclosure of the report and give you the opportunity to revise it if they think that the reasons for your opinions are unclear or insufficient (Rix 2015b).

Acting ethically

What Lord Reed and Lord Hodge identify in *Kennedy* as 'the duties imposed on an expert witness' are most authoritatively set out in the Rules (<https://www.justice.gov.uk/courts/procedure-rules>).^c They refer to the duty and responsibility of the expert to present to the court expert evidence that is, and can be seen to be, the independent product of the expert, uninfluenced as to form and content by the exigencies of the litigation, and to provide assistance to the court by way of objective, unbiased opinion on matters within their expertise.

Dr Squier was found to have failed to provide objective and unbiased opinion, but she was cleared, on appeal, of having acted dishonestly. Like Dr Pool, who was regarded as lacking in insight because he persisted in his belief that he was an expert in general psychiatry, she was

found to have given evidence outside her expertise. On the facts as decided by the tribunals, the impression is of two doctors who thought that they were assisting in the administration of justice, but inadvertently did not do so.

There are many ways in which experts can try to ensure that they consistently act ethically, particularly in endeavouring to fulfil their duty to provide objective, unbiased opinion on matters within their expertise.

One of these is to be familiar, and act in accordance, with what the Criminal Procedure Rules now refer to as 'the code of practice or conduct for experts of my discipline' (Ministry of Justice 2017a: 19B, para. 13). For psychiatrists this is the Royal College of Psychiatrists' report CR193 *Responsibilities of Psychiatrists Who Provide Expert Opinion to Courts and Tribunals* (Rix 2015a). Therefore, to comply with this requirement in the criminal jurisdiction, and sensibly in a report for the other jurisdictions and tribunals, you should include in your expert's declaration the statement set out in Box 6.

Peer review is also an important means by which experts can ensure that they are acting ethically. Medicolegal case-based discussions (Rix 2011a) provide the opportunity for you to assess your conduct against criteria such as 'Compliance with relevant rules' and 'Evidence of independence and impartiality' (Box 7). Generally, case-based discussions are conducted after the case has ended, since otherwise there is a risk of 'opinion by committee'. However, discussion of any 'difficult issues' in a case with a colleague before finalising a report is to be recommended, provided that this is acknowledged in the report. If you are at risk, as Dr Pool and Dr Squier were, it is far better to find out in advance through discussion with a fellow expert. Beyond this, however, case-based discussions conducted *ex post* provide a crucially important source of peer review of your practice more generally, for inclusion in information submitted within annual appraisals towards revalidation (see also below).

Annexed to the Family Procedure Rules Practice Direction Part 25B are Standards for Expert Witnesses in Children Proceedings in the Family Court (Ministry of Justice 2017b: Annex). These include the requirement for the expert to have undertaken appropriate training, updating or quality assurance activity – including actively seeking feedback from cases in which they have provided evidence – relevant to the role of expert in the family courts in England and Wales within the previous year. With such a requirement in mind, which may reasonably

c. These were brought together and set out comprehensively and clearly in the *Ikarian Reefer* judgment (*Naviera SA v Prudential Assurance Co Ltd The Ikarian Reefer* [1993]).

BOX 6 Compliance with the code of practice for expert psychiatric witnesses

Example declaration that complies with para. 13 of Criminal Practice Direction Division V, Evidence 19B (Ministry of Justice 2017a):

I confirm that I have acted in accordance with the Royal College of Psychiatrists' report 'Responsibilities of psychiatrists who provide expert opinions to courts and tribunals'.

be applied in all jurisdictions, not just the family courts, psychiatrists also have available to them an online feedback system, the Multi-Source Assessment Tool for Expert Psychiatric Witnesses (MAEP) (www.rcpsych.ac.uk/workinpsychiatry/qualityimprovement/maep.aspx). At the end of a case the psychiatric expert witness can opt to seek anonymous feedback either from the instructing solicitor alone or from the instructing solicitor, their counsel or advocate, the other party's solicitor, their counsel or advocate, the other party's expert and, if the report is considered by a judge or if the expert gives oral evidence, the judge. Box 8 shows the domains in which the expert is rated.

As recognised by the Royal College of Psychiatrists (Rix 2015a: p. 25):

'Appraisal directed towards revalidation requires that all aspects of a doctor's work be assessed [...] 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).'

However, review from lawyers and judges does not amount to 'peer review'. And so both MAEP and the results of case-based discussions should inform appraisal and revalidation.

Conclusions

Expert psychiatric witnesses occupy a position of privilege which may bring them many professional and also financial rewards; but with privilege goes responsibility in the form of a duty properly to assist in the administration of justice. To fulfil this duty it is necessary to:

- be properly trained at the 'frontier' of medicine and law;
- engage in an open discussion with potential instructing solicitors about your qualifications, training and experience and the issues that require expert psychiatric opinion;

BOX 7 Standards assessed in case-based discussion of an expert report

- Within the psychiatrist's expertise
- Evidence of consent where appropriate
- Acceptable structure and properly presented
- 'User-friendly'
- Compliance with relevant rules
- Methodology explained, and includes such information as the court may need to decide whether the opinion is sufficiently reliable to be admissible
- Knowledge, understanding and correct application of evidence to legal tests
- Facts and opinions clearly separated
- Issues addressed
- Evaluation of quality of evidence/clinical veracity
- Opinions supported by reasons, withstand logical analysis and explained simply
- Includes range of opinion
- Summary of opinion/conclusions
- Glossary (if applicable)/terms explained
- Evidence of independence and impartiality
- Expedition at all stages, particularly achieving all deadlines
- Probity (terms and conditions, record of time spent, detailed itemised billing)

(based on Rix 2011a: Box 47)

- rely only on published literature which is within your core area of expertise or of which you have a working knowledge, being careful not to 'cherry-pick' findings;
- provide reasoned opinions that withstand logical analysis and are explained simply;
- be subject to processes that ensure that you act ethically.

If you act ethically, the rewards of being an expert witness should far outweigh the costs.

References

Eastman N, Adshead G, Fox S, et al (2012) *Forensic Psychiatry*. Oxford University Press.

Eastman N, Grubin D (in press) Insanity, diminished responsibility and personality disorder in England and Wales. In *International Handbook on Psychopathic Disorders and the Law. Vol II: Law and Policies* (eds AR Felthous, H Sass). John Wiley & Sons.

BOX 8 Feedback domains for the Multi-Source Assessment Tool for Expert Psychiatric Witnesses (MAEP)

- Professionalism/professional demeanour
- Ethics
- Skills
- Reliability of opinion
- Presentation of opinion/report
- Understanding of law, procedure and rules of evidence
- Oral testimony
- Business manners and affairs

(www.rcpsych.ac.uk/workinpsychiatry/qualityimprovement/maep.aspx)

MCQ answers

1 c 2 a 3 d 4 d 5 d

Gunn J, Taylor P (2014) *Forensic Psychiatry: Clinical, Legal and Ethical Issues* (2nd edn). CRC Press.

Ministry of Justice (2015) *The Criminal Procedure Rules: Part 19 expert Evidence*. Ministry of Justice (<http://www.justice.gov.uk/courts/procedure-rules/criminal/docs/2015/crim-proc-rules-2015-part-19.pdf>).

Ministry of Justice (2017a) *Criminal Practice Directions 2015 Division V (as amended November 2016 & April 2017)*. Ministry of Justice (<https://www.justice.gov.uk/courts/procedure-rules/criminal/practice-direction/2015/crim-practice-directions-V-evidence-2015.pdf>).

Ministry of Justice (2017b) *The Duties of an Expert, The Expert's Report and Arrangements for an Expert to Attend Court*. Ministry of Justice (https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/practice-direction-25b-the-duties-of-an-expert,-the-experts-report-and-arrangements-for-an-expert-to-attend-court). Accessed 30 August 2017.

Percival T (1803) *Medical Ethics or a Code of Institutes and Precepts Adapted to the Professional Conduct of Physicians and Surgeons*. S. Russell.

Rix KJB (2011a) *Expert Psychiatric Evidence*. RCPsych Publications.

Rix KJB (2011b) Medico-legal work for psychiatrists: direction, not drift. Commentary on: 'You are instructed to prepare a report'. *Psychiatrist*, 35: 272-4.

Rix K, Eastman N, Adsheed G (2015a) *Responsibilities of Psychiatrists Who Provide Expert Opinion to Courts and Tribunals* (College Report CR193). Royal College of Psychiatrists.

Rix KJB (2015b) When is an expert not an expert? Question time for expert psychiatric witnesses. *BJPsych Advances*, 21: 295-303.

Rix K, Haycroft A, Eastman N (2017) Danger in deep water or just ripples in the pool: has the *Pool* judgment changed the law on expert evidence? *BJPsych Advances*, 23: 347-57.

Royal College of Psychiatrists (2017) *A Competency Based Curriculum for Specialist Training in Psychiatry: Specialists in Forensic Psychiatry (February 2010, update approved 2 October 2014, revised March 2016 and May 2017)*. Royal College of Psychiatrists (http://www.rcpsych.ac.uk/pdf/TW_TR_Forensic_Psychiatry_Curriculum_August_2017.pdf).

Rutherford J, Chalmers J, Zigmond A et al (2015) *Guidance for Detaining Authorities and Tribunal Panels about Medical Evidence for First Tier Tribunal – Mental Health*. Royal College of Psychiatrists/Tribunals Judiciary.

Vora R (2016) *Marshalling*. AllAboutLaw (<https://www.allaboutlaw.co.uk/law-careers/legal-work-experience/marshalling>). Accessed 30 August 2017.

Cases

Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH (1976) (3) SA 352.

Dingley v Chief Constable, Strathclyde Police (1998) SC 548.

Kennedy v Cordia (Services) LLP [2016] UKSC 6.

McTear v Imperial Tobacco Ltd [2005] 2 SC 1.

Naviera SA v Prudential Assurance Co Ltd The Ikarian Reefer [1993] 2 Lloyd's Rep 68.

Pearce v Ove Arup Partnership Ltd (2002) 25(2) IPD 25011.

Pool v General Medical Council [2014] EWHC 3791 (Admin).

Routestone Ltd v Minorities Finance [1997] BCC 180.

Squier v General Medical Council [2016] EWHC 2739 (Admin).

MCQs

Select the single best option for each question stem

1 Training as an expert psychiatric witness:

- a requires registration in the relevant category on the General Medical Council's Specialist Register
- b cannot begin until appointment as a consultant psychiatrist
- c forms part of the Royal College of Psychiatrists' competency based curriculum for specialist training in psychiatry (T)
- d should not begin until after the completion of general professional training
- e takes place under arrangements agreed between the Royal College of Psychiatrists, the Tribunals Judiciary and Her Majesty's Courts and Tribunals Service.

2 The potential expert witness's negotiation with potential instructing solicitors:

- a should include the solicitor's assessment as to whether the proposed witness has the necessary expertise and whether their evidence is otherwise admissible
- b can be based on a brief statement as to their current appointment and day-to-day practice

- c is best conducted by a secretary who provides the potential instructing solicitors with a list of the potential expert's degrees and postgraduate qualifications
- d follows a procedure that is set out in the *Ikarian Reefer* judgment
- e represents an aspect of expert witness practice that is best learnt following appointment as a consultant.

3 Published literature:

- a should never be cited in an expert report
- b should only be cited if the expert is the author or coauthor of the publication
- c can properly be cited selectively in a report, as evidence to support the expert's opinion
- d can be cited if it is from a discipline of which the expert has no more than a working knowledge
- e cited in a report should be limited to that which is within the expert's core expertise.

4 An expert's opinion:

- a is accepted without question as a consequence of the court acknowledging the doctor's relevant expertise

- b needs merely to be stated simply and clearly
- c can stand up even if the reasons do not
- d can only be properly evaluated if the expert discloses the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds
- e can be too complicated to be explained adequately to a jury without judicial elaboration.

5 About the duties of an expert witness:

- a these were first set out in the Civil Procedure Rules
- b they include a responsibility to present to the court expert evidence that is, but does not have to be seen to be, the independent product of the expert
- c they include a responsibility to assist their instructing party to win their case
- d compliance with the duties of an expert witness can be addressed in a case-based discussion of a medicolegal case
- e a doctor's compliance with the duties of the expert witness falls outside the jurisdiction of the Medical Practitioners Tribunal Service.