

Medico-legal practice in anaesthesia – a guide for the curious

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Medico-legal work can be broadly divided into personal injury and negligence. The former entails examining clients who are making claims for injuries they have sustained outside the medical arena, often occupational in nature, e.g. repetitive strain injury or back pain, or following an accident, e.g. whiplash or nerve damage leading to a chronic regional pain syndrome. While much of this work is performed by our orthopaedic colleagues, it can provide a useful source of income for the chronic pain specialist, who will often encounter patients in need of an insurance report in the course of their daily duties.

However, this guidance is aimed squarely at clinical negligence work and the role of the medico-legal expert. There are some misconceptions about medico-legal experts, so let's deal with these first.

You have to be old to be an expert

No. In fact any consultant anaesthetist is, almost by definition, an expert in anaesthesia, although not necessarily an expert in all branches of anaesthesia – it is unwise to stray outside those areas of practice you encounter on a regular basis. An expert has to be able to:

- derive a likely sequence of events from an often disorganised and sometimes incomplete bundle of documents, largely clinical records;
- explain those events in terms that an intelligent layman can understand;
- decide (often by reference to the literature or to national or local guidance) whether the standard of care contained in those events would be regarded as acceptable and logical practice by a reasonable body of his or her peers;
- write all of this down in a grammatical and accessible manner;
- and – very rarely – hold his or her own in what many regard as the ultimate viva voce, the conference with Counsel or an appearance in the witness box.

Yes, your qualifications and expertise will be compared with those of the expert retained by the other side, but this is a very minor issue; the calm, honest, modest and well-prepared expert will always come over well.

Experts have to sell their souls to the lawyers

This is, or certainly should be, completely untrue. Expert witnesses have always been meant to be impartial and, whichever side has instructed them, their report should be neutral. This has, in the past, been more honoured in the breach than in the observance, but guidance from the Department of Justice, in the form of Part 35 of the Civil Procedure Rules, means that the expert's duty to the Court has been formalised, and the days of the so-called 'hired gun' are well and truly over [1]. Modern experts should eschew being labelled as 'claimant' or 'defence' practitioners. Indeed, recent reforms mean that they might even be instructed by both sides, although this rarely seems to happen in practice.

Do I really want to do it?

Expert witness work has some distinct advantages. You are not beholden to surgeons for independent income, and the bulk of the work can be done from the comfort of your own home. The research needed to produce a report can be enlightening and educational in its own right. The rewards can be substantial, although you will be fortunate indeed to achieve an hourly rate that matches that of independent clinical practice.

However, medico-legal work is not an easy option. Deadlines are rarely flexible and recent reforms have made them tighter than ever. There can be no short cuts in writing a report; flaws are very quickly and publicly shown up if the case gets to Court. Reports are very rarely unchallenged, even by the team that has instructed you, so if you find it difficult to accept criticism, this is not a job for you. Good organisational skills are essential, especially as your practice expands, and you will need a well-ordered and persistent billing service. And, of course, medico-legal practitioners can get into very hot water indeed if they are perceived as having stepped outside their field of expertise. I must stress that this is not a theoretical risk; there are many ex-experts out there whose professional careers have been blighted or even ended after public criticism of their medico-legal performance by an angry judge.

The GMC has some useful advice for putative medico-legal practitioners. This represents the standard that your regulatory body expects you to apply and, as such, must be mandatory reading for all intending to practice in this field [2].

So how do I get started?

Word of mouth remains the best way to get your first instructions. Somewhere near you is an expert in anaesthesia with more work than he or she can handle. Ask them if you can help out, or offer to write a draft report on a simple case so that they can get an idea of your abilities. Solicitors are looking for someone who can deliver a sensible, logical, readable report that addresses the key issues, who can do it on time, and who will not overstate the strengths of the case only to retract later when under pressure.

In the past, most experts have learned on the job, but this is far from ideal, and there are now courses that the aspiring practitioner can attend. Action Against Medical Accidents (AvMA) has transformed from an aggressive pressure group into a powerful and respectable training and policy-setting organisation. Details of courses, including 'Essential Legal Concepts for Experts in Clinical Negligence Claims', can be found on its website [3]. Other commercial bodies offer similar courses and even the chance to stand up and be cross-examined in a court hired for the day, although the costs can be rather prohibitive [4].

Moving on

There are organisations that act as forums for medico-legal practitioners and represent their interests, such as the Academy of Experts [5] and the Expert Witness Institute [6]. These bodies provide useful advice to their members, and membership (which requires references from solicitors and/or barristers) is an indication to instructing solicitors that you know what you are doing. They represent a useful next step to advancing your medico-legal career, although very few solicitors will instruct you on the basis of membership of one of these organisations alone. AvMA holds a register of practitioners that does appear to be widely used by claimant solicitors looking for an expert. Inclusion is out of the expert's control but seems to be based on a good history of producing high quality reports.

As timeframes for conducting cases and costs are being forced down by the courts, solicitors are looking more avidly for fast turnaround times and low costs when selecting experts. A fixed-price preliminary report is now often the first recourse for the solicitor who wants a quick opinion as to whether a case has merit, and this approach has been sanctioned by the courts and professional bodies. The ability to provide a 2–3 page report within two weeks of receipt of records often leads to further instruction in the same and other cases, although this does need careful organisation and time management.

A final word of caution

As with every other area of medical practice, there are great pressures to reduce the amount of money doctors can earn as experts. The Legal Services Commission (formerly the Legal Aid Board) has stated that expert fees should be capped at levels that are far below the sort of rates currently charged, and are actively in consultation to achieve this end. At the same time, there is a drive towards improving quality by introducing accreditation, through a process that is still far from clear.

You will, of course, have taken out professional liability insurance with one of the medical defence organisations (MDO) for your clinical practice, but be aware that this does not necessarily provide cover for medico-legal work, or for work outside the UK. You can fall foul of doctors whom you have unfairly castigated in a report, of patients who feel that you have not been sufficiently supportive of their claim, or of lawyers who are dissatisfied with the service you provided. Medico-legal insurance is available from all the major MDOs and costs very little – make sure you are covered!

It is tempting to take on every case that comes through your door – after all, it is flattering to have your opinion sought. However, always ask yourself the following questions before agreeing to help:

- Can I deliver within the requested timeframe?
- Is this within my area of expertise?
- Do I have any conflict of interests, e.g. close friendship or professional relationship with any of the doctors involved?
- Can I take on the extra work that will inevitably arise through requests for clarification, further comments, responses to challenges from the other side, conferences with Counsel, and Court appearances?

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References

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