



BEST PRACTICE GUIDELINES FOR EXPERT WITNESSES

Hong Kong Academy of Medicine
Professionalism and Ethics Committee
Task Force on Laws for Healthcare Practitioners



Second Edition



HONG KONG ACADEMY OF MEDICINE
香港醫學專科學院

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Expert witnesses serve important functions in the administration of justice. Their opinions have a significant impact on the outcomes of proceedings and represent a respectable source of information to parties seeking explanation, understanding and closure in a dispute. The integrity of expert witnesses, as well as the substance and quality of their opinions, speak to the probity and standards of their respective disciplines which are essential for gaining and maintaining the public's trust.

The task of an expert witness requires a unique skill set and body of knowledge. In addition to the abilities to analyse complex and detailed information in forming a trustworthy opinion and to communicate his or her views effectively, an expert witness needs to be familiar with, and abide by, established legal principles and professional standards which govern his or her work and conduct.

Recognising the increasing demand for competent expert witnesses from disciplinary bodies and the courts, the Academy launched an online training course for expert witnesses in October 2022. The course was organised by the Task Force on Laws for Healthcare Practitioners under the Professionalism and Ethics Committee of the Academy. It was well received by the Academy Fellows and specialist trainees. In response to requests from Fellows, the Academy published the first version of the *Best Practice Guidelines for Expert Witnesses* in October 2023. To maintain continuous improvement and stay current with evolving practices, the Academy has now released a revised and updated version of the guidelines. This new edition incorporates the latest developments and feedback from the field, further enhancing its value as a resource for expert witnesses. We are particularly grateful for the contribution of Prof. Albert Lee, a renowned scholar in healthcare law with extensive experience as an expert witness. His insights and expertise are invaluable in shaping the revised guidelines.

As with the first version, the current guidelines aim to assist and prepare medical doctors and dentists, who are acting or are considering to act, as expert witnesses, by setting out relevant standards and regulations and offering practical advice. The document is intended to serve as a useful source of references rather than a prescriptive or an exhaustive code of practice. Expert witnesses are strongly advised to take note of this guidance so as to meet the expectations of the courts and other relevant decision-making bodies.

We hope that these Best Practice Guidelines will complement the teaching material from the training course and will be helpful in your service to the communities and in making your work as an expert witness a fulfilling professional experience.

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The information contained within this document is for guidance only and not intended to offer legal advice. It is developed from the perspectives of professionalism and ethics, on the basis of which medical and dental practitioners should exercise their professional judgement, with regard to all clinical and other circumstances. Colleagues are reminded to keep up-to-date with new developments in laws and regulations as well as healthcare science.



I. When might you be asked to act as an expert witness?

- 1 Lawyers, acting on behalf of healthcare practitioners, healthcare facilities, employers, the Police, the judiciary, regulatory bodies, medical defence organisations, insurance companies as well as patients or their family members, may ask you to assist in proceedings involving, for example, the Coroner's Court, civil court, criminal court, family court, and / or professional tribunals.
- 2 You may be instructed to act as a **professional witness** (also known as '**witness of fact**'), being someone who has had clinical involvement with the patient concerned. This is often a requirement that you need to comply with. You would be expected to provide a factual account based on your personal knowledge and records of the case (e.g., clinical findings, test results, actions taken), and you are not required to offer an opinion on whether or not, for example, the clinical management of the patient was reasonable or up to standard.
- 3 You may be instructed to act as an **expert witness**, in which case you may opt to accept or decline the instruction. You would be asked to provide an opinion about a person, who is not your patient, on particular issues based on your expert knowledge, experience, and the facts of the case (which could be in written form, or according to your own examination of the person). This set of guidelines will focus on expert witnesses.



II. Facts to find out when you receive an instruction and kinds of expert witnesses

Facts to find out when you receive an instruction

- 4 There are certain facts that you need to ascertain once you receive an instruction as they would determine your suitability as an expert witness

for the particular case. If in doubt, clarify with the person who instructs you (e.g., the lawyer, the Secretary of a disciplinary body or a party to the dispute) before you decide whether to accept the instruction, especially if you are not an experienced expert witness. **(Box 1)**

Box 1: Facts to find out when you receive an instruction

- Does your professional indemnity insurance cover your work as an expert witness?
- What is the nature of the case?
- What issues are you expected to address? Are they within your areas of expertise?
- Who are the parties involved? Who is instructing you?
- Is there any potential conflict of interest?
- What type of proceedings is involved?
- Are you acting as an expert witness for one of the parties, as one of the joint expert witnesses, or as a single joint expert witness?
- Are you expected to examine the patient / injured person?
- Are you expected to attend court / hearings / disciplinary inquiries to give evidence?
- What are the fees and time frame? Has any date been set by the Court for your attendance?

Appointment of expert witnesses

5 Expert witnesses may generally be appointed in the following manners:

- (a) Firstly, you may be appointed as an expert witness for one of the parties to the proceedings. For example, in disciplinary inquiries, you may be appointed by the Secretary of the Medical / Dental Council or the defendant doctor / dentist, and you do not have to interview or examine the patient. In medical negligence claims, the plaintiff or defendant doctor / dentist may instruct you to prepare an expert report on liability (i.e., whether the clinical management is up to a reasonable standard) and causation (i.e., whether, on the balance of probabilities (i.e., more than 50%), the defendant's negligence caused or materially contributed to the injury) in support of the claim or defence. In both scenarios, you will prepare an independent report, separate from the one adduced by the other party, based on the information and documents provided to you by the party which appoints you.
- (b) Secondly, in personal injury claims (including medical negligence claims), parties may appoint experts to jointly assess the plaintiff's injuries including condition and prognosis, which is relevant to quantum (i.e., the amount of compensation awarded if the claim is made out). In such cases, you may be appointed as one of the two (or more) joint expert witnesses. You will interview and examine the plaintiff together with the quantum expert instructed by the other side and prepare a joint expert report. If the joint report is drafted by the expert for the other side, you must check the draft very carefully, especially after a few exchanges of drafts, to make sure that your opinion and conclusion are accurately reflected in the joint report before you sign

it. In a UK Supreme Court case in 2011,¹ a clinical psychologist was sued because she signed a joint statement drafted by the opposite expert which, she later claimed, did not reflect what she had agreed to in a prior telephone conversation. As a result of her oversight, the party instructing her was constrained to settle his claim for significantly less than the settlement that would have been achieved. The Supreme Court ruled that the immunity from suit for breach of duty that expert witnesses have enjoyed in relation to their participation in legal proceedings should be abolished. The patient was allowed to pursue a claim against her. This case will be further discussed in Sections 56 and 58 below.

- (c) Thirdly, in personal injury claims, the District Court has increasingly encouraged parties to appoint a single joint quantum expert in assessing the plaintiff's injuries, condition and prognosis.² If you are appointed to be a single joint expert witness, you are expected to examine all available medical evidence and records carefully and study them in light of the plaintiff's claims and complaints, taking into account the initial injuries sustained by the victim in the accident; the treatments received by him or her in the hospital and / or clinics; the response to the treatments and the progress of the condition. You also have to consider whether the subjective complaints made by the victim match the objective signs or medical evidence; the diagnosis and prognosis made by the treating doctor; the length of sick leave given; the history of the recovery; the post-accident work record; and so on. You will interview and examine the plaintiff by yourself and then compile an independent, impartial and objective report to be submitted to both parties, giving your expert opinion which will assist the court to understand the technical or medical issues involved.

¹ *Jones v Kaney* [2011] UKSC 13

² *Rai Chandra Kala v La Creparie 8 Ltd and ECAFB* [2023] HKDC 671; DCPI 244/2019



III. Are you a suitable expert witness?

Defining 'experts'

- 6 The term “expert” is not defined in law, and there is no official list of medical or dental expert witnesses in Hong Kong. The Hong Kong Academy of Medicine (the Academy) maintains a list of Fellows who are willing to serve as expert witnesses in their respective specialties. However, parties and their legal advisers may freely engage any registered doctor or dentist of their choice to be their expert witness, whether or not the individual is on the Academy’s list.

Areas of expertise

- 7 It is imperative that you have the expertise and experience relevant to the issues raised in the particular case.
- 8 Medicine and dentistry have evolved to include many specialties and subspecialties, each of which requires its practitioners’ years of studying, training and practical experience to attain expertise. The mere fact that you possess the relevant professional qualifications (e.g., Academy fellowship) might not suffice for the purpose of acting as an expert witness in a particular case. You must also possess sound knowledge and experience about the standard and practice in the particular field at the time of the incident.³ Ideally, you should

be practising in that field at the time or be able to demonstrate understanding of the standards applicable at the time.

- 9 You should be mindful of any limitations of your areas of expertise and act within those boundaries as a matter of duty to the court or to the tribunal. For expert reports on liability (i.e., to comment on whether a doctor’s management was up to reasonable standard), the usual practice is to select an expert in the same specialty / subspecialty as the doctor concerned. For expert reports on quantum, the appropriate specialty / subspecialty will largely depend on the injuries suffered by the claimant and his / her need for future treatment. If in doubt, discuss with the person who instructs you before accepting the instruction. **(Box 2)**
- 10 If you wish to comment on an issue but are unsure whether you have the relevant expertise, you should clarify this with the party who instructs you and state the concern(s) in your report. Where an issue falls outside your areas of expertise, you should refrain from commenting and suggest the party to invite suitable expert(s) instead. Only in exceptional circumstances and under some specific conditions will the court consider admitting witness reports from an expert not of the same specialty / subspecialty as the defendant. **(Box 3)**

³ Chiu JSP, Leung GK. Expert witnesses and area of expertise. *Hong Kong Med J* 2023;28(1):4-5.

Box 2: Case study

A child presented with hip pain after a fall. Dr. A, a specialist in Family Medicine, failed to diagnose the child's hip fracture. The child subsequently developed osteonecrosis of the femoral head.

- It would be appropriate for an expert witness in Family Medicine (rather than an expert witness in Orthopaedics) to comment on Dr. A's standard of care in diagnosis and treatment.
- An expert witness in Orthopaedics may be required to provide an opinion on causation (i.e., whether Dr. A's breach of duty of care had caused the child's osteonecrosis).
- It would be appropriate for an expert witness in Orthopaedics (rather than an expert witness in Family Medicine) to comment on the patient's long-term prognosis and future treatment (i.e., quantum).

Box 3: Case study

In an Australian case, the claimant suffered hemiplegia following a neurosurgical procedure.⁴ The defendant (a neurosurgeon) raised an argument about the expertise of the claimant's expert witness, who was a neurologist not a neurosurgeon.

- The Court did not exclude the neurologist's expert opinion and held that "the opinion expressed by (the Neurologist expert) in the present case was clearly based upon his knowledge of, and his training, study and experience in, those matters."
- However, it was also held that "it might be the case that ultimately, the weight to be attached to (the Neurologist's) opinion was less than that to be attached to the opinion of a Neurosurgeon."
- In other words, questions of admissibility must not be confused with questions of weight.

Conflict of interest

- 11 Before accepting an instruction, you should disclose any possible conflict of interest to the person who instructs you, who will then decide whether or not to engage you. Should knowledge of a conflict of interest emerge during the ensuing proceedings, you must formally declare such knowledge to the people instructing you, the other party, and the court immediately. Failure to do so may result in the court dismissing your opinion and / or referring the matter to the Medical / Dental Council for disciplinary action against you.
- 12 Conflict of interest may arise in a variety of circumstances, such as professional or personal involvement with one of the people involved in the case (e.g., your instructing party, the opposite party, the patient concerned), or when you have a personal interest in the outcome of

the case. Such involvement may be pecuniary in nature or otherwise. If in doubt, you should disclose.

- 13 The key principle is that you should have no interest, and be seen to have no interest, in the outcome of the case.

Types of proceeding

- 14 An incident may be handled by different official bodies with different purposes and functions, and they may call for different types of opinions. You need to have a good understanding of the roles of the proceedings involved and be able to address issues emanating from them.
- 15 For example, a professional disciplinary inquiry (e.g., by the Medical Council of Hong Kong or the Dental Council of Hong Kong) may be looking into a complaint about a

⁴ *Sandra Battersby v Allan* [2017] NSWSC 1724

practitioner's professional misconduct; the Coroner's Court would focus on the causes and circumstances of death and not liability; whereas civil litigation may deal with a claim in negligence, in which case the issues would be about liability and / or quantum. (See later sections)

Commitment and fees

- 16 The work of an expert witness can be time-consuming and challenging. Be prepared to read and analyse lengthy and detailed documents and to be able to communicate your views clearly and concisely to people without a background in medicine or dentistry.
- 17 You may be required to provide a written report, attend case conferences, conduct joint clinical assessments, give oral testimony, and be cross-examined in proceedings. You may be acting as a single expert witness for one party, as one of the joint expert witnesses or as a single joint expert witness. Make sure that you will have the time, and are prepared to spend the time, throughout the proceedings, and that you will be available to attend court / tribunal hearings in person, before accepting an instruction.

- 18 You should agree with the person who instructs you on the time frame and your fee at the outset (e.g., hourly rate, estimated number of hours and if supplementary reports are required). Inform and discuss with the person who instructs you early when you think you will need more time.

- 19 Clarify with your employer if you need prior approval for undertaking 'outside work'. Remuneration for expert witness work is taxable.

Training

- 20 Although not required by law, it is advisable for anyone taking up the role of an expert witness to undergo prior formal training, such as the Academy's Online Training Course for Expert Witnesses and Workshops on Expert Witness Report Writing.⁵ The Academy maintains a list of Fellows who are interested in serving as expert witnesses. If you wish to add your name to the list, you may visit the Academy's website and submit the completed online form.⁶ After undergoing formal training, Fellows are advised to start with simple cases and work closely with instructing lawyers to gain experience and develop the necessary skills.

⁵ Hong Kong Academy of Medicine Training Course for Expert Witnesses and Workshops on Expert Witness Report Writing.

⁶ List of Fellows who are interested in acting as Expert Witness (the List) Reply Form



IV. What are your duties as an expert witness?

21 Once you have accepted an instruction, you must pay attention to and observe various duties.

Duty to the court / tribunals

22 It cannot be overemphasised that an expert witness has an overriding duty to help the court / tribunals impartially and independently on matters relevant to the expert's area of expertise.⁷ This means you must act in an honest, trustworthy, and impartial manner. Your opinion must be unbiased and based on ascertainable, objective evidence. You are not an advocate for the party instructing or paying you. You must make sure that any report that you write, or evidence you give, is accurate and not misleading. This means you must take reasonable steps to check the

accuracy of any information you give, and to make sure that you include all relevant information.⁸ (**Box 4**)

23 You would be expected to cooperate with case management, meet timelines, and attend case conferences and hearings. You need to familiarise yourself with the Code of Conduct for Expert Witnesses with regard to the declaration of duty to the court, verification of reports by a statement of truth, and format of expert reports. You should abide by any direction of the court to:

- (a) confer with any other experts, if required;
- (b) endeavour to reach agreement on material matters for expert opinion, if required; and
- (c) provide the court / tribunal with a joint report specifying matters agreed and

Box 4: Expert witnesses' duties to the court

"Experts are instructed to assist the court by offering their expert opinion on areas which are within their specialist experience and which are not matters of common knowledge. That expert opinion has to be based on the objective evidence available to and ascertainable by them. The paramount duty of the expert is to the court, not to his client who has engaged him and by whom he is to be paid. There is no doctor-patient relationship between him and his client. He is not a mouthpiece for his client but must conduct a forensic examination and critically weigh the objective facts before offering his opinion to the court..." (Bharwaney J, at para 25.)⁹

⁷ Code of Conduct for Expert Witnesses. Cap. 4A The Rules of the High Court, Appendix D.

⁸ General Medical Council. Doctors giving evidence in court. Duties of all witnesses. Para 79

⁹ *Zahid Anwar v Graceful Sound Limited* HCPI 410/2008 & HCPI 370/2009

matter not agreed and the reasons for any non-agreement, or an independent report.¹⁰ (Appendix I)

Duty of confidentiality

24 Your written report and communications with the instructing party are subject to legal professional privilege, which protects confidential communications that have come into existence for the dominant purpose of use in connection with actual, pending or contemplated legal proceedings. You must

not disclose such information to anyone not involved in the proceedings without permission (e.g., casual discussion with your colleagues).

25 All reasonable steps must be taken to secure the use, transmission and storage of such information.

26 The principles of honesty, objectivity, trustworthiness, and impartiality and the duty of confidentiality shall apply to other relevant proceedings (e.g., professional disciplinary inquiries of tribunals).

¹⁰ Note 7.



V. Forming your expert opinion

27 Since your duty is to assist the court or the tribunal concerned, you must ensure that any evidence and opinion you give is sound and capable of standing up to scrutiny by the court / tribunal and the opposite party. The expectable standards of expert evidence have also been set out in statutory instrument¹¹, case law¹² and guidelines issued by professional bodies.^{13,14,15}

Sources of information

28 Your opinion should be based on the materials provided to you by the instructing party. Study them thoroughly and carefully. Ask the instructing party should you require further information or clarification.

29 You may also refer to other materials (e.g., scientific literature, clinical guidelines) to support your views. Cite them properly and list them out in your report. Be prepared to provide copies to the person who instructs you. Make sure that such materials are relevant to the issues addressed and applicable at the time of the incident. **(Box 5)**

30 Note that documents referred to in your expert evidence may need to be provided to the opposite party at the same time as the exchange of reports.

Nature and scope of opinion

31 Your opinion must be honestly held, trustworthy, objective, and impartial. You

Box 5: Case study

You have been instructed to comment on a case concerning a complication arising from a laparoscopic colectomy for colonic cancer performed in 2010. In respect to the standard of care of the operation:

- a journal article on the complication rates of laparoscopic colectomy published in 2005 would be relevant and applicable; whereas
- an article on open colectomy or an article on a new technique in laparoscopic colectomy published in 2021 is not.

¹¹ Note 7.

¹² *The Ikarian Reefer* [1993] Lloyd's Rep 68, at pages 81-82.

¹³ Academy of Medical Royal Colleges, Acting as an expert or professional witness — Guidance for healthcare professionals (2019).

¹⁴ British Medical Association expert witness guidance (2007).

¹⁵ General Medical Council. Acting as a witness in legal proceedings (2013)

should take reasonable steps to check that any statement you make is accurate. Consider all available evidence, including statements from the other parties. Do not deliberately leave out relevant information. Distinguish facts that you know to be true from those which are assumed.

- 32 For any tests or examinations carried out by you or by another person, you should state the nature of the test / examination, the diagnostic criteria used, and the ranges of normal results.
- 33 Your opinion must be supported by materials that you have been provided with or referred to. State the facts, matters and assumptions upon which your opinion is based as well as their limitations, if any. When addressing the questions of fact and opinion, keep the two separate and discrete. Do not speculate beyond the facts if you believe that your report may be incomplete or inaccurate without some qualification (e.g., where there is conflicting evidence). If necessary, you should also seek clarifications and ask for any outstanding relevant information from those instructing you.
- 34 If you consider your opinion is not a concluded one because of insufficient research or data or for any reason, it should be stated as a provisional one. Where there is a range of opinions, you should summarise them and state the reasons for your own view. Your opinion should be unbiased, even if it may be used to diminish the merit of your instructing party's case. Always remember that you are not an advocate for the parties and that your overriding duty is to the courts and tribunals.

35 Where a particular question or issue falls outside your area(s) of expertise, state this in your report. You may suggest expert(s) from the relevant field(s) who would be more appropriate to address the issue.

36 You are entitled to change your opinion later, for example, after exchange of reports. However, any change of view on a material matter must be communicated (through legal representatives) to the other party and to the court / tribunal in a supplementary report. Once your report has been issued in its final form, it cannot be amended.

Specific points to note

37 Your report should ideally be tailored to the proceeding involved. For example:

38 Professional disciplinary inquiries conducted by the Medical Council of Hong Kong or the Dental Council of Hong Kong focus on professional conduct. They aim to uphold professional standards and to protect the public. They do not award compensation for losses or suffering that had been caused. Your report should therefore address the issue of 'professional misconduct'. **(Box 6)**

39 Death inquests held by the Coroner's Court consider the causes and circumstances of death. It does not aim at allocating liabilities, metering out penalties, or awarding compensation. Your report should aim at assisting the court in understanding the cause of death and reaching a verdict, which could be death by natural causes, occupational disease, dependency on drugs / non-dependent abuse of drugs, want of attention at birth,

Box 6: Meanings of 'professional misconduct'

For medical doctors:

The term 'misconduct in a professional respect' means "conduct falling short of the standards expected among registered medical practitioners. It includes not only conduct involving dishonesty or moral turpitude, but also any act, whether by commission or omission, which has fallen below the standards of conduct which is expected of members of the profession. It also includes any act which is reasonably regarded as disgraceful, dishonourable or unethical by medical practitioners of good repute and competency."¹⁶

For dentists:

Section 18(2) of the Dentists Registration Ordinance (Chapter 156) states that "unprofessional conduct means an act or omission of a registered dentist which would be reasonably regarded as disgraceful or dishonourable by registered dentists of good repute and competency." "There are two kinds of conduct which are likely to be viewed as unprofessional. The first is dental treatment to patients which no dental practitioner of reasonable skill exercising reasonable care would carry out. The second is conduct, connected with his profession, in which the dental practitioner has fallen short, by omission or commission, of the standards of conduct expected among dental practitioners."¹⁷

suicide, attempted / self-induced abortion, accident, misadventure (i.e., where an act that is lawful but that has an unexpected consequence has caused the death), lawful killing, unlawful killing, stillbirth, and possibly an open verdict.¹⁸ The evidence presented to the Coroner's Court may be used in subsequent civil claims for negligence.

40 A claim in negligence in the civil court may consider whether the defendant practitioner is liable in causing the

claimant's injuries and what the amount of compensation should be. Your report on liability and causation should contain facts and opinions to deal with the issues of whether the defendant owed the claimant a duty of care, what the standard of care was at the time, and whether the defendant's care had fallen short of that standard and had caused the claimant's injuries; if your report is on quantum, it should discuss the nature and extent of the claimant's injuries, and the need for future medical treatment (if any). (Box 7)

¹⁶ The Medical Council of Hong Kong, Code of Professional Conduct for the Guidance of Registered Medical Practitioners (2022).

¹⁷ The Dental Council of Hong Kong, Code of Professional Discipline for the Guidance of Dental Practitioners in Hong Kong (2019).

¹⁸ Hong Kong Judiciary, 'Coroner's Court. Appendix III—Examples of findings which may be made by the Coroner or the Jury'. (https://www.judiciary.hk/en/court_services_facilities/cor.html#14).

Box 7: Standard of care and causation in medical negligence

Standard of care

- The legal standard of care in civil claims is not necessarily the same as the professional ethical standard expected of medical doctors and dentists in their practice.
- For diagnosis and treatment, the legal standard of care is such that “a doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art”.¹⁹ In other words, a doctor or dentist is not negligent if he / she is acting in accordance with such a practice, even though there may be a body of medical opinion that takes a contrary view irrespective whether it is a larger or smaller body. However, the professional opinions must be able to stand up to logical analysis by the Court.²⁰
- For informed consent, a doctor / dentist is under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments. The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient’s position would be likely to attach significance to the risk, or the doctor / dentist is or should reasonably be aware that the particular patient would be likely to attach significance to it. This is the “patient-centred” test. However, the doctor / dentist is entitled to withhold information as to a risk if he / she reasonably considers that it is detrimental to the patient’s health or in circumstances of necessity.^{21,22}
- In regard to the duty to discuss “reasonable alternative or variant treatments”, a doctor / dentist is not required to discuss every possible alternative, but only alternatives that s/he regards as reasonable in the exercise of professional judgment. A doctor / dentist is not liable for failing to discuss other possible alternative treatments if his/her assessment is supported by a reasonable body of professional opinion. The doctor / dentist is required to discuss the material risks of all alternatives which s/he regards as reasonable, and not only the risks of alternatives which s/he prefers.²³

Causation

- Causation is a complex issue. In general, the causation requirement is satisfied if it can be shown that, on the balance of probabilities, the patient would not have sustained his or her injuries but for the breach of duty of care by the doctor / dentist concerned.²⁴ In other words, it has to be shown that it is more likely than not (i.e., greater than a 50% chance) that the patient would not have suffered the injury if the doctor / dentist did not breach the duty of care.

41 A plaintiff to a claim may make several allegations on liability, e.g., one on substandard treatment causing injury, and another on failure to obtain informed

consent. You will have to address them separately. Negligence / breach of duty of care may be established when one of the allegations is substantiated. **(Box 8)**

¹⁹ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

²⁰ *Bolitho v City and Hackney Health Authority* [1996] 4 All ER 771

²¹ *Montgomery v Lanarkshire Health Board* [2015] SC 11 [2015] 1 AC 1430

²² The Medical Council of Hong Kong, Newsletter Issue 22, December 2015.

²³ *McCulloch and others (Appellants) v Forth Valley Health Board (Respondent)* (Scotland) [2023] UKSC 26

²⁴ *Hotson v East Berkshire Area Health Authority* [1987] 2 All ER 909

Box 8: The case of “Mills”²⁵

- Patient C had a brain tumour. The neurosurgeon (“D”) discussed three treatment options (surveillance, biopsy and endoscopic resection) and the risks and benefits of each of them. D did not offer a microscopically assisted resection procedure as an alternative and did not explain the comparative risks and benefits of these surgical techniques.
- C opted for endoscopic resection and suffered a haemorrhage during the endoscopic procedure which caused him to suffer from a stroke. His wife brought a claim, alleging that D had: (i) performed the operation negligently, and (ii) failed to take reasonable care to discuss the material risks involved in the proposed procedure and / or of any reasonable alternative.
- C could not prove that the use of endoscopic technique was negligent, nor that D had performed the procedure negligently.
- It was established that D should have discussed the alternative of microscopically assisted surgery, and that had C been so advised, he would probably have chosen that approach. Moreover, had C undergone a resection operation using the microscopically assisted technique (as he would have done if he had been properly advised), it is probable that if haemorrhage had occurred, it would have been better controlled and C probably would not have suffered a stroke.
- The claim based on alleged clinical negligence in the performance of the surgery FAILED (Applying *Bolam*); but SUCCEEDED on the basis of informed consent (Applying *Montgomery*).

42 You must be mindful of the distinction between question of law and question of fact. Whether or not there is professional misconduct or negligence is a question of law for the tribunal or the court, not an expert

witness, to decide. Your role is to assist the tribunal / court to make that decision. The person who instructs you would advise you on how to address these issues. Clarify with him / her if you have any questions.

²⁵ *Mills (by Maria Mills his wife and litigation friend) v Oxford University Hospitals NHS Foundation Trust* [2019] EWHC 936 (QB)



VI. Format of written report

43 The quality of your written report, in terms of its content, style of expression and format of presentation, is important. Referring to Section 8 of the Code of Conduct for Expert Witnesses (**Appendix I**), your report should (in the body of the report or in an annexure) specify the following:

- your qualifications as an expert and expertise relevant to the particular case (including practical experience);
- the facts, matters and assumptions on which the opinions in the report are based (a letter of instructions may be annexed);
- the reasons for each opinion expressed;
- if applicable, that a particular question or issue falls outside your field of expertise;
- any literature or other materials utilised in support of the opinions; and
- any examinations, tests, or other investigations on which you have relied, and the identity and details of the qualifications of the person who carried them out.

Apart from the above, your report should also contain the following:

- identity of the instructing party, date of instruction, case number (if any);
- scope of the report (matters to be investigated and issues to be addressed);
- information that forms the basis of your opinion (a list of materials provided by the instructing party and other materials you have utilised);
- a summary of relevant facts of the case;
- your opinions on the issues raised, including the facts, matters, reasons and assumptions on which the opinions are based;
- issues that fall outside your field of expertise (and suggestions for inviting other experts, if necessary);
- other issues that you wish to address (e.g., new issues that you have identified);
- a summary of your opinions;
- a signed and dated Form of Declaration (**Appendix II**);
- a signed and dated Statement of Truth (**Appendix III**);
- appendices (your brief curriculum vitae, references relied on etc.)

44 A good expert report should be easy to understand for people without a medical / dental background. (**Box 9**)

Box 9: Dos and Don'ts when drafting an expert report

Dos:

- properly formatted with relevant headings;
- set out in paragraphs of suitable length;
- number your paragraphs;
- written in clear and straightforward language;
- use simple terminology with a glossary for unusual medical terms;
- acronyms spelt out in full when used for the first time;
- include norms for range of motions etc. (by reference to page number of reference guides);
- explain special tests conducted;
- opinion is clearly stated;
- use diagrams, imaging studies to illustrate relevant matters;
- state the necessary qualifications to your opinions;
- state that your opinion is provisional if there is insufficient research or data available when you express your opinion.

Don'ts:

- long paragraphs;
- overuse of medical jargons;
- convoluted sentences;
- jumping between issues;
- mixing opinion with facts;
- not a stand-alone report;
- quote and base your conclusion on references published after the incident in question.

45 If, after communicating your opinion with the instructing party instructing you (or that party's legal representative), you change your opinion on a material

matter, you should forthwith provide the party (or that party's legal representative) with a supplementary report to that effect.



VII. Attending case conference

46 The person who instructs you may wish to meet with you to discuss your report, or you may be requested to attend a case conference together with the expert witness, instructing lawyer(s) and relevant person(s) of the opposite party. Where you are appointed as one of the joint expert witnesses, you shall abide by any direction of the Court to endeavour to reach agreement on material matters for expert opinions and state the reasons for any non-agreement.


47 Make sure that you are apprised of your own report, the materials that you use to form your opinion, and the report and the materials from the other party, if available, before attending the meeting.

48 These meetings provide you with an opportunity to explain your opinion, highlight its strengths and weaknesses, identifies areas of disagreement, areas of agreement with other experts, and any further evidence which may assist.

You may be asked to prepare a joint statement with the opposite party's expert to set out the areas of agreement and disagreement (with reasons), and the aim is to assist the lawyers, and ultimately the court or tribunal. It is not a confrontational exercise to argue your case. Make careful notes of the discussions.

49 Your opinion should remain independent. You should not act on any instruction or request to alter or withhold your opinion unless you think it is justified to do so according to your own independent professional judgement. If you have decided to change your opinion, you should inform the parties, explain your reasons, and amend your report accordingly.

50 Once your report has been issued in final form, it cannot be amended. Sometimes, the person who instructs you may seek a supplementary report from you if additional information is available.



VIII. Appearing in court / tribunal hearings

- 51 You may be required to attend hearings. Make sure that you are informed of the date (and any changes) and discuss with the person who instructs you of any scheduling difficulties on your part well in advance.
- 52 Be very well-prepared. Bring all relevant materials with you including journal articles etc. that you have utilised in forming your opinion and notes that you have made during case conferences.
- 53 Use simple terms and be proactive in explaining technical terms or jargons when you give oral evidence. State your opinion plainly and distinguish statements of opinion from statements of fact.
- 54 You may be cross-examined which can be an intimidating and stressful experience. Adopt a professional, moderate and objective demeanour. Do not argue with the questioner or lose composure in response to any attempts to 'provoke you'. Avoid a combative approach or the use of humour or sarcasm. Make notes of important issues raised by the lawyers and the judge.
- 55 Other principles mentioned in previous sections apply when you are being cross-examined.
- you are there to assist the court / tribunal, not to fight for your instructing party's case;
 - be very well-prepared;
 - listen to the question carefully and answer honestly;
 - do not provide information beyond the question;
 - if you do not understand the question, ask for the question to be restated or rephrased;
 - if you do not know the answer to a question, say so;
 - do not testify on matters outside your area of expertise;
 - if you are asked to speculate, qualify your answer.



IX. Liabilities of expert witnesses

56 As an expert witness, you have personal and professional responsibilities regarding the evidence that you give. Misleading information (e.g., scope of expertise, conflict of interest), evidence given in bad faith, and seriously defective evidence can have untoward and far-reaching legal consequences. The professional or academic status of an expert witness by itself offers no excuses. The common law does not provide immunity to an expert witness from professional disciplinary proceedings for professional misconduct

of the expert (**Box 10**) and from negligence claim by the instructing party. (see Sections 5(b) and 58)

57 In Hong Kong, professional guidance stipulates that an expert's comments on a professional colleague's conduct, competence, or fitness to practice should be carefully considered, justified, and offered in good faith. It is unethical for a medical doctor / dentist to make unjustifiable comments which, whether directly or by implication, undermines trust in the professional

Box 10: The case of *The General Medical Council v Professor Sir Roy Meadow*²⁶

Professor Sir Roy Meadow, an Emeritus Professor of Paediatrics and Child Health, was acting as a prosecution expert witness. He gave evidence relating to probabilities of sudden infant death syndrome but did not make clear that he was not an expert in statistics. Mrs. Clark was convicted of the murder of her first two sons and received two life sentences. Her first appeal was dismissed. It later transpired that Professor Meadow's evidence was mistaken and some essential evidence had also been withheld from Mrs. Clark. She made a second appeal and was set free in 2003. Her father then made a complaint to the General Medical Council (GMC) alleging serious professional misconduct on the part of Professor Meadow. In 2005, the GMC found him guilty and his name was erased from the register. He appealed to the High Court and the order of the GMC was overturned.

The GMC appealed to the Court of Appeal (CA) in 2006. There were two distinct parts of the appeal. The first was whether an expert witness should be entitled to immunity from disciplinary regulatory or fitness to practise proceedings in relation to statements made or evidence given by him in or for the purpose of legal proceedings. The second entailed a consideration of the GMC's challenge to the High Court judge's decision that Professor Meadow was not guilty of serious professional misconduct. The CA allowed the first part of the appeal and held that the Fitness to Practice Panel of the GMC had jurisdiction to entertain the allegations against Professor Meadow. [In other words, common law does not provide immunity of an expert witness from professional disciplinary proceedings for professional misconduct of the expert]. The second part of the appeal was rejected on the ground that giving honest albeit mistaken evidence in the circumstances of Professor Meadow's case should not lead to the finding of 'serious professional misconduct' [Note: the test in Hong Kong is "misconduct in a professional respect" and not "serious professional misconduct"].

competence or integrity of another doctor / dentist.^{27,28}

58 There may also be legal consequences. As has been discussed in Sections 5(b) and 56 above, in England and Wales, the legal immunity historically enjoyed by expert witnesses in respect to evidence they give has been removed and patients engaging the experts are allowed to make a claim against the experts for their losses resulting from the experts' negligence. However, the absolute privilege that they enjoy in respect of claims in defamation has not been abolished.²⁹ In Hong Kong, the Code of Conduct for Expert Witnesses

provides that:

"Proceedings for contempt of court may be brought against a person if he makes, or causes to be made, a false declaration or a false statement in a document verified by a statement of truth without an honest belief in its truth."³⁰

59 You are therefore strongly advised to follow the guidance set out in this document as well as any guidelines issued by the relevant professional bodies. You should also check whether your professional indemnity covers medicolegal work on top of your clinical practice.

²⁶ *The General Medical Council v Professor Sir Roy Meadow* [2006] EWCA Civ 1390

²⁷ The Medical Council of Hong Kong, Code of Professional Conduct (2022), Part 2(E) s19.

²⁸ The Dental Council of Hong Kong, Code of Professional Discipline (2019), s.9.

²⁹ Note 1.

³⁰ Note 7.



X. References

Statutory instrument:

Code of Conduct for Expert Witnesses. Cap. 4A, The Rules of the High Court, Appendix D.

Cases:

Bolam v Friern Hospital Management Committee [1957] 1 WLR 582

Bolitho v City and Hackney Health Authority [1996] 4 All ER 771

Hotson v East Berkshire Area Health Authority [1987] 2 All ER 909

Jones v Kaney [2011] UKSC 13

McCulloch and others (Appellants) v Forth Valley Health Board (Respondent) (Scotland) [2023] UKSC 26

Mills (by Maria Mills his wife and litigation friend) v Oxford University Hospitals NHS Foundation Trust [2019] EWHC 936 (QB)

Montgomery v Lanarkshire Health Board [2015] SC 11 [2015] 1 AC 1430

Rai Chandra Kala v La Creperie 8 Ltd and ECAFB [2023] HKDC 671; DCPI 244/2019

Sandra Battersby v Allan [2017] NSWSC 1724

The General Medical Council v Professor Sir Roy Meadow [2006] EWCA Civ 1390

The Ikarian Reefer [1993] Lloyd's Rep 68

Zahid Anwar v Graceful Sound Limited HCPI 410/2008 & HCPI 370/2009

Other resources:

Academy of Medical Royal Colleges, Acting as an expert or professional witness — Guidance for healthcare professionals (2019). (<https://www.aomrc.org.uk/reports-guidance/acting-as-an-expert-or-professional-witness-guidance-for-healthcare-professionals/>)

British Medical Association expert witness guidance (2007). (<https://innermosthealthcare.com/wp-content/uploads/2016/02/expert-witness-guidance2.pdf>)

Chiu JSP, Leung GK. Expert witnesses and area of expertise. *Hong Kong Med J* 2022 Feb;28(1):4-5. (<https://doi.org/10.12809/hkmj215125>)

Coroner's Court. Examples of findings which may be made by the Coroner or the Jury. (https://www.judiciary.hk/en/court_services_facilities/cor.html)

General Medical Council. Acting as a witness in legal proceedings (2013). (https://www.gmc-uk.org/-/media/documents/gmc-guidance-for-doctors---acting-as-a-witness-in-legal-proceedings_pdf-58832681.pdf)

General Medical Council. Doctors giving evidence in court. Duties of all witnesses. Para 76 (<https://www.gmc-uk.org/professional-standards/the-professional-standards/protecting-children-and-young-people/doctors-giving-evidence-in-court>)

The Dental Council of Hong Kong, Code of Professional Discipline for the Guidance of Dental Practitioners in Hong Kong (2019). (<https://www.dchk.org.hk/pdf/code.pdf>)

The Hong Kong Academy of Medicine Training Course for Expert Witnesses. (<https://www.hkam.org.hk/en/events/hkam-training-course-expert-witnesses>)

List of Fellows who are interested in acting as Expert Witness (the List) Reply Form. (<https://online.hkam.org.hk/form/HKAMExpertWitnessesRF>)

The Medical Council of Hong Kong, Code of Professional Conduct for the Guidance of Registered Medical Practitioners (2022). ([https://www.mchk.org.hk/english/code/files/Code_of_Professional_Conduct_\(English_Version\)_\(Revised_in_October_2022\).pdf](https://www.mchk.org.hk/english/code/files/Code_of_Professional_Conduct_(English_Version)_(Revised_in_October_2022).pdf))

The Medical Council of Hong Kong, Newsletter, Issue 22, December 2015. (<https://www.mchk.org.hk/files/newsletter22.pdf>)

Code of conduct for expert witnesses

(O. 38 rr. 35, 37B and 37C)

Application of code

1. This code of conduct applies to an expert who has been instructed to give or prepare evidence for the purpose of proceedings in the Court.

General duty to Court

2. An expert witness has an overriding duty to help the Court impartially and independently on matters relevant to the expert's area of expertise.
3. An expert witness's paramount duty is to the Court and not to the person from whom the expert has received instructions or by whom he is paid.
4. An expert witness is not an advocate for a party.

Declaration of duty to Court

5. A report by an expert witness is not admissible in evidence unless the report contains a declaration by the expert witness that—
 - (a) he has read this code of conduct and agrees to be bound by it;
 - (b) he understands his duty to the Court; and
 - (c) he has complied with and will continue to comply with that duty.
6. Oral expert evidence is not admissible unless an expert witness has declared in writing, whether in a report or otherwise in relation to the proceedings, that—
 - (a) he has read this code of conduct and agrees to be bound by it;
 - (b) he understands his duty to the Court; and
 - (c) he has complied with and will continue to comply with that duty.

Expert report to be verified

7. A report by an expert witness must be verified by a statement of truth in accordance with Order 41A of the Rules of the District Court (Cap. 336 sub. leg. H).

Form of expert reports

8. A report by an expert witness must (in the body of the report or in an annexure) specify—
 - (a) the person's qualifications as an expert;
 - (b) the facts, matters and assumptions on which the opinions in the report are based (a letter of instructions may be annexed);
 - (c) the reasons for each opinion expressed;
 - (d) if applicable, that a particular question or issue falls outside his field of expertise;
 - (e) any literature or other materials utilized in support of the opinions; and

- (f) any examinations, tests or other investigations on which he has relied, and the identity and details of the qualifications of the person who carried them out.
- 9. If an expert witness who prepares a report believes that it may be incomplete or inaccurate without some qualification, that qualification must be stated in the report.
- 10. If an expert witness considers that his opinion is not a concluded opinion because of insufficient research or insufficient data or for any other reason, this must be stated when the opinion is expressed.
- 11. An expert witness who, after communicating an opinion to the party instructing him (or that party's legal representative), changes his opinion on a material matter shall forthwith provide the party (or that party's legal representative) with a supplementary report to that effect which must contain such of the information referred to in section 8(b), (c), (d), (e) and (f) as is appropriate.

Experts' conference

- 12. An expert witness shall abide by any direction of the Court to—
 - (a) confer with any other expert witness;
 - (b) endeavour to reach agreement on material matters for expert opinion; and
 - (c) provide the Court with a joint report specifying matters agreed and matters not agreed and the reasons for any non-agreement.
- 13. An expert witness shall exercise his independent, professional judgment in relation to such a conference and joint report, and shall not act on any instruction or request to withhold or avoid agreement.

Note: Proceedings for contempt of court may be brought against a person if he makes, or causes to be made, a false declaration or a false statement in a document verified by a statement of truth without an honest belief in its truth.

(L.N. 153 of 2008)

Form of Declaration

I declare that: -

I have read the Code of Conduct for expert witnesses and agrees to be bound by it;

I understand that I have an overriding duty to help the court impartially and independently on matters relevant to my expertise.

I understand that my paramount duty is to the court and not to the person from whom I have received instructions or by whom I am paid and that I am not an advocate for a party to the proceedings.

I have complied with and will continue to comply with that duty.

Signature _____

Date _____

Name _____

APPENDIX III ■

Statement of Truth

I, _____, believe that the facts stated in this report are true and that the opinions expressed in it are honestly held.

Signature _____

Date _____

Name _____