

## Giving Evidence in Court

At Medisec, we appreciate that it can often be disquieting for doctors to receive correspondence from a solicitor asking you to attend Court as a witness concerning a patient. It is understandable that you may have many queries about what such a request will mean for you, how you will arrange locum cover in these challenging times and what to expect if you are required to attend Court in person to provide evidence.

Doctors may be requested to prepare medico-legal reports in various circumstances, including personal injuries cases such as road traffic accidents or accidents at work. Doctors might also be asked to provide reports in family law proceedings on behalf of one of their patients.

This factsheet deals with issues arising for doctors who are requested to appear in Court and provide evidence as a medical factual witness (i.e. concerning treatment they provided to a patient), as opposed to an expert witness, providing an expert opinion on issues such as liability / breach of duty and causation. For guidance on drafting expert reports and giving evidence as an expert witness, please refer to our factsheet *Acting as an Expert Witness*, available on our website.

When preparing a medico-legal report at the request of a patient's solicitor, you should bear in mind that you may be called upon to give evidence, on oath, as to the contents of your report. It can understandably be a daunting prospect, particularly if a doctor has not previously attended Court. It is worth noting; however, that most personal injuries cases resolve between parties without the case proceeding to a full trial, and as a result, doctors are frequently not called upon to give evidence. The Courts Service has indicated that approximately 97% of all personal injury cases resolve without the need to proceed to a Court hearing.

We set out below some guidance and considerations on how best to manage attending Court, as a factual witness.

### Request to attend Court

A doctor may be requested to attend Court to give evidence in respect of matters referred to in a medical report which they prepared and submitted. Usually, the patient's solicitor will contact the doctor and canvass their availability to attend Court on a particular date or dates. On receipt of a request to attend as a witness, we recommend liaising with the solicitor to try and narrow down a specific day/time when you will be required to attend, as some cases can run for days or even weeks. You should also request to be immediately informed if a case settles or if your attendance is no longer required. You should seek written confirmation from the solicitor that your fees/expenses associated with attending Court will be discharged, including the cost of a locum.

Unfortunately, we are aware of instances where very little notice about a Court date is provided to a doctor, which can result in significant difficulties for doctors with patient commitments and finding cover at short notice. If a party other than the patient's solicitor seeks your attendance at Court to provide evidence, you should insist upon service of a Subpoena or a Witness Summons to facilitate your attendance. In the context of family law proceedings, where you have treated both partners, it is advisable to insist upon service of a Subpoena or a Witness Summons to facilitate your attendance at Court.

If a witness (in this case a doctor) refuses to attend Court following a request, they may be served with a Subpoena; the witness must then comply with the direction of the Court to attend. There are two forms of Subpoena which you may receive:

- Subpoena ad testificandum: this requires you to attend Court in order to give evidence.
- Subpoena duces tecum: this requires you to attend Court in order to give evidence and to bring certain documents to Court (for example, specific patient medical records).

## Attending Court

You should clarify with the party requesting your attendance details such as the location of the specific courtroom, the time of the hearing, the full name and record number of the case. You should bring any documents that were specified in the Subpoena, if you received one. It would also be helpful to bring a copy of any correspondence/reports that you have prepared relating to the matter and to familiarise yourself with the patient's medical records.

It is important to dress professionally when attending Court and to conduct yourself appropriately, including switching off your mobile telephone or any other device before entering the courtroom.

Typically there will be other parties present in the courtroom, such as solicitors, barristers, the court registrar, a stenographer and possibly some members of the public or court reporters. Family law proceedings; however, are held "*in camera*" which means the case is held behind closed doors and members of the public and journalists are not permitted to attend.

When the Judge enters the courtroom, all those present should stand.

## Giving evidence

If a doctor is asked to give evidence in any proceedings, it is important to distinguish between giving evidence as a medical professional witness/factual witness and giving evidence as an expert witness.

A factual witness can give evidence concerning matters that they have personally witnessed such as an examination of the patient in the course of treatment. They cannot give evidence of their opinion.

An expert witness, on the other hand, is an independent individual with no link to a case, who is retained to provide an expert opinion on matters outside the ordinary knowledge of the Court. An expert witness can give evidence of what they know or believe to be true on the basis of their expertise.

A doctor's role is to provide impartial evidence to assist the Court. You should not act as an advocate for either party. Before giving evidence in Court, you must take an oath or affirmation (a verbal declaration) that your evidence will be truthful. You will do this in the witness stand, typically located at the top of a courtroom, near the Judge. For remote hearings, the Courts Service advise that if a witness wishes to take an oath on a Bible or other sacred text, the witness must have this text with them during the virtual hearing. The witness will be asked to make the text visible to the Court. (see below)

In most cases, you will be asked to provide your name and role to the Court. When giving evidence, you should answer the direct questions raised by the barrister or solicitor representing the patient. They will ask you a number of questions based on your evidence/report ("examination in chief"). You should address your answers to the Judge and refer to them as "Judge".

You may be subsequently asked questions by the barrister or solicitor representing the other party to the case ("cross-examination"). This could include being asked about any inconsistencies or any possible alternative explanations in respect of the evidence you provided. The purpose of cross-examination is generally to test/challenge the evidence that you have provided.

Following this, the barrister or solicitor representing the patient/party who called you to give evidence may ask further questions to clarify your evidence on cross-examination. This is known as "re-examination".

If the Judge or barrister asks a question to which you do not know the answer, it is perfectly reasonable for you to simply state that you do not know or do not recall. You should not be afraid to keep your answers short and to the point.

With the permission of the Court, you may refer to contemporaneous notes from the time of the patient's attendance or to your medico-legal reports.

When your evidence is complete, you will be asked to leave the witness stand. Most people conventionally bow towards the Judge when they are exiting the courtroom.

## Video-link

Since the Covid 19 pandemic, in certain cases it has been possible for hearings to be held remotely and witnesses have been able to give evidence by video-link. The Courts Service has provided useful guidance on remote hearings, titled “Virtual Courtrooms, Guidance for Practitioners and Lay Litigants” which can be found on the Courts Service website.

The guidance advises that you should treat the virtual courtroom as you would a physical courtroom. You should make sure that you are joining the virtual courtroom from a quiet, private location with appropriate lighting so your face can be clearly seen, enter your full name, as this may be the name displayed on your video and ensure that your background is appropriate for a formal scenario.

For connection details, you should seek clarity in advance from the solicitor who has requested that you provide evidence by video-link. You should give yourself sufficient time in advance to access the virtual courtroom and you should mute your sound, unless you are providing evidence.

## Media

Although most Court cases are open to the public and some personal injuries cases are mentioned in the media, it is unlikely that you will be approached by the media and asked to comment. As you will see from most media articles, they are focused on a synopsis of the facts and any monetary award made, if applicable.

Below are some points to consider if you are approached by a member of the media at Court or afterwards:

1. You are not obliged to speak with the media and you should always bear issues of patient confidentiality in mind. Always avoid responding immediately to a media query as you may be caught off guard without the time to formulate an appropriate response.
2. Your reception staff should be advised to adhere to the following procedure should a journalist call your practice. The journalist should be asked to submit the following details by email and advised that they will be called back:
  - a) Publication/programme name
  - b) A list of questions
  - c) Their deadline
  - d) Their contact details.
3. If a journalist gets through to you directly by telephone, we recommend that you do not engage and you may wish to speak with your indemnifier for specific advice. It is important that you do not speak off the cuff and you should ask them to submit the details listed at ‘a- d’ above.
4. If you are approached in person by a member of the media, try to stay calm and polite and do not challenge and again always be mindful of patient confidentiality.
5. Avoid saying ‘no comment’ – as it can be construed as defensive. Explain that you will consider all queries but insist that they are sent in writing to afford you appropriate time to consider them.
6. Inform your staff or clinic management team if you are contacted so they can be prepared, should the journalist try to speak with another member of your team.
7. If you are approached by a photographer or film crew, maintain your professional composure – do not be aggressive or rude, react angrily or cover your face. Smiling may also convey an inappropriate image.
8. If a camera crew or photographer arrives at your practice, advise your patients and be firm that patients should not be identifiable in any film footage or photography.
9. Always assume that anything you say to a journalist can be published.

Appearing in court can be a stressful and challenging experience, so being as prepared as possible is crucial. If you need any advice regarding your report or giving evidence in Court, please contact us at Medisec for assistance and please don't hesitate to get in touch if you are contacted by the media in relation to a medico-legal issue.

"The contents of this publication are indicative of current developments and contain guidance on general medico-legal queries. It does not constitute and should not be relied upon as definitive legal, clinical or other advice and if you have any specific queries, please contact Medisec for advice".