



Giving evidence in court

Mr Liam Heffernan, Legal Counsel in Medisec, outlines what medical practitioners should know when called to be a witness in court

Receiving a solicitor's letter asking you to confirm your availability to attend court as a witness concerning one of your patients can often be an unsettling request. It is understandable that doctors may have many queries about what such a request will mean for them and what to expect if they do have to appear in court 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 provide reports in family law proceedings on behalf of one of their patients.

This article will deal with issues arising for doctors who are requested to appear in court and provide evidence as a medical factual witness (ie, concerning treatment they provided to a patient), as opposed to where doctors are asked to provide an expert opinion on issues, such as liability/breach of duty and causation.

It is worth noting that most personal injury cases resolve between parties without the case proceeding to a full trial, and as a result, doctors are not called to give evidence in respect of the majority of reports they provide. The Courts Service has indicated that approximately 97 per cent of all personal injury cases resolve without the need to proceed to a court hearing.

However, when preparing a medico-legal report at the request of a patient's solicitor, doctors should bear in mind that they may be called to give evidence, on oath, as to the contents of their report. It can understandably be a daunting prospect, particularly if a doctor has not previously attended court.

Request to attend court

You may be requested to attend to give evidence in court about the matters referred to in a medical report you prepared and submitted. Typically the patient's solicitor will canvass your availability in advance to attend court on a particular date or dates. Unfortunately, we are aware of instances where very little notice is provided, which can result in significant difficulties for doctors with patient commitments and issues with 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 summons to witness (detailed below).

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 (as some cases can run for days or weeks). You can also request to be immediately informed if a case settles or if your attendance is no longer required. You should also liaise with the solicitor in advance about fees and seek written confirmation that fees/expenses will be discharged.

However, ultimately if a witness (in this case a doctor) refuses to attend, they may be served with a subpoena to attend court. A 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 as well (for example specific patient medical records).

Prior to attending court, you should fully review the patient's medical records and any medical reports, which you have prepared on behalf of the patient.

You may be asked to give evidence in the context of family law proceedings. If you have treated both partners, it is preferable to insist upon receipt of a subpoena or summons to witness.

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 of the case and record number. 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 may have prepared relating to the matter, or to have familiarised yourself with such documentation in advance of the court date.

It is important to dress professionally when attending court and to conduct yourself appropriately, including switching off your mobile phone or any other device before entering the courtroom and standing when the judge enters the court.

Typically, there will be other parties present, such as solicitors, barristers, the court registrar, a stenographer, and possibly some members of the public or court reporters. However, family law proceedings 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.

Video link

Since the pandemic, in certain cases it has been possible for hearings to be held re-

motely 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 its 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. Ensure that you have entered your full name on entering the courtroom as this may be the name displayed with your video and check 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. You should give yourself sufficient time in advance to access the virtual court and your sound should be muted unless you are providing evidence.

Giving evidence

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 declara-

tion) 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 advises that if a witness wishes to take an oath on a Bible or other sacred text, you must have this text with you during the virtual hearing. You will be asked to hold this text up to ensure it can be seen by the court.

In most cases, you will be asked to provide your name and role to the court. You will provide your evidence from the witness stand.

When giving evidence in court 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, who should be addressed 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 the evidence provided by you 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. It would be inadvisable for a doctor to attempt to answer a question that may be outside his or her clinical area of expertise or knowledge. Do 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 your medico-legal reports.

When your evidence is complete, you will be asked to leave the witness stand in the courtroom. Most people conventionally bow towards a judge when they are leaving the door of the courtroom.

Lastly, although most court cases are open to the public and some personal injury cases are mentioned in the media, it is unusual for individual witnesses to be approached by the media and asked to comment. If this occurs, try to avoid responding immediately to a media query as you may be caught off guard without the time to consider an appropriate response, if any. You are not obliged to speak with the media and you should always bear issues of patient confidentiality in mind.

Appearing in court can be a stressful and challenging experience, so being as prepared as possible is crucial. If you need any advice regarding giving evidence in court or dealing with the media, please do seek assistance from your indemnifier.

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