

Health and Care Professions Tribunal Service

PRACTICE NOTE

Opinion Evidence, Experts and Assessors

This Practice Note has been issued for the
Guidance of Panels and to assist those appearing before them.

Introduction

The Panel rules¹ provide that, at hearings before a Panel, the rules on the admissibility of evidence are those that apply in civil proceedings in the part of the United Kingdom where the Panel is conducting a hearing. Consequently, as in any other civil proceedings, expert evidence is admissible.²

Opinion evidence

As a general principle, witnesses may give evidence of facts but not opinion evidence. That principle is based upon the premise that the Panel should reach its own conclusions on the factual evidence put before it, rather than deferring to the opinion of others.

The two main exceptions to that principle are:

- evidence provided by expert witnesses, who may give opinions on matters requiring specialist knowledge within their field of expertise³; and
- evidence provided by non-expert witnesses who, in describing facts, express an opinion on matters within the competence of lay people generally (such as the approximate speed of a moving vehicle seen by the witness).

In proceedings like those before a Panel, where issues of professional practice and other technical issues arise on a regular basis, it is not uncommon for witnesses of fact to have specialist expertise. Panels should not assume that they can only admit expert evidence if it is provided by an independent expert witness instructed by one or both of the parties.

In *Hoyle v Rogers*⁴ the court held that the regime for the control of expert witnesses “who [have] been instructed to give or prepare expert evidence for the purpose of

¹ HCPC (Investigating Committee) (Procedure) Rules 2003, r.8(1)(b); HCPC (Conduct and Competence Committee) (Procedure) Rules 2003, r.10(1)(b); HCPC (Health Committee) (Procedure) Rules 2003, r.10(1)(b).

² Civil Evidence Act 1972 section 3

³ *R v Turner [1975] QB 834*

proceedings "only regulates the use of a particular category of expert evidence and does not amount to "a comprehensive and exclusive code" regulating the admission of all expert evidence.

In *DN v London Borough of Greenwich*⁵ it was held to be wrong to decline to allow the defendants to a professional negligence claim to rely on opinion evidence in the witness statement of an educational psychologist who was said to have been negligent.

That decision was applied in *Multiplex Constructions (UK) Ltd v Cleveland Bridge Ltd*.⁶, where the court allowed an engineer giving factual evidence to also provide statements of opinion reasonably related to facts within his knowledge and relevant comments based on his own experience.

Panels should be aware that a witness of fact who is able to provide opinion evidence based upon their specialist knowledge or expertise does not owe the same paramount duty to the Panel as an expert witness. However, that does not mean that such evidence must be excluded. As the court recognised in *Hoyle*, in dealing with mixed fact and opinion evidence provided by witnesses who are not independent expert witnesses in the strict sense, an important distinction has to be drawn between the admissibility of that evidence and the weight to be given to it. Nevertheless, Panels should take care to ensure that where a witness does give an opinion, that witness does have specialist knowledge in that field of expertise.

Independent expert witnesses

Whether independent expert evidence of any kind is required is a matter within the discretion of the Panel. Consequently, the consent of the Panel will be required to call an expert witness or submit an expert's report in evidence.

Wherever possible, Panels should direct that matters requiring expert evidence are to be dealt with in a single or joint expert report. Where a Panel has directed that evidence is to be given by one expert but a number of disciplines are involved, an expert in the dominant discipline should be identified as the single expert. That expert should prepare the general part of the report and be responsible for annexing or incorporating the contents of any reports from experts in other disciplines.

The independent expert's role

The paramount duty of an independent expert is to assist the Panel on matters within the expert's own expertise. This duty overrides any obligation to the party that instructs or pays the expert. Expert evidence should be the independent product of the expert. Experts should consider all material facts, including those which might

⁴ [2014] EWCA Civ 257

⁵ [2004] EWCA Civ 1659

⁶ [2008] EWHC 2220 (TCC)

detract from their opinion and should provide objective, unbiased opinion on matters within their expertise.

An expert should make it clear:

- when a question or issue falls outside the expert's expertise; and
- when the expert is not able to reach a definite opinion, for example because of a lack of information.

It can be a serious matter for expert witnesses to give evidence about matters which fall outside their expertise, as it has the potential to lead to injustice. Panels should be careful to ensure that evidence is only given by an expert about matters which fall within their expertise.

Independent experts' reports

Experts' reports should be addressed to the Panel, not to the party who instructed the expert. An expert's report must:

- set out details of the expert's qualifications;
- provide details of any literature or other material which the expert has relied upon in preparing the report;
- contain a statement setting out the substance of all facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those opinions are based;
- make clear which of the facts stated in the report are within the expert's own knowledge;
- identify any person who carried out any examination, measurement, test or experiment used by the expert for the report, the qualifications of that person, and whether the task was carried out under the expert's supervision; and
- where there is a range of opinion on the matters dealt with in the report, summarise the range of opinion.

An expert's report must be supported by a Declaration and Statement of Truth in the form set out in the Annex to this Practice Note.

Instructions

The instructions given to an expert are not protected by privilege, but an expert may not be cross-examined on those instructions without the consent of the Panel. Consent should only be given if there are reasonable grounds for considering that the statement in the report of the substance of those instructions is inaccurate or incomplete.

Questions to experts

Questions asked for the purpose of clarifying the expert's report should be put to the expert in writing no later than 28 days after the expert's report is provided to the parties.

Where a party sends any written question(s) directly to an expert, a copy of the question(s) should, at the same time, be sent to the other parties and the Panel. The party instructing the expert is responsible for paying any fees charged by that expert in answering those questions.

Assessors

Articles 35 and 36 of the Health Professions Order 2001 provide for the appointment of:

- registrant assessors, to advise on professional practice issues; and
- medical assessors, to advise on medical issues.⁷

A Panel may request the appointment of a registrant assessor or medical assessor in any case. It is also open to the parties to request that an assessor be appointed, but the decision as to whether an assessor is required is a matter for the Panel alone. Any request from a party must be made in writing to the Panel, setting out the issues on which the party concerned believes the Panel will need the assistance of an assessor.

Where a Panel proposes that an assessor be appointed it should notify the parties in writing of the name of the proposed assessor; of the matter(s) in respect of which the assistance of the assessor will be sought; and of the qualifications of the assessor to give that assistance.

A party that wishes to object to the appointment of an assessor must do so in writing. Any objections should be taken into account by the Panel in deciding whether the appointment is to be confirmed.

Assessors' reports should be prepared in a similar format to an expert's report and must contain a copy of the instructions given to the assessor by the Panel in preparing that report. Any report prepared by an assessor must be sent to each of the parties not less than 14 days before the hearing.

Assessors should normally be present at the hearing and may participate in the proceedings as directed by the Panel. However, an assessor should not appear as a witness or be cross-examined.

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⁷ The functions which registrant assessors and medical assessor may perform are set out in the Health Professions Council (Functions of Assessors) Rules Order of Council 2003.

Annex

Declaration and Statement of Truth

I [insert full name of expert] **DECLARE THAT:**

1. I understand that my duty in providing written reports and giving evidence is to help the Panel, and that this duty overrides any obligation to the party by whom I am engaged or the person who has paid or is liable to pay me. I confirm that I have complied and will continue to comply with my duty.
2. I confirm that I have not entered into any arrangement where the amount or payment of my fees is in any way dependent on the outcome of the case.
3. I know of no conflict of interest of any kind, other than any which I have disclosed in my report.
4. I do not consider that any interest which I have disclosed affects my suitability as an expert witness on any issues on which I have given evidence.
5. I will advise the party by whom I am instructed if, between the date of my report and the hearing, there is any change in circumstances which affect my answers to points 3 and 4.
6. I have shown the sources of all information I have used.
7. I have exercised reasonable care and skill in order to be accurate and complete in preparing this report.
8. I have endeavoured to include in my report those matters, of which I have knowledge or of which I have been made aware, that might adversely affect the validity of my opinion. I have clearly stated any qualifications to my opinion.
9. I have not, without forming an independent view, included or excluded anything which has been suggested to me by others, including those instructing me.
10. I will notify those instructing me immediately and confirm in writing if, for any reason, my existing report requires any correction or qualification.
11. I understand that:
 - (1) my report will form the evidence to be given under oath or affirmation;
 - (2) questions may be put to me in writing for the purposes of clarifying my report and that my answers shall be treated as part of my report and covered by my statement of truth;
 - (3) the Panel may at any stage direct a discussion to take place between experts for the purpose of identifying and discussing the expert issues in the case, where possible reaching an agreed opinion on those issues and

identifying what action, if any, may be taken to resolve any of the outstanding issues between the parties;

- (4) the Panel may direct that following a discussion between the experts that a statement should be prepared showing those issues which are agreed, and those issues which are not agreed, together with a summary of the reasons for disagreeing;
- (5) I may be required to attend the hearing to be cross-examined on my report by a cross-examiner assisted by an expert;
- (6) I am likely to be the subject of public adverse criticism by the Panel if it concludes that I have not taken reasonable care in trying to meet the standards set out above.

STATEMENT OF TRUTH

I confirm that, insofar as the facts stated in my report are within my own knowledge, I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion.