



FRAMEWORK FOR THE CONTINUING EDUCATION AND PROFESSIONAL DEVELOPMENT OF FELLOWS ON THE RANZCOG EXPERT WITNESS REGISTER

PREAMBLE

This document has been prepared to assist Fellows on the RANZCOG Expert Witness Register to identify, understand, and comply with a range of issues relevant to their role as expert witnesses, including the responsibilities that are increasingly being imposed upon them by courts and tribunals in an endeavour to reduce the length, complexity and cost of litigation.

OBJECTIVES

- To explain to Fellows the legal context in which they might be asked to act as an expert witness
- To explore and explain the different types of expert evidence relevant to Fellows;
- To describe Fellows' roles, rights and responsibilities;
- To outline the expanding obligations and responsibilities of Fellows who act as expert witnesses;
- To describe how Fellows can optimise their role as expert witnesses in the interests of the administration of justice and the obtaining of proper outcomes in dispute resolution;
- To provide a framework for the continuing education and professional development of Fellows on the RANZCOG expert witness register

This document is not intended to address all aspects of a Fellow's duties where acting as an expert witness, but is designed to assist them to understand the expectations and requirements of the College and, more importantly, the Courts, in relation to Fellows' activities as expert witnesses.

WHAT IS AN EXPERT?

Witnesses fall into two broad categories:

1. Those who are called to give first-hand evidence about what they saw, did or heard in connection with an issue that is relevant to the proceedings;
2. Those who, by reason of their relevant expertise are called to provide a court or tribunal with the benefit of that expertise, so that the court or tribunal can come to the correct conclusion on the issues before it.

This second category of evidence is called expert evidence, and will usually involve:

- (a) the scientific task of collating, examining and evaluating the case material, and forming an opinion based on that study;
- (b) the technical function of communicating this opinion to the Court, preceded by adequate preparation combining a sufficient quantity of study with orderly methods of analysis.

The relevant communications will be both written and oral, the latter involving not only the giving of evidence before a court or tribunal but also, on occasion, the attending of pre-hearing conferences.

What are the special features of Fellows' role as an expert witness?

Unlike other evidence, expert evidence occupies a privileged category. Only experts are permitted to give "opinion" evidence.

However, this privilege is qualified:

1. The evidence must be relevant;
2. It must be within the expert's field of expertise, and
3. It must be the opinion of the expert and not of some other person.

What rules govern the giving of expert evidence?

Legislation in all jurisdictions-various versions of the Evidence Act-provide many legal framework for the admissibility of evidence generally, including expert opinion evidence.

In addition to legislation, various courts have provided, or are in the process of creating, rules relating to evidence in their respective courts.

The common law (that is, judge-made law as opposed to statute law) also provides guiding principles as to the "weight" to be attributed to evidence. Those principles are generally based on common sense and fairness, and provide guiding principles as to the role and function of the expert in Court.

When Fellows might be asked to act as an expert-medicolegal cases

You have indicated your willingness and capacity to provide expert evidence in connection with one or more of the following:

- a** giving evidence as to reasonable practice in general obstetrics ;
- b** giving evidence on scientific data in general obstetrics;
- c** giving evidence as to reasonable practice in general gynaecology;
- d** giving evidence on scientific data in general gynaecology;
- e** giving evidence on reasonable practice in the subspecialty to which you belong;
- f** giving evidence on scientific data in the subspecialty to which you belong.

Such expert opinion may be requested in the following settings:

- A.** Legal proceedings where the quality and competence of obstetric or gynaecological care are being scrutinized.

In this setting, the Fellow may be asked to give expert opinion in connection with one or more of the following issues:

1. Whether a practitioner acted in accordance with the standard of care to be reasonably expected in the circumstances- a **liability opinion**
2. The nature and extent of obstetric or gynaecological injuries sustained by a woman (and occasionally a fetus or neonate), the treatment options available and expert opinion on prognosis. Lawyers call this a **"quantum" report**.
3. The extent to which certain acts and omissions of health professionals (whether negligent or not) caused the injuries complained of-this is called a **"causation" opinion**.

Fellows will sometimes be asked to prepare an opinion in which all three issues are expressly canvassed. At other times, they will be specifically approached only in connection with one of these issues. On many occasions, however, it will not be clear whether the Fellow is being asked to comment on one or all of these issues. If there is any doubt, the expert is encouraged to seek clarification.

- B.** Where the quality of the obstetric or gynaecological care is **not** in dispute, but where the commissioning lawyers believe that expert opinion from a Fellow is required to properly address other medical issues, as routinely happens in connection with industrial or motor vehicle accidents litigation, or public and products liability litigation.

For the purposes of this Guideline, all such matters will be referred to as **"medicolegal cases"**

Medicolegal cases are conducted in a variety of settings, including:

- The "compensation courts", that is the Supreme Court and the other, lower courts in which personal injuries claims are prosecuted
- The Coroners Court
- The medical disciplinary tribunals of each jurisdiction

These fora differ in important respects and it is important that Fellows understand in broad terms the legal system, how the particular courts/tribunals operate, and what part the Fellow's expert evidence plays.

When Fellows are unclear about the nature or scope of their proper role, they should at first instance seek guidance from the person commissioning the report from them.

Early clarification of scope of opinion, and assessment of suitability of opinion

Whatever the nature of a case, it is important to communicate with the person commissioning the expert opinion (usually a lawyer) to clarify precisely what it is they require, so that the Fellow can not only better understand the brief, but can also address the threshold issue of whether they are sufficiently qualified and experienced to provide an expert opinion on those specific issues.

PREREQUISITE TO ACTING AS A AN EXPERT

As an expert witness, a Fellow need not be a leader in the field or even a senior practitioner. However, the Fellow must have demonstrated expertise, skill and knowledge in the relevant area. The Fellow must have credibility among their peers with respect to their knowledge, proven by such activities as:

- Actively practising and undertaking continuing professional development and practice review and clinical risk management activities
- Current teaching activities
- Relevant research
- Relevant education course on preparing medico-legal reports and has satisfied the assessment as part of the course.

1. College Fellows in active practice

The person giving the opinion must be a Fellow of the College who is:

- In good standing and
- In active practice in the relevant area of expertise, and
- Actively participating in the College's Continuing Professional Development program

2. Retired Fellows or Fellows no longer practising in the area of expertise addressed in the expert report

A retired Fellow, or a Fellow no longer practising in the area of expertise, may be required to act as an expert witness.

In such situations, the Fellow or the retired Fellow should only do so where:

1. The opinion relates to an incident that occurred:
 - a. In the case of a retired Fellow, when the retired Fellow was in active practice;
 - b. In the case of a Fellow no longer practising in the area of expertise, when the Fellow was practising in that area of expertise, and
2. The Fellow or the retired Fellow seeks the approval of the Chairman, RANZCOG CPD Committee.

THE ROLES AND RESPONSIBILITIES OF AN EXPERT WITNESS

As an expert witness, the Fellow's role is to act as an appropriately qualified expert speaking on issues relevant to the proceeding, in which the Fellow expresses their own, honestly held opinion.

As an expert witness, the Fellow has an **overriding** duty to assist the court or tribunals in matters relevant to the expert's area of expertise. Any evidence is given to enable the court or tribunal to form its own independent judgment, by applying the Fellow's evidence to the fact proven in evidence.

In acting as an expert witness, the Fellow's role is **not**:

- To act as an advocate for the party commissioning their report. The Fellow must act independently from the party by whom they had been instructed. Their role is to express opinions which they consider to be valid, **not** because they think it will help their clients to get the desired result
- To act as an arbitrator called upon to decide the case on liability.

THE FORM OF THE EXPERT EVIDENCE

An **expert's written report** must give details, either in the body of the report or by way of an attachment, of:

- The expert's qualifications
- The literature or other material used in making the report
- The questions or issues that the expert was asked to address
- All assumptions of fact made by the expert in preparing a report
- The person or persons who carried out any tests or experiments upon which the expert relied in compiling the report, and give details of the qualifications of such person(s).

Commenting on the care provided by others

Fellows should consider and articulate the spectrum of care considered reasonable by their peers at the time of the event and of all the options in any clinical situation rather than only the ideal option in the best of circumstances with the advantage of hindsight. The critical issue is what was considered a "reasonable" -not a perfect- standard of care at the relevant time and in the prevailing circumstances

Fellows are required to act as experts in the interests of justice and fairness. Fellows are therefore encouraged to consider providing expert opinions not only for defendants but also for plaintiffs.

Conditional, qualified or preliminary expressions of opinion

Where an opinion expressed in the report does not constitute the Fellow's concluded opinion, because of insufficient research or data, or for any other reason, a statement of that fact should be contained in the report.

If the opinion is not fully researched because the expert considers that insufficient data are available or for any other reason, this must be stated with an indication that the opinion is no more than a provisional one. Where the Fellow who has prepared a report believes that it might be incomplete or inaccurate without some qualification, the qualification(s) must be stated in the report.

The Fellow should express frankly any shortcomings or limitations of their report or in their evidence and, in particular, the grey areas, together with the inferences which cannot be legitimately drawn from their opinion

The Fellow should make it clear if, or when a particular question or issue falls outside their field of expertise.

Changes to previously expressed opinion

Where for any reason, including the consideration of subsequently obtained materials, the Fellow changes their view on a material matter, the change of view should be communicated in a timely manner (through legal representatives) to each party to whom the expert witness's report has been provided and, when appropriate, to the Court.

Differing opinions

The Fellow may properly defend, forcefully if necessary, a genuinely held opinion based on their specialized knowledge. However, where there are recognised differences of opinion or approaches between experts in the relevant discipline, the Fellow should be willing to acknowledge those differences.

The Fellow should be willing to express an opinion based on alternate factual premises, where those alternate premises are capable of being answered.

Reliance upon College Materials

If the Fellow seeks to use College policy or other College material to illustrate or to give weight to the opinions presented, it is important that the qualifications provided in the preamble to the College policy documents are clearly understood and clarified for the court and current at the time of the event.

Giving evidence in court/tribunals

When giving evidence, a Fellow should:

- Be properly prepared. This involves ensuring that the Fellow has reviewed all materials relevant to the matter, and is aware of any specific obligations imposed upon them under the rules of the court or tribunal hearing the evidence;
- Seek guidance from the barrister about taking documents and papers into court;
- Answer questions truthfully and to the best of their ability;
- Seek clarification of questions when they do not make sense, rather than guessing at what the question might mean;
- Indicate when a question or an issue falls outside their area of professional expertise or experience;
- Attempt to give short and clear answers wherever possible. If a longer answer is necessary but the barrister will not permit the Fellow to give it, look to the court/tribunal for assistance and direction;
- Ask the court or tribunal for permission to refer to documents, where such access will help the Fellow to answer the question or to refresh their memory;
- Be willing to make appropriate concessions;
- At all times conduct themselves in a courteous, objective and professional manner

Endorsed by RANZCOG Executive
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