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Giving evidence in the Scottish Criminal Courts

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Giving evidence in the Scottish Criminal Courts: A guide for junior doctors

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Abstract

Junior doctors working in Scotland can be called to court to give evidence as a professional witness; this usually relates to a patient treated for injuries in the Accident and Emergency or Surgical Departments. Doctors do not always receive formal instruction as professional witnesses, and hence a court

appearance can be a daunting experience. This review aims to familiarise doctors working in Scotland with the Scottish Criminal Courts, de-mystifies some legal terminologies, and provides a practical guide to giving evidence in court as a professional witness.

Introduction

During the career of a doctor, it is likely that he or she may be called upon to give evidence in criminal proceedings. This is likely to occur under four circumstances: As a layperson, in a case unrelated to his or her profession; as a *witness of fact* in a professional capacity (professional witness); as an *expert witness* in a case where he or she is not directly involved as a clinician; or as a defendant in a criminal matter relating to his or her personal or professional conduct. The junior doctor is most likely to give evidence as a professional witness initiated by a witness statement, *precognition*, or a witness citation to court. This usually relates to a patient treated for injuries in the Accident and Emergency or Surgical Departments.

At present, doctors do not receive any formal undergraduate or postgraduate instruction as professional witnesses. Consequently in court, a competent lawyer can make even the most experienced doctor appear incompetent. This review aims to familiarise junior doctors working in Scotland with Scottish Criminal Courts, de-mystify some common legal terminologies, and provide a practical guide to giving evidence in court as a professional witness. In the light of recent high-profile cases, we would recommend that junior doctors do not act as expert witnesses; this responsibility is best shouldered upon an experienced consultant.

The Criminal Court System in Scotland

The main characteristics of the Scottish Judicial System are the existence of separate courts and tribunals for civil, criminal, and administrative matters. The criminal courts can be divided into the superior and inferior courts, and those with appellate *jurisdiction* (court of appeal) and original jurisdiction (court of first instance or trial court). There are several factors that determine which court has jurisdiction and the mode of proceedings. These include geographical considerations, severity of the crime, sentencing powers of the

courts, and the *statutory prescription*.

The Scottish Legal Process

The **Scotland Act 1998** established the Lord Advocate as the head of the Crown Office, which is responsible for the legal and administrative direction of the Procurator-Fiscal Service (PFS). A team of advocates, collectively known as the Crown Counsel, are chosen to represent the Lord Advocate in the High Court. Subject to the **Criminal Procedure (Scotland) Act 1975**, the Procurator-Fiscal (PF) assesses the evidence, and has discretion to bring a case to trial and decide on the venue. The PFS is responsible for investigating and reporting serious crimes to the Crown Office, initiating fatal incident inquiries for sudden, suspicious, or unexplained deaths, and conducting criminal prosecutions in lower courts. However, in practice, crimes are reported and investigated by the police or a statutory authority (e.g. Health and Safety Executive).

In Scotland, the method of prosecution is almost exclusively the prerogative of the Crown and falls under one of two procedures: Solemn Procedure is exercised by a trial on *indictment* before a High Court Judge or a Sheriff (a legally qualified full-time judge) sitting with a jury panel of 15 lay people. The judge decides the questions of law, and the jury decides the questions of fact. The jury will then deliver one of the following verdicts, unanimously or by simple majority; “not guilty”, “guilty”, or “not proven”. The latter verdict, unique to Scots law, is given where the case cannot be proved “beyond reasonable doubt” and a conviction cannot be made, despite a suspicion in the minds of the jury. The accused is released without a criminal record but, with tainted character in eyes of the public. Summary procedure is exercised by trial on *complaint* by a Sheriff, *Stipendiary Magistrate*, or *Justices of the Peace*, sitting alone without a jury, and deciding questions of both fact and law.

The Witness Citation, Statement and Precognition

The witness citation (see Appendix C) is likely to be the first intimation the junior doctor will have of his or her legal involvement in the case. The citation will bear the name of the defendant, who may or may not be the patient. The defendant may have assaulted the patient, who is therefore a witness and in which case the name of the patient should be clarified with the PF to retrieve

the correct case notes.

Precognition with the PF (or representative) may be necessary in addition to any Police statement given at the time of treatment. Statements must be precise, concise and unbiased without any reference to personal details. Any medical terminology should be translated into lay language. During the interview with the PF, the doctor may be familiarised with other items of evidence (e.g. photographs) that may later appear in the courtroom.

Precognition with a representative of the defence may also be required, so the defence and prosecution can agree on the evidence prior to the trial. Travel expenses and costs can be reclaimed from the PF for interviews and attendances in court.

Junior doctors, as witnesses of fact, base their evidence on personal recollection and depend on good “contemporaneous” notes (made at the time of examination). Since poor evidence can lead to miscarriage of justice, witnesses owe a duty of care to the Court. Therefore, legible comprehensive medical notes are essential and can be made available to the PFS and court. Consistency is required between “contemporaneous” notes and the witness statement, as discrepancies will be identified in court and challenged. To protect patient confidentiality, consent should be obtained at the time of treatment, or verified later via the PF.

Preparation for Court

Failure to attend without good reason amounts to contempt of court and it is important to clarify the date, time, and location of the hearing with the PF in advance. For a number of reasons, delays and adjournments commonly occur and it is advisable to be in close contact with the PF in the weeks and days up to the trial. If attendance is not possible due to extenuating circumstances (e.g. work abroad, exams, interviews), another doctor may be called upon to read from the case notes; hence pictorial representations and typed notes are invaluable. Sometimes, a doctor’s written statement will suffice and attendance in court may not be necessary. The doctor may be placed on “stand-by” and called upon to elaborate on or clarify the evidence at short notice on the day of the trial at the court’s request.

On the day of the trial, a last minute review of the notes to refresh memory will enhance credibility during cross examination. A professional appearance is expected by the court and casual dress code may distract from the weight attached to the evidence. Punctuality is important and any unavoidable delays

must be notified to the court by phone as soon as possible. On the other hand, courtroom delays are common and extra reading material in addition to the case notes may ease the waiting room boredom. Witnesses are not allowed to bring any new documents into the courtroom. Mobile phones and beeps should be switched off in the courtroom. Witness citations should be brought to court and endorsed by a court official in order to claim expenses.

Giving Evidence in Court

The rules governing the admissibility of testimony are the domain of the lawyer and judge. There is a difference between “testimony” (one’s own “best evidence”) and “hearsay” evidence (other’s opinion). Under Scots Law, all evidence must be corroborated by two independent witnesses. Cross-examination of prosecution witnesses by the defence is allowed to clarify or expand upon any evidence given. A case for the defence does not have to be presented, although it inevitably is; the presumption of law being the accused is innocent until proven guilty by the prosecution.

In court, there is no opening speech but a plea is tendered by the defence on behalf of the accused. If this is not a guilty plea then proceedings will commence with the first witnesses being summoned by the prosecution. The doctor will not be allowed inside the court until called to give evidence in order to prevent his or her testimony being influenced by those of other witnesses. At the beginning of the testimony, the doctor will be asked to verify his or her name, place of work and biographical details of qualifications and experience before taking an oath or affirming to tell the truth. Witnesses should stand during the testimony and face the presiding judge, not the counsel. In the High Court and Sheriff Court, the judge or sheriff is addressed as “My Lord” or “My Lady”; in the District Court the sheriff is addressed as “Your Honour”, and a Stipendiary Magistrate or Justice of the Peace is addressed as “Sir” or “Madam”.

It is important to pay close attention to the wording of questions posed by the judge and counsel and ask for clarification of any legal terminology if in doubt. Allow a time for composure and thought prior to commencing on the testimony, as it is better to give a short pause before answering a question than to give a bad answer. Answers should be precise and to the point however, failure to acknowledge a possible second interpretation may result in loss of credibility. Comply with the request for a “Yes” or “No” answer only if it would not mislead the court and ask for the opportunity to give more detail.

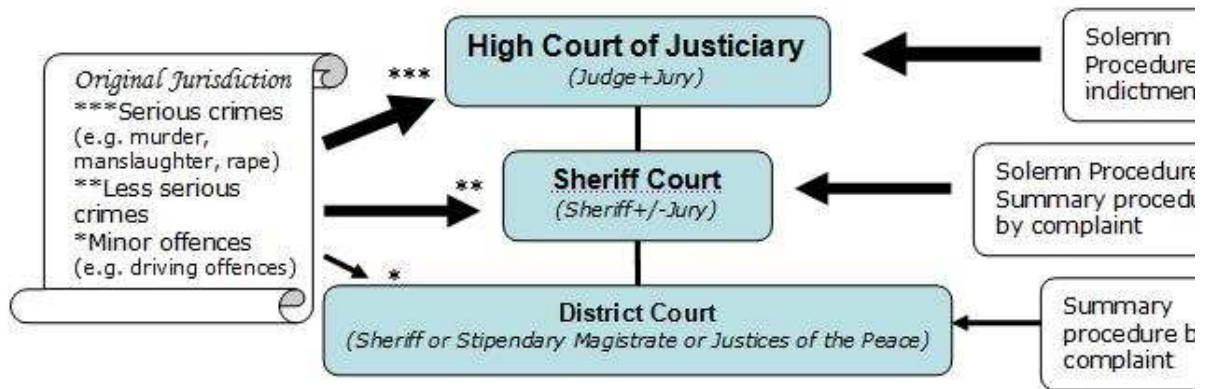
Referring to any contemporaneous notes as an *aide memoire* is allowed, however permission from the judge should be sought first. It should never be assumed that the counsel or court is familiar with medical terminology.

Professional witnesses giving factual evidence may also be asked to give expert opinion in the same case. Any opinion given must be qualified using terms such as “To the best of my knowledge...”, or “With my limited experience...” and it is acceptable to answer “I don’t know” than to overstate the case. The counsel may try to confuse the witness with statements on how opinion would change if the facts were untrue by posing hypothetical questions. Care should be taken before accepting others’ facts to avoid accidentally conceding a point which may damage the case.

It is easy to become irritated in court for number of reasons; delays, stress or a line of questioning which may appear foolish or insulting. It is important to remain calm and patient, appearing professional at all times. If any line of questioning is unacceptable, the trial judge will intervene. Witnesses should not respond to objections, argue about comments or whether or not the evidence should be heard; it is necessary to accept the unfamiliarity of testifying rules. Only one person may speak at a time as everything said in court is transcribed, and the court reporter cannot make a good record when people interrupt each other or talk simultaneously. Volunteering additional information to fill any periods of silence is not advisable.

Witnesses are in the court to persuade and not to impress. The old advice to speakers applies to giving evidence in court: “Stand up, Speak up, Shut up”. When testimony is finished, it is the judge who permits the witness to leave the stand by excusing the witness. The witness is free to leave or stay in court. If the witness is required to remain for further testimony, then he or she must stay or ask for another time to attend; the court may or may not grant this request. The witness must not return to the waiting room after giving evidence nor must discuss their evidence with other witnesses who have not yet given their evidence.

Figure 1



Three-tiered criminal court hierarchy in Scotland: The High Court of Justiciary, the Sheriff Court, and the District Court. Appeal lies from District Court to Sheriff Court to the High Court of Justiciary, from where there is no further appeal to the House of Lords (for further details see Appendix B).

The Future

All doctors are likely to attend court as a professional witness at some stage in their careers. Undergraduate medical courses provide an introduction to medical ethics and law and there are a number of expert witness courses. However, there is currently no formal training provided by medical schools or the National Health Service for junior doctors in their role as a professional witness. In the current increasingly litigious society, it is necessary for medical professionals to acquire a basic understanding of medical law and the UK courts system. The solution is to provide doctors with formal training early in their careers, and possibly as an integral part of the undergraduate medical curriculum.

Keypoints for giving evidence in court

Have a sound knowledge of the evidence
 Be familiar with legal processes and court procedures
 Stand during the testimony, face and address the judge
 Ensure questions and any legal terminology are understood - if in doubt, ask
 Speak slowly, audibly, and clearly
 Answer precisely, taking care with hypothetical questions and “Yes” or “No” answers
 Explain any medical terms
 Qualify any opinion according to experience

Further Reading

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Appendix A: Legal Glossary

Complaint- a document instituting summary criminal proceedings in Sheriff or District Court, setting out the offence charged.

Convention Rights - basic human rights and fundamental freedoms created by the **European Convention on Human Rights and Fundamental Freedoms 1950** and incorporated into UK laws.

Expert Witness - a person with special skill, technical knowledge, or professional qualification whose opinion on any matter is admitted as evidence.

Indictment- The offence is set out in a document called indictment issued in the name of the Lord Advocate.

Jurisdiction- the power of a court or judge to entertain an action or other proceedings.

Justices of the Peace- local lay persons appointed by the First Minister for conservation of peace and certain other duties. They preside as judges in the District Courts to administer oaths and to exercise other miscellaneous powers.

Precognition- a procedure peculiar to Scottish criminal proceedings where a preliminary unsigned written statement of the evidence is taken from a witness by a defence or prosecution lawyer, clerk or agent. Whilst there is no legal obligation to give precognition, legal representatives can apply to the court to have a witness precognosed under oath in court.

Sheriffdoms- the 6 Sheriff Court District areas within which a Sheriff Principal exercises his or her jurisdiction: Grampian, Highland and Islands; Tayside, Central and Fife; Lothian and Borders; Glasgow and Strathkelvin; North Strathclyde and South Strathclyde; Dumfries and Galloway.

Statutory Prescription- the acquisition of a right under a statute or act.

Appendix B: The Criminal Court Structure

The High Court is the supreme criminal court in Scotland and can operate as both a trial and appeal court throughout Scotland. In the latter case, a panel of at least 3 judges hears appeals from all lower courts, including the High Court itself when acting as a trial court, and any appeals referred by the Secretary of State. It has exclusive jurisdiction over the most serious crimes such as treason, murder, culpable homicide, armed robbery, drug trafficking, rape and sexual offences involving children and other serious crimes; except those crimes specifically reserved to another court by a statute. Furthermore, the Lord Advocate may refer a point of law from a case in a trial court for an opinion, without affecting the outcome of the case. An accused may be allowed to conduct his or her defence without legal representation.

The head of the High Court is the Lord Justice-General. His deputy, the Lord Justice-Clerk and fifteen other High Court judges are known as the Senators of the College of Justice. As an appeal court, the High Court resides at the Parliament House in Edinburgh, however as a peripatetic trial court, it can sit anywhere in Scotland and at present there are 4 circuits: Home (Edinburgh); North (Inverness, Aberdeen, Perth, Dundee); West (Glasgow, Stirling, Oban); and South (Dumfries, Ayr, Jedburgh). Within its appellate jurisdiction, except on a point of law, there is no further appeal to the House of Lords, the highest court in UK (*Mackintosh v. Lord Advocate* (1876) 3 R(HL)34).

The majority of criminal work is performed by the 49 Sheriff Courts in six regions called *Sheriffdoms*, where cases can be brought under solemn or summary procedures. The Sheriff Court, regulated by the **Criminal Procedure (Scotland) Act 1995**, deals with more serious and minor criminal cases within the Sheriffdoms than the District court; the presiding Sheriff has powers to hear a wide range of criminal cases that are not reserved for the High Court. Local administration is performed by Sheriff's Clerks and their staff, led by a Sheriff Principal whose team of Sheriffs hear cases in each region. If a Sheriff feels that a particular case restricts his or her sentencing

powers, the case can be referred to the High Court.

At the bottom of the hierarchy are 30 District Courts in each local authority area, established under the **District Courts (Scotland) Act 1975 (as amended)**. All statutory and minor offences, such as road traffic offences and breach of the peace committed within their territorial jurisdiction, are summarily heard before the Justices of the Peace. They are assisted by a legally qualified person, except in Glasgow where their role is assumed by a legally qualified Stipendiary Magistrates.

All appeals from the District court, Sheriff Court and Trial Court, come before the appellate jurisdiction of the High Court of Justiciary. Finally the United Kingdom's membership of the European Union, and the *Convention Rights*, uphold individual rights and laws that must be interpreted by the Scottish Courts. In cases of conflict, these laws take priority over national laws (*Minister of Finance v. Simmenthal* (1978); **Human Rights Act 1998**)

Appendix C:

P.F. REFERENCE
LT 0045739/FEA12

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Date of Inv&

WITNESS CITATION

URGENT

Dr. JOE BLOGGS
ACCIDENT AND EMERGENCY DEPARTMENT
ST. PETER'S HOSPITAL
LITTLETOWN

YOU are hereby cited to attend a Sitting of the Sheriff and July Court within the

SHERIFF COURT HOUSE
CASTLE STREET
LITTLETOWN

"A" on ... MONDAY, the 12th day of May 2003
"A" at 9.45 A.M. and at any adjourned Diet as a Witness for the Prosecution in the indictment at the instance of

HER MAJESTY'S ADVOCATE

Against

JOHN BROWN

NOTE . – Notwithstanding the terms of the above Citation shown at **"A" your attendance is not required until 9.45 a.m. on Tuesday, 20 May, 2003**

Served on the 30th day of April 20 03

by me,

Signature..... *Chris McDonald*.....Police Officer

ANY WITNESS FAILING TO ATTEND IN TERMS OF THIS CITATION IS LIABLE TO BE APPREHENDED AND IMPRISONED OR FINED

IF YOU ARE UNDER 16 YEARS OF AGE YOU SHOULD BE ACCOMPANIED BY AN ADULT. BE PUNCTUAL IN ATTENDANCE AND PRESENT THIS CITATION TO THE OFFICER IN CHARGE OF THE WITNESS ROOM.

There are no car parking facilities at this court

SEE NOTES OVERLEAF

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