Royal College of Surgeons
ADVANCING SURGICAL CARE

Surgery and the law

Neil Mortensen

Thursday 14 November 2019

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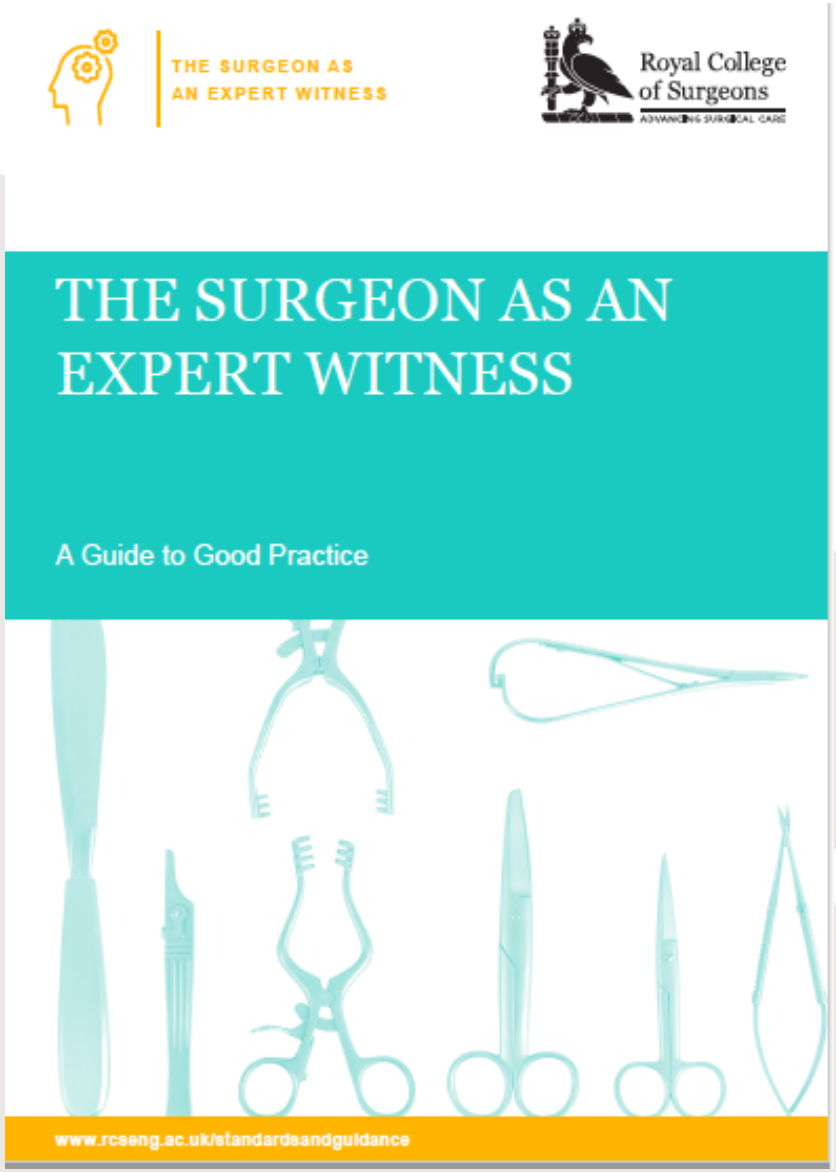
The Assembly Rooms, Newcastle

#SurgeryAndTheLaw

THE IMPORTANCE OF BEING AN EXPERT WITNESS

Neil Mortensen
Vice President RCS Eng

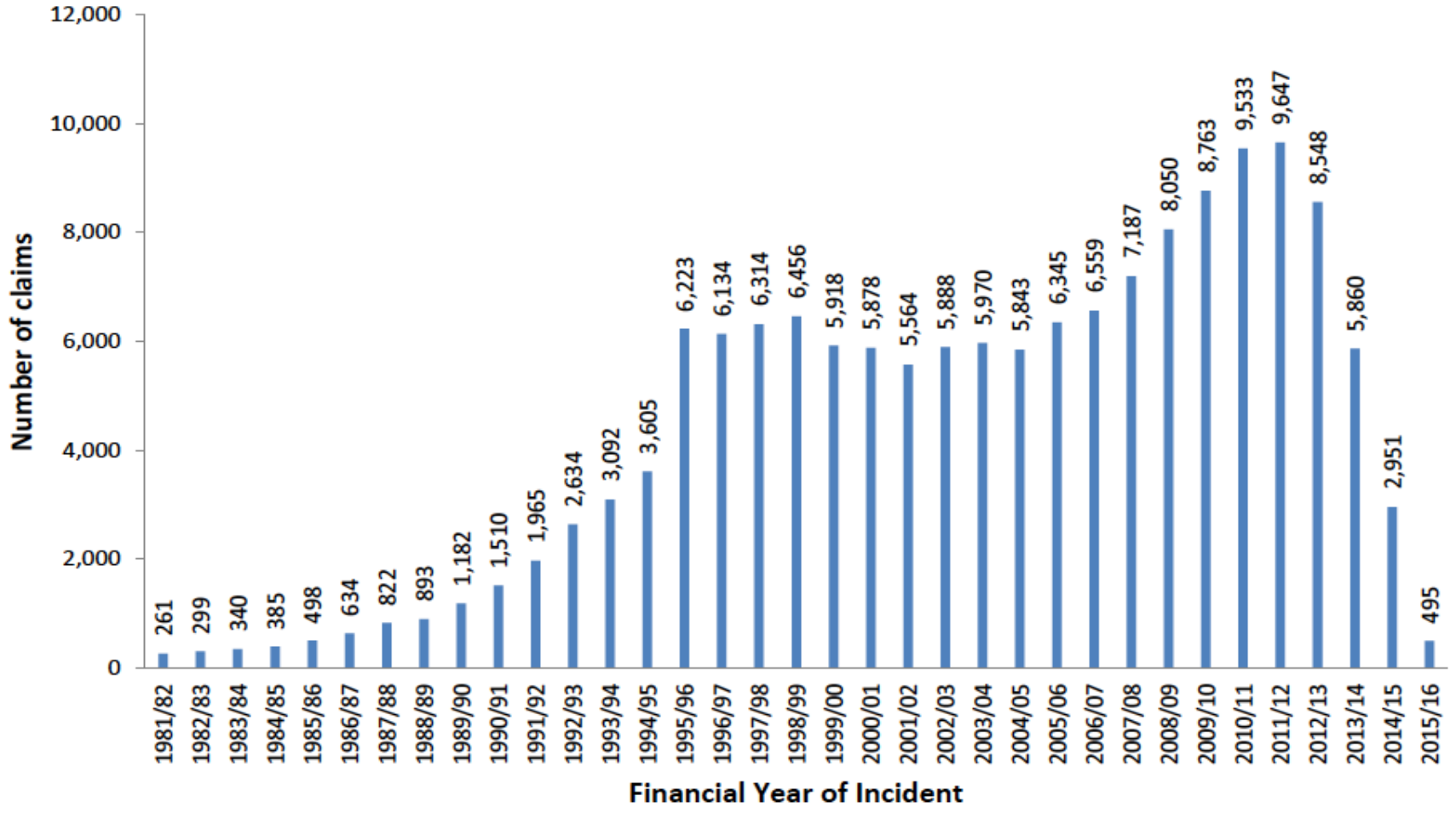


The background

- **Rising numbers of medical negligence claims**
- **Increased scrutiny**
- **Patient and family awareness**
- **Coroners narrative verdicts**
- **Gross negligence manslaughter**

Total number of clinical negligence claims by financial year of incident as at 31/03/16

(Since 1981/82, all clinical negligence schemes, including "below excess" claims handled by trusts



The Williams Review

CPS and Coroners to have better instruction on GNM

Better experts for criminal cases

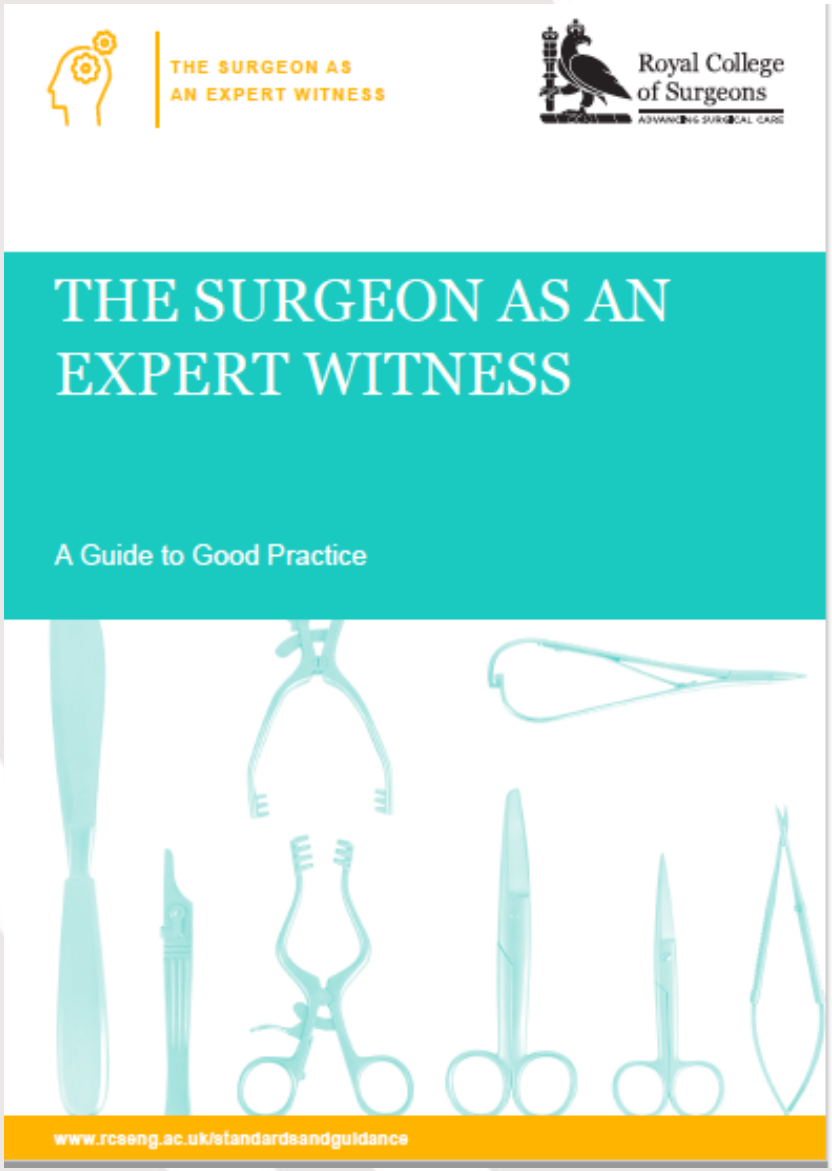
Changes to GMC proceedings

Leslie Hamilton's Review

Recommendation 11: Those providing expert witness reports and evidence should be required:

- To state in a specific section of their report the basis on which they are competent to provide an expert opinion on the matters contained within the report or evidence.
- To state in a specific section of the report where their views fit on the spectrum of possible expert opinion within their specialty.
- To calibrate their reports to indicate whether an individual's conduct was, in all the circumstances, within the standards that could reasonably have been expected, below the standard expected; far below the standard expected; or whether the individual's conduct was truly, exceptionally bad. They should also give their reasons for the views reached.

Recommendation 12: Doctors should only provide expert opinion to the coroner, procurators fiscal, police, CPS, GMC or to the criminal court on matters which occurred while they were in active and relevant clinical practice.



Why are we launching this now?

- **In response to Williams and Hamilton**
- **Patients and surgeons need good experts**
- **Experts need to be trained**

Prof of media studies at LSE ae 61
Two major ops elsewhere – could I help

- **July 2007**
- **Abdominal surgery**
- **3 days post op**
- **Cardiac arrest**
- **Intra abdo bleed**
- **Died 2 days later**

Professor Roger Silverstone, who has died aged 61 following corrective surgery, was a leading pioneer of British media and communication studies. As the author or editor of 12 books, he played a prominent role in the intellectual development of a new academic subject in Britain, just as he did in its institutional development.

Obituary July 2007

theguardian

April 25 2012

Murdoch at the Levenson Enquiry April 25, 2012

The Case: that the surgery was carried out negligently and that post op care was negligent

I was the Defendant, not just an expert in a Civil Case

- **Trial took 8 days**
- **Hospital and NM co defendants with separate teams of lawyers and barristers and experts , three teams in all**
- **NM in dock for 1.5 days**
- **5 other medics and one nurse from the JR witnesses**

The Hon Justice Thirlwall

Now Hon Lady Justice of Appeal

The Judgement

Home / Cases / 2012 / October

Silverstone (Executrix of the Estate of Roger Silverstone, Deceased) v Mortensen and another

Source:	**All England Reporter**
Publisher Citation:	**[2012] All ER (D) 158 (Oct)**
Neutral Citation:	**[2012] EWHC 2706 (QB)**
Court:	**Queen's Bench Division**
Judge:	**Mrs Justice Thirlwall DBE**
Representation	**David Westcott QC and Nathan Tavares (instructed by Irwin Mitchell LLP) for the claimant.**
	Edward Bishop QC (instructed by Nabarro LLP) for the surgeon.
	Charlotte Jones (instructed by DAC Beachcroft LLP) for the trust.
Judgment Dates:	**12 October 2012**

This case summary is from

Lexis®Library

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That is our measure of profitability."

Case dismissed on all counts

My impressions

- It was terrifying fight or flight stuff
- My colleagues especially trainees were fantastic in the dock
- I realised how much I needed a good expert

RCS

Aims

- A guide to good practice
- practical advice on the nature and scope of the role
- To encourage new recruits

What is an Expert Witness?

- **Neither an expert on the law nor a witness because not there in real time**
- **Asked to give an expert opinion on the medical details of the case**
- **Quite different from a factual or professional witness**

If you were the plaintiff or patient what sort of an expert would you want?

- **Someone who had done it before**
- **They had been trained**
- **They were truly an expert in the subject of the case**
- **They were compassionate**
- **They had honesty and integrity**

If you were the defendant what sort of an expert would you want?

- **Someone who had done it before**
- **They had been trained**
- **They were truly an expert in the subject of the case**
- **They were compassionate**
- **They had honesty and integrity**

Key Messages

- **Expert witnesses play a vital role**
- **Provide independent balanced and objective views**
- **Was there substandard care and did this cause patient harm?**

Which Court?

- **Coroner's Court**
- **Civil Court**
- **Criminal Court**

- **Experts need to understand the difference between these environments**

What issues are covered?

- **The role – to whom is the expert evidence addressed**
- **Surgical expertise – don't stray**
- **Prior experience to support your opinion**
- **Training**

Who can be an expert?

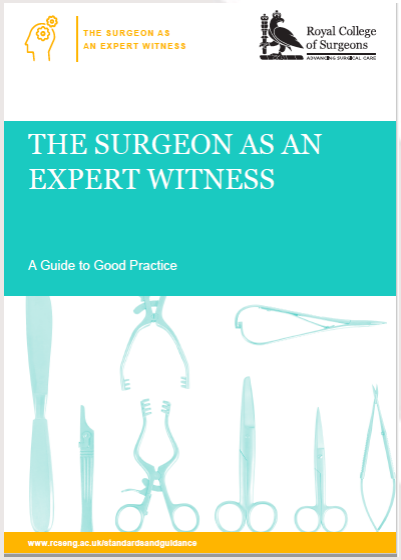
- **Consultant surgeon for at least 5 years**
- **Advise on cases in their routine practice and subspecialty**
- **Give an opinion contemporary with the events**
- **Discontinue after 3 years from retirement from clinical practice**

Legal issues

- **Instructions**
- **Standard of care – liability**
- **Breach of duty**
- **Harm**
- **Causation**
- **Condition and prognosis**

So why do it?

- **We need good experts**
- **It will be intellectually stimulating**
- **It may inform your own practice**
- **It may help prevent similar harm to a patient in the future**
- **You may help a colleague in need**



4 News
First Trump impeachment hearings