Effective Use of Experts

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Introduction

The importance of expert opinion evidence in medical negligence litigation is well recognized. In *Bafaro v. Dowd* , Carpenter-Gunn J. states:

> *Due to the specialized knowledge of the medical profession, expert evidence is needed in medical malpractice cases:*
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> > *Actions alleging malpractice involve issues to be decided that are not within the ordinary knowledge and experience of the trier of fact. Therefore the Plaintiff requires expert evidence to prove that the Defendant physician was negligent…*
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> *Where the issues to be decided involve diagnostic or clinical skills and are not within the ordinary knowledge and experience of the trier of fact… the Court's findings should be based on expert evidence; and the Court should not make conclusions of breach of the standard of care or causation without expert opinion evidence in support of those conclusions.*

As the foregoing passage reveals, expert evidence is almost always required in order to assist the trier of fact on a variety of different issues due to the complex medical and scientific concepts that pervade medical negligence law. In the result, the ability to work effectively with your experts at all stages of the litigation process is an essential element to successfully litigating medical malpractice claims.

This paper is designed to provide some practical suggestions to the selection and utilization of experts in medical negligence litigation. While it is necessary to discuss some of the applicable legal principles for the sake of context, this paper will seek to provide the reader with practical tips and examples to illustrate best practices for dealing with experts in a medical negligence action.

Selecting an Appropriate Expert

There are a number of considerations that inform the selection of an appropriate expert. Indeed, selecting an expert can often be difficult as there are numerous medical disciplines and even more numerous sub-specialities within each discipline. There is also a wide range of expertise within each sub-specialty.

Although there are strategic considerations that may differ on a case-to-case basis, there are certain elemental aspects of expert selection that should be considered in every case. First and foremost, an

expert should generally not be retained to comment on a case unless you are reasonably confident that the opinion of that expert will constitute admissible evidence should the matter proceed to trial. The Supreme Court of Canada's decision in *R. v. Mohan*, makes it clear that expert opinion evidence is presumptively inadmissible. A party seeking leave to adduce expert opinion evidence must satisfy the Court on a balance of probabilities that the evidence is:

1. Relevant;
2. Necessary in order to assist the trier of fact;
3. Not subject to any other exclusionary rule of evidence; and,
4. Is to be adduced by a properly-qualified expert.

An important consideration to keep in mind when selecting an expert for your case is that medical specialists are not properly situated to opine on the standard of care of specialists in other areas. Accordingly, careful consideration should be given to selecting an expert with the appropriate qualifications. In particular, counsel should seek to retain a standard of care expert with similar qualifications to that of the defendant whose care is to be assessed.

To illustrate this point, one can be directed to the case of *Alakoozi v. Hospital for Sick Children* in which the Ontario Court of Appeal upheld the decision of the trial judge to refuse to admit the opinion evidence of the plaintiff's expert, a paediatric haematologist and oncologist, as it related to the standard of care of the defendant otolaryngologist. Similarly, where the action involves the care of an emergency room nurse, it is inappropriate to tender opinion evidence from a nursing expert with experience on the hospital floor but no emergency room experience.

Even if a potential expert has some experience in the same medical specialty, counsel should consider how the proposed expert matches up with the defendant health practitioner, including the following:

- Is the expert a general practitioner or a specialist?
- Does the expert work in a community care setting or a tertiary care setting?
- Does the expert have academic appointment or not?
- Has the expert taught or published in the relevant areas?

Arguably, allowing a "super-specialist" to comment on standard of care of a non-super-specialist creates a risk that such a witness will erect too high a standard of care. In addition, the "super-specialist" might not

possess the requisite “practical knowledge” or “occupational experience” to accurately comment on the care provided by a colleague with a more general practice.

While the standard of care evidence of more specialized health practitioners is generally admissible notwithstanding this discrepancy, relying on a standard of care expert who is not similarly-situated to the medical professional whose care is being assessed may result in little or no weight being afforded to that opinion. Although it may seem instinctively attractive to retain the expert with the best qualifications, you may find that it is not always the best choice. Avoid retaining experts that have either too little or too much experience in the subject matter at hand. Your opponent will likely seek to discredit your super-specialist on the basis that they have set the bar too high for standard of care.

In addition, the background and experience of the expert should be reviewed to determine whether he or she has the appropriate clinical experience or whether the expert is an academic, researcher or a “professional witness”. While nothing precludes counsel from retaining an expert who consistently performs in medical legal work, there has been a concerted effort in Ontario attempting to eliminate “hired-guns” or “opinions-for-sale”. As such, an increased level of scrutiny is being placed on the ability of an expert to give impartial and objective evidence during the trial process. I strongly discourage retaining experts who act solely as medical legal experts and who do not have active clinical practices. Any opinions they give related to standard of care and causation are particularly vulnerable to attack and your opponent will likely pay little attention to the “hired-gun” expert when evaluating the case for settlement purposes.

It is necessary to consider at an early stage whether your expert will be viewed as someone capable of complying with their duty to the Court to give fair and objective evidence. This has become increasingly important in the last several years and some of the recent case law suggests that trial judges are increasingly exercising a “gate-keeper” function in which opinion evidence that does not meet basic minimum standards of reliability and credibility will be considered inadmissible. If there is any indication that the Court may consider your expert to be lacking in objectivity, counsel may wish to consider looking elsewhere unless you are content to use this person as a consultant only and not as your trial expert. Needless to say it is important to rule out any possible conflicts with your expert early on. Confirm that the expert has not treated the patient and has not been retained by any other party. Make sure the expert has no personal relationship with either the plaintiff(s) or the defendant(s).

Finally, a critical consideration is the retention of any expert should be how well they will present as a witness in Court. They may be eminently qualified, but are they capable of conveying their opinion in a manner that is both persuasive and understandable to the trier of fact? There are a number of sources of

information available regarding possible experts, however, nothing can provide better information than a face-to-face meeting or, at the very least, a telephone call in order to assess the expert as a possible trial witness.

Experts and the Discovery Process

As with any type of litigation, adequate preparation for discovery is a key to success. Discoveries are especially important in medical negligence actions and often will make or break the case.

Experts can play an important role in preparing counsel for discovery. The best way to truly understand the medicine and the real issues of the case is to sit down with a quality expert who has had a chance to review the records and who can provide you with a firm understanding of the relevant medicine. The expert can often identify for you the key issues in the case. Further, experts can provide valuable assistance to both plaintiff and defence counsel on the conduct of the discovery. From the plaintiff's perspective, an expert can provide assistance in identifying the areas to be canvassed with the defendant on discovery. From the defence perspective, not only can an expert help identify the key issues that likely will be raised by a good plaintiff lawyer, but will also identify areas of examination of the plaintiff that could be relevant to both liability and causation.

Having your expert identify and discuss their views of the case at this stage will also allow you to obtain an early and objective opinion about potential problems with your case. While discussing these issues with a medically-trained client or even a general medical-legal consultant may also assist you with discovery preparation, spending some time with a good expert is often even more effective.

It is also important to obtain early documentary disclosure so that you can get this documentation into the hands of an expert at an early stage of the litigation. Further, an expert's opinion of a case may be significantly compromised if he or she has not reviewed the relevant documentation prior to formulating an opinion. In medical negligence cases it is usually better to obtain full production early rather than waiting for answers to undertakings. Ensuring documentary disclosure is obtained and forwarded to your expert on a timely basis will increase the likelihood that any opinion that is received is as thorough and accurate as possible.

Following examinations for discovery, it is critical that you send your expert(s) a copy of the transcripts for review and comment together with any further relevant productions. This is an important step in the process of ensuring that your expert's opinion is based on all of the relevant evidence, and also allows counsel to determine whether or not an expert's view of the case has changed after reviewing the discovery evidence. If an expert is going to soften his or her support for your client's case based on

evidence obtained on discovery, it is better to know about it sooner rather than later. Your expert's advice will only be as good as the completeness and reliability of the material provided to him or her for review.

The Expert Report

Counsel should be examining every expert report for compliance with Rule 53.03 of the *Rules of Civil Procedure*.

A report provided by an expert under this rule must contain the following information:

1. The expert's name, address and area of expertise.
2. The expert's qualifications and employment and educational experiences in his or her area of expertise.
3. The instructions provided to the expert in relation to the proceeding.
4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
6. The expert's reasons for his or her opinion, including,
    i. a description of the factual assumptions on which the opinion is based,
    ii. a description of any research conducted by the expert that led him or her to form the opinion, and
    iii. a list of every document, if any, relied on by the expert in forming the opinion.
7. An acknowledgement of expert's duty (Form 53) signed by the expert.

The above criteria are the basic minimum requirements for a report. Indeed, non-compliance with the provisions of Rule 53.03 has been held in some cases to be a basis for rejecting the opinion evidence of an expert in its entirety.

Beyond the minimum requirements of an expert's report, there is the common sense suggestion that the written report of an expert be easy to follow and understand. It is likely the report will be seen by the pre-trial judge and the trial judge at some point in trial.

Lastly, it is important to ensure that a report addresses all of the issues you want that expert to discuss when appearing as a witness at trial. To the extent those issues are not included in a report; they may take the other parties by surprise and the Court may choose to disallow the expert to give evidence on these points. While there is a limited ability for an expert to "amplify" or "expand upon" the evidence contained in his or her report, generally the expert will be confined to giving evidence that falls within the "four corners" of that written material.

Experts and Trial Preparation

Preparing your expert(s) to give evidence at trial is a crucial part of trial preparation. Regardless of an expert's qualifications or experience, relying on an unprepared expert witness to relay critical evidence can damage an otherwise meritorious claim or defence. It is imperative that the expert be reminded of their duty to the Court when acting as an expert.

One of the biggest challenges in preparing an expert is to obtain enough of the expert's time and attention to undertake proper preparation of their evidence. Medical experts are sometimes reluctant to give up their time to attend as an expert witness, and are often even more reluctant to set aside large amounts of time for trial preparation. Preparation with your expert must be done in a quiet setting and not while patients are waiting or the expert is otherwise distracted. In most cases, preparation should be in person but in some cases a video conference is also a viable option. It is important to see the expert, and this may involve some degree of travel on your part and meetings taking place early in the morning, at night, or on weekends. It is important to communicate with your expert well in advance of trial in order to set aside as much time as necessary for adequate trial preparation.

In addition, my typical preparation of an expert will involve a discussion of the following topics:

- The Court process and the role of the expert; how to address the Court; and if applicable the process involved in a jury trial;
- The importance of presenting as an honest, credible, fair and objective witness. Make sure the expert understands their duty to the Court in this respect.
- Stages of evidence including examination-in-chief, cross-examination and re-examination;
- Qualification of the expert including any anticipated challenges to qualification;
- Key issues in the case and where the expert's evidence fits in; a review of the complete theories in the case;
- A detailed review of the evidence to be elicited during that expert's examination-in-chief;
- A review of all areas of anticipated cross-examination;
- Rules of evidence that may apply i.e. scope of an expert's opinion as it relates to the content of their written report, hearsay, use of documents, use of authoritative literature;
- A review of the records the expert should bring to Court and the use which can be made of them while giving evidence; and,
- A general discussion of how to give effective expert opinion evidence.

It is also important to set aside time to obtain the expert's assistance in preparing your cross-examination of the opposing expert. If possible, schedule a separate meeting to discuss cross-examination of the opposing experts.

Conclusions

The importance of expert evidence in medical negligence litigation cannot be overstated. Effectively utilizing experts at each stage of the process will allow you to understand your case and to provide sound legal advice to your client(s). In this regard, spending the time getting to know your case will allow you to be an active participant in your discussions with an expert, and to provide focussed areas of inquiry upon which you expect the expert to comment. Simply sending the expert the medical documentation with an instruction to "give me your opinion" will generally not often be of assistance to the expert and will almost certainly not be of assistance to you.

Good expert opinion evidence and good expert reports do not happen on their own. They require careful direction and preparation by trial counsel working with the expert to develop sound expert opinion that will be persuasive and accepted by the trier of fact.