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Medical Malpractice: A How To Guide

Retaining Experts

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With the rare exception of self-evident cases (wrong-limb surgery, sponges inadvertently left post-operatively), and cases where the standard practice itself is fraught with obvious risks such that anyone is capable of finding it negligent (*ter Neuzen v. Korn*, [1995] 3S.C.R. 674, no medical malpractice action can be prosecuted successfully without expert input from an appropriate medical practitioner. In the absence of such input, defence counsel will have little difficulty in moving for Summary Judgment to have the action dismissed.

Equally, where plaintiffs' counsel has served expert reports from medical practitioners, defence counsel generally cannot hope to succeed without reciprocal expert opinion.

When should a medical expert first be retained?

Save for the self-evident cases, no plaintiffs' counsel, whatever his or her prior experience in medical malpractice litigation, is likely to be in a position to make a valid and useful recommendation to a prospective plaintiff as to whether an action should or should not be commenced unless that counsel has obtained some form of expert input from an appropriate medical practitioner. It is therefore recommended that plaintiffs' counsel obtain that input before a medical malpractice action is commenced. When faced with a limitation deadline, a Notice of Action should be issued, but the proper phrasing of

a Statement of Claim will require expert input, and it is only in the rarest of occasions that a Statement of Claim should be issued without reasonably specific input from a suitable health practitioner.

From the defence point-of-view, it is important that early expert input be obtained to ensure that the principals of defence counsel are given a timely, and hopefully accurate, opinion as to the merits of the case and, in particular, whether the action should be settled before proceeding to examinations for discovery.

Who should be the expert?

In order to succeed in a medical malpractice action, plaintiffs' counsel must establish that the defendant health practitioner(s) failed to meet a standard of practice reasonably to be expected of a reasonably careful and competent practitioner in the defendant's field of practice. In other words, an expert opinion with respect to an orthopaedic surgeon must come from an orthopaedic surgeon, with respect to a nurse from a nurse and so on. The Courts are belatedly becoming somewhat more rigorous in determining whether a witness is in fact qualified to give expert testimony, and it is essential that the Court be satisfied that the proposed expert be qualified, by way of training, expertise, experience and practice, to provide the Court with valid and useful input as to the standard of practice reasonably to be expected of the defendant health practitioner(s).

The use of "Jack of all Trades" experts who are prepared to give an opinion on multiple specialties should be avoided. Similarly, when dealing with standard of care, one should avoid the retention of individuals whose primary professional activity consists of acting as an expert. Look for experts who have clinical teaching and/or research experience in the subject matter. Be wary of using "super specialists" to comment on the standard of care of physicians who do not have the same level of training and experience. Although it is challenging at time to identify an expert willing to review a matter, it is best advisable to avoid repeatedly retaining the same expert. This potentially opens up a line of cross-examination based on the expert being repeatedly retained by the same counsel

to provide favorable opinions. In other words, keep your list of potential experts as wide and large as possible and select the right expert for the case at hand.

Determining that the proposed expert witness has appropriate credentials is, however, only the beginning of the process of choosing a suitable expert witness. One must also satisfy oneself that the expert is able to express him/herself in clear and cogent language likely to be readily understood by a Judge or Jury. Indeed, there are many highly-qualified health practitioners whose personality, language skills or other characteristics make them fundamentally unsuited to provide effective expert testimony at trial. It is therefore essential that one meet face-to-face with a proposed expert before making a final decision as to a retainer.

It is also a good idea to check the website of the College applicable to the health professional in question to ensure that the expert you are considering does not have a notably checkered past which is likely to come out at trial. Equally, you should question the expert as to the types of cases in which he/she has previously provided reports or testimony to minimize the chance that he/she has in previous litigation expressed an opinion that is contrary to a supportive position in the case with which you are concerned. It may be helpful to conduct your own research to determine if your proposed expert has previously testified in court and whether there has been any judicial comment on the proposed expert's testimony or qualifications.

Finally, plaintiffs' counsel should avoid as far as possible retaining experts who have, rightly or wrongly, obtained the reputation among defence counsel of being intellectually dishonest in favouring plaintiffs no matter what the merits of the case. From a plaintiffs' point-of-view, the best outcome of a medical malpractice action is a prompt and reasonable settlement; no such settlement is going to be generated by a report from an expert whom defence counsel and their principals regard as inherently biased. Indeed, to the extent they can, plaintiffs' counsel should attempt to retain experts they know to have been retained in the past on behalf of defendants, since opinions from such experts are,

for obvious reasons, likely to be given substantial weight by defence counsel and their principals.

Payment of the expert: avoiding unpleasant surprises

Just as when retaining any form of independent contractor, it is important that the terms of an expert's retainer be clearly set out in writing prior to commencement of the retainer. This can readily be done by an exchange of letters in which the expert should be required to specify his/her hourly billing rate and to provide an estimate of the amount of time he/she expects to have to devote to each stage of the retainer from conducting an initial review of the relevant documents through preparing a report and subsequently preparing for and testifying at trial.

While one, of course, wants to keep the expert well-disposed toward one's case, life is simply too short to have to justify to one's client, or to oneself, the necessity of paying an account significantly larger than had been anticipated.

In this regard, it should be noted that plaintiffs' counsel are increasingly finding that health practitioners who devote a significant portion of their time to providing expert input are becoming ever more aggressive in their hourly billing rates and claims for hours expended on a given retainer. Indeed, it is not uncommon for plaintiffs' counsel to be faced with bills of \$20,000.00, \$30,000.00 or more in circumstances in which they were reasonably expecting closer to \$10,000.00. Only by clear advance agreement on terms of payment can such unpleasant surprises be avoided.

Providing instructions to the expert

Sending relevant medical records to an expert with a covering letter that states "what do you think" is a recipe for disaster. It is very important that the expert be provided with clear instructions as to what is being asked of them. While one may initially want to obtain the general impressions of an expert in order to identify what the primary issues and gain a better understanding of the case, it is extremely important to keep one's expert focused. The instructions should clearly set out the specific issues that you want the

expert to address (i.e. standard of care, informed consent, causation). Where there are multiple physicians and/or nurses involved, it is important to tell your expert that you want them to comment on the conduct of certain specific parties. Otherwise, you face the risk of an expert commenting on everything and everybody.

It is also important to have a clear understanding with the expert as to what research, if any, the expert is expected to conduct in the formulation of their opinion. While many experts will already be familiar with the relevant medical literature, specific research may still be required. This is particularly so in matters related to causation. Since an expert is required in his/her report to disclose all materials they are relying upon, the expert should be allowed to complete any required research before finalizing their report.

In the course of dealing with an expert, it may become obvious that you require someone with different expertise or qualifications in order to ensure that his/her practice more-closely aligned with that of the health care practitioner whose conduct is being reviewed. With respect to standard of care in particular, one may need to retain a new expert with either more or less expertise depending on the circumstances of each case. One should not feel as though they need to continue with an expert who does not have the ability to give them the required opinion.

What does the expert need to know?

Once you have settled on an expert, he/she must be provided with all of the medical records and other material currently available and likely to be relevant to the ultimate outcome of the litigation. At the very least, this will include any relevant hospital and office charts together with, if they exist by the time of the retainer, transcripts of discoveries. As a general rule, however, experts should not initially be provided with reports of other experts, whether for or against the position one wishes the proposed expert to take, so as to avoid any suggestion of inherent bias in the expert's position.

Once, however, the expert has provided you with his/her initial opinion, the expert should be provided with all reports of opposing experts both to determine whether those

opinions alter the opinion of the proposed expert and, of course, because the proposed expert must then prepare a report specifically responding to the contents of the opposing expert reports.

Before an expert prepares a report, counsel must have a detailed discussion, preferably in person, with the expert in which one canvasses every potential issue and satisfies oneself that the expert is intellectually comfortable with the position he/she is taking. It is generally a good idea to challenge the expert to some extent during such a discussion and in effect cross-examine the expert to obtain at least a sense as to whether the expert is likely to stand up well in testifying at trial. The expert needs to know that you are seeking his/her professional opinion irrespective of whether it is supportive of your client's case.

Once one is satisfied that the expert is in fact fully supportive, the expert should be provided, orally or in writing, with general guidelines as to the manner in which the report should be structured, but the expert must **not** be given any specific suggestions as to the phrasing of the report. In other words, it is entirely proper for counsel to ensure that the report covers every issue relevant to the litigation, but the manner in which he/she covers each issue is entirely up to the expert.

It should be noted in passing that some members of the Bench have been heard to suggest that it is in some way improper for counsel to meet or otherwise discuss cases with experts before experts prepare a report or give testimony at trial. Any such suggestion is fundamentally wrong; any counsel who fails to have such discussions should put LawPro on his/her speed dial. All experienced counsel should ensure that they communicate with their experts prior to a report being finalized. The purpose of this communication is not to change the expert's opinion. Rather, it is to make sure the expert has addressed the correct issues; has a proper appreciation of the facts; has considered all of the alternative arguments; and has properly recorded their opinion in a written report in the form now required by the *Rules*.

Preparing the expert witness for trial

This is a topic which could take up many pages as it goes to the core of the conduct of a trial. Nevertheless, a few brief suggestions can fairly be made in a paper of this kind.

First, constantly remind the expert that the Judge or Jury are not health professionals and, no matter how many episodes of “Grey’s Anatomy” or “House” they may have watched, the trier of fact will have very little prior knowledge as to how to read a hospital or office chart, what even the most common medical terms mean, and what piece of the body fits where. An expert who cannot make him/herself understood to the Judge or Jury is wasting everyone’s time and is of no assistance to the counsel who retained the expert. The KISS principle must be paramount in this regard.

Furthermore, the expert should ensure by the time he/she testifies that he/she is reasonably familiar and up-to-date with relevant medical literature and guidelines as well as, of course, being thoroughly familiar with the chart material and evidence relevant to the specific case being tried. In this latter regard, experts, particularly on the defence side, should be prepared on the basis of the issues as they are transpiring during the course of the trial, rather than as they appeared to be in the expert reports previously exchanged. It is a fact of litigation life that in the course of most trials things that seemed unimportant before trial become important and vice versa. The experts should not be “two ships passing in the night”; the testimony of the defence experts must respond directly to the expert evidence given in court by the plaintiffs’ experts, rather than to evidence contained in the reports of the plaintiffs’ experts.

Finally, one must do what one can to help the expert come across in court as a knowledgeable, trustworthy and intellectually honest witness who is doing everything he/she can to truly assist the court in coming to an appropriate and accurate understanding of the medical issues relevant to the litigation. Arrogance, anger and intellectual dishonesty are unpleasant in any individual; in an expert witness, they are

fatal. An expert should also be reminded of their obligations as an expert witness and the contents of Form 53 which they have previously signed.

How many witnesses should be called to testify at trial?

There has in recent years been an increasing, and understandable, tendency on the part of the Bench to reduce the number of experts permitted to testify at trial. While some Judges have been limiting counsel to calling one expert for each issue (standard of practice, causation, damages), most Judges are still prepared to permit two experts per issue.

One should in any event very seldom want to call more than two experts on any given issue by reason of the fundamental trial rule that one never calls a witness one doesn't have to call and never asks a question one doesn't have to ask. Generally speaking, you should have two experts prepared and ready to testify on each issue, but one should reserve judgment as to whether the second expert need be called until the first expert has testified; if the first expert has done well, it often makes no sense to run the risk that the second expert will do less well. In this regard as in all aspects of trial practice, the fundamental question is: "is this witness really necessary?"

Conclusion

The care and feeding of experts is a topic which can, and sometimes does, occupy entire books. The intent of this paper, and the program overlying it, is merely to provide some general guidelines. More precise, and no doubt more valuable, information is to be obtained by speaking to experienced trial counsel who will generally always be happy to share the fruits of their trial experience.