Medical Negligence – Understanding the Litigation Process

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This is the second part of a series on medical negligence and litigation.

For the previous instalment, please refer to pages 11 and 12 of the February 2011 issue of SMA News.

In this era of patients' and the public's call for greater transparency, explanations, and demands for professional accountability, doctors must be prepared to appear in court or before disciplinary tribunals.

Attending court is considered a formidable if not an overwhelming task for most doctors, as the process is unfamiliar and adversarial, and most doctors are neither prepared nor trained for such a task. This article aims to provide clarifications of common legal terms in reference to medical litigation and suggest some approaches in preparing to defend oneself in court.

Understanding the terms and definitions

A **Writ of Summons** is a legal document issued by the court addressed to the defendant, notifying him/her that a civil suit has been commenced against him/her by the plaintiff and requiring the defendant to appear before the court if s/he wishes to dispute the plaintiff's claim.

A **Statement of Claim** is a document that sets out the factual and legal basis of the plaintiff's claim against the defendant named in the Writ of Summons. A medical doctor defending a claim on receiving the Statement of Claim should make an early and detailed study of it and seek legal counsel.

A **Memorandum of Appearance** is a legal document filed in court to indicate the defendant's intention to contest the plaintiff's claim. It has to be filed within eight days upon receipt of the Writ of Summons.

Pleadings are legal documents filed in court by both parties and served on each other, which help to define the issues that the court is asked to adjudicate on.

The **Defence** is the defendant's Pleading or legal document that sets out the facts and legal basis of the defendant's case in response to the Statement of Claim. This is usually done by a point for point or paragraph for paragraph rebuttal. A Defence is usually due to be filed in court, and served on the plaintiff within 22 days from the date the defendant was served with the Writ of Summons.

Discovery is the process by which both parties in a civil suit disclose or make available to each other all documents in their possession that are relevant and necessary for the determination of the issues in the case. Discovery usually takes place after the close of pleadings (i.e. after the exchange of Statement of Claim, Defence and Reply). The aim of discovery is to enable both parties to have all required documents so as to enable effective preparation and presentation of the case for trial. Disclosure of documents by discovery is the continuous obligation on both parties until the trial begins.

An **expert witness** is a witness who possesses special knowledge and experience in a subject that enables him/her to give opinions and draw conclusions relevant to the case, so as to impartially and objectively assist the court in its work. The medical expert witness is expected to articulate the standard of care in medical negligence cases and give an opinion supported by sound, logical reasoning and evidence. The role of an expert witness is to assist the court on specialist or technical matters within their expertise. The expert's duty to the court overrides any obligation to the person who is instructing or paying him/her.

Affidavits of Evidence-in-Chief are formal statements containing evidence of the witness for each party to support their respective case, which are sworn or affirmed before a Commissioner for Oaths, and filed in court and exchanged between parties before the trial.

Examination-in-Chief is the process of questioning of a witness by the party who called the witness at the trial. Its objective is to elicit an oral testimony in support of facts required to satisfy the elements of a party's claim or defence.

Cross-examination is the process of questioning of a witness carried out by the opposing counsel at the trial. The aim of this is to uncover flaws, inconsistencies of the witness's evidence and discredit the witness. It is important for the witness to be calm and answer in a clear, concise and thoughtful manner after listening to the questions carefully.

Re-examination is the process by which at the end of the cross-examination, the counsel who had first introduced the witness's evidence will be given an opportunity to re-question the witness to clarify any points that arose during the cross-examination.

A **subpoena** is a court order requiring a witness to be present in court or to produce certain documents in court. Failure to answer a subpoena without a good reason can amount to contempt of court and makes one liable for court sanction.

Contempt of court is an act of wilful disobedience of the rules, orders or processes of a court that diminishes the dignity and authority of the court in its administration of justice. Doctors should be familiar with the rules and etiquette of appearance in court to avoid being held in contempt.

Preparing for defence in court

Once you have secured a capable lawyer, usually appointed by your professional indemnifiers, be prepared to share with your lawyer all the facts of the case, and your thoughts including the weaknesses and strengths of the defence. Meet with your lawyer regularly so that you are fully informed about the entire legal process, and involved and updated on the progress of your case.

Secure and collate all relevant documents of the case early, so that they can be produced without delay as and when required.

Prepare your affidavit early. Find appropriate published medical literature that supports your position and defence. Discuss with experienced and competent colleagues, but be careful not to breach patient confidentiality.

Medico-legal cases are largely a combat of expert opinions. Secure competent, credible and experienced expert witnesses who are prepared to advance your defence. Generally, the expert must be from the same field, and preferably a leading authority in the area of dispute. More than one expert witness may be required if the case is complex. Having a good reputation based on competence and integrity within the medical fraternity is a useful prerequisite to be able to secure good expert witnesses.

Know your case notes very well. Case notes are contemporaneous records of evidence of your professional standard of care. Do not be tempted to alter the medical records when you find some missing data.

Know the expert witnesses reports well and the positions s/he has taken on issues that are relevant not only for your defence, but also for the plaintiff's case.

Be prepared to be cross-examined by an adversarial plaintiff's counsel. You should be well-prepared with answers to possible difficult questions before taking the witness stand.

While in court be dressed appropriately. Show respect to the judge by addressing him/her as "Your Honour". Always maintain eye contact with the judge when responding to questions.

Medical litigation can often be a long and laborious process, taking you away from your regular work, family and leisure. Be honest about its impact on you and your health. Seek professional help early, so that you are in the best state to defend your case. SMA