

The Professional Role of the Doctor as a Medical Expert Witness

By Dr T Thirumoorthy, Executive Director, SMA Centre for Medical Ethics & Professionalism

Introduction

The doctor, in the course of his professional work, could be summoned to be a witness in court proceedings, to act as either a witness of fact or a medical expert witness.

The doctor could be called to testify under oath in a court of law giving evidence regarding a particular patient that he treated or had a doctor-patient relationship with. In such a situation the doctor is acting as a witness of fact.

Meanwhile, a medical expert witness would not have been involved in the care of the patient in question, but possesses special knowledge and experience of a subject that enables him to give opinions and draw conclusions relevant to the case, to impartially and objectively assist the court or tribunal in its work. The medical expert witness is expected to articulate the standard of care in medical negligence cases and standard of professional conduct in disciplinary tribunals, and give an opinion supported by good arguments and evidence.

To be effective, a medical expert witness needs to be trained to acquire competence. Untrained, unskilled and incompetent expert witnesses would mislead the courts and tribunals to inappropriate conclusions and make dispute resolution complex, wasteful and costly.

The duties and responsibilities of a medical expert witness

Before becoming an expert witness, the physician has to ask whether he possesses the appropriate expertise for the questions asked and to write his report. In addition the expert must ensure that he has the time to examine the documents and complete the work in a timely manner as demanded.

The expert's duty to the court overrides any obligation to the person who is instructing or paying him. This means that the expert has a duty to act independently and not be influenced by the party who retains the expert. His role is to assist the court on specialist or technical matters within his expertise.

The expert is not supposed to give opinions on which version of facts he thinks is correct. He makes a report after studying all the facts and documents provided to him regarding the case at hand, based on the instructions given to him.

The expert must be honest, trustworthy, objective and impartial when writing reports, when completing or signing documents, and in all spoken and written statements. It is his duty to be independent and unbiased in his formation of opinions.

The expert is obliged to make sure that any documents

written or signed are not false or misleading. He is expected to take reasonable steps to verify the information in the documents and ensure that important and relevant information are not deliberately left out. He must complete requests for medical reports without unreasonable delay.

The expert must make clear the limits of his knowledge or competence. He must exercise honesty and accuracy about experience, qualifications, publications and positions held.

The expert must preserve confidentiality. He should not disclose confidential information to others outside the parties to the proceedings, unless he has obtained consent to do so, is obliged to do so by law, or has been ordered to do so by a court or tribunal.

A medical expert must reflect as to whether there are and potential or perceived conflicts of interest in taking up this task. He must declare all conflicts of interest early, and may continue to act as an expert witness only when the court decides that the conflicts are not material to the case.

Writing an expert witness report

It is important for the expert witness to ensure that he understands exactly what questions he is being asked to answer. The expert may need to address issues of standard of care and whether it was breached or issues of causation and/or prognosis. In the case of disciplinary tribunals, the expert may be required to give an opinion as to whether the conduct amounted to professional misconduct. If the instructions given are unclear, inadequate or conflicting, he should seek clarification from the instructing party.

It is important for him to use language and terminology that will be readily understood by those for whom he is providing expert reports or opinions to. He should explain any abbreviations and medical or other technical terminologies that are used.

His report must give a balanced opinion, and state the facts, reasons or assumptions on which it is based. When there is a range of opinions on the question or the subject in consideration, the expert should summarise the range of opinions he considers to be acceptable and the reasons why in his report. His report should also contain a summary of the range of opinions which are not acceptable with the reasons why. It is important for the expert to explain how he arrived at his preferred view. He should make suitable references and append them to the report.

In the case when an expert is unable to reach an opinion because of insufficient information, he should state the extent

to which such opinion may be provisional or qualified by further information or facts.

All medico-legal reports must be dated, and have pages numbered with subheadings and numbered paragraphs.

All medical expert witnesses must be familiar with the Rules of Supreme Court Order 40A Experts of Parties which can be assessed at http://app-stg.supremecourt.gov.sg/data/doc/ManagePage/97/roc_o40.htm. A relevant portion is reproduced here:

Requirements of expert's evidence (O. 40A, r. 3)

- (1) *Unless the Court otherwise directs, expert evidence is to be given in a written report signed by the expert and exhibited in an affidavit sworn to or affirmed by him testifying that the report exhibited is his and that he accepts full responsibility for the report.*
- (2) *An expert's report must —*
 - (a) *give details of the expert's qualifications;*
 - (b) *give details of any literature or other material which the expert witness has relied on in making the report;*
 - (c) *contain a statement setting out the issues which he has been asked to consider and the basis upon which the evidence was given;*
 - (d) *if applicable, state the name and qualifications of the person who carried out any test or experiment which the expert has used for the report and whether or not such test or experiment has been carried out under the expert's supervision;*
 - (e) *where there is a range of opinion on the matters dealt with in the report —*
 - (i) *summarise the range of opinion; and*
 - (ii) *give reasons for his opinion;*
 - (f) *contain a summary of the conclusions reached;*
 - (g) *contain a statement of belief of correctness of the expert's opinion; and*
 - (h) *contain a statement that the expert understands that in giving his report, his duty is to the Court and that he complies with that duty.*

Appearing in court as an expert witness

An expert witness should be thoroughly prepared for trial by knowing the facts of the case and familiarising himself with all the documents and expert reports.

The expert's authority derives from his objectivity and impartiality in his report and testimony. The expert should avoid being drawn into an argument, pulled into the "arena of dispute", nor should he view himself as an advocate.

It is important to speak clearly and slowly to the judge with eye contact even though the questions may have come from the examining counsel. It is important for the expert to answer only when he has understood the question and spent time thinking of the answers. If the questions are not clear, he should seek clarifications from the judge.

When the expert is asked a leading question requiring only a yes or no answer, he may inform the judge that he needs to explain his answer. He should stop speaking when objections are raised and resume only if the objections are overruled.

The medical expert should stay calm in the face of provocative or aggressive questioning, and not answer hastily or impulsively. He must be prepared to be challenged on his credentials, incompleteness of reports, the relevance and the logic of the opinions as well as whether the opinions are based on the correct application of the facts for which the opinions are required.

Conclusion

The medical expert witness provides the opinions and conclusion in a medical expert report, and offers testimony during examination in court. Both are critical components in arriving at an equitable and fair decision in any dispute resolution.

Being a medical expert brings along with it legal and professional responsibilities and liabilities. He may be liable for false declarations, fraud and even perjury if he makes false statements or does not furnish all the facts. He may also be liable for negligence if it can be shown he did not take due care, diligence and consideration in preparing the report or in giving the oral testimony. Such legal sanctions are bound to bring about accountability for professional misconduct with the Singapore Medical Council.

The interests of the patients, the public and the profession are best served when competent and objective expert witness reports and testimonies are made available to the courts of law and disciplinary tribunals. The interests of the patients, public and the profession are, as always, convergent and congruous in creating a just and effective system of dispute resolution. **SMA**

Further reading

1. Medical Protection Society. A guide to writing expert reports. Available at: <http://www.medicalprotection.org/singapore/factsheet/a-guide-to-writing-expert-reports>. Accessed 7 June 2012.



Dr T Thirumoorthy is an associate professor at Duke-NUS Graduate Medical School.