



FACTORS TO CONSIDER WHEN RETAINING MEDICAL EXPERTS IN PROFESSIONAL LIABILITY AND PERSONAL INJURY CASES

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Factors to Consider When Retaining Medical Experts

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Seminar Purpose

Gain a better understanding of process lawyers undertake when they find, select, retain and instruct an expert

Become aware of limitations and risks involved in retaining experts

Understand how to maximize benefit and minimize costs and risks associated with medical experts

Overview

- Do you need an expert - Why?
- Timing considerations
- Finding and selecting experts
- Instructing Experts
- Costs of Experts
- Jointly Retaining Experts
- Tips and Checklist to consider before retaining

Do You Need an Expert?

Admission of expert evidence depends on the application of the following criteria:

- (a) Relevance;
- (b) Necessity in assisting the trier of fact;**
- (c) Absence of any exclusionary rule;
- (d) Properly qualified expert

R. v. Mohan [1994] 2 S.C.R. 9 (S.C.C.)

**Need for Medical Experts
Case Law**



***Branco v. Sunnybrook* (2003) O.J. No. 3287 (O.S.C.J.)**

Actions alleging medical 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.

Branco v. Sunnybrook (2003) O.J. No. 3287 (O.S.C.J.)

The onus of proof at trial is on the plaintiff.

In an action alleging medical malpractice, a Court may not make findings of either breach of the standard of care or causation except on the basis of expert opinion evidence to support those findings.

Where a plaintiff fails to obtain any supportive expert reports, the Court will draw an inference that the plaintiff has been unable to obtain any expert opinion supportive of the allegations of negligence.

How do Courts evaluate medical experts?

Malette v. Shulman (1987) 43 C.C.L.Y. 62 (Ont. H.C.)

- *The relevance of their training, experience and specialty to the medical issues before the Court*
- *Any reason for the witness to be less than impartial*
- *Whether the standard of care propounded reflects the standard of the great majority of medical practitioners in the field in question*
- *Whether that testimony appears credible and persuasive compared and contrasted with the other expert testimony at the trial*

Use of Medical Experts

- Curtail extent of plaintiff's damages:
 - Severity
 - Prognosis
 - Duration
 - Effect of impairment
- Establish no causation
- Prove no breach of standard of care
- Rebut plaintiff's expert



Timing Considerations



When to retain an Expert?

- When first review file?
- Before Discoveries?
- Before Mediation?
- Before Trial?
- Sequencing of experts

Retain Expert when first review file

- To assist in "understanding" file - consultant
- To assist in preparing for discoveries
- Issue - When to draft report
- Recommended for:
 - Cases with complex medical issues
 - Cases with significant damages
 - Cases where difficult to determine at outset which of co-defendants are likely responsible

Retain Expert before Discoveries

- Have to disclose findings, opinions and conclusions at discovery unless:
 - Litigation privilege protected; and
 - Will not call as witness at trial
 - Rule 31.06
- **Advantages of retaining expert before discoveries:**
 - Can focus questions at discovery
 - Can gain edge in negotiations
- **Disadvantages of retaining expert before:**
 - Tip off plaintiff re strategy
 - Will likely need a rebuttal report
 - May give plaintiff's expert your game plan

Retain Expert before Mediation

- After discoveries
- After plaintiff has retained their experts
- After plaintiff has served expert reports - can rebut
- Defence experts can counter plaintiff's experts
 - Liability
 - Causation
 - Damages
- Strong expert reports may facilitate settlement
- Plaintiff will have to balance:
 - Risk of your expert prevailing
 - Offer on table at mediation
 - Strength of their expert

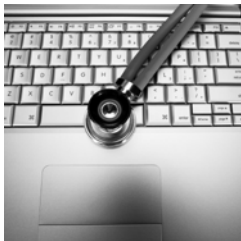
Retain Expert before Trial

- Must serve expert report 90 days before Trial
- If responding to report, then 60 days before Trial
- Rule 53.03
- **Expert not allowed to testify re issue unless:**
 - Issue set out in report; or
 - Supplementary Report served 30 days before Trial
- **January 2010:**
 - Rule change
 - 90/60 days before Pre-Trial

Timing - Sequence of Experts

- Does your expert need to review another report?
- **Example: Personal Injury Claim – Brain Damage**
 - 1st Expert: Neurologist – for medical diagnosis
 - 2nd Expert: Neuropsychologist – cognitive impairment
 - 3rd Expert: Life Care Plan Expert
 - 4th Expert: Vocational Rehab Expert
 - 5th Expert: Present Value Expert
- Each subsequent expert:
 - Arrives at own conclusions
 - Builds on findings of other experts
 - Consistent with overall “game plan”

Finding Medical Experts



Medical Expert Sources

- Previously retained on another file
- Colleagues
- Word of Mouth
- Universities
- Hospitals
- Quicklaw Search
- **Research (Medline Research - Publications)**
- Professional Organizations

Medical Expert Sources - Location

- Start Local – GTA
- Increase scope – Ontario
- Next - Look to rest of Canada
- Totally out of luck – USA



Increased levels of “specialization” in case will require more effort to find a suitable expert

Example – Finding a Medical Expert

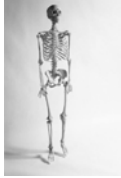
- Finding suitable expert depends on what you need expert to comment on
- **Example:**
 - Rehabilitation (need Physiatrist)
 - Pediatric Patient (need Pediatric Physiatrist)
 - Cerebral Palsy Patient (need expertise with CP patients)
 - Surgical Rehabilitation (need expertise with surgical rehab)
 - Hip Surgery (need expertise with hip surgery rehab)
- Expert required for all 5 of the above criteria
- Interviewed many “potential” candidates
- Some experts – not interested / not available
- Found suitable expert in USA via research

Selecting Medical Experts



Selecting a Medical Expert - Factors

- Reputation and technical expertise
- Conflict free
- Portrayal of impartiality
- Good communicator
- Likeability
- Hired gun risk?
- Cost
- Skeletons in Closet
 - Previous decisions – unfavourable comments by judge
 - Professional discipline decisions - suspensions
 - Previous malpractice defendant



Frazer v. Haukioja [2008] O.J. No. 3277 (O.S.C.J.)

At trial the expert must be and appear to be independent of the party or counsel who retained the services of the expert and must demonstrate objectivity and impartiality in the analyses and opinions that she or he is allowed to give.

Independence and impartiality; the court expects nothing more and it will accept nothing less.

Frazer v. Haukioja [2008] O.J. No. 3277 (O.S.C.J.)

The cross examination of Dr. R brought his objectivity into the limelight... in the context of a practice profile that he admits involves about 80% of his medical legal work being done for defendants and that involves "more like 25%" of his professional time being devoted to medical legal matters from which he earns "probably twice as much income" as he does from his clinical practice.

That an expert is paid for services rendered in a case is not, of itself, a concern but the profile elicited from Dr. R is a red flag, the sight of which focuses the court's attention upon the need for impartiality to be demonstrated in the evidence the proposed to give.

Instructing Medical Experts



Instructing Medical Experts

- What can and can't you do?
- What should you do?
- Can you "control" what an expert will report?
- What are the risks?
- What are best practices?

Instructing Medical Experts

- **Detailed Instruction Letter:**
 - Ensure expert addresses key issues
 - Can pose "what if" scenarios
 - However, if report silent on question – why?
 - Expert may be asked to produce instruction letter
- **General Instruction Letter:**
 - Ask to "comment on standard of care"
 - Less risk if asked to produce instruction letter
 - Risk if later pose questions which you did not pose at first
 - May then be seen as "leading" the expert

Instructing Medical Experts

- **Expert Examination and Assessment:**
 - If examine plaintiff – expert disclosed
 - In general - better report if expert sees plaintiff
 - Can counter plaintiff's expert who examined plaintiff
- **If No Examination:**
 - Do not have to disclose expert unless use report
 - Can match what plaintiff's expert did
 - Can use IME later as required – Rule 33

Instructing Medical Experts Case Law



***Frazer v. Haukioja* [2008] O.J. No. 3277 (O.S.C.J.)**

The independence of Dr. N rises to a level of concern for the court ... by his agreement to provide a formal opinion to counsel in writing only after discussing his views with counsel orally.

Dr. N's impartiality is called into question by his having had several hours of telephone conversations and a meeting with counsel before preparing his reports ...

Frazer v. Haukioja [2008] O.J. No. 3277 (O.S.C.J.)

Cherry picking facts that support a diagnosis that just happens to support the cause of the client that retained the expert and failing to include the facts that hurt the cause, whether those latter facts are capable of explanation and elimination in the course of the development of the expert's analysis and opinion or not smacks of partiality.

**Instructing Medical Experts
Draft Reports**

■ **Use of Draft Reports:**

- Move towards "final" report
- Possibility of having to produce all notes
- Instructions to experts
 - Re draft revisions
 - Written or verbal
 - May have to produce



■ **Double Edge Sword:**

- Multiple drafts – better final report
- Risk - multiple drafts surfacing and questions why

**Aviaco International v. Boeing Canada Inc.
[2002] O.J. No. 3799 (O.S.C.J.)**

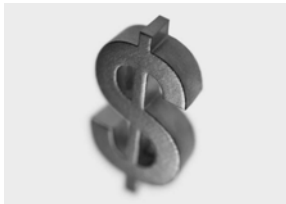
... draft reports represent, at the very least, preliminary findings, opinions and conclusions of the expert and therefore fall within the scope of the rule.

... a party ought to be able to explore with an expert whether he or she changed her views from draft to draft and, if so, why. It is all part of testing the expert's conclusions.

Instructing Medical Experts - Tips

- Speak with expert before providing instructions
- Provide good and “safe” instructions
- Minimal contact afterwards – if so, by phone
- Advise expert to phone you back – not e-mail
- Clients need to understand lawyer’s dilemma:
 - Over-guide expert - Exposed at trial – Expert discounted
 - Under-guide expert - Poor report – Hard to rectify after

Costs of Experts



Costs of Experts

- Cost varies
- Increases with specialization
- \$ 200 - \$ 500 per hour
- Psychologists and Psychiatrists \$\$\$
- Neuropsychologist:
 - Neuropsych testing
 - Interview
 - Medical Records review
 - Report : 40+ pages
 - \$ 15,000 - \$ 20,000 +

Controlling Costs of Experts - Tips

- Inquire re hourly rate at the outset
- Obtain “ballpark” estimate up front
- Cap “maximum fees” in writing
- Advise expert to inform if will exceed “cap”
- Facilitate experts’ roles:
 - Set out precisely what you want them to do
 - Provide them with brief overview of facts - the “story”
 - Provide them with “organized” brief of records
 - If dump records – Increase costs for record review
 - Ensure they understand what is required from them

Jointly Retaining Experts

- **Advantages:**
 - Share costs
 - Common Objectives and Game Plan
 - Concerted Front vs Plaintiff
 - Less risk of “cross-fire” from co-defendants’ experts
- **Disadvantages:**
 - May have to make concessions against co-defendants
 - Lack of control over expert if “handled” by co-defendant
 - Risk of errant shot in report
 - May be problems if “deal” falls apart – “secrets” exposed

Jointly Retaining Experts

- **Key Considerations:**
 - Who will instruct expert?
 - Opportunity to preview letters (and drafts)
 - Who uses up their IME?
 - Who is directly responsible for expert fees?
 - Who has “control” of expert?
 - Set out who will do what in writing
 - Tie in with deal on apportionment of liability



Tips for Insurance Clients

- Know specific purposes and plan for experts
- Understand need for advance preparation
- **Garbage in – Garbage out**
- Be informed on all experts required at outset
 - Set a budget
 - If limited funds – decide on what expert is a priority
 - Anticipate plaintiff's experts
- Understand that expert process can take time
 - Time to find expert
 - Time to prepare expert
 - Time to coordinate assessment and report

Checklist for Insurance Clients

- Do you need an expert?
- Why do you need an expert?
- What type of expert?
- When should expert be retained?
- Ask what expert can do:
 - Minimize damages – by how much?
 - Prove no breach of standards?
 - Prove no causation?
- Cost vs Benefit assessment



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