The Role of the Medical Expert

– *A Medical Perspective (Part 1)*

By Dr Joseph Sheares

Introduction

Medical practitioners are often reluctant to serve as medical experts because they are uncertain of the requirements of the expert and they are apprehensive to testify in a State or Supreme Court trial, or in a Singapore Medical Council (SMC) Disciplinary Tribunal (DT). This perspective attempts to explain the role of the medical expert and to enable the doctor to become an effective and credible medical expert.

This article, the first instalment of a series, will detail the requirements and code of conduct expected of a medical expert.

Definition of a medical expert

The Supreme Court has defined an "expert" in Order 40, Rule 1 (4) thus: "'expert', in relation to any question arising in a … matter, means any person who has such knowledge or experience of … that question that his opinion on it would be admissible in evidence".[1] We may infer from this that a medical expert is any doctor who has a deep knowledge and wide experience of his specialty so that he is able to state the standard of care that is proper and acceptable to responsible skilled members of the medical profession (Bolam principle) and is logically defensible (Bolitho rider), and is therefore competent to give his opinion on issues of medical negligence.

Occasionally, the medical expert is expected to state the standard of professional conduct that is honourable and not disgraceful to the profession, and is therefore competent to give his opinion on issues of professional misconduct in disciplinary inquiries.

The Court prefers a medical expert with the relevant clinical experience because he would prove more credible and reliable in "hands-on" issues (Low Cze Hong v SMC [2008] 3 SLR(R) 612). When two medical experts submit their opinions, the Court is entitled to prefer the evidence rendered by one over the other, or reject them both, but the Court cannot adopt a third opinion of its own (Saeng-Un Udom v Public Prosecutor [2001] 2 SLR(R) 1). The expert may be asked to serve in cases in the Civil Courts, SMC inquiries, Coroner's Court and even in hospital inquiries.

Duty of an expert

The requirements or duty of the medical expert are not vague but have been defined by the Supreme Court in Order 40A, Rule 3 as follows:

1. Unless the Court otherwise directs, the 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 report must:
    a. Give details of the expert's qualifications;
    b. Give details of any literature or other material which he 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 qualification 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 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.[2]

There are two parts to these requirements. The first part states that unless the Court otherwise directs, the expert's evidence is to be given in a written report. The second part specifies that the report must contain eight items and four of them, 2c, 2e, 2g and 2h, are very important. Items 2c and 2e form the expert's brief, and the expert's evidence usually forms the basis upon which charges are framed against the defendant doctor (Chai Chwan v SMC [2009] SGHC 115). 2g implies that the expert's report must not contain false or misleading opinions because they will subvert the course of justice, and also prolong the case thereby increasing the costs. If 2h is not complied with, the Court is empowered to disregard or even draw an adverse inference against the expert's evidence with consequent damage to his reputation.

Code of conduct

These duties or requirements of the medical expert impose a code of conduct, and it is relevant to read the Supreme Court's Order 40A, Rule 3 (Requirements of expert's evidence) in conjunction with any guidelines that may be advised in the SMC Ethical Code (which was published in 2002 and is currently undergoing revision). The expert's duty is to the inquiry or the Court and not to the party who is instructing or paying the expert, so he must not be prejudiced in favour of the latter.

The expert should not mislead the Court about his credentials or experience, and should restrict himself to the areas where he has sufficient knowledge and experience when giving opinions. He must make clear the limit of his competence and decline to give an opinion outside of this. His opinion should be based on the facts available, and if there is any information lacking he should ask for further information, unless he is confident that such information is unlikely to make a difference to his opinion and he must make this clear to the Court.

His expert's report should only be submitted in privilege to his instructing lawyer and it remains confidential within the parties involved in the dispute in court or the inquiry. He should state any potential conflict of interest early in the case for the Court to decide if his report is admissible in court. A conflict of interest exists when the expert entrusted with a primary interest tends to be unduly influenced by a secondary interest.[3] Most experts' reports are required expeditiously and the expert must ensure he devotes enough time to it.

The expert's opinion should be objective, impartial, accurate and not misleading. It is also important for the expert to provide a logical opinion, and logic had been defined legally as a two-stage inquiry by the expert (Khoo James v Gunapathy d/o Muniandy [2002] SGCA 25). In the first stage, the expert must consider the comparative risks and benefit of the treatment given to the patient. And in the second stage, the opinion must be internally consistent, and make cogent sense as a whole, without contradictions. It must take into account proven extrinsic facts (eg, those found in the hospital case file), and known medical facts (eg, good clinical practice following guidelines and references of evidence-based treatments), and advances in medical knowledge. It is by balancing all of the above that the expert will reach an opinion that is defensible.

It is important to note that if the expert flagrantly disregards his legal requirements and any SMC guidelines on his expected code of conduct, he may then be liable to a charge of professional misconduct and a possible loss of immunity against claims of negligence in the his report. Any fraudulent opinion or concealment of non-beneficial evidence will be exposed during his cross-examination in court.

Medical negligence

Because the expert will be asked many questions on issues of medical negligence, he must be very familiar with the three legal elements that prove negligence: duty of care, breach in duty, and causation of injury or loss. These show that the doctor had a duty of care to the patient, and there was a breach in this duty which caused an injury or loss to the patient. All three elements must be present to prove negligence.

In the duty of care to the patient, the plan of management must be rational and based on evidence or good clinical practice. The common breaches in the duty of care are failure by the doctor to diagnose, treat, attend to and refer timely the patient for further investigations or to other specialists when appropriate. Other breaches are: lack of informed consent including information of alternative treatment options, and complications following medical or surgical treatment. These breaches in care indicate substandard care to the patient.

It is essential to show that the breach in care had caused the injury to the patient in negligence claims. This is sometimes a very complex exercise, but the expert is expected to be at least 51% sure or greater that the breach had caused the injury, and this is known as the "balance of probability". If the expert is unable to demonstrate this, then there is no negligence, even though there may have been substandard care (Yeo Peng Hock Henry v Pai Lily [2001] 1 SLR(R) 517; [2001] SGHC 58).

Professional misconduct

Although uncommon, the medical expert may occasionally be asked questions of professional misconduct, and he should be familiar with the three broad definitions of this.

First and foremost, the expert must be familiar with the definition in the SMC Ethical Code (which is undergoing revision). A failure to abide by the acceptable standards of duty of care to the patient and standards of behaviour of the doctor can potentially lead to deleterious consequences to patients and bring disrepute to the profession, and such actions may subject the doctor to disciplinary proceedings. In general the four principles of good medical ethics are: beneficence, non-maleficience, respect for autonomy, and justice. The doctor must be committed to help patients by providing medical benefit, do no harm to them, and respect their right of deciding for themselves what treatments to accept. The doctor is required to treat patients fairly without prejudice.

Secondly, the expert must remember that failure of the doctor to abide by the Ministry of Health (MOH) guidelines on good clinical practice – eg, inappropriate prescription of drugs of potential abuse, dependency, and addiction – may also subject him to disciplinary proceedings.

Thirdly, the expert must note some court decisions in cases involving professional misconduct, especially the decision by the Appeal Court of Three Judges in the case of Low Cze Hong v SMC [2008] 3 SLR(R) 612. The judges criticised SMC's year 2002 definition of professional misconduct as unduly restrictive, irrelevant, and SMC's year 2002 interpretation could not govern the meaning of professional misconduct as it appeared in the Medical Registration Act (MRA) Section 45 (1) (d) [amended in 2010 as MRA Section 53 (1) (a - e)]. The judges went on to say that professional misconduct is found in two situations: one, where there is an intentional, deliberate departure from standards observed or approved by members of the profession of good repute and competency; and two, where there has been such serious negligence that it objectively portrays an abuse of the privileges which accompany registration as a practitioner. Underpinning these two situations is MRA (2010) Section 53 (1), Findings of Disciplinary Tribunal, reproduced in abbreviated form below:

a. Convicted in Singapore/elsewhere of any offence involving fraud/dishonesty.
b. Convicted in Singapore/elsewhere of any offence implying defect of character … unfit for profession.
c. Guilty of such improper act/conduct … in opinion of DT brings disrepute to the profession.

d. Guilty of professional misconduct.
e. Failed to provide professional services of quality which is reasonable to expect of him.[4]

If a DT finds any one of these five offences, then the doctor will be convicted of professional misconduct.

The expert should note that with regard to professional standards in practice and behaviour, all doctors must comply with the SMC Ethical Code which should be applied in conjunction with the laws passed by Parliament and the common law, and with the regulations of the relevant government ministries (eg, MOH).

Role of medical expert: recent developments in cases

The role of the medical expert in cases of medical negligence and professional misconduct may best be illustrated by looking at recent developments in two high profile cases. In the case of Eric Gan Keng Seng v SMC [2010] SGHC 325, a surgeon had unsuccessfully performed an endoscopic retrograde cholangiopancreatography and pre-cut sphincterotomy for removal of common bile duct stones. The patient subsequently developed abdominal pains and distension at night and was managed by the registrar on call, who was also a surgical trainee. The surgeon saw the patient the next day, ordered a CT scan in the late afternoon, which showed a duodenal perforation and an emergency exploratory laparotomy was then performed later in the night. The patient eventually died of septicaemia.

SMC charged the surgeon with wilful neglect of professional duties and gross mismanagement of the post-operative treatment. The role of the expert would have been to determine if there was a breach in the duty of care by the surgeon for not attending personally to his patient in the night and for the delayed diagnosis of duodenal perforation because his registrar on duty was not as experienced. The expert would also determine whether there was mismanagement post-operatively because the surgeon should have ruled out earlier a duodenal perforation which is a known complication in a failed pre-cut sphincterotomy, and the surgeon should have known that the deteriorating condition of his patient required a CT scan in the night. The DT decided the two charges were proven and convicted him of professional misconduct.

In the second case of Eu Kong Weng v SMC [2011] SGHC 68, a patient had alleged absent informed consent for a staple haemorrhoidectomy in spite of a signed consent form. SMC charged the surgeon for not informing the patient of alternative treatment options, and not sufficiently explaining the possible risks and complications of the procedure. The role of the expert would have been to examine the case notes for records of a discussion of treatment risks and options, and to look at other contemporaneous documents to support the surgeon's claims, and also to look for any inconsistencies in the surgeon's claims of having taken consent in a busy day surgery clinic, eg, did he have enough time to take an informed consent? The DT decided the charges were proven, the surgeon should have set the standard because he was the head of the department, and convicted him of professional misconduct. The Court of Appeal upheld this decision of SMC's.

The interesting questions that arise from these two cases are: why were the doctors not convicted of mere negligence since it was their first ever breach in care; and was there a deliberate and intentional departure from standards, or abuse of the doctors' privileges? These questions are complex. Although the medical expert will be asked many questions on issues of medical negligence, he will not be asked whether the doctor had committed ordinary negligence instead of gross, reckless, egregious behavior. He will not be asked whether there was more than mere negligence or professional incompetence or deficiencies in practice, and whether there was abuse of privileges by the doctor and confidence placed by the patient. These are questions of professional misconduct which the Court or the DT is capable of deciding without any assistance from the expert. ■

References

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