Writing the Expert Report and Testifying in Court (Part 2)

By Dr Joseph Sheares

Part 1 of this series can be found in last month's issue of SMA News *(http://goo.gl/F3GZ89).*

Difficulties in interpreting lawyer's instructions and complying with expert's brief

Before writing his report, the expert must understand and clarify his brief and his lawyer's instructions. The expert's brief is defined in the Supreme Court Order 40A, Rule 3 (2c & e), and his report must contain statements of the issues asked by the instructing lawyer; and these issues are invariably linked to the charges that will be framed against the defendant doctor.[1] It must also contain a statement of the basis for the evidence used, including: true facts, facts that the expert had been instructed to accept, and facts that the expert had assumed. It must also contain a statement of the facts leading to the expert's opinion.

The written expert report should preferably follow an acceptable template, eg, the one given in a guide by the Medical Protection Society's (MPS),[2] and it should also fulfil the requirements of the expert's evidence in Order 40A, Rule 3.

It may be difficult for the expert to write an effective report because it is only as good as the issues and questions asked in the instructing lawyer's letter. Sometimes the right question was not posed because he has not understood medical management. Once, I was asked why a patient's pleural effusion was not treated by the defendant doctor – a query that would tend to receive a negative and defensive reply. However, if what had been asked was: "When should pleural effusions be treated?", it would be an open question and give more scope for opinions. Sometimes the lawyer had failed to realise the significance of an investigation; eg, although the chest X-ray appearances for a lung collapse and pleural effusion might appear the same, the treatment clearly cannot be the same. At times, I came across lawyers who had failed to read all the clinical notes because there were too many unfamiliar matters; or failed to retrieve a vital report because they did not have time, and occasionally this would be the Coroner's Report because it had been submitted late.

In one instance, I encountered a defendant who could not explain, in a consistent and logical way, the reason for his chosen method of treatment and not the alternative option; and his lawyer with no medical training was unable to help him. Regrettably, I also saw a defendant doctor's damaging initial report, because he had been advised by another lawyer to admit to a small percentage of the patient's post-op loss of lung function to mitigate the patient's claim of a large loss of function. No objective pre-op and post-op lung function tests had been performed, so it was wrong to admit to any loss of function.

To overcome these difficulties, I have found it useful for the instructing lawyer and expert to meet to discuss whether the client's standard of care has been appropriate and logical, and also discuss what the relevant medical and legal issues are. A separate conference with the lawyer, his client and the expert will clarify the evidence and the reasons for the course of management taken by the client, as well as identify relevant issues for the client. I once came across a medical report by an anxious client which focused upon trying to explain the discrepancies between the pathological report of a frozen section of a lung biopsy which showed lung carcinoma, and the final report of the lobectomy section which showed lung infection. Instead, he should have focused upon his pre-operative diagnosis of lung carcinoma, which was supported by his frozen section biopsy which showed lung carcinoma, which in turn made it consistent and logical for him to perform a lobectomy of the diseased lung. He should have left it to the pathologists to explain the discrepancies in their reports.

Challenges in preparing expert reports

One of the greatest challenges I faced in writing reports arose when I was forced to give an opinion when there was little or no medical basis, which then tempted me to give my own version of the facts. Doctors are sometimes very parsimonious with their signed entries in the hospital notes. I once came across an entry in a hospital's case notes, which was just "pleural effusion?", signed and dated by the doctor. This was a very important issue in the case, but the doctor's entry in the notes was open to many interpretations. Did the question mark indicate doubt of presence of fluid, of location, of type, of quantity, or even of management of the pleural effusion?

This had to be determined by checking with the author of the note, because the judge would not be interested in my version of the fact unless I had the evidence to support it. If I had not clarified it, I would not have been able to write my report, and the opposing lawyer would have insisted that I clarify it during the cross-examination. Another challenge would have ensued if the author of the note was unavailable to explain it. Then I would have had to read the notes thoroughly, looking for trends or indirect references of treatment. If, for example, the doctor had next ordered a chest X-ray or a CT scan, then it was likely he was concerned about the location or quantity of the effusion. If he had ordered the nurse to prepare a chest aspiration instrument, then he was likely deciding when to treat it. I would have to give the Court my reasons for my assumptions accordingly.

It is very tempting to produce an expert report favouring the instructing lawyer and his client, especially if the latter is a colleague. After all, the expert has been asked by the lawyer in preparation for an adversarial contest in court, so it is to be expected the former will avoid a non-beneficial opinion. However, this is not permitted on legal and ethical grounds. I experienced a case of a patient who alleged absence of informed consent for a particular lung operation from his surgeon, a friend of mine, in spite of a signed general consent form. After a lengthy search of the documents and interviews with my friend, I could not find documented informed consent for that particular surgery. I then informed my friend that my report would be non-beneficial to him and his lawyer. Although he was upset, both he and his lawyer had time to prepare for the consequences of my opinion, and the case was settled out of court in confidence and without prejudice, thus sparing my friend an embarrassing court trial. He has remained my friend. I have also had an instance when my opinion was non-beneficial to the instructing lawyer, and then my services were no longer required.

Personal experience as an expert in the courtroom

Several years ago, I was a novice medical expert in a Subordinate Courts trial instructed by the lawyer for the defendants (a hospital and its staff), to give opinions in a case where the plaintiff was a patient who had undergone coronary artery bypass graft surgery and suffered complications of a redo surgery, stroke and lung infection. At that time, I was unaware and untrained in the requirements and code of conduct of a medical expert. Therefore, I learnt the hard way that a trial in court is a formal contest between two adversarial and opposing lawyers and the final decision is left entirely to the judge. I was also inexperienced and unprepared for the cross-examination by the opposing lawyer, who sought to damage my confidence, credibility and testimony in court.

While cross-examining expert witnesses, lawyers employ many strategies including flattery to elicit overconfidence, questioning the experts' professional integrity and attacking their personal integrity. Lawyers will also use and discredit peripheral issues, elicit damaging assumptions or concessions, and magnify inconsistencies and minor mistakes. They will test recall and memory of evidence or submerge real issues beneath irrelevancies. They will also use hypotheticals to induce the expert to agree with their hypotheses, eg, "shouldn't reasonable experts disagree?"[3] I will highlight three examples of these strategies because they were salutary lessons for me.

The opposing lawyer started his cross-examination

by eliciting overconfidence in me with flattery of my credentials, but this was quickly followed by a formal and hostile "examination of the expert witness", focusing on my training, experience and publications. Any inconsistencies in my training were magnified to show I had been deceitful. If I had been guilty of padding up my number of publications by publishing a topic of subject matter in one journal and then publishing the same topic with minor variations in another journal or as a chapter in a book, the lawyer would present my misleading claims as deceitful, thereby eroding my credibility and personal integrity with the judge. Any conflict of interest, if not already declared by the expert, will be exposed at this early stage of the cross-examination.

I had naively prefaced my written report of post-CABG (coronary artery bypass graft) stroke with a newspaper photograph and caption showing a prominent businessman who had undergone a CABG in a foreign country performed by an internationally acclaimed heart surgeon, and the patient had developed a stroke after the operation. I had wished to show that post-CABG strokes were not often caused by surgical negligence, and had three journal references to support this opinion. Continuing with my cross-examination, the opposing lawyer waved this newspaper article in the air, demanding to see the evidence that related it to the case in court, and how it was relevant to his client who had neither been operated on by that acclaimed surgeon nor had his surgery in that foreign country. As I became more defensive and argumentative, I realised I would be making damaging assumptions and unsubstantiated opinions. The lawyer had succeeded in using and discrediting a peripheral issue I had foolishly raised.

I was then asked by the lawyer whether the hospital and its staff had been negligent in their duty of care, thereby causing the complications of a redo operation, stroke and lung infection. I denied there had been negligent care, whereupon he interrupted me by declaring that was my biased opinion and how could I know since I was not there? I was confused by his leading question which invited me to agree that I could not know. Unfortunately, I had not been trained that there are two types of evidence to establish a fact in court. Firstly, there is the oral testimony by the expert witness, which would include the basis for any assumption made. Secondly, there is the documentary evidence in the Bundles of Documents submitted by the two opposing lawyers to the Court. Had I been aware of this, I could have deflected the lawyer's challenge to my testimony by giving the basis for my assumption or moved to the Bundles of Documents in court.

In view of these challenges under cross-examination, there are some essential skills which the medical expert should acquire before testifying in court.

Skills needed of medical experts

The expert must have a thorough knowledge of the case, verify the evidence and facts, and clarify ambiguous statements in the case documents. He will lose credibility if he has an inadequate review of the case and states erroneous evidence and assumptions. He must be able to support his opinions with evidence and reasons, often quoting guidelines, references of evidence based treatments and recent medical advances.

Because new evidence and documents will be introduced during the course of the court trial or disciplinary tribunal (DT), the expert must be ready to modify his opinion and not appear inflexible. But if the modified opinion is very radically different from his original, it shows that his report was poorly produced and he may lose credibility with the Court. If he is asked an issue that is beyond his expertise, he must honestly state that it is not within his experience and knowledge, and decline to comment on the issue. To avoid appearing ignorant, it would be wise of the expert to be prepared to be asked in court a wide range of questions of and challenges to his opinions expressed in his written report and oral testimony.

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Court procedures are formal and the expert should discuss with the instructing lawyer the legal processes in addressing or replying to questions asked of him in court. During the cross-examination, the opposing lawyer will ask leading questions which are designed to invite the expert to agree, with a simple "yes" or "no" reply, with the lawyer's hypothesis or opinion on the issue. The instructing lawyer will be able to reassure the expert that these leading questions from the opposing lawyer will be revisited in the re-examination, when the expert will be able to explain his opinion. Above all else, the expert's opinion must be objective, unbiased, independent and logical to assist the Court or DT reach a just and fair decision.

Communication skills are important and the expert should remain calm and speak clearly, use straightforward terms and pace at the same speed at which the judge is writing down the testimony. Avoid arguments, arrogance, and condescension; and answer to the point or ask for clarification of the question. It is important for the expert to look up at the judge when speaking, to maintain eye contact

and rapport with him. It will also remind the expert that his duty is to the Court, and he is then unlikely to descend into the arena of dispute with the lawyer. Good body language is also helpful. The expert should be fastidious in manner and dress, non-fidgety, and always courteous to behave like the judge to establish rapport with him.

The expert has an advantage over the other witnesses because he has the respect of the Court. The Court acknowledges the expertise of the expert, who also has the authority to state the standard of professional practice and behaviour that is acceptable to the medical profession. This respect by the Court is subject to the expert showing no vested interest in the case, and remaining within the boundaries of coherence, rationality and impartiality. The Court should not, when confronted with expert evidence which is unopposed and appears not to be obviously lacking in defensibility, reject it and prefer to draw its own inferences (Saeng-Un Udom v Public Prosecutor [2001] 2 SLR(R) 1). The Court accepts that upon a point of medical science, the opinion of persons specially skilled in such a science are relevant facts [see the Evidence Act Section 47 (1)] for consideration.[4]

Concerns with agreeing to act as experts

Doctors with extensive experience and deep knowledge of their specialty have a responsibility to patients, doctors and society to serve as medical experts to assist the Court or DT to reach a just and fair decision in disputes of professional standards of medical practice and conduct. However, doctors usually have two main concerns which make them very reluctant to serve as expert witnesses. They dislike the cross-examination which may reveal incompetence and poor preparation of the expert reports, their difficulties in explaining the basis of their opinions, and are naturally embarrassed in an adversarial environment. Doctors are also very reluctant to suggest substandard care by their colleagues which will damage their reputation and career, and also destroy relationships in our close-knit medical fraternity. They are embarrassed to appear disloyal or unfair. On the other hand though, their unwillingness or refusal to serve as experts may make them appear unsupportive of colleagues. The solutions to these concerns are providing the experts with training and professional support.

What medical experts want and professional support

The importance of medical experts' services was highlighted in a *Straits Times* newspaper article, which reported the case of an alleged serial thief.[5] The Chief Justice of Singapore referred him to medical experts to assist the Court to decide if the offender was a kleptomaniac or a serial thief. A novice medical expert will want to be trained to a level of competence that would satisfy the judges in our courts and DTs. The expert's experience and knowledge would enable him to state the standard of professional practice and behaviour acceptable to the medical profession. However, his opinion must be objective, unbiased, independent, and logical. Such qualities may be difficult to be developed, but potential medical experts may develop and hone these skills by attending relevant training courses conducted by SMA, MPS, the Law Society and the Academy of Medicine, Singapore. These organisations have or are in the process of establishing their own panel of medical and legal experts who will provide training, support and advice to novice experts.

The medical expert not only has a responsibility to assist the Court and DT to reach a just and fair decision in claims of medical negligence and professional misconduct; but he also has a responsibility to the public, whose expectation is: "if something goes wrong, somebody is at fault"; and a responsibility to the defendant doctor whose career, reputation and livelihood are at stake. Therefore the expert should be trained to compare the benefits and complications of the treatment given, and trained to give logical opinions that are consistent, that make sense as a whole without contradictions, and that balance the proven extrinsic facts with known medical facts and known medical advances. The expert should also be made familiar with the rules or requirements and the code of conduct expected of him, and be introduced to the Court's judicial procedures. The training and support from the abovementioned organisations will give him the confidence to testify in court as a credible and reliable medical expert. ■

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