

Being an expert witness in a medical malpractice case

Aneesa Bodiat

Head of Legal

Natmed Medical Defence (Pty) Ltd

© Medpharm

Prof Nurs Today 2019;23(2):34-36

Medical malpractice cases often rely on the expert witness testimony of doctors and other medical professionals in order to assist the court in understanding complex medical issues. The court makes the ultimate decision based on the facts as determined and the law, but medical experts are invaluable in guiding the court on medical science and practice.

Both the plaintiff and the defendant make use of medical experts to help present their cases. This does not mean that the medical expert is an advocate or supporter of either the plaintiff or defendant – medical experts are required to present unbiased objective opinions regardless of which party they are preparing an expert report for.

Voluntarily agreeing to act as an expert witness for a plaintiff or defendant is different from being subpoenaed as a witness. When you are subpoenaed by the court, you are obliged to present evidence to the court – however, subpoenaing witnesses is generally done only when the witness was involved in the case in some way or was an eye witness to the events – this is different to being an expert witness for one of the parties, in which case you would not have been involved in the medical management of the patient's case and you are an objective outsider. For more on what do you when you receive a subpoena, read Natmed's: [*What if I receive a subpoena?*](#)

Our focus for the rest of this article is how to be a good expert witness.

How does the process unfold?

An attorney for one of the parties (representing either the patient or the defendant medical practitioner or hospital) will contact you to ask whether you are available to act as an expert witness in their case. They may already have a trial date allocated that will allow you to check your availability. Apart from attending the trial, you will need to set aside time to review the medical records, prepare an expert report and attend various other meetings.

In accepting the brief, the attorneys will also ask you for a copy of your professional CV. This allows the parties to check whether you have all of the relevant experience necessary for the specific case and to prove your suitability and expertise to the court. You should also ensure that you are confident that your expertise aligns with the medical questions arising from the case and that your experience will allow you to present logical and well-reasoned evidence. Also check for any conflicts of interest (for example, if you personally know any of the parties, this may infringe on your ability to provide unbiased evidence).

It is wise to discuss your fees upfront and to agree your hourly rate as well as your fee related to preparing the expert report and attending the trial. A written agreement setting out your fees will protect you in this regard. Stay away from contingency fee agreements (which could take the form of "no win, no fee") because an expert witness should be objective and must assist *the court* in coming to a decision. The expert must not argue either party's case.

Once you have accepted the brief the attorneys will send you a copy of the medical records to enable you to begin work on formulating your expert opinion. You will need to prepare a written expert report. Depending on the circumstances, you may be allowed to examine the patient in order to assist in preparation of your report.

After preparation of your draft report, you will most likely meet with the attorneys in order to explain any of your findings, and to check whether all of the necessary elements required for the report have been sufficiently covered or whether the report needs to be supplemented. The expert report forms part of the formal evidence at trial.

Before the trial, there will usually be a meeting of the experts (you will meet the other party's expert witness). This meeting allows experts from the opposing sides of the case to determine whether any of their findings can be agreed upon. Finding areas of common ground helps to limit the matters in dispute for the trial (where reasonably possible) and will save time at the trial stage. An expert must act ethically and

independently, but also be cautious about not being bullied into making any unwarranted concessions. The experts prepare and sign an “expert minute” after this meeting and this minute forms part of the court documents as well.

The attorneys may meet with you again in preparation for trial, in order to prepare you for examination on the witness stand and to explain the court process as well as the process of cross-examination.

The expert evidence process ends with the trial, at which your expert report will be discussed and evaluated. You will be called as a witness to confirm your report in person and to answer any further questions that the court or the other party has regarding your expert opinion. Your expert opinion must be clear and well-formulated, because you must be prepared to have your evidence challenged in cross-examination.

The expert opinion expressed is only as good as the facts upon which it is based and is dependent on those facts being proven and accepted by the court. It is not your job as an expert to prove those facts but to provide an opinion based on the facts and logic. Before giving evidence, check with the legal team whether the factual basis for the opinion has changed at all, having regard to the evidence which will be led in court.

This summary illustrates the above process

- Request from attorneys to act as an expert witness.
- Check expertise, CV, conflicts of interest and availability before agreeing to accept the brief.
- Study the medical records and perform an examination on the patient in order to prepare a draft report.
- Discuss draft report with attorneys in order to clarify or supplement, then finalise the report (which forms part of the court documents).
- Meet with other experts and prepare an expert minute to limit the issues in dispute.
- Attend trial to present and discuss your expert opinion.

What must the expert report contain?

- Begin the report by setting out your details as well as the details of the patient.
- Summarise the questions that you have been asked to consider.
- List and summarise the evidence that you have examined, including medical records. Note whether you have examined the claimant in person (as well as the date of that examination). Quote relevant portions of the documents, if necessary.
- List all of the academic literature relied upon in reaching your opinion and include quotes where necessary.
- In relation to the above, distinguish clearly between your use of medical records, personal examination of the patient and academic literature.

- If there are issues of fact or medical opinion on which there are a range of options, set out all the options, and include your preferred option, with reasons.
- If you are commenting on another expert’s report, include areas where you agree and disagree with their opinion, with reasons.
- Set out treatment options, the probability of the patient’s condition improving or deteriorating and timelines, where appropriate.
- Include notes on any gaps in the evidence or missing information that affects your opinion.
- If assumptions have been made, state these clearly.
- Comment on matters within your expertise only.
- Set out your opinion and conclusion logically, and explain technical terms and medical jargon clearly.
- If you have provided your opinion on a range of issues within the main body of the expert report, summarise your findings and opinions at the end.

Ethical and legal duties of the expert witness

The expert witness is not a “hired gun” who tailors their evidence to suit either party. Your evidence must be objective and unbiased.

The High Court in *Schneider NO and Others v Aspeling and Another* [2010] said that

“an expert comes to Court to give the Court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusion of the expert, using his or her expertise, is in favour of the line of argument of the particular party. But that does not absolve the expert from providing the Court with as objective and unbiased opinion, based on his or her expertise, as is possible. An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case. An expert does not assume the role of an advocate, nor give evidence which goes beyond the logic which is dictated by the scientific knowledge which that expert claims to possess.”

That same judgment provided additional guidelines as well:

- Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
- An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his or her expertise.
- An expert witness should state the facts or assumptions upon which the expert opinion is based. He or she should not omit to consider material facts which could detract from the concluded opinion.
- An expert witness should make it clear when a particular question or issue falls outside his or her expertise.

- If an expert opinion is not properly researched because the expert considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.

The expert report could help the parties to settle the matter because it may help the parties to assess the strengths or weaknesses in both sides' cases, and thus it can facilitate a speedy resolution in some matters.

Medical malpractice cases often involve two completely opposing versions of what happened (the patient versus the doctor, for example) and therefore the courts often rely on expert evidence to help in establishing what most probably happened. Your duty to the court must not be taken lightly because the testimony of a credible, honest and objective expert witness may bear a great deal of weight on the outcome of the case.

For more detail on how the courts approach the testimony of expert witnesses, read Natmed's *Annual Survey of Medical Malpractice Judgments of 2018*, which includes a number of judgments relating to expert evidence.