PROFESSIONAL NEGLIGENCE ACTIONS
EFFECTIVE EXPERT OPINION EVIDENCE

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Expert opinion evidence will often make or break a professional negligence action. Its importance cannot be overstated. The extra time and effort that you put into obtaining credible expert opinion evidence will pay off. This paper will identify how to obtain effective expert opinion evidence. It will, also, refer to and discuss recent Saskatchewan case law concerning expert opinion evidence.

I have restricted my practice to medical negligence. I only represent plaintiffs. Consequently, the information that I offer in my paper concerning expert opinion evidence is gleaned from my experience in prosecuting medical negligence actions. However, I expect that what I have learned from prosecuting medical malpractice actions applies generally to most professional negligence actions.

In professional negligence actions, expert opinion evidence is typically required to determine issues of:

1. standard of care;
2. causation; and
3. quantum of damages.

I initially concentrate on obtaining expert opinions on the standard of care and causation. If I receive opinions critical of the standard of care and supportive of causation, I will then consider what expert opinion evidence is required to determine quantum of damages.

Attention must be given to retaining an expert with a professional practice background similar to the professional in question. Further, when offering the opinion evidence the expert must focus in on that particular professional practice. For example, in Bear (Litigation Guardian of) v. Lambos, 2005 SKQB 148 (Baynton, J., March 28, 2005) an action was commenced against a
Prince Albert pediatrician. Each side retained a pediatrician to offer expert opinion testimony on the appropriateness of the standard of pediatric care provided by the Defendant physician.

In reviewing the evidence offered by the two physician experts, Baynton, J. concluded that the Plaintiff’s expert tended "... to define an acceptable standard of care as the level of treatment that he or his colleagues with years of specialized training would provide in a neonatal unit for an infant in distress" (paragraph 54-emphasis added). On the other hand, Baynton, J. held that the Defendant's expert "... although he also has had years of specialized training and practice, tend[ed] to define an acceptable standard of care as the level of treatment that is expected of a physician in a less specialized practice" (paragraph 54-emphasis added). In other words, the Defendant’s expert more appropriately identified the standard of care that would be expected of a physician in a practice similar to that of the Defendant.

Consequently, identify the key characteristics of the practice of the professional in question before you. Once you have identified the key characteristics of the professional practice in question, you can then begin the process of making contact with potential experts who are familiar with that type of practice.

During this process keep in mind the importance of the credibility of your potential expert witness. One of the battlegrounds in professional negligence actions, particularly medical negligence actions, is the perceived credibility of the expert. If your expert is perceived by opposing counsel and, more importantly, by the trial judge as not being credible or is viewed as being a "hired gun" then no matter what your expert might say in support of your case it will likely be of little actual assistance to you and your client.

In the medical negligence action of Martin Estate v. Inglis 2002 SKQB 157, 218 Sask. R. 1, [2002] 9 W.W.R. 500 (Hrabinsky, J., April 17, 2002), the credibility of an expert who was called on behalf of the Plaintiff was questioned. The expert "...admitted that he had been associated with organizations that are in the business of providing expert witness testimony" (paragraph 34). In response to some questions that were asked of him during cross-examination, the expert stated he could not recall some of the specifics of his association with those organizations and whether he had paid a fee to be registered as an expert with the organizations. He admitted that
as a result of his association with those organizations he had offered opinions involving medical negligence. He further admitted on cross-examination that in the majority of those cases he provided expert testimony on behalf of the plaintiff.

Hrabinsky, J. held that the responses offered by the Plaintiff's expert concerning his association with the expert service organizations "... to be lacking in candour. His answers were circumspect" (paragraph 39). Then at paragraph 122, Hrabinsky, J. had this to conclude about the Plaintiff's expert:

"I have already alluded to Dr. Leitman's credibility or lack thereof. He admitted that he was involved in, or had been associated with a number of professional expert witness organizations and that he had been approached for this case through one of these organizations. He admitted that he primarily testifies on behalf of plaintiffs in cases involving allegations of medical negligence. I do not find his expert evidence to be an independent product uninfluenced by the demands of litigation. I am of the view that he assumed the role of an advocate advocating the plaintiff's case".

The findings made by Hrabinsky, J. concerning the credibility of an expert witness is illustrative of a potential and serious problem that can develop with expert witnesses. When retaining an expert it is important to be aware of the red flags that might indicate a bias or an advocacy role by the proposed expert. If during your initial conversations with the proposed expert you sense a lack of impartiality or a bias or a "hired gun" type of approach move on and find a different expert. As an aside I have contacted physicians whom, when told that I am representing an individual who is retaining me to investigate the standard of care provided by a physician, will inform me that they only provide expert opinion evidence on behalf of physicians. Defence counsel should, therefore, also take heed the comments of Hrabinsky, J. when assessing the credibility of their potential expert.

I will now offer a few practical comments in finding a credible medical expert. What I do to locate a credible medical expert can be applied, with some variation, to finding an expert witness in a negligence action involving a member of a different profession.

I will often begin my search for potential experts by doing a CANLII search. Assume, for example, that a file centers on the standard of care provided by a hospital emergency room
physician who attended upon a patient and the patient ultimately suffered a heart attack. Inserting the words "heart attack" in the Search field of CANLII will result in a number of judgments in the search results. Skimming through the judgments you will quickly determine which of the judgments pertain to medical negligence actions and involve an emergency room physician and heart attack. Then by reading the judgments you will pick out the names of the experts who were called on behalf of the plaintiff and the defendant physician.

When I read through the judgments, I look for any comments about the experts. I particularly look for any comments by the trial judge pertaining to the credibility of the experts. Surprisingly, comments pertaining to expert witness credibility are common.

I will then do a CANLII name search for the experts that I have picked out of the judgments and determine if the experts have testified in other actions. I will then start the process all over and read through the list of judgments where the experts have testified in other actions.

Once I have narrowed down the list of potential experts, I will then refer to the *Canadian Medical Directory* published by HCN Publications Company. The *Directory* is an annual publication. Contained within the *Directory* is a listing of physicians (categorized by name, province, city, and by speciality) practising in Canada. The list includes the name, address, phone number, fax number, email address, year and the university where the Medical Degree was obtained Medical Degree, and, if any, Fellowship designation for each physician.

I will then use the information contained with the *Directory* to contact potential expert witnesses. In my initial conversation with the potential expert, I immediately state that I am representing an individual whom is retaining me to investigate the standard of care provided by a physician. As I previously mentioned in this paper that sometimes concludes the conversation and I move onto contacting another potential expert.

Also, during the initial conversation with the potential expert I will typically ask whether the individual has been retained on behalf of defendants and plaintiffs in medical negligence actions. I actually prefer to retain experts who are often retained on behalf of defendants. By retaining an expert who is frequently retained on behalf of defendants, you will have some confidence that
the individual will appreciate the work that is required of an expert witness. Further, and I appreciate that what I am about to suggest might be controversial amongst the members of the plaintiff's bar, I believe that by retaining experts whom are frequently retained by the defence bar you might avoid credibility issues. If the other side has previously retained your expert on other matters then your expert will obviously be known by the other side and will, presumably, be respected by defence counsel.

During the initial conversation with the potential expert it is important to be candid and up front in terms of any upcoming deadlines. Many of the physicians who agree to be expert witnesses in medical negligence actions are, also, very busy clinicians. Consequently, they do need to know when you require their opinion. Also, during your initial conversation with the expert discuss the basis for the expert's proposed fees (usually based on an hourly rate) and whether the expert requires a retainer for fees.

Once I am satisfied that I have retained an expert who is qualified to offer an opinion concerning the matters in issue and appears credible, I typically ask the expert to telephone me once the expert has arrived at an opinion. I do so for the following reasons:

1. to ensure the expert correctly understood the issues requiring an opinion;
2. to inform the expert, after hearing the opinion, whether an elaboration of a specific point is required;
3. to determine whether additional issues need to be considered by the expert; and
4. to avoid the uncertainty of whether a draft expert opinion is subject to disclosure and production.

The question of whether a draft expert opinion must be disclosed and produced was the subject of an application in *Martin Estate v. Inglis* 2002 SKQB 24, 215 Sask. R. 286, [2002] 3 W.W. R 357 (Hrabinsky, J., January 21, 2002, addendum February 7, 2002). Defence counsel applied for an Order pursuant to Rule 284D of *The Queen's Bench Rules* and the inherent jurisdiction of the Court for the Plaintiff to obtain from the Plaintiff's expert and then produce to Defence counsel
"...copies of any working notes, draft reports, opinions, instructions, or correspondence passing between [the plaintiff's expert] and plaintiff's counsel, in short, [the expert's] entire working file".

Hrabinsky, J. heard the application. At paragraph 19, Hrabinsky, J. held as follows:

"When an expert witness is called to testify at trial:

(1) A litigant and his/her counsel do not necessarily waive all privileged documents within their possession.

(2) Privilege is waived in respect of those facts or premises in the expert's file which have been used to base the expert's opinion and which came to the expert's knowledge from documents supplied to the expert.

(3) The documents in their possession to be produced are those which may be relevant to matters of substance in the expert's evidence or his credibility.

(4) As to the expert's credibility, I agree with Sopinka, Lederman & Bryant in The Law of Evidence in Canada, supra, at p. 671 that "... caution should be exercised before that becomes the basis for wide-ranging disclosure of all solicitor-expert communications and drafts of reports...

(5) If the facts and premises were used as the basis or underpinning for the expert's opinion, the privilege would impliedly be waived."

Hrabinsky, J. then went on to find that:

"... whether there is privilege or not can be ascertained in two ways. First, a judge can examine the documents or material for which privilege is claimed and make a determination. Secondly, counsel through cross-examination of the expert may be able to determine what, if any, documents and materials are privileged" (paragraph 20).

Hrabinsky, J. then held that the expert's complete file materials including:

"...copies of any working notes, draft reports, opinions, instructions or correspondence passing between Dr. Leitman and plaintiff's counsel..."

be in the possession of the Plaintiff's expert and the Plaintiff on the opening to the trial. The documents would then be available at trial:

"...for determination which, if any, documents are privileged" (paragraph 21).
In speaking with defence counsel in *Martin*, it is my understanding that no further application was made to determine whether any of the documents in the opposing expert's file was subject to privilege.

Given the findings of Hrabinsky, J. in *Martin* I would argue that draft expert opinions are generally subject to privilege and are not producible. However, in practice I continue to ask the experts whom I have retained to phone me and discuss with me their opinion before putting their opinion to paper.

Another issue that might come up in relation to expert opinion evidence is what to do with the transcript from the Examinations for Discovery when the expert has reviewed the transcript in preparation of his opinion. This issue, also, came up in *Martin Estate v. Inglis* 2002 SKQB 36, (Hrabinsky, J., January 29, 2002). The transcript of the examination of the Defendant physician was made available to the Plaintiff's expert in preparation of his opinion. At trial, the question was raised whether the Examination transcript should be read into the record or only filed as an exhibit. Hrabinsky, J. held as follows:

"Since I am sitting alone as trial judge without a jury, I have concluded that it will not be necessary to read the transcript into the record. It will be sufficient to file the transcript as an exhibit. However, I find that such filing of the transcript as an exhibit will be for the limited purpose of revealing the background material upon which Dr. Leitman based his opinion but not for the proof of the facts stated therein" (paragraph 3).

When deciding what background material you want to provide to the expert, it is important to bear in mind how that background information may later be used in the proceeding. The example of the discovery transcript in *Martin* illustrates the need to think out in advance how that information might be later used.

An alternative to providing the expert with a copy of the transcript from the Examination for Discovery is to provide the expert with a list of assumptions (drawn from the Discovery transcript) when arriving at an opinion. That way the issue of what to do later with the Examination transcript is entirely avoided.
The final point that I want to address is the use, prior to trial, of the expert report. I strongly advise lawyers who represent plaintiffs in professional negligence actions to obtain their expert opinions on standard of care and causation before commencing the action. Use the information contained within the expert opinion to prepare the pleadings. In particular, use the expert opinion to specify the alleged particulars of negligence. I am of the belief that a Statement of Claim which clearly and succinctly identifies the particulars of negligence is much more effective than a Claim that sets out the negligence in a more generic fashion. Also, by retaining experts before the commencement of the action you have the opportunity to retain the best experts.

Another important use of the expert report is when preparing for the Examination for Discovery of the defendant. I use the information contained within the expert opinion to zero in on the relevant issues and to formulate the specific questions that I must ask of the defendant.

In speaking with defence counsel in medical negligence actions, I understand that it is not uncommon for a plaintiff’s lawyer to conduct an Examination of a defendant physician before the plaintiff’s lawyer has received the expert opinions on standard of care and causation. It is not good practice for a plaintiff’s lawyer to proceed, in the absence of an expert report on standard of care and causation, with an Examination of a defendant in a professional negligence action. Without the benefit of the expert opinions, the plaintiff’s lawyer will not know what subject areas need to be focused on during the Examination; what specific questions need to be asked of the defendant and; more importantly what answers are necessary to support the action.

In summary, effective expert opinion evidence in professional negligence actions is imperative if you are going to be a successful lawyer in this very interesting and challenging practice area. This paper has identified methods to assist you in obtaining effective expert opinion evidence.