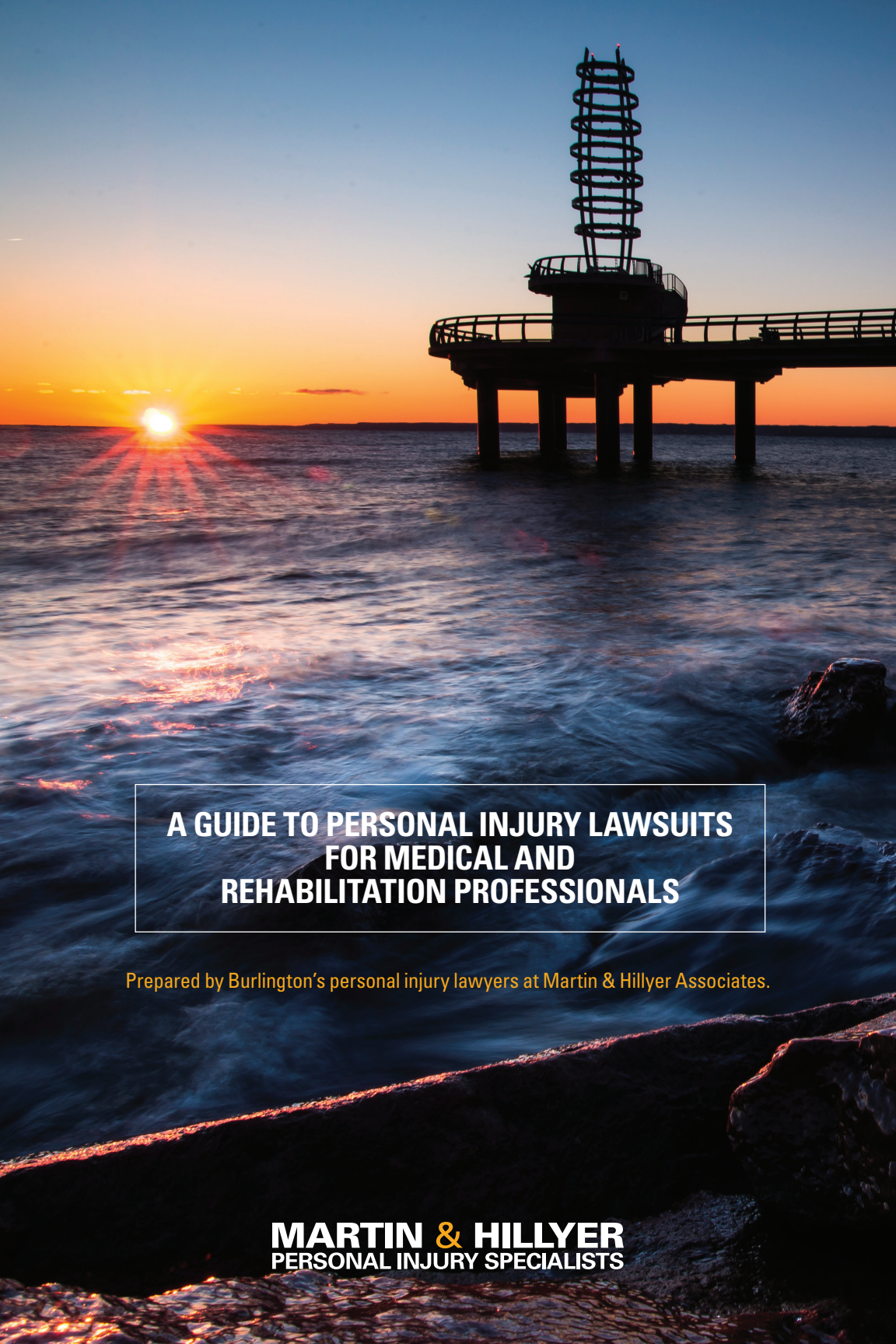

A GUIDE TO PERSONAL INJURY LAWSUITS FOR MEDICAL AND REHABILITATION PROFESSIONALS

Prepared by Burlington's personal injury lawyers at Martin & Hillyer Associates.

MARTIN & HILLYER
PERSONAL INJURY SPECIALISTS

A NOTE ABOUT THIS GUIDE

This Guide is intended to provide healthcare professionals with a general overview of personal injury litigation, and is not comprehensive. In addition to the obligations discussed herein, you may have additional ethical and professional obligations as a member of your profession that are not considered here. Your regulatory or professional organization can provide you with more information about these obligations.

Personal injury lawsuits can vary significantly, and you should not rely solely on the information contained in this guide if you or one of your patients is confronted with legal question or concern. You should always arrange for a consultation with a personal injury lawyer to provide you with legal advice applicable to your particular situation.

The lawyers at Martin & Hillyer Associates provide a free initial consultation to all of our personal injury clients. In addition, all of our personal injury lawyers are happy to speak with medical and rehabilitation service providers directly to provide them with further guidance on their role in a personal injury litigation process. Find out more about our lawyers and their expertise or arrange a free consultation by visiting **mhalaw.ca**.

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INTRODUCTION

TORTS & INSURANCE DISPUTES

What exactly is personal injury litigation?

Personal injury litigation is a broad term which generally refers to lawsuits resulting from either intentional or negligent torts, or insurance disputes and denials.

1. Torts

When someone is injured as a result of someone else's **negligence** or **intentional act** (such as an assault), the injured person may opt to sue the other person. Negligence and assaults are both types of torts – a kind of legal wrong for which one is entitled to receive some form of compensation under the law. People may sue for any number of personal injury torts that have been committed against them, such as: **slips, trips & falls** caused by hazards on public or private property; **car accidents** resulting in serious injury; physical, psychological and sexual **assaults**; **defective products** causing injury; or **professional malpractice** causing injury.

2. Insurance Disputes

Many people are protected by insurance plans which provide coverage in the event of disability or personal injury. In these cases, a person may have to sue his or her **own insurance company** for terminating or failing to provide coverage. It is very common for these disputes to arise at the same time as lawsuits for 'torts' described earlier, but they can also arise in isolation.

Insurance disputes often involve: **accident benefits** (ABs) provided by car insurance policies; **long-term disability** or **short-term disability** insurance usually provided through employment benefits; or public insurance schemes such as **WSIB** (also known as workers' compensation or workplace safety insurance).

LAWYERS ARE NOT DOCTORS

How This Guide Can Help

As a medical or rehabilitation professional, it's likely that at some point in your career you will be brought into this world of personal injury lawsuits. By their nature, these lawsuits exist at a unique intersection between the legal and medical disciplines. Lawyers are not doctors. They have to rely heavily on your knowledge, training and experience to make or break a personal injury case.

Your observations, diagnoses and opinions may form the foundation of a plaintiff's or defendant's legal case. You may be called upon to prepare a written report that answers complex legal questions using your professional expertise. And you may be called upon as a key witness for either side in a lawsuit. All told, it can be a bewildering and stressful experience for even the most seasoned practitioner.

This guide can act as a roadmap to help you navigate this unfamiliar territory. It provides general information about the interaction between the medical/rehabilitation and legal discipline and can help answer many common questions about the litigation process like:

- *do I have to disclose my records?*
- *what kind of an expert am I?*
- *how do I write a powerful medical-legal report?*
- *how much can I charge for my services?*
- *how should I prepare for a tough cross-examination?*
- *how do I apply the right legal test?*

Chapter One highlights the obligations of treating medical and rehabilitation providers to their patients in the personal injury litigation context and outlines some of the ways these treating providers can inadvertently impact their patient's case.

Chapter Two focuses on healthcare professionals who have been retained to provide opinions for either a plaintiff or a defendant in a lawsuit - either third-party experts, or treatment providers who have been asked to take on an expert role on top of their treating role.

Chapter Three covers medical-legal reports, providing sample report outline and highlighting common pitfalls when preparing such reports.

Chapter Four takes us to the courtroom, providing rules and tips for both treating and retained healthcare providers who are called upon to testify as a witness in court.

Chapter Five explains in detail some of the legal tests experts and treating professionals are routinely asked to comment on for their patients and in their reports.

1 YOUR ROLE AS A TREATMENT PROVIDER

Treating professionals are arguably the most important actors in the personal injury litigation process, though they are often not aware of just how essential their role is and how much power they wield. A lawsuit is obviously not at the forefront of a treatment provider's mind when caring for their patient - nor should it be! Unlike the "experts" discussed in the next chapter, the treating provider's duty is first and foremost to treat their patient to the best of their ability - not to report to a lawyer or advise a judge.

But whether the treating professional likes it or not, the issues they are dealing with will be so central to their patient's case that it is essential they keep the context of the lawsuit in the back of their mind, since they can easily - and often unintentionally - alter the course of a lawsuit by their treatment choices, clinical notes, offhand or imprecise commentary, or how they do or do not cooperate with the lawyers on both sides of a case.

There are some simple things that treating medical and rehabilitation professionals can do (and not do) to help their patients and avoid unintentionally creating problems in the litigation, and this chapter addresses some of these points.

Limitation Periods

ASK A LAWYER – DON'T TRY TO BE ONE

As a treating medical or rehabilitation professional, it is likely that you will be among the first to come into contact with persons who may have reason to begin a personal injury lawsuit - fortunately, most people visit a doctor before they visit a lawyer when they get hurt!

This can put you in an awkward position - your job is not to look out for the legal interests of your patient, but as a professional practising in this field, you will undoubtedly have

some knowledge that your patient lacks. One of the most important pieces of information that you may be aware of is that there is usually a limited amount of time for an individual to begin a lawsuit.

In Ontario, people usually have **2 years** from the date of an accident or a denial of insurance benefits to start a lawsuit, and if they fail to do so before the 2 years is up, they will be precluded from ever doing so later. But it is not always this straightforward - in some unusual cases exceptions can be made to this to extend the time, while in other cases even *earlier* deadlines may apply to potential litigation (as just one example, individuals have only **10 days** to warn a municipality of an intention to sue them).

Members of the general public often do not know about these deadlines or limitation periods, and so they might not seek legal advice until it is too late.

You cannot give legal advice to your patients and should not try to tell them *what* time limits apply to their case - this is outside of your professional expertise, and could be problematic for both you and your patient. However, if you suspect a patient may have a legal claim, you can certainly warn him or her that they may have a limited amount of time to start a lawsuit or put a defendant on notice, and suggest that he or she therefore **move quickly** to obtain legal advice if they are interested in finding out more.

Clinical Notes & Records

Aside from suggesting your patients get legal advice, probably the single most important thing you can do as a treatment provider of someone involved in a personal injury

action is to keep **clear**, **detailed** and **appropriate** clinical notes and records.

As the treating practitioner, you are at the forefront of the personal injury litigation process. Your observations and opinions - from both before and after an accident - will form the foundation for the cases advanced by both sides of the lawsuit, and they will inform the opinions of any experts retained after the fact. The essential record of these observations and opinions will come from your clinical notes.

CLEAR & ORDERLY NOTES

Records: The Basics

Perhaps the most obvious thing you can and should do is to make sure that your notes are **legible**. People joke about illegible doctors' handwriting, but when your patient's case depends on the observations contained in your notes, it is no laughing matter when those notes can't be deciphered by anyone other than yourself. Make an effort to write clearly, or type computerized notes where possible.

Beyond clear writing, pinning down specific timelines is extremely important in many personal injury lawsuits, so clear dating of records is also essential. This means not only ensuring that everything gets dated in the first place, but also that it gets dated *clearly*. Does **03/04/05** mean April 3, 2005? Or March 5, 2005? Or April 5, 2003? Different people have strong opinions about which order is "correct," but the fact is that different people use different date formats - sometimes even within the same hospital or facility! While you may always know what you mean, there is no way for a third party reviewing your records to know which format is being used, so clearer formats such as "03-Apr-2005" or simply "April 3 2005" are preferable and take minimal additional effort.

Releasing your Records

Early on in any personal injury lawsuit, both sides will need to obtain and review the records of all of the plaintiff's treating doctors and specialists to determine the nature and severity of his or her injuries.

RECORDS MUST BE RELEASED

Under provincial privacy laws, as well as most professional guidelines, you have a **duty** to provide copies of your records to a patient or their agent when requested, and to do so in a timely manner. There is no discretion for a healthcare professional to exclude any information - it must all be provided if requested. It's worth noting that this even includes **raw test data** and **consultations and records from third parties** regarding the patient that you may have in your file.

You should ensure you receive authorization from your patient for any disclosure requests, including from their own insurance company. Usually a signed authorization form will be provided with any request you receive.

Disclosure of your Records

It's important to remember that all of your records will be released not only to your patient's lawyer, but **also to the lawyers and insurers on the other side**. There are very few exceptions to this rule: even solicitor-client information that a client relays to you and that you note down in your records will likely end up being disclosed to the other side.

You obviously make records first and foremost for your *own* treatment purposes, and the fact that a lawsuit is ongoing should not change this. But because of the persuasive power of your notes, it is very important that you remain mindful of

what you are putting in your records and the fact that it will eventually be released in the lawsuit - usually without all the context that you had when you made the note.

A common area of concern is if you receive information such as **solicitor-client advice** or if your patient shares very specific concerns with you about the legal proceeding. You should think twice before noting down this sort of information, and only do so to the extent that it is relevant and necessary for your ongoing treatment of the person. For example, if a patient tells you that they are stressed out about the legal proceeding because their lawyer told them their case is probably only worth $X, you may want to note down the client's stress about the proceeding if it is relevant to your treatment, but the specific advice given by the lawyer is likely not relevant to your treatment, and could be extremely prejudicial to your patient's case if it is disclosed to the other side. So you would likely only want to note down that the patient is stressed about their case and not note down the specific details of the advice.

ACCURATE & CLEARLY-SOURCED FACTS

Another area of concern is the factual information you may make note of in your report, often in passing while reviewing the patient's history. You should be careful to ensure that the factual information you note down is **accurate** and **detailed**, and that the **source** of that information is made clear. For example, if you recall reading somewhere in a patient's chart that they were hit while accelerating through an intersection on a yellow light, for simplicity you may be tempted to simply note down "patient hit while running red light." This will almost certainly cause unintended problems for your patient's case, since it is unclear where this information came from by only looking at your records - did the patient tell you this? Is it your conjecture? Did you hear it from a third party? You should always specify exactly where you received the factual

information that you are relying on, and ensure that the information is accurately summarized.

Charging for your records

While you must disclose your records, you are of course able to charge the party requesting them for reasonable expenses involved in responding to their request.

YOU CAN CHARGE FOR YOUR RECORDS

The *Personal Health Information Protection Act* allows you to charge for "**reasonable cost recovery**." It's worth noting that a 2015 decision by the Information and Privacy Commissioner has found that "reasonable cost recovery" does not mean "full cost recovery," and that "health information custodians should be encouraged to develop file systems and train their agents in a manner that facilitates the efficient processing of requests for, or disclosures of, records of personal health information."[1] Because of that, it has been determined that health information custodians can charge a maximum base fee of **$30** (which includes the first 20 pages), and then **$0.25** per photocopied page after that, or **$10** for a CD of the records.[2]

If there is some reason your fee will exceed this amount, it is a good idea to confirm it with the lawyer requesting your records in advance. In the case of medical doctors, the OMA Guide specifically notes that "physicians are prohibited from charging a fee for providing copies of their medical records, unless they first give the individual an estimate of the fee that will be charged."[3]

[1] *London Health Sciences IPC Decision, Complaint HA13-108, Order HO-14, March 6, 2015 at para 53*

[2] *Ibid. at para 59.*

[3] *Available to OMA members online at www.oma.org.*

Funding for Treatment

It's important that medical and rehabilitation providers are aware of any **private benefits** for medical and paramedical

services that may be available to their patients so they can make appropriate treatment recommendations and take advantage of the funding that is available. This most commonly comes up in car accident claims, since funding for medical and rehabilitation treatment is made available through the **accident benefits** system.

The injured person's lawyer cannot and should not be directing their client's medical care, so if there is a treatment option that would be helpful for a patient but it is not funded by OHIP, it is generally **up to the treatment provider** to advise their patient of the option and to submit a treatment plan to the appropriate benefits provider. At the initial stages, when a treatment plan is being designed for a patient, the lawyer's role will be limited to providing advice as to the *type* and *amount* of private funding that is available - the actual treatment decisions are always made by the patient along with the advice of his or her doctors and treatment providers. The available funding will obviously be a relevant factor to consider when determining treatment approaches, however, so where there is uncertainty about what benefits are available or where the benefits are limited and might be exhausted, you should not hesitate to contact your patient's lawyer to discuss the options.

YOU DIRECT YOUR PATIENT'S CARE – NOT THE LAWYER

The other situation where lawyers and their clients' treatment teams need to work closely together is when private funding for recommended treatment gets denied or inappropriately limited by the injured person's insurance company. In these cases, lawyers may have to step in to dispute those denials and ensure the client has access to the funding they need.

Because of this, it is essential that an injured person's lawyer is kept in the loop with regard to the ongoing privately-funded treatment that their client is seeking and receiving. This is

KEEP THE LAWYER IN THE LOOP

not always easy for plaintiff lawyers - they usually have no way of knowing when a new treatment plan is submitted to an insurance company unless **you send them a copy of it**. Lawyers do not have access to the HCAI system that auto insurers and treatment professionals use to submit and track treatment plans. Clients are often unclear about the status of their medical benefits (especially if they have multiple benefit providers). And adjusters are not perfect - it is unfortunately not unusual for insurance companies to fail to provide a copy of their response to a treatment plan to the injured person's lawyer, or to miss a treatment plan and not respond at all within the allowed time.

If the treatment provider has not sent a copy of the treatment plan to the lawyer, the lawyer has no way of knowing about about a denial or a deemed approval, and can't step in to ensure funding gets approved so you can go ahead with the treatment your patient needs. It's therefore both in your patient's interest and in *your* interest to ensure that the injured person's lawyer is copied on everything that is sent to the insurance company.

When a treatment plan is approved, it's also important that you bill the insurance company promptly. Again, your patient's lawyer has no way of knowing when you bill the insurance company and when they pay you, so if you experience problems, it's important you let the lawyer know so they can ensure your bills get paid. You also don't want to encounter a situation where the benefits claim gets settled and closed before your bill has been submitted and paid!

Interim Medical Opinions

Usually when we talk about medical opinions in the personal injury context, we are talking about **expert** opinions, which

are the topic of the next chapter. But even when you are not formally retained as a litigation expert, it's not unusual for a treating medical or rehabilitation professional to be asked to provide a sort of "pseudo-expert" opinion about a specific topic that may be related to the main lawsuit, but not at the heart of it.

This most commonly arises when a plaintiff is dealing with insurance benefits in addition to a primary "tort" lawsuit.

HELPING WITH BENEFIT APPLICATIONS

For example, one of the first things that happens after a person is involved in a car accident is that they apply to their own insurance company for accident benefits. Part of the application process includes the completion of a "Disability Certificate (OCF-3)" by the injured person's healthcare provider. Practitioners may be asked to complete similar forms for individuals applying for private or public disability benefits, or other sorts of insurance coverage. In addition to completing forms, they may be asked to provide a supporting opinion letter to assist a company or agency in determining the injured person's entitlement to benefits.

Even after the initial applications, lawyers and insurers may seek a treating practitioner's opinion on certain questions in order to determine or dispute ongoing entitlement to a specific benefit. Examples include **non-earner benefits**, **income replacement benefits** and **catastrophic impairment-level benefits** in the auto insurance context; short and long-term **disability benefits** based on an individual's ability to work; **CPP disability** benefits; **WSIB** benefits; and so on.

For the injured person, a great deal rides on how the practitioner completes these forms and the thoroughness of their supporting opinions. A misplaced or overlooked checkmark, an incomplete

or left-out diagnosis, a late submission of a form, or a failure to include available supporting documentation can have profound implications for the benefits a patient may be able to receive.

It's therefore crucially important that a practitioner tasked with providing such an interim opinion, no matter how routine it may seem, take the time to fully review and assess their patient's condition before completing any forms or providing a report. They should ensure the information provided is **comprehensive** and **complete**, and that all available **supporting documentation** from other specialists and treatment providers is included.

They also need to make sure they understand the implications and nuances of every question they are being asked to answer. Many questions that practitioners are asked to comment on involve detailed legal tests that may not be apparent if the practitioner is not familiar with the issue. For example, the question "has the claimant suffered an inability to carry on a normal life" appears fairly straightforward, but answering it properly actually involves a complex and nuanced consideration of very specific factors.

KNOW WHAT'S BEING ASKED OF YOU

A few of the common tests and issues that practitioners are routinely asked to comment on are reviewed in Chapter 5 of this guide. But in general, if you are not familiar with a test or if there is any uncertainty about a question, you should get in touch with your patient's lawyer to ensure you **understand exactly what is being asked of you**.

YOUR ROLE AS AN EXPERT 2

YES, YOU ARE AN EXPERT

Who is an expert?

"But I'm not an expert!" This is a statement sometimes uttered by doctors (especially family doctors) and treatment providers when they are asked to participate in a personal injury lawsuit.

In fact, most treating professionals, whether specialists or not, are likely qualified to provide expert testimony in court. To be qualified as an expert simply means that the witness is entitled to provide opinions about issues in dispute.

Normally, witnesses are restricted to testifying about what they saw, did or heard – strictly factual observations. Being an expert witness means you are permitted to provide **opinion** evidence as well, provided it is within your area of expertise.

For example, an orthopaedic surgeon who is qualified by the court to provide opinion evidence could do so regarding orthopaedic diagnoses, prognoses, causation questions, and treatment recommendations; however, he or she would likely not be permitted to provide opinion evidence about psychiatric disorders.

In 1994, the Supreme Court of Canada explained when expert testimony is necessary and appropriate in litigation:

> *1. the proposed expert evidence must be relevant to issues in litigation.*
> *2. the proposed expert evidence must likely be outside the experience and knowledge of a judge or jury.*
> *3. the evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify.*[4]

[4] *R. v. Mohan, [1994] 2 S.C.R. 9*

Some of the most important elements of any personal injury lawsuit are proving **what injuries** a plaintiff did or did not suffer, proving **what caused** the injury, proving the **limitations** resulting from that injury, and proving what is likely to happen with the injury in the **future**. This is all information outside the expertise of the average person, and so courts must rely on outside opinions and expertise. Because of their training and experience, healthcare professionals (whether specialists or not), are regularly found to be qualified to provide this expert (i.e. opinion) evidence.

THREE TYPES OF EXPERTS

In a 2015 decision, the Ontario Court of Appeal explained that there are three types of medical experts whose opinions might be relevant in a personal injury lawsuit:

1. **Litigation Experts** who are hired by one side in a lawsuit specifically to provide a medical-legal opinion about the case.

2. **Participant Experts** who are usually treating professionals who formed opinions in the course of their treatment of a patient, and who might be called upon to explain those opinions to the Court

3. **Non-Party Experts** who were hired to provide an opinion to a third-party to the lawsuit, often an insurance examination (IE) assessor.[5]

[5] *Westerhof v. Gee, 2015 ONCA 206.*

The first category of expert is the one we commonly think of - these are usually specialists who are hired by one party to answer litigation-specific questions to help prove their side of a case. While hired by one side, the role of these experts is first and foremost to provide **impartial** and **unbiased** opinions to assist the court.

The roles of the second and third types of expert are more nuanced: they will originally have been involved either to treat their patients or provide a third-party opinion - not to help a court. So when they do come to court, their role is normally limited to recounting the opinions they formed in the course of their regular work - not to provide new, litigation-specific opinions for one side or the other. Note, however, that in some circumstances these participant and non-party experts can become litigation experts if they are retained by one party to provide litigation-specific opinions.

Expert versus advocate

AN EXPERT IS NOT AN ADVOCATE

If you are an expert witness at a trial - whether a litigation expert, participant expert or non-party expert - it will be one side or the other in the lawsuit that either hires you or calls for your testimony as a witness. Remember that just because one side involves you in the case, that does not mean that your job is to advocate for that side!

Your duty of a litigation expert is spelled out in the *Rules of Civil Procedure* which govern lawsuits in Ontario. The rule describes the duty as follows:

YOUR DUTY OF IMPAR-TIALITY

Duty Of Expert

4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,

(a) to provide opinion evidence that is fair, objective and non-partisan;
(b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and
(c) to provide such additional assistance as the court may reasonably require to determine a matter in issue.

Duty Prevails

(2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged.

Technically this rule applies to litigation experts, but it provides helpful framework that should be kept in mind by any expert - including participant and non-party experts - who wish to have their testimony accepted by a court.

In particular, many experts fall into the trap of becoming an **"expert advocate"** on behalf of the party who retained them. This can happen with any expert, but it often arises in the case of treating professionals who are called as participant experts, or are subsequently retained as litigation experts.

Usually the professional is motivated by compassion and the strong belief that his or her patient is entitled to the compensation or benefits being sought. As any healthcare provider knows, in most contexts, vigorously advocating for your patient's interests is an essential part of your role.

PERSUASIVE OPINIONS ARE OBJECTIVE

However, in the legal context, advocating for a patient is likely to be counter-productive. When an expert provides an opinion which does not appear to be objective and impartial, but instead seems to be advocating for one side or the other, their opinion will likely be given very little weight by the court. In some cases, the opinion may be excluded all together.

When judges make a ruling in a case, they will weigh the credibility of all the evidence before them and it is common for them to comment of the credibility of the witnesses themselves. For example, in a 2010 decision, a judge was impressed by the competence and compassion of the Plaintiff's physician, but in the end he afforded **less weight to the physician's opinion because of his advocacy on behalf of his patient:**

> *I will take into account that [the doctor] has been a passionate advocate for [the Plaintiff] and has formed a therapeutic alliance with him. I must, therefore, take his evidence with the proverbial grain of salt that goes to its weight.*[6]

The result was that this doctor's evidence was largely discounted, and his patient's case was hurt by his being perceived as an advocate.

It is very common for lawyers on the other side of a case to suggest – either bluntly or subtly – that an expert is acting as

[6] *Kusnierz v. The Economical Mutual Insurance Company, 2010 ONSC 5749.*

ADMIT THE OBVIOUS

an advocate for that side rather than providing the court with impartial opinion evidence.

Forcing an expert to **defend an absurdity** is the easiest way to accomplish this: if an expert fails to concede an unhelpful but undisputed fact, his or her opinion and credibility will be seriously undermined.

For example, a doctor retained on behalf of a plaintiff who denies that his or her patient has a significant pre-accident medical history when one is clearly evidenced would be seen as advocating.

Conversely, a doctor retained on behalf of a defendant who implausibly denies that the plaintiff has any injury whatsoever, when some impairment is obvious, would also have his or her testimony discounted.

Your reputation as a credible and impartial expert witness can be very powerful and sticks with you beyond just one case. You do not want to jeopardize this power by coming across solely as an advocate, rather than an expert.

However, just because you should not flagrantly advocate for one side or another does not mean you cannot have a strongly held opinion. If you firmly believe in your conclusions, you can confidently stand by them: acknowledging the obvious does not mean equivocating on strongly held opinions if you believe they are supported by the evidence.

Experts' Interactions with Lawyers

A common question that arises after a litigation expert is retained is how much interaction there should be between the expert and the lawyer who retained him or her.

Should the only interaction be the initial request letter from the lawyer and then the final report delivered by the expert? Can draft reports be sent? Can telephone calls take place between the expert and the lawyer to clarify issues before the report is completed? Does an expert sharing preliminary opinions with the lawyer or the lawyer providing feedback on a draft report cross the line from impartiality to advocacy?

A 2015 decision from the Ontario Court of Appeal answers some of these questions, and provides some clarity to the relationship between experts and the lawyers who retain them.

LAWYERS, EXPERTS & PRIVILEGE

The court explained that, *"just as lawyers and judges need the input of experts, so too do expert witnesses need the assistance of lawyers in framing their reports in a way that is comprehensible and responsive to the pertinent legal issues in a case."* [7]

Because of that, discussions and correspondence between the expert and the lawyer who retained him or her are permitted and will in most situations be protected by **litigation privilege** - this means that the communications do not need to be provided to the other side in the lawsuit (although their existence and the fact of their occurrence will likely need to be disclosed).

This includes the exchange of draft reports between expert and lawyer, and the lawyer can suggest revisions if appropriate to ensure the report is responsive to the issues in the case.

[7] *Moore v. Getahun, 2015 ONCA 55 at para 62.*

WORK WITH THE LAWYER

The court explained that, *"Counsel play a crucial mediating role by explaining the legal issues to the expert witness and then by presenting complex expert evidence to the court. It is difficult to see how counsel could perform this role without engaging in communication with the expert as the report is being prepared."*[8] It is still important that the expert does not cross the line to become an advocate, however, and so the ability for counsel and their experts to communicate and work closely together is not unlimited. The court reaffirmed that lawyers may not interfere with a litigation expert's duties of **independence** or **objectivity** and that if a lawyer does this, that communication will have to be disclosed and will likely cause the expert to be disqualified.

So long as their independence and objectivity is not challenged, however, this case makes clear that retained litigation experts can feel free to **call the lawyer** who has retained them to ask for clarification or additional information, they can provide **preliminary opinions**, and they can even provide **draft reports** to the lawyer who has retained them and make **revisions** as suggested before serving a final report.

It's worth noting that this privilege protection applies to experts only. In the case of **treating doctors** who become experts in the case, the records of correspondence, draft reports and communications that make their way into a patient's clinical file may not be protected in the same way. Because of that, treating doctors who become experts in the case should be careful to confirm which communications are in their capacity as a treatment provider, and which are in their capacity as an expert to ensure the proper application of privilege.

[8] *Moore v. Getahun, 2015 ONCA 55 at para 64.*

The value of your opinion

YOUR OPINION MATTERS

It is not unusual for treating practitioners to be reluctant to participate in their patient's personal injury case, and there are many valid reasons for not wanting to take on that role - especially if it can compromise your ability to effectively treat your patient. Doctors and treating professionals can't be forced to be experts (in the case of medical doctors, Policy Statement #7-12 of the College of Physicians and Surgeons of Ontario states clearly that, *"physicians do not have an obligation to act as medical experts.")*[9] However, one common reason for a treating professional to not want to assist in their patient's case is that they feel their opinion is somehow less valid or not as compelling as the opinion of a specialist or retained expert.

This is simply wrong, and it is always unfortunate when the court is deprived of the insights of a treating professional because of this misconception.

A treating practitioner's opinion often carries more weight than the opinions of savvy expert witnesses who have testified numerous times in court. The treating professional has the benefit of much more quality contact with the patient as opposed to the doctor hired solely for the purposes of the lawsuit who sees the patient on one occasion only.

Their familiarity with a plaintiff often allows them to pick up on subtle changes and to provide a more holistic assessment of the plaintiff's condition, and it is usually their observations as the treating providers which end up informing the opinions of the retained experts. So treating medical and rehabilitation providers should never discount the value of their opinions to a case.

[9] *Available at cpso.on.ca/uploadedFiles/policies/policies/policyitems/Medical-Records.pdf*

KNOW YOUR ROLE

At the same time, the opinion of a totally impartial specialist who does a single comprehensive review and assessment of the Plaintiff remains valuable in different contexts. Both are essential for educating the judge or jury regarding medical issues, and one does not eclipse the other.

It's important you **understand what your role will be** if your patient is involved in a personal-injury lawsuit: are you a treating provider only? Will you be called as a participant expert to talk about the opinions you've formed? Are you being retained as a litigation expert to impartially help the court with your opinion? When there is any doubt, it's always best to confirm with the lawyer what your role is expected to be.

3 WRITING A MEDICAL-LEGAL REPORT

All litigation experts who are asked to provide opinion evidence in a personal injury lawsuit must prepare a medical-legal report that summarizes their evidence.

There is no particular method that experts should follow in writing a medical legal report. Indeed, different medical experts employ different styles and formats and this individuality should be encouraged. At the same time, there are several procedural and legal technical requirements that apply to reports.

This chapter will explore these issues and will also address a few of the legal standards of proof that apply to particular questions routinely posed to medical experts by legal counsel.

Technical requirements of medical-legal reports

The Ontario Rules of Civil Procedure provide some rules to which medical legal reports must adhere if they are going to be used in a civil court proceeding in Ontario. While the Rules do not apply to other types of legal proceedings for which your report may be required (such as at the Financial Services Commission of Ontario, or in criminal or quasi-criminal matters), as a matter of practice, all reports should reflect compliance with the underlying values and principles outlined in the Rules.

FAIR, OBJECTIVE & NON-PARTISAN REPORTS

As discussed in Chapter 2 of this Guide, Rule 4.1.01 requires that the opinion provided is *"fair, objective and non-partisan,"* and that experts are only to opine on *"matters that are within the expert's area of expertise."*

Rule 53 provides technical details about what must be included with every medical-legal report:

EXPERT WITNESSES

Experts' Reports

53.03 (2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:

1. *The expert's **name, address** and **area of expertise.***
2. *The expert's **qualifications** and **employment** and **educational experiences** in his or her area of expertise.*
3. *The **instructions** provided to the expert in relation to the proceeding.*
4. *The **nature of the opinion being sought** and each issue in the proceeding to which the opinion relates.*
5. *The expert's **opinion respecting each issue** and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.*
6. *The expert's **reasons** for his or her opinion, including,*
    - *i. a description of the factual **assumptions** on which the opinion is based,*
    - *ii. a description of any r**esearch** conducted by the expert that led him or her to form*
    - *iii. a list of every document, if any, relied on by the expert in forming the opinion.*
7. *An **acknowledgement of expert's duty** (Form 53) signed by the expert.*

The **Acknowledgement of Expert's Duty** form that is referred to in item 7 above should be provided to you by the lawyer requesting your report. If for some reason a form has not been provided to you, you should contact the lawyer and request one.

Experts are also encouraged to provide a current copy of their **curriculum vitae** with the completed medical-legal report to ensure compliance with item 2 above. Providing a CV will verify that the opinions expressed in the report are provided by a qualified individual and the CV will be required in advance of trial in any event.

TREATING DOCTORS MUST PROVIDE A REPORT

Do you have to provide a report?

Different professions have different guidelines and requirements regarding third-party reports, and you are encouraged to consult with the guidelines and regulations provided by your professional regulatory organization. For medical doctors, if you are a patient's treating physician, you do have a duty to provide a report if requested. Policy Statement #2-12 of the College notes that, *"treating physicians are obligated to provide reports about their own patients when proper consent is provided."*[10]

The same Policy Statement notes that third party reports are expected to be provided **within 60 days.** If for some reason this timeframe is not realistic, it is important you let the requesting party know well in advance to avoid prejudicing the case. It is worth noting that under regulations to the Ontario Medicine Act, it is grounds for misconduct if you fail *"without reasonable cause to provide a report or certificate relating to an examination or treatment performed to the patient or his or her authorized representative within a reasonable time after the patient or his or her authorized representative has requested*

[10] *Available at cpso.on.ca/uploadedFiles/policies/policies/policyitems/ThirdParty.pdf*

such a report or certificate."[11]

Again, for other professions, you should check your professional regulatory organization's rules and guidelines to learn about your professional obligations to act as an expert.

How much can you charge? How do you get paid?

YOU ARE ENTITLED TO BE PAID

You have every right to be paid for your time and expertise in providing expert evidence. The amount you can charge is between you and the lawyer who retains your services. But keep in mind that different professions have guidelines and requirements relating to these costs as well. For example, looking again at the rules for medical doctors. The Ontario Medical Association's Guide to Third Party and Other Uninsured Services is a helpful resource when preparing an expert report and it contains guidelines on how to charge for the preparation of a report.[12]

The OMA Guide suggests an hourly rate of **$331.05/hr** for the preparation of a "full narrative report" or a "clarification report". The OMA stresses, however, that this is simply a guide, and physicians are entitled to make their own financial arrangements with the requesting party so long as the amount charged is reasonable.

The OMA Guide also notes that physicians should provide reports within a "reasonable time" after they are requested.

Regardless of the guidelines of your profession, it is prudent to discuss anticipated fees and expected payment arrangements with the lawyer requesting the report prior to providing it.

When a lawyer requests that you provide a report about a patient,

[11] *Professional Misconduct, O. Reg. 856/93.*

[12] *Available to OMA members online at www.oma.org*

it is that lawyer's obligation to pay your invoice for the report. If a Plaintiff lawyer has retained you, your fee will ultimately be paid by either the Defendant or the Plaintiff personally, depending on whether or not the Plaintiff is successful with his or her case. If a Defendant lawyer has retained you, your fee will usually be paid by the insurance company representing the Defendant either way.

For case-flow purposes, it is the practice of some plaintiff lawyers to pay for reports when the case is resolved out of the funds received. This could be a number of months (or sometimes even years) after the report and invoice has been provided to the lawyer's office.

It is important to note, however, that whether the case is successful or not, the lawyer is always obligated to pay the invoice.

Many professionals are content with this deferred-payment practice, and may charge interest on overdue invoices.

CONFIRM FEE DETAILS FIRST

Others insist on payment in advance funded by the lawyer or law firm, or by their client personally, before they release a report. This is also an acceptable approach. However, while it obviously ensures prompt payment of your invoice, it comes with a corresponding responsibility of promptly providing the report once payment is received.

It is best to confirm the lawyer's expected payment arrangement before providing the report to ensure you are in agreement about how your invoice will be handled.

THE BASIC STRUCTURE

Sample outline for a medical-legal report

There is no one format with which expert reports must comply. As long as the technical requirements of the Rules are met, experts are free to write their opinions following a format and structure that is intuitive to the writer. The following suggested outline of a medical-legal report is offered only as an illustrative example; it is not a format that *must* be followed:

1. *Brief introduction to the **expert's background and expertise.** If a curriculum vitae is attached to the report, it can be referenced*
2. ***List of documents reviewed** by the expert in preparing the opinion (sometimes, experts will extract portions of medical records considered relevant to their opinion in summary form)*
3. ***History of the Injury** and/or description of the accident*
4. ***Summary of treatment** received since the injury*
5. *Summary of **patient's current status** at the time of the assessment including current treatment regime and medications being taken*
6. *Description and list of any **tests administered***
7. ***Results of examinations**, if undertaken*
8. ***Diagnosis***
9. ***Prognosis***
10. *Opinion regarding impact of injuries on **past and/or future employability***
11. *Opinion regarding impact of injuries on the patient's ability to carry on with his/her **activities of daily life**, including the ability to keep house and care for his/her family, property, etc.*

12. *List of **future needs** and **treatment recommendations** if these can be predicted and are within the expert's scope of expertise*
13. *Comments regarding **causation** (see below for more information in this regard)*
14. *Review of **literature** (if the expert has considered literature in coming to his/her opinion)*
15. ***Limitations of opinion**, if any (for example, if the expert was unable to obtain review a particular medical document, is recommending further investigative tests that may alter the opinion, etc.)*

Again, this provides a brief sketch of a possible format that can be followed for your medical-legal report. All reports need to be customized to the particular patient, the scope of examination undertaken, and, above all, the specific questions posed by the lawyer when requesting the report.

Common pitfalls

HELP YOUR CREDIBILITY

There are several pitfalls that can become problematic for medical experts. Avoiding these issues in your report will streamline court testimony and enhance your reputation for reliability and professionalism:

1. **Opining outside of the area of expertise.** A psychologist should not be diagnosing musculoskeletal injuries any more than an occupational therapist should be diagnosing PTSD. Stick to what you know. Reliance on other expert opinions is permitted, provided appropriate references are made.

2. **Failure to clearly state the facts that are being relied upon.** Ideally, if there are multiple sources of information, they should be referenced. For example, if the patient subjectively advises the expert that there was or was not a loss of consciousness following an accident, it bolsters the opinion if the expert references collaborative documentation such as an ambulance or ER report.

3. **Failure to adequately address causation.** Causation (whether the incident in question actually caused the injuries being described) is often a central issue in dispute in the lawsuit, and so it is essential that you address the topic in the report. A throw-away comment that the accident did or did not cause the injury is not as useful as a thoughtful and detailed analysis connecting the patient's health to the incident or showing why such a connection does not exist.

4. **Failure to take patient's pre-existing health into account.** If the patient's pre-existing health condition would have affected his or her long-term health, you should comment on how this affects the diagnosis/prognosis and needs. If this is beyond the scope of your practice, you should state that you are unable to comment on the interplay between the injury and the pre-existing condition.

5. **Failure to ask counsel for further documentation.** If you need further documentation to answer the questions posed to you, you should not to hesitate to ask for whatever documentation you need. For example, if asked to opine on whether a patient's ability to work has been compromised by the injury, you will likely need a detailed description of the plaintiff's job.

TESTIFYING IN COURT 4

BEING PREPARED TO TAKE THE STAND

Preparation

Generally, you should insist on at least one **meeting with the lawyer** who will be calling you as a witness during the trial. You should be **familiar with your clinical notes and records** regarding the plaintiff, and **thoroughly review any reports** that you have written.

You should also be given the opportunity to review the patient's **entire medical file** from all treating practitioners, so that you can obtain a more accurate view of the patient's complete clinical picture.

You should be especially aware of any medical opinions from other practitioners that come to **conclusions different from yours.** It is extremely important that you be made aware of those reports, and be given an opportunity to review those reports before you testify. The lawyer who is calling you as a witness will provide you with this information, but if you feel you are missing any relevant information before testifying, you should certainly discuss your concerns with the lawyer.

If you are being called to provide testimony in opposition to another expert, if that expert has based his or her opinion upon medical literature, you may find it useful to **review the literature** to form your own opinion about the reliability and authoritative basis of the information. Again, ideally the lawyer who asked you to testify will already have reviewed these texts, and will be able to discuss them in detail with you, but you should not always assume that all lawyers are as prepared as you would like them to be!

As discussed in the Reports section of this Guide, you should also make sure your **curriculum vitae** is up to date, accurate and strictly factual – it is a good idea not to be overly elaborate describing your previous positions, experience and publications.

The opposing lawyer will likely be cross-examining you on your C.V., and he or she will highlight any inconsistencies or embellishments. For example, if you indicate that you sit on a Board of Directors when you are no longer a member of that Board, it may damage your credibility on the stand if the other lawyer points that out.

Examination 'In-Chief'

When you get to court, the lawyer who has called you as a witness will be the first one to question you in the witness box. This examination is known as an "examination in chief."

YOUR RECORDS WILL BE ON DISPLAY

During the course of your evidence, the lawyer questioning you will likely refer you to various portions of your clinical notes and records, and ask you to comment upon those notations. Generally, these records will be shown on a screen to the judge (and jury if there is one), so that everyone can review the records at the same time.

Lawyers questioning their own witnesses are not permitted to pose **leading questions** to their witnesses. Leading questions are questions that suggest the answer within the body of the question.

For example, if a plaintiff's lawyer is the one examining you in chief, they would not be permitted to ask you the following question:

Q: *As the patient's family doctor, would you agree that she is a credible person who would never exaggerate her injuries, and that as long as you've known her she has always been truthful and forthcoming?*

Instead, you would likely be asked a series of questions to try to establish the point the lawyer wishes to make, such as:

Q: *How many years have you treated this patient?*
A: *Five years.*
Q: *What has been your experience in terms of the reliability of this patient's self-reports regarding her medical condition?*
A: *I have found her to be consistently straight-forward in her attitude and presentation.*
Q: *During the period of time that you have been her family doctor, have you ever had occasion to doubt or question the information that she was reporting to you?*
A: *No, I have never had reason to question the truthfulness of the information that she was providing to me.*

FOLLOW THE LAWYER

When you are being questioned in chief, you should take your lead from the lawyer, and provide answers that are accurate, succinct and address **only the question being asked.**

When you are preparing for trial with the lawyer, the lawyer should be able to tell you if there is a particular question where you are free to expand your answer to provide a very thorough answer.

When you are giving evidence in chief, you will usually be permitted by the trial judge to review your report or records to **refresh your memory** as you are testifying. You therefore should not worry about having to remember specific times and dates, or what was specifically said at a particular visit. It is important, however, that you have a broad understanding of the services and medical care that you provided for that particular patient, and what your opinions and conclusions are relating to the medical condition of the patient.

Furthermore, you need to be comfortable with the evidence that you are being asked to provide, so that when you **swear or affirm** to tell *"the truth, the whole truth, and nothing but the truth,"* you are in fact only giving truthful evidence that you believe and can fully support.

KEEP IT SIMPLE

Finally, remember that your primary audience, whether it is a judge or a jury, does not have your extensive medical training or knowledge. The most effective expert witnesses therefore tend to be the ones who keep their evidence as **simple** and **straightforward** as possible. If your evidence becomes too technical or cerebral, you may lose most of the people trying to understand what you have to say, and will thereby undermine your own effectiveness as a witness.

Cross-examination

Once your evidence in-chief has been completed, it will be the opposing counsel's turn to question you. Sometimes, but certainly not always, there may be a break in proceedings before cross-examination begins. Note that during this break, the lawyer that called you will not be able to review the evidence you have given so far.

Indeed, until you are completely through with your direct, cross and re-examination, the lawyer who called you will be **extremely limited in what he or she is allowed to discuss with you.**

Don't take it personally if the lawyer does not want to speak with you during a break – he or she is just respecting the rules. They will be able to speak with you later on in the proceeding, once you have finished giving evidence. Unlike examinations in chief, **leading questions** are permitted during a cross examination. In fact, it would be very unusual for a lawyer cross examining a witness not to use leading questions.

The questioning style of each individual lawyer varies. Some lawyers try to intimidate witnesses and bully them, while others attempt to "disarm with charm." As an expert witness, it is not as likely that the opposing lawyer will attempt to intimidate you, particularly since you will have much more knowledge than the lawyer questioning you.

ANSWERING LEADING QUESTIONS

In all likelihood, the lawyer cross-examining you will attempt to have you agree to a series of assertions that the lawyer hopes will lead to a conclusion that favours his or her position. An example of how leading questions are used in this way would be:

Q: *Doctor, you have testified that you have been the Plaintiff's family physician for 5 years, is that true?*
A: *Yes.*
Q: *And as her family physician, is it your understanding that you are aware of all the important medical treatments and conditions that she has experienced these past 5 years?*

A: *Yes, I would expect that I would be aware of all relevant medical events she has experienced.*
Q: *Were you aware that she spent 6 months abroad last year?*
A: *Yes, I knew that she had been away for a period of time.*
Q: *Were you aware that while she was away, she injured her back in a surfing incident?*
A: *No, I was not aware that she had injured herself surfing.*
Q: *Would you agree with me that when you testified that the car crash was the sole cause of her injuries, that you did not know that she had hurt her back surfing?*
A: *Yes, I would have to agree with that statement.*

The best way to avoid problems like this on cross-examination is thorough preparation. You should be aware of the patient's complete medical history, including all pre-existing medical conditions, and any injuries or medical problems that occurred after the injury that is the main subject of the litigation.

DON'T GET PINNED DOWN

In addition, should feel free to **qualify** your answers if necessary and **should not allow yourself to be pinned down to a particular answer if you don't feel it tells the whole story.** For example, in the above line of questioning, the witness could have answered:

Q: *Would you agree with me that when you testified that the car crash was the sole cause of her injuries, that you did not know that he had hurt her back surfing?*
A: *Yes, that's true, although it would not have changed my opinion. I examined her immediately on her return to Canada and her condition had not changed since my previous examination before she left. So the surfing injury would not appear to have been a particularly significant medical event.*

As much as the opposing lawyer may want to limit you to yes or no answers, you always have the right to **fully answer the question to your own satisfaction.** Also, it's important to **resist the urge to get angry or upset** at the opposing lawyer. The calmer and less flustered you appear, the more convincing your evidence is likely to be.

Re-examination

If any new issues are raised by the lawyer cross-examining you that were not previously addressed in your examination in-chief, the lawyer who called you will have the opportunity to question you again about the new issues that were raised - again, without asking leading questions.

Re-examinations are typically fairly brief, as the lawyer can only question you on new issues that arose through the course of the cross examination. It is not uncommon that there are no questions for re-examination, as no new issues arose during cross-examination.

Fees

CONFIRM FEE ARRANGE-MENTS

Before coming to court, you should discuss your **fee** for attending with the lawyer calling you as a witness. You are entitled to be paid for your time and your expertise! Your fee is worked out as a private agreement between you and the lawyer calling you as a witness, and you should make sure the fee amounts and payment arrangements are clear in advance.

Effective Testimony Checklist

Medical questions are at the heart of personal injury lawsuits. Yet the ultimate deciders of the case – the judge and jury – have no background with these issues, and the lawyers whose

job it is to present their case in a compelling way are far from qualified to give or even fully understand evidence about the medical issues themselves.

It therefore falls to the medical professionals to fill in the gaps and tell the story from a medical perspective in a way that is **understandable** and **compelling.** The following checklist provides some final quick-tips to help you ensure you are prepared to give the most effective in-court testimony when you are called as a witness in a personal injury case:

- ✓ Review the patient's medical file.
- ✓ Meet with the lawyer calling you before you give your evidence.
- ✓ Understand the areas where there may be controversy or a diversity of opinion between your opinions and other experts in the case.
- ✓ Make sure you are aware of all of the medical issues suffered by the patient both before and after the injury.
- ✓ Answer the question asked, but don't be afraid to expand your answer if you feel it is necessary.
- ✓ Keep your answers as simple as possible, and avoid the use of medical lingo, jargon, or unnecessarily technical terms.
- ✓ Remain calm and professional.

MEDICAL LEGAL TESTS 5

THE RIGHT TEST FOR THE RIGHT QUESTION

Legal standards of proof: applying the correct test

There are a variety of legal tests that apply to questions often posed to medical experts. You have probably heard of the two most common legal tests: proof beyond a reasonable doubt (used in criminal cases); and proof on a balance of probabilities (used in civil cases).

In personal injury law, however, there are a series of other tests that can apply depending on the question being asked of the expert. The list below is not exhaustive but is designed to provide the appropriate legal tests for some of the most common questions posed to medical experts.

1. Facts

Facts in a personal injury lawsuit must be proven on a **balance of probabilities** (greater than fifty percent, or, more likely than not). Facts include everything from how the injury/accident occurred to the extent of the plaintiff's injuries themselves and the plaintiff's medical diagnosis. Given the centrality of certain facts to a medical-legal opinion, it is essential that medical experts take care to outline the facts upon which they are relying in their reports, as well as the basis for their belief in those facts.

2. Cause of Injury

A special test is applied to determine the cause of an injury in most personal injury lawsuits. This test is known as the 'but for' test. Simply put, the test asks the question:

But for the defendant's act or omission, would the plaintiff have sustained the injury?

For example, in the case of a rear-end collision, but for the defendant hitting the plaintiff, would the plaintiff have suffered the back injuries she has?

Applying this test is simple in some cases but if there are conditions unrelated to the case (for example, pre-existing conditions or separate injuries post-accident), the analysis becomes more difficult. When applying the test in these more complex situations, it is not a question of positive, scientific proof. It often comes down to common-sense.

PREDICTING THE FUTURE

3. Future Losses

Predicting the future is obviously difficult and many doctors are uncomfortable with this essential aspect of medical-legal reports.

Because of the inherent uncertainty, future losses don't have to be proven to as high a standard of certainty as many other elements of a personal injury case. For future losses, the question is whether there is a **reasonable chance** that the loss or damage will occur.

Accordingly, when asked to provide opinions regarding prognosis (deterioration or amelioration of an injury), future income losses, future care costs, future treatment needs and/or future housekeeping needs, the applicable question is whether there is a "reasonable chance" the patient will suffer that loss or incur a particular cost.

For example, if a plaintiff sustains an orthopaedic injury and the question of whether arthritis will develop around a fracture arises, at issue is only whether there is a reasonable chance that arthritis will develop; it need not be proven or disproven on a strict balance of probabilities.

4. Car Accidents: the Threshold

Ontario's complex compensation system for car accident victims modifies some of the traditional legal tests. The most significant alteration to the usual rules has been to restrict general damages (for pain and suffering) to claimants who have sustained a **permanent and serious impairment of an important physical, mental or psychological function.**[8]

PERMANENT, SERIOUS IMPAIRMENT

To meet this test, ALL THREE of the following must be met:

1. The impairment must *(at least one of the following)*:

   i. substantially interfere with the person's ability to continue his or her **regular or usual employment**, despite reasonable efforts to accommodate the person's impairment and the person's reasonable efforts to use the accommodation to allow the person to continue employment, **or**

   ii. substantially interfere with the person's ability to **continue training for a career** in a field in which was being trained before the incident, despite reasonable efforts to accommodate the person's impairment and the person's reasonable efforts to use the accommodation to allow the person to continue his or her career training, **or**

   iii. substantially interfere with **most of the usual activities of daily living**, considering the person's age.

Note: When considering whether or not an impairment meets one of the requirements noted above, the Ontario Court of Appeal has provided the following additional guidance:

> The requirement that the impairment be "serious" may be satisfied even although plaintiffs, through determination, resume the activities of employment and the responsibilities of (a) household but continue to experience pain. In such cases it must also be considered whether the continuing pain seriously affects their enjoyment of life, their ability to socialize with others, have intimate relations, enjoy their children and engage in recreational pursuits."[13]

2. For the function that is impaired to be an **important** function of the impaired person, the function must *(at least one of the following)*:

i. be necessary to perform the **activities that are essential tasks of the person's regular or usual employment**, taking into account reasonable efforts to accommodate the person's impairment and the person's reasonable efforts to use the accommodation to allow the person to continue employment, **or**

ii. be necessary to perform the activities that are **essential tasks of the person's training for a career** in a field in which the person was being trained before the incident, taking into account reasonable efforts to accommodate the person's impairment and the person's reasonable efforts to use the accommodation to allow the person to continue his or her career training, **or**

[13] *Brak v. Walsh, 2008 ONCA 221 at para 7*

iii. be **necessary for the person to provide his or her own care or well-being, or**

iv. be **important to the usual activities of daily living**, considering the person's age.

3. For the impairment to be **permanent**, the impairment must *(all of the following)*:

i. have been **continuous since the incident** and must, based on medical evidence and subject to the person reasonably participating in the recommended treatment of the impairment, be **expected not to substantially improve**,

ii. continue to meet the criteria in paragraph 1, **and**

iii. be of a nature that is **expected to continue without substantial improvement when sustained by persons in similar circumstances**.

ABILITY TO WORK

5. Disability Benefits

Many patients who are injured are covered by disability policies that are designed to provide income loss protection coverage – either short-term or long-term disability policies, usually provided through their employment, or income replacement benefits provided through their care insurance.

There are generally two tests that apply regarding disability benefits:

1. the own occupation test; and,
2. the any occupation test.

If asked to provide an opinion regarding disability benefits, it is important that you have been given the exact wording of the applicable disability test, since the test can differ from policy to policy and the can also change over time.

Many policies start out applying some version of the first test, and after a certain period of time switch to the second to show someone's continuing entitlement to the benefits.

Generally, if applying the **own occupation** test, the issue is whether the claimant is able to **substantially perform the tasks of his/her own occupation.** *"Own occupation"* is simply the occupation that the claimant had at the time of injury.

Under the **any occupation** test, the issue is usually whether the claimant is able to **substantially perform the tasks of any employment for which he/ she is reasonably suited by way of education, training and experience.**

To determine if a patient meets either of these tests, an assessor providing an opinion will need to have an understanding of the claimant's vocational background and occupation. Evidence relating to the claimant's occupation (such as a job description, Functional Ability Evaluation, Functional Capacity Evaluation or Vocational Assessment) can be invaluable in this regard, as can a detailed interview with the patient.

6. Non-Earner Benefits - the "Complete Inability" test

Non-earner benefits are particular benefits available to motor vehicle accident victims through the no-fault/accident benefit system. These benefits may be available to patients who were not employed at the time of the accident and involve a particularly onerous test known as the **complete inability** test.

One of the challenges faced by treating doctors whose patients are seeking one of these benefits from their insurance company is that the form the doctor must complete to assist their patient in applying for the benefit (known as a Disability Certificate, or OCF-3) provides very little guidance in how to interpret the operative test to be applied.

Physicians are asked whether the claimant: "is suffering a **complete inability to carry on a normal life.**"

DEFINING 'NORMAL LIFE'

Being unable to carry on a *"normal life"* is defined as having an impairment that *"continuously prevents the person from engaging in **substantially all of the activities in which the person ordinarily engaged** before the accident."*[14]

The test initially appears to be extremely stringent, but judicial interpretation has further refined the test to provide a bit more flexibility. The Court of Appeal outlined several key factors which must be considered when interpreting this test:

"

- *recognition that the starting point for the analysis of whether a claimant suffers a complete inability to carry on a normal life will generally involve comparing the claimant's **"activities and life circumstances"** before the accident to his or her activities and life circumstances after - though there may be instances where a detailed comparison is not necessary because of the nature of the post-accident condition;*

- *recognition that, in determining whether a claimant is able to engage in "substantially all" of-his or her pre-accident activities, it may be necessary to assign greater weight to those **activities which the claimant identifies as being important** to his or her pre-accident life*

[14] *Statutory Accident Benefits Schedule, O. Reg. 34/10, available at canlii.ca/t/521pk#sec3*

- *recognition that it is necessary to consider the manner in which the relevant activity is performed and the quality of the performance when assessing the claimant's ability to "engage in" activities*

- *if **pain** is a primary factor preventing the claimant from engaging in activities, recognition that the question is not whether the claimant can physically do the relevant activities, but rather whether the degree of pain experienced is such that the claimant is **practically prevented** from engaging in the activity.*[15]

To provide a thorough and persuasive analysis for the purpose of the *"complete inability"* test, experts must therefore carefully consider all the factors highlighted above, which will involve ascertaining the claimant's status before the accident, and comparing it to changes post-accident.

7. Grading Impairment in Car Accident Cases - Minor & Catastrophic Injuries

In an effort to streamline the no-fault benefit system of car insurance in Ontario, insurance companies will categorize an injury sustained in a car accident into one of three categories: minor, catastrophic or neither.

Minor injuries include sprains, strains, whiplash, contusions, abrasions, lacerations and subluxations, all of which are terms precisely defined in a guideline known as the Minor Injury Guideline, or the ***"MIG."***[16]

[15] *Galdamez v. Allstate, 2012 ONCA 508.*

[16] *The guideline is available at www.fsco.gov.on.ca/en/auto/autobulletins/2011/documents/a-06-11-1.pdf*

Catastrophic injuries are defined to include paraplegia, quadriplegia, some amputations, total loss of vision, certain brain injuries, certain mental/ behavioural disorders, and certain combinations of impairments caused by a car accident. Again, the term is precisely defined in legislation,[17] and it has been further refined by judicial decisions over the years.

Doctors are often asked to rate the impairment of their patients to place them in one category or another, which will determine the level of insurance coverage that is available to them. The level of impairment can change over time based on improvements or deterioration in a patient's condition (for example, moving from what initially appeared to be whiplash associated disorder which would fall within the *'minor injury'* category, to a diagnosis of chronic pain which would take a claimant out of it).

Determining if someone meets the definition for one of these categories – particularly the catastrophic injury category – is exceedingly nuanced and complex, and of significant importance in determining what type of benefits a patient will be able to access. Given their complexity, it is beyond the scope of this chapter to analyze all the nuances of these two tests. But if asked to provide a medical-legal opinion on a patient's level of impairment, it is essential that you are aware of the various tests and are comfortable with the requirements of the test you need to apply. It is also important that you **ask for guidance** from instructing counsel if you require clarification in interpreting or applying the test in question.

[17] *Statutory Accident Benefits Schedule, O. Reg. 34/10, available at canlii.ca/t/521pk#-sec3subsec2.*

NOTES

NOTES

MARTIN & HILLYER
PERSONAL INJURY SPECIALISTS

This Guide is prepared by the personal injury lawyers at Martin & Hillyer Associates, proudly serving Burlington, Oakville, Hamilton, Milton and surrounding areas for over 40 years.

Our Personal Injury Practice Areas

Car Accidents
Slips, Trips & Falls
Insurance Disputes & Disability Claims
Assault & Sexual Assault
Professional Malpractice

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