M&H Guide

a guide to personal injury lawsuits for medical professionals

prepared by **Martin & Hillyer Associates** *for medical professionals in* **Burlington, Oakville, Hamilton, Milton** *and surrounding areas*

MH
MARTIN & HILLYER
ASSOCIATES

The information provided in this Guide is general information only and is intended to provide background and a quick reference for medical professionals involved with a personal injury action. Personal injury lawsuits can vary significantly, and you should not rely solely on the information contained herein. You may have ethical and professional obligations as a medical professional, and this Guide is not intended to fully inform you of these obligations.

IN THIS GUIDE

1

PERSONAL INJURY LITIGATION

Lawyers aren't doctors.

As a doctor or medical professional, it's likely that at some point in your career – or at many points in your career – you will be brought into the 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.

You may be called upon as a key witness for either side in a lawsuit. Your medical 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 medical expertise. All told, it can be a bewildering and stressful experience for even the most seasoned medical professionals.

This guide can be a helpful reference tool if you become involved as a witness or expert in a personal injury lawsuit, for either a plaintiff or a defendant. The following pages can help you with questions such as:

- *what is your role if you are asked to provide an opinion for an injured person or his or her opponent?*
- *how do you write an unbiased medical-legal report that will stand up to cross-examination?*
- *how much can you charge for your services provided in a litigation context?*
- *what should you do if called as a witness in a personal injury trial?*

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. The injured person who is suing is the Plaintiff in the lawsuit; the person who committed the tort (the "tortfeasor") is the Defendant. 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*
- ***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*
- *public insurance schemes such as **WSIB** (also known as workers' compensation or workplace safety insurance)*

Your role in personal injury litigation

Both treating doctors and independently-retained professionals can be called upon by one side or the other to assist in a personal injury lawsuit.

Lawsuits are decided on the basis of legal principles and tests, but in personal injury lawsuits, the determination of whether these tests are met and how these principles should be applied often comes down to medical evidence and opinion.

Your job is to help the court, as an **impartial**, **unbiased** expert, to understand medical evidence, and to provide your best opinion on the key medical issues in dispute.

Your opinion evidence comes in the form of **testimony at court** as well as a **written expert report**.

And yes, more often than not, you are an expert. The term 'expert' in this context is a legal concept. Even though you may not think of yourself as an expert in a specific medical specialty, your legal role if you become involved in a personal injury lawsuit is likely as an expert with a duty to inform and help the court (either a judge or a jury) to come to a determination.

The first chapter of this Guide is intended to help you understand your role and this duty in more detail. It provides a brief overview of expert evidence and expert opinion, and discusses what sort of evidence you are qualified to provide. It also addresses the importance of impartiality and not being an advocate, even though it may be one side or the other that is paying you to participate in the lawsuit.

The second chapter discusses the importance and requirements of medical-legal reports. It provides a general outline which may be used to help structure your reports to address the key medical-legal questions, and warns you of common dangers and pitfalls to avoid when writing these reports.

This chapter also explains in greater detail some of the questions frequently asked of medical experts in preparing a report to help you understand the importance of various common legal 'tests' that you may be asked to consider.

In the third chapter, some basic rules and tips when it comes to testifying in court are discussed, and some tips on how you can prepare for your court appearance are included.

It is hoped that these three chapters will give you a brief and informative reference tool that you can consult if and when you are asked to provide an expert medical-legal opinion, to testify as an expert witness in a personal injury trial, or simply when treating a patient for injuries that may be related to a personal injury action.

2 YOUR ROLE AS AN EXPERT

Who is an expert?

"But I'm not an expert!"

This is a statement sometimes uttered by doctors (especially family doctors) when they are asked to participate in a personal injury lawsuit.

Yes, you *are* an expert.

In fact, all physicians (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.

There are *some* situations where a doctor might testify at trial without being deemed an 'expert.' In these situations, the doctor – likely a treating doctor – would be providing a factual recounting of observations, and would not be permitted to provide opinions.

In 1994, the Supreme Court of Canada summarized some key principles that apply to expert opinion evidence as follows:

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.*[1]

Based on the above criteria, physicians and other medical professionals (whether specialists or not) are almost always found to be qualified to provide some expert (i.e. opinion) evidence. It is the lawyer's job to ensure that the questions you are asked as an expert are limited to your area of expertise. However, should you be asked to comment on something outside your area of expertise, you should not speculate and should simply state that you are not able to comment as it is not within the scope of your expertise.

Expert versus advocate

An expert's job is to provide the judge and jury with **fair** and **objective** opinion evidence. Even though as an expert you will be retained by and paid by one of the parties, your sole purpose is to assist the court, and not to advocate on behalf of the party that has hired you.

An expert is not an advocate.

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

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

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.*

In spite of this duty, many experts fall into the trap of becoming an "**expert advocate**" on behalf of the party who retained them.

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

However, in the legal context, the more a physician is seen to be advocating for his or her patient or client, paradoxically, the less likely it is that his or her opinion will be accepted as helpful by the court.

The problem of "expert advocates" was described in a recent decision in Ontario's Divisional Court:

> *Our courts have long afforded witnesses, recognized as experts, the privilege of giving evidence of their opinions in areas where their expertise has been demonstrated. This has not always worked in a way that assists the administration of justice.*

...

> *There are some who do not understand or accept that, with the privilege, comes responsibility to the court and its process. They offer opinions outside their expertise and testify with a predisposition in favour of the party on whose behalf they have been called.*[2]

Because of this, when judges make a ruling in a case, they will weigh the credibility of all the evidence before them and it is not uncommon for them to comment of the credibility of the witnesses themselves. In one recent 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.*[3]

The result was that this doctor's evidence was largely discounted, and his patient's case was hurt, not helped 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 an advocate for that side rather than providing the court with impartial opinion evidence.

Admit the obvious.

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.

[2] *Westerhof v. Gee (Estate)*, 2013 ONSC 2093.
[3] *Kusnierz v. The Economical Mutual Insurance Company*, 2010 ONSC 5749.

Conversely, a doctor retained on behalf of a defendant who denies that the plaintiff has any injury whatsoever, when every other expert acknowledges some injury and the real dispute is actually regarding its severity, 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.

The value of your opinion

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.

It is not unusual for treating doctors to have the view that their opinion does not really matter compared to one being put forth by a retained expert. They may therefore feel that they should not put forth their view at all.

This is simply wrong.

Your opinion matters.

A family doctor or treating specialist's opinion often carries more weight than the opinions of savvy expert witnesses who have testified numerous times in court. The treating physician 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. The treating physician, furthermore, often has had the benefit of learning about the patient's experiences and difficulties from collateral sources such as family members.

At the same time, the opinion of a totally impartial doctor 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.

Do you *have* to act as an expert or provide a report?

It is not unusual for doctors to be hesitant to get involved in a lawsuit by providing an opinion or a report. 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."*[4]

However, 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."*[5]

Treating doctors must provide a report.

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 such a report or certificate."*[6]

[4] Available at *cpso.on.ca/uploadedFiles/policies/policies/policyitems/Medical-Records.pdf*
[5] Available at *cpso.on.ca/uploadedFiles/policies/policies/policyitems/ThirdParty.pdf*
[6] *Professional Misconduct*, O. Reg. 856/93.

YOUR ROLE AS AN EXPERT

While many of your duties are touched on in this Guide, the Policy Statements and Regulations address many other issues surrounding your opinion and such reports. Your duties under the rules of court which are discussed here are distinct from those that arise through your own obligations as doctors as articulated through the CPSO Policy Statements. As such, you should familiarize yourself with the CPSO Policy Statements in addition to the information presented here.

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

You have every right to be paid for your time and expertise in providing expert evidence. The Ontario Medical Association's *Guide to Third Party and Other Uninsured Services* is a helpful resource when preparing an expert reports and it contains guidelines on how to charge for the preparation of a report.[7]

The OMA Guide currently 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, furthermore, reiterates the importance of physicians to provide records and reports within a "reasonable time" after they are requested.

It is prudent to discuss anticipated fees and expected payment arrangements with the lawyer requesting the report prior to providing it.

You are entitled to be paid.

When a lawyer requests that you provide a report about a patient, it is that lawyer's obligation to pay your invoice for the report.

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

For case-flow purposes, it is the practice of some 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.

Confirm fee details before providing your report.

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

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

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.

What can you do *before* you are consulted as an expert?

While you may not have legal obligations under the rules of court before you have been retained as an expert, if you are a treating doctor of someone who is or is likely to be involved in a personal injury lawsuit, there as some ways you can help your patient, and some other rules and guidelines to keep in mind.

1. Limitation Periods

As you may know, in Ontario, individuals usually have **2 years** from the date of a tort or a denial of insurance benefits to start a lawsuit, and if they fail to do this before the 2 years is up, they will be precluded from ever doing so later. In some 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).

Many individuals do not know of these deadlines or limitation periods, and would never think to seek legal advice where they might learn of them until it is too late.

You can help even before you are retained.

As a treating doctor, it is likely that you will be among the first to come into contact with persons who may have reason to begin litigation as a result of personal injury.

While you cannot give legal advice to your patients, if you suspect a patient may have a legal claim, you can still warn him or her that there may be a limited amount of time to start a lawsuit or put the defendant on notice, and suggest that he or she should therefore move quickly if interested in obtaining legal advice and further exploring the possibility of litigation.

2. Medical Records

You can help your patients by ensuring detailed (and legible!) notes are taken after any incident that could give rise to a legal proceeding.

Early on in any personal injury lawsuit, both sides will need to obtain and review the medical records of the Plaintiff's treating doctors and specialists to ascertain the nature and severity of the injuries. Your detailed notes can assist with early and effective resolution of a potential claim.

It can be a significant inconvenience and expense for your practice to respond to lawyers' requests for your records, but it is also essential for lawyers to have these records to effectively protect your patients' rights.

As mentioned earlier, 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. This is explicitly stated in the CPSO Policy Statements, and reiterated as appropriate in the OMA Guide.

Most law firms will be understanding of the inconvenience and expense of their request to your office, and will have no problem if the request takes some time to be satisfied, or with paying your fees for providing the records.

It is interesting to note that OMA Guide stipulates 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."* In terms of the appropriate fee, the Guide provides the following:

> *the OMA recommends physicians charge **$30.00 + $0.25 per page** for each page over 20 pages for the reasonable cost of copying, printing, reproducing or transmitting medical records. This amount **includes** clerical labour costs, equipment lease or amortization costs, print volume fees, toner and paper costs, electronic storage media costs, equipment maintenance costs, office lease costs for equipment and record storage space and other costs of similar nature…*
>
> *in addition to the costs described above, the physician may charge any out-of-pocket disbursements that he or she incurs that are directly related to the request for the provision of copies of the medical records. Examples of such disbursements include charges for the retrieval of the medical record from storage, postage, courier, long-distance fax charges and other charges of similar nature.*

Again, however, the above is a guideline only, and if provided with your invoice for a reasonable amount, most firms will have no difficulty promptly paying it.

3 WRITING A MEDICAL-LEGAL REPORT

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

Fair, objective and non-partisan 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.

As discussed in Chapter 1 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 **research** 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.

As discussed in Chapter 1, the College of Physicians and Surgeons also has guidelines which apply to medical-legal reports to which you should refer when asked to prepare a report.

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

Sample outline for a medical-legal report (continued)

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 when preparing a medical-legal report

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.** For example, a psychologist should likely not be diagnosing musculoskeletal injuries. 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 a loss of consciousness following an accident, it bolsters the opinion if the expert further 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 caused the injury is not as useful as a thoughtful and detailed analysis connecting the patient's health to the incident.

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.

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).

The right test for the right question

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.

If the 'but for' test is unworkable, an alternative test of causation known as the '**material contribution**' test can sometimes be used. This test is rarely applied, but sometimes, where it is simply not possible to prove causation using the 'but for' test, it may be appropriate to show causation by establishing that the defendant's negligence "caused or materially contributed to" the plaintiff's condition. You will ordinarily not need to worry about this test unless the lawyer requesting your report mentions it.

3. *Future Losses*

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

Predicting the future

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 discussed previously. 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]

What is a permanent, serious impairment?

Claimants whose injuries do not surpass this **threshold** are unable to claim general damages and health care expenses. Note that this threshold only applies in motor vehicle accident claims and does not apply in workplace cases, slip/trip and falls, etc.

General damages are a significant part of any personal injury claim, so whether the plaintiff's injuries surpass the threshold is one of the most important questions in a car accident case. You will therefore often be asked to comment on whether the plaintiff's injuries do or do not meet the threshold.

To help interpret this test, courts over the years have developed definitions of the various components of the threshold test, which have been further defined by regulations.

Generally, the term "**permanent impairment**" has been considered to be a *"weakened condition lasting into the indefinite future without any limit"* or *"when a limitation in function is unlikely to improve for the indefinite future."*[9]

Similarly, the term "**serious impairment**" has been interpreted as an impairment that has caused the plaintiff to suffer a *"substantial interference with his or her ability to perform usual daily activities or employment."*

[8] O. Reg. 461/96, s. 4.1 , available online at *http://canlii.ca/t/kwkc#sec4.1*
[9] *Meyer v. Bright*, 1993 CanLII 3389 (Ont. C.A.) and *Brak v. Walsh*, 2006 CanLII 5142 (Ont. Sup. Ct.).

The Ontario Court of Appeal has explained that 'serious impairment' is a broad concept:

> *the requirement that the impairment be serious may be satisfied even although plaintiffs, through determination, resume the activities of employment and the responsibilities of 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****.*[10]

Given the broad interpretation of this test that courts have taken, if asked to comment on whether a plaintiff's injuries meet the threshold, it is recommended that assessors carefully evaluate the full impact of the patient's injuries on their daily life, including their ability to work, enjoy life, socialize, and engage in recreational pursuits to inform their opinion regarding the threshold.

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.

Determining ability to work

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.

[10] *Brak* (supra).

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. Caregiver & Non-Earner Benefits - the "Complete Inability" test

Caregiver and 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."*[11]

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 recently 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*
> - *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.*[12]

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.

[11] *Statutory Accident Benefits Schedule, O. Reg. 34/10, available at canlii.ca/t/521pk#sec3*
[12] *Galdamez v. Allstate*, 2012 ONCA 508.

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**."[13]

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,[14] 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.

[13] The guideline is available at www.fsco.gov.on.ca/en/auto/autobulletins/2011/documents/a-06-11-1.pdf
[14] *Statutory Accident Benefits Schedule, O. Reg. 34/10, available at canlii.ca/t/521pk#sec3subsec2.*

4 TESTIFYING IN COURT

Whether you are excited by the idea of giving evidence in court, or whether it gives you anxiety, if you are a treating physician or expert retained on behalf of a plaintiff or defendant in a personal injury lawsuit, you may find yourself in the witness box regardless of your feelings. The following information can help you prepare when your turn comes 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.

Being prepared to take the stand

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." When you are giving evidence, the trial judge will usually allow you to sit or stand, depending upon your personal preference.

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.*

It is important to recognize that when you are being questioned in chief, you must take your lead from the lawyer, and provide answers that are accurate, succinct and address **only the question being asked**.

Control your answers.

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.

The manner in which you give your evidence may vary from case to case. That is why it is so important to spend time with the lawyer prior to actually giving evidence in the trial, so that you clearly understand the information that the lawyer is expecting you to provide at the trial.

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.

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.

Keep it simple.

In addition, 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 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. They may be able to speak with you about points not yet raised but that they feel will be covered in cross-examination, but there will not be much that can be discussed at this time.

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 or professional witness, it is not as likely that the opposing lawyer will attempt to intimidate you, particularly since you will have vastly more medical knowledge than the lawyer questioning you.

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.*

If the lawyer calling you to testify has thoroughly and properly prepared you, there should be no surprises. 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.

You can and should feel free to **qualify** your answers and **should not allow yourself to be pinned down to a particular answer**. 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: *Well, yes, I would agree that I was not aware of her surfing injury, but I would presume that it was not a significant injury as when I examined her after her return to Canada, her condition had not changed significantly from when I last examined her before she left.*

As much as the opposing lawyer may want to limit you to yes or no answers, you should always have the right and the opportunity 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.

As noted, the lawyer will not be able to discuss your evidence with you before re-examination – even if your testimony goes for more than one day.

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.

Final tips

Fees

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.

5

FINAL THOUGHTS & ADDITIONAL INFO

The information in this Guide is not intended to be a complete review of expert evidence and testimony, but it is hoped these guidelines, rules and tips will provide you with some background and a quick-reference tool to help you when the time comes for you to get involved with the personal injury litigation system.

In the end, no reference guide will replace specific advice and guidance from the lawyer who has retained your services, and you should not hesitate to speak with the lawyer about any questions you have at any stage of your involvement in a file.

In addition to speaking with the lawyer involved in the file, a great deal of helpful information is available to you through professional organizations including the OMA and CPSO, and various legal resources, some of which are discussed in the preceding pages.

You can find more information about the personal injury litigation process and the team who has prepared this guide by visiting Martin & Hillyer Associates online at **www.mhalaw.ca**.

NOTES

MARTIN & HILLYER ASSOCIATES

The M & H 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

Our Personal Injury Team

- Bruce Hillyer
- David Hayward
- Laura Hillyer
- Kennedy Nolan
- Stephen Abraham
- Claire Wilkinson
- James Page

2122 Old Lakeshore Rd., Burlington, ON L7R 1A3 Phone: (905) 637-5641 Fax: (905) 637-5404
mhalaw.ca