

PROVIDING OPINION FOR MEDICO-LEGAL CASES

This Committee Opinion has been reviewed and approved by the Medico-Legal Committee and Executive and Council of the Society of Obstetricians and Gynaecologists of Canada.

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Abstract: This Committee Opinion outlines the guiding principles and a format for the physician who is requested to provide a peer opinion for a medico-legal case. The format allows for completeness, uniformity, and consistency in the preparation of expert opinions given in medico-legal cases. This Committee Opinion outlines the different elements that should enable lawyers and the courts to assess the weight of the opinion, its factual basis, and the reasons for opinions expressed.

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INTRODUCTION

When a lawyer calls a physician to solicit his or her help in the role of an expert assessing the care provided in a given case, that physician's professional judgement is implicitly recognized. The physician undertakes a grave responsibility that may have serious impact on the plaintiff, the defendants, the legal system, and society at large. The "expert" physician is being asked to conduct a peer review and educate those involved in the process of a judicial adversarial adjudication.

Providing an expert opinion is a civic responsibility to be undertaken only with the objective of educating those involved with the legal process in a particular case. Medico-legal cases are assessed, tried, and adjudicated largely on the basis of opinions

given by physicians on the standards of care provided by other physicians. The medical specialty of obstetrics and gynaecology includes generalists and subspecialists, physicians with knowledge and expertise in different clinical and scientific areas as well as different practice settings. Advances in maternal-fetal medicine, increased surveillance in general obstetrical practice, and improved neonatal outcomes from specialized neonatal intensive care units have all resulted in heightened public expectations for ideal outcomes.^{1,2} However, limitations are imposed by biology and technology. It is not generally known by the public, for example, that a sudden intrauterine demise is often not predictable by ultrasound examination, nor that surgical sterilization or intrauterine contraceptive devices can fail, even when the gynaecologist's decisions and technique meet the standard of care. Tort³ or compensatory damage is sometimes demanded by the patient and her lawyer when there has been a bad clinical outcome, on the basis of allegations that appropriate care was not provided. The quality of the physician's care is often the key issue of the legal action, and consequently the physician is often the primary target of the lawsuit. The role of the physician providing an expert opinion is to educate those involved in the legal process on the standard of care provided, taking into account all facts and variables relevant to the case, including the practice setting.⁴

These guidelines reflect emerging clinical and scientific advances as of the date issued and are subject to change. The information should not be construed as dictating an exclusive course of treatment or procedure to be followed. Local institutions can dictate amendments to these opinions. They should be well documented if modified at the local level. None of the contents may be reproduced in any form without prior written permission of SOGC.

The level of evidence and quality of recommendations within this Committee Opinion have been determined using the criteria described by the Canadian Task Force on the Periodic Health Examination.⁵

HOW TO PROVIDE AN EXPERT OPINION

QUALIFICATIONS

The physician should have relevant clinical expertise and familiarity with the issues in order to discharge the responsibility. It is inappropriate for those physicians who obtained their relevant qualifications recently to provide opinions on an event that occurred many years ago without declaring this potential discrepancy and without learning the practice patterns and standards of care existing at the time of the event. Similarly, if the physician stopped practicing obstetrics many years ago, it is equally inappropriate for that physician to provide expert opinion on a recent case, unless a similar declaration and learning procedure have occurred. The appropriate opinion is provided by a peer, a physician of similar qualifications and practicing under similar circumstances. The opinion should be based on the information the physician of the case had as clinical events unfolded, and not influenced by the “retrospective” perspective of a known bad outcome. Upon a review of all the clinical facts provided, an opinion should be formulated and discussed verbally with the lawyer who requested the opinion. If that lawyer requires a written report from the expert, the expert will be so advised. A written report must use clear language understandable to a lay person.

THE WRITTEN REPORT

The Committee recommends that members of the SOGC who undertake to provide opinions should use the following format.

1. The physician should identify him- or herself as a physician in good standing with the appropriate licensing college of his or her jurisdiction. The year of certification in the specialty with the Royal College of Physicians and Surgeons of Canada should be stated, identifying any relevant subspecialty interests and qualifications.
2. The physician should state what his or her scope of practice was at the time when the case to be reviewed occurred and what it is at present (e.g., general Obstetrics and Gynaecology, Perinatology, Urogynaecology, etc.).
3. The physician should state the number of years of experience he or she has in the area relevant to the case.
4. The physician should state the number of years, if applicable, since he or she last practiced the specific area of obstetrics or gynaecology relevant to the opinion given.
5. The physician should state his or her affiliation to hospital(s) and university, if applicable.
6. The physician should state if any other elements of his or her clinical practice are relevant to the case.

THE FACTS

1. The physicians should itemize information reviewed.
2. The physician should provide a short synopsis of the facts contained in the materials reviewed, using objective, non-slanted language.

THE ISSUES

The physician should identify clinical issues concerning the standard of care of possible relevance to the clinical outcome.

OPINION

1. For each issue identified in the report, the physician should give an opinion as to whether or not the standard of care was met.
2. If there are facts not available to the physician at the time of writing the report and if his or her opinion is subject to change if other facts are presented, he or she should state this clearly in this segment of the report.

REASONS

The physician should provide reasons for the basis of the opinion with appropriate reference: a standard textbook, specific review articles, professional society guidelines, widespread clinical practice in the physician’s jurisdiction, or personal experience. It is important for the physician to remember that biological variations occur and bad outcomes do not necessarily result from substandard care. His or her opinion will be subject to intense scrutiny in an adversarial system by lawyers who most certainly will try to obtain a contradictory opinion from another colleague.

CAUSATION

The report should conclude with the expert physician’s analysis of the relationship between the physician’s care and the clinical outcome. It is important to state when a physician sees no relationship between quality of care and clinical outcome, especially if it is his or her opinion that the standard of care was met, and even if it is concluded that performance was below standard.

The physician should complete the report with his or her signature.

COMMITTEE DISCUSSION

The physician who provides a written expert opinion is subject at trial to thorough cross-examination on every aspect of the report. The recommended format addresses several issues that currently are problematic in the provision of expert opinions: it will identify the scope of practice of the expert witness and the relevance of his or her expertise; it will also identify the extent of the medico-legal practice of the expert and any biases inherent therein.^{6,7} The format will help the physician give a comprehensive report that clearly separates the facts from the

opinions and provides a basis for the opinion stated. This format will be useful to lawyers for either plaintiffs or defendants in appraising negligence and causation. It is hoped that the structured format will encourage more physicians to provide medico-legal opinions and thereby enlarge the pool and decrease the burden of physicians who provide expert opinions. It should result in opinions based on the practices that were current at the time of the case under review and encourage true peer opinions.

RECOMMENDATIONS

With full consideration of the medical and legal aspects of malpractice lawsuits, the Committee makes the following recommendations.

The physician providing the expert opinion should:

- 1. be aware of the serious responsibility being undertaken, and participate only if the physician possesses the knowledge and expertise to provide an optimal assessment (III-C);**
- 2. before proceeding with the provision of an opinion, determine whether or not he or she is a true peer, practicing under similar circumstances as the defendant at the relevant time, and state his or her qualifications relevant to the case being reviewed (III-C);**
- 3. assess the care given to the patient, relative to the standard of care at the time of the case, using guidelines of national organizations such as the Society of Obstetricians and Gynaecologists of Canada (SOGC) where they exist, and where there are no professional guidelines, determining appropriate standards as dictated by provincial norms (III-C);**
- 4. provide an expert opinion on what other reasonable physicians would do in similar circumstances, as clinical situations can often be managed correctly in more ways than one;**
- 5. state opinions that are credible and that will stand the scrutiny of peers, leaving advocacy to the lawyers;**
- 6. be prepared for the cross-examination under oath, including a review of everything in the report and questions aimed at the physician's qualifications to provide an opinion on the specific case under review and the credibility of the opinion provided (III-C).**

CONCLUSION

The courts, physicians, and the public need access to an ample cadre of physicians for medico-legal cases under review. By following the format of this guideline, expert opinions should be universally comprehensive and instructive, enabling a fair and objective judicial process for the plaintiff and the defendant.

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