

MEDICAL WITNESS & THE INDIAN COURTS

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Abstract

In our practice it has been seen that the doctors are generally afraid to testify in the courts. This is mainly because of two reasons: one that they are not familiar of the legal procedures and two because they are afraid to be grilled in the court by the lawyers. As a result many a times the attitude of the doctor while testifying in the court is to finish the testimony and go back, irrespective of the outcome. The beneficiaries in such cases are the culprits who have to be acquitted because of lack of evidence. As a result the knowledge, skill, education, experience and training of the doctors are necessary to make them more competent while testifying in the court.

Key words: Medical Witness, Court, Legal System

Introduction

Medical evidence is routinely required for administration of justice all over the world. As an expert witness, the doctor can be thrust, often unwillingly, into a foreign environment where the flow of information is tightly controlled by complex rules of evidence which have been shaped by various laws with which the expert witness cannot expect to be familiar. It is a common perception among Indian medical professionals that lot of time and effort is required for expert testimony in the court of law in our country. Thereby, large numbers of professionals avoid sharing medicolegal responsibilities.

The legal system

The two dominant legal systems in the world are often referred to as the adversarial and inquisitorial systems. The objective is just resolution of disputes and maintenance of social order. In the inquisitorial system the court and the judiciary plays a proactive part and is involved in the examination and

questioning of witnesses. The adversarial system being followed in India is based on the philosophy that the true facts of a given situation, and hence justice, will emerge if the parties to a court action act as adversaries rather than cooperative participants. Each side vigorously advances its own version of the facts, an impartial third person or group of persons (judges) will sift out the truth.

Since the jury were thought to be influenced by media and public support for the parties and is also open to being misled, the Indian government abolished jury trials after the case K.M.Nanavati vs. State of Maharashtra in 1959.

The presiding officer or the judge sits in his chair at a higher platform; besides him on his sides at a lower level were the reader and the clerk. The court staff includes head clerk (*mukhya sahk*), administrative clerk (*nazir*), readers (*peshkars*), stenographers (*stenos*), record keepers (*almads*) and orderlies (peons). Clients (*muakkils*) are present with their lawyer (*vakil*) accompanied by his scribe (*munshi*) in the courts (*kacheri*). [1]

The Supreme Court of India is the highest judicial tribunal of the country. It has power of supervision over all courts and the law declared by it, is binding on all courts. [2] The High Courts are the highest judicial tribunal for the states. These are the courts of appeal. Sessions Courts are the highest judicial tribunal of the districts. These can pass any sentence. The lower courts are the Magistrate Courts. There are also special courts like Juvenile Courts and Fast Track Courts.

Presentation of evidence

After receiving summons or subpoena [3] the expert witness must appear before the court at the appointed time with the relevant documents. The evidence is probed for areas of uncertainty, inconsistency or any factors which may make the evidence appear unreliable. Evidence is presented in a systematic order.

1. Oath (s. 51 Indian Penal Code)
2. Examination-in-chief (direct examination, no leading questions allowed, s. 137 Indian Evidence Act)
3. Cross-examination (leading questions permitted, s. 141-146 Indian Evidence Act)
4. Re-examination (Re-direct examination, s. 138 Indian Evidence Act)
5. Court questions (questions by judge, s. 165 Indian Evidence Act, s. 311 Criminal Procedure Code)

The recorded deposition of witness is handed over to him, which he carefully goes through, and signs at the bottom of each page, and on the last page immediately below the last paragraph; and initials any corrections (s. 278 Criminal Procedure Code). The witness shall not leave the court without the permission of the judge.

Expert Witness

An expert witness is defined as a person especially skilled in foreign law, science or art, etc. who helps the court in forming opinion on that point. (Indian Evidence Act 1872 section 45). An expert witness, by virtue of education, profession, publication or experience, is believed to have special knowledge of his subject beyond that of the average person, sufficient that others may officially and legally rely upon his opinion. In general, witnesses may only give evidence of fact and not an opinion. An expert however, is permitted to offer his opinion as evidence.

Typically, experts are relied on by both sides to a dispute for opinions. The objective of the expert witness is to support the proper administration of justice and the early resolution of dispute through fair and unbiased expert evidence.

Government Scientific Experts as per Code of Criminal Procedure 1973 Section 293 (4) are

- a) Chemical Examiner or Assistant Chemical Examiner
- b) Chief Controller of Explosives
- c) Director of Finger Print Bureau
- d) Director Haffkeine Institute Bombay
- e) Director, Deputy Director, Assistant Director of central or state FSL
- f) Serologist to Govt.
- g) any other Government scientific expert specified by notification, by the Central Government

Expert medical evidence

The term evidence has different meanings in law and medicine. In law, evidence is material or testimony which is admissible to the court. In medicine, it refers to data obtained through

scientific investigation. The quality of such evidence is defined by the scientific methodology employed in the investigation. [4,5,6] In law, complex rules restrict the type of evidence that may be presented to the court. [7] These rules aim to exclude evidence which may be unreliable, irrelevant or misleading and include evidence which has the maximum probability of being the truth.

Medical evidence helps the courts to draw logical conclusions from the facts presented. The evidence presented by medical experts is based on their opinions derived by their specialized skills acquired by study and experience. [8] Medical experts are routinely involved in the administration of justice particularly in criminal courts. In India, ordinarily medical evidence is admitted only when the expert gives oral evidence under oath in the courts of law expect under special circumstances like:

- i. When evidence has already been admitted in a lower court;
- ii. Expert opinions expressed in a treatise;
- iii. Evidence given in a previous judicial proceeding;
- iv. Expert cannot be called as witness; and
- v. Hospital records like admission/discharge register, birth/death certificates etc.

Judges are assumed to possess knowledge and experience of general fields of human endeavour and experience. Experts may not provide evidence regarding matters of 'common knowledge'. There are several areas of medicine which intersect with day to day life and therefore invoke the common knowledge rule. An expert need not be asked to number the fingers on the hand.

The expert witness may only testify within his or her area of expertise. It is left to the judiciary to rule on whether an area of scientific or medical knowledge represents an area of expertise. [9] Critics point out that judges with limited medical knowledge may not be the most appropriate 'gate keepers' of scientific evidence in relation to the court. [10] The Frye test [11] rules that in order to be classified as an area of expertise, the area must be sufficiently established to have gained general acceptance in the particular field to which it belongs. [12] The Daubert ruling has further specified the criteria to determine the admissibility of scientific evidence. [13]

The expert must be able to clearly justify his opinion on the basis of facts using his expertise, describing how he was able to reach at the opinion using any documents, books, photos etc.

Limitations and problems of evidence from the expert witness

There are many instances where court decisions contrary to popular expert opinion on issues like bone cut, rape, burns, age, consent, dying declaration, *compos mentis*, etc. have been delivered.

The expert witness is often expected to provide clear 'yes or no' unambiguous answers to questions where there is profound uncertainty within the field of inquiry. The medical witness may find the process an intensely frustrating, confusing and unrewarding experience.

This approach to problem solving is alien to most medical practitioners. Expert witnesses may only be permitted to present part of their evidence and this may result in an incomplete or distorted version of the truth as they see it.

This system is not based on a concept of 'absolute truth' in a scientific sense but rather on satisfaction 'beyond reasonable doubt' that the legal elements of a crime have been established.

Opposing medical expert witnesses may have minor points of disagreement, which may be construed as major differences of opinion when this is not the case.

Cross-examination by its nature usually involves direct challenge of the witness and may at times be quite an aggressive process with direct personal attack not uncommon. This sort of combative approach to problem solving is obviously foreign to most doctors, some of whom would be rarely challenged, let alone attacked, in the course of their professional lives.

An expert witness may be confronted with seemingly simple terms which are defined by various laws of which the majority of expert witnesses will be unaware. The rules of evidence limit what the expert witness may say. [14]

Expert witnesses are often chosen and retained on the basis of what they will say and how they will say it rather than on any scientific or professional merit. Partisan selection of expert witnesses maximizes potential for bias and inaccurate expert testimony.

There is a natural bias to do something serviceable for those who employ you and adequately remunerate you; with the consequence of being paid agents. [15]

The pressure of the adversary system often forces the experts to the limits of his expertise. Often the litigants' case becomes the expert's

cause. Experts may feel like they themselves are on trial.

Especially for medical expert witnesses there is always a difference between the expertise of undergraduates and the postgraduates in a specific subject; and the courts should be sensitive to these issues, and the opinion should be given due weight-age and respect.

In India, it is a common perception that lot of time and effort is required to record evidence and therefore by and large members of the medical profession do not like to be involved in medicolegal cases. [16] Some of the possible reasons put forward for this perception are undue time consumption; repeated adjournments; and lack of work culture. Some of the reasons for delays in evidence are non-availability of presiding officer in the court; issue of summon by mistake; work suspended by lawyers; non-availability of some documents; adjournment of the case before arrival of medical witness, etc. It has been observed that overall more time is taken in waiting in courts and receiving payment than in actual recording of evidence. The mean lag period between registration of first information report and time to appear before court of law to give evidence by a medical witness has been found to be more than two years. [17]

Initiatives required on resolving the issues

There is ongoing judicial anxiety about the partisanship of forensic witnesses.

1. Several medical organizations and courts worldwide have issued professional guidelines for medical expert witnesses. [18]
2. Expert evidence should be subjected to peer review.

3. Medical evidence should be supported by substantial documentary evidence including photos, videos and radiographs.
4. Even in cases of re-examination and referred opinion cases, in case of any difference of opinion from the initial report, a definite opinion with a supporting basis should be provided. Further the courts may believe and rely on that opinion which is tallying with the eyewitness account and discard the opinion of other expert on this ground alone.
5. Expert opinion should be considered in the same light as clinical medicine and as such subject to same rules of negligence. [19] Statutes need to be amended so that breaches of the expert's duty of objectivity would constitute professional misconduct.
6. Expert witnesses should be required to read and sign a 'witness code of conduct' [20] outlining general principles with regard to impartiality and minimum requirements for medicolegal reports. [21]
7. There is a need for the accreditation of expert witnesses and making them accountable for their conduct during court appearance.
8. An expert's report and the further evidence must give
 - a. details of the expert's qualifications, relevant experience and accreditation;
 - b. details of literature or other information which the expert has relied on;
 - c. statement of all facts upon which those opinions are based;
 - d. statement that the facts stated in the report are within the expert's own knowledge;
 - e. name and qualifications of the person who carried out any examination or tests used;
 - f. summary of the range of opinion, and reasons for the opinion;
 - g. reasons if no definite opinion has been reached;
 - h. summary of the conclusions;
 - i. statement that the expert understands and complies to his duty to the court; and
 - j. declaration of truth.
9. The medical expert witness must understand that cross-examination is a method for testing the quality of their evidence and aggressive challenge should be expected. If the witness becomes angry or argumentative it can only decrease the quality of the evidence in the eyes of the judges.
10. Prior education and training of the expert witnesses assists in understanding the whys, hows and the procedures of the court.
11. With the emergence of private sector the focus of the laws on 'government experts' should be shifted to accommodate and accept the others.
12. The presence of trainees in the court should be acceptable to the judiciary.
13. An adequate and just compensation of the expert monetarily will be highly instrumental in reducing some natural bias due to this issue.
14. The experts are the guests of the court and should be treated with due respect.

Conclusion

Medical expert opinion is commonly required by the courts. A medical witness called in as an expert to assist the court is not a witness of fact and the evidence given by the doctor is really of an advisory character given on the basis of the signs and symptoms found on examination. The expert witness is expected to put before the

court all materials inclusive of the data which induced him to come to the conclusion and enlighten the court on the technical aspects of the case by explaining the terms of science so that the court although not expert may form its own judgment on those materials after giving due regard to the experts opinion because once experts opinion is accepted, it is not the opinion of the doctor but of the court.

Doctors will continue to find themselves in this often alien and unfamiliar arena. Members of the medical profession, wary of interaction with the legal system, may think that the risk to reputation is too great and may be reluctant to help. Those willing to help may also be unnecessarily circumspect in their evidence. The current practice of soliciting expert medical testimony within the adversarial system appears flawed and contains inherent pressures conspiring to maximize bias.

The conditions for the expert medical witness in courts is satisfactory which is quite in contrast to the apprehensions prevalent in the minds of medical professionals. However, this important aspect of the justice administration can be further improved by the following measures:

- a. Discouraging routine summoning of doctors; [22]
- b. Calling expert witness at pre-scheduled time;
- c. Recording experts' testimony by alternative judicial officer in case of non-availability of the presiding officer the court that summoned him.
- d. Amending provision of criminal procedures to have admissibility of the medical records
- e. Recording of experts' testimony through video-conferencing. [23]

The medical expert witness should be aware that what they may say in court is tightly controlled by complex rules of evidence. An understanding of the system's fundamental flaws may enable the expert witness to recognize when evidence is distorted and appeal to the judiciary accordingly. [24]

There is a unanimity that medical evidence plays a crucial role in helping the courts of law to arrive at logical conclusions. Therefore, the expert medical professionals should be encouraged to undertake medicolegal work and simultaneously the atmosphere in courts should be congenial to the medical witness. This attains utmost importance looking at the outcome of the case, since if good experts avoid court attendance, less objective professional will fill the gap, ultimately affecting the justice. [25] Thus, there is a need to address the apprehensions that ponder the mind of medical professionals.

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