

Being a plaintiff witness in a negligence suit

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It is not a sin to be a witness for a plaintiff in a civil action commenced by a patient against a chiropractor. Really. At least it is not one of the Ten Commandments.

In civil litigation involving an allegation of professional negligence the onus of proof is predominantly placed upon the plaintiff to prove the allegation of negligence. In order to accomplish this, the plaintiff must introduce evidence that the chiropractor was negligent in the performance of his or her professional responsibility (the definition of negligence being “conduct falling below the standard accepted by the community resulting in the unreasonable risk of foreseeable injury”).

In order to provide the evidence required to prove that the standard of practice of the profession was not maintained by the practitioner, the plaintiff will generally be required to introduce expert evidence. It may well be that the chiropractor may establish his or her own negligence by the mere review of his or her file and the obvious omission or commission of the action of the chiropractor as in the case of a failure to obtain informed consent. It may be unnecessary to introduce expert evidence to prove that informed consent is a requirement of a professional chiropractic practice. It is trite law that informed consent is required to be obtained by a chiropractor.

Where the situation becomes muddy is whether the informed consent was required in the particular situation, ie. was there a risk that had to be discussed with the patient. If there is a material risk then consent must be obtained.

As in any professional negligence suit it will generally be a member of the defendant's profession who will be required to testify as to the standard of the profession. It does not seem to be a matter of unsurmountable difficulties to obtain an expert witness to testify in a negligence suit involving a medical doctor, lawyer, accountant, etc. As repulsive as it might seem to members of the chiro-

practic profession, a chiropractor will be required to testify for the plaintiff in a malpractice suit and it is important that such testimony be available.

It will not seem very palatable to a chiropractor who is being sued for negligence to have a member of his or her profession testify that what was done in the doctor's office fell below an accepted standard. However, if chiropractors are unwilling to testify in such actions then the profession is left with having its standards investigated and judicially considered and established by other professions such as the medical profession. This should be considered to be unacceptable in any circumstances.

It may well be acknowledged that it is not an easy task to seek out and find a chiropractor who is willing to testify against a fellow chiropractor and it may well be similar in other professions. The more difficult issue arises when practitioners are willing to testify under inappropriate circumstances.

In the Communique of the Canadian Chiropractic Protective Association of January 2001, it was noted that in at least two of the recent trials which involved the CCPA on behalf of its member, it was determined that the witness testifying on behalf of the plaintiff provided information and/or opinion that was not accepted by the court in determining the outcome of the trial. In one instance testimony was given that the Glen Erin Guidelines were the applicable professional standard to which the defendant chiropractor should be held. It was acknowledged by the Court, on testimony adduced on behalf of the chiropractor, that the Glen Erin Guidelines had not been adopted by the particular provincial regulatory body as the standard for the practice of chiropractic. It might be concluded that this was an instance where a chiropractor who had been retained by the plaintiff provided an opinion which gave credibility to the plaintiff's case and may have provided justification in the mind of the plaintiff to continue the litigation.

Having regard to the lessons which should be learned

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from such experiences, it is important that the chiropractic profession understand the ramifications of participating as an expert witness. This commentary is not provided for the purpose of dealing with the parameters associated with the production of expert witnesses and the limitations associated with acting as an expert witness (for further information refer to the Supreme Court of Canada case of *R. v. Mohan*, [1994] 2 S.C.R. 9). What needs to be acknowledged is that not all chiropractors are competent to act as expert witnesses. Being a chiropractor means that the practitioner has become registered as a member of his or her profession after graduating from a chiropractic college and passing licensing examinations. To be acknowledged as an expert, generally, a practitioner will have to provide credentials indicating that he or she has progressed beyond the basic education and practice of the ordinary chiropractor, i.e. post graduate education, teaching experience, authorship, and possibly an acknowledgement by others that he or she is an expert in the chiropractic profession.

It is folly for any practitioner to provide an opinion which is to be considered as that of an expert witness unless the author of the opinion is prepared to substantiate the fact that he or she is an expert. This is not the same thing as providing an opinion in a chiropractic legal report on behalf of a patient in a matter such as a motor vehicle accident. In that case, the author is competent to deal with matters relating to the general practice of chiropractic, i.e. a review of his or her own files, the tests which were performed, the diagnosis or assessment which was provided, etc. It is in those situations where the doctor is commenting on the efficacy of the treatment of fellow practitioners or other health care practitioners that the witness should be in a position to provide credentials which attest to his or her qualifications as an expert.

I have had the opportunity to provide expert testimony on at least three occasions in the court environment. I was under no delusion that upon the commencement of my testimony by the lawyer who had retained me that the "other side" would immediately require that my qualifications as an expert be established for the purposes of accepting or rejecting my standing as an expert and my ability to

provide "opinion evidence." It was a matter that I was fully expecting and was not disappointed or concerned about having to deal with.

A chiropractor who is called upon to be an expert witness in any adversarial situation whether it involves arbitration, mediation, litigation, or the regulatory board's discipline process, should fully understand the role that they are to play. The unfortunate outcome of a practitioner who may be unqualified to act as an expert or provides information which is ultimately discounted by the courts is that it does little service for the practitioner, the patient and the profession. The issue of an unacceptable expert witness is different than that of a qualified and competent expert witness whose opinion is discounted having arrived at an opinion, while otherwise acceptable, is rejected by the adjudicator.

The conclusion to be drawn from the above comments is not to ensure that there is no chiropractor available to testify on behalf of a plaintiff in a malpractice case. The chiropractic profession has matured to the point where it should be able to withstand the scrutiny of experts within its own field of expertise. The alternative and unacceptable result is to have the profession put up a concerted effort to ensure that chiropractors do not testify on behalf of plaintiffs in actions involving chiropractic negligence which would ultimately result in the conduct of the chiropractor being reviewed by medical practitioners. It is the opinion of the writer that for too long the profession of chiropractic has been examined and judged by professionals who are not chiropractors and should not, therefore, ascertain the standard by which chiropractic care should be judged. Chiropractors, like all professionals, should be judged by their peers.

The conclusion to be drawn is that the "playing field" (courtroom) should be "a level playing field" so that the decisions which emanate in the area of chiropractic negligence claims are reasonable; that litigation is not propagated by inappropriate opinions which support a claim without reasonable expectation of success; and that the public is not misled into a false understanding of the extent of litigation involving chiropractors.