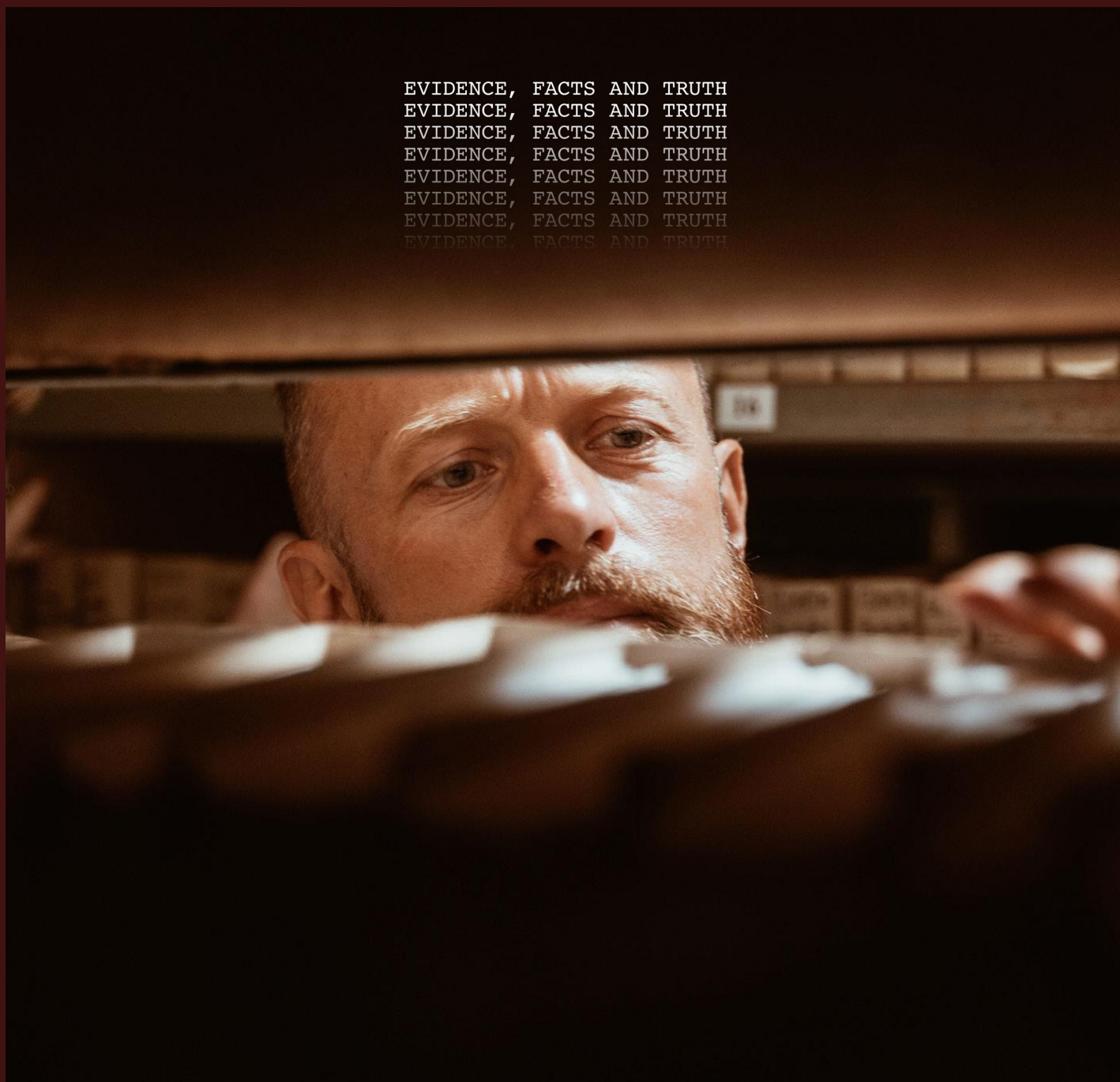


# the Verdict

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EVIDENCE, FACTS AND TRUTH  
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**TRIAL  
LAWYERS  
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*of BC*

Supreme Court Justices Clash  
Over the Constitutionality of the  
“Ghomeshi Rules”

Evidence to Facts  
to Truth to Justice

Defamation,  
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## MEDICAL MALPRACTICE ►



BY **BRENDA OSMOND**  
TLABC Member

Brenda Osmond is a lawyer at Pacific Medical Law. Brenda obtained her law degree from UBC and was called to the bar in 2010. Her law practice is focused on representing patients who have suffered injury as a result of medical malpractice. Throughout her career Brenda has been a speaker at professional development conferences, a frequent contributor to professional publications and an adjunct professor at the Allard School of Law.

# Acute Ischemic Stroke

**This is the fourth article in our series aimed at providing a detailed examination of the challenges and pitfalls in different types of medical negligence lawsuits and approaches to overcoming them. Each article will focus on specific injuries and will highlight the obstacles a plaintiff faces in bringing their case to a successful conclusion. By comparing cases involving similar injuries, we hope to illustrate how the plaintiff succeeded, and when they did not, strategies that may have been available to improve their chance of success.**

**This article will focus on a recent stroke case in which the plaintiff was successful, *Hasan v. Trillium Health Centre Mississauga, 2022 ONSC 3988 (CanLII) (Hasan)* to illustrate a number of successful strategies used by plaintiff's counsel, and point out some problems experienced by the defence as they presented their case. With damages agreed on a global basis in advance, the court was left to determine standard of care and causation over the course of this 21-day trial.**

## Introduction

Delayed diagnosis leading to delayed treatment are often at play in stroke cases, and given that there is a relatively short window for the successful treatment of a stroke, the plaintiff's lawyer must embark on a methodical and thorough work-up and presentation of the case in order to persuade the court that but for the negligence, the diagnosis would have been made in time to administer appropriate therapy and achieve recovery.

In 2011 Syed Hasan was a 40-year-old man with no pre-existing serious health conditions. Early on December 3, 2011, he felt dizzy and nauseous and he began to vomit. He was unsteady on his feet and feared he would fall if he didn't hold on to somebody's hand. He attended Milton District Hospital where he was diagnosed with probable peripheral vertigo and discharged home. Later that day he was still unwell and saw his family doctor who examined him, gave him a referral note and directed him to go to Trillium Health Partners – Mississauga Hospital, the Regional Stroke Centre ("Trillium") with the request to "rule out organic cause (brain lesion or stroke)."

Later that day Mr. Hasan was seen by the defendant Dr. Campbell at Trillium. Dr. Campbell took a history, examined him, and ordered medications and a CT of the head which showed no evidence of intracranial hemorrhage. His diagnosis was "Dizzy – Bell's Palsy – Peripheral Vertigo." Mr. Hasan was sent home with a prescription for dizziness and instructions to follow-up with his family doctor in 3-4 days and return to the emergency department if he got worse.

Early on December 4, 2011, his condition worsened significantly, and at 3 a.m. he could not get out of bed. He returned to the emergency department at Trillium by ambulance. He was again assessed by Dr. Campbell who ordered another CT scan of the head to rule out a stroke. By noon Mr. Hasan had deteriorated so severely that he had to be intubated and admitted to the intensive care unit. He had suffered a devastating life-altering stroke that left him with severe long-term disabilities.

On December 8, 2011, five days after his initial symptoms, Mr. Hasan underwent an MRI of the brain and a CT angiogram of the head and neck. He was then diagnosed with a brain stem stroke and was placed on an anticoagulation protocol. It was noted that Mr. Hasan had very good collateral circulation around the area of the blood clot, which was what allowed him to survive the serious stroke.

The court found that the defendant breached the standard of care on December 3 and 4 by not taking a complete medical history, not conducting a complete physical examination and by not ordering a CT angiogram to rule out a stroke, among other things. The uncontested evidence was that a CT angiogram would have been the immediate test of choice on December 3-4.

The complex causation arguments are detailed in the judgment, and while there are a number of differences in the theories advanced by both sides, the difference that impacted the question of what treatments were available and how likely were they to be successful, was that of a clot.<sup>1</sup> The plaintiff's theory was that he suffered a dissection in the left vertebral artery that was the source of the formation of a clot that occluded his basilar artery and cut off blood flow to parts of his brain. The defence's experts agreed that there was a dissection in the left vertebral artery, but opined that it was the dissection itself that extended and occluded multiple blood vessels cutting off the blood flow and causing a stepwise progressive stroke. This difference was critical to the causation finding. If a blood clot were involved, there would have been three options available to try to open the blockage created by the blood clot – intravenous administration of the clot-dissolving drug tPA, use of a catheter to pull out the clot, or the injection of a smaller dose of tPA directly into the clot through the tip of a catheter. If the defence's opinion was preferred by the court and no clot was involved, the plaintiff's claim would be dismissed because it would have been very difficult to treat the plaintiff and obtain a positive outcome.<sup>2</sup> Ultimately the court found that Mr. Hasan's stroke was caused by a clot, and had he been diagnosed by CT angiogram on December 3 or 4, he would have had appropriate therapy that would have been successful.

## Working With Your Experts

The *Hasan* judgement reads as a masterclass in how to work with your experts at several significant steps from initial selection of the expert all the way to preparation for cross-examination.

### Qualifications

It goes without saying that careful selection of your experts is the

starting point for success. In *Hasan*, in commenting on the complexity of the case, the court noted that nearly all of the experts were teachers, most of whom had received various teaching awards. They were able to explain their opinions and the science in clear and accessible terms that the court found helpful.<sup>3</sup> Despite making that comment, when the defence invited the court to give no weight to the opinion of an expert who had fewer awards, recognitions, research, and publications than the defence's highly accomplished doctors, the court pointed out that "awards and publications do not produce opinions; experience produces opinions."<sup>4</sup>

While it may not always be possible to retain experts with a teaching background, what is clear is that it is necessary to work with your experts to ensure that their opinion can be expressed in clear and understandable terms. In *Hasan* the complicated causation theories on both sides were made even more accessible to the judge through demonstrative aids including medical illustrations and an animation. Although these were not entered into evidence, they were still noted by the judge to be useful in simplifying complex concepts.

### Use of Factual Assumptions

In *Hasan*, as in many stroke cases, the evolution of the plaintiff's symptoms over hours or days play a central role in the expert's understanding of the nature of the stroke, the potential treatments available and the likelihood of success of a potential therapy. The facts required to accurately outline the evolution of symptoms may come from a

number of sources including the medical records and imaging, but also from collateral sources such as the plaintiff themselves or friends or relatives who were with them when the stroke happened. Because an expert may not have access to all of this critical information through the records alone it may be beneficial to create a set of factual assumptions to assist them in forming their opinion. Because their opinion may rise and fall on that factual foundation, these assumptions must be created meticulously, and it is necessary to consider each fact and ensure that it can be proven at trial. In *Hasan* the court emphasized that "Where an expert mingles admissible and inadmissible evidence, the weight to be attributed to that opinion will be directly related to the amount and quality of admissible evidence on which the expert relies."<sup>5</sup> This was in play in *Hasan* as the court noted that the defence experts did not have a correct understanding of the progression of the plaintiff's symptoms, which undermined their opinions both on the standard of care and on causation.<sup>6</sup>

### The Expert's Methodology

In weighing the expert opinions with respect to their review of the CT scans, the court considered the methodology employed by

**As illustrated in the *Hasan* judgement, starting with a blank slate gives the expert the best chance of arriving at an opinion that will be viewed by the court as helpful and unbiased.**



each expert to arrive at their conclusions.

Two of the plaintiff's experts approached their review of the imaging "blindly" meaning they did not have preconceived theories about what might have occurred. Although the court wasn't certain if the third plaintiff's expert followed that same approach, the judge was impressed with that expert's description of his process — he asked himself questions as he reviewed the imaging and matched up the imaging with the trajectory of the plaintiff's symptoms.<sup>7</sup>

In contrast, one of the defence experts, the neurologist Dr. Silver, developed a theory about what might have happened based on particular features on imaging of December 8, then set about to prove his theory. As a result, he overlooked two other critical features on the imaging. The approach taken by the defence's neuroradiologist, Dr. Krings, was also highlighted. Dr. Silver spoke with Dr. Krings and provided him with his theory of the case. The court did not suggest deliberate collusion, but was alive to the possibility of an unconscious or confirmation bias.<sup>8</sup>

The different methodology used by the experts for each side left the judge with greater confidence in the reliability of the plaintiff's experts' opinion. How you approach a potential expert at the beginning of your discussions with them has the potential to colour their approach to the case. As illustrated in the *Hasan* judgement, starting with a blank slate gives the expert the best chance of arriving at an opinion that will be viewed by the court as helpful and unbiased.

### Cross-Examination

Each of the experts in this case gave their evidence over three or four days and no doubt the cross-examination was grueling. The court contrasted the approaches taken by the causation experts for both sides.

The experts for the plaintiff gave their evidence in an objective, forthright and comprehensive manner. They made concessions in

cross-examination where it was warranted.<sup>9</sup> They provided explanations that were thorough, comprehensive and made common sense.<sup>10</sup> The court appreciated the evidence given by the plaintiff's standard of care expert, but noted that his finding that the defendant breached the standard of care was based principally on admissions made during the cross-examination of the defence expert, as well as some of the defendant's own testimony.

In commenting on the causation defence experts, the court noted that they did not mention a key feature on the imaging, the dissection in the left vertebral artery at the C5/C6 level (described by a plaintiff's expert as the "smoking gun") in their initial opinions, which raised doubt over the reliability of their opinions on causation.<sup>11</sup> One defence expert readily admitted that he had overlooked the dissection at the C5/C6 level<sup>12</sup> and when questioned further he was dismissive of the importance of it. One defence expert agreed that it would have been best if he had reported on that irregularity, but the court found that concession to be compromised by a sarcastic follow up comment.<sup>13</sup>

Preparing one's experts for cross-examination is a critical step in the preparation for trial, including what questions to expect and when and how to make concessions if appropriate. Although the demeanour of an expert in the witness box is not a factor to be considered when a court weighs conflicting expert evidence,<sup>14</sup> a reluctance to make concessions when warranted, and a retreat to sarcasm or dismissing the importance of key evidence has the potential to colour the courts' weighing of that evidence.

### Medical Literature: Bolster Expert Opinion

Medical literature often plays an important role in medical negligence cases and can be persuasive for both the standard of care and causation analysis.

If there are relevant recognized practice guidelines published by professional organizations, in peer-reviewed journals, or in text-



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books, these can be useful to bolster the standard of care case. In *Hasan*, the plaintiff's standard of care expert, Dr. Brankston, gave evidence on the appropriate approach to evaluating a patient with vertigo and other cranial nerve abnormalities. The court noted that the approach he described lined up with the guidance provided in a particular textbook.<sup>15</sup> It was especially helpful that the textbook was one accepted by the defendant and other expert physicians as an authoritative text and reference guide.

This alignment of the plaintiff's expert's opinion with the guidance provided by this accepted textbook not only gave added weight to the opinion, but also undermined the defence's urging that the expert's opinion should be rejected on the basis that he was not impartial, that he was biased and that his opinion was arrived at through the benefit of hindsight.<sup>16</sup>

## Medical Literature – Distinguish Your Client

It was nearly 30 years ago that the phrase “time is brain” was coined to recognize the importance of early treatment to improve the chance of recovery from stroke. In those early days of ischemic stroke therapy using tPA to dissolve the clot, the time window for the successful treatment was considered to be three hours from the onset of symptoms. Over the years that window has been extended up to four-and-a-half hours. More recently, head imaging

has been used to identify certain patterns of ischemia that are associated with a greater chance of neurological improvement even if reperfusion occurs more than 12 hours after the onset of symptoms. In addition, the literature has shown that optimal collateral circulation can positively affect outcomes, and that the location of the clot may also be relevant to the chance of successful recovery.<sup>17</sup> This information highlights the importance of ensuring that your experts consider the unique characteristics of your client and are prepared to distinguish them from the participants in studies that report aggregated data.

Mr. Hasan had very good collateral circulation, as mentioned earlier. Unfortunately for another plaintiff, Ms. Neelands, she did not. Although her case bears similarity to that of Mr. Hasan — minor symptoms culminating in a significant stroke — Ms. Neelands' lack of good collateral circulation contributed to the finding that earlier treatment would not have been of benefit to her.

In *Neelands*, the plaintiff was a 54-year-old woman who experienced symptoms of arm numbness a day and a half before her speech became garbled, and she fell onto the floor. She was taken to hospital by ambulance where a CT scan showed a right middle cerebral artery stroke. She was not treated with tPA. The expert for the defence noted that stroke specialists were moving away from the “time-based window for thrombolysis” to a “tissue-based window” using multimodal CT or MR imaging to guide decision making. In his view the plaintiff did not suffer the occlusion of the right middle cerebral artery until the time at which she fell to the floor and by the time the CT scan was done 1.5 hours later she had developed irreversible brain damage. Although that seems like a very short time to develop irreversible brain damage, he noted that the plaintiff did not have good collateral circulation which explained why her irreversible brain damage occurred so quickly. He opined that thrombolysis in that situation would have had a high risk of hemorrhage, and would not have been warranted.

In *Hasan*, the court was presented with medical literature to support the plaintiff's expert neurologists' opinion that Mr. Hasan had several unique characteristics that supported the theory that he would have had a successful outcome if treated late on December 3 or early in the morning of December 4. The studies relied on by the defence experts reviewed the likelihood of success of recanalization therapies but did not relate that data to Mr. Hasan's specific clinical presentation.<sup>18</sup> When a defence expert was confronted on cross-examination with the specific condition of the plaintiff on presentation to the hospital on December 3, he conceded that 73.8% of patients with the plaintiff's condition would have a good outcome following recanalization therapy.

The use of the medical literature in *Hasan* underscores the importance of understanding how study data and results are presented, and how your client's characteristics align with those studies. Data that is presented in terms of overall efficacy in a large cohort of study participants may not be reflective of your client. Working with your experts to ensure you understand the implications of the literature and how it relates to your client's situation can help you identify strategies to capitalize on, or minimize the impact of,

those characteristics.

## Conclusion

Certainly not all stroke cases can be won by the plaintiff, even with the most astute plaintiff's counsel and the best team of expert opinions. But *Hasan* provides an example of a case where plaintiff's counsel was able to present a complex case with the help of well-reasoned expert opinions and demonstrative aids. Through meticulous attention to every detail, they were able to unravel the defence opinions on cross-examination and arrive at a winning judgment. **W**

- 1 Hasan v. Trillium Health Centre Mississauga, 2022 ONSC 3988 (CanLII) at para 155, 156, 188, 191.
- 2 Hasan v. Trillium Health Centre Mississauga, supra at para 259.
- 3 Hasan v. Trillium Health Centre Mississauga, supra at para 153.
- 4 Hasan v. Trillium Health Centre Mississauga, supra at para 219.
- 5 Hasan v. Trillium Health Centre Mississauga, supra at para 73, "see Marchand, at paras. 60-61."
- 6 Hasan v. Trillium Health Centre Mississauga, supra at para 115, 252.
- 7 Hasan v. Trillium Health Centre Mississauga, supra at para 222.
- 8 Hasan v. Trillium Health Centre Mississauga, supra at para 224.
- 9 Hasan v. Trillium Health Centre Mississauga, supra at para 213.
- 10 Hasan v. Trillium Health Centre Mississauga, supra at para 227.
- 11 Hasan v. Trillium Health Centre Mississauga, supra at para 225.
- 12 Hasan v. Trillium Health Centre Mississauga, supra at para 229.
- 13 Hasan v. Trillium Health Centre Mississauga, supra at para 240.
- 14 Hasan v. Trillium Health Centre Mississauga, supra, see paras 70, 71 for a description of the factors to be considered.
- 15 In this case, Rosen's Emergency Medicine, (7th edition).
- 16 Hasan v. Trillium Health Centre Mississauga, supra at para 110, 112, 114.
- 17 Journal of Stroke and Cerebrovascular Diseases, Vol. 27, No. 8 (August), 2018; pp 2214-2227.
- 18 Hasan v. Trillium Health Centre Mississauga, supra at para 297.

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