

Medical Practitioners and the Litigation Process

Part One: *The Court and Tribunal System.*

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This paper will discuss issues relating to the preparations required for medical practitioners who are required to attend a particular court, tribunal or panel.¹

As a preliminary point, it is worth noting that there are essentially two kinds of court process. The terms “inquisitorial” and “adversarial” are sometimes used to distinguish between these two different forms of court process. The inquisitorial system is one where the role of the court is to “inquire” into the facts of a particular matter in order to reach a final judgment. This term is commonly used to describe the legal systems operating in continental European countries. The most significant instance of an inquisitorial court in an Australian context is that of the Coroner’s Courts of each state and territory.

The adversarial system on the other hand refers to a court process in which parties to a legal dispute bring competing claims before the court so that the court may decide the outcome having regard to the merits of the competing claims. The Australian common law system is often referred to as “adversarial”. This is because nearly all of the courts in our legal system operate in an adversarial manner.

An adversarial court process involves a carefully structured argument between competing parties. Each party to the dispute presents their most compelling evidence to the court, and in the most persuasive manner. At the same time, each party is given the opportunity to test the evidence put forward by the other. The court in such situations generally does not make any investigations of its’ own. This necessarily involves the process of examination, cross-examination and re-examination of witnesses. The technical “rules of evidence” regulate the conduct of this process.

The rules of evidence can be strict depending on the particular court and the relevant legislation that applies to the dispute. In most adversarial courts, the rules of evidence have a common theme: namely that a witness who is called by a party to the dispute may be examined and should not, under examination, be prompted in giving their evidence. An opposing party may cross-examine a witness called by the other side. The rules of evidence provide that the opposition should be allowed to prompt, cajole, insinuate and probe that witness.

By contrast, in the Coroners Court, where the inquisitorial process is adopted, the rules of evidence can be applied or excluded as the Coroner sees fit.² The Coroner is essentially charged with determining at an inquest the identity of the deceased, how the death occurred, and the cause of death in cases of suspicious circumstances.³ In doing this, the Coroner may be assisted by special counsel and has wide powers

of investigation and inquiry.⁴ Interested persons may, under the supervision and direction of the Coroner, attend an inquest and may examine or cross-examine witnesses or make submissions to the Coroner regarding the inquest.⁵

Medical Reports

As indicated above, the quality and utility of evidence provided by a party to legal proceedings can be either enhanced or compromised with respect to both its content and its presentation. Particularly with respect to adversarial legal proceedings, the impact of both of these aspects on the persuasiveness or otherwise of a given side’s argument should not be underestimated.

It cannot be stressed strongly enough that the basis of a medical practitioner’s preparation for a court attendance should be the provision of comprehensive, detailed and impartial medical reports. However, such reports must also be presented in such a manner to allow them to be of maximum utility to the proceedings in question.

The ill-considered, badly prepared medical report is an open invitation for harsh cross examination. Where ambiguity is evident on the face of the report, it will become necessary for the medical practitioner to attend court to explain the shortcomings of that report. This opens the door for the practitioner, rather than the report to become the focus of examination and cross-examination.

Put another way a medical practitioner can avoid having to go to court where a medical report is adequate for the purposes of the legal proceeding. Firstly the medical report must be properly prepared, in that its opinions must be soundly based and the views expressed within it must be clear and unambiguous. It is only when the views expressed within a medical report are unclear that clarification must be sought and the medical practitioner called to provide further information. Of course even when the report is clear a medical practitioner may be called as a witness, but the potential for problems of interpretation to arise is lessened.

Confidentiality and Court Cases

It is relevant here to explain that whilst the court in an adversarial process does not generally make any investigations of its own accord, there are rules and procedures that allow some courts to obtain information through subpoena which may threaten the relationship of confidentiality which a medical practitioner holds with their patient. It is well recognised that the relationship of patient and medical practitioner is one of trust and confidence and that a medical practitioner

should not divulge (unless with the consent of the patient) any information to third parties in relation to that patient. This rule is not inconsistent with a medical practitioner providing a medical report to the patients' solicitor or insurer where the patient has authorised the giving of that report.

There are however, frequently recorded on the medical practitioner's notes and files other matters which the medical practitioner may regard as confidential. Whilst there is a relationship of trust and confidence as between the patient and the medical practitioner, this relationship is not recognised as being a relationship of privilege for the purposes of courts. In other words, the ethical duty of confidence between medical practitioner and patient does not overrule or exclude the jurisdiction of the court.

In common law jurisdictions the relationship of legal professional privilege may attach to that of the lawyer and client, such that any information that passes between those parties cannot or should not be divulged to the court. By contrast, it is open to the court to demand from a medical practitioner any information passing between the medical practitioner and the patient that is relevant, even though the medical practitioner or patient may consider the information to be confidential.

It follows that in preparing for court proceedings, a medical practitioner should be ready to give evidence about any matter that has passed between themselves and their patient. It is therefore incumbent upon the medical practitioner to bring to court all notes, papers, files and documents that in any way relate to the relationship between the medical practitioner and the patient.

Preparing to Give Evidence – Some Hints

The medical practitioner need not rely on their memory in giving evidence. A medical practitioner is entitled to make use of notes for a number of reasons. In the first place it may simply be to refresh the medical practitioner's memory of facts and circumstances. It may be that they wish to recall matters of referral or extraneous reports from other medical practitioners. All this is permissible. It is also good practice for the medical practitioner to refresh their memory from their notes before the court hearing. Of course all this presupposes that the medical practitioner has been given sufficient notice of the likelihood of their attendance at court.

Unfortunately some lawyers fail to alert medical practitioners to the possibility of a court appearance until only a short period beforehand. This leaves the medical practitioner little time to prepare.

There is no reason why the medical practitioner cannot discuss the implications of the case with the lawyer who has requested their attendance at court. In the event that a medical practitioner is invited or instructed to attend court, it is open to them to contact the lawyers to discuss the case with them and to elicit the kind of questions that they are likely to be asked in court. It is wise to refrain from rehearsing answers

or discussing outcomes. However, it may be fruitful to discuss the issues at stake as between the parties. If sufficient time is available, it may also be prudent to request that the patient be reviewed prior to the hearing so that the evidence is fresh.

In some cases, a medical practitioner is only requested to attend court for the purposes of giving case history. That is particularly so in the case of general practitioners who, whilst making a provisional diagnosis, have relied upon a specialist practitioner to provide a definitive diagnosis and recommendations as to treatment.

In those cases, the general practitioner's evidence is usually limited to clarifying the history obtained from the patient, and giving details of the number of attendances for treatment and like matters. In such situations, it is absolutely crucial that the general practitioner be prepared to give details of the number of attendances for consultation, the nature of referrals and the types of medication prescribed. In each case, the medical practitioner should be prepared to supply information of their observations at the time of consultation.

As only about five percent of all disputed cases actually get to court, the vast bulk of cases are either settled in some other way. In a sense this means that a large number of medical reports are prepared that do not end up as exhibits before a court.

Nevertheless, where a medical practitioner becomes aware that there is some possibility of litigation or that there is some compensation claimed as a consequence of a work injury, special attention should be paid to the preparation of their report. Such features as the history of the accident and particular observations made about the patient's condition when each consultation is made are essential. In a sense, there is no reason why this rigorous style of note-taking should not be automatic in the case of every patient, but it is particularly pertinent in the case of work injury cases.⁶

A medical practitioner can be compelled by subpoena to come to court. In most jurisdictions there are arrangements between medical bodies and legal bodies so that it is not necessary to issue a subpoena. Under these arrangements it is customary for a lawyer to notify the medical practitioner by letter of the likelihood of a court appearance. If the medical practitioner indicates they are unwilling to attend court, only then is it appropriate for a subpoena to be directed to the practitioner compelling them to attend.

A medical practitioner who on receipt of advice that a court case is likely, should contact the lawyer to discuss the case and to make arrangements for attendance at a convenient time. In most courts it is well recognised that medical practitioners have considerable commitments and courts are willing to make reasonable efforts to accommodate the attendance of expert medical witnesses. For example, in the case of orthopaedic surgeons or neurosurgeons, it is recognised that they will be engaged in operative treatment and that their availability for

court may not be very flexible. In such a situation, with proper notice the lawyer can arrange for attendance of the medical practitioner at a time convenient to that practitioner. The key here is, remembering that the power of compulsion resides with the court, to be proactive and contact the lawyer at the first instance and not to wait until the lawyer contacts the medical practitioner a short period before the matter is due to be heard.

It may assist the medical practitioner's preparation for the court hearing to know which other medical witnesses will be called, and whether their medical reports are available for consideration beforehand. It is reasonable to request the lawyer to provide copies of any other relevant report for your consideration. For instance, general practitioners who are aware that a patient has been referred to a specialist should request copies of those reports if they do not have them. This will help prevent being taken by surprise at court during cross-examination. There is however, no formal rule of procedure that requires a lawyer to provide a complete background of the case to a medical practitioner.

If the aetiology of a medical condition is doubtful, there is no reason why the practitioner cannot consult with eminent medical texts in preparation for a case. Of course, if this is the case, the most recent edition of those texts should be used. Recent articles from eminent journals are obviously an appropriate source of additional background material.

Medical Practitioners as Expert Witnesses

An "expert" has been defined by the Shorter Oxford Dictionary as: "One whose special knowledge or skill causes him to be an authority; a specialist."

For the purposes of court proceedings there are two considerations when an expert witness is called upon to give evidence. First, whether the witness is giving evidence in a field of expertise which is sufficiently organised as a branch of science or knowledge? In the case of allopathic medicine, this branch of science and knowledge has been recognised by the courts for many centuries. It may be however, that other fields of alternative medicine are not so well recognised. In such cases, there will be a threshold issue for determination by the court before a witness can accurately be described as "expert". The second consideration is whether the witness is a person who has sufficient knowledge of the particular field of science or knowledge? This aspect goes to the quality, or the relevance of the expert.

Given that one of the issues before the court is whether the witness is actually an expert in the field in question, it follows that the first issue about which an expert witness will be examined, and subsequently cross-examined, in giving testimony is as to their qualifications. In some cases the qualifications of the medical practitioner need not be extensively stated. In a case involving motor vehicle injuries where the patient has sustained a broken leg or arm there would be little doubt that

an orthopaedic surgeon would be capable of giving evidence on those issues. By contrast it may be that qualifications of an expert in a case involving mesothelioma or asbestosis would require some examination.

The key issue in relation to expert evidence of a medical practitioner is whether that witness is entitled to express an opinion.⁷ It is not generally the case that a witness is entitled to express an opinion in court but a key exception to this applies to an expert medical practitioner.

A medical practitioner who has given evidence in court a number of times may be in the comfortable position of having their qualifications already recognised by the court prior to them giving evidence. A practitioner who is new to a jurisdiction may find that there is considerable questioning as to their expertise.

To be prepared, an expert should be able to adduce evidence as to their qualifications, including the degrees obtained, fellowships held and other studies undertaken. If they have undertaken a particular area of study or research, then this should be drawn to the court's attention. It may be useful to have on hand a short summary of qualifications so that this can be tendered to the court at the time of the hearing. In addition, relevant experience is an important factor in determining whether an individual is an expert witness.⁸ A history of the medical practitioner's relevant experience should therefore be included with any statement of qualifications.

The Hypothetical Question

It is frequently the case that an expert is asked to comment upon hypothetical circumstances. This usually arises because there is some divergence as to the basis upon which opinions have been expressed. The court must therefore inform itself of the competing alternative perspectives. The classic hypothetical question follows a typical format. The expert witness is given a statement of facts and is then asked a series of questions

"On the basis of the history I gave you and of your description of the disease/injury/condition what is your opinion of the connection between A and B?" or

"What is your opinion of the applicant's capacity for work?"

"Now that you have been presented with a version of the facts different to that which the worker has given does that change your opinion as to the origins of the disease/injury etc?"

Because a medical expert is allowed to express an opinion, this kind of question is permissible. Therefore a witness who is to give evidence of opinion should expect that they will be asked to comment on alternative sets of circumstances.

In preparation for this, the expert medical witness in a personal injury type case would do well to check whether there is any conflicting evidence as to the circumstances surrounding

the accident, or the evolution of the condition that forms the subject of the litigation. For example, it may be that there is some evidence that a worker fell from a height of one metre, whilst there is other evidence that the worker fell from a lesser height. In such a situation it may be that the expert medical witness is asked to express an opinion on the effect of a fall from different heights.

Cross-Examination Of Expert Medical Witnesses

In John Mortimer's "Rumpole's Returns" the great warrior advocate expresses his apprehension in putting his client into the witness box for cross-examination and examination.

In a way, cross-examination is the easiest part of the defending barrister's job. You have the sword, the red tape to swing in the hope of exciting blind and intemperate anger, and, unless you slip on a pile of horseshit and get gored to death, you may hope to be in some sort of control of the situation.

When you call your own client to give evidence in his own defence, however, the matter is entirely different. Out there in the witness box he is, for all practical purposes, beyond your help. You can't lead him, or put words into his mouth. For the first time in a trial he must tell his own story and in his own way, and all you can do is guide him towards the main points at issue and then lead him to sink or swim on his own.

The expert medical witness is called to give opinion evidence. That is, to express an opinion as to whether or not the symptoms elicited on examination correlate with the history of an accident that has been obtained. Is the worker fit to return to work? How long it will be before the worker recovers from an operation recently performed? Is there some other matter that cannot be stated as a matter of fact, but which requires some application of theory and practical skills to a past event or future prediction. There are of course a host of other matters that may require the expert medical witness to express an opinion.

What Is Cross-Examination?

A party who calls a witness to court is, generally speaking, not entitled to cross examine that witness. The witness called can only be "examined" by the party calling that witness. Examination of a witness prohibits the use of "leading" questions¹⁰ and generally, any request for an opinion or advice on hypothetical matters from that witness. A witness who is under examination by the party calling them would not expect to have propositions put to them, but would be asked to recall the facts and circumstances of a matter with as little prompting as possible.

By contrast, the process of cross-examination arises where the witness is subject to questioning by the party who has not called them. Cross-examination allows propositions to be put to the witness for comment, for leading questions to be put to the witness and generally for the witness to be required to comment only on the matters asked. In cross-examination a

limitation is usually put on the witness if the witness attempts to elucidate an answer.¹¹

It has been said that cross examination can follow three forms namely; probing; insinuation; and confrontation.

A probing question is one that is designed to elicit information and to tie the witness down to a specific account of the circumstances. It is characteristic of this type of questioning that they are short, pointed questions which make the witness answer with precision, so that they cannot avoid, qualify or complicate the question. The next type of questioning is insinuation. With the insinuation technique it quite often hardly matters what the answers to the questions are. The purpose is often to put a proposition to the witness in an attempt to get the witness to agree or to infer that in some way the witness is mistaken. Finally the confrontation style of cross examination is the presentation to the witness of an alternative version of the facts.

Cross-Examination of Medical Witnesses

It is worth remembering that in law there is no property in a witness. This means that there is nothing to prevent an expert medical witness being approached by either party to the litigation. It is generally regarded that as a courtesy, either side should be advised that the medical practitioner will be consulted.

As to medical witnesses, it is said that there are essentially two methods of cross-examining. The first is to discredit the witness and the second is to, as far as possible, establish an alternative interpretation of the facts upon which the expert opinion is based.

It is rare that a medical practitioner would be subjected to cross-examination in the form of probing, insinuation or confrontation unless the credibility of the medical practitioner was severely put in issue. For the most part, a medical practitioner is called to court to give opinion evidence. As already noted, it is a general rule of evidence that opinions not be given by witnesses unless they are established to be experts.

A witness will usually be called to give evidence of facts or matters that they have seen or heard. An opinion may be an expression of a view based on matters of fact but may not be capable of proof in a strict sense. Often they involve predictions or reconstruction or events.

Having noted that it is rare for medical practitioners to be cross-examined, there are four reasons why an expert could be cross-examined.

First, it may be that the credibility of the witness will be challenged, perhaps as to the witness's qualifications or generally as to whether or not they are impartial. Second, it may be that cross-examination should take place so as to destroy the evidence of another witness. Third, cross-examination can be used to elicit facts that may be used to cross-examine other

witnesses. Finally cross-examination may be used to attempt to obtain evidence favourable to the party seeking to cross-examine. The option is always open for cross-examination not to take place. A party who chooses not to cross-examine presumably does so because none of the four matters detailed above could be achieved.

The thrust of the cross examination in most cases is to test the reliability of the opinion expressed. All expert witness must state clearly the basis upon which their opinion is based, whether this is derived by assumption, or medical histories. A failure to do this exposes the opinion to being rendered inadmissible.¹² Frequently the reliability of the opinion expressed will depend upon the accuracy of the history obtained from the patient and the thoroughness of the physical examination.

In relation to history obtained from the injured person, it is essential that prior to coming to court the expert medical witness should establish the precise history of the injuries. If an opinion is based upon the subjective history of the patient only, then this point should be expressed in the medical reports and made clear in examination. If the opinion is based on the history given by the patient and supported by extraneous material (such as witness statements and other reports) then again that should be detailed in the report so that this is clear in examination. These steps will avoid the possibility of cross-examination as to whether or not the opinion is based on the history of the patient or some other material.

It is always important to detail in medical reports the circumstances involved in the accident that forms the subject of the litigation. Where those details are obtained from extraneous material this should be stated in the reports. Stating clearly the source of any information used to form an opinion proffered in a report reduces the prospect that the opinion will be attacked as unsupported.

In some cases, the opinion of an expert medical witness will be impugned on the basis of the frequency (or lack thereof) that the patient has been examined. It is often argued that a report based on only one or two examinations of the patient should be given less weight than a report that describes a relationship involving frequent examinations. This may not necessarily be so where a properly supported opinion may be sustainable regardless of the frequency of contact with the patient.

Cross-examination may take place as to diagnostic procedures. In order to avoid embarrassment during cross-examination, it is best to be totally frank about what these procedures were.

Consider the evidence of the fictitious Professor Ackerman. Professor Ackerman was apparently a most distinguished Pathologist. He had been associated with death in various forms. His reputation in the courts was such that he was treated as infallible by judges. His word on bloodstains or bruises or marks of strangulation was accepted as Holy Writ in the courts. In one particular case recounted by John Mortimer, when he was cross examined by the learned Horace Rumpole, he re-

sponded thus;

Rumpole: Consider it now, Professor. I beg of you! The various constituents of blood stains fade in time, don't they?

Professor Ackerman: Yes, they do.

Rumpole: And blood becomes more difficult to classify.

Professor Ackerman: I would say, less easy.

Rumpole: Less easy, thank you. But the constituents don't fade evenly do they? Some factors may vanish before others.

Professor Ackerman: It is possible.

Rumpole: You found my client's blood was A. Canter's was O. After that finding you didn't do more tests to break down the classification further?

Professor Ackerman: No. The situation seemed perfectly simple.

In this case Rumpole used a series of probing questions rather than confrontation but led Professor Ackerman to the position where the tests undertaken by him were shown to be insufficient, just as a failure to use recognised techniques might also be the subject of cross-examination.

Sometimes the vulnerability of an expert medical witness is tested by questions as to the number of occasions that they have seen the witness and by whom they were engaged to prepare the medical report eventuating from review of the patient. In other words, the reasons for preparing the report may be subject to cross-examination.

Questions as to whether or not the patient was treated may also be the subject of cross-examination. Often the expert medical witness may be asked whether they were in the habit of preparing reports for insurers, trade unions or solicitors who habitually act only for particular groups. If the worker was illiterate or had a different language to the examining medical practitioner, was there an interpreter present at the time of the interview? The important point here is that the nature of the evidence of an expert medical witness should be impartial and balanced.

Above all else, the best protection from adverse consequences under cross-examination is preparation. In the first place, this involves the preparation of comprehensive reports. Secondly, the medical practitioner's personal preparation for court. There is no reason why an expert medical witness cannot consult the parties involved prior to the hearing so as to apprise themselves of the kinds of questions that are likely to be asked. Of course it is well to remember that one party may have no intention of revealing the nature of their cross-examination strategy.

Expert medical witnesses should beware of attempting to cover all circumstances on the one hand and being too categorical in evidence on the other. If medical texts have been referred to that the expert medical witness is not familiar with, this should be admitted immediately. If a particular author is known, but the works of that author are unfamiliar, then this should be

expressed in evidence.

Expert medical witnesses should not feel constrained in expressing a view on the credibility of the patient if this effects the assessment and diagnosis. If the patient is found to be inconsistent, then this should be so indicated. The facts and circumstances surrounding a patients' workplace should be ascertained if this is relevant.

A medical practitioner should be careful not to presume that they are familiar with the requirements of a specific job within a specific workplace context unless they have made careful enquiry in each individual situation. Formal job descriptions are obviously a good starting point, however these should not be regarded as conclusive of the actual requirements of a particular job. The duties that the patient actually performs on a regular basis should be taken into account.

Medical practitioners may be presented with conflicting versions of job requirements. Whichever version of the duty statement is relied upon as the basis of recommendations in medical reports should be clearly stated in those reports. Opinions should not be expressed in court or in medical reports if they are unsupported by available material. Above all else the expert medical witness is always best advised to respond, "I don't know," where this is warranted.

Endnotes and references

¹ Hereinafter referred to as the "court".

² Eg *Coroners Act 1996* (WA) s 41.

³ Eg *Coroners Act 1996* (WA) ss 23 and 25.

⁴ Eg *Coroners Act 1996* (WA) s 46.

⁵ Eg *Coroners Act 1996* (WA) s 44.

⁶ Special attention should be given to the leading judgment of Rolfe AJ in the Western Australian Supreme Court Full Bench decision in *Re Croser; ex parte Rutherford & Anor* [2003] WASCA 8 at 19-21. Note in particular his Honour's observations at 20 that medical reports might be open to criticism on the basis of "the sufficiency of the history given to the doctor providing each report by the worker; the extent to which, if at all, the doctor has examined the worker and what the doctor has ascertained from that examination; whether the doctor has overlooked some matter ... and whether the views expressed by the doctor accord with a respected body of medical opinion."

⁷ *R v Turner* [1975] QB 834 at 841 "An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury"; Affirmed *Murphy v R* (1989) 167 CLR 94.

⁸ *Weal v Bottom* (1966) 40 ALJR 436.

⁹ This question is explored in depth in Ehrlich, JW (1970) "The Lost Art of Cross-Examination; or Perjury Anyone?" Barnes & Noble Inc, New York.

¹⁰ Ie: A question that suggests its own answer.

¹¹ The witness is usually given this opportunity in re-examination.

¹² *Arnotts Ltd v Trade Practices Commission* (1990) 97 ALR 555.