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# MEDICO-LEGAL SOCIETY OF NSW INC.

## SCIENTIFIC MEETING

## WEDNESDAY, 15 NOVEMBER 2017

## AT 6.15 P.M.

## THE TOPIC:

## PITFALLS OF AN EXPERT?

**SPEAKERS: MS KYLIE AGLAND**
**DR LISA BROWN**

**DR DAVID GRONOW:** My name is David Gronow. I am the Chair tonight, as Keely gives her apologies. The topic tonight is Pitfalls of an Expert. I can see we only have experts in the audience.

We have two speakers who are addressing us tonight. The first speaker will be Kylie Agland, who is a partner of TressCox Lawyers in the Health and Aged Care Division. Kylie has more than 18 years' experience as a health industry lawyer and acting on behalf of doctors.

Her primary expertise is in medical defence litigation. Kyle specialises in Supreme Court litigation involving major claims. She has expertise in cases involving obstetric management, cancer, infectious diseases and neurological injury.

She also assists medical practitioners in dealing with complaints and coronial inquests. Kylie has been selected for inclusion in the Best Lawyers Australia for Medical Negligence in Sydney for the last five years. Please, welcome Kylie.

**MS KYLIE AGLAND:** Thank you for inviting me to speak this evening. I'm going to look at the pitfalls of being an expert specifically from a lawyer's perspective. Obviously, I'm a defendant lawyer, so I come from that perspective to look at the topic.

This evening's presentation will cover qualifying an expert, briefing an expert, writing an admissible report, conclaves, joint reports concurrent evidence and what some of the implications for giving expert evidence might be.

To start with, we pick an expert. Who do we qualify? First thing is obviously expertise, as we're looking for the expert who has got the right expertise to fit the right case, but sometimes it's a bit more than that.

Sometimes we're looking for the expert who can write the best report, and given that most matters settle and never make the Court room, writing a report is really critical. So, picking an expert who can write a very good report is something that factors into our decision-making.

We might also be considering an expert who can participate in a conclave, so are therefore looking at who the

plaintiff's experts are and trying to pick somebody who will work well in that conclave situation or we are looking for an expert who can give evidence well in Court.

So, it's combination of all of those things that comes into how we pick the actual expert we'll ultimately use.

One of the questions I quite often get when we start qualifying experts, is when I ring up an expert, or send them some material and then they'll ring me back and say, "I've already done a report on this matter, is it a conflict, can I do the report?"

My answer to that generally is there is no property in a witness, so no particular party owns any expert. Any expert can provide a report at any time in the proceedings but the information that that the expert has been provided by the other party remains privileged and confidential.

My usual spiel to an expert in that situation is: If you feel comfortable, if you feel that you can provide expert evidence based on the material I give you - only the material I give you - then it's a matter for you.

There are other considerations in terms of referrers and things like that, business decisions as to whether they will choose to go ahead, but strictly it's not a conflict because nobody owns any particular expert.

The other issue where we see some conflict arising when we're picking an expert, is in relation to the really sub-specialised areas where everybody knows everybody. You pick an expert and contact them, and they'll say: I know Dr So-and-so. My standard spiel on that tends to be: Did you train them? Do you know their children's names, and have they been to your house?

Those questions tend to be a good guide as to whether the relationship is too close or not, but again ultimately, it's a matter for the expert to decide. We guide them, and we give them those sorts of parameters to work with and consider, but ultimately, it's a matter for them as to whether they think they can be objective about the matter or not.

A particular English decision on this issue involves Dr Charles Barker. In that instance the expert had trained the defendant for seven years and that wasn't disclosed at any point until he'd been cross-examined for a number of days, and then it came out as part of the cross-examination.

What the Court said was that the role of mentor is such a lasting bond, that it's really difficult for an expert to be impartial and objective when they've got that bond.

The Court was really critical that it wasn't disclosed. It wasn't so much that he should have declined, but it should have been disclosed.

I think that's a really critical point for experts, that if you're a little bit marginally uncomfortable with something, disclose it at least.

When we qualify experts - and this isn't such an issue for defendants, but for plaintiffs, quite often they'll ask a treating doctor to provide an expert opinion and it becomes a really difficult situation that the expert is then put in, because on one hand they're the treating doctor trying to do the very best they can for their patient, but on the other hand, they have to be objective for the Court's benefit and they may have to say things that don't necessarily help advance their patient's position.

There was a Western Australian decision of *Jordan v Lee.* In that case the Court determined that the treating neurosurgeon was not able to provide objective evidence, as the neurosurgeon allowed his passion and subjective involvement in the plaintiff's treatment to impair his objectivity and impartiality.

When we qualify experts, what do we give the experts? Lisa and I were talking about this one and she asked: How do you pick what you give us and what you don't give us?

The starting point is that everything that a lawyer gives an expert is discoverable. We waive privilege over it when we give it to an expert, so that affects the information that is or isn't given.

The big item that really varies is probably whether as an expert you get given the plaintiff's or the opposing side's expert reports. There tends to be two schools of thought. One is you don't hand those reports over, because you want your own expert to form their own independent view, unbiased by what other people might say about the facts of the matter.

The alternative view, which is one that I generally tend to adopt, is that I prefer to hand it over because the process of expert evidence now is now so much one of engagement. It's one of conclaves and concurrent evidence. The whole

role of an expert is to engage with an opposing expert's opinion.

My view is that I prefer to hand it over originally and have that engagement with them from the very first time that they start to consider the matter.

But there are different views and different tactics taken in different matters. Sometimes you'll get an expert who'll get the other reports, sometimes they won't.

The other thing we do sometimes in qualifying experts is try to obtain a blind report. It's trying to remove that hindsight bias where you know the outcome. It's difficult. Obviously, the expert knows the information is coming from a lawyer and everyone wants to be a little bit smart and be able to pick the problem before everybody else would.

So, we use it sometimes where we're trying to disguise the diagnosis. It might be a clinical record and we say, have a look at this consultation, what do you think, but they don't know the diagnosis. Quite often in radiology cases we hand over some radiology and say report on it, as you would in the course of normal business.

I have had experts be a little upset by briefings in that way, because they felt that I was trying to trick them out. So, they would say, yes that consultation looks completely fine. Then I would write a letter back saying thanks so much for your report, now for your reference they actually had meningococcal and nobody diagnosed it. They get very offended and think "you've tricked me", because if I had of known that, I would have said a whole range of different things. But that's exactly the problem.

If an expert is ever instructed in that way, it's not intended to trick them out, it's trying the best we can to remove that hindsight bias.

Once you've been qualified and briefed, you need to write a report, and it's critical the report be in an admissible form, otherwise it's of no value to any of the parties or the Court.

As a general rule, opinion evidence is not admissible, but the exception is for expert evidence. You must be an expert in the field that you're writing the report in, otherwise it's not admissible opinion evidence.

The High Court decision of Dasreef Pty Limited v Hawchar sets out the admissibility requirements, so it's generally that the report has got to go to the issue of the proceedings, the expert must have specialised knowledge and the opinion they give must be based on that specialised knowledge. Most experts are able to write reports that comply with that requirement.

Given that your report is not admissible if you're not an expert, experts are to make sure that they are an expert in the area that they're writing in. That's probably the first thing to make sure the report is admissible.

This is a TressCox case this one, *Morocz v Marshman*. In that matter we had six plaintiff reports ruled inadmissible because the case was about endoscopic thoracic sympathectomy and none of the experts had any experience in performing that procedure and some weren't even medically trained.

Again, they are never going to be admissible reports because they're not experts and therefore they don't fall within the exception of the opinion rule.

An admissible report needs to comply with and refer to the Code of Conduct. The Code of Conduct is the paramount duty that you have to the Court. Anyone who is giving any sort of expert evidence will be really well aware of that Code, and you've got to refer to the Code.

I think that there's an advantage, if you're doing quite a lot of expert reports, to have some sort of template that you start with that's got the "I have read and agree to be bound by the Expert Code" to make sure you don't miss it, because it's so important that it's there if you don't want to undermine the credibility of the report and even the admissibility of the report.

In terms of admissible supplementary reports, as lawyers, you get nervous about them. The reason we get nervous is because if we served an expert's first report, we're compelled to serve any supplementary report; we have no option in it.

So, quite often, we will approach experts in relation to supplementary issues verbally. That is where, as experts, you may get those letters saying here's some information, have a chat about it. That's why we try and get those supplementary reports in that manner.

There was a recent decision in 2016, where immediately right before the trial the plaintiff underwent an x-ray, the x-ray was sent to the expert, but it was sent with a covering email saying, “Attached x-ray done today for Teneale. Only rely on it if it helps us.”

The Court was obviously most unhappy, particularly with the solicitor, because that’s clearly not the best way to qualify your experts and the expert really can’t do that. If they’re complying with the Code, they can’t have a look at an x-ray and respond that it doesn’t really help us and disregard it and pretend it doesn’t exist. It’s clearly not complying with the Code to simply follow that solicitor’s instructions.

Another item required in an expert report, is that if there is a contingency fee arrangement, you need to disclose that in the report. I have never seen it disclosed in a report. I don’t know if that means because really there aren’t contingency arrangements going on, or if people aren’t aware of the rule.

Failure to do so doesn’t make a report inadmissible; it may go to weight, but as an expert there is an obligation to disclose if there is a contingency arrangement in place.

Once you’ve written a report that is admissible, as an expert, the next stage in the process will be conclaves and joint reports. This is now covered by Practice Notes in the Supreme Court and the District Court. You can argue there are special circumstances but by and large everything will be dealt with evidentiary-wise on this basis.

Before we can organise conclaves, the lawyers need to agree upon what the conclave groups will be. There is generally a bit of arguing about how we group the experts together. We’ve got some case law guidance which makes it clear as to how we should go about grouping the experts together for conclaves.

In the decision of *Avery v Flood*, the plaintiff wanted all the experts together on every issue in one conclave and the defendant wanted a breach conclave and a causation conclave. What the Court said is that generally if an expert has expressed an opinion on an issue, they should be involved in that conclave.

This decision is where we start to see decisions coming about the principle that conclaves should work on an issues-based parameter. The issue is what determines who participates in a conclave.

Following that decision was *Porter v Le*, and again, it was the argument about whether there should be a breach conclave and a causation conclave, but then there was the suggestion of holding all these other sub-conclaves.

What the Court said was no, you put your experts all together addressing the same issues. You may have a conclave with a radiologist, neurosurgeon and urologist, all with different specialities but all addressing the issue of causation.

What the Court said in that case is that the expectation is that experts in that scenario would comply with the Code and they will refrain from commenting upon issues that are outside their expertise.

For an expert in that situation, the expectation is there may be some questions in the agreed questions for the conclave that you will refrain from answering or that you will defer to other people who are in the conclave who have expertise in that area. Again, we see it's an issue-based process.

Then, after we agree on the groups, we need to agree on the questions. This was another issue Lisa raised with me, that as experts you get these questions the day before the conclave, why does that happen? Because we're lawyers, and we can't agree on anything is primarily why.

Again, we've got some guidance as to the way in which we should go about addressing these questions. *John v Hensen* made it clear that the questions shouldn't be intended for a yes or no answer. In professional negligence matters, that's not sufficient to deal with the issues. They should be simple, they should be open-ended and again, deal with the issues in the proceedings. Again, it's an issue-based approach to the conclave.

That conclaves are all issues-based; that's the driving message that the Court gives us about how we should approach them of who we group together and the questions that are put to the experts.

Then if you get through the conclaves and your joint report, and you end up in Court, it's concurrent evidence or the "hot tub", as it's referred to. That again is now the practice in both the Supreme Court and the District Court.

Given that this is, for many of us, an entire new way in which evidence is dealt with, it's really interesting to

look at the dynamics of how some of this plays out within a particular matter.

A paper was published on the Kilmore East bushfire proceedings, which was the largest class action in Victoria and after the litigation was finished, they went and interviewed all the experts who had been involved in the conclave process to get some feedback from them and make these sorts of analyses as to how the conclave process works.

There were 40 experts, multiple conclaves and concurrent evidence that ran for days at a time. One of the experts explained that he was very strategic about when he questioned other experts. He used the questions only when he knew the outcome and he used them to emphasise a particular point.

So, you see this real advocacy skill coming through in the experts, which follows on that if the expert has a competitive personality, any rules of engagement will be used. You see this position where it used to be the barrister who controls things; a barrister never asks a question that they don't know the answer to, they ask the question to make the point.

The experts themselves, in this instance, start to step into that role, which is a whole new dynamic.

But it's reassuring to know that despite all of that, the overwhelming conclusion was that the experts who came across best were the ones that were on top of their science. Personalities didn't factor into it, the experts shone through the process.

Another really interesting thing that came out of that particular hearing, and it may be somewhat specific to that hearing, was because it went on for such a long time, there were so many experts involved and they were giving evidence over such a long period of time, and they were quarantined from the lawyers, so they really didn't have anyone to rely upon except themselves and that's where they supported each other through the process, which in theory sounds really nice, but some of the experts met outside of Court. They shared stories and technical discussions over a bottle of red wine or two.

They continued to have contact with each other and that resulted in people changing their opinions on some topics, being more ready to defend or reinforce opinions on work that they had not contributed to or shown an interest in or

previous opinion. I thought it was not entirely innocent. Some people were working the social play for influence.

Again, you see this different dynamic between experts that we may not have predicted. Again, this is a particular circumstance, but you can see if you're all out at Walgett for a number of days and caught there, that there's clearly that opportunity.

I think as an expert, it's something to be wary of in terms of the way you interact with the other experts that you are there with.

Once you have given evidence, is that the end of the story? Potentially not. There are some possible implications that can arise from giving expert evidence.

As a general rule, experts have immunity from suit and that's on the understanding that their primary responsibility is to the Court, not to the party who retains them. You can't just sue their expert because they changed their mind during the trial and your whole case falls apart.

There was a High Court decision last year which looked at advocate's immunity. Barristers are generally immune for things that they say in Court and generally, it follows as well that experts share the same immunity.

That decision in the High Court confirmed that the immunity exists, but it did narrow it. What it said was that it doesn't usually extend to negligent advice which leads to settlement of the case by agreement between the parties in relation to advocate's immunity.

I guess the question that sits out there is does that also apply in relation to expert immunity, and given that the majority of cases do settle, you're fitting within that 'negligent advice' that leads to the settlement of the case. In some circumstances, that immunity might be challenged in the future. At the moment there's nothing on it, but it's certainly there and the door is open this much for somebody to step through.

While there's immunity in relation to suit, there is no immunity from disciplinary proceedings arising from the giving of expert evidence.

An English decision *Pool v The General Medical Council* involved a psychiatrist who didn't make it clear what his

actual sub-specialty was, and he was giving repeated expert evidence in matters in which he was not really an expert.

He was ordered not to act as an expert witness for a period of three months. The restriction imposed upon him affected only his practice as an expert witness.

There was a really high-profile matter of Dr Squier. She is a leading paediatric neuropathologist. She gave evidence in criminal cases involving shaken baby syndrome, and it was found that her evidence was either misleading or dishonest at one level or that she lacked objectivity and was not unbiased in the opinion she was giving.

She initially got struck off completely and deregistered, then appealed. Conditions were then imposed that for three years she was unable to give expert evidence in proceedings. Again, the penalty affected her ability to give expert evidence, but she could still continue to practice though.

However, the matter of Mustac, is a Western Australian decision, again involving a psychiatrist. He was giving evidence and was misusing testing methods for purposes for which they were not approved or recognised.

He was suspended from practice for six months, so, his entire ability to practice was suspended as a result of expert evidence. That's beyond the English decisions, which all tend to focus on 'you can't write expert reports'. In that particular decision, you now can't practice potentially.

Another potential implication from giving expert evidence is costs. Again, it's an English decision Phillips v Symes, but the psychiatrists had given some evidence and they disregarded their duties to the Court, and as a result of that had caused significant expense to be incurred in the proceedings. The Court ordered that the experts were to pay some of the costs associated with the proceedings.

Again, it's an English decision, we haven't seen that here but within our Court rules there is certainly provision for personal costs orders against solicitors who unnecessarily incur costs and delay proceedings. Again, potentially that door could be open for experts. It is not currently, but that's certainly an area where there could be potential exposure.

In conclusion, to avoid the pitfalls, stay within your expertise; that paramount duty to the Court is absolutely paramount and trumps every other duty that you might have.

The report you write is of no value if it's not admissible, so you need to ensure that it's in admissible form and conclaves and concurrent evidence have changed the whole landscape of expert evidence.

I think we, as lawyers and as experts, all need to adapt to that process and be aware where the pitfalls are within that process.

**DR DAVID GRONOW:** I would now like to welcome Dr Lisa Brown, who is a clinical forensic psychiatrist who has been qualified since 1993. She currently works in private practice and holds an academic position as senior lecturer at the University of Sydney.

With the support of the NSW Institute of Psychiatry, Dr Brown undertook research into the association between sexual abuse and eating disorders and the development of clinical interest in the treatment of post-traumatic stress disorder and dissociation.

She has been working as a visiting medical officer to the Silverwater Women's Correctional Centre for 20 years. Dr Brown is now involved in writing both criminal and civil reports, particularly in the areas of medical negligence, historical sexual abuse and bereavement related claims.

Her teaching commitments include instruction in mandatory reporting for medical students, she is a committee member of the NSW Forensic Faculty for the Royal Australian and New Zealand College of Psychiatrists and has in press an article on the role of support persons in medico-legal examinations.

**DR LISA BROWN:** I promise I'm not going to spell changing like that in a report - only Bob Dylan can get away with that I think.

Since I started working as an expert witness 20 years ago, things have changed. The landscape, as Kylie has mentioned, has changed in a number of ways. I would argue from my point of view as an expert, that it hasn't changed quite enough and that experts have a long way to go writing reports that are of sufficient quality to assist the Court.

Long before the Code of Conduct came along in 2005, I think the trend was already towards hired young experts, so when I started, I received some very useful advice from Georgie Haysom - I don't know if she's here today. She gave me my first medical negligence report and said to me that what was important was that I say what I thought, because if I didn't

and I said what I thought she wanted to hear, it would end up with a whole lot of trouble in Court.

So not knowing any different, that's what I did, and I hope I've been able to continue to do. I think it's been very, very good advice, and it goes to the whole idea of the Code of Conduct.

I think one of the other changes is that the reports are better standardised, they have subheadings, they're longer, they're more detailed and also, the MAA reports having the structure has always helped train a new generation of experts to write reports that cover topics in a more comprehensive fashion.

We've also seen more in the way of shared expert reports, but I would argue not enough. I've certainly done cases for, say Department of Veteran Affairs, where I've provided a report to both parties and also, I think there is a trend in this area for historical sexual abuse claims, where there's an obvious thought not to cause excessive trauma for the plaintiff or claimant.

Joint expert conclaves and evidence; most experts now have a reasonable level of expertise and know enough to know that these experiences can go poorly, or they can go well.

There's a new breed of experts out there. When I started, the stereotypical expert was the ageing surgeon who could no longer operate, but hoped to live out a twilight career. I think experts are now starting their work earlier in their career, but hopefully not within the first year or two. The Motor Accident Authority generally recommends people have two to three years' experience before they're qualified as an assessor.

Many of the same clinical skills are required for an expert as a clinician but the purpose is different. The history is not elicited for a therapeutic purpose, but it's designed to elicit information to be used in the ultimate determination of a Court or Administrative Tribunal setting.

The expert, often unknown to the solicitor who's instructing, has to juggle multiple roles - as a clinician, a researcher, a teacher and it's often very difficult to deal with sick patients and then go off to Court.

The expert is also juggling lifestyle demands, so no lawyer has awareness that three boxes may have come in on one case,

five boxes on another and you've got a deadline to get things ready for Court.

Particularly, as an expert gains experience, cases build up from years ago. A matter you might have expected to settle a number of years back will come back and there'll be more supplementary reports, so you start to build up a head of practice work in the expert role that is not obviously apparent to a solicitor.

It's also important for the expert to develop writing skills. As Kylie said, your report is often the only thing that ever sees the light of day, if that.

It's also important to develop Court room skills, and this is quite hard because although in criminal matters experts generally end up in the box, in civil matters, usually these cases settle before Court and we don't get too many opportunities for what is generally a steep learning curve to practice those skills.

But as a psychiatrist, most of our work involves listening, not talking, so I think the opportunity to get up in Court and to strut our stuff is a great one, but one that does take a little bit of confidence that you can express yourself clearly and confidently.

Some of the desirable qualities as a clinician is a capacity to monitor and address bias, which is an inherent part of any opinion which is provided. A good report should be direct in its opinion, but not politically incorrect.

I'm ashamed to say, I still see reports where a plaintiff or claimant is described as attractive and I fail to see the relevance of that to the report.

A good expert doesn't procrastinate, they get on with their report and they meet deadlines. You also need a readiness to see the case through to its completion. You're no use to the instructing lawyer if you say I'm actually a bit busy at the moment, I've got quite a few things on. I can't get that supplementary report done for you in time.

I often hear my secretary say that; she'll say Dr Brown couldn't possibly get that done in a week, and I think, I think I will, I'll get it done.

Forensic training - and I'm not sure this relates to some of the other specialities in medical and surgical areas. It's hard to come by. There's now a Masters in Forensic Mental

Health offered by Justice Health and the University of New South Wales, but my impression has been that it's largely correctional based for practising prison psychiatry.

The Institute of Psychiatry provided a training course back in the early 2000's and that hasn't been repeated to my knowledge.

The main source of training is through mentoring and colleagues who provide support, but there's often difficulty in learning how to get referrals, how to write a report; it's a slow and tedious process until one is known and word of mouth takes over for referral.

Here are the expert red flags. When I see a report like this, I'm quite pleased because these are easy to knock over and to challenge. These reports lack detail. "The plaintiff told me that he is depressed". There's a reliance on a template that is so predictable that if you change the font, I can still tell who it's from. It's the same diagnosis, it's the same treatment, it's the same prognosis and the same causation.

It's quite frightening that reports of this type are still being served up and seem to actually be accepted by the Courts as adequate.

There's a real temptation as a busy expert to churn reports through in a cookie cutter or sausage machine type of way and I'd argue that it is very important to keep the reports individualised, because in a sense, particularly in psychiatry, we're providing a narrative or a story for instructive counsel and the Court to gain an understanding of who this person is.

Other red flags, an obvious bias; the expert who uses the words "This tragic circumstance" and "This should never have happened." The loss of impartiality and taking on an advocate role doesn't befit expert work.

It's also still not uncommon to see an attack on an opposing expert. Some reports are quite vituperative. I had a report and I can still remember my senior colleague said, "Dr Brown has written a very comprehensive report. However, she lacks the erudite appraisal expected other than of an extremely junior colleague." Ouch!

This is part of being an expert, you can't react to this, you can't attack back, you have to remain professional and in your most professional manner, argue the case.

There are some pitfalls of expert work and in this sense, I'm coming at the topic from a more experiential view than Kylie's presentation. It can be isolated work. It lacks the immediate gratification that comes from working clinically, seeing patients get well and working with them.

The reports go out into the ether and the only feedback you often get is more referrals. Occasionally, and not uncommonly from Kylie, you get a very gracious letter saying that the matter was settled, and your report was of benefit or assistance - whether it was or not - but it's still nice to receive something, because we're not used to not getting feedback as doctors.

It's important that we stay on brief, as Kylie said, and stick to our area of expertise. I've seen psychiatrists comment on the work of gastric surgeons and express horror that such a procedure could have been attempted in the manner undertaken by the surgeon - ouch!

As I said, it's very important for an expert to keep working on this issue of managing bias.

The old adage that you look at your report afterwards and say would this report be different if I was providing it to the opposing party, is still a good one, and it's important to be able to revise your draft that you don't think fits the evidence that you have.

Before the assessment, as Kylie mentioned, it's important to determine if you are a suitable expert, and if you're uncertain, to discuss the matter with the instructing solicitor.

It's important to spend time reading the documents, thinking about them. It's also important if you could send the documents before the night before. It's important to know what you've been asked to talk about, whether it's damages or liability and sometimes it's relevant to have a pre-interview discussion if there are obvious documents that will need to be provided.

I think it's more common for solicitors to phone me before the assessment to couch topics that they haven't put in their letter of instruction because they think they're too sensitive or they don't want to disclose, to give a heads up on the matters that may be relevant to ask about.

During the assessment, it's quite a different position we take compared to being a clinician. It's important to maintain boundaries and to avoid commentary. It's still not uncommon to hear a plaintiff say, well, the other expert told me I should be doing this, and I could do that.

Whether or not that's true it's hard to know, but there's no place, in my opinion, for that type of commentary to occur; your opinion goes into the report, and I will expressly say that to the claimant, that I will not make any commentary, my opinion will be provided in the report.

I had a plaintiff go out today and he was at the door as I was seeing him off, he said, "Doc, you've got to tell me, am I crazy?" "No comment."

We deal with hostility and resistance on a day to day basis in our expert work, particularly if you're doing defence work and the plaintiff comes along with a whole set of misperceptions about you're on the other side. It is an important part of our preamble to say that we're not to be on anyone's side and our role is to provide a fair opinion to the Court.

Nonetheless, it's often a long, hard battle to get someone to settle down, and there have been occasions in which I've terminated the interview because of concerns about violent behaviour, but I've never had to have a security guard present, except when I work in prison, and they're called correctional officers.

We are also in a situation where the plaintiff or claimant turns up with a support person and we haven't been warned about this. In press at the moment I have an article called Help or Hindrance - The Support Person in the Medico-legal Examination.

Sometimes a support person can be a great help, for example, in the case of a demented patient and their spouse may attend and provide very useful information. On other occasions, if the support person is a spouse or a child, it can be extremely difficult to ask about sexual practices, drug use or other matters which the plaintiff may prove not to want to disclose in that situation.

Kylie talked about the important of the written report. In Freudian terms there is the expression "Good enough parent". The good enough report should be of sufficient detail and length to cover what is required. It has internal consistency and there are no obvious contradictions.

Occasionally, you see a report where it says in one part that the plaintiff doesn't drink and then the plaintiff does drink and drinks excessively. There are obvious errors like this which are of concern.

I like to see the other expert's report, because I will often ask questions based on what they told the other expert and I can use that information to elicit further history and tease out contradictions.

It's still common to see documents listed as being viewed but they are not summarised, and neither is the adequate commentary provided in the report.

Because the documents have been often contemporaneously compiled, in hospitals or doctor's surgeries, my impression is that the Court does take them very seriously and they also lack the retrospective problems that arise with people's memories. I think this is an area where the expert report often could be improved.

Psychometric reports are often used in psychiatric and psychological reports. Most of the questionnaires that are cited have not been validated for use in a forensic setting and are easily endorsed. They're obvious what the answers are if you want to exaggerate your symptoms.

The use of the literature in the expert report has a role, but because it refers to large populations, it takes away, in my opinion, from the individual case. It's all very well to say 60 per cent of people exposed to a particular trauma develop post-traumatic stress disorder, but that leaves 40 per cent of people who don't. So, it's important to individualise the opinion to the particular plaintiff.

It's very important to get that report moving - procrastination is the expert's enemy.

It is important to also be able to provide supplementary reports, despite the demands on one's time otherwise.

As Kylie has done, I thought it might be important to talk a little bit about expert conclaves and what it's actually like in the conclave. As I said, most of us have gathered experience over time.

I think my slide's a bit more racy than Kylie's hot tub. I have to say, I haven't shared any alcohol in a conclave. I have had to call a halt to a conclave because the expert

became aggressive and threatening and requested a facilitator (negotiator) for the second round and then had to deal with being kissed by this expert. It was a horrifying experience.

Most of the time nothing that exciting happens, but as Kylie said, it depends quite a lot on the expert's personality, which is not really what we're expecting. We're expecting it should be based on their professional capacity.

We often have differing sets of documents, we arrive at the conclave and the other expert will say, I never saw that, so I'm not changing my opinion. They say, I don't have time, we've only got half an hour for 30 questions, so I'm not going to read it now.

If we're expected to agree as experts, can a lawyer in the audience tell me why we get two sets of questions, many of which are the same but slightly differently worded?

If you do that, what will happen is that we will answer the first set of questions - so you better get yours in first - and then when we get to the second set of questions we'll say, "Answered as above."

The time allowed for the conclave is often grossly inadequate, particularly when the other expert says that they have the opera at eight and we've only been allowed an hour.

It's very important, if you can, to organise a face to face meeting. The phone conclave doesn't have the immediacy and the rapport that helps to flesh out a report. Our answers will be briefer. It's often difficult to hear on the speaker phone. We all want to get off the phone as soon as possible.

If the expert is out of town or interstate, then that's obviously acceptable, but my preference is always for a face to face and I'm happy to travel, because I think it gives you a much better result.

I don't mind a facilitator, it's usually some semi-retired barrister who quite enjoys the experience, but to tell you the truth - there's another role for the ageing barrister perhaps, instead of the ageing expert - most of the time, we can manage on our own.

If there are six experts it might be helpful, but my preference would be to allow the experts to get on with what they need to do.

It is possible to sway another expert, particularly if you know them well and you know how they give evidence. Some of them will back down quite easily if you hold your forceful position.

I've also been in the situation where senior and junior colleagues have difficulty working together.

But before we move on, just to mention transcription. It is optimal to have transcription service available, but preferably not on the phone. So, you've got experts providing their opinion and you've got a transcriber on the speaker phone, it's a bit of a debacle.

But, they're useful to have so that we're not dictating, or one expert is not dictating the report on their own after the conclave.

We have some experts - the first one I have trouble with is the immovable expert. It doesn't matter what new documents you show them, they're not changing their opinion. I've seen experts come along with a written response to each of the questions which they read from, so they are not interested in discussion and collegiate collaboration. This, in my opinion, goes against the spirit of the hot tub.

Then we've got the turn coat expert. You get in that hot tub and they immediately roll over and they'll agree to anything that you suggest.

It is important, as Kylie was saying, that your expert can hold their own and they can maintain an opinion unless there is new evidence to the contrary.

I'm going to let you guess who's the senior and who's the junior there, and it does date it a bit, but I remember my first conclave was with four professors and myself, and I'm not a professor. By the end of it they were all screaming at one another and my role had actually become that of a peacekeeper.

It wasn't a great introduction, but I certainly learnt that it is a very important skill to have as an expert, to put your opinion in a professional but civil manner, and not to start attacking or rising with hostility.

This is, I'm afraid a psychiatric conclave, it's not relevant to any medical or surgical experts, but handling disagreement

and doing so in a spirit of collaboration is extremely important.

There are, sometimes, a good feeling in a conclave where you're actually working and talking together and coming up with middle ground, which might be useful for the Court in its ultimate determination. I think that's Freud and Jung.

Fortunately, we're different to America. When I trained in forensic psychiatry in the States, there's a training course. As part of one of the conferences, one of the major lectures was how to dress for Court. Women have to dress in an authoritative manner, wear court shoes and make sure their knees were covered, and men should never wear a plaid suit - I think the word in Australia is tartan.

Courts here are very reasonable and we obviously observe dress rules, but most of the time experts don't need to be instructed in these areas.

The expert's day in Court. As I said, with criminal matters you're invariably in Court, civil matters you can be at the door just about to step in and it's settled.

Pre-court briefings and discussions are often very helpful. I hope both from your point of view, and also for us; freshening up our sense of the case, preparing our thoughts, getting used to the questions that might be asked.

I think this is occurring less frequently in the last few years and I wonder if budgetary constraints might be affecting conferences with counsel, which I used to regularly attend, but much less so in the last year or two.

Sometimes your expert will have a bad day in Court. It lives on in one's memory. Sometimes a colleague will send me a judgment and I think, I don't want to look, I don't think I did very well, and other days you'll have a good day in Court.

But as I said, it's that very steep learning curve we have and not much practice these days to really develop our skills the way we'd like it.

Feedback in the form of comments is often very helpful, even if it's a bit difficult to take on board at the time, but also to read judgments and to look at how the Court considers our evidence.

There are lots of rewards of being an expert, as well as pitfalls. It's incredibly intellectually interesting and stimulating work. It helps to keep you abreast of literature and research. It's a great balance to clinical and other work, and we also have a great deal more inter-profession interaction.

As I said, sometimes a good day in Court is not necessarily because the ultimate result of Court is not up to us, but if you feel you've given evidence well, you haven't let your instructing solicitor down, it's a good feeling, because you're ultimately no good to counsel if you sort of fall at the last barrier.

You can engage an expert through word of mouth or through a service. As Kylie mentioned, there's a shortage of experts and so it's often very difficult to find someone. Experience specialty, gender and culture don't seem to matter much these days. I had a series of, I think, six penile implants gone wrong with the Arabic interpreters. We got through just fine, it was not really a problem. The interpreter looked a bit askance at some of the questions, but there was no issue from my point of view.

As Kylie mentioned, the expert's capacity to perform well in conclave and Court is often untested and you're, I imagine, hoping for the best, but we also want to perform well at this stage of the matter.

Please give us enough documents. I never complain I've got too much. It's helpful to have a pre-warning if the plaintiff or claimant is known to be aggressive or if you would like or do not wish a support person to be present.

Let us know if you have a timeline for when you need the report to be prepared by and sometimes I get a courtesy call that three more boxes are coming in for a supplementary report, other times they just turn up.

Some preparation pre-conclave is often quite helpful, and as I said, we're not reliant on feedback but sometimes it is useful to know what was helpful and what was not helpful in a report.

In conclusion, I'd like to take the opportunity to say that I'm indebted to my colleagues, who've been wonderfully supportive and who have provided great mentoring.

I'm not sure if it goes across the board, but I think most experts find that they receive a great deal of support from

their colleagues, other experts and we're very fortunate to have that kind of collegiate support and cooperation between us.

It's because of the kind of input that I've had over the years and the very helpful mentoring, that I'm able to look back on 20 years as an expert and say that I've enjoyed that part of my practice greatly and it's always a work in progress for us to improve our skills.

I might leave it there and we can open for questions.

**QUESTIONS**

**DR GRONOW:** That was very informative. We've already got someone standing, wanting to ask a question I assume.

**DR ANTHONY LOWY:** I'm Dr Anthony Lowy, I've been doing medico-legal reports, expert witness full-time since 1980.

As for the lengthy explanation you both gave, it's complicated. It requires a lot of expertise of the health professional, the maturity, training, before you even start with the medico-legal work.

The preparation for each report or each case is considerable. My first point is, I think we are immensely underpaid for the number of hours that we take to do this task, and WorkCover and CTP are trying to reduce the fee at the moment.

The second thing is, we're in an adversarial situation, which is unfortunate. When one brings in a support person, often, and very often now, it's an interpreter.

**DR LISA BRONW:** Yes.

**DR ANTHONY LOWY:** To work out what the conversation is between the interpreter and the claimant is very strange and very difficult. I have mostly no confidence at all that the translation is accurate, and that is something else that has to be taken into account.

When you talk about collegiate support, there are 400 of us now and I find collegiate support is very competitive. We are competing with each other for a shrinking market and it's quite tricky.

The next thing is Court. In third party and workers' compensation the Courts are closed. We have no obligation to the Court. We have these backroom experts or arbitrators

somewhere - we never know - so it's a strange quasi Court situation.

All health practitioners require feedback. The first lesson I give the doctors that I have taught is if you need feedback, this is not for you. Hardly ever does one get feedback, apart from when your name is dropped from the list or something like an appeal or it's a complaint or something like that; so, feedback is very, very rare, which makes it quite difficult and one has to be mature to do that.

With regard to support, twice I've come across a couple. When a couple comes in, the claimant forgets who he or she is. You've got to ask the couple their name, their date of birth - they know nothing; so, it's quite a strange situation. The claimant's partner should sit in the back where they can't really speak.

But, twice I've come across a time when a claimant's wife has said, he wouldn't take his tablets, but I take them for him - how about that?

**DR DAVID GRONOW:** We might stop it there, so we can have some response.

**DR LISA BROWN:** I don't know where to start. I'll just make the comment that I know some experts who charge for what they call shower time. That's the time where they spend in the shower thinking about the case. I promise you, I do not charge shower time.

But I think our colleague raises a point, that there are some authorities who commission reports, the reports are described as complex, but the pay rate is progressively going down and those reports end up being briefer and less helpful I think ultimately for the people who commission them.

Perhaps there are differing areas in terms of collegiate support. I'd be interested to hear what other experts think about that one.

**DR ARTHUR RICHARDSON:** My name is Arthur Richardson, I'm in the twilight of my surgical career.

**DR LISA BROWN:** Congratulations, that's a great achievement.

**DR ARTHUR RICHARDSON:** I know it's an adversarial system, but my concern is that a lot of expert reports that I read are not by experts, they're not done by anybody that I regard with any particular expertise in that subject and that's a

big problem. That muddies the waters and really disadvantages everybody, including the plaintiff.

Why can't we move towards a system with a real bank of experts in each specialty where they are truly appointed by the Courts and actually give evidence along those lines, because surely that would be a better way to do it?

Secondly, I have to say that as a surgeon, you are not an expert in any clinical matter once you've stopped operating for, at most, five years; that's the end of it as far as I'm concerned, you're out of date, very, very quickly and you can't keep doing it, that's all there is to it. But, I'd be interested in your views.

**MS KYLIE AGLAND:** I see it all the time, expert reports by people who are not experts and I would love to see a pool of approved experts. The problem for us I think is that it's so diversified in the experts that we use, where on liability and causation we're looking for - damages is a little bit easier, but when we're looking for a paediatric kidney transplant surgeon, there's not going to be an approved one of those on the list.

We're more reliant upon the experts to self-regulate that themselves unfortunately and the opportunity where we get the chance to challenge the expertise of an expert is generally not until we get into that conclave and hearing process, which is not the majority of matters.

They're out there and there's not, unfortunately, a lot we can do. I try really hard to brief experts who are the experts in their field and I hope that they can write a really good report and they can challenge the non-expert on particular issues.

But, you're relying upon that report writing, because until they're actually challenged in that verbal manner, their expertise generally doesn't come undone and sometimes even they're great personalities, I've seen experts who I did not think were particularly qualified to be commenting on a topic and a judge will accept their evidence. That's the system we're in unfortunately.

In terms of liability reports, if you were not practising , , so whether a doctor acted in accordance with the appropriate standard of care at the time, you must have been practising at the time. I don't see how you can otherwise provide a reliable opinion about whether that was an

appropriate practice at the time if you were not practising at the time.

So, the retired surgeon has a limited life expectancy as an expert. You've generally got three years pretty much. There's not going to be much more, unless you pick up those old claims.

**DR TULY ROSENFELD:** My name's Tuly Rosenfeld, I'm a geriatrician. Over the last couple of years, I've been asked to do reports for both sides, so I'm a single expert. You haven't really talked about that. That creates all sorts of issues. For instance, recently I became almost in the middle of one side being quite hostile because they didn't like what I said. What are your views on that situation?

**DR LISA BROWN:** I only briefly referred to this issue of what I call shared expert reports, where both parties will agree and then the party that doesn't get the opinion they want, turns on you, and that's unfortunately inevitable. I think the reason why it should happen more, but it doesn't, my contact in this area is often in Church related claims, where there are efforts on both the part of the claimant's solicitor and the Church to find middle ground and to prevent the claimant from unnecessary distress in undergoing multiple examinations.

I think it can work and we, as experts, like that role so that we can actually carry out what the Code of Conduct suggests that we're doing anyway. It would be great to see more. Perhaps a lawyer would be able to say why it isn't done more.

**MS KYLIE AGLAND:** Because we can't agree on anything. That's pretty much why. I've tried to have it raised in terms of quantum reports, agreeing upon quantum experts. The problem is that there tends to be in the quantum experts, a lot of plaintiff or defendant experts, so I propose all of my defendant experts, the plaintiff proposes all of their plaintiff experts and we can't agree.

So, I've never managed to agree upon a single expert to provide a report. I would like to, I think there are huge advantages to it, but I think we're a long way, certainly in the medical negligence field, of getting there.

**DR DAVID GRONOW:** I might thank you both for a very informative evening.

MEETING CONCLUDED