

# Reliability of the Expert Witness

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**Mr Munro:** I am Don Munro, the president of the society. We have Peter Garling and Dr Fred Hinde to address us on a topical matter being the role of the expert witnesses. Peter, being the true gentleman, has elected to go first and Dr Hinde will follow.

Peter is senior counsel, he has practised as a lawyer for over 20 years and he has a special interest in professional negligence; I invite him to take us through the paper.

**Mr Garling:** Good evening ladies and gentlemen. This is a great topic, it excites much debate, much angst and I think it's a fertile area for on-going development. My colleague tonight is the controversial speaker and I just play a straight bat as the opening batsman.

The first proposition we need remind ourselves of is who does the law regard as an expert, because that is really the starting point for a discussion as to whether someone is truly an expert or is not.

The classic formulation of an expert is to be found in a case in 1960; *Clarke v Ryan* (1960) 103 CLR 486 at 491-492. Chief Justice Dixon formulated the question of who the law regards as an expert in essentially the same way but in slightly differing terms. He said:

*"The opinion of witnesses possessing peculiar skill is admissible whenever the subject matter of enquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance. In other words, when it so far partakes of the nature of a science as to require a course of previous habit or study in order to achieve the knowledge of it".*

*"Expert witnesses may give in evidence statements based on their own experience or study."*

*"No one should be allowed to give evidence as an expert unless his professional course of study gives more opportunity of judging than other people."*

You will observe that this is a relatively low threshold over which an individual must step in order to be regarded by the law as an expert.

More recently in New South Wales the Evidence Act sought, in one sense, to define in a statute who an expert was. It did it really in a reflection of the terms of this judgment. Section 79 says:

*"If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to the evidence of an opinion of that person".*

Now, in short what that means is if an individual has specialised knowledge based on the person's training, study or experience the law would regard them as an adequately qualified expert.

You will immediately observe that in the context of this Society the law pays little or no regard necessarily to individual medical specialties. Perhaps the worst practical example of this low threshold approach, in my experience, is that of a case in which I was involved where evidence was led about a patient who when she presented at an accident and emergency department of a large Sydney teaching hospital, was really in very poor health. The on-call consulting physician was summoned and he attended to her over the next six or eight weeks or so. Her principal illnesses related to renal failure and epilepsy.

The plaintiff in prosecuting her claim chose to call as their principal expert medical witness a consultant general surgeon. In cross-examination, which I thought was withering and devastating, designed to test the qualifications of this gentleman to give evidence, he freely admitted that had he been on duty at the hospital when this patient was brought in, he would not have accepted the patient under his care because he did not regard himself as qualified to treat the patient and that he would have summoned the consultant physician on call. However, the law regarded him as an adequate expert to give an opinion about the quality of care of the consultant physician, the jury accepted his evidence, and ultimately a substantial verdict was entered in favour of the plaintiff.

The question is whether that sort of test or threshold these days is too low and whether we should allow it to remain. Alternatively, given that that is the law as it presently is, how do we as practitioners formulate codes of practice and conduct which address the question of how we obtain the best expert evidence in a particular case.

May I remind every one here of the essential roles of an expert in litigation: There are of course in medical litigation two principal streams of cases; the first consists of cases where the plaintiff's principal allegation is where there has been a failure to warn about the consequences of particular procedure or course of treatment. They are very fashionable these days as we know. The second stream is where the conduct of the practitioner in undertaking the procedure, including the diagnosis of the condition, the appropriateness of the treatment and the behaviour and consequences of the particular procedure is dealt with.

An expert is largely irrelevant in that first stream of cases because the question is, having regard to the nature of the operation or procedure or treatment what are the

consequences and, in particular, was it material that the patient should know.

As to the second stream of cases an expert plays a role which is regarded as necessary, relevant, and in practice is often decisive. The role of the expert is, in general terms, to cover the following areas.

First, the technical issues involved in the plaintiff's diagnosis, treatment and, for the assistance of the court, the meaning of those technical issues.

Secondly, what was the proper practice or appropriate standards of practice which existed at the relevant time.

Thirdly, whether there were any alternative diagnoses or courses of treatment to those carried out by the practitioner whose conduct has been called into question.

Fourthly, whether there are any questions of causation, by which I mean, what is the causal relationship between the conduct of the defendant and the outcome suffered by the plaintiff.

We should remember that the High Court of Australia has said, in (a case that we all keep under our pillows at night), *Rodgers v Whittaker*(1992) 175 CLR 479 at 489

*"...that whether a medical practitioner carries out a particular form of treatment in accordance with the appropriate standard of care is a question in the resolution of which responsible professional opinion will have an influential, often a decisive, role to play.*

*Whether the patient has been given all the relevant information to choose between undergoing and not undergoing the treatment is a question of a different order."*

Shortly put in practical terms, as I understand that extract, certainly in the stream of cases which do not involve questions of warning, an expert medical witness is the essence of a successful case from one side or the other.

The question, of course, that troubles us all is what makes a good expert? I think if we all knew the answer to that you would not bother coming to lectures of this kind.

There are, of course, different perspectives on that question. The medical perspective would suggest that the elements which would contribute to a good expert are formal and highest qualifications, most extensive experience, clinical or surgical, and thirdly, reputation and standing among colleagues.

The lawyer's perspective is probably somewhat different. As I see it from the lawyer's perspective, both plaintiff and defendant, the first question is – does the expert have adequate qualifications and experience? Secondly – does the expert have a capacity to communicate clearly and succinctly in writing, but perhaps more importantly are they efficient in providing reports? Thirdly, when the expert comes to court how do they account for themselves? Are they articulate, do they have an ability to express their views clearly and adhere to them in the course of cross-examination? Fourthly, does the expert support my case?

The judicial perspective is, like some things judicial, opaque. We do not always know what the judges are thinking or

perhaps precisely why they form a particular conclusion. However, there are a couple of comments which I have found in judgments which may be relevant. Justice Badgery-Parker, an experienced Common Law trial judge who did a significant number of medical cases, said this in respect of one expert, in *Woods v Lownes* (1995) 36 NSWLR 344, although reported I do not think this part is to be found in the New South Wales Law Reports. He said in respect of this witness and his evidence:

*"It raises a very substantial concern as to whether he was indeed, as one would have hoped and expected him to be, an expert offering an independent expert opinion or whether he did not perceive his function to be that of an advocate for the cause. I regret to say that in the end I reached a firm conclusion that in some respects he abandoned the role of an independent expert in favour of the advocate.*

*That does not mean that all of his opinions are necessarily to be rejected, it does demand that they be scrutinised with a great deal of care."*

What his Honour found was a "hired gun" advancing opinions for the benefit of his client but I note that even then his Honour, a careful and experienced trial judge, was not willing to abandon the expert's evidence completely. I venture to suggest if it were Grand Rounds the medical community would have stood up and walked out after three minutes of that witness's discussion of the case.

Justice Wilcox in the Federal Court of Australia is perhaps at the other end of the spectrum. In dealing with two experts, both clearly hired guns, they were Americans I immediately hasten to add, he said:

*"The court was fortunate to have the arguments expounded by such impressive witnesses. Each of these witnesses sincerely holds the view he expresses, as is evident from the fact that each propounded that view in America in the relevant time. The major difference between them does not arise out of any matter of scientific fact or reasoning but from a difference in perception about the balance between the two factors, which are probably impossible to determine and which certainly have never been scientifically determined."*

My conclusion from those judgments, and many others, is that most judges would look for an expert witness who is well experienced from a clinical and practical perspective and who is offering an opinion genuinely held from the perspective of being an independent rather than a partisan witness.

Against the background that expert witnesses were of varying quality, in the year 2000, both the Supreme Court and the District Court of New South Wales introduced a Code of Conduct for all expert witnesses, including doctors. You will all find it in the Supreme Court Rules if you go to the internet and follow that through. Alternatively, for lawyers, look in the Supreme Court Practice or District Court Practice, or for the medicos here please ask your local friendly lawyer. If you are still desperate I have a couple of copies available.

There are a number of matters of significance in the Code to which I would like to draw your attention. The first is that the Code prescribes that the duty of an expert witness is a

paramount duty to the court to assist it impartially and not be an advocate for the party retaining the expert.

The second element of the Code is that the expert report really is to be provided in accordance with a fairly specified or standard format.

The third principal element of the Code is that the expert agrees, if required or ordered by a court, to participate in a conference of experts and doing so in an attempt to agree upon issues for the court and to reduce areas of dispute between the experts in the proceedings. The next speaker has had personal experience of that process and I look forward to his enlightenment of it.

The general view of these conferences is that since lawyers are banned there ought to be a session in which experts freely express their own views about the particular circumstances and reach such agreements as they can. If the experts are truly complying with their duty to the court and are not advocates, then there is no reason why that ought not achieve its aim, but it very much depends upon the integrity of the individual experts.

To that end, I think for my part, the Code can be improved upon and no doubt may well be over time by the appointment of an independent chair or facilitator of these conferences to bring these experts together. Perhaps that is something which learned Colleges and Societies of the various medical specialities (and I include the College of General Practitioners in that description) could take up as one of their functions. In other words, to provide for those conferences, to facilitate them, and to ensure that, so far as any person presiding at such a conference can, appropriate concessions are made and issues minimised.

The last part of the Code which it is relevant to record is that the author of the report is required to set out, either in the report or attached to it, that he or she has read the Code, agrees to be bound by it and has produced their report in accordance with it.

I have summarised those points in this way:

- The expert Code of Conduct expects an expert to have a paramount duty to the court. If one pauses and thinks about that, this is the over-arching theme of the Code. It will provide, I think, for great steps forward.
- Secondly, the expert has to be independent, impartial and not an advocate.
- Thirdly, that the reports essentially are in a standard format. By that I mean the code requires the expert to set out his or her curriculum vitae, it requires them to set out their qualifications, it requires the facts, matters and assumptions on which the opinions are based, the reasons for each opinion, and if applicable, whether a particular question or issue falls outside their expertise, together with any literature used and finally, any examinations, tests or other investigations which they have carried out and relied upon.

It seems to me that this Code, experimental at the time it started, but being worked through at the moment, provides a skeleton against which the difficulty that we have encountered with the threshold for experts being relatively

low and their being a mixed group of experts, in terms of experience and qualification, can be successfully addressed.

There are, of course, as with all innovations improvements which can be made. I hope that sessions like tonight and communication between those in the medical profession and those in the legal profession will lead to suggestions being put forward as to how this Code may be improved so that ultimately the court has the best possible assistance.

For my part I proffer, as I said earlier, a suggestion to the medical profession, that from the point of view of their Professional Associations, Colleges and Societies, that a useful function which those bodies could engage in, in terms of providing a role, by way of chairing or independent assessment of experts meetings in accordance with the Code, perhaps they could certify people as experts. I do not think that the medical profession should stand by and leave it all to the lawyers. For my part as a practitioner we need your help.

Ladies and gentlemen, that is what I wanted to say by way of introduction on who an expert is, what the law is currently doing about it and how we might, in very short form, address some improvements to the existing Code. I look forward to hearing Dr Hinde's practical experience in the world of expert evidence.

**Mr Munro:** Dr Hinde is an obstetrician and gynaecologist of 30 years standing, he has special interests in medico-legal work, and has had a long and distinguished medical career, including being president of the College of Obstetricians and Gynaecologists, along with various other appointments. The court reporter here tonight advised me that she saw him as recently as today in the witness box.

**Dr Hinde:** Until recent times as an obstetrician and gynaecologist I had little exposure to the legal processes in the course of practice. As you will appreciate worker's compensation and third party work rarely effect people in the practice of my specialties, and before the recent upsurge in litigation over the last decade my exposure to law was really limited except on two counts: Firstly, my father was a court reporter and my childhood was spent replete with accounts of court action and when we disagreed he would tell me I should do law and become an equity barrister.

Secondly, I had the good fortune to be a member of the New South Wales Medical Board for about six years, from 1978 to 1984 and participation in disciplinary Tribunals is a great experience in the sense that it allows you to dispassionately view the performance of counsel, see members of the medical profession cross-examined, and listen to their evidence.

In approaching the topic tonight I proceeded on the basis at the present time any medical practitioner having duly graduated in medicine and surgery, after an approved course of instruction, thereby qualifies as an expert with respect to giving evidence. This would accord with what we have heard from Mr Garling.

Certainly in the first quarter of the twentieth century, almost a hundred years ago, this was a reasonable proposition. When I was a student at Prince Alfred in the early 1950s there was Dr Robert Scott Skirving there, who was still alive, although not practicing, and he held the position of

consultant physician to Prince Alfred and consultant physician to St Vincent's. I would suggest that those times have changed.

It is only between the world wars that the major specialties evolved; neurosurgery for example, was encouraged by the late Professor Dew as a discipline in its own right as recently as the 1930s. By the 1960s internal medicine had fragmented progressively into anatomical specialties. In the following decade general surgery did likewise. In obstetrics and gynaecology it followed rather later, in the 1980s, with subspecialties such as cancer, infertility and ultrasound.

The result of this is that now many people have had limited training in the broad aspects of their previously recognised speciality, or alternatively, may indeed have given up most parts of a speciality to concentrate on an area of specific interest which on occasions may be as limited as a single disease. Others, upon assuming fulltime academic positions, make a career decision to give up areas of practice because of pressure of other duties, particularly administrative. In my own speciality this often involves ceasing to undertake operative obstetrics, activities in the delivery ward or operative gynaecology. Unfortunately this decision to restrict practice is often not accompanied by a decision to decline to give expert opinions in relation to such issues in which personal practical experience may have ended a couple of decades before.

Which brings me to the question of the curriculum vitae. These are now a requirement of the court rules in New South Wales, as we have heard, and I have seen many impressive CVs supplied with expert opinion. Unfortunately it is not rare to find that the learning and experience catalogued in that document is of little or no relevance to the issues in dispute in the matter and this may not necessarily be obvious to the court or lay reader, and thus I feel one aspect of the reliability of expert witnesses relates to the question of CVs.

A second problem appears to me to be a reluctance to question the credit of an expert. When on occasions I have suggested this to counsel it was certainly not greeted with wild enthusiasm. In a past era the expert medical witness was, I believe, genuinely a person of great respect in the medical community. Expertise resided in great personal experience over a wide area of the speciality and hence they were well able to provide knowledge reflective of the time and of the standards of practice to be expected. I am sure you will be agree, with the explosion of knowledge and the resulting fragmentation of medicine, that person has effectively disappeared. If we are to persist if the present legal definition of an expert it is important to all involved in litigation that the court should be in a position to evaluate the weight to be given to an expert's evidence, and in the interests of a fair hearing there should be no reluctance to question the relevant experience of the expert.

One of my interests in this was generated by a decision of the High Court in the United Kingdom in the matter of *Scott v Bloomsbury Health Authority*, which was reported in Butterworths Medicolegal Reports in 1992. The details of the matter, which relate to a neurosurgical operation on the back, do not require telling here. Of greater importance is the fact that the expert upon whose report the action had been launched had become a consultant over 40 years previously

and had been retired from all active clinical practice for 14 years. The judge found for the defendant and was highly critical of the plaintiff's expert, concluding by recommending that the Legal Aid Board, in consultation with the General Medical Council and the medical Royal colleges, should examine the case with a view to preventing complex claims being supported in future at public expense on the uncorroborated evidence of a consultant who had long retired from clinical practice. While I appreciate the judge's major concern related to the expenditure of public funds, nevertheless, it highlights the problem of the currency and the relevance of an expert's opinion. And I think these two issues may be considered under a number of headings. The first is the obvious one, matching expertise to the issues. In an age of subspecialisation and fragmentation of disciplines the genuine expertise of the professional witness should match the issues at the heart of the disputed matter and the absence of such a relationship should be made clear in the court. I shall cite some gross examples from my own experience in the last three years: A cancer specialist giving an opinion on a rare complication of obstetrics; a paediatrician who had not ever practised obstetrics in 30 years since graduation giving a opinion on labour management; and a chest physician giving an opinion on the diagnosis and management of pregnancy in the fallopian tube, yet so little acquainted with the subject he was incapable of correctly transposing the title of a paper to which he made reference in his report and which was not a relevant reference anyway.

The second heading is temporal considerations with respect to specific expertise: If a person has not personally performed a procedure for 20 years one would have to question the value of the opinion. Certainly I have read reports at times which leave me with the overwhelming impression that it is many many years since the author of the report ever grappled with the clinical problem at issue.

The third is related temporal considerations with respect to standards of care: You will appreciate that this is of great importance in relation to my own speciality in neonatal paediatrics where the limitation period is 21 years. What today would be regarded as outmoded and no longer acceptable may well have been standard practice almost a generation ago; tests which are now standard practice may not have been available at an earlier time or of a lesser degree of accuracy and reliability; and it should be obvious that whether an expert was either a specialist at the relevant time or well on the way to becoming one is a crucial criteria to the acceptance of that person's opinion in relation to standards of practice, yet I have encountered examples of this in the last two or three years.

A fourth heading is changing practice. With the more expensive use of endoscopic equipment, keyhole surgery if you like, the face of surgery is changed forever. Whilst some of these new techniques have not lasted most have and there is little doubt that the majority of surgery in the future, in many specialties, is going to be performed by this method. Cholecystectomy, removal of the gall bladder, is a case in point; about 90 per cent of such operations are now performed laparoscopically, with great benefit to the patient, with reduction in pain, duration of hospital stay and duration of disability. I feel if a case revolves around a complication of such surgery, unless there be a transgression

of basic principles common to all approaches to surgery, the experience of the expert witness in the performance of the endoscopic technique should be clear to the court.

Five is the overseas expert: In recent years this has become a more frequent occurrence in obstetrics. One can immediately question the appropriateness of a person with a Harley Street address opining upon the actions of general practitioner obstetrician in a small New South Wales country town, but more than that it is necessary to examine the way in which a speciality is practised in the country of origin of the imported expert. Again I refer to obstetrics because that is my area of knowledge. Care of women in the delivery wards in the United Kingdom, until the last year or two, was almost exclusively provided by people who had not reached consultant status and it is only subsequent to public dissatisfaction that that has now changed. Yet the lack of personal continuing experience over the last two to three decades in labour wards has not proved a disincentive to consultants from the U.K. giving opinions on matters relating to the care of women in labour.

Six is the textbook reference: It has long fascinated me that even in hospitals the printed word, as opposed to that handwritten or spoken, is accorded a degree of eminence which may be entirely inappropriate. In hospital practice the result of a test, neatly printed on a fancy form, was given far greater reference than the handwritten opinion of an experienced consultant. In law my impression is that there is an almost unquestioning acceptance that what is contained in a textbook has to be true. I can only say that in one case in which I was involved regarding breach delivery two out of half a dozen texts produced were quite incorrect with respect to proper practice, and this fault derives either from an attempt at single authorship, with resultant areas of inexperience in the writer, or poor editorship of a multi authored book. I appreciate that much has been done in law to eliminate trial by ambush and I would suggest that this should be extended to cover text books and my next topic, the journal article.

#### **The Journal Article**

The problem with such literature may be scientific. That is, there could be an inherent fault in sampling or errors in the statistics which invalidate the results. However, it is more in the realm of expressed opinion included in such articles that is relevant here. In the U.S. journals, with which I am acquainted, the status of authors is commonly not shown.

Although this is true of British and Australian literature, however, my impression has been in legal hearings the degree of experience of the author of an article commonly appears to be given scant consideration. For example, in a recent case much reference was made to a paper which was in fact written by a registrar, that is a person training in a speciality, and detailing the work of similar persons in relation to a particular obstetrics procedure, concluding with opinion as to appropriate management. Yet I wonder in law if the opinion of an employed solicitor, of say three years standing, writing of the actions and opinions of other employed solicitors, up to just those becoming senior associates, would be accorded the same degree of acceptance.

So how to solve these problems? The obvious simplistic answer is to alter the formal definition of an expert. As a lay

person in the legal sense I would see this as a daunting task, even for the most skilled in the use of words, if the definition as to is to be a broad one encompassing all experts in all jurisdictions. I cannot usefully comment beyond this and will hence restrict my further comments to the application of the present system.

It would appear to me that any solution must allow the legal adviser or litigant his choice of expert. I think this follows on from what Mr Garling said. It may be adjudged that a particular expert writes well or has an excellent delivery in the witness box and these qualities outweigh his lack of personal practical experience over the preceding decade or more. So be it. So long as this is utterly clear to the judge in evaluating the weight to be given to conflicting opinions.

If we appreciate the foregoing I do not see a panel of approved experts, approved either by the court or relevant medical college, as the immediate solution. Certainly the formation of such a panel can prove difficult. Some years ago the committee of the College of Obstetricians and Gynaecologists in this state, in response to requests from solicitors for expert opinion, attempted this. Fellows in New South Wales were invited to put their names forward to be included on a list to be approved by the college committee. The response was not overwhelming. Significantly those with the greatest expertise were too busy to want to be involved and of those who did respond, their vision of their expertise, interestingly, was not shared, in about half the cases, by their peers on the committee. This reflects the likelihood that the expert seeking inclusion may be doing so because his personal clinical practice is not busy. At this point I make it quite clear that I am specifically excluding a number of people, predominant orthopaedic surgeons, whose practice, by choice, is entirely forensic. I would point out that to my understanding their expertise is mainly, if not exclusively, sought not with regard to liability but to assessment of degree of disability and quantum.

In any case in an age of litigation related to antidiscrimination I have my doubts about college vetted lists. I think any such list would be vulnerable to appeal on the basis that a fellow, having completed his continuing education requirements, has the right to be included on the list which then simply becomes a catalogue of persons available to give opinion.

The problem of temporal considerations with respect to standards of care is readily solvable by separation of the issues of liability and quantum. The provision for this already exists and as a doctor I believe that it should rest with the power of the court to order a trial on the question of liability rather than it being an option for litigants to accept or reject.

I can only say as an expert witness who has been involved in a number of cases, the long list of which goes back to 1966, that it is difficult to divorce ones mind from later developments, or to be certain when accepted practice changed when assessing care. I am in no doubt that issues of conformity with, or divergence from, appropriate standards of care should be decided within a decade of the event. Further more the whole concept of the limitation time for minors beginning at age 18 I believe needs urgent review. In relation to medical negligence cases it is a legal principle really based on nineteenth century concepts. With the

present day provision of expert paediatric advice to the population as a whole, awareness of the likelihood of a successful tort only emerging after 20 years is simply a fiction. A six year statute of limitation was introduced in California some years ago with success and, if nothing else, it would focus the legal mind upon preparing the case rather than letting it meander for years with the prospect of just evaluation of the issues of liability steadily declining with time.

I appreciate that court appointed experts are possible under the present rules. I would think it unlikely, however, that the role of such an expert, for example in wet cases before the admiralty jurisdiction is easily applicable to medical negligence claims. It is seldom that there is a single appropriate approach to medical treatment and where such is the case I believe the matter is unlikely to come to hearing anyway. Further more, the expert whose knowledge is almost exclusively related to one area of surgery may hold a view of appropriate standards which is not reflective of standards at large.

The problems of the single expert then lead to consideration of the conclave of experts introduced in recent years. I appreciate the difficulty of the plaintiff's legal adviser who reads the report of the outcome of such a conference, finds his case weakened, but is unable to give a satisfactory explanation of the reasons for the changed situation to his client, nevertheless I believe the system does have considerable merit. Freed from the rules of evidence there is likely to be more direct and blunt discussion between experts. I would emphasise this is not to bring consensus but rather to identify clearly the areas genuinely in dispute. The irrelevant garnish which so often embroiders claims, in many cases deriving from incomplete information available to the plaintiff's experts at the time of their initial opinions, can be swept away. With respect to the topic of this talk, I think that in such a conclave the participants are much more likely to be unaccepting of opinion expressed by someone known to lack recent relevant experience and that they would express that rejection in a forthright manner.

Given the present rules for qualification as an expert witness I would therefore propose that it is imperative that the court be in the best position possible to adjudge the weight to be accorded to an individual's evidence.

The answer to this may lie in a different approach to the use of the court appointed expert. One possible solution would be the creation of a panel of experts from whom could be drawn one or more, depending on the case, to advise upon the particular areas of expertise required to assist the court in reaching judgment. Such advice would be effectively devoid of subjective influences which might beset such an expert if giving a formal opinion on the matter. He or she has simply to examine the documentation at an appropriate stage in the litigation process.

If the litigants can resolve the matter along the way there is no need for such examination. However, once a hearing is likely then the court expert should be involved and each expert witness on behalf of the parties would be required to indicate the extent to which they conform to the desired requirements. It would then be the role of the litigant's legal advisers to decide whether they need further opinion or

whether they will persist with what they already have. The court, however, is less likely to be misled as to the person's background. I have little doubt that as in any other field of human endeavour, such a proposal would lead to innovative practices to circumvent its aim. Nevertheless, I would suggest that it does offer a better prospect of the correct assessment of an expert witness.

In conclusion I have assumed that the Medicolegal Society acts in part as a forum for new ideas. My proposal in the context of the present rules may not prove to be practical. However, of one thing I am certain, that in medical negligence cases in particular the time has come to examine the credit of the expert witness in some degree of depth and, if need be, with some aggression. In an era of fragmentation of the medical profession into smaller and smaller parts, a phenomenon still far off in law, which has only recently seen the introduction of formal specialist recognition for solicitors, the assessment of the weight to be given to expert evidence is critical and I believe each expert has an obligation to substantiate in the most transparent terms his or her claims to expertise in a particular matter. Thank you.

**Mr Munro:** As is customary, we will take questions from the floor. Could you identify yourself and whether you are legal or medical please.

Just taking up what Peter Garling was saying about the appointment of a facilitator, I can indicate that I was a member of the working party of the professional negligence list, which was chaired by Justice Alan Aberdee, who made a number of recommendations which I understand are before the Rules Committee of the Supreme Court at the moment, where that is up to I am not quite sure. A number of the issues that have been raised tonight are under review.

**Dr Yolande Lucire (Medical):** Today I have heard experience, experience, experience, and I do not think there is anything in the law yet in Australia that differentiates the opinions of people with expert status, who claim experience from true expertise, which has to be based on medical literature, on studies, on evidence based material; when is the law going to address that? It raises all sorts of problems for me in that I do not know who is going to be on the other side because of the way the law is structured about experts – I find it is completely unfair. Is the law going to do something to differentiate the opinions of people with expert status and true expertise?

**Mr Garling:** No, in the sense that I agree with what Dr Hinde said, that it would be a very difficult task to frame a definition or a code which by words sought to separate, in a formal sense, the expert who is the true expert and the expert who claims to be one. I think that the law's solution to that is to test the expertise in the course of the adversarial process. I accept what Dr Hinde suggested, which is perhaps lawyers should be doing that somewhat more aggressively and in somewhat greater detail than we presently do. I suspect that is probably the real answer in the end.

**Mr A Dix:** At the medical board, in the professional disciplinary arena, we have been contemplating the idea of having the sort of rules that have been introduced in the Supreme Court and the District Court: I just wonder if the panel has any views about whether there is something

different about professional disciplinary proceedings which would make the idea of that panel of experts not work as well?

**Dr Hinde:** In professional standards committees with which lawyers won't, I think, be generally familiar, which is a somewhat inimical environment to barristers because you are not allowed to speak, I think that this has been done on occasions. Because of the less formal nature of PSCs I do not know that the group of experts is of such great value. I wonder how often there really is an adversarial issue in the clinical side of many disciplinary proceedings. I think that might apply in some but not many.

Just while I am speaking about the conclave of experts: The absence of a facilitator is to some extent a problem because somebody has to get the thing running. The one in which I was involved, the first thing that happened was that they proposed that I be the facilitator, but it is a task that takes time. Certainly you need somebody to essentially draw out people's opinions. I realise that originally it was hoped that a report would come from that sort of meeting immediately, but really if the issues are at all complex it does require time and a series of faxes going around in order that people's opinions are adequately expressed.

I emphasise again that often the role of that conclave of experts is not to give a consensus opinion but to clearly delineate what are the issues and setting out why particular people hold their views. At least if the matter comes to trial, as I see it as a doctor, the issues are much more clear cut for the judge to have to deal with and to save a lot of time in that regard.

**Mr Garling:** May I add something to that which may be worthwhile considering disciplinary matters: The Federal Court experimented in a number of cases with what has been christened the "hot tub" method of expert evidence which is where essentially the experts are permitted to give evidence to the court at the same time. So that if one expert expresses an opinion the court can immediately ask the other expert whether that particular view is agreed or not agreed and if so why not. Properly controlled I can see some advantage in a process similar to that in the disciplinary environment where the PSC or the tribunal may see that they would have a better discussion of the conflicting views of the experts if they were present, heard each other, and were able, in effect, to provide comments, although on oath, to each other's evidence.

There is a difficulty that I have personally experienced in that circumstance where in an inquiry in which I appeared three authors of a report were called; none of them would answer the critical question because they each claimed the other one had written that part of the report.

**Judge H Cooper:** I am a judge of the District Court and also a Deputy Chairperson of the Medical Disciplinary Tribunal. I would like to perhaps answer the matter raised. In the Medical Disciplinary Tribunal we have a series of direction hearings before the actual hearing. As part of our standard directions we make it clear to the parties that any expert witness they call must agree to be bound by the Supreme Court rules as to the duties of experts. And, indeed, that is always done now.

Secondly, what we do to prevent ambush is that we require

the HCCC to file in court and to serve on the respondent doctor or practitioner all evidentiary material upon which it intends to rely, this includes the peer review reports or expert reports which are given. Then within a certain period of time the respondent practitioner has to file and serve on the HCCC his or her evidentiary material, including expert reports. These expert reports, each is then available to be shown to the other expert and they can see what the issues are between them.

I might say that my experience, which goes back now to about 1985 in Medical Tribunal matters, that probably 80 per cent of the dispute between the experts is not a dispute as to their technical knowledge or technical opinion, it is really a difference of opinion based upon different facts which they have been given to found their opinion. So more often than not it is up to the Tribunal to decide what the facts are and then to correlate that to the respective medical opinion.

You do, however, get the odd case, probably no more than 25 per cent, in which there is a difference in medical opinion where you will have one group of experts saying, this practitioner was wrong in doing what he was doing and it would attract severe probing and, on the other hand, you will get others who will say; at that particular stage in those particular circumstances what he did was maybe not the optimum but not entirely inappropriate.

Now, when we get this type of view, or disparate views, then we have to make up our own minds. Of course the Medical Tribunal is in a much better position than I am when I am sitting as a judge alone to determine these issues because as a Medical Tribunal I have the benefit of two highly experienced practitioners sitting there beside me guiding me on many matters and not only explaining to me the medical terminology and correcting my spelling of medical terms but most importantly of giving me the benefit of their experience. I just thought I would mention that.

**Mr Munro:** Thank you, Judge. As I understand the way the Tribunal works one of the medical members is of the same speciality of the doctor under investigation?

**Judge H Cooper:** Yes.

**Mr Garling:** I have had an idea brewing which is not yet crystallised but may be worthy of further thought and I would be interested if Judge Cooper had any different view. I wonder if in some cases, either in the disciplinary area or civil area, perhaps there ought be a determination of facts first, so when the experts come to express their opinion the court has determined what the facts are upon which they are asked to express their opinion.

**Judge H Cooper:** Which comes first, the chicken or the egg? Look, in some cases that would work but in a lot of cases it really turns on whether you think the plaintiff, I am talking now in civil actions, is a bloody liar, a damned malingerer, suffering from some quite severe psychiatric reaction, or does have a genuine slipped disc, and more often than not that question is going to depend partly on the medical evidence. I do not know if that type of question can really be determined in isolation.

**Dr N Sardon:** I am just wondering, the general gist of what you are trying to head for in the legal system seems to be some sort of agreement as to who is an expert and,



therefore, establishing what fact is and you have mentioned this "hot tub" concept where they can all discuss this in front of each other, whereas in medicine we attempt to shield potential prejudice, in other words influence. Where you have just said yourself that each person would not admit to having written that specific section, surely such a hot tub situation could influence an individual to be persuaded to think differently?

**Mr Garling:** May I answer that by saying if the influence is a proper professional influence and causes an expert to adjust or modify their view, having heard the view of another expert, I would think in an over all sense that is a good thing, but if more what you are concerned about is the adjectival matters influencing an expert to express a view one way or the other, in other words, the presence of an expert or some reluctance to expose their view in some way

**Dr N Sardon:** An attempt to remove prejudice like a double blind study; you give an individual a pill, does the pill work? The individual doesn't know whether they are getting the treatment, nor does the observer, as a consequence you establish fact, outside prejudice is eliminated. What you seem to want to do is the reverse of that. I would have difficulty in establishing such a system where you would expect to try and remove prejudice.

**Mr Garling:** I think you have identified one issue which is a long existing problem and that is there is always a tension between the way scientists address matters and the way lawyers address them. They are not always the same, the scientific proof and legal proof are not necessarily identical.

**Dr S Kaushik (medical):** Evidence-based medicine is being crystallised and is the modern medicine and it is the best and the expert evidence which probably will be recognised sooner or later.

**Dr Hinde:** I think that evidence-based medicine is becoming commoner, particularly with the computer studies set up by the Cochrane Institute. I think the point I was making though was that it is one thing to do a study, it is where people then start extending that to their opinions that you need to take into account who is actually writing the article and how much they have actually done. The fact somebody has written an article doesn't necessarily mean that they have had a lot of experience in the matter. Certainly one of my colleagues some years ago as a registrar was involved in looking at a particular matter and when he went overseas his consultant allowed him to present the paper. In fact he really had had very little experience of actually looking after the patients involved. What arose out of that, from his lecture somebody approached him and asked him to write a chapter in a book about it.

I take on board what you are saying about evidence based medicine, there is no question with the advent of computer analysis this is providing more answers but we are still a long way from having answers about everything.

**Dr R Lyneham:** I am a gynaecologist. The Royal Australia New Zealand College of Obstetrics and Gynaecology has been accruing lists of accredited witness for about the last 18 months. The college has been preparing a list of fellows who have stated that they are prepared to give

expert opinions in areas of practice, obstetrics or gynaecology, clinical practice, or science, and the subspecialties, and in putting forward their name on that list they have to state that they are currently in practice in that area and state the areas that they are in practice in. It is being developed. The college does no more than confirm the individual is a fellow of a college and up to date with continuing medical education.

The idea is to try and prevent the people Dr Hinde was talking about, who haven't been practicing for 20 years, from giving evidence, except where giving evidence about something 20 years ago, which would be appropriate. This list is available to legal practitioners; it was an approach of the college to address issues that Dr Hinde has raised.

**Mr Maconachie:** Dr Hinde's assertion that we should attack doctor's credit is wrong and Peter Garling's adoption of it is also wrong. Ask Justices Sperling and Roger Giles about their experience in Albrightons case and the impact it had on that case. You cannot get the complete copy of the judgment, at least not easily. I also had an experience where I sought to attack the credit of two people; one a psychologist, another a psychiatrist. I sought to attack their qualifications by crossexamining them to establish that they had been and still were adherents to deep sleep therapy. I called a psychiatrist to prove that anybody who had that view was out of step with mainstream medical opinion and had been for 20 or 30 years. That went to the Court of Appeal.

Two judges in the Court of Appeal eviscerated me for having drawn a red herring across the path of a jury trial and, accordingly, the appeal was successful and it went back for a new trial. Only one just and wise Judge thought that what I had done is right and he is here tonight, Mr Justice Handley, but it is a very dangerous proposal. Experience dictates that if you attack the credit or indeed the qualifications of doctors and you do not get it absolutely right it will blow up in your face.

**Mr Garling:** Must be the way you do it, John. I take your point that forensically the decision to attack an expert on those matters is a very difficult decision. There is no question about it and the examples that you refer to are well known in the legal profession, but my support of it is really from the point of view that if we do not do it I wonder if we are, as Dr Hinde says, letting too many doctors off scotfree and thereby encouraging the fragmentation of expert opinion.

So, my support of it is, I think, not on a case by case basis where I generally chicken out, unless the profession as a whole approaches it and asks the difficult questions we will not get more reliable opinions given in court.

**Dr Hinde:** I would agree. I think the whole thrust of what I said in the proposals was leaving it in the hands of litigants legal advisers what they did. I just feel there has probably been too much reluctance. I happen to be aware of some of the things in the Albrighton because it involved a colleague who graduated at the same time, but that was 20 years ago and perhaps the winds of change have started to blow.

**Mr Munro:** Ladies and gentlemen, is has been a very provocative meeting, with a very forthright exchange of ideas. I would like you to thank both our speakers.



The committee of the Society is very pleased to welcome the following new members – Jane Pochon and Geoffrey Pike (Legal); and Satish Kaushik, Hari Kapila and Olav Nielssen (Medical). You will know that we are very keen to enlarge the membership and we would be very grateful for your help in promoting the Society. We would also be grateful if you could ensure that new applicants are properly proposed and seconded.

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