

# Casting the first stone: Trials and tribulations of an expert witness

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*“Judge not, that ye be not judged” Matthew 7:1*

*“...let he who is without sin cast the first stone” John 8:7*

The familiar biblical injunctions against judging others must be set aside by expert witnesses involved in medical negligence cases. Unlike New Zealand, Australia does not have a “no fault” system for compensating patients who are injured by medical treatment. The only avenue for an injured patient to obtain compensation is through the civil courts, which is a slow, expensive and unreliable process. Only about half of cases continue to settlement, and of these only 6% are settled in court. About half of cases are settled for less than \$10,000 and 6% for more than \$500,000. Most claims are settled within three years of lodgement, although 10% take more than five years.<sup>1</sup>

Settlement is always the best outcome for both doctors and patients. For the doctor being sued, it avoids the stress and the disruption to their practice involved with appearing in court. For the plaintiff, it avoids the risk that they may not receive any compensation at all. Because the terms of settlement are confidential, expert witnesses usually do not learn the outcome of the cases that they have reported on.

## What is an expert witness?

An expert may be defined as *“a person who has specialised knowledge based on the person’s training, study or experience.”*<sup>2</sup>

An expert witness in medical negligence cases may be commissioned to provide a report by legal firms representing either side of the dispute. However, in coronial inquests, they are commissioned by the court. Legal firms also commission expert witnesses to report on cases that have led to a hospital enquiry into a doctor’s performance, or have resulted from a complaint to another regulatory body.

Expert witnesses should be familiar with contemporary clinical practice. In some countries (such as the USA, but not Australia) retired doctors are not allowed to serve in this role.

## Responsibilities of the expert witness

The core responsibilities of an expert witness are outlined in the “Expert Witness Code of Conduct.”<sup>3</sup> These include an *“...overriding duty to assist the court impartially on matters relevant to the expert’s area of expertise; to observe a paramount duty to the court and not to the person retaining the expert; not to act as an advocate for a party; to make a full disclosure of all matters relevant to his or her report and evidence..”* Expert witnesses are required to state in their reports that they have read and agree to comply with this code.

It is worth expanding on these core responsibilities, especially the requirement “to assist the court.” The expert witness must avoid the temptation to act solely as an advocate for the party who is commissioning their services. The “hired gun” contributes to the polarisation of expert witnesses, which is apparently a bigger problem in medical negligence cases than in other forms of personal injury litigation.<sup>4</sup> I have seen some expert witness reports that could best be described as false and misleading, and worst as simply malicious.

By the same token, expert witnesses shouldn’t allow professional loyalty or other factors to affect their judgement. Writing a report that unfairly minimises or justifies an act of negligence by a colleague may prevent a patient from winning a valid claim for compensation. It may also not even help the doctor being sued, as it may encourage his or her lawyers to take the case to court, rather than to negotiate a settlement.

Expert witnesses should only provide opinions that are directly related to their areas of expertise. They should either avoid providing opinions that are outside of their area of expertise or acknowledge when they are doing so.

## Keys to writing a medico-legal report

Blessed with perfect hindsight, it is easy for an expert witness to criticise a doctor's actions that led to an adverse outcome. In the interests of fairness however, it is important to attempt to judge their actions based on the information that was available to them at the time, with reference to what was considered accepted practice at that time.

The question (in various forms) that you will repeatedly be asked by lawyers is: *"In relation to this action, do you consider that Dr. X acted in a manner that was widely accepted at that time by peer professional opinion as competent professional practice for an anaesthetist?"* When answering these questions, you need to explain in plain English the basis for your opinions and any medical terms or concepts in your report. You should explain whether your opinion is based on your interpretation of the patient's medical records, or on the Statement of Assumptions provided to you. The Statement of Assumptions includes a summary of the events in the medical records as well as statements from the doctor or the patient in relation to these events.

Writing a report frequently involves reference to the medical literature that was available at the time of the incident and a comment on whether it was widely known at the time. Relevant journal articles or clinical practice guidelines (such as institutional, national or College guidelines) should be appended to your report.

Other reasons for your opinions should also be explained (such as clinical experience, institutional practice etc.) and areas of clinical uncertainty or controversy should be acknowledged.

## Appearing in court

From the preceding, expert witnesses do not have to appear in court to defend their reports very often. This is fortunate, as it can be very tedious and time consuming. You have little control over the nature and direction of questioning during cross-examination and legal discussions can become very bogged down in clinically irrelevant areas.

Appearing in court can also be very stressful, especially for coronial inquests. Coronial inquests are less adversarial than civil suits as they intended to establish the cause of death, rather than to apportion blame. However, this distinction may mean little to the grieving relatives of the patient and to the anaesthetist involved in their death, who share the courtroom.

## Conclusion

The most interesting aspects of being an expert witness are the 'forensic' nature of the work involved and the challenge of writing a report that can withstand close scrutiny by the opposing medical and legal team. The least appealing aspects are not knowing the outcome of the majority of your cases (which are mediated prior to trial) and having to appear in court. It is also important work, because a doctor's actions cannot be judged fairly unless their peers are, when necessary, prepared to pick up a stone.

### References:

1. Australian Institute of Health and Welfare report on medical indemnity claims. Sept 2012
2. Section 79, Evidence Act (NSW), Pt 1r8
3. Expert Witness Code of Conduct. Uniform Civil Procedures Rules, NSW Supreme Court 2005, Schedule 7
4. Lord Woolf MR. Access to Justice: Final Report, Chapter 13, p137