

# Understanding the orthopaedic surgeon: What they and the lawyers should reasonably expect of each other

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The first question facing a lawyer with a client who needs assessment by an orthopaedic surgeon is whether to use a medico-legal firm or an individual.

## The advantages of using a firm

- Your client may be seen more expeditiously. Orthopaedic surgeons in general are reluctant to do examinations and have some problems dealing with medico-legal matters, as I pointed out in APLA's February "Update", ("Understanding the Orthopaedic Surgeon" page 18). As a consequence, few in active clinical practice regularly do medico-legal examinations and others may severely restrict the number done
- A degree of standardisation of the report format can be expected. Many firms have a *pro-forma* to follow so that important aspects are not overlooked
- The process is efficient
- The lack of any degree of dependence of the expert on the referring solicitor should ensure greater impartiality
- The fee may be less

## The advantages of using an individual

- Personal or phone contact with the expert in an organisation to discuss any aspect of the report may not be feasible. The organisation, rather than the expert, usually retains the file and clinical notes. The expert may also be from another city having flown in for a day's consulting. We even have some visit from New Zealand
- Court attendances by experts in an organisation may pose logistic problems particularly with the usual short pre-courtroom clarifying chat. Court is of course less of a problem nowa-

days with the increasing use of telephonic evidence.

- Those working for firms usually retain between 55 and 65% of the fee generated. This could be expected to encourage a high volume turnover which might be at the expense of quality. I do know of one expert who travels to another city to perform twenty "E&Rs" in a day
- The expert in a firm, unless particularly requested, may be of a discipline not specifically qualified to deal with the client's particular area of pathology. Specialist panels include general surgeons, physicians, neurologists, rheumatologists and many others
- Defendant organisations use medico-legal firms much more frequently than any independent practitioner - experts working for them may consequently appear to lean towards the insurer's view

## Qualifications of the orthopaedic expert

The expert should:

- be preferably in both clinical and medico-legal practice
- have expertise in the area of pathology under review
- be conscientious, thorough, impartial and sensible
- be willing to defend his opinion in Court
- be a full member of the Australian Orthopaedic Association

## The report

Ideally the orthopaedic report should be succinct. Multiple pages of padding or philosophical waffle merely waste time and effort.

The report should be factual, scientific and as precise as possible. Vague terms

such as "displayed inappropriate illness behaviour", "she moved easily"; "her back moved beautifully" or even the word "normal" should be used sparingly when describing the findings at examination.

The report should address all relevant concerns, offer a realistic, defensible position and deal appropriately with the question of present and future levels of impairment.

The report should display impartiality. Words such as "alleged" should be avoided as they appear to demonstrate bias. The expert is not a field officer of the defendant and observations such as the ease with which the plaintiff crossed the road or got into his car seem inappropriate in a medico-legal report.

## Words requiring elaboration: aggravation, pre-existing

It is commonly stated that an aggravation has occurred producing a temporary increase in the symptoms associated with pre-existing (often unknown) degenerative change. There is no logical or scientific basis on which one can conclude that an aggravation has been temporary or that some permanent deleterious change in the underlying pathology, has not occurred as a result of the incident.

## Degenerative change

This is a natural and inevitable consequence of ageing. It is caused, in part, however, by repetitive micro-trauma. Examples of this are the osteoarthritis common in the wrist joints of long-term jack-hammer users or the lumbar spondylosis of bulldozer drivers. Such changes are usually gradual and escape conscious awareness unless some traumatic episode occurs - that is, the "aggravation".

The mere presence of radiological

evidence of degenerative change has no significant correlation with pain or employment and is of minimal predictive value in any assessment of future working capacity.

**Eponyms**

I believe these should not be used as they are an elaboration of secrecy. Only the cognisant know what "Waddell's signs" are held to mean. Precise and frank descriptions incapable of misinterpretation are the only acceptable means of communicating physical signs or symptoms.

**Referral letter**

If your expert is doing a proper job, your letter need only say, "your usual report is requested", followed by reference to any specific concerns.

All other available reports should accompany the letter so that points of disagreement and any oversights can be properly dealt with. Points of agreement can also be indicated, saving time and effort. It is unlikely that your nominated expert will be adversely influenced by opposing opinions.

**Relationship between plaintiff and expert**

Your client needs to appreciate the reason for the consultation with the expert - that is, the production of an impartial medico-legal assessment, rather than for treatment or advice. It is in fact unethical and unfair to both the client and his medical advisers for the consultant to advise the plaintiff or indicate any opinion as the expert has no role or responsibility in the client's ongoing management. The orthopaedic expert should be courteous, understanding, uncritical and uncommunicative.

**The fee**

Of the three possibilities, speculation, is in my view, inappropriate for the expert witness. Unlike the lawyer who is committed to the client's cause, the expert should not appear to take

sides. "No win, no fee" seriously undermines the perception of the impartiality of the consultant.

The question of deferred or up-front payment is purely one of economics and arrangement between the parties. ■

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