

THE MEDICAL EXPERT



By Ngaire Watson

Medical evidence is an enormous topic with many facets. This article gives an overview of some important aspects of medical evidence, and considerations for a plaintiff team when working with expert medical witnesses.

WHO HAS EXPERTISE?

When engaging an expert medical witness, it is worth noting that the so-called 'allied health professions' are often overlooked, and can provide a valuable source of information and evidence. Such professions include nurses, physiotherapists, occupational therapists and psychologists amongst others. Seek out those experts who hold doctoral qualifications.

A number of cases provide guidance on the use of expert witnesses, including *Makita (Australia) Pty Ltd v Sprowles*¹ and *Velevski v R*.²

Points to consider when retaining an expert

1. The expert must be an expert in their particular field, preferably with recent peer-reviewed publications.
2. The expert ought not to be identified as either pro-plaintiff or pro-defendant. Indeed, caution needs to be exercised with experts whose legal work dominates their medical work. The case will be undermined if bias is exposed in the expert.
3. Experts become part of the team and it is imperative to establish a good working relationship with them. The lawyer-doctor relationship can be a delicate one in which egos tussle. A lawyer who is aware of this tension can avoid being drawn into unnecessary conflict. As a member of the team, the expert should be kept up to date with developments that are relevant to them.
4. Counsel must become familiar with the medical issues of the case. This may require considerable reading and research of current medical literature. However, without an early understanding of the pathology, counsel will be hampered in drafting letters to experts, or dealing with interrogatories.
5. Experts cannot anticipate every aspect of the case needing examination. It is the responsibility of the legal team and, in particular, counsel, to draft questions to be answered by the expert.

PROVIDE THE EXPERT WITH A GUIDE

The writer inherited a matter in which an earlier letter had been sent to an expert which essentially asked only 'what went wrong and whose fault was it?'

The expert needs a concise précis of the matter that contains all the salient points. The legal team may have a hypothesis about the negligent action. This should be tested by putting the proposition to the expert. Specific questions guide the expert through the case. During your research you may have found three or four quality journal articles that are on point. Submit these with your questions for the expert's comments.

If you have located some literature which you think advances the case, provide these to the expert for their opinion.

It is best to identify weaknesses in one's case early on. Strategies can then be developed to manage them. Any concerns that the legal team has about the case, should be put to the expert. It is better to expose one's own weaknesses than leave this to your opponent.

A client's first port of call with a medico-legal problem is to consult a solicitor. Medical terminology and treatment has spawned complex technical language. It is not uncommon (despite the requirements for patient consent) for there to be ambiguity as to the actual procedure or treatment received by the client. It may fall to counsel experienced in medical matters to start the process of clarifying the problem.

Early identification of and communication with a suitable expert witness to provide medical evidence is paramount.

MEDICAL SUB-SPECIALITY

Not all experts are created equal. For example, if the matter relates to an obstetric error, counsel needs to explore exactly what kind of obstetric problem occurred. For example, did the problem occur in the pre-natal, post-natal or in the delivery period? The technical nature of medicine is such that doctors develop special interests in niche areas. The expert

with a depth of case knowledge in the particular problem area of your client is going to best advance their case.

An example of such sub-speciality knowledge required by a client occurred in a case concerning a woman who had previously given birth by caesarean section, whose uterus was ruptured during a subsequent vaginal delivery. One might think that all obstetricians would be well-placed to comment upon this labour. Yet a review of the medical literature reveals that vaginal birth after Caesarean (VBAC) is a speciality area of obstetrics. Much medical research surrounds the safety considerations when assessing a woman for a VBAC, including exactly where the incision of the first caesarean section was performed on the uterus, and the calculation of pressures that will develop along the scar line when the woman is in advanced labour.

LEGAL TESTS

*Rogers v Whitaker*³ established that the *Bolam*⁴ test never gained a foothold in Australia. While not yet recognised in Australia, a 1993 American case, *Daubert v Merrell Dow Pharmaceuticals Inc*, advances *Rogers v Whitaker* and clearly establishes the notion that judges be the gatekeepers of scientific evidence. Following *Daubert*, trial judges must evaluate whether the proffered expert witness's evidence is both 'relevant' and 'reliable'. It is the role of the bench to determine this, but the expert must have derived their conclusions from the scientific method.

'...*Daubert* decided that, when applying Rule 702 of the Federal Rules of Evidence, a court must make an assessment of whether the reasoning or methodology underlying "expert" opinion evidence is scientifically valid...'⁵

While evidence in American medical negligence cases is heard by the bench and juries, here in Australia it is the bench that must grapple with complex technical scientific data.

The decision in *Daubert* set out:

'...indicators which would assist a court in determining scientific reliability: whether the assertion can be and has been tested; whether the theory of technique has been subjected to peer review and publication; and the known or potential; rate of error...These indicators represent a move away from the pre-existing test...which refers to "general acceptance" within a relevant scientific community...'

The *scientific method* was described by Thomas Kuhn,⁶ and includes four essential elements:

1. Characterisations (observations and measurements of the subject of inquiry)
2. Hypothesis (theoretical, hypothetical explanations)
3. Predictions (reasoning and deductions flowing from the hypothesis or theory)
4. Experiments (tests of all of the above)

Ideally, the evidence of a medical expert can withstand the scrutiny of the scientific method.

Four collections of medical/nursing research stand out: PubMed Central,⁷ the Cochrane Collaboration,⁸ Trip database⁹ and the Joanna Briggs Institute.¹⁰ Unfortunately, not

all the information held by these databases is free. However, one can typically obtain the article abstract. Those who have access via their professional organisation or university should be able to obtain a full reference. They are first-rate sources of high-quality evidence in healthcare. The online resource, www.gopubmed.com, is an excellent site that identifies the significant contributors in the medical field of interest.

Specialists from different fields globally review medical research and subject it to a set of criteria to assess the standard and quality of the research. For example, a Cochrane Review may find research lacking due to poor statistical methodology.

QUANTITATIVE OR QUALITATIVE RESEARCH?

Quantitative and qualitative research yield very different results. One is not necessarily superior to the other, but the expert needs to be able to differentiate current research findings. Generally speaking, quantitative research (which often has large participant numbers) produces results that can be generalised to a wider population but lacks specificity, whereas qualitative research may yield great detail that is gained from a small research population.

Identification of high-quality research (usually found in prestigious medical journals) is essential. 'Best practice' guidelines are typically endorsed by the profession, and are used to set standards. This concept is a cornerstone of healthcare practice in Australia. Identification of departure >>



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from 'best practice' by an expert will help to develop the case theory for the plaintiff.

Medical and nursing speciality groups are currently actively engaged in drafting 'best practice' guidelines in order to improve standards of patient care. Often found in policy manuals and documents held by the hospital executive, these documents should be sought in order to assess if there has been any deviation from the standards that the professions set for themselves. A good expert witness will be aware of the state of the development of this process, as it is not uniform across Australia.

Ask the expert if they think you have missed anything. We should not assume we can generate all the relevant questions.

GROUP EXPERT TESTIMONY

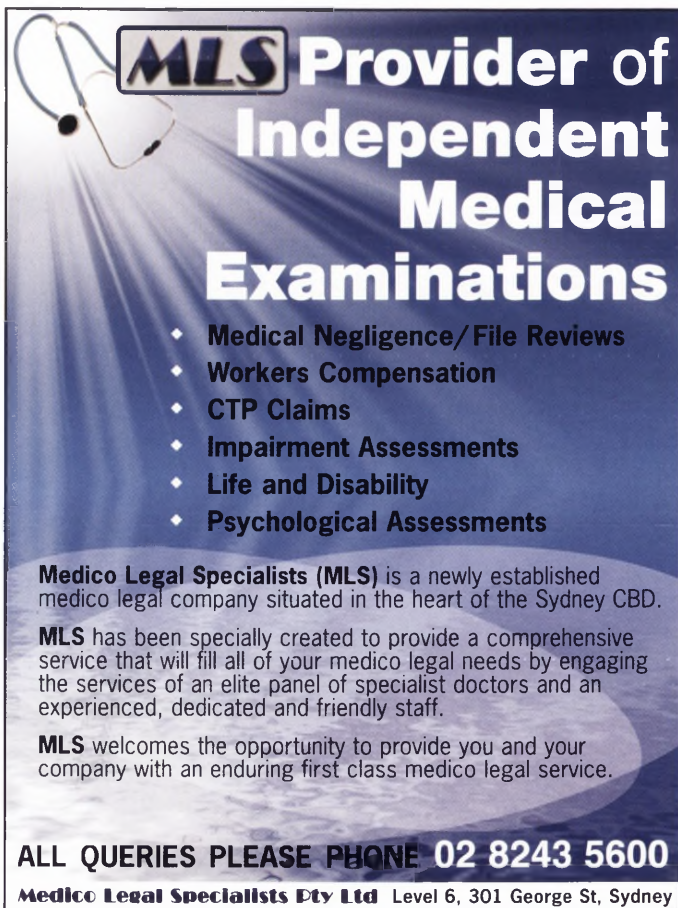
At trial in NSW, the Practice Note Supreme Court Common Law 7 (SC CL 7) – Professional Negligence List – applies. This sets out the role of the expert witness. The experts are brought together as a group to give concurrent evidence. The practice is also referred to as 'the conclave' or 'hot-tubbing'. The expert witnesses are assembled and questions about facts in issue can be directed to them by the bench and counsel. Any weaknesses in your expert/s are likely to show up here. As with any field of practice, over time the players come to know each other. They are a peer group. A pecking order may already exist among the experts, as to who holds seniority. Your chosen expert not only needs the

specialised knowledge required but must be able to conduct themselves with confidence in court and not 'fold' in the face of opposition from their peers.

In conclusion, plaintiff lawyers often need to assess the scientific merit of a case, which in turn involves an understanding of the science behind the case. This is a necessary preliminary step before engaging an expert for an opinion. While not followed in Australia, the 1993 American case, *Daubert*, is a useful guide in determining the relevance and reliability of your expert's evidence. Online databases are an important tool in the determination of standards, and a good place to start your search for an expert witness. ■

Notes: **1** In *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, Heydon JA at 743-744, *inter alia*, summarised the attributes of expert evidence as being as agreed or demonstrated as from a field of 'specialised knowledge', the expert must have gained the specialised knowledge by training, study or experience, the expert should identify the facts they observed or relied upon and these should be subject to proof. **2** *Velevski v R* (2002) 76 ALJR 402. This case became a battleground with differing opinions of five experts. **3** *Rogers v Whitaker* [1992] HCA 58; (1992) 175 CLR 479 (19 November 1992). The appellant in *Rogers v Whitaker* sought but failed to have the Bolam test applied. An objective test is now used in Australia. The current standard required is whether the doctor's practice conforms to the standard of reasonable care demanded by the law. **4** Mason CJ, Brennan, Dawson, Toohey, and McHugh JJ (at para 7 in *Rogers v Whitaker*) quote Lord Scarman in *Sidaway v Governors of Bethlem Royal Hospital*. Lord Scarman (in dissent) stated the Bolam principle in these terms ((6) (1985) AC, at p 881): 'The Bolam principle may be formulated as a rule that a doctor is not negligent if he acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion even though other doctors adopt a different practice. In short, the law imposes the duty of care: but the standard of care is a matter of medical judgment.' **5** *Daubert v Merrell Dow Pharmaceuticals* – applications of Rule 702 of the USA Federal Rules of Evidence required the court to make an assessment of the validity of reasoning or methodology underlying the scientific opinion. Accessed 31/5/09 www.alrc.gov.au/media/2004/mr2707.html **6** Thomas Kuhn wrote *The Structure of Scientific Revolutions* in 1962. Kuhn elaborated the components of the scientific method. **7** PubMed Central (PMC) is the US National Institutes of Health (NIH) free digital archive of biomedical and life sciences journal literature. This huge database is the repository of thousands of journal articles, some of which are free. <http://www.pubmedcentral.nih.gov/> **8** The Cochrane library is highly regarded. Cochrane is a regularly updated evidence-based healthcare database. <http://www.cochrane.org> **9** 'Turning Research into Practice'. TRIP describes itself as '...the Internet's leading resources for evidence-based medicine allowing users to rapidly identify the highest quality clinical evidence for clinical practice.' <http://www.tripdatabase.com> **10** Joanna Briggs is a global organisation with a strong Australian presence. The organisation describes itself thus: 'The Joanna Briggs Institute is an International not-for-profit research and development organisation specialising in evidence-based resources for healthcare professionals in nursing, midwifery, medicine, and allied health. With over 54 centres and groups, servicing over 90 countries, the Joanna Briggs Institute is a recognised global leader in evidence-based healthcare.' <http://www.joannabriggs.edu.au/>

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