Medical panels: a threat to justice

Paul Henderson & Vivian Waller, Melbourne

Science and the law

Victoria's new *Accident Compensation Act* marks the greatest intrusion on the judicial process yet by medical panels. By a redefinition of the term "medical question", medical panels will now make determinations of fact which Courts will be bound to accept. This fact determination process will not allow parties any opportunity for cross-examination, and places this burden of expert fact determination on doctors who are not trained to make such assessments.

This approach has been tried in New South Wales and Queensland, where it has failed through the provision of insufficient funds to attract sufficient medical expertise, and through the lack of a screening process to identify cases which would benefit from reference to an expert panel, for instance by using a criteria of "medical conflict" rather than "medical question". Both these errors have been replicated in the new Victorian legislation, which displays a fundermental misunderstanding of the interplay between the disciplines of law and medicine.

Medical science and the law have long had a curious relationship. When two disciplines of different historical origins collide there is bound to be an element of confusion between them. The differences between science and the law are often brought into sharp relief in personal injury cases where medical evidence plays a crucial role in the case.

Medicine is said to be a scientific discipline and relies upon a scientific standard of proof. The law of negligence, however, requires the plaintiff to convince the court on the balance of probability. This difference as to the acceptable standard of proof is often cause for consternation between the professions.

At an epistemological level, medical science and the law conceptualise knowledge in fundamentally different ways. Whilst the scientific professions hold fast to the notion that scientific knowledge exists as objective fact, lawyers do not view scientific knowledge as static or inherently objective.

Whilst it is not appropriate or warranted to embark upon a denigration of science or scientific method, drawing attention to the differences between the professions will assist in illuminating the appropriate use of expert medical testimony in the courts.

The acquisition of medical knowledge is a living breathing process. The term "scientific fact" is somewhat of a misnomer. Rather than the existence of said facts, a body of scientific knowledge exists which is constantly the subject of scrutiny and critique, of peer review and further research, of discussion and contest. These are the recognised processes by which scientific knowledge is developed and refined. The very nature of this process involves co-operative research, but also a healthy conflict of ideas and differing opinions.

After a period of time, sometimes decades, a consensus opinion emerges on a topic. Sometimes an accepted medical belief stands the test of time, and sometimes it is overturned by fresh research and new ideas. Many examples illustrate this process and the way in which "previously contemporary" views of medical science have played a part in the administration of justice in this state.

Phrenology and the shape of the human skull

An Austrian physiologist Franz Fall and his colleague invented the scientific theory of phrenology. It was thought that the shape of the human skull was determinative of criminal disposition. Scientists were convinced that physical appearance and inherited character traits could explain and predict criminal behaviour. After Ned Kelly's death his skull was examined and it was proclaimed that he was a man clearly destined to a life of crime. The application of phrenology in determining criminal behaviour gained wide acceptance. It played a significant part in the administration of criminal justice at the turn of the century. A professional society was formed which attracted eminent and enlightened doctors of the time who conducted their research with sincerity. Noting that the area above the ears was prominent in several violent criminals they labelled this section of the skull "destructiveness." From the 1870's Charles Darwin's theories of evolution were gaining credibility and an Italian Professor of Psychiatry devised the theory of the "Criminal Man." The central tenet of this view was that criminality was genetic and that the born criminal "*...reproduces in his person the ferocious instincts of primitive humanity and the inferior animals*". Research eventually revealed that the skulls and brains of "honest men" did not vary from that of criminals, and psychiatry and sociology proffered alternative explanations of criminal disposition.

You may think that this is a lesson in ancient history with little relevance to contemporary personal injury litigation. Consider the following examples.

Asbestos and lung cancer

In the mid 1950's there were still sections of the medical community who believed that there was no causal link between exposure to asbestos and lung cancer. The dangers are now well understood, as is the causal nexus.

Smoking and lung cancer

By 1950 there was a respectable body of medical research indicating that smoking caused cancer. Other reputable investigators acknowledged the statistical association between smoking and lung cancer but argued that a causal relationship was not scientifically established. Other researchers argued that the increased mortality rate due to lung cancer was a func-

tion of improved diagnosis not an increasing incidence of lung cancer. This was soundly refuted by subsequent studies. In 1958, RA Fisher published an article stating that early lung cancer produces the desire to smoke, that is, lung cancer causes smoking. This curious research was refuted on the basis that the desire to smoke would have to start approximately 25 years before the disease was evident as for a moderate smoker the disease had a 25 year lead time. Further, lung cancer would have to provoke a desire to smoke cigarettes rather than pipes or cigars since the risk of lung cancer from cigarette smoking far outweighs the risk of smoking pipes or cigars. Other research refuting a causal link between smoking and cancer claimed that hereditary factors were causative of lung cancer, that the increased incidence of lung cancer was due to increased air pollution, that the studies were epidiemiologically flawed and were not drawn from representative populations and that alcohol was causative of lung cancer.

In 1954 the Tobacco Industry Research Committee began its own scientific research to exonerate tobacco's effect on health. It hand picked Clarence Little, an American Cancer Society executive and former University of Michigan President to study the effects of tobacco. Little published a report in 1960 concluding that the link between smoking and lung cancer was unproven. Tobacco companies to this day are relying on epidemiological studies that demonstrate there is no causal link between smoking and lung cancer. It became apparent that the early research claiming there was no causal link between smoking and cancer was flawed. Further, it became apparent that cigarette companies were in possession of and suppressed research and data which supported the causal nexus. This example serves to demonstrate that medical evidence is not necessarily objective nor correct. Misguided scientific "results" propagated by, in the normal course of events, reputable scientists, end up in reputable scientific journals. What if a court of law had commissioned such medical evidence and found it determinative?

This short review is not intended to denigrate the scientific process but to acknowledge that it is just that - a process. Medical science is not a collection of objective facts. These examples demonstrate that medical science is not an exact exercise but like all other fields of human endeavour a process of the acquisition of knowledge. It is necessary to bear this in mind when contemplating the appropriate role of expert medical evidence in personal injury cases. In personal injury cases the plaintiff and the courts face particular difficulties when dealing with expert medical evidence.

Evidentiary difficulties for the plaintiff in medical negligence litigation

Medical negligence litigation raises difficult issues over and above those experienced in any other type of personal injury litigation. In medical negligence cases the appropriate standard of care must be established as well as the nature and cause of the injury.

The question of whether or not an acceptable standard has been reached in most cases involves a careful examination of a prospective plaintiff's medical history.

Ready access to a patient's medical records held by public hospitals is available under the *Freedom in Information Act*. Not so in the private sector. In the case of *Breen v Williams* the High Court determined that medical records were an aide memoir for the doctor to which the patient has no common law right of access.

Without access to medical records the task of the lawyer to advise a client on the merits of the particular claim is very difficult. The assessment of the claim is restricted to the recollections of the client of medical treatment; in some circumstances the medical treatment has been received over an extended period of time and in stressful circumstances. The accuracy of the advice given is only as good as the instructions provided by the client.

Access to a doctor's private medical records may be possible under Order 32.05 of the Supreme and County Court Rules. In such an application it must be shown that there is reasonable cause to believe that the prospective claimant may have the right to obtain relief from the court against the person from whom the records are sought.

The process under Order 32.05 is available in limited circumstances only. Bringing such an application is expensive, and occurs in a context where the viability of the prospective claim cannot be determined until the medical records are viewed. This process imposes upon the doctor the expense and anxiety of litigation which could be avoided if uniform access to medical records were available. Early access to medical records may reduce protracted litigation.

Where the defendant is a doctor or hospital the defence has access to medical expertise and resources unmatched by the plaintiff or patient.

Of particular concern in medical negligence litigation is the reluctance of doctors and expert witnesses to provide opinions which in some cases may require them to be critical of the standard of work of fellow practitioners. This is acutely so in fields of intense specialisation, where the evidence of an expert with clinical experience is crucial, but the pool of experts from which to draw testimony is small and close knit. It is of paramount importance to medical negligence practitioners to secure quality medical expertise in support of the claim - to do otherwise is to court disaster. The frugal quantity of the plaintiff's evidence, or the fact that it may be drawn from interstate or overseas medical practitioners, does not intimate that the plaintiff is drawing a long bow on the question of causation. Early access to medical records, and to reliable and independent expert opinion early in the litigious process would facilitate earlier resolution of potentially protracted litigation.

Breen v Williams has made it clear that the patient does not own the records, nor does the patient have a common law right to access. In the United Kingdom, Canada and most states of the United States people have a right to gain access to their medical records.

The former Minister for Health Dr Carmen Lawrence and the then Minister for Justice, Mr Duncan Kerr initiated moves in 1995 for a legislative response to allow access to medical records. In December 1996 Senator Neal made an unsuccessful attempt to amend the Health Insurance Amendment Bill facilitating access to records.

On 7 April 1997 the Senate Community Affairs Reference Committee began public hearings into access to medical records. The inquiry arose as a consequence of the failed attempt by Senator Neal to amend the Health Insurance ▶

Amendment Bill. The report recommends urgent federal legislation granting a right of access to all medical records, public and private, and APLA supports this recommendation.

It can only be hoped that Australia follows the lead of other industrialised nations in understanding that the patient and prospective plaintiff should have access to their medical records. A number of inquires have been conducted in recent years which recommend reform to enable access to medical record. The nature and scope of any such reforms requires careful consideration. It is necessary to consider issues such as to whom medical records should be revealed, the cost, whether access extends to copying or amending, appropriate exceptions, appeal provisions where the doctor has refused access and issues relating to privacy.

Lord Woolf recommends court appointed medical experts

The courts also experience difficulty when dealing with complex medical issues and are often confronted by conflicting expert medical opinion in personal injury cases. In the United Kingdom Lord Woolf recently published a report entitled *"Access to Justice"* which recommended extensive reforms to administration of civil justice. One aspect of these reforms was the introduction of CAME's or Court Appointed Medical Experts. These suggested reforms to civil procedure could greatly reduce access to expert medical witnesses in litigation. Any such reforms should be treated cautiously.

A summary of Lord Woolf's suggested reforms:

- The calling of expert evidence should be under the complete control of the court.
- No expert evidence can be adduced without the leave of the court.
- There should be no more than one expert in any speciality unless this is necessary for some real purpose.
- "Single" or "neutral" experts would be jointly selected and instructed by the parties, or if the parties cannot agree, appointed by the Court.
- All medical reports should be disclosed
- The court may order that no expert evidence be adduced at all in a particular case
- The Court may limit the number of expert witnesses per party
- The Court may require that the expert evidence be given in written form without the expert's attendance at Court.
- In cases where it is warranted parties may, with leave, call their own expert witness in addition to the "neutral" or Court appointed witness
- A party may consult an expert prior to, or in contemplation of, litigation. However, the party will not necessarily be entitled to rely on its own expert's evidence for the purposes of litigation
- Once an expert has been instructed to prepare a report for the use of a court any communication between the expert and the client or his advisers should not longer be the subject of legal professional privilege.

Critique of court appointed medical experts

Lord Woolf's recommendations should be approached with caution. In personal injury cases, and particularly in medical negligence cases, such a move represents a dangerous departure from the adversarial fact-finding contest and may in the future bring the judicial system into disrepute. It is fashionable for some sections of our community to point to the recalcitrance and inflexibility of lawyers or perhaps to their avarice. Some, however, consider it their duty to voice concerns about the erosion of basic common law rights and the encroachment of judicial independence - from governments and from vested interest groups.

Impartiality

Court appointed medical experts raise serious concerns as to how a Court could ensure the impartiality and independence of their experts, both now and into the future.

When medical panels were introduced into the WorkCover system, considerable effort was made to ensure that the panels contained a broad base of members who had extensive clinical experience. It is a different story today. The majority of work appears to have gravitated to members who are no longer substantially involved in clinical practice or to those whose predominant professional practices have been medico-legal examinations on behalf of insurers.

The responsibility of the Court would shift from weighing the evidence presented by parties to controlling the evidence presented. This constitutes an erosion of the independence of the court.

Complex and strongly contested cases

Personal injury cases can be complex and strongly contested. In medical negligence cases this phenomenon is even more intense. Often there are several tenable schools of thought about causation of the injury, appropriate treatment or diagnosis. The single court appointed medical expert would be inappropriate in complex personal injury cases.

Lord Woolf remarked that *"Experts sometimes take on the role of partisan advocates instead of neutral fact finders or opinion givers."* Further he stated that *"A single expert is much more likely to be impartial than a party's expert can be."* It is difficult to see the logic in the later statement.

The fact that medical experts often disagree does not necessarily reflect the partisan nature of their view, but rather that medical science is not a collection of objective facts. Medical science is not a collection of uncontroversial bones constructed to make a skeleton.

Medical evidence is essentially no different than other kinds of evidence. All evidence is evaluated to see if it is compelling, presented by credible persons with suitable experience or expertise and whether it is consistent. Highly developed rules of civil procedure regulate the way in which evidence can be presented and cross examination can be ruthlessly used to expose any weaknesses in the evidence. Medical evidence is the same in nature as any other kind of evidence, although more complex, and should be subject to the same scrutiny.

To appoint one medical expert to proffer to the court an opinion is to reduce the outcome of the case to luck of the draw. The outcome of the case may be determined by the disposition of the medical expert to the issues in contest. The fact that issues are in contest at all indicates that there is some debate about the validity of the medical evidence presented. It is necessary for the Court to be exposed to the medical issues in contest, not simply to the predominant view of the court appointed

medical expert. Often there will be a need to call experts from various disciplines such as a pathologist, oncologist, diagnostic physician and so on. To only allow evidence from one court appointed medical expert is to seriously hinder the exposure of all relevant material. To reduce the medical issues to the purview on one court appointed medical expert is to misunderstand the nature of scientific knowledge.

Case preparation

Lord Woolf has recommended that investigative reports in preparation for trial will not be generally admissible. The court will rely on the evidence of the appointed medical expert. How then will a solicitor advise the client of the prospects of success if the practitioner cannot count on calling evidence accumulated during trial preparation? The solicitor will not know the view of the court appointed medical expert and will be unable to accurately evaluate the claim. This has serious implications for the solicitor and the client - who may be penalised with an order for costs if unsuccessful. A prohibition on the reliance and production of investigative reports will seriously hinder the solicitor's capacity to provide to the client informed advice about the risks and costs of the anticipated litigation.

Abdication of responsibility of the courts

Court appointed medial experts constitute an abdication of the Courts' responsibilities. Such an initiative represents a significant departure from the adversarial system of justice upon which the legal system is based.

The role of the legal system is to resolve disputes between specified parties by evaluating the evidence and argument presented by both sides. It is the duty of the court to determine on the information before it which version of events is more compelling.

When choosing between conflicting expert evidence Lord Woolf stated that "*the judge may not be sure that either side is right, especially if the issues are technical... his decision may be influenced by factors such as the apparently greater authority of one side's expert, or the expert's relative fluency and persuasiveness in putting across their arguments.*"

Yet this is precisely the function of the Court - armed with the rules of evidence and procedure - to sift through the evidence and decide which is more compelling. If the answer was clear one suspects there would be no case to be litigated.

In recent times we have witnessed an erosion of judicial independence. Courts have been abolished, members of the judiciary sacked, judicial powers removed and judicial independence has been threatened. The amended *Accident Compensation Act* will continue this process by delegating the Court's role and responsibility as a triers of fact to appointed medical experts. As outlined above, the process by which medical facts are 'established' is one which needs open scrutiny, which the common law legal system is designed to provide. Restricting scrutiny is a course of action which will bring the very foundations of justice into disrepute.

Disrepute of the judicial system

In the prelude to this paper the notion of medical science as a process rather than a collection of objective facts was espoused. Surely there is a risk that court appointed medical experts may impinge upon the integrity of the judicial system by making it dependant on the shifting sands of scientific endeavour. The Courts will be directly responsible for the evidence adduced under their commission. They will be viewed as in error where scientific knowledge changes or develops in the future. Instead of a review of scientific papers demonstrating the earlier errors and misunderstandings, there will be a litany of judicial decisions, based on court commissioned evidence, which in a future light will be seen as judicial error. These decisions would be on the record of the court. Hindsight is a powerful tool not always employed with a sensitivity to the operative constraints of the time. If the Courts of the day made criminal convictions based on court commissioned and accumulated evidence from the "science" of phrenology, then the employment of such experts may in retrospect be seen as political, ill-advised or foolish. Over time this may erode respect for the legal system.

Under the present system, the judiciary is not exposed to this risk. Members of the bench make their decisions in the light of evidence presented to them by the parties. The litigants bear the ultimate responsibility for the conduct of the case. It is the litigant's responsibility to present the best and most relevant evidence possible. It would be a substantial burden, and a risky burden, for the Court to assume responsibility for the production of medical evidence.

Medical domination of issues of justice

The prospect of Court appointed medical experts raises the possibility that significant decisions will be made within the province of medical knowledge, decisions which should be made by the exercise of judicial consideration. Such proposals constitute yet another erosion of common law rights. In relation to medical negligence litigation these common law rights have been expressed in *Rogers v Whitaker*.

It is now well established principle in Australia that in an action for negligence the measure of the standard of reasonable care is to be *decided by the court upon hearing the evidence of various experts and not by a body of professional opinion*. It was held that the duty of the courts in this regard was not to be delegated. The High Court has clearly stated that the standard of care provided by a doctor is not to be evaluated solely by reference to the practice of other doctors, but is to be evaluated by the court. In the area of diagnosis and treatment the reasonableness of a doctor's conduct is not a matter exclusively within the province of medical knowledge. To some extent it remains a question of "common sense" capable of judicial review. Although the facts in *Rogers v Whitaker* relate to a failure to warn of material risk the majority of the High Court Justices stated that the principle extends to diagnosis and treatment.

In the recent case of *Murkerjee*, Chief Justice Miles the Supreme Court of the ACT stated:

> *... the decision in Rogers v Whitaker must be applied. In practical terms it seems that, in accordance with that decision, once there is evidence of a medical opinion which supports the plaintiff's case that the medical practitioner acted without reasonable care, then it is incumbent upon the Court, difficult as the exercise may be, to pass judgement on the various medical issues raised.*

In the *Murkerjee* case the plaintiff was born with cerebral palsy and a medical negligence claim was commenced against the obstetrician Dr Mukerjee and the Australian Capital Territory (the body ▶

responsible for the administration of the Hospital in question.) The plaintiff's case against the doctor was not established. Liability was affixed to the second defendant, (the ACT on behalf of the hospital) for an error in communication between hospital staff which delayed the performance of a caesarean section considerably.

In the judgement his Honour stated that in most cases of cerebral palsy the cause of the condition cannot be identified. It is therefore a substantial task to establish that the child's condition was brought about by hypoxia induced by the conduct of one of the defendants. The judge stressed that in professional negligence actions the plaintiff must prove that the defendant's act or omission was unreasonable, and not simply avoidable. The necessity for the plaintiff to prove that no reasonable obstetrician would have acted in that fashion placed a substantial obstacle in the plaintiff's path.

When evaluating the conduct of the obstetrician Chief Justic Miles cited Justice Mahoney in *Lowns v Wood* :

> *... the courts should be slow to intervene where what is involved is the weighing up of advantages and disadvantages, medical necessities and the like by the profession and then by the courts, the mere substitution of the later for the former. There are, of course, extreme cases. But there must, I think, be strong reasons why a clinical judgement properly arrived at is to be put aside as wrong and, a fortiori, as negligent.*

This case did not raise new legal issues in relation to medical negligence but applied *Rogers v Whitaker* to the facts in contest. Cases of this sort serve to remind us of the difficulties encountered in medical negligence litigation. There are those who dramatically portray a crisis or explosion in medical negligence litigation, but such a view is not born out by the facts. The Final Report of the Review of Professional Indemnity Arrangements for Health Care Professionals provides considerable evidence that there is no explosion of medical negligence litigation. Data obtained through the compulsory reporting provision of the *South Australian Medical Practitioners Act* 1993 showed fewer than 50 settlements and judgements against medical practitioners in South Australia per year, with no pattern of increase. Only four plaintiffs in a five year period obtained more that $500,000 while over 60 per cent received less than $60,000. Successful claims against obstetricians on behalf of infants with cerebral palsy averaged only five per year across Australia, with an average payment of $750,000.

The notion that it is appropriate for courts to assess the standard of care exercised by the medical profession in treatment and clinical decision making was affirmed in the recent appeal decision in *Procopis v Woods*. The Court may substitute its own decision as to the content of the duty of care for that of the medical profession, however, the Court should be reluctant to do so. Mahoney JA stated in that case;

> *A judge can substitute his own judgement of what a medical risk involves for that of a treating doctor. Rogers v Whitaker makes that clear. But, at least in the case of the clinical judgement, there must be reasons in the nature of the factual material warranting such a factual decision... the courts should be slow to intervene where what is involved in the weighing up of advantages and disadvantages, medical necessities and the like by the profession.*

It is important to maintain the capacity of the courts to review medical decision making. It is doubtful that it would be considered appropriate for a court appointed panel of lawyers to provide expert opinion on the standard of care delivered by other lawyers. Should we ask a panel of court appointed company directors to provide expert evidence in relation to white collar crime? Proposals of this type protect the professional interests of privileged groups and restrain the independence of the courts.

If court appointed medical experts or medical panels are to be employed in the County Court, careful consideration is required. Research from the USA indicates that great care is needed in the design and implementation of new panels. Panels in several states of the USA have been abandoned or abolished, or are rarely used. Peter Barth has published a study which is a systematic review of the operation of medical panels in the United States and one of the major findings was that medical panels should be advisory - not binding - on adjudicators. This would maintain the crucial distinction between the judicial role of assessing evidence and the medical expert role of assisting the court to determine the voractiy of medical evidence adduced.

It is no coincidence that Tort law is the subject of such attention and intervention. Tort law often attracts legislative interference restricting the common law which are unheard of in commercial litigation. The common law is a powerful tool with which to redress imbalance of power between contesting parties. The asbestos litigation arising from the Wittenoom Mine and the Ok Tedi litigation have both set standards of corporate behaviour that would not have come about without litigation. Governments have been unwilling or unable to set such standards by regulation. Both of these cases proceeded in the wake of human suffering and destruction.

Medical negligence cases such as medically acquired HIV help set standards of medical practice, training and care. Litigation such as the CJD cases assist to set standards in relation to research and ethics. Medical negligence cases can cause medical facilities to review and improve their common practices where they may result in error. They can cause medical facilities to ensure that they are adequately insured. Whilst such cases raise allegations of the practice of "defensive medicine" they also contribute to the provision of more careful and informed health care. Recent medical negligence cases have resulted in increased screenings for cervical and breast cancer. The Interim Report of the Commonwealth Review of Professional Indemnity Arrangements for Health Care Professionals stated that many of the submissions received from health professionals supported the continuation of a fault based system of compensation on the grounds that it promotes individual professional responsibility.

It is important to protect the common law rights of plaintiffs from legislative stealth and incremental erosive change. The last vestige of these rights lies within the heart of the Courts and must be protected. ■

Paul Henderson, of Slater & Gordon, **Phone** 03 9602 4855 and **Vivian Waller**, of Maurice Blackburn & Co, **phone** 03 9345 2700 in Melbourne co-authored the above paper.