

Expert evidence

Expert evidence is a fundamental and essential component of personal injury litigation. Whether the claim is a complex medical negligence case or a simple soft tissue injury claim arising from a motor vehicle collision, the evidence of an expert medical witness is a foundation stone on which a solid case for a plaintiff is built. The effective and persuasive presentation of expert evidence requires more than the mere tendering of a medical report. Good preparation and presentation of medical evidence will provide the ammunition to bolster your client's claim and credibility.

Rules and practice on the presentation of expert evidence vary in jurisdictions throughout Australia. In some jurisdictions, medical evidence is presented simply by tendering a medical report. In other jurisdictions, limited evidence-in-chief and cross-examination is allowed. Despite the restrictions, it is incumbent on the plaintiff's lawyer to ensure that the medical evidence is presented in the best possible light. Here are a few tips on extracting the best from your medical witnesses.

GET THE FACTS RIGHT

Many doctors who undertake a substantial amount of medico-legal work prepare their medical reports through a combination of reviewing the medical evidence and interviewing and examining the patient. Unfortunately, during the course of the process, some of the facts get misinterpreted.

It is essential that when a doctor prepares a report or, more importantly,

commences final preparation to give evidence, they comprehend the facts and circumstances in which the injury arose. Any mistakes in factual history should be corrected soon after a report is received. But if it is not corrected at that time, make sure that the doctor knows the correct facts before he/she sits in the witness box. Clarify the point by way of supplementary report before the trial commences.

HAVE A 'MEDICAL THESIS'

Think through the medical issues carefully. Sit down with your main medical witness and discuss the issues of the case generally. Try to get to the bottom of the opinion and understand the medicine involved. Then try to develop a summary of the case on the medical issues. In each case that I do, I prepare a 'medical thesis'. It is simply a series of connected points that is the 'theory' of the case on medical issues. In a simple case the medical thesis might be:

1. The plaintiff sustained a soft tissue injury to the cervical spine in the motor vehicle collision.
2. This caused pain and discomfort in the cervical spine.
3. As a consequence of the cervical spine injury, the plaintiff also suffered headaches.
4. The pain and discomfort was intense and consistent for a period of six months.
5. The plaintiff required physiotherapy, medical treatment and medication to treat those symptoms in the acute phase of injury (during the first six months). ▶



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6. The majority of soft tissue injuries heal and patients recover completely, but a significant percentage of patients continue to have symptoms after an 18-month period.
7. The plaintiff continues to suffer from symptoms in the cervical spine and occasional headaches.
8. Accepting that the plaintiff's symptoms are genuine, the ongoing pain and headaches are caused by the motor vehicle collision.

This serves as the template for both evidence-in-chief and cross-examination. If these are the key issues in the case as far as the medical evidence is concerned, they should form the focus of case preparation on this point (and it's a nice short summary of the medical evidence for your opening).

WHAT DO THE OTHERS SAY?

Once you've developed your medical thesis, show it to all the medical witnesses in the case. In Queensland, the plaintiff is allowed to contact the defence medical expert to ask them questions about the case.

Some lawyers feel more comfortable telling the defence that they intend to speak to a medical witness, but there is no obligation to do so. When you do speak to the defence medical witnesses, run your thesis by them. You may find that you obtain some surprising concessions that are very useful in cross-examination.

WORK OUT THE DEFENCE THESIS

Read the evidence from the defendants carefully and try to determine exactly what it is they are saying about your client's injuries. Don't ignore the defence case on the medical evidence. Are they saying that the plaintiff is not telling the truth and the factual foundation for the expert evidence is incorrect? Are they saying there is some independent medical evidence that is inconsistent with your thesis? Are they alleging that there is a pre-existing degenerative condition that may have impacted upon your client's ability to work in any case? You need to scrutinise the defence evidence carefully to ensure that you understand their theory.

Make sure that you take your own medical witnesses through those issues. They need to have the opportunity to consider the defence thesis before they give evidence. Often the medical witness can present research or other examples to disprove the defence thesis. This will help to bolster your case and defuse any cross-examination.

SUMMARY

Ensuring that your expert witness is fully conversant with all aspects of the case, both factually and medically, will ensure that they are properly prepared for evidence. There is nothing worse than having a medical witness look from the witness box to the bar table as if to say 'what the hell is this all about?' when they are surprised with something during the course of cross-examination. A medical witness cannot give proper consideration to a topic if it is dropped on them in cross-examination. Allowing that to happen exposes your client to an enormous risk that the witness will run off the rails and the evidence will not be accepted. **PL**

APLA HAS MOVED!

APLA moved office on Thursday 22 July 2004. Please note our street, postal and DX addresses as listed below:

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The logo for APLA, consisting of the lowercase letters 'apla' in a bold, italicized, sans-serif font, enclosed within a black rectangular border.