PSYCHIATRISTS AND THE MENTAL HEALTH COURT

Address to
THE ROYAL AUSTRALIAN & NEW ZEALAND COLLEGE OF PSYCHIATRISTS
QUEENSLAND BRANCH – FORENSIC SECTION

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Justice Margaret Wilson

1. Introduction

The concept of a specialist Mental Health Tribunal constituted by a judge assisted by psychiatrists is unique to Queensland. The Mental Health Court, which came into being on 28 February 2002, is the successor to the Mental Health Tribunal.

The Mental Health Tribunal was set up in 1985. It was the realisation of a vision of Dr G Urquhart, the Director of Psychiatric Services in Queensland between 1966 and 1985.

The role of the Mental Health Court is to determine questions of criminal responsibility, to hear appeals from the Mental Health Review Tribunal, and to investigate the detention of patients in authorised mental health services.

In determining questions of unsoundness of mind and fitness for trial, it affords an alternative procedure to the traditional determination of these questions by juries. A patient dissatisfied with the decision of the Mental Health Court may yet elect to proceed to trial by jury.

The Mental Health Court is a special court in the Queensland system, not only because of the issues with which it deals, but also because it is not set up on the adversarial model. It is inquisitorial in nature: the Court must inquire into the matter before it and may inform itself of any matter relating to the inquiry in any way it considers appropriate.[1] Of course, it is bound by the rules of procedural fairness, and it must respect parties' rights to be heard and to unbiased determinations.

The Court is constituted by a judge of the Supreme Court assisted by psychiatrists. The decision is that of the judge.

2. Assisting Psychiatrists

The Act provides that the assisting psychiatrists are:

(i) to examine material received for a hearing to identify matters requiring further examination and to make recommendations to the Mental Health Court about the matters;

(ii) to make recommendations about the making of court examination orders;

(iii) to assist the court by advising it on the meaning and significance of clinical evidence, and about clinical issues relating to the treatment and detention needs of persons under the Act.

Their functions are limited to matters within their professional expertise.[2]

Out of court they perform an indispensable and onerous task in reviewing files (in the absence of the judge, but with the assistance of the registrar), making recommendations about matters requiring further examination and

about orders by the court for the examination of patients. These are necessary parts of the preparation phase of a case.

This is not to overlook the considerable time spent in reading for hearings.

In court, the assisting psychiatrists assist in the clarification of issues, they give advice which may assist in preferring one opinion over another and they have input into orders about ongoing treatment.

The meaning of "advice" in this context was considered by the Court of Appeal in *AG v Kamali*[3]. "Assisting" will often involve expressing views about the evidence given. The assisting psychiatrists may highlight those views, or the possibility of them, through the questions they ask. They may help the judge in approaching the difference between apparently contradictory conclusions in the expert field. They may assist the judge in understanding the effect and meaning of technical evidence. Although that case was decided under the previous legislation[4], I would expect a similar approach to be taken under the present legislation.

To avoid any perception that matters go on behind closed doors, the new Act contains provisions requiring any advice given by the assisting psychiatrists to the judge before the hearing commences or during any adjournment (other than an adjournment for the Court to make its decision) to be relayed to the parties. Any advice given during the hearing must be audible.[5] There will be occasions when the assisting psychiatrists give the judge advice while the decision is reserved. In such circumstances the rules of procedural fairness require the judge to draw such advice to the attention of the parties if it raises new issues or approaches to issues which have not been canvassed during the hearing. The parties would then have the opportunity to make further submissions. The judge is required to state

in the reasons for decision any advice tendered by the psychiatrists which materially contributed to the decision.[6]

In practice I encourage the assisting psychiatrists to take an active part in the proceedings. They ask questions where appropriate. They make observations which highlight or clarify clinical issues. At the conclusion of questioning by counsel I ask the psychiatrists if they want to ask any questions and then give counsel the opportunity to ask further questions arising out of those asked by the psychiatrists. Again after counsel's submissions, I ask the psychiatrists for their advice in open court, and counsel have an opportunity to make further submissions in the light of it.

3. Disposition of Cases

It is expected that the Mental Health Court will sit for 4-6 weeks in each half year. Like everyone else in the public sector, it is constrained by limited resources. The judge constituting the court is a Supreme Court judge, and the amount of court time that can be allocated to the Mental Health Court is limited by the demands of the mainstream of the Supreme Court's work.

The assisting psychiatrists are very generous in the amount of time they devote to the work of the Mental Health Court, but they, too, have other commitments.

The Court's only administrative staff are the registrar and his one assistant. My associate, who assists me with research and administrative tasks in all the cases that come before me, directs her efforts to Mental Health matters when I am working in that jurisdiction.

Last month the Mental Health Court had its first sittings. It sat for 9 days out of the fortnight beginning on 20 May. It dealt with 74 cases. 57 of them

were finally disposed of, 12 were adjourned and in 5 the decisions have been reserved. The Court was able to dispose of so many in that period because most turned out ultimately to be not contentious. But to reach that point, a great deal of effort was put in by everyone – the staff of the Director of Mental Health, the lawyers, the registry staff and the Court. Reports had been filed in advance of the hearing dates, and the assisting psychiatrists and I read the files before going into court. The appearance of experienced, well prepared counsel was of immeasurable assistance.

There are presently 138 live matters in the registry – 82 of them commenced under the 1974 Act and 56 commenced under the new Act.

The Court sits in Brisbane, but will sit in other centres such as Townsville and Cairns where the work warrants it.

4. Psychiatrists as Expert Witnesses

A judge can decide a case only on the evidence which comes before him or her. In *AOTC Ltd v McAuslan*[7], a personal injuries case, there was psychiatric evidence. After the case had closed, the judge did his own research. In his judgment he was critical of the psychiatrist on various grounds and he relied on parts of DSM III which had not been placed before him in evidence, and in respect of which the psychiatrist had not had the opportunity to respond. The matter went on appeal to the Full Court of the Federal Court, which was very critical of the trial judge for his breach of the rules of procedural fairness. As it happened, his decision was upheld because there were sufficient other grounds to reject the psychiatrist's evidence, but it is worth noting that the appellate court's concern was with unfairness to the plaintiff, rather than to the psychiatrist.

Generally courts will not receive opinion evidence. However, expert witnesses may express opinions on matters outside the experience and knowledge of a judge or jury. They must be opinions in an established field of knowledge, and ones relevant to the witness's expertise. Credibility is always for the Court to assess.

It is sometimes said that an expert witness should not "swear the issue" – that he or she should not express an opinion on the ultimate question for the Court's determination. It is doubtful that the rule is as absolute as that, particularly where there is no jury.[8] That said, let me take as an example the issue of unsoundness of mind. The Court has to determine whether the patient was deprived of one or more of the three capacities (the capacity to know what he or she was doing, the capacity to control his or her actions and the capacity to know that what he or she was doing was wrong)[9]. The Court is assisted by opinions on factors relevant to the deprivation of each capacity rather than by conclusions that the patient was or was not of unsound mind. Similarly, the question of fitness for trial is one which the Court has ultimately to decide. It is assisted by opinions on various factors relevant to that determination. The Court must be satisfied of these issues on the balance of probabilities, bearing in mind their seriousness.[10]

There are two aspects of a psychiatrist's role as an expert witness – report writing and giving oral testimony.

5. Report writing

A report can be in the nature of advice to a client or it can be intended to be relied on as evidence. It is the latter which I am going to discuss.

An expert opinion is only as good as the foundation on which it is based. While the facts proved need not correspond with precision to a proposition

on which an opinion is based, failure to prove data significant to the formation of that opinion will warrant its rejection.[11]

Ascertaining the factual foundation can be a complex task, although I note that recently the Victorian Court of Appeal described it as grist to the mill for experts accustomed to assessing and evaluating complaints from psychiatrically disturbed people.[12]

The duties and responsibilities of expert witnesses were summarised by Cresswell J in *The Ikarian Reefer,* an admiralty case[13]. His Honour made seven points.

1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of the litigation.

2. An expert witness should provide independent assistance to the Court by way of objective, unbiased opinion in relation to matters within his or her expertise. He or she should never assume the role of an advocate.

3. An expert witness should state the facts or assumptions upon which his or her opinion is based. He or she should not omit to consider material facts which could detract from his or her concluded opinion.

4. An expert witness should make clear when a particular question or issue falls outside his or her expertise.

5. If an expert's opinion is not properly researched because he or she considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In

cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.

6. If, after an exchange of reports, an expert changes his or her view on a material matter having read the other side's expert report or for any other reason, such change of view should be communicated (through the legal representatives) to the other side without delay, and, when appropriate, to the court.

7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.

An expert's overriding duty is to the Court, to present his or her honestly held opinion in non-partisan way.

In *Cala Homes (South) Limited & ors v Alfred McAlpine Homes East Limited*[14]*, a* copyright infringement case, an architect was called as an expert witness. He was also a Fellow of the Chartered Institute of Arbitrators and of the Academy of Experts. He had previously written an article *The Expert Witness: Partisan with a Conscience* which had been published in a professional journal. In it he had described the expert as the man who works the Three Card Trick, someone who goes through three phases:

(1) that of the candid friend, who tells the client all the faults in his or her case;

(2) that of the hired gun, who writes a report intended to be shown to the other side;

(3) that of the witness in court whose earlier pragmatic flexibility is brought under a sharp curb, whether of conscience, or fear of perjury, or fear of losing professional credibility.

The article was used against him in cross-examination to devastating effect, and it provoked scathing criticism by the trial judge. Needless to say, the architect's evidence was rejected.

There are salutary lessons to be learned from the *Vernon* saga in England[15]. There medical witnesses gave different opinions in different proceedings, one being for compensation arising out of a motor vehicle accident and the other being matrimonial proceedings. In the claim for compensation for negligently inflected psychiatric damage, the plaintiff alleged that he had sustained post traumatic stress disorder in consequence of his two young children being killed in a motor vehicle accident. The car in which they were travelling was driven by the nanny. It ran off the road, down an embankment and into a fast flowing river. The nanny escaped but the children were trapped. The plaintiff and his wife watched helplessly as police and rescue services tried unsuccessfully to save the children. There was a great deal of criticism of the medical witnesses in the case. One of the judges in the Court of Appeal said that he would have expected "disinterested evidence" from the medical practitioners, but that instead they had been "allowed to roam unchecked into almost every aspect of the case". The plaintiff called the treating doctors who assumed, as an established hypothesis, that he was suffering from post traumatic stress disorder. The psychiatrists called by the defence became partisan, not through lack of professionalism, but through the osmotic process which was an almost an inevitable incident of litigation of that intensity.

But that was not all. Before the Court of Appeal judgment was entered, the defendant's counsel learnt that in separate proceedings relating to the custody of other children of the marriage the same treating doctors had given evidence of substantial recovery by the plaintiff. The Court of Appeal allowed fresh evidence of the changed views of the expert witnesses. It was critical of the plaintiff for misleading the court. Thorpe LJ referred to the dilemma in which the plaintiff's counsel had been placed as one "plainly created by the readiness of [the experts] to do their best to present the plaintiff's condition on different dates and in different proceedings in the light that seemed most helpful to the immediate cause, ignoring their equal or greater duty to the court and disregarding the very considerable inconsistencies that inevitably developed."

Experts, in your case psychiatrists, are witnesses, not judges. Your evidence is admissible to enable the judge to reach a properly informed decision on a technical matter. A judge is not bound to accept the evidence of an expert witness if there is proper basis for rejecting it (such as other evidence before the Court, of the factual foundation not being proved), or if for some other reason he or she is not persuaded by it.

In an article entitled *The Expert Witness in Forensic Psychiatry* Chaplow, Peters & Kydd set out some practical guidelines for report writing and giving oral evidence[16]. Perhaps their best advice was simply: "Every word needs to be defensible".

Remember you are addressing laymen, not fellow psychiatrists. Lawyers are often, sometimes fairly, accused of talking in legal mumbo-jumbo. Sometimes members of the medical profession are prone to a similar tendency. It is worth taking the time and trouble to reduce your findings and opinions to as simple and succinct statements as possible. Judges face an

analogous call in having to explain the law and its application to juries. For me, at least, that has proved both challenging and edifying: I have been forced to think of legal concepts from first principles and to reduce sometimes quite complex concepts to terms which are readily comprehensible.

Chaplow, Peter & Kydd give a list of practices to be avoided in report writing:

(1) Be sparing in your use of complex psychodynamic formulations of a subject's behaviour.

(2) Avoid psychological/psychiatric jargon.

(3) Facile over-generalisations are unhelpful.

(4) Do not use pejorative terminology such as "compensation neurosis".

(5) Do not use hearsay.

(6) Do not confuse fact with opinion.

6. Oral testimony

If you are to give oral testimony, make yourself available for pre-trial conferences with counsel, even if these are conducted by telephone. This will not only make counsel's task easier – it will also help you to prepare for the ordeal of cross-examination.

Review your clinical notes and your report before the conference. If you have been given copies of reports by other experts, review them also. How do they differ from your own? Is there anything in them which would cause you to change or modify the opinions you have expressed? Be able to explain simply and succinctly where you disagree with the others and why.

Bring you clinical notes and a copy of your report to the conference, and in due course to court. Check with the lawyers that hospital files or anything else to which you may need reference will be in court.

A few moments' reflection on the dynamics of the courtroom may be worthwhile.

The Mental Health Court is not set up on the adversarial model. Its role is inquisitorial, and no party bears the onus of proof[17]. Counsel for the Director of Mental Health customarily appears in an *amicus curiae* role, ensuring that all relevant angles are put before the Court, but not pushing for the adoption of any particular one. The Director of Public Prosecutions' role, as in any prosecution, is fairly and impartially to put the Crown case; while the prosecutor cannot strive for findings of soundness of mind and fitness for trial, he or she is entitled, indeed bound, to advance the prosecution case firmly and vigorously, and if necessary strenuously to attack the case advanced by the patient. Obviously the patient has a very real and very partisan concern in the outcome of the proceedings.

Every witness, like every counsel, has his or her own personality and style. So, too, does every judge.

Your overriding duty is to the Court, not to the party who commissioned your report. Generally a calm, dispassionate and logical presentation will be well received.

Remember it is the duty of counsel for the other side to put his or her instructions, and to persuade the Court of the merits of his or her client's case. His or her cross-examination of you, in which he or she attacks your opinions and/or tries to convert you to those held by his or her expert, is part of that process. I have no doubt that the experience of cross-examination can be irritating if not infuriating, and unsettling, especially for someone of great experience and high repute in his or her profession gruelled by a barrister apparently with little real understanding of the particular area of expertise. By all means stand your ground and don't be intimidated. But be prepared to make concessions where warranted.

The barrister's expertise is in advocacy. I remember soon after commencing practice at the Bar hearing Cedric Hampson QC say that a barrister needs a bathtub mind: at the beginning of a case he or she should put the plug in and fill the tub up with information about that case and areas of technical expertise relevant to it; at the end of the case the barrister has to take the plug out and let it all drain away, in preparation for the next case. Cross-examination of an expert can be more of an ordeal for the barrister than it is for the expert!

Have you previously expressed views germane to the issues before the Court? Do not be surprised if you are suddenly confronted with them.

7. Telephone evidence

Courts are very conscious of the logistical difficulties with which members of the medical profession who give expert evidence have to deal. In the

past too much time has been lost waiting to be heard by a court. Courts endeavour to reduce waiting times as far as possible, and they encourage legal representatives to be realistic in their time estimates and to cooperate in the scheduling of witnesses.

Some years ago Queensland courts began receiving some evidence by telephone, and on occasion by video link. This requires the leave of the presiding judge, but that is usually given fairly liberally.

Personally I have some reservations about the effectiveness of telephone evidence, at least in cases where there is considerable conflict. As in so many areas of legal practice, it is a matter of achieving the right balance between competing demands.

That said, can I offer a few observations about telephone evidence generally.

Everyone involved in the process (the judge, the legal representatives, the witness) has to strive to maintain the solemnity of the court proceedings so far as possible. The witness can expect that one of the legal representatives will call to make arrangements for him or her to be available to give telephone evidence at a specific time. Usually the witness is asked to ring into the courtroom.

Make sure that you know what documents you may need to refer to. Confirm this with the legal representative who makes the arrangements. If necessary, ask for copies of documents to be faxed to you in advance of your giving evidence. Make sure you have the documents in front of you when you give evidence.

The bailiff will administer an oath or affirmation. If an oath is to be taken, you should have a Bible available at your end of the call.

Remember that everyone in the courtroom is listening into the conversation; your evidence is being recorded by a court reporter, just as it would be if you were actually in the courtroom. Adjust your presentation accordingly.

8. Developments in the Expert Evidence Area

In Queensland there is a Rules Committee (made up of the Chief Justice, representatives of both divisions of the Supreme Court, the District Court and the Magistrates Court) charged with the formulation and review of rules of court[18]. It is presently working on a new set of rules about experts in civil proceedings. These are expected to encapsulate the principles I have been discussing, and to give guidance and assistance to experts (as well as the parties) as to what is expected.

Their implementation will require a cultural change on the part of experts and the legal profession. It will inevitably affect experts in other courts such as the criminal courts and the Mental Health Court.

Recently a body called the Expert Witness Institute of Australia has been formed. It has a Queensland chapter headed by Mr Tom Baxter, a consulting engineer, and Justice Glen Williams of the Court of Appeal. It is modelled on the English Expert Witness Institute. It aims to train people who are already experts in their respective fields better to perform the role of expert witness.

The Institute will conduct a number of seminars. I attended a seminar staged by the English Institute in London a couple of years ago. Under

the English rules of court, the Court may order experts to meet and attempt to narrow the issues really dividing them. The seminar I attended was one for experts; it was chaired by a gynaecologist and also addressed by a forensic accountant and a Court of Appeal judge. The participants were experts from various fields; there were very few lawyers in attendance. The issues discussed included setting the agenda for such a meeting, whether the lawyers should be present, how agreements reached should be recorded and when - before there was time to go away and change their minds, before there was time for lawyers to intervene, etc. There was lively participation in what was a very successful seminar.

The Australian Institute plans similar activities. There will be a seminar for forensic scientists in Brisbane next month. It will take place over a whole weekend. There will be lectures and workshops led by judges and senior members of the Bar.

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[1] *Mental Health Act* 2000 *s.* 383(2)
[2] *Mental Health Act* 2000 *s.* 389
[3] (1999) 106 A Crim R 269
[4] *Mental Health Act* 1974
[5] *Mental Health Act* 2000 *ss.* 406, 407
[6] *Mental Health Act* 2000 *s.* 408
[7] (1993) 47 FCR 492
[8] *R v Chayna* (1993) 66 A Crim R 178; *Murphy v R* (1989) 167 CLR 94 at 110 per Mason CJ and Toohey J
[9] *Mental Health Act* 2000 schedule 2 (Dictionary); *Criminal Code s.*27
[10] *Mental Health Act* 2000 *s.* 405(2); *R v Schafferius* [1987] 1 Qd R 381; *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362).
[11] *Ramsay v Watson* (1961) 108 CLR 642; *Paric v John Holland (Constructions) Pty Ltd* (1985) 59 ALJR 844.
[12] *City of Brimbank v Halilovic* [2000] VSCA 12.
[13] [1993] 2 Lloyds Rep 68; approved on appeal [1995] 1 Lloyds Rep 455
[14] [1995] FSR 818
[15] *Vernon v Bosley (No. 1)* [1997] 1 All ER 577; *Vernon v Bosely (No. 2)* [1999] QB 18
[16] *ANZ Journal of Psychiatry* 1992; 26:624-630
[17] *Mental Health Court Act* 2000 *s* 405
[18] *Supreme Court of Queensland Act* 1991 *s.* 118C