

Expert witness

conferences in medical negligence proceedings

By Associate Professor Barbara McDonald



The Law and Justice Foundation of NSW recently awarded a research grant to Associate Professor Barbara McDonald and Professor Patrick Parkinson of the Faculty of Law at the University of Sydney to investigate the practice of court-directed expert witness conferences in medical negligence cases in the Supreme Court of NSW.

The project was suggested by Justice Studdert and Justice Sperling of the Supreme Court. They identified a number of issues meriting investigation, which arise out of the conduct of expert witness conferences in medical negligence cases in the professional negligence list. There is concern, for example, at possible inconsistency and inefficiency in the way these conferences are conducted; and of inconsistency in the way in which agreements on matters of evidence are reached by witnesses, the parties and their legal representatives in conference. There would also be benefit in knowing in which circumstances the courts tend to direct the holding of an expert witness conference.

While the particular focus of the project is medical negligence cases, where the parties and courts are critically dependent on expert medical opinion, its findings may also be of interest to the conduct of expert witness conferences in other types of proceedings. >>

Broadly, the aim of the project is to ensure the proper and just resolution of medical negligence actions and to improve the use of court-directed expert witness conferences. More specifically, it aims to:

- ensure that current practice leads to fair and proper agreements between expert witnesses, reached in a manner which adequately protects the rights of both parties;
- assess and report on the integrity and efficiency of the current process; and
- make recommendations to improve the process, where necessary, to achieve its stated objectives.

The court has the power to direct expert witness conferences by Rule 13 CA of Part 36 of the Supreme Court Rules. This was introduced in January 2000, with amendments in 2001, in order to achieve the efficient determination of claims and savings in legal and court costs to all parties in cases involving expert evidence.

It allows the court to direct that expert witnesses confer and endeavour to reach agreement on outstanding matters in dispute between them, then provide the court with a joint report specifying matters agreed and those not agreed upon with the reasons for non-agreement. The court may make the direction either on the motion of a party or on its own motion. In either case, the parties may agree to be bound by the agreement reached by the expert witnesses in conference and not to adduce any inconsistent evidence.

Where there is conflicting expert opinion, examination and cross-examination is often lengthy and costly for all involved. Reaching agreement between the parties on technical issues of fact will save time and therefore reduce costs considerably, encourage settlements and reduce the involvement of the court. The matters on which each witness needs to be examined and cross-examined will be drastically reduced and the court given much more guidance about the real issues in dispute.

A process by which experts for opposing parties come to some agreement may also help to produce a more comfortable outcome for both plaintiff and defendant. To achieve this, it is essential that agreement by experts is reached properly and that all parties are satisfied that the process has been fair.

While the primary intended beneficiaries of the rule are the litigants, through assumed savings in costs, reforms are also intended to benefit medical expert witnesses by reducing the time they are tied up in legal proceedings. There is an overall benefit to the courts and the administration of justice by the just, swift and cheap resolution of the real issues in civil proceedings.

The project will be conducted by structured interviews of solicitors, counsel and medical expert witnesses involved in selected medical negligence proceedings where the court had directed an expert witness conference. It will be supplemented by a postal survey of lawyers and medico-legal experts.

The interviews and survey will investigate such matters as:

- whether the conference was held in person or by telephone;
- whether legal representatives were present and took part in discussion of issues;
- whether the conference was facilitated or led by one of the participants;
- whether there was an agreed agenda;
- if so, who drafted or agreed on the agenda;
- whether any experts appeared to modify their previous opinions;
- whether the presence or absence of lawyers was helpful;
- how the report to the court was drafted and settled;
- whether the participants were satisfied that the report was fair; and
- whether the participants thought the conference was beneficial and, if so, in what respects.

Following the survey, results will be collated and analysed. A report will be prepared identifying the strengths and weaknesses of current procedures and practice with recommendations for improvements. This report will be circulated to both legal and medical professional bodies for comment. ■

Barbara McDonald is Associate Professor at the Faculty of Law, University of Sydney. If you would like to participate in this survey or make other comments on the project, please contact Associate Professor Barbara McDonald at barbam@law.usyd.edu.au.



Dr Keith Tronc.

Barrister-at-Law and an APLA member of long standing, who has been invited to speak at the last six APLA National Conferences, is a former teacher, school principal, TAFE teacher, university lecturer, solicitor and Associate Professor of Education. He assists numerous Australian law firms in educational litigation involving personal injuries, discrimination, bullying, sex abuse, breaches of contract, and TPA matters. Dr Tronc appears frequently in court in several States providing independent expert opinion on matters concerning education and the law. Dr Tronc has published four national textbooks and looseleaf services on schools, teachers and legal issues.

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