

# How to brief experts in medical negligence cases

By David Hirsch

**P**robably the most important aspect of preparing a medical negligence claim is obtaining expert opinion.

Before approaching an expert witness, amass as much primary medical information as possible. Hospital records should not be difficult to get, either with the written authority of the client or under Freedom of Information. Records from treating doctors may be more problematic where they have been advised not to disclose their records without a subpoena or other form of third – party discovery. But you should still make the effort to obtain them.<sup>1</sup>

With the benefit of primary records, your client's instructions, and some preliminary research into the medical issues, you should then develop a theory of the case. There may be several alternative theories, so keep an open mind. Often, you will need advice from different experts on the issues of liability and causation. Do not spend time, effort and money seeking reports on damages unless liability and causation reports have been obtained, and you are confident that the case has merit.

Liability reports should be sought from an expert in the same field as the proposed defendant: for example, an expert GP should opine on the liability of a GP. Where the defendant is a hospital, you should choose an expert from the same area of practice as that under investigation. The expert should be one who was in active practice at the relevant time, otherwise the weight of the opinion may be open to challenge.<sup>2</sup>

Causation reports need not be from an expert in practice at the relevant time because the question of causation is a matter of science, not acceptable practice at the relevant time. An internet search for recent articles can turn up experts who are often pleased to share their information and provide opinions on narrow causation issues.

Once an expert has been located, you should send a brief 'feeler letter', seeking an expression of interest. This letter should summarise the facts, and invite the expert to discuss the case over the phone. This is a good time to 'test drive' your theories of the case and quite possibly discover new ones.<sup>3</sup>

The next step is to prepare a brief of all the relevant records and send this to your chosen expert, together with a statement of assumptions,<sup>4</sup> and specific questions.

Asking the right questions is vital, since the expert's written opinion becomes, in a practical sense, the whole evidence-in-chief. The written opinion should in itself

be sufficient to prove the case without the need for oral evidence. The report must comply with the relevant Expert Witness Code of Conduct and, in particular, contain a statement of the factual assumptions and the reasoning behind the opinion.

In some states, any written communication with the expert needs to be disclosed, including file notes of discussions. My advice is to write as little as possible and, when taking notes in relation to preliminary opinions and those based on limited facts, make the limitations of those opinions clear.

Obtaining draft, unsigned reports for discussion, that are clearly marked as such, is a good idea. These remain privileged communications. Once a report is signed, it cannot be suppressed if, for example, it contains an opinion that the expert later changes in a subsequent report with the benefit of more information. You cannot choose to serve only the later report.

Solicitors should remember that many experts do not see their role as extending beyond answering the specific questions asked. Several experts have told me that, while they sometimes did see other issues in cases they were asked to comment on, they did not mention them because they were not specifically asked to do so. This is very unfortunate. I know of cases that were lost not because of what the expert said but, rather, what was not said – because the solicitors failed to ask the expert to comment on what ultimately became the crucial issues in the case.

A good expert report is a thing of beauty. A judge should be able to rely on it in preparing a judgment. More importantly, the report should be sufficient to either satisfy you to advise the client to abandon the case, or to persuade your opponent to settle as soon as possible. ■

**Notes:** **1** Reviewing HIC (Medicare) records can be useful in ensuring that you have identified all of the plaintiff's treating doctors. **2** Using 'one stop shop' experts is discouraged. Consultant general physicians are experts in treating complex problems (like Dr House on TV), but often they are not the best experts to opine on treatment performed by another doctor (unless, of course, that other doctor is also a general physician). **3** Unless you are confident in your expertise in the area, it is a good idea to have counsel involved in this discussion. **4** See D Hirsch, 'Statements and Statements of Assumptions' in *Precedent*, Issue 85, March/April 2008. p47.

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