Fear and restraint in the hot tub

By Andrew Stone

If the practice of medicine is a science rather than an art, why is it that plaintiff and insurer medico-legal 'experts' so regularly reach such disparate conclusions regarding injuries, disabilities and prognosis? Why do they demonstrate bias along the way?

Before addressing these questions, let me give me some examples from recently reviewed medico-legal reports:

'In April 2005, his physiotherapist advised him that it was safe and even helpful for him to return to the gym (in the same way he had been attending a gym before the accident).'

'[The MRI report] was completely normal. The report refers to "a ***very slight*** dilation of the central canal of the spinal cord" ...This is a variation of normal, and is congenital, ie: not related to trauma.'

My issue isn't with the history taken about gym attendance or the opinion regarding the MRI report. What troubles me is that the emphasis (the underlining and the bold) was not added by me but was in the doctor's report. Reports from this doctor to various insurers are littered with sections in bold and underlining. Amazingly, it is only ever those parts of the report that assist the insurer's case that are underlined or highlighted.

My own view is that this is a pathetic display of partisanship from a tertiary qualified professional who has acknowledged an expert's Code of Conduct. The doctor's desire to impress or assist his insurer paymasters seems akin to the faithful puppy bringing a dead rat into the house. [This isn't a perfect analogy – the rat is unwelcome, whereas insurers don't seem to mind receiving medico-legal reports full of pandering prejudice. I offer a bottle of wine for the best suggestion from a reader as to a better analogy.]

I trust I don't need to persuade anyone that underlining or highlighting positive points in favour of only one side in a medico-legal report is the conduct of an advocate and demonstrative of bias. The more interesting issue is why any expert thinks they can get away with it. I suspect that at least two changes in the style of litigation have contributed to more frequent and more overt bias from medico-legal experts acting for both sides.

First, with the emphasis on quick, cheap and just outcomes to litigation, very few doctors are now cross-examined. It takes a major claim with controversial medical issues to get doctors into the witness box (or 'hot-tub'). A vigorous cross-examination over demonstrated bias in the presentation and phrasing of a medico-legal report (if a judge would permit it) should serve to encourage doctors to stick to the facts and leave out the prejudices. Fear of being grilled on oath is a powerful restraining factor during report writing. Remove the fear, remove the restraint.

Second, beyond cross-examination lies the fear of judicial criticism. Being judicially labelled as biased or partisan or an advocate should place a doctor's medico-legal earnings at risk. Reduced judicial criticism of biased report writing removes another powerful incentive in favour of restraint.

Unfortunately, many personal injury cases are now determined by arbitrators, assessors and tribunals rather than courts. These fora seem less willing to make appropriately robust criticism of poor-quality medico-legal reports. Perhaps government-appointed assessors (usually active legal practitioners) keep their decisions bland to avoid any suggestion of bias that might jeopardise their own re-appointment. In many of these fora the decisions are not published, so any criticisms of doctors remain well hidden.

I am not suggesting that it is necessary to go as far as Justice Hunt did in describing three insurer medico-legal regulars as 'that unholy trinity' (before they had even given evidence – see *Vakauta v Kelly* (1988) 13 NSWLR 503). However, some stronger judicial and quasi-judicial criticism of biased medico-legal reporting would help reintroduce a much-needed sense of balance. ■

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