

Of experts, geese and ganders

By Andrew Stone

In my last column I railed against what I perceived to be overt demonstrations of bias in medico-legal reports. I suggested that part of the solution may involve the occasional vigorous cross-examination of the report-writing expert and occasional judicial criticism of those experts who act as advocates rather than being genuinely independent.

There is one further step that I believe would help put the so-called 'independent' medico-legal report in context – disclosure by the doctor of the percentage of their income derived from writing medico-legal reports and how that income breaks down as between the plaintiff's side and insurer's side. Judges, arbitrators and assessors used to be familiar with who 'the usual suspects' were and could discount the more one-sided opinions accordingly.

Before exploring this theme further, a slight detour. Centrelink has a statutory immunity from producing records under subpoena (s207 of the *Social Security (Administration) Act 1999*). To try and get around this provision, insurers will ask claimants to execute an authority to have their Centrelink file released. I always advise my instructing solicitors against executing such authorities on principle.

The federal government intended Centrelink documents to remain confidential. The only reason they are released to a claimant is because Freedom of Information (FOI) provisions were introduced to allow people to access their own records for the purposes of checking their accuracy. These FOI provisions were never intended to provide a back-door means of subverting the statutory protection from subpoena.

In *El-helou v Smith* [2009] NSW SC 741, Harrison J ordered a plaintiff to execute an authority (at the behest of an insurer) to release a Centrelink file. In the course of his reasons, Justice Harrison stated:

"...having commenced these proceedings, the plaintiff fell under and remains bound by an obligation as far as reasonably possible to assist the Court to arrive at a fair conclusion. In the absence of even the hint of proper

reason, whether founded upon a statutory prohibition or an allegation of prejudice or the demonstration of some legitimate forensic disadvantage or claim of confidentiality or the assertion of privilege, it is difficult to discern any reason why it is not in the interest of the just, quick and cheap disposition of the proceedings to make an order in the terms sought by the defendant."

I detour via this case to illustrate the point that claimants engaged in personal injury litigation can have no expectation of any privacy being protected. All and any aspects of their life are fair game to an insurer trying to 'assist the court to arrive at a fair conclusion'. If this is the rule applied to plaintiffs, then why should it be any different for other voluntary participants in the process, including experts?

It is fairly common in the US for experts to be deposed prior to litigation. Part of that process is the questioning of experts as to the sources of their income, so that arguments as to bias can be made with a proper foundation.

I have twice tried issuing subpoena to experts to secure information about their earnings as expert witnesses. Both times judges at first instance set aside the subpoena. My sole success was with a subpoena to NRMA for a list of all their payments to the medical experts retained in a case over the previous five years. The case subsequently settled before the list of payments was produced.

I remain of the view that it is a legitimate forensic exercise to seek evidence as to the earnings of a medico-legal expert as the foundation for cross-examination on bias. Without the documentary evidence, any cross-examination will fall flat when the doctor is unable to recall precise details of their earnings from insurer medico-legal briefs. Privacy is no answer – what is good for the (plaintiff) goose should be good for the (expert) gander. ■

Andrew Stone is a barrister from Sir James Martin Chambers in Sydney. **PHONE** (02) 9223 8088 **EMAIL** stone@sirjamesmartin.com