PRESENTATION OF EXPERT MEDICAL EVIDENCE – A VIEW FROM THE BENCH

Presented to Europe Asia Conference 28 June 2023 by Justice J D Henry

Introduction

[1] Thank you to CPE for this opportunity to address your conference of medico-legal attendees. Professional collegiality between the medical and legal communities is important.

[2] Eleven years ago, in my second year as a judge, an orthopaedic surgeon friend of mine and I founded the Far North Queensland Medico-Legal Society. We did so by convening a function which was well attended by the doctors and lawyers of Cairns. As our guest speakers we pitted a local surgeon against a local QC, each speaking to the topic "Ten Things I Hate About You".

[3] The title was of course derived from the teen romantic comedy movie, "10 Things I Hate About You". That movie involved breakthrough roles for Julia Stiles and Heath Ledger. Ledger, played the role of "bad boy" Patrick Verona, who was hired to date Kat, the anti-social shrewish Stratford sister, played by Stiles. As is heralded by those Shakespearean name references, the movie, set at Padua High School, retold Shakespeare's *The Taming of the Shrew*.

[4] It culminated in the protagonists being assigned to write their own versions of Shakespeare's Sonnet 141, which in Kat's case was a poem titled "10 Things I Hate About You", revealing, after all, her love for Patrick, which was duly reciprocated.

[5] The sonnet underscores how apt that movie title was as a source of inspiration for a discussion of the relationship between medical experts and the lawyers who call them as witnesses. To illustrate, one need look no further than quatrain 1 of Sonnet 41:

> "Q1 In faith, I do not love thee with mine eyes,
> For they in thee a thousand errors note;
> But 'tis my heart that loves what they despise,
> Who, in despite of view, is pleas'd to dote;"

[6] Well, on the night of our convening of the Far North Queensland Medico Legal Society, the lawyers and doctors were sociable, friendly, exhibiting a certain fondness for each other.

[7] When it came to our protagonist guest speakers the love aspect, of the love hate theme of quatrain 1, seemed to continue in the light-hearted attack advanced by the urbane local silk as against the doctors. Despite his expressed views of them, he seemed "pleased to dote" on them.

[8] But when it came to the guest speaker surgeon, his speech, while witty, was a determined pursuit of the first half of the quatrain. "For they in thee a thousand errors note". It was an entertaining but cutting critique of we lawyers and our ways, with many errors seen in us noted.

The mixed attitudes of medical expert witnesses

[9] In the wake of that memorable evening, I reflected upon and dissected the surgeon's critique of lawyers. Some of it seemed to be driven by the inconvenience which the law and its processes present for the lives of doctors. Like most sovereign citizens, medical

experts like what the law does in delivering a civilised rules-based society, until such time as it inconveniences their existence. As with all witnesses, some medical experts are philosophical and understanding of the demand placed upon them as witnesses and some are disdainful and unrealistic about it.

[10] The more philosophical and understanding of them seem to be those medical experts whose involvement in the case began when they were recruited by one side to give evidence in it. The medical expert witnesses who develop something of a practice writing reports for the lawyers in cases in which they were not involved as treating doctors are naturally more forgiving of the inconvenience of the process. That is not to say they are positively co-operative. There remains a sense of disdain exhibited by some of them about the ways of our legal process, but they are at least transactional in coping with those ways.

[11] At the other end of the spectrum are the treating doctors. We see a much less accepting attitude in many of those who are called upon to testify about their actual treatment of a patient, typically a patient who ends up as the plaintiff in a civil case or the complainant in a criminal case. These are busy professionals who happen to be involved in the case because the plaintiff or complainant happens to have been their patient amidst a passing parade of other patients. They have no court-based practice. They do not want to come to court. They avoid coming to court. Don't we know they are too busy to come to court like other witnesses? They avoid writing reports if asked. Why can't the letter their secretary wrote about the patient be enough? They know better than to provide a statement to police. Better to leave the police or the lawyer in doubt about what they will say if subpoenaed, that way the prosecution or lawyer in the civil case will not risk calling them. I of course acknowledge that not all of this cohort hold such views, least of all those of you whose attendance here demonstrates your interest in medico legal collaboration.

[12] In this cohort perhaps the least philosophical and understanding of our ways are doctors who become defendants. Of all treating doctors those being sued for medical negligence are least likely to be happy with we lawyers and the ways of the legal process.

The Doctors' false impression

[13] As I reflected upon our medical guest speaker's critique of lawyers and the angst and inconvenience the court system causes them, I wondered whether some of it reflected a want of understanding of civics and of our profession's role in administering the rule of law in a democracy. I softened in that view, conscious that the systemic accommodation of the medical professions' convenience, by allowing evidence-in-chief to be by written report and evidence to be given by telephone or video link may have given a false impression. It may have given the impression that no inconvenience at all should be occasioned by being an expert medical witness. If so, that is a false impression.

[14] It is a matter of unavoidable fact that the execution of the important dual role of the legal profession and the courts in delivering justice according to law, requires that citizens, including witnesses who are medical experts, will sometimes be inconvenienced for the greater good. That is, to cite the philosopher Hornsby, just "The way it is".

Some troubling reflections

[15] I was thus able to reconcile some of the medical guest speaker's criticism as unrealistic. Not so the rest. My reflections upon the other things the medical guest speaker hated about our profession came to trouble me more. They related to perceived deficits in the way lawyers deal with medical experts, in aiding preparation and presentation of their

evidence, so that their opinion can be properly explained and understood. They also related to the apparent lack of comprehension of lawyers and courts of what the correct medical position in a case is. These perceived deficits came to trouble me much more than the unavoidable occasional logistical inconvenience which doctors must cope with if they are witnesses.

[16] At first, I rationalised them as the product of a power imbalance. After all, doctors are masters of their work environment. Some, like some counsel and some judges, rate themselves as all knowing.

[17] It must be a difficult thing for expert medical witnesses to absorb that for all their expertise in their field it is not even another doctor or a panel of doctors who assess the correctness of their actions and the reliability of their opinions. Instead, it is a judge or jury who make the assessment. To appreciate the point, I invite the lawyers here present to imagine a world in which your right to appeal an adverse outcome at trial is to a local hospital where a panel of three doctors will decide whether the judge made a legal error.

Understanding – a conundrum

[18] Here we encounter the conundrum inherent in the law's use of expert evidence. Such evidence is adduced because its subject matter is beyond the common knowledge and experience of judges or juries. Yet where expert witnesses disagree it is for the judge or jury, not for an expert, to decide the issue.

[19] Judge Learned Hand described this conundrum long ago:

> "The trouble with all this is that it is setting the jury to decide, where doctors disagree…but how can the jury judge between two statements each founded upon an experience confessedly foreign in kind to their own? It is just because they are incompetent for such a task that the expert is necessary at all."[1]

[20] The theoretical answer to the conundrum lies in the premise upon which the court receives expert evidence. The premise of placing medical expert evidence before the court is that it will be done in a way which will allow the court to understand matters otherwise beyond its knowledge and experience so that the court may reach a properly informed conclusion.

[21] I say that is a theoretical answer because it assumes expert evidence will be presented in a manner which its audience can understand, can comprehend. The court's decision should not be guesswork. It should be a logical rational conclusion properly aided by expert testimony which is prepared and presented so that it can be understood.

[22] Surely, the lawyers in the audience ask, there can be no doubt the profession has been very progressive to that end. The last 25 years of litigation in Australia have been replete with changes in procedures relating to expert evidence. Codes of conduct, practice directions, court appointed experts, single experts, joint reports, concurrent evidence or hot-tubbing.

[23] Yes, it's true the diversity of procedural change has been significant. I have heard these progressions spoken highly of by some lawyers, a material proportion of whom were not closely associated with their instigation or adoption.

[24] It may of course be accepted the procedural changes have instigated efficiencies, for instance in narrowing issues. That said, the capacity for agreement, whether in a joint

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1 Learned Hand, *Historical and Practical Considerations regarding Expert Testimony* (1900), pp 15-16 (cited in Freckelton & Ors, *Expert Evidence in Criminal Jury Trials* (2016), p 3).

report or hot tub, may be constrained not only by conscientious differences of opinion but by ego. Different professions, different professionals, have different levels of civility or incivility.

[25] In any event it remains that complete agreement will often resolve a case, so that those advocates and judges in cases which remain in contest, which do enter the arena of the courtroom, will still confront the elemental need for the court to understand and thus be persuaded of the reliability and merits of differing expert medical opinions. It therefore remains that the elemental goal of the preparation and presentation of evidence of medical experts is that the court understands it.

The lawyers' false impression

[26] In this I suspect the false impression referred to earlier in respect of some doctors has its counterpart in a false impression some litigation lawyers may have derived from procedural changes relating to expert evidence. That impression is that those changes have diminished the need for counsel and their instructing solicitors to fulfil their obligation to prepare and present the evidence of expert medical witnesses in a way which can be properly understood. It is a false impression. It may have led, in some lawyers, to a laxity in properly tending to some quite elementary steps which are essential to the effective preparation and presentation of expert medical evidence.

Deficiencies in tending to the basics

[27] As I reflected on the obstacles to understanding exposed by the guest medical expert at our inaugural medico legal society gathering and as my experience as a judge grew, I increasingly apprehended there was substance to our guest speaker's criticism. The fact is some lawyers do not prepare and present expert medical evidence effectively. The gap in some cases between what should happen and what does happen caused me to wonder what an uninformed observer of the presentation of expert medical evidence in court must make of the process. If a lay person in the public gallery were asked to identify what the rules of that process must be, what would those rules be? Such rules would likely be instructive in exposing approaches which are the antithesis of what should occur to aid proper understanding of the merits of the expert medical evidence, in identifying what not to do.

The Rules of Presenting Expert Medical Evidence

[28] So, I gradually developed a set of such rules of medical expert evidence. Rules which hold a mirror up to our profession and call it as it too often is from the perspective of those on the outside looking in, not as we would wish it to be. Those rules have evolved and been fine-tuned over time.[2] They are still evolving.

[29] Over time I have whittled what were 12 rules back to 10 rules. I confess I hesitated in abandoning 12 rules. There's a certain magic in a dozen. That said, conscious of the discipline of brevity, the mathematical beauty of the decimal system and its source for many great authors, I settled on ten as the number of rules. Ten of course is a number with deep historical routes, stretching back beyond its European adoption from the Moors, back beyond its Hindu-Arabic-Chinese routes, to early homo-sapiens and the number of fingers they realised were on their hands. That the product of my deep reflection on the topic at hand happens to coincide with the number of fingers on my hand is, what we in the law call, a coincidence.

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[2] See the author's earlier paper "*Expert Evidence – a view from the Bench*", delivered at the Australian Lawyers Alliance National Conference, Port Douglas, 22 October 2016.

[30] Reminding you again that these are the rules of what not to do, I now give you the ten Rules of Presenting Expert Medical Evidence.

Rule 1: Expert evidence must not be comprehensible to lay persons.

[31] This rule is an overarching one, informing all of the other rules. It reflects the reality that expert medical evidence is seldom presented in a manner that is easily comprehended by laypersons. In this context laypersons include not only members of juries but also judges. While judges are hopefully of above average intelligence and while their experience as practising lawyers and judges may have exposed them to a somewhat greater degree of knowledge of a particular field of expertise than the average layperson, that background does not make them experts. The safer course must always be to assume that your judge does not have more than the average layperson's knowledge of the field of expertise in question. Lawyers should present the medical expert evidence accordingly and judges should not hesitate to indicate if they are not understanding it.

[32] A parting word of caution about this rule: there is invariably a tendency for litigators to shift blame to the expert when it becomes apparent that an expert's evidence has been presented in a way that is incomprehensible. While expert witnesses may be experts in their field, it does not follow that they are experts at giving evidence. The law's evidentiary process is the lawyer's field of expertise. It is the job of the litigation lawyer, trained in the rules of evidence and the art of effectively presenting it, to prepare the presentation of the expert's evidence with the expert and properly control the ensuing presentation, so as to ensure that it is comprehensible to its lay audience.

Rule 2: You do not need to understand an expert's evidence in order to lead, cross-examine or address on it.

[33] It sometimes appears from the questions lawyers ask of experts and from what they say in their submissions to the court that lawyers do not fully understand the expert evidence. If they do not understand the evidence they are presenting, what possible hope can there be that the judge or jury will understand it?

[34] In a 2008 article published in the Australian Journal of Forensic Sciences, *Australian Forensic Scientists: A View from the Witness Box,*[3] Rhonda Wheate reported upon an Australia-wide survey of 132 forensic experts which investigated the views of forensic scientists on the process of collecting evidence, dealing with legal counsel before and during the legal proceedings, and their interaction with the judge, jury and other forensic experts. Participants in the Wheate survey complained their evidence was sometimes made to appear weak because the party calling them did not ask appropriate questions or re-examine in such a way that the appropriateness and reliability of the method supporting the opinion was communicated to the court.

[35] Conversely, there was also a concern that scientific evidence sometimes appeared to be stronger than it in fact was, because lawyers did not ask or explore abnormal or striking results or were unaware of how the results could be consistent with a different opinion. Participants perceived the failure to ask the right questions so as to ensure that evidence was not left incomplete or misunderstood, was a product of a lack of proper understanding.

[36] A commonly cited example of lawyers' failure to understand the area of expertise they are dealing with is their poor knowledge of the meaning of terminology used in particular

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[3] Australian Journal of Forensic Sciences Volume 40 No 2, p 123.

fields of expertise. Participants in the Wheate survey expressed such concern. Wheate correctly observed:

> "Without the tools of language to properly describe what the expert has found, lawyers are naturally incapable of asking meaningful questions, truly comprehending the expert's answers, or rebutting mistakes made by the opposing side. While experts may endeavour to minimise the jargon they use in court, it is inevitable and sometimes necessary for particular terms to be used to describe particular things, so that the results are not misunderstood or misrepresented. In recognition of this, it is imperative for lawyers to have an understanding of the methodology and terminology used in forensic disciplines; a knowledge which cannot be imparted solely by reading an expert's report…"[4]

[37] As to how litigation lawyers may properly educate themselves in terminology and more generally in the field of expertise with which they are dealing, an obvious starting point is to use the expert they are calling as a source of learning. This heralds the third rule.

Rule 3: Confer with your expert as little and as late as possible or, preferably, not at all.

[38] It is impossible to be entirely sure in my view from the Bench what, if any, conferencing has occurred with a party's expert. However, there are sometimes tell-tale signs of inadequate conferencing apparent, in the form and content of expert reports and the questions asked of experts in court.

[39] Participants in the Wheate survey were particularly critical of lawyers for either not conferring at all in advance of trial with their expert witness or not conferring more thoroughly. The participants made the point that a proper pre-trial conference had utility not only as a matter of professional courtesy and in better informing the lawyer involved, it also provides an opportunity for experts to discuss how their evidence will be presented in court.

[40] We as lawyers, when dealing with expert witnesses, can sometimes be in awe of their expertise and knowledge, yet we forget that when experts come to court, particularly with the knowledge their reliability is likely to be questioned in cross-examination, they are the ones who are in awe, they are the fish out of water.

[41] Medical experts will be less apprehensive, better functioning witnesses if they have been informed in advance about matters of process such as the concept of taking an oath or affirmation, refreshing memory before testifying, bringing along and referring to contemporaneous notes to refresh memory while testifying, the use of their report as evidence in chief, the notion of only answering the question asked of them, the rules of cross-examination and re-examination, and so on. The question of how expert evidence should be presented is an important topic for pre-trial discussion and planning in conference with the expert. It is useful as part of that process for the litigator to discuss what aids to explanation, including visual aids and analogies drawn from everyday life, might be used to make the expert's evidence more comprehensible to its lay audience.

[42] Planning the presentation of the expert's evidence in collaboration with the medical expert assists lawyers in identifying the right questions to ask in order for the expert's evidence to be properly explained or tested as the case may be. The failure to properly confer with witnesses was identified by participants in the Wheate survey as a major

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[4] Ibid p 128.

reason behind poor questioning by lawyers, not only in chief but also in cross-examination and re-examination. The confusion participants identified as occurring during cross-examination was seen as flowing not only from the inherent complexity of the evidence, but also from the inability of poorly prepared lawyers to adequately lead the evidence, address difficult issues and set a firm foundation in the mind of the jury. Participants were also frustrated by the inability of the party calling them to recover the initiative in re-examination.[5]

[43] Conferring with the expert medical witness ought not be reserved merely for the eve of trial. It should also occur in the early stages of the litigation. If, as often occurs, the medical expert is evasive of attempts at such conferral, it is imperative the medical expert is pursued and informed of why the conference is necessary. The point is an important one for doctors here present to absorb. The effective presentation of your evidence in court requires your participation in its preparation. There is no temporal short cut in that process. Evade it and you can blame yourself, not the lawyers, if your evidence is later presented poorly and misunderstood. I assure you doctors that your single greatest contribution to the ineffective presentation of your evidence is your reluctance to make the time to confer with the lawyer to properly prepare its presentation. So, remember lawyers cannot help with presenting your evidence effectively if you will not help them by conferring with them.

[44] As lawyers come to better understand the expert evidence by conferring with their expert early and using the expert as their teacher, they may also realise there are more issues to be addressed by the expert, resulting in an addendum or supplementary report or statement being requested, followed by another conference. Timely conferencing will also allow litigators to arrive at a better understanding of their opponent's expert evidence; its strengths, its weaknesses. An understanding of the expert issues in the case is essential not only to lawyers' eventual preparation for trial but also to their earlier work, for instance in properly pleading their case or pursuing a just and timely settlement.

[45] It is timely to remind you of the principle that there is no property in a witness and that it applies to all witnesses, including experts. The advantage likely to accrue to a potential cross-examiner in conferring in advance of trial with an opponent's expert is self-evident.

[46] It appears from a study of lawyers and forensic scientists by Leone Howes of the Tasmanian Institute of Law Enforcement Studies, reported in her 2015 article, *Towards coherent co-presentation of expert evidence in trials: Experiences of communication between forensic scientists and legal practitioners,*[6] that such conferral continues to be the exception. Ironically my experience at the bar was that experts, subject to accommodating their availability, seemed more willing than lay witnesses to participate in conferences with lawyers acting for an opposing side. I suspect that was because most experts pride themselves on appearing objective rather than being seen as taking sides.

Rule 4: The expert witness can draft an effective report for court without any guidance as to its form or content from lawyers.

[47] The lack of guidance given by lawyers to their expert witnesses is obvious from the content of many expert reports. Aside from laxity the explanation may be that some lawyers are unduly cautious about being seen to influence the expert as to what opinion should or should not be expressed.

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5 Ibid p 133.

6 (2015) 39 Crim LJ 252, 259-260.

[48] A superficial reading of cases such as *Phosphate Co-operative Co of Australia Pty Ltd v Shears (No 3)*[7] may explain that undue caution. In that matter Brooking J concluded the expert's report did not contain a genuine opinion but rather was the product of an exercise carried out for the purpose of arriving at a desired result. His Honour was damning of an exercise in which the expert was engaged before any questions were identified for the expert to provide an opinion on. However, that engagement involved the compromising of the expert's independence from the outset by involving the expert in a meeting involving the client and its lawyers in which their forensic aims were discussed.

[49] As the *Phosphate Co-operative* case demonstrates, it is important that lawyers' dealings with an expert do not seek to influence the expert's opinions. However, few medical experts will be aware of the legal and ethical principles that should be complied with in the formulation of an expert report. If such experts are left to their own devices without any, or any proper, guidance the prospect of them providing a useful report containing admissible and relevant evidence is remote.

[50] It is not improper, indeed it is desirable, to assist a medical expert witness with information about the form and content of expert reports. I speak of "content" not in the sense of what the ultimate opinion should be, but in the sense discussed in Heydon JA's seminal judgment in *Makita (Australia) Pty Ltd v Sprowles*,[8] namely content articulating the foundation for the opinion, such as the facts, the assumed facts and the expertise and reasoning applied. It is also desirable at the outset that the expert be instructed to avoid incorporating jargon or technical terms without explanation.

[51] Lawyers should have nothing to fear from including advice about such content matters in the letter of instruction to a medical expert. They are of neutral import so far as issues of objectivity or bias are concerned, but are of critical import in ensuring the report satisfactorily meets the law's expectations of an expert's report and evidence. Another tip in dealing with a medical expert who has not given expert medical evidence before is to provide some examples of well written expert medical reports (redacted to preserve anonymity) to provide guidance.

[52] A little care at the outset in respect of legal expectations of report content will, in the long run, result in significant saving because it minimises the potential need for addendum or supplementary reports tending to matters that ought to have been tended to correctly and fully in the original report. A litigation lawyer's guidance will also hopefully contribute to the generation of a comprehensible and thus potentially more persuasive report.

Rule 5: Do not allow your expert to have up to date information about the case before giving evidence.

[53] A simple example of this rule is a personal injuries case in which the experts are divided as to whether or not the plaintiff's condition is improving. The slow pace of litigation may mean that in the lead up to trial the plaintiff's expert has not examined the plaintiff in over a year. Unfortunately, arrangements are not always made for a re-examination to occur shortly before trial and an opinion that a plaintiff is unlikely to improve is thereby rendered less persuasive than it might have been.

[54] Another common example of experts not having up-to-date information before giving evidence involves the evidence relevant to the foundation for their opinion that has actually been given at trial. The practice of having an expert sit in court and observe the

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7 [1989] VR 665, 686.

8 (2001) 52 NSWLR 705, 743-744 [85]; approved in *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588, 604.

evidence unfold before being called as a witness is considerably rarer than it once was. Doubtless it would be a more cost-efficient option to provide an expert with a transcript of what has transpired in the trial prior to the expert giving evidence, but again it is apparent from the answers given by experts at trial that the provision of such information is not common.

[55] It is well enough known amongst students of cross-examination that it is easier to undermine an expert witness by reference to the facts, of which the cross-examiner is the master, rather than by reference to the field of expertise, of which the witness is the master. It is fundamental that the evidence establishes the foundational facts upon which an expert's opinion is based. If there is any variation between those facts as initially understood by the witness in first articulating the opinion and as ultimately given at trial, the expert needs to be aware of that fact in advance in order to properly consider what, if any, bearing that has upon the opinion previously expressed.

[56] Misapprehension of facts is the expert's Achilles heel. Lawyers do their expert and their case a disservice if they do not ensure that their expert is forewarned of the relevant evidence actually given at trial and, more particularly, of any variation in it as compared to the facts the expert was asked to assume for the purpose of giving the opinion.

Rule 6: The opening must not be used as a device to help explain the expert evidence to be called.

[57] For the benefit of the doctors in our audience, an opening is the speech which a party's lawyer makes before then calling witnesses in the party's case. It is a narrative summary of the facts to come. Unlike the closing address it is not argumentative in character. However, it is still a tool of persuasion in aiding the judge or jury's understanding of what is to come and in framing that understanding favourably to a party's case.

[58] It is therefore surprising that the quality of some openings is patchy and that in the most complex of cases I am not infrequently asked whether I require an opening. It is difficult to understand why counsel would so volunteer to surrender such an aid to the proper judicial appreciation of their case.

[59] It is sometimes evident that so little preparation time has been invested in preparing the opening that little priority must have been given to it as a tool of persuasion. Yet it is difficult to imagine a field where the opening could be of more utility and persuasion than expert medical evidence. The formidable challenge in ensuring that a party's expert medical evidence is comprehended by the court can be considerably eased by opening the evidence in a manner which explains it in lay terms.

Rule 7: The court should never see the expert give evidence but, if it does, make sure it is only by video link and never in person.

[60] The legal profession's zombie like drift into expert witnesses giving evidence only by video-link, or worse still only by telephone, rather than giving evidence in person at court is an anathema to the effective presentation of expert evidence. That is not merely because technical problems with connections and audio and visual quality abound. It is because of what is lost in comprehensibility and persuasion.

[61] Lest it be overlooked, the easiest witness to see is the witness who is present in person. The easiest witness to hear is the witness who is present in person. The easiest witness to ask questions of is the witness who is present in person. The easiest way for a witness to explain a physical exhibit or use a visual aid or to demonstrate something is for the witness to be present in person. In short, the full armoury of the persuasive tools of the

litigator's trade in presenting evidence effectively is only present when the expert medical witness is present in person.

[62] Yes, the physical presence of the medical expert will be more important in some cases than others. Yes, the professional convenience of medical experts will sometimes trump other considerations. However, it is obvious from the ubiquity of use of video link and telephone for giving expert evidence that its use is undiscerning. Insufficient consideration is given to considerations favouring physical attendance, including assisting the court's proper understanding and assessment of the evidence.

Rule 8: Pictures, diagrams, graphs or other visual aids should not be used but, if they are, try to avoid the judge or jury seeing them clearly as the witness explains them.

[63] Many participants in the Wheate survey suggested that permitting experts to use more visual aids would improve the quality of the presentation of expert evidence to laypersons.[9] That is undoubtedly correct.

[64] Visual aids invariably assist in the comprehensibility and persuasiveness of medical expert evidence. Unfortunately, in my view from the bench, they are under-utilised. Further, when they are used and are explained by the witness, insufficient consideration is given to ensuring they are then legible and in sufficient copies or presented via video technology in such a way as to be simultaneously accessible to the judge or jury. Too often when an expert medical witness is answering questions about a photograph, diagram, drawing or other illustrative document, the document will be visible to counsel and the witness but not to the judicial audience which is supposed to understand the evidence.

[65] The reason is almost certainly a lack of planning and preparation for the presentation of the medical expert's evidence, as already discussed.

Rule 9: The more impressive and relevant your expert's CV, the less you should highlight it.

[66] Parties calling a particularly well-qualified expert, with expertise of greater than ordinary relevance to the case, often overlook highlighting the expert's qualifications and expertise. It appears satisfaction at the merely neutral development that there is no challenge to expertise diverts attention from extracting positive persuasive value out of the witness's expert qualifications and experience.

[67] Participants in the Wheate survey perceived the practice of an opposing side stipulating or agreeing to accept the witness as an expert and, in turn, the party calling the witness not exploring the witness's credentials in court, denies or at least blunts the opportunity for the court to properly grasp the true force of the expert's experience and knowledge.

[68] In connection with this topic it is noteworthy that Wheate survey participants also expressed concern at lawyers' lack of familiarity with experts' qualifications, training, experience and accreditation. They considered this resulted in experts being called upon to answer questions outside their field of expertise and in lawyers misunderstanding the witness's expertise, asking inappropriate questions and failing to ask appropriate ones.

Rule 10: The foundational reasoning for the expert's opinion is sacred. It must never be the subject of elaboration or testing by lawyers' questions.

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9 Supra p 136.

[69] The expert's statement of reasoning for the foundation of the opinion given is fundamental to the admissibility of the expert's evidence.[10] This requirement allows the parties to litigation to properly explain in evidence-in-chief and test in cross-examination the true force of the expert's opinion.

[70] Unfortunately, litigants often seem to avoid exploring or testing a medical expert's foundational reasoning, as if it is a no-go zone. This may, in part, be due to the view that lawyers are on more sure footing when dealing with the facts upon which an opinion is based, than with the expert reasoning behind the opinion.

[71] If the foundational reasoning for the expert's opinion is built on a solid factual base and on well-established professional expertise then that should be made apparent in evidence-in-chief or in the report serving as evidence-in-chief. Conversely if it lacks such reasoning that should be revealed by proper questioning in cross-examination.

[72] I reiterate the conundrum I identified at the outset: the difficulty in laypersons deciding which medical expert opinion is to be preferred. If that decision is to turn, as it should, upon the state of the evidence, then the force of the foundational reasoning for each medical expert's opinion exposed in evidence will be pivotal to the decision. If that reasoning is compelling, then it is important that it be elaborated upon and explained properly. If it is not, then it is equally important its weaknesses are demonstrated through cross-examination.

[73] A parting note on this rule: where the process giving rise to the opinion is supported by published or peer reviewed opinion, it will be all the more compelling. When expert reports and opinions advanced in court are supplemented by annexed or exhibited journal articles or other professional publications on point, such material invariably makes the opinion it supports both more comprehensible and more credible.

Conclusion

[74] That was the last of the ten Rules of the Presentation of Medical Evidence.

[75] You will have observed that our rules expose elementary deficiencies. The means of improvement are not revelatory. Why are those means not deployed more?

[76] I conclude by positing a potential explanation. It is that the procedural changes of recent decades in respect of experts has diverted attention from the reality that experts are still witnesses.

[77] Medical expert witnesses are not some separate species for whom core considerations relevant to the effective preparation, presentation and testing of a witness's evidence ought be discarded. As with any witness, they benefit from guidance in the manner by which they commit their account to writing. As with any witness their written account may contain error or omit relevant detail. As with any witness, both they and the party calling them will benefit from a pre-trial conferences. As with any witness, they are vulnerable to unwitting bias, the vagaries of human memory and reluctance to concede error once in the witness box. As with any witness their evidence may mislead if not properly tested.

[78] Finally, as with any witness, their evidence will be unpersuasive if it is not properly understood.

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[10] *Dasreef Pty Ltd v Hawchar* [2011] CLR 588.

Appendix: The Rules

Rule 1: Expert evidence must not be comprehensible to lay persons.

Rule 2: You do not need to understand an expert's evidence in order to lead, cross-examine or address on it.

Rule 3: Confer with your expert as little and as late as possible or, preferably, not at all.

Rule 4: The expert witness can draft an effective report for court without any guidance as to its form or content from lawyers.

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Rule 6: The opening must not be used as a device to help explain the expert evidence to be called.

Rule 7: The court should never see the expert give evidence but, if it does, make sure it is only by video link and never in person.

Rule 8: Pictures, diagrams, graphs or other visual aids should not be used but, if they are, try to avoid the judge or jury seeing them clearly as the witness explains them.

Rule 9: The more impressive and relevant your expert's CV, the less you should highlight it.

Rule 10: The foundational reasoning for the expert's opinion is sacred. It must never be the subject of elaboration or testing by lawyers' questions.
