

THE PSYCHIATRIC EXPERT WITNESS
Using the expert witness optimally!
Dr Michael Epstein

1) The scope of this paper

- a) There is extensive literature on expert witnesses and expert evidence. This literature has either been written by lawyers for lawyers or by members of the various professions, for the guidance of members of those professions. So my profession, medicine and in particular, psychiatry has a similar extensive literature on expert witnesses written by psychiatrists for psychiatrists.
- b) In my experience I have never seen a Judge or tribunal pull up a barrister during cross examination for being “*high-handed, condescending or rude and engaging in unnecessary aggression*”. The more obvious danger is that the experienced expert witness is put offside!
- c) This paper is an attempt to bridge the gap and to inform lawyers about the experience of being an expert witness and of providing expert evidence. You may well ask why this would be of any interest to a lawyer? My answer is that by understanding something of the experience of an expert witness you will be better placed to make better use of expert witnesses, not only psychiatrists but those in other professions whom you require to act as an expert.
- d) An example of the different perspectives is best illustrated by this quote from ‘Cross-examination of expert witnesses by Victoria Brigden, a lawyer:
 - i) Justice Pembroke’s advice to junior barristers when cross-examining experts was to be even more polite than usual, to be respectful of the expert witness, at least initially, not to be high-handed, condescending or rude and not engage in unnecessary aggression. His Honour warned that the danger of acting otherwise was in getting the **judge** offside. (my emphasis)

2) What is my expertise?

- a) I am a fellow all of the Royal Australian and New Zealand College of Psychiatry having been a fellow of the College since 1976. I initially worked with children and later with adolescents and adults.
- b) Before I opened my practice I was asked by the solicitor for the father to assess a child with regard to an access dispute and in that context I spoke to both parents and the child.
- c) When I appeared in court I was told that the father had been in jail for 5 years. In my ignorance I had not asked him about any criminal behaviour. I was totally thrown and agreed with the proposition that this may effect his ability to parent. He lost his claim for access.

- d) I later found that he had been the 17 year old driver of a car involved in an accident in which his friend was killed. He was convicted of dangerous driving. He had become a successful businessman, married and had three children, he was a widower when he met his second wife and had another son, the second marriage broke down after five years. By all accounts he was a diligent, caring and conscientious father. The mother had remarried and found him a distraction.
- e) A year or two or two later I prepared a report regarding a drunken off duty policeman who left a restaurant car park having smashed into four cars while exiting. I assessed him and wrote a report for his criminal trial. In my evidence in court I said, almost in passing, that I thought he had some “diminished responsibility” because he was so drunk. There was an immediate uproar, the jury were sent out, I was gobsmacked at the ensuing chaos. There was a recess. Two experienced forensic psychiatrists were in the court, they both pounced on me and said “that’s not a defence in Victoria!” I crept out with my tail between my legs.
- f) I determined then that every time I would learn something every time I made a mistake as an expert witness.
- g) Over the years I continued to work in private practice but also worked in prisons, hospitals and started a crisis service at the Austin Hospital. I continued to do medico-legal work and became part of a peer review group that has continued for more than 30 years. I was Federal Secretary of the RANZCP for 6 years and I have been a member of the Forensic Leave Panel since 1998 and a member of the Victorian Medical Panel for a similar period.
- h) I am a co-author of the GEPIC, the psychiatric impairment guide used in Victoria and South Australia and I have trained more than 140 psychiatrists in its use. Most recently I published *The Guide to Civil psychiatric Assessment* in 2019, this includes a chapter on being an expert witness.
- i) I have continued to be called as an expert witness. An experience that can be daunting and, indeed humbling.

3) An example of being humbled

- a) *In 2019 I was again an expert witness regarding a worker’s compensation claim, I had seen George five times about his WorkCover claim. His father and elder brother ran a construction business in a rural city. George worked as a carpenter for them doing some site management. George was married but had had an affair and the marriage was slowly recovering.*
- b) *Unbeknownst to him the company was failing, his father and elder brother unexpectedly brought him into the partnership and almost immediately resigned leaving George as the sole proprietor. He had no experience in management, his father and brother moved interstate, the business failed within weeks. Long-standing friends could not be paid, suppliers likewise and he was declared bankrupt. George was shunned by his friends and the broader community. He*

lost his house and eventually his marriage and became severely depressed and has not worked since then.

- c) Where did I go wrong? There were a multiplicity of events in George's life. In my first report I quoted two sentences by a psychologist about his distress when he realised the company was broke. I did not reference the sentences to the psychologist and did not ask him for any more detail about that time, in part because the initial interview took over two hours. In my subsequent reports I did not revisit the initial incident but focused on what had changed since I last saw him.
- d) When I was cross-examined I was obliged to agree with the proposition that those two sentences were taken from the report of the psychologist and that I had no further information about that time apart from what the psychologist had written. The cross-examiner focused on that time to disparage that situation as the cause of George's mental health collapse. The barrister made much of his affair and the effect on his mental state attributing his subsequent breakdown to that and the end of his marriage.
- e) What did I learn? I should have teased out the various factors occurring at the time of his breakdown. I should have reread my initial report to see if there were any areas that required more exploration.
- f) Recently I was subpoenaed regarding a court appearance about a motor accident claim. This man had previous trauma and mental health issues. On rereading my report I realised that in my opinion I had not discussed the relationship between those issues and his claim. I contacted his solicitor and suggested that she request a supplementary report regarding these matters (for which I did not charge). She received the report and the upshot was that the court case was settled.

4) The Expert Witness

- a) The role of the expert witness is both important and a dilemma.

5) Who is an expert?

- a) A paper written by the Law Society of New South Wales entitled "The Practitioner's Guide to Briefing Experts" stated an "expert" must demonstrate:
 - i) there is a field of 'specialised knowledge';
 - ii) there is an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert.

6) Expert evidence

- a) Once the above had been demonstrated, the expert's opinion must demonstrate the following:
 - i) The opinion is 'wholly or substantially based on the witness's expert knowledge';
 - ii) to the extent that the opinion is based on facts, that:
 - iii) if the facts were 'observed' by the expert, that they have been identified and admissibly proved by the expert; and
 - iv) if the facts were 'assumed' or 'accepted' that they have been identified and proved in some other way;
 - v) the facts observed or assumed by the expert form a proper foundation for the opinion; and
 - vi) the opinion logically follows from the information on which it is stated to be based.

7) Codes of Conduct

- a) In an endeavour to provide a framework to guide the expert witness every jurisdiction in Australia has a code of conduct for expert witnesses These include Expert Witness Codes of Conduct & Court Guidelines
- b) These codes specify that the expert's general duty is to the Court, rather than the party retaining the expert, in other words, the expert witness must not be an advocate for either side.
- c) An expert witness should provide independent assistance to the Court by way of objective, unbiased opinion in relation to matters only within his or her expertise.
- d) It is the duty of the instructing solicitor to supply the expert with a current copy of the appropriate code. This core principle is followed throughout Australia. (See Appendix for a list of Practice notes and Codes of Conduct)).

8) The Task of the Expert Witness

- a) The task of the expert witness is to assess all the data with regard to the expert's area of expertise, provide a timely report systematically outlining the data and coming to an opinion that is consistent with the data and with the professional literature. It is helpful if the opinion also comments on the opinion of other experts.

9) How is this done by a psychiatrist expert witness?

- a) Read the letter of instruction and the documentation, making notes as required.
 - i) As a psychiatrist I am usually asked the following questions:
 - (1) Is there a mental health problem?
 - (2) Is it related to the accident or injury?
 - (3) To what extent?
 - (4) Are there any pre-existing or unrelated mental health problems?

- (5) If there are any unrelated mental health problems, how have they been effected by the work or accident injury?
- (6) Has the mental health problem (if present) effected the claimant's quality of life?
- b) Interview the claimant focusing on one's area of expertise and bearing in mind the questions asked in the letter of instruction.
- c) Perform a mental state examination
- d) Prepare a comprehensive report and an opinion responsive to the questions asked.
- e) Provide the report in a timely fashion.
- f) Be available for conferences, conclaves and court/tribunal appearances.
- g) I acknowledge that the expert witness must not be an advocate for either party but the expert witness should be an advocate for his or her opinion.

10)Conclaves and Concurrent Evidence

- a) Conclaves and concurrent evidence are provided for in Victoria but in my experience are very uncommon. However conclaves and concurrent evidence are very common in New South Wales and for lesser extent in the Administrative Appeals Tribunal.
- b) A useful summary of the process of concurrent evidence is given by Dr Rix in his book Expert Psychiatric Evidence:
 - i) *the agenda is based on the matters not agreed at the experts' meeting, supplemented by any additional issues that have arisen in the trial thus far. In relation to each issue, the judge initiates discussion by asking each expert for their views; the judge then has the opportunity to question the expert and so also, on the invitation of the judge, do the other experts. Then the parties' representatives are given the opportunity to ask their questions but only to test the correctness of an expert's view or clarify it. They should not cover ground already fully explored and in general a full cross examination or re-examination is not appropriate. Finally, the judge may seek to summarise the experts' positions and asked them to confirm or correct the summary.*
- c) In my experience conclaves and concurrent evidence are a mixed bag. Conclaves should only be a meeting of experts to did determine what is agreed and what is not agreed and prepare a report as a response that should be signed by all the experts. Some conclaves have involved expert witnesses trying to persuade me to their point of view. This is an incorrect use of the conclave.
- d) Concurrent evidence sounds good in theory but only works if the judge or tribunal strictly monitor the process, it can be a logistical nightmare.

- e) At one time I was called to the AAT to give concurrent evidence. There were five psychiatrists including one remotely. The idea was that each psychiatrist gave evidence and the other psychiatrists would then ask questions about that evidence in turn. It was a shambles because the first two psychiatrists asked permission to leave before they could be questioned and leave was granted! The psychiatrist on the phone had technical issues and could not participate. That left only two of us and we agreed with each other.
- f) However I was on a very effective "hot tub" with another psychiatrist that I found very enlightening and useful. The other psychiatrist was very experienced and informed. There were some areas of difference between us and he was persuasive. He performed his essential role that was to inform the court.

11) Cross examination with regard to concurrent evidence

- a) In general, cross examination in these situations is more difficult (depending on the number of experts). In my experience the summary by Dr Rix is not correct with regard to cross examination and judges do not seem to play such a dominant role as he describes. Obviously experts briefed by both sides to the dispute will be called to provide evidence. This evidence may be challenged by the other experts. Barristers are required to do both direct and cross examination in rapid succession. The questions asked by the other experts lead to the flow of the barristers' examination being already covered or interrupted. Some of the questions from other experts are technical questions, for example about the minutiae of diagnosis or the details of treatment, that may be beyond the knowledge of the cross-examiner.

12) Expert witnesses and the Covid 19 pandemic

- a) There have been major changes as a result of the pandemic but these changes are more to do with the way in which the work is done rather than any significant change in the work itself.
- b) Since March 2020, with few exceptions, my interviews have been via Zoom. Similarly when I have been called to give evidence it is done remotely via Team or Webex. I have found videoconferences with claimants more time-consuming but actually more helpful. Claimants are more relaxed being interviewed in their homes and are less concerned if they are kept waiting. They avoid all the hassle of travel, overnight accommodation, attending the office and then returning home.
- c) Similarly my experiences of giving evidence by videoconferencing has been very positive. It is far less disruptive as there is no travel involved and the court situation is less daunting.
- d) In my opinion, in the long-term, when this pandemic is over I would prefer to do most of my interviews via videoconferencing and would prefer giving evidence in the same way because of the reduced disruption involved.

13) Problems for Expert Witnesses

- a) The letter of instruction is either unclear or ask questions that are very problematic. Some examples:
- i) *Please examine our client regarding his claim (no further details provided).*
 - ii) *Our client has been involved in eight motorcycle accidents. Please determine his level of impairment from each accident and his level of impairment from each accident that is not secondary to physical injury.*
 - iii) *Our client now aged 60 came from a dysfunctional family and was sexually abused from the age of six until the age of 12 whilst resident in 4 different children's homes. He has had extensive problems with drug and alcohol abuse with periods of imprisonment. He has had multiple physical health problems including diabetes, hypertension, emphysema and bowel cancer. Please determine whether or not he has experienced any mental health issues arising from his sexual abuse and, if so apportion that portion of his sexual abuse that occurred at each of the children's homes.*
- b) The documentation provided is voluminous and some documentation is illegible. There seems to be little attempt by solicitors to cull the information provided that would be time consuming. Too often I am sent all the documentation electronically. The impression is that solicitors find it much easier to email all the documentation and expect me to print it and do the culling. Why do I print the documentation? It is much easier to scan and collate hard copy rather than an electronic version. Orthopaedic surgeon colleagues also complain that radiology is sent to them that they are unable to open or has been sent in a reduced format that does not show fine detail.
- i) *It is not uncommon for me to be provided with more than 1000 pages of documentation. It is also not uncommon to receive hundreds of pages of hospital record listing blood pressure recordings/provision of medication/illegible handwritten notes.*
- c) I have provided referring solicitors with a letter to give to claimants. This includes an explanation about why the claimant is seeing a psychiatrist, a list of typical questions, contact details and directions.
- i) *Some claimants are not given this information and are confused as to the purpose of the interview. Some arrive with no idea that they are seeing a psychiatrist. Some are expecting treatment and have difficulty understanding my role. Some have posted complaints on particular website that I was non-understanding or helpful!*
 - ii) *One claimant was furious that I had not supported her claim. She posted slanderous comments about me. She made a formal complaint to the Medical Board of Australia (that was dismissed) and initiated a VCAT Claim demanding repayment of her fee.*

iii) Another claimant sacked her solicitor after the interview and then demanded a copy of my report via Medical Records legislation. She refused to pay her solicitor. Her solicitor was embarrassed paid my fee. I provided a copy of my report to the claimant but redacted my opinion.

14) Problems with Expert Witnesses (Ian Freckelton “the Trial of the Expert)

- a. partisanship
- b. expert shopping
- c. experts for hire
- d. the adversary process leading to polarisation of opinion.
- e. inability to communicate their opinion.

In addition

- a) The court hears not the most expert opinions, but those favourable to the respective parties.
- b) The corrupt expert may be a rare phenomenon, but will not necessarily be exposed by an inexpert cross-examination.
- c) The expert is paid for his/her services, and is instructed by one party only; some bias is inevitable.
- d) Questioning, whether extractive or hostile, by a lay barrister may lead to the presentation of an inaccurate picture, which will mislead the court and frustrate the experts.
- e) Where substantial disagreement arises, it is irrational to ask a lay judge to solve it; the judge has no criteria by which to evaluate the opinion.
- f) Success may depend on the portability or self-confidence of the expert, rather than professional competence.
- g) Those professions on which the judicial system is reliant are antagonised by adversary trial procedures.
- h) Arrogant expert witnesses
 - i) *An eminent professor when asked about his CV; “How long have you got?”*
- i) Incompetence, this can be manifested in a number of ways:
 - i) Ignorance about the process;
 - ii) wearing inappropriate clothing
 - iii) not pre-reading the report
 - iv) not understanding the process of direct and cross examination
 - v) responding to a reasonable cross examination with hostility

- j) Inadequate in the role:
 - i) Expertise challenged
 - ii) lack of knowledge of the literature
 - iii) lack of knowledge of the legislation (e.g. not knowing the definition of injury in the WIRCA 2013)
 - iv) Failing to take an adequate history and, hence failing to provide an adequate opinion.

15) Mental Health expert witnesses - specific concerns (Freckelton)

- a) allegations of unreliability
- b) psychiatry regarded by some as subjective and unscientific
- c) evidence derived from it does not meet reasonable criteria for being admissible.
- d) distortion of professional's usual treating role
- e) a tendency towards findings of mental illness.

16) Use of the treating mental health professional as an expert witness.

- a) Treaters are consciously or unconsciously advocates for their patients.
- b) Treaters focus on the presenting problem and may not have taken a comprehensive history.
- c) Treaters rarely see reports of independent assessors or clinical notes from other treaters.
 - i) A common question I am asked is:
 - (1) *Doctor, why should we take notice of your opinion as you have only seen the claimant once for an hour. her treating psychiatrist has seen her weekly for 3 years and disagrees with your opinion?*
 - ii) In essence I state that I have a different role to a treater. I am required to provide an independent expert assessment and opinion, the treater is required to treat a person's health issues and this role requires the treater to be an advocate for the patient.
 - iii) I take an extensive and detailed history to inform my independent opinion. The treater is tasked with dealing with the presenting issue and usually does not take such a detailed history as much of it is not relevant to the immediate problem.
 - iv) The treater also wants to preserve the relationship with their patient and is unlikely to be totally frank if the treater has any reservations about the patient's credibility, questioning this is likely to lead to a breakdown in the relationship. If a patient is severely depressed the treater would probably

have little interest in exploring an unrelated work injury some years previously.

- v) Moreover the treater has relied on the patient to provide an accurate and comprehensive history, I have received information from the claimant but also other reports that providing accounts that vary from that of the claimant.

(1) Did you have any mental health problems before this accident?

(2) No Doctor.

(3) I have a report from your GP who referred you to a psychologist 5 weeks before the accident and provided a prescription for anti-depressant medication.

(4) I don't remember that.

17) Judges comments about Medical expert witnesses

(This was from a study I did of more than 90 judgments that had comments about medical testimony, the expert witnesses have been de-identified (except for):

- a. inadequate and incompetent
 - i. *Judging from the content of the two reports, I can only conclude that Dr. Wilson gave the most perfunctory attention to the plaintiff's difficulties at work.*
- b. lack of credibility
 - i. *I found Dr. Peabody's written report bizarre and his evidence before me extraordinary.*
- c. partisanship
 - i. *I thought Dr. Price, both in his report and in his evidence, tended to go in to bat for the defendant, on whose behalf he examined the plaintiff.*
- d. Ignorance
 - i. *In this regard it is difficult to say whether Dr. Black fully understands the definition of injury in the Act*
- e. Inflexibility
 - i. *So far as concerns the level of disability found by Dr Epstein, I thought he was too unwilling to adjust his assessment when informed that aspects of the history given to him by the plaintiff were inaccurate.*

- a) This last case involved a claimant who had been a sales representative. Ten years previously he was in a bank when a group of men burst into the bank.

He thought this was an armed robbery and had a severe panic attack and has never recovered. In fact this was a police response to a false alarm.

- b) When cross-examined I was told that 2 bank tellers had given evidence the previous day about the event 10 years previously that differed from the evidence given by the injured worker. I was told police came through the swinging wooden doors. The cross examination was interrupted by the judge who said they were not wooden doors they were swinging glass doors. Opposing counsel said that was not quite correct they were glass doors but they were sliding glass doors.
- c) I commented that this was a dispute about different recollections of what had happened 10 years previously but the two barristers and the Judge could not agree about evidence that had been given the previous day! The judge was visibly offended.

18) The task of the plaintiff/defendant solicitor

- a) These tasks include:
 - i) find an appropriate expert
 - ii) provide an adequate letter of instruction that includes:
 - (1) the nature of the claim.
 - (2) the specific questions the expert witness is required to answer.
 - (3) relevant documentation.
 - iii) requesting supplementary reports if:
 - (1) there were problems with the initial report'
 - (2) new information has emerged
 - iv) negotiating with the expert witness about a court or tribunal appearance.
 - v) Paying the expert witness in a timely fashion.

19) The task of the barrister with expert witnesses

- a) In general the task of the barrister for the party requesting the report is to confirm the expertise of the witness, to concisely outline the data, to allow the expert witness to provide the opinion and to ask questions about the opinion in an endeavour to confirm the findings of the expert witness.
- b) In doing so the barrister should regard the expert witness as an important resource.
- c) What does that mean?

- d) In my view if one is prepared to be an expert witness one must also be prepared for the inevitable inconvenience of being called as a witness however the inconvenient can be mitigated.
- e) Give adequate notice of when the court hearing might occur.
- f) Try to incorporate the time constraints of the expert witness with the case. In many cases this may require interpolating the expert witness between other witnesses. Sometimes waiting is inevitable however no one likes to be messed around.

20) On Direct Examination (Gismondi & Associates)

- a) don't "script" questions, use an outline instead
- b) clarify the expert's area of expertise
- c) use simple language, analogies and/or examples to explain technical terms or concepts
- d) use short, precise questions
- e) use demonstrations or examples to explain a point
- f) take the "sting" out of anticipated attacks on credibility
- g) summarise the opinion at the end of the expert's testimony

21) Part of the barrister's job is to look after the expert witness.

- a) On many occasions I have been called to court, waited less than 15 minutes, gave evidence and was then released in a timely fashion.
- b) On many occasions I have had a telephone conference with the barrister who has questioned some aspects of my opinion in a totally ethical fashion and if there were areas of my opinion that could be open to attack, these were brought out in the direct examination.
- c) Often I am thanked afterwards. The highlight of this occurred early in my career involving the great Ted Hill, of whom Wikipedia wrote
 - i) *Despite his prominence as a Communist, Hill was able to pursue a long and distinguished legal career, as one of the best known and highly regarded workers compensation lawyers in Australia. He was widely praised by trade unions, judges and other lawyers, most of whom did not share his political views, on his death in 1988.*
 - ii) After I gave evidence Ted Hill came up to me and said "my boy, you were magnificent". It took months for my ego to resume its normal size.

- d) However solicitors and barristers can cause significant problems to expert witnesses by being inconsiderate, thoughtless, not protective and not alerting expert witnesses to possible errors.

22) Errors in looking after the expert witness

The legal team for either side should treat the expert witness as a resource and not, has sometimes has occurred, “a bloody nuisance” or “cannon fodder”. This includes the following:

a) Give adequate notice of a court appearance and be flexible if other considerations intervene.

- i) A colleague on holiday in Turkey and was told of a subpoena to give evidence in a Sydney court hearing whilst she was in Istanbul.*

(1) She had to:

(a) find a suitable place where she could give video evidence,

(b) have the file sent to Istanbul

(c) She was to be called at 10.30AM (2.30AM Istanbul time) but waited 4 hours until 6.30 AM before giving evidence. The Court adjourned early and she was required to appear at 2.30 AM the next day. She gave evidence for another 2 hours.

(d) She paid for the use of the facility and was re-imbursed 18 months later.

(2) She was surprised to be told that the subpoena did not apply in Turkey!

Two further examples:

Being lied to:

ii) I was asked to go to Mildura to give evidence. I flew to Mildura arriving at about 8 AM and was brought to the courthouse.

iii) I was told I would be called before lunchtime. At 2 PM I was told I would be called in the next 30 minutes. At 3 PM my request for further information was ignored.

iv) I contacted my office and found the last plane left Mildura at 5:30 PM. I sent this information to the solicitor, the response was that the last plane left at 7:30 PM. This proved to be a “porky”.

v) I sent a message back saying the last plane was leaving at 5:30 PM and I would be on it! I was on the witness stand in 15 minutes.

Commitment not kept:

vi) *I was in Tasmania for a week's holiday. I was asked to come back to Victoria for a day midway through the week to give evidence with the promise that my airfares would be paid. I returned, gave evidence, went back to Tasmania. My airfares were not paid!*

b) The legal team including the solicitor and barrister should highlight any issues with regard to the report of the expert.

Example 1

(1) *A senior psychiatrist, Dr X appeared with me and another psychiatrist to give concurrent evidence in a court in Sydney.*

(2) *The claimant's income protection payments had stopped after 12 years.*

(3) *Dr X had seen the claimant 10 years previously and again six months before the court hearing.*

(4) *During cross examination it emerged that for inexplicable reasons Dr X had not taken any history about the claimant's activities over the preceding 10 years! Dr X, wisely, did not prevaricate and admitted to this major error. It had a significant effect on the court findings.*

(5) *It should have been obvious to the claimant's legal team that there was a gaping hole in the report of Dr X.*

(6) *If that had been brought to his attention promptly it could have been corrected and he would have not experienced open humiliation and the claim would not have been contaminated by this error.*

Example 2

ii) *I saw a police officer regarding a claim for medical negligence.*

iii) *Nine years later I was asked to see him regarding his workers compensation claim arising from a workplace injury.*

iv) *In my second report I mentioned my first report and noted his previous claim for medical negligence. As it happened I was not called to give evidence.*

v) *however the judge took exception to the fact that I had cut and pasted information regarding his past and family history from his first report into his second report*

vi) furthermore the judge could not understand how I had supported both his medical negligence claim and his workers compensation claim and made adverse comments about me.

(a) I heard nothing from the claimant's legal team but was contacted by WorkSafe who required a meeting to discuss the judge's adverse findings against me. the WorkSafe representatives were uncertain how to proceed but took my advice that they should write me a letter asking me to comment on the judge's findings. I did so and heard nothing more.

(i) I wrote that a workplace injury did not have to be the only injury nor even the major injury and that by acknowledging his workplace injury I was not conflating that with his injury arising from medical negligence. Furthermore I agreed that I had copied background information from a previous report but I could not see that that was a problem as it was a different sort of claim heard in a different setting and was, in a sense, generic information.

(2) I was let down by the barrister for the claimant inasmuch as I believed the judge was in error with regard to his understanding of the definition of injury in the Accident Compensation Act and the judge making adverse findings against me without counsel defending me and I was not provided with any opportunity to rebut those findings. This also led to problems for the claimant.

C) The barrister should be responsive to the needs of the Court and the Jury

vii) Usually the barrister who does the direct examination will summarise my report and asked me to comment at various points.

viii) On this occasion I had written a report that was 20 pages long. To my astonishment I was asked to read this to the jury in full.

ix) About halfway through this laborious task, the judge said "the court will now adjourn for 15 minutes to give Dr Epstein a break." I said that I was okay"

x) . The judge said "well, I think I need a break and I think the jury need to break, I would also ask Mr X (the examining barrister) if this is the best way to proceed?"

23) Cross examination of an expert witness

a) The major obstacle for most potential expert witnesses is their fear of being cross-examined. I have been cross-examined hundreds of times and, in general, have emerged unscarred.

- b) I believe that if I have taken a comprehensive history and prepared a competent report and produced an opinion that is consistent with that report and is readily understandable as to its conclusions then cross examination is a paper tiger.
- c) Leaving aside having to cope with poor cross examination techniques about which I will say more later, the only problems I have had with cross-examination is when, for whatever reason, my report and opinion was inadequate in some respects. This is clearly not the fault of the cross examiner. I have to wear the consequences of providing a report that is substandard. The only remedy is 24-hours of “ego pain” and then a determination to learn from that experience and prevent it happening again.

d) Inadequate cross-examination

In a 1999 study by Freckelton and others; judges were asked what they considered to be the most significant reasons for inadequate cross-examination of expert witnesses. These reasons included:

- i) inadequate preparation by the cross-examiner
- ii) lack of skill by the cross-examiner
- iii) confusion in use of terminology by the advocate
- iv) not having their own experts present when other expert witnesses gave their evidence
- v) a propensity on the part of the advocate to allow witnesses to go beyond the limits of the expert’s expertise.

e) To this list I would add the following:

i) rudeness and discourtesy

(1) I am not interested in cross-examining you on your report, I want to cross-examine you on your handwritten notes and see what you left out.(handed over) They do not appear to be in order, put them in order?

(2) You’re just a hired gun aren’t you Dr Epstein? Answer “you mean like a barrister?”

ii) dumb questions

(1) Would you agree that a person’s early life experience influences their later life?

(2) Tell me what happened in 2016?

(3) You have written that the worker has dysthymia (dysthymia is a milder, but long-lasting form of depression). There is no evidence that the worker

has any problems with his thymus gland Doctor!(said with a note of triumph, a gotcha moment!)

iii) Counter-productive hostility

(1) *We have three expert witnesses who totally disagree with you Dr Epstein, what do you have to say to that?* Answer: It sounds like we differ.

(2) *You have described the worker as having a major depressive disorder, actually, it is most likely midlife crisis isn't it Doctor? (This was with reference to a high school principal who had been hospitalised with depression after he was attacked by a parent).* My answer: Look, I'm not familiar with midlife crisis as I don't read the Women's Weekly!

(3) *In your report you have summarised other expert reports, in effect, you had written your report before you saw the claimant. What do you have to say to that?* Answer: Surely the issue is whether or not I had written **my opinion** before I saw the claimant. I did not do so and there is no evidence that I did.

(4) *I am not interested in interposing Dr Epstein, he will just have to wait his turn (this after waiting 3 hours the previous day.)*

24) Preparation for a court appearance

- a) I read my report and opinion the day before the planned court appearance.
- b)
- c) I do this for two reasons, both to familiarise myself with the claimant and my opinion and to locate any possible errors, omissions, confusion or any clarifications required. For example if I have summarised the report of an orthopaedic surgeon and I have written that the "claimant had a SLAP lesion" I check to know what this term means. I also anticipate areas of dispute.

An example:

d) *A young woman, Jane, had been experiencing intermittent severe abdominal pain. Her boyfriend, a medical intern, gave her pethidine tablets. She became a pethidine addict. Eventually the cause for her pain was found and remedied but she remained an addict and was drug seeking. She was referred to a psychiatrist who treated her with Nardil, an old-fashioned anti-depressive medication with potential severe adverse effects. In particular interaction with pethidine leads to a catastrophic increase in blood pressure*

e) .

(1) *She was admitted to a psychiatric clinic in 2000, the psychiatrist did not inform clinic staff that she was a pethidine addict and only described her as depressed. Jane stole a prescription pad from a doctor's office, had a prescription for 50 pethidine tablets filled and took the lot. She had a massive increase in blood pressure causing a stroke and became severely disabled with little mobility and was unable to care for herself or to speak. The day before I gave evidence I realised that the issue of the*

use of Nardil with a pethidine addict would be important. I researched the MIMS Annual (sent to all GPs and specialists) for 1985, 1995 and 1998 that all warned about the drug interaction of Nardil and pethidine.

- (2) *During cross examination I was told that a psychiatric expert from Sydney had been brought down and had given evidence the previous day that at the time of the incident the drug interaction was not known. I said this was not correct and provided three photocopies of all the relevant pages of the MIMS Annual. The case was settled that afternoon.*
- f) As a side note I thought the psychiatrist was incompetent and I made a complaint to the RANZCP. The psychiatrist claimed to have not kept any notes. The RANZCP reprimanded the psychiatrist for failing to keep adequate records but made no mention of incompetence!
- g) I arrive on time and I am generally patient waiting to be called. I often have a brief conference with the barrister and solicitor outside the court.

25) Dealing with cross examination

Over the years I have tried to tread a fine line between being a smart ass and being assertive. As a result I have developed some strategies for dealing with cross examination.

i) When encountering hostile questioning:

- (1) I speak in a monotone
- (2) I do not look at the barrister
- (3) I give monosyllabic answers
- (4) When I am asked a long winded question I pause, appear to be thinking, wait until I sense some impatience and I then ask for the question to be repeated. Most barristers will have forgotten the question by that stage.
- (5) I insist on completing my answer when interrupted by the barrister.

ii) When asked hypothetical questions

- (1) I endeavour to be cooperative and usually agree with all the hypothetical propositions. On the basis of my agreement I am then asked to determine whether or not this effects my opinion. I usually answer that it has led me to review my opinion but on the basis of the information provided I see no reason to change it.

iii) When provided with new information

- (1) There are times when I have been provided with information in the court that is contrary to what I had been told. For example I saw a young

woman who claimed that she had so much back pain that she could not push her baby's pram. I was shown video evidence of her pushing the pram to the local shops and back.

- (2) The hardest thing for an expert witness to do is to change his or her mind. When provided with fresh evidence my general rule is to ask for some time to consider this information, this usually leads to a brief adjournment. Bearing in mind that my responsibility is to inform the court or tribunal, I have no hesitation about changing my opinion when confronted with new facts.

26) Conclusions

- a) Expert witnesses have a significant role, that is to inform the court or tribunal of their opinion in their area of expertise.
- b) Barristers are required, within their obligations to the court, to be advocates.
- c) Barristers and solicitors should endeavour to make best use of the expert witnesses. This should include:

i) Initial

- (1) providing an informative letter of instruction
- (2) asking reasonable questions
- (3) providing appropriate documentation
- (4) preparing the claimant for the interview.

ii) Pre-court

- (1) arranging for a review if the initial report is out of date.
- (2) requesting a supplementary report if there is further information or there are questions about the initial report.
- (3) conferring with the expert witness to test the opinion provided and to clarify any issues that may have been raised.
- (4) giving early notice of any court appearance and being responsive to any issues the expert witness may have with that particular date.

iii) Court

- (1) Ensuring that the expert witness is called within a reasonable timeframe.

- (2) assisting the expert witness to provide the data and the opinion in a digestible way for the judge/tribunal/jury.
- (3) clarifying any issues raised by the expert witness or raised by others regarding the evidence provided by the expert witness.

d) Cross examination

- (1) avoid personalising the cross examination (don't attack the ego of the expert witness, unless the expert's ego interferes with obtaining appropriate responses to reasonable questions.)
- (2) focus on the issues rather than over generalising.
- (3) ask relatively brief straightforward questions.
- (4) avoid rudeness (you catch more flies with honey than you do with vinegar)
- (5) however, certainly challenge omissions in the data set and errors in logic.

e) Expert witnesses must:

- (1) only give opinions in their area of expertise
- (2) be responsible to the court or tribunal
- (3) not be an advocate for either side
- (4) make themselves available for conferences, conclaves and court hearings
- (5) behave appropriately and responsibly
- (6) maintain their continuing professional education
- (7) maintain their registration

Bibliography

- Brigden, V : Cross Examination of Expert Witnesses: NSW Bar News Spring (2018).
- Butt, A; Wentworth, S and Stowe, H: Playing in the Hot Tub-I Guide to Concurrent Expert Evidence in New South Wales: NSW Bar News Spring (2018).
- Dwyer, D;The Judicial Assessment of Expert Evidence, (Oxford: Cambridge University Press, 2008).
- Epstein, MWN The Guide to Civil Psychiatric Assessment : Beach Press 2019.
- Freckelton, Ian and Selby, Hugh, Expert Evidence: Law, Practice, Procedure and Advocacy, (5th ed), (Sydney: Lawbook Co., 2013].
- Freckelton, Ian, Reddy, P and Selby, Hugh, Australian Judicial Perspectives on Expert Evidence: An Empirical Study, Australian Institute of Judicial Administration Inc, Carlton, Vic, 1999.
- Gismondi & Associates: Direct Examination of the Expert Witness.
- Glissan, J L; Advocacy in Practice, (6th ed), (Chatswood: LexisNexis Butterworths, 2015), [5.43].
- Hampel, G, Brimer, E and Kune, R: Advocacy Manual: The Complete Guide to Persuasive Advocacy, (Melbourne: Australian Advocacy Institute, 2008).
- Napley, D; The technique of persuasion, (3rd ed), (London: Sweet & Maxwell, 1983).
- NSW Supreme Court Practice Note SC Gen 10, UCPR 31.51.
- Resnick, PJ and Knoll, JL: Being an Effective Psychiatric Expert Witness: Psychiatric Times Vol 24 No 6; 2007.
- Rix, KJB; Expert Psychiatric Evidence, RCPsych Publications, 2011
- Robertson, D and Gregory, C: Admissibility of Expert Evidence: NSW Bar News Spring (2018).
- Stitt, R, Cross-examination of expert witnesses: A practical approach via a personal excursion (2005) 26 Australian Bar Review.
- Stitt, R, Cross-examination of Experts (1987) 61 ALJ 622.
- Stowe, H and Wentworth, S: Preparing expert witnesses-a (continuing) ethical boundaries: NSW Bar News Spring (2018).
- The Practitioner's Guide to Briefing Experts First Edition 2017: the Law Society of New South Wales
- Wells, W A N, Evidence and Advocacy (Sydney: Butterworths, 1988),

Appendix

Schedule 1 - Expert Witness Code of Conduct (ACT)

Schedule 7 - Uniform Civil Procedure Rules 2005 [UCPR] (NSW)

Annexure 3 - Code of Conduct - Expert Witnesses (District Court WA)

Uniform Civil Procedure Rules 1999 - Reg 428 Requirements for report [Queensland Consolidated Regulations]

Expert Witness Code of Conduct (Supreme Court of Tasmania)

Order 44 - Expert Evidence of the Victorian Supreme Court (General Civil Procedure) Rules 2015

Expert Witness Code of Conduct Victorian Supreme and County Court.

Expert Witnesses Victorian Civil Procedure Act 2010.

Part 23 of Federal Court Rules 2011 - Experts

Federal Court of Australia, Expert Evidence Practice Note.

Part 15.5 of the Family Law Rules 2004 - Expert Evidence

Guidelines for Persons Giving Expert and Opinion Evidence (AAT)

Supreme Court Practice Directions 2006 Direction 5.4 (inc Guidelines for Expert Witnesses in Proceedings in the Supreme Court of South Australia)

Victorian Civil and Administrative Tribunal: Practice note – PNVCAT2; Expert Evidence