

1 Expert evidence and healthcare professionals

I. Freckelton

Introduction

Expert witnesses have the special entitlement of being permitted to give evidence in the form of opinions, not just facts. This makes determination by a court of who is and is not an expert important. Broad definitions as to who is an ‘expert’ (as opposed to a lay witness) are given for court purposes: a person who possesses specialized knowledge by reason of skill, experience or training. It is the substance of the specialized knowledge rather than its provenance that matters (Freckelton and Selby, 2009). The knowledge can have evolved as a result of a treatment or a third-party assessment relationship with a patient.

Even those with more experience and familiarity with giving evidence in court (e.g. forensic physicians and forensic pathologists) may find it difficult. For many doctors and other healthcare professionals, it is stressful and sometimes traumatic to give evidence to courts and tribunals as expert witnesses. To embark upon the forensic role involves departing from the familiar world of doctor–patient interaction and to cede a significant degree of authority to another profession in an environment that is generally not fully understood or appreciated by medical practitioners. Questions are asked which seem arbitrary, uninformed and disrespectful; opportunities for explanation and expiation are often denied; and rules that rarely appear in medical textbooks govern all interactions. There can be little doubt that the forensic environment is one characterized by a longstanding level of mistrust of expert witnesses because of concerns that evidence may be biased (Beran, 2009; Andrew, 2003; Cooper and Neuhaus, 2000) and that their bias will not be effectively unmasked, leading to the potential for miscarriages of both civil and criminal justice (Freckelton, 2007). In the past, many of those giving expert evidence may not have understood their general duties within the court setting; the sense of an expert being a ‘hired gun’ may have had some relevance. With limited facility for doctors to receive training in the unwonted arena of the courtroom, and the uncomfortable expectations of the law in relation to their writing of reports and their giving of evidence, it is not surprising that many prefer not to fulfil a forensic function and even make active efforts to avoid doing so.

This chapter explains the examination-in-chief, cross-examination and re-examination of medical practitioners to facilitate and reinforce the forensic

physicians' and other healthcare professionals' ability to adapt effectively to the environment of the witness box. It examines these particularly from the perspective of the Australian adversarial court system. The principles generally apply in other jurisdictions, although it is important for the reader to be fully aware of law and procedure within their own country or region.

The adversarial system of justice

In adversarial judicial systems such as those in the UK, Canada, Australia, New Zealand and the US, cases are decided on the basis of the information adduced by the parties to the litigation: in criminal cases this refers to the prosecution and the defence and, in civil cases, the plaintiff and the defendant. The principal role of the judge is to ensure that the contest between the parties is fair and that the rules of engagement, both procedural and evidentiary, are properly adhered to. The parties to the case are principally responsible for determining which evidence goes before the trier of fact – the judge, magistrate or jury. 'Proof' is determined as being beyond reasonable doubt by the prosecution in criminal matters and on the balance of probabilities in civil matters. Costs are generally paid by the loser in civil cases, except in the US.

Much of the evidence is given orally live in court or sometimes by audio or video link. For such evidence, the way in which a witness (including any expert witness) gives evidence is particularly important in the evaluation by the trier of fact of its probative value and its persuasiveness. Judges and magistrates rarely take steps, in the way that tribunal members, coroners and judicial officers in the inquisitorial tradition do, to have evidence placed before them which they believe may assist the fact-finding task. They rely on the parties for this. Judges and magistrates ask questions to clarify matters but, for the most part, leave questioning to the advocates for the parties. The task of the courts is conventionally accepted not to be a search for truth but to provide a forum for determining whether allegations made by the prosecution in criminal matters and the plaintiff in civil matters are duly proved on the basis of the evidence adduced (*Whitehorn v The Queen* (1983) 152 CLR 657 at 682).

However, the adversary system is continuously evolving and judicial management of cases is becoming more assertive (Hayne, 1999; New South Wales Law Reform Commission, 2005). For instance, in many jurisdictions there can no longer be expert evidence by ambush (i.e. without any forewarning of the views of the expert). In both civil and criminal matters, a report by an expert (or at least a clear indication of the evidence which it is anticipated that the expert will give) must be provided to the court and the other side a prescribed period of time before the commencement of the trial in many jurisdictions. In addition, a number of jurisdictions have limited the number of experts that can be called by parties unless latitude is extended by the court (e.g. the Family Court, New South Wales, the Australian Capital Territory and Queensland). In addition, superior courts (e.g. Supreme Courts in Australia and the High Court in England and New Zealand) have powers to call experts themselves in civil matters. Another important development has been the use of concurrent evidence by courts, particularly in New South Wales, enabling evidence to be given by more than one expert at a time in a way that enables discussion between experts and reduces the role of counsel (Freckelton and Selby,

2009; McClellan, 2005). In addition, there is a trend towards judges being more involved in clarifying issues in dispute pre-trial between experts in order to manage trials more effectively and reduce costs and delays.

Expert reports

All superior courts in Australia, New Zealand and the UK have promulgated codes of conduct, variously described, for experts who write reports in relation to civil litigation (Freckelton and Selby, 2009). These codes have been drafted in an effort to reduce the culture of partiality among some experts and to facilitate transparency and accountability of reasoning processes on the part of experts. Thus, experts' primary duties are clearly stated to be owed to the courts and not to the parties commissioning or paying for them. All data, tests used and assumptions made must be identified. Reasons should be given for each opinion expressed and where reports are preliminary, qualified or tentative this must be stated. Experts are expected to communicate co-operatively and constructively with one another, when so ordered by courts, in order to identify issues upon which they agree and disagree. Perhaps most importantly, experts are required to state that they have made all enquiries necessary to enable them to express their views. This is a further attempt to unleash experts from the distorting constraints of an adversary system in which they might be inclined to express opinions on the basis of a selective cross-section of relevant information (*J v The Queen* (1994) 75 A Crim R 522). In essence, it requires that they undertake their forensic functions in a similar way and with equal rigour to the way in which they undertake their clinical functions.

While these codes of conduct apply strictly only in civil matters, it has been held that they should also be regarded as broadly applicable in criminal matters (*R v Harris* [2005] EWCA Crim 1980; *R v Bowman* [2006] EWCA 417 at [177]). They are reflective of a wish on the part of courts that the processes and the bases upon which experts reach their views be accessible and thereby amenable to effective evaluation by fact-finders. Findings from surveys undertaken on behalf of the Australian Institute of Judicial Administration (Freckelton, Reddy and Selby, 1999, 2001) identified partiality/bias and a lack of clarity in the expression of opinions as particular concerns on the part of both magistrates and judges in relation to expert evidence. Both the quantitative and qualitative answers to the surveys revealed a significant level of disillusionment about the independence and objectivity of a problematic percentage of expert witnesses. Medical witnesses were singled out in this regard both in relation to their reports and their oral testimony. In turn, these studies have given a fillip to both the tightening of codes of expert conduct and judges' preparedness to insist upon adherence to them.

Evidentiary exclusionary rules

The evidentiary rules of admissibility determine the information that experts are permitted to provide to courts. They differ from one jurisdiction to another. They apply equally to doctors who treat patients who are involved in litigation and doctors who undertake third-party assessments for overtly forensic purposes. The law recognizes just two forms of evidence: evidence of *fact* and evidence of *opinion*.

As noted above, for the most part lay (i.e. ordinary or non-expert) witnesses are not permitted to express opinions. Expert witnesses are, but only to the extent that they are possessed of specialized information permitting them to express views that are likely to be over and above the cognisance of a lay trier of fact, and thus have the potential to assist or enhance the fact-finding process.

Generally the evidence given by medical practitioners, especially forensic physicians, is a combination of evidence of fact and evidence of opinion. Too little emphasis is often given to evidence of observations: what a doctor may see, hear or smell. Aside from the other skills of medical practitioners upon which the courts seek to draw is their ability to be careful observers and recorders of detail. When a doctor observes particular injuries to a patient or a set of disarranged clothes, is privy to extreme expression of distress or hears (and records) particular words spoken shortly after what is alleged to be an event of relevance to the court, a clear account of such matters (even without any interpretation) can be extremely helpful to the discharge of fact-finding responsibilities. Moreover, evidence of fact by medical practitioners is subject to far fewer evidentiary requirements than evidence in the form of opinion. From an admissibility point of view, the question is principally whether the doctor's observations are relevant to a matter in dispute before the court.

Australia has two regimes of admissibility that apply to expert opinion evidence. In Queensland, South Australia, Western Australia and the Northern Territory the common law applies, as it does in the UK (albeit with some differences), but with the Australian common law tending to be more proscriptive and less expert-friendly. In the Australian common law jurisdictions the expertise, area of expertise, common knowledge, basis and ultimate issue rules apply, supported by the prejudice-probative exclusionary discretion in criminal matters (Freckelton and Selby, 2009). What is often referred to as Australia's uniform evidence law applies in New South Wales (*Evidence Act 1995* (NSW)), Victoria (*Evidence Act 2008* (Vic)), Tasmania (*Evidence Act 2001* (Tas)), the Australian Capital Territory and in the Federal Court (*Evidence Act 1995* (Cth)). There are significant differences between the two systems (Freckelton and Selby, 2009). New Zealand, the US and Canada have their own legislative provisions relating to expert evidence.

In matrimonial proceedings there tends to be a considerable amount of latitude in terms of the opinions permitted to be expressed by experts. For instance, s69ZT of the *Family Law Act 1975* (Cth) provides that Australia's federal evidence legislation does not apply to child-related proceedings unless the court otherwise determines, for instance, if so agreed between the parties.

The UK approach bears many features in common with the Australian statutory approach in that it is not overly technical in terms of admissibility rules (Hodgkinson and James, 2006). By contrast, at the federal level in the US the principal inquiry is into the 'reliability' of expert evidence, assessed by reference to the following indicia: the falsifiability or testability of the evidence; the extent to which it has been peer reviewed; the existence of controls; and the degree to which its theories and methodology are generally accepted within the relevant scientific community (*Daubert v Merrell Dow Pharmaceuticals*, 509 US 579 (1993)). By contrast, the main inquiry at state level is simply as to whether the theory or technique has emerged from the experimental to the demonstrable and what its standing in the intellectual marketplace is (*Frye v United States*, 293 F 2d (1923)).

In general terms, however, expert evidence must emanate from persons who have relevant expertise, howsoever obtained. The provenance (e.g. skill, training or experience) is not important in respect of the area on which they purport to offer expert opinions. Courts have held it important that uninformed speculation and hypotheses do not masquerade as expert views (*HG v The Queen* (1999) 197 CLR 414). In addition, there can be admissibility problems about areas of expert endeavour that have not yet proceeded beyond the novel, that is, are iconoclastic and do not command general acceptance within the orthodox intellectual community in question (*R v Parenzee* [2000] SASC 143; *Frye v United States*, 293 F 2d (1923)). Further, if the methodology employed by the expert is questionable or lacking in rigour, the evidence may be accounted more prejudicial than it is probative. Should the bases of the expert evidence not be established by admissible evidence, the opinions of experts may themselves be inadmissible because they are serving as a conduit for the views or research of others, or at least may be unacceptably difficult of evaluation. In some jurisdictions there is also a formal preclusion upon experts, especially those in the mental health area, testifying about the ultimate issues to be decided (especially by juries). In general it is good practice for experts to refrain from testifying squarely about such matters, unless asked by a judicial officer to do so.

Pre-trial preparation for expert witnesses

The more familiar that an expert is with courtroom procedures before giving evidence, the more likely they are to be able to focus upon their task and give their evidence in a way which effectively communicates what they think about a subject. Knowledge of matters such as ‘no-go’ areas and court procedure and etiquette makes the discharge of the forensic role considerably less intimidating (Hampel *et al.*, 2008) and can facilitate concentration by the expert on the issues which are intellectually relevant to the litigation. Going to the court in question to see others giving evidence and to observe the furniture, the layout and the acoustics can also add to the familiarization process. Observing the magistrate or judge who will be hearing the case in which the expert will be giving evidence can be helpful in terms of assisting the expert to be aware of the reception which they are likely to receive when it is their turn to testify.

It is important for the expert to be closely familiar with the report that he or she has written. The Australian Institute of Judicial Administration surveys (Freckleton, Reddy and Selby, 1999, 2001) suggested that judges and magistrates are more impressed by experts’ practical experience and familiarity with the facts of the case than by their credentials, their publications and whether they have given evidence previously. A key in this regard is the making of time and effort to re-familiarize oneself with one’s report and relevant documentation. Trials often take place many months (sometimes years) after the initial expert report was written. Preparation by the witness for trial therefore involves the expert reviewing their report so that they are familiar with the issues contained therein. It is particularly important to review the conclusions in the report and how they were arrived at, as well as checking any underlying information which may have contributed to the opinions formed.

It is also worthwhile for the expert to have a system of file organization with which they are familiar (e.g. using tabs, labels and dividers) so that he or she can locate material promptly and easily when being asked questions which touch upon it. Failure to be able to do this can call into question – in the eyes of the court – the competence of the witness. Importantly, however, reference to such documentation can only be undertaken by permission from the judicial officer. In Australia, England and Wales the expert can ask the judge from the witness box if it is permissible to refer to the written report or statement previously provided. Generally, the judge will grant such permission. Efficient, organized recourse to relevant material contributes to the impression of professionalism and reliability which should lie at the heart of the way in which the expert conveys himself or herself to the court.

If there are articles or studies that are referred to in the expert's report, these should also be re-read close to the time of giving evidence and should be accessible for reference in the course of giving evidence. If the area in question is under development or is one of controversy, an appropriate online search (e.g. Medline or Ovid) to check for significant studies that might have been published in the period between the time of the writing of the report and the time of trial can be useful and can provide a safeguard against cross-examination directed towards questioning the expert's awareness of current developments in the relevant area (see below). In a criminal case, the 'opposing' expert may be in court advising counsel on questions as evidence progresses (unless there is an order excluding witnesses from presence in court until they give evidence). In most jurisdictions in criminal cases, the defence team is not required to disclose an expert report on which they do not intend to rely, but they may use it to assist in cross-examination.

An important part of preparation for giving evidence should consist of a conference between the medical practitioner and counsel before trial. This does not always occur. The advantages of such contact between the witness and the advocate calling the expert are multiple in terms of facilitating suitable questions being asked in examination-in-chief and communicating ahead of trial where shades of grey may lie in the opinions held by the expert. A pre-trial conference can only enhance the ability of both the expert and counsel to fulfil their respective roles. However, such conferences do not commonly take place (except in the corridors of the courthouse on the morning of the trial) for a range of logistical reasons. Nonetheless, when an expert is concerned about, for instance, complex issues traversed in their report or about a shift in their position, they should be pro-active and make contact with the instructing solicitor and seek a meeting with counsel.

Being an expert in the forensic environment is to play a role, sometimes a key one and sometimes just a bit part, in a drama. Knowing how a contribution fits into the overall play is a constructive piece of information which can assist in how answers are given to questions posed. It is useful for an expert to ask the instructing solicitor how their evidence is likely to fit into the material being placed before the trier of fact, whether the case is criminal or civil.

Appearance

Being a player in a drama involves management of impressions. Dress is part of this. As for all other components of presentation, the forensic expert should dress

in such a way as to maximize the impression of professionalism, authoritativeness, reliability and trustworthiness. What takes place in court is important for a whole range of reasons. Judges, magistrates and jurors conduct themselves accordingly; so too must experts. This means that clothing should be comfortable for the witness, but also appropriate to the court setting. Accessories should be reasonably conservative and not distract or trivialize.

Timeliness

Courts tend only to sit for between five and six hours a day (between about 10.00am and about 4.00pm with an hour's break for lunch). It is important that experts meet schedules given to them for attendance to give evidence. Failure to do so can result in the issuing of a subpoena to attend or even an arrest warrant. Communication is the key to ensuring a good working relationship between the courts and the expert. If a court is aware of an expert's other commitments, it is easier to ensure a mutually convenient time of attendance. More importantly, keeping a court waiting is a sure way to antagonize a judicial officer and to fluster the witness. It is sensible to arrive in plenty of time before the appointed hour of attendance to settle nerves, speak with counsel and gather composure before entering the witness box. Tom Grisso, an experienced US forensic psychiatrist (Brodsky, 1991: 110–111), has stressed in this context the need for clearing the mind before giving evidence: "I usually arrange to cut myself off from normal business so that I can get my head together. ... I take a walk, or stop at a favourite place for breakfast on the way to court. For me it's very important that I be alone at those times. I'm not aware of any need to get 'psyched up'. It's more a matter of spending some time tuning out the customary activities of work, so that I can arrive at court relatively uncluttered and properly focussed."

Giving of evidence

Expert witnesses give evidence to assist the trier of fact which may be a judge, a magistrate or jury. Accordingly, it is important for them not to direct their answers towards those asking the questions and (apparently) ignoring those who matter most in the courtroom – those who make the decisions. There are important advantages for the expert in focusing principally upon the trier of fact rather than upon, especially, the cross-examiner. The essence of cross-examination is the manipulation of witnesses. Eye contact is an important part of this and taking it out-of-play as a technique can be very helpful for the witness. In addition, directing answers toward the trier of fact enhances the development of rapport between the expert and the decision-maker(s). It also assists the expert to concentrate upon the questions being asked of them rather than the way they are being asked or the motives for which they are being asked, both of which can be distracting.

It goes without saying that mobile phones and pagers should be switched off or set to silent or meeting mode. A technique often used by experts and counsel is to place their phone/pager in front of them when commencing giving evidence in order

to ensure that it is suitably switched and also to reassure the expert that they are aware of its status. In such a situation, care needs to be taken with a phone that might otherwise vibrate distractingly on a hard surface.

The way in which the trier of fact is likely to respond to what an expert says is a factor of a number of different things. We all communicate in ways other than words. Body language, for instance, includes posture, eye contact, facial expressions, gestures, body orientation, positioning and vocal qualities including loudness, rhythm, tone, pitch, inflection and timbre. Boccaccini and Brodsky (2002) express the not surprising conclusion that non-verbal behaviour can influence the way in which communications in the courtroom are processed and weighted. They identify several behaviours that tend to characterize effective communicators: frequent eye contact with both lawyers and jurors (especially while speaking), illustrator gestures, leaning forward slightly, relaxed posture, facing one's body and head appropriately, expressing genuine emotions and speaking at just a moderately fast rate in a loud voice that varies in pitch. By contrast (Boccaccini and Brodsky, 2002: 193), they found that ineffective communicators tend to "avert their gaze (especially when speaking), make frequent posture shifts, have rigid postures, pause before answering questions, display extreme affect (flat or melodramatic), and speak slowly using a soft and flat voice." It is also important to avoid alienating mannerisms and aspects of demeanour which are likely to detract from perceived trustworthiness (Stone, 1991: 829).

Should the expert give mixed messages in the course of their evidence or convey a significant sense of discomfort while in the witness box, jurors may conclude that he or she is biased, incompetent or even lying (Edinger and Patterson, 1983: 30ff). By contrast, exhibition of confidence when communicating information has been found to be an important determinant of positive recipient response. In one study, when other variants were controlled, communicator confidence accounted for 50% of decisions about whether to accept what was said as true (Neitzel and Dillehay, 1986: 129).

It is important for answers to be given by expert witnesses at a reasonably slow pace only. It is easy to speak more quickly than normally when anxious or feeling under pressure. This can be irritating for the trier of fact and makes it difficult for accurate notes to be taken. The expert should be aware of how fast the judge is writing (on paper or on computer) and can often assess whether their delivery is too fast, before being asked by the judge to 'Pause please, doctor'. In addition, unduly quick speech can detract from the witness' gravity and make them appear nervous and prepared to say what first comes into their head. It is significant that most of the great orators speak at a slow rate and with considerable dignity, gravity and apparent thoughtfulness.

It is vital that what an expert says in court be comprehensible to the trier of fact. However, it must not be simplistic to a point where it seems to be condescending. In the interests of accessibility and comprehensibility it is best to avoid jargon (Conroy, 1999: 3) but, where technical terms need to be employed, they should be explained. It is often best to use the technical term and then to explain it, rather than the reverse. This engages the listener with the information and is less likely to be perceived as patronizing. This advice also applies to written reports.

Judges and magistrates insist upon answers being responsive to questions posed. Responding to questions (whether in examination-in-chief, cross-examination or re-examination) cannot be an opportunity for perorations or speechmaking. It is therefore important for witnesses to listen carefully to the questions asked; they must ensure that it is the actual questions that they answer and not the questions that they would have liked to be asked. It is quite acceptable, and indeed often the correct response, for an expert witness to admit “I do not know” or to concede that they do not recall a conversation from a long time before or an obscure fact. In reality, such an answer can communicate an impression of honesty and awareness of the parameters of their knowledge on the part of an expert. The temptation to appear to be the ‘all-knowing’ witness needs to be resisted, as should the opportunity to indulge in guesswork or speculation. On occasion, it is appropriate for the witness to offer to look at notes or to peruse a source of information to assist the court.

If a question is unclear, poorly expressed or inaudible, it is appropriate and sensible for a witness to ask for it to be repeated or clarified. This must only be done where it is necessary, not as part of a combative strategy on the part of the expert. Similarly, if a question is asked by counsel that has multiple parts, it is appropriate for the witness to ask for it to be broken down into its constituent parts so that it can be fully answered. It is important to remember that the responses to the questions given in court are those that are recognized as the evidence from that individual, rather than what may have been put in a question or even what may form part of a report that may not have been tendered in evidence.

The tone for answering questions, whether in examination-in-chief or cross-examination, should be detached, dignified and professional. This involves maintaining equanimity in face of provocation, on occasions, and concentrating on the task rather than viewing it as a personalized attack or a contest between counsel and expert witness (Rogers and Shuman, 2005: 64). Avoiding emotional delivery of evidence or angry or sarcastic responses to offensive questions or styles of questioning is essential.

An expert functions as a ‘witness teacher’ in the courtroom (Zobel and Rous, 1993: 154). Their role is to provide information from their own domain in order to enable the court to make a more informed and nuanced decision than would otherwise be possible. To this extent, the role of the expert has elements of the pedagogical about it depending on the capacity of the witness to be engaging and interesting in their delivery. However, the temptation to give a lecture in an expansive way which is inappropriate for the forensic environment needs to be resisted.

Medical practitioners are accustomed to utilizing a variety of aids to communicate to colleagues at grand rounds, seminars and conferences. There is no reason in principle why a variety of such aids (known as demonstrative evidence), including powerpoint presentations, transparencies of anatomy, drawings on whiteboards, models and even simulations cannot be employed by expert witnesses. On occasions (*Butera v Director of Public Prosecutions (Vic)* (1987) 164 CLR 180), courts have been encouraging of such adjuncts to oral communication and it can be identified that contemporary court proceedings are utilizing non-verbal means of communication more extensively than previously. However, it is important for an expert to canvass the use of such aids with counsel before the trial

and to ensure that the nature of any assumptions made or data input to a programme is clearly and fairly made known in the course of evidence. Unfortunately, often due to physical constraints (e.g. the use of old buildings) or financial considerations, the use of technology will vary from one court room to another. The expert should make the assumption that they will be explaining their evidence without any specialized facilities but, if facilities are available, they can in principle be used.

Humour on the part of a witness who is only privy to part of the evidence in a trial can be very risky (Blau, 1999: 327). Dvoskin and Guy (2008) have warned of the insensitive use of humour by experts: "Humor can be highly inappropriate if doing so expresses disrespect for the process. On the other hand, humor at one's own expense can ease tension and make the expert likeable. Sarcasm, however, can make one look small-minded, mean-spirited, disrespectful and insecure." Generally, it is better to let the judicial officer or the advocates make (or attempt to make) the amusing utterances but, if humour is to be deployed by the expert, it is important that it be consistent with the dignity of the court proceedings and the expert's professionalism. It must not be cruel or directed toward someone else's detriment. As Brodsky (1999: 101) put it, no-one wants a comedian or Bozo the Clown in the witness stand.

Managing cross-examination

It is unhelpful and unduly defensive to get into the mindset that cross-examination is an ordeal by combat that one can only hope to 'survive' (see Watts, 2009). It is more appropriate to view it as an opportunity to be questioned about one's assumptions and methodologies and to explain one's thinking and reasoning processes. Modern thinking about accountability is that it is an opportunity to learn and improve. Essentially, cross-examination is an exercise of testing, probing and imposition of accountability. It is an intellectual challenge that can be managed well and enjoyably most of the time by a well-prepared and ethical expert. Practice, preparation, anticipation and training all assist in the discharge of the forensic role.

By contrast with the open-ended form of questioning required of the examiner-in-chief, competent cross-examiners will mostly ask closed-ended questions which require something close to a 'yes' or 'no' answer (Dillon, 1990: 21; Jones, 1994: 144); alternatively, they may determine that any answer received will be helpful or that the situation of their client is so problematic that other forms of questioning are strategically justified. For the expert witness, this can be frustrating as they feel themselves pushed into a position of answering in absolutist terms when in fact the issue they are dealing with may be complex and characterized by shades of grey. In this situation, the primary responsibility of the expert is to answer the question responsively and not to attract the admonition, "Witness, just answer the question". However, it is generally open to the witness to indicate some reservation in the answer which will signal to the advocate who called them that questions should be put to clarify the situation in re-examination. It is not inappropriate for the expert witness to seek the assistance of the judge if they have concerns about the clarity or interpretation of questions.

In some situations, where an answer in a yes or no format risks misleading the court, the expert is therefore at liberty to explain this to the presiding judicial officer and to ask to answer more fully. This indulgence cannot be availed of on multiple occasions so the request for providing an answer that is not wholly responsive to the question asked must be utilized infrequently and only when clearly necessary to avoid the court being given a serious misimpression.

While experts are often anxious about dealing with a personal attack upon their credentials, expertise, methodology or competence, this is an atypical experience. Generally the aim of cross-examination is simply to secure modest concessions (*Donald* (1983) 11 A Crim R 47 at 54) which might enable a doubt to intrude into what seemed from examination-in-chief a straightforward absolute position expressed by the expert. It is relatively rare for counsel to engage in the table-thumping intimidation tactics that are to be seen in the short grabs of legal dramas on television. When it does happen, judges and magistrates usually put an end to such behaviour quickly – it is generally inappropriate for the courtroom and does not assist the decision-making process. Cross-examination is usually a subtle exercise of evaluating the satisfactoriness of the data taken into account by the expert, assessing the quality of the reasoning process engaged in by the expert and identifying whether other interpretations of the data before the court are plausible.

On occasions, however, counsel will ask questions during cross-examination directed towards suggesting that a witness, while an expert in certain spheres, has exceeded the boundaries of their competence in expressing certain views. In such a situation, it is important for the expert to be circumspect and modest in their claims to expertise. The day of the ubiquitous medical expert have passed and expectations of specialization and sub-specialization are the norm in the general community as well as in the courts (*F v The Queen* (1995) 83 A Crim R 502; *J v The Queen* (1994) 75 A Crim R 522). However, it is always the case with medical experts that they have generalist medical qualifications and are likely to be extended some latitude in terms of answering questions about ordinary medical matters. Experts must be aware that, with the universal availability of online information, counsel may have access to transcripts of evidence and to judgements given in previous trials in which the same expert or experts were involved. An expert should always be aware of what information can be accessed about themselves online.

A common technique of cross-examiners is to try to ‘get under the skin’ of an expert and to provoke them. This can elicit unedifying responses from arrogant witnesses that alienate the witnesses from the fact-finder or that push them into dogmatism or absolutism that can set up the contention that the expert is biased. It is therefore important for witnesses to maintain their composure and dignity, answering each question on its merits and with a measure of humility and tolerance, not condescension. It is never helpful to argue with counsel or to engage in a contest of wills. Counsel are used to the environment of the court and likely to know the judge or magistrates best. It is counsel who will be standing and counsel who ask the questions. In short, there is a power imbalance of which it is important for witnesses to remain conscious.

An important aspect of cross-examination of an expert is scrutiny and testing of the bases of opinions. As Abadee J observed in *R v Pantoja* (1996) 88 A Crim R 554 at 577: “An expert opinion is only as persuasive as the facts upon which it is based.” This can consist of identifying the building-blocks of the views of a medical practitioner, for instance, what has been said by the patient and the patient’s

relatives, observations by nurses, the results of tests, the reports of doctors and general medical literature. The suggestion may be made that the data relied upon by the witness are insufficient or not supportive of the inferences drawn. Alternatively, it may be put that proper, objective assessment would have led not just to obtaining other information but the deploying of different tests.

Another focus of cross-examination is upon the use of logic by expert witnesses. Sometimes there are non-sequiturs and syllogisms in opinions expressed in examination-in-chief. If inappropriate assumptions are made by witnesses, this may contaminate the reasoning process. On occasions, the assumptions of experts are not clearly revealed. In *Chambers v Jobling* (1986) 7 NSW 1, for instance, the question was whether the plaintiff had been the driver of the motor vehicle which had been involved in an accident. The process of expert inference was as follows: the body of the deceased was on the one side of the vehicle; it was thrown about inside the vehicle in the course of the accident; the laws of physics are such and such; and therefore it should be inferred that the body could not have been in the seat alleged before the accident. The problem revealed by cross-examination was that the way in which the body had been thrown about in the course of the accident was quite unclear so the application of the orthodox laws of physics assisted little.

On occasions, too, ‘hindsight error’ or ‘outcome error’ (Hugh and Dekker, 2009), also known as the ‘retrospectoscope’, contaminate reasoning processes when the issue needs to be looked at from the perspective of a time immediately before a key event. For example, if a baby was administered a triple-antigen vaccination and died shortly after of respiratory failure, post hoc reasoning would suggest a causal nexus between the two phenomena. However, this may be fallacious – they may be entirely or at least partly independent.

Gee and Mason (1990: 91) drew attention to two notorious errors in logic that are also often the subject of scrutiny in cross-examination: affirming the consequent and denying the antecedent. They cite the following as an example: if the heart is weak, then the pulse is feeble. The pulse is feeble. Therefore the heart is weak. At first sight, such a proposition is plausible but the feebleness of the pulse may be due to reasons other than weakness of the heart. Gee and Mason also cite the following passage from the Sherlock Holmes story, *The Boscombe Valley Mystery*:

It was about ten minutes before we regained our cab. ... Holmes was carrying with him the stone which he had picked up in the wood. “This may interest you, Lestrade”. He remarked, holding it out. “The murder was done with it”. “I see no marks.” “There are none”. “How do you know that?” “The grass was growing under it. It had only lain there a few days. There was no sign of a place when it had been taken. It corresponds with the injuries”.

Again, the reasoning leaves a good deal to be desired. The conclusion drawn is only one of a number of the possibilities and not a logical result of the propositions preceding it.

Another beguiling form of error for which advocates search in cross-examination is the ‘denial of the antecedent’. For example, consider the following.

If schizophrenia is hereditary, lineal descendants will inherit it. Schizophrenia is not hereditary. Therefore, lineal descendants will not develop it.

Given the first proposition, negating its existence does not have the necessary consequence that descendants will not develop schizophrenia because the condition may well have any number of other causes.

A further technique commonly employed by cross-examiners is to query the validity of proceeding from a finite number of specific findings to a general assertion by extrapolation and thence to an explanation of a particular instance. More typically, however, experts are questioned about their failure to adopt an alternative position that is supported by some of, or at least one prominent member of, their professional brethren. The reality is that unanimity of approach within any discipline is rare and there tend to be multiple plausible ways to approach any given issue. A failure to acknowledge a variety of perspectives can provide fertile ground for an allegation of bias. The issue of partisanship was exposed by the Australasian Institute of Judicial Administration (AIJA) studies as the greatest source of concern for contemporary judicial officers in Australia about expert evidence. It is therefore not surprising that much cross-examination is directed towards tapping into this judicial anxiety and suggesting that the approach of expert witnesses is not wholly dispassionate and even-handed. The appropriate response for experts is to be acutely aware of the level of concern about partiality of specialist witnesses and to conduct themselves at all times in their forensic role in an unbiased and objective manner.

Should an expert have crossed a number of subdisciplinary boundaries in their evidence, cross-examination may be directed towards suggesting that the expert is unduly inclined to offer views on a wide variety of subjects on which the expert's level of expertise may be questionable. In addition, it is common for cross-examiners to obtain or be aware of other reports by the same expert. Comparison of them can yield the appearance of anomaly or inconsistency. Again, this can be portrayed as a preparedness of the expert to tailor their testimony and their reports for the exigencies of the party commissioning (and paying) them. By contrast, scrutiny of multiple reports may yield a surprising degree of consistency, suggesting a propensity on the part of the expert to write 'template reports'. Such information can be used to suggest that the expert is a 'hired gun' or gives inadequate attention to the specifics and subtleties of individual cases when offering forensic opinions.

Another form of cross-examination employed in some cases is what is sometimes termed 'the learned treatise attack' in which the expert is asked about their knowledge of a series of published works by other experts in the field. If the expert is unaware of some of them or disagrees with most of them, this can be used to suggest that the expert is either insufficiently up-to-date or even out of touch with the majority of the intellectual community. Commonly, the expert is asked about the views of well-known experts in second-tier journals or about very recently published pieces of scholarship.

The attack is best dealt with by reference to the status of the publication and acknowledgment that, although the expert does extensive ongoing medical education, it is impossible to read and recall every article, especially when it is not published in a leading journal in the area. The offer can be made to peruse the relevant article during a break in proceedings. If an expert quotes a paper or a report, though, it is essential both that they have read and understood it and that they are able to identify the relevance of the material to the case in hand. Many references within

medical papers are secondary references that have been misquoted or misinterpreted. No expert should refer to a publication of which they do not have first-hand knowledge.

Because of the proliferation of codes of ethics and conduct for practitioners (including in the forensic context), if experts depart from their stipulated obligations it can be suggested in cross-examination that they have conducted themselves inconsistently with their ethical duties (as enunciated in the relevant documentation) and therefore cannot be trusted in relation to the views they have expressed in the litigation. Again, this can be a means of impugning the expert's reliability and independence, invoking the spectre of bias. It highlights the need for experts to be familiar with relevant codes and protocols and to adhere strictly to them. Experts should be aware that there is a trend for experts to be reported to their professional bodies if their evidence (both written and oral) does not adhere to codes of practice (Freckelton and Selby, 2009).

Summary

The forensic role is eschewed and reviled by many medical practitioners. However, the expert perspective of both treaters and third-party assessors is needed and valued by the courts. Adjustment to the forensic environment, awareness of the culture of the law and lawyers and careful preparation for giving evidence can go a long way towards rendering the experience of being an expert witness both challenging and intellectually stimulating. When healthcare professionals show that their evidence is carefully considered and the subject of thoughtful analysis, modern courts increasingly go out of their way to ease the disruption to doctors' schedules and to ensure that they are treated with dignity and respect. Evolution in the adversary system, expert evidence law reform and changes to court procedures, including the introduction of concurrent evidence, are easing the lot of the medical practitioner in the courts and better enabling doctors to assist the courts towards the achievement of just and medically informed results.

References

- Andrew, L.B. (2003) The ethical medical expert witness. *Journal of Medical Licensure and Discipline*, 89(3), 125.
- Beran, R. (2009) The role of the expert witness in the adversarial legal system. *Journal of Law and Medicine*, 17, 133.
- Blau, T.E.H. (1998) *The Psychologist as Expert Witness*, 2nd edn, John Wiley & Sons, Ltd, New York.
- Boccaccini, M.T. and Brodsky, S.L. (2002) Believability of expert and lay witnesses: Implications for trial consultation. *Professional Psychology: Research and Practice*, 33, 384.
- Brodsky, S.I. (1999) *The Expert Witness: More Maxims and Guidelines for Testifying in Court*, American Psychological Association, Washington DC.
- Butera v Director of Public Prosecutions (Vic)* (1987) 164 CLR 180.
- Chambers v Jobling* (1986) 7 NSW 1.

- Conroy, C. (1999) The importance of expert witnesses being trained, in *The Role of the Expert Witness*, (ed. B.D. Daly), Inns Quay, Dublin.
- Cooper, J. and Neuhaus, I.M. (2000) The 'hired gun' effect: Assessing the effect of pay, frequency of testifying and credentials on the perception of expert testimony. *Law and Human Behavior*, 24, 149.
- Daubert v Merrell Dow Pharmaceuticals*, 509 US 579 (1993).
- Dillon, J.T. (1990) *The Practice of Questioning*, Routledge, London.
- Donald*, 11 A Crim R 47 at 54 (1983).
- Dvoskin, J.A. and Guy, L.S. (2008) On being an expert witness: It's not about you. *Psychiatry, Psychology and Law*, 15, 202.
- Edinger, J.A. and Patterson, M.L. (1983) The understanding of technical evidence. *Psychological Bulletin*, 93, 30.
- F v The Queen* (1995) 83 A Crim R 502.
- Freckelton, I. (2007) Psychiatrists as experts, in *Psychiatry and the Law* (eds W. Brookbanks and A. Simpson), Lexis Nexis, Auckland.
- Freckelton, I. and Selby, H. (2009) *Expert Evidence: Law, Practice, Procedure and Advocacy*, 4th edn, Thomson, Sydney.
- Freckelton, I., Reddy, P. and Selby, H. (1999) *Judicial Perspectives on Expert Evidence: An Empirical Study*, AIJA, Melbourne.
- Freckelton, I., Reddy, P. and Selby, H. (2001) *Magistrates' Perspectives on Expert Evidence: A Comparative Study*, AIJA, Melbourne.
- Frye v United States*, 293 F 2d (1923).
- Gee, D.J. and Mason, J.K. (1990) *The Courts and the Doctor*, Oxford University Press, Oxford.
- Hampel, G., Brimer, E. and Kune, R. (2008) *Advocacy Manual*, Australian Advocacy Institute, Melbourne.
- Hayne, K. (1999) Judicial case management and the duties of counsel, http://www.hcourt.gov.au/speeches/haynej/haynej_bris.htm, accessed 28 February 2010.
- HG v The Queen* (1999) 197 CLR 414.
- Hodgkinson, T. and James, M. (2006) *Expert Evidence: Law and Practice*, 2nd edn, Sweet & Maxwell, London.
- Hugh, T.B. and Dekker, S.W.A. (2009) Hindsight bias and outcome bias in the social construction of medical negligence: A review. *Journal of Law and Medicine*, 16, 846.
- J v The Queen* (1994) 75 A Crim R 522.
- Jones, C.A.G. (1994) *Expert Witnesses*, Oxford University Press, Oxford.
- McClellan, P. (2005) Expert witnesses: The recent experience of the land and environment court. *Judicial Officers Bulletin*, 17, 83.
- Neitzel, M.T. and Dillehay, R.C. (1986) *Psychological Consultation in the Courtroom*, Pergamon Press, London.
- New South Wales Law Reform Commission. 2005. *Expert Witnesses*. Report No 109, Govt Printer, Sydney.
- R v Bowman* [2006] EWCA 417 at [177].
- R v Harris* [2005] EWCA Crim 1980.
- R v Pantoja* (1996) 88 A Crim R 554 at 577.
- R v Parenzee* [2000] SASC 143.
- Rogers, R. and Shuman, D.W. (2005) *Fundamentals of Forensic Practice: Mental Health and Criminal Law*, Springer, New York.
- Stone, M. (1991) Instant lie detection? Demeanour and credibility in criminal trials. *Criminal Law Review*, 821.
- Watts, P. (2009) *Surviving the Witness Box: Expert Opinion in Court*, Ogilvie Publishing, Canning Bridge WA.
- Whitehorn v The Queen* (1983) 152 CLR 657 at 682.
- Zobel, H.B. and Rous, S.N. (1993) *Doctors and the Law*, Norton & Co, New York.

