

expert update

Uncovering the latest Expert Witness news with Ferrier Hodgson

How reliable is your client's information?

When a client briefs his expert witness before a hearing, what lengths should the witness go to in order to independently verify what he has been told?

*PANAGIOTOPOULOS v RAJENDRAM [2007] NSWCA 265
(28 September 2007)*

In this medical negligence case, a former taxi driver sued his wife's doctor, claiming that he suffered psychiatric injury following the death of his wife because the doctor had failed to diagnose her cancer until it was too late. But the judge rejected the evidence of the man's expert witnesses on the basis that they had relied too heavily on the word of their client without independent verification. It is a clear warning to experts about the need to assess or verify information provided by clients.

In April 1996, Mrs Panagiotopoulos ("Mrs P") had a consultation with Dr Rajendram ("Dr R"), who was made aware of recent blood tests Mrs P had, which indicated abnormalities. Dr R advised Mrs P that she could continue with a planned trip to Greece but should have further blood tests upon her return in two months. On her return to Australia, Mrs P had a further consultation with Dr R where she complained of pain caused by sitting. Dr R referred her to a general surgeon, but did not order further blood tests and failed to advise the surgeon of the results of the earlier blood test. Mrs P was ultimately diagnosed with colorectal cancer in October 1996, for which she received surgery and extensive treatment until her death in March 1999.

Mr Panagiotopoulos ("Mr P") subsequently claimed psychiatric injury arising from this alleged negligent treatment.

Various medical experts provided different opinions as to whether the delay in ordering further blood tests had allowed the cancer to progress to a point where it was incurable. The trial judge relied upon evidence from an expert witness for the defence that earlier diagnosis would have had no impact on the patient's survival.

Part of the grounds for appeal related to the Judge's preference for the defendant's expert evidence:

"In some cases there may be factors which allow an appellate court to conclude that such a preference demonstrates error. For example, one expert may have more relevant expertise than another, a factor which is disregarded by the trial

judge, or one expert may have based an opinion upon a factual premise which was not made out. In the present case, no such error in his Honour's reasoning was demonstrated. Indeed, the differences of opinion between the various oncologists may well have been somewhat artificially accentuated by the process of litigation. As may be seen from the quotation from [Mr P's expert] set out above, whatever chance he attributed to a better outcome for Mrs P, had the diagnosis been made in June rather than October, it was slight and not expressed with any precision. The experts were making evaluative judgments, with the benefit of hindsight, and there was undoubtedly a legitimate range for professional opinion on the topic."

Other experts provided psychiatric evidence in relation to the medical condition, if any, suffered by Mr. P and as to whether it could have been foreseen by Dr R that Mr. P would have developed psychiatric problems as a result of the death of his wife. The Judge noted that expert evidence is generally not admissible to establish foreseeability of risk of psychiatric injury, but could be relevant in the case of a medical practitioner defendant.

"If the foreseeability test is to maintain a factual link with the conduct of people in every day life, its application will usually not depend upon expert psychiatric evidence, or statistical evidence as to what should be expected in particular circumstances... Nevertheless, in the case of a defendant with medical knowledge, such evidence may be relevant and admissible."

The psychiatric evidence provided by the experts was rejected by the Judge as it largely relied upon the word of Mr. P to describe his symptoms. There was also documentary evidence indicating that Mr. P may have provided some false information to the experts. For example, he said that he stopped work as a taxi driver after his wife's diagnosis and subsequent death and was unable to return, but it had been shown, via Mr P's tax returns, that he had both stopped work prior to his wife's diagnosis and had resumed work for a period after her death. He had also been seen attending consultations with Dr R prior to his wife's death in relation to depression.

The judgment stated:

"As noted in *Whisprun Pty Ltd v Dixon*; (2003) 77 ALJR 1598, where medical opinions 'themselves seem premised on an acceptance of [the patient's] account of her history and complaints', the trial judge "was entitled to take the view – which we would take ourselves – that their opinions were contingent on [the patient] suffering from the problems of which she complained. Thus, a finding that she did not suffer from those problems removed the basis on which the opinions were expressed.'

That analysis applies with equal, if not greater, force in the present case."



In concluding, the Judge held that:

“The nature of the duty of care owed by a general practitioner to his or her patient’s spouse should not be articulated at too high a level of abstraction, but must be understood with reference to the particular breach identified and the consequences which are said to have flowed from the breach.”

Significance

Legitimate range of professional opinion

The judge underscored the principle that the process of litigation may artificially accentuate the differences of opinion between experts, meaning that in some cases there will be a legitimate diversity of professional opinions.

Allegedly false evidence provided by the Appellant to the experts

The experts’ evidence was rejected by the Judge on the basis that it largely relied upon the word of the appellant to describe his symptoms.

An expert should avoid relying solely upon the word of his client, and should seek verification of information if at all possible, and where reasonable. In some circumstances, for example involving psychiatric experts, this will clearly not be possible as there is unlikely to be any physical or physiological evidence that the expert may use to verify the information verbally provided to him. Similarly, in the case of reports of expert accountants, a statement is made that they have not ‘audited’ all of the financial information provided to them, as to do so would be an unreasonably onerous exercise.

The expert should therefore make it apparent in his evidence where he is relying on the information provided to him by his client, and the extent to which this has been verified.



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