



OVERVIEW

This module has two distinct parts, the first on becoming an expert witness which involves the process of undertaking the role as an expert witness in Court, from the time of becoming appointed and obtaining instruction through to giving evidence in Court, and the second part involving subpoenae, the different types of subpoenae and what you need to do in the event that you receive a subpoena associated with your practice of podiatry.

THE ROLE OF THE EXPERT WITNESS

It is the role of the Courts to determine disputes where legal rights are in question. Courts determine these disputes by hearing and evaluating evidence. Evidence generally falls into two categories: -

- (a) Lay evidence which is evidence of facts given by witnesses, usually in relation to what they have heard or seen about relevant events. Facts which were not heard or seen (perceived) by a person directly, but rather were learned from another person (second-hand) are referred to as hearsay. There are exceptions as to when the Court will consider hearsay evidence but those exceptions are limited due to the inherent unreliability of such second-hand information. Lay evidence usually comprises of the relevant facts and only those facts which are within the knowledge of each individual witness called in the case.
- (b) Expert Evidence which is evidence provided by a suitably qualified person providing relevant information in relation to both facts about which they are aware and opinions within their field of expertise that they hold arising from those facts. An expert can only express an opinion within his or her field of expertise, facts that have come to his or her attention from testing or examination (eg. such as the presentation of an injury) and hearsay evidence such as the history provided by the patient in relation to how an injury occurred. Usually the hearsay component of the evidence will not carry weight with the Court in proving how the injury occurred, but may be relevant in so far as whether or not the patient has been consistent in the version of events giving rise to the injury.

APPOINTMENT AS AN EXPERT WITNESS

Expert witnesses can be appointed to their role in three ways: -

- (a) On behalf of one of the parties to the dispute;



- (b) By agreement between each of the parties to a dispute as a single expert; or
- (c) By appointment by the Court as a single expert.

Appointment in the above three ways should be distinguished from someone being required to give evidence as a treating specialist, which is much more akin to providing lay evidence as to the history of treatment of a patient as a treating practitioner. Such witnesses are not expected to comply with the Expert's Code of Conduct (which will be discussed later in this module) or maintain impartiality to the same degree, because their primary role has been that of a treating practitioner providing for the welfare of the patient.

APPOINTMENT ON BEHALF OF ONE PARTY

When an appointment as an expert witness takes place on behalf of one party the expert witness is engaged as that party's expert and may have a far more consultative process in carrying out that role, subject to compliance with the Expert Witness Code of Conduct. Such an appointment often takes place with a view to obtaining a report that may only be used in Court if it is favourable to the party that has commissioned the report. In some cases the other party may never be aware that the report has been prepared. In other cases the other party may be aware that the report has been prepared but never have access to it because it is considered to be legally privileged. Legal privilege arises in circumstances where a client communicates with a Lawyer for the purpose of obtaining legal advice or when a Lawyer communicates with an expert in preparation of the case and it is agreed that those communications should not be made available to the other party to the dispute.

APPOINTMENT BY AGREEMENT BETWEEN THE PARTIES AS A SINGLE EXPERT

This type of appointment takes place where parties to a dispute agree that there is a need for expert evidence in order to resolve a dispute and in order to either comply with the rules of a particular Court or minimise the costs associated with resolving the dispute may agree to jointly instruct an expert with a view to both parties accepting the opinion of that expert as the prevailing view to be provided to the Court. The fact that parties have agreed to instruct a single expert does not mean that they are prevented from instructing their own expert in accordance with (a) above, in circumstances where they do not accept the view expressed by the single expert in his or her report. In those circumstances the views of the experts may be competing and the Court will have to determine which should be preferred and in some cases an expert on behalf of one party requires the permission of the Court before such a report may be relied upon.

APPOINTMENT BY THE COURT AS A SINGLE EXPERT

The Court, in most cases, has the power to appoint an expert to determine any issue requiring expert opinion, which will assist it in making its determination. The practical operation of such an appointment is similar to that referred to above in (b), except that to introduce a competing opinion may require the leave (permission) of the Court.

In some circumstances where there are experts appointed on behalf of each of the parties the Court may order a meeting of those experts in order to attempt to reconcile their opinions. The Court may also order that the experts prepare a joint report or an agreed statement of facts to assist in the understanding of the issues in dispute where the experts' opinions cannot be reconciled those differing opinions are still able to be maintained, if it is appropriate to do so, after a meeting of the experts has taken place.

EXPERTS CODE OF CONDUCT

Most Common Law jurisdictions (those based on the English legal system) have developed Expert Witness Codes of Conduct which seek to regulate the role of expert witnesses in their disputes. The general elements of Codes of Conduct for expert witnesses are set out below, however, it is important for a copy of the appropriate Code of Conduct to be obtained from the instructing party or parties at the time of appointment.

GENERAL DUTY TO THE COURT

An expert witness has overriding duty to assist the Court impartially on matters relevant to the expert's area of expertise.

An expert witness should state the facts or assumptions upon which his or her opinion is based. He or she should not omit to consider material facts which could detract from his or her concluded opinions.

An expert witness is not an advocate for a particular party. A report by an expert witness must (in the body of the report or an annexure) specify: -

- (a) The person's qualifications as an expert; and
- (b) The facts, matters and assumptions on which the opinions in the report are based; and
- (c) Reasons for each opinion expressed; and
- (d) If applicable that a particular question or issue falls outside of his or her field of expertise; any literature or other materials are utilised in support of the opinions expressed within the report; and



- (e) Any examinations, tests or other investigations on which he or she has relied and identified, and give details of the qualifications of, the person who carried them out. If an expert witness who prepares a report, believes that it may be incomplete or inaccurate without some qualification, than that qualification must be stated in the report.

If an expert witness considers that his or her opinion is not a concluded opinion because of insufficient research or insufficient data or for any other reason, this must be stated when the opinion is expressed.

An expert witness, who after communicating an opinion to the party engaging him or her, changes his or her opinion on a material matter, then the expert must provide the engaging party with a supplementary report, to the effect which must contain such of the information referred to in the above paragraphs as is appropriate. Where an expert witness is appointed by the Court, the proceeding paragraph applies as if the Court were the engaging party. It is most important that expert's evidence is expressed in plain language which is clear, precise, brief, relevant, direct and orderly.

A report should address all of the issues, in so far as the expert is able to do so, which are raised in any letter of instruction and in some cases may be required to annex the letter of instruction to the report.

CHALLENGES FOR EXPERTS

It can often be challenging for an expert witness where he or she is engaged on behalf of one of the parties to a dispute where it may be perceived that there is pressure being brought to bear to provide a report in support of that party's view in the dispute. Experts should bear in mind that it is to that party's advantage to be aware as early as possible if the expert evidence is weak. Such knowledge may assist the party and his or her legal representative in determining whether or not a line of argument or an entire case should be pursued.

It may also be tempting at times for an expert to attempt to express an opinion resolving the entire dispute and not keep his or her opinion confined to the matters about which expert evidence is required. It should be borne in mind that Judges decide cases, not experts.

GIVING EVIDENCE

After providing an expert report the expert will often be required to swear an Affidavit annexing that report. An Affidavit is simply a sworn statement prepared for use in Court and will usually entail the expert confirming that he or she holds the opinions expressed in the report which is annexed to the Affidavit.



Whether or not an expert is required to give oral evidence in Court and be cross-examined is usually not a matter for the party that has engaged them or commissioned the report. That decision is usually reserved for the opposing party who may choose to test or discredit the contents of the report. The other party would usually give notice to the party who commissioned the report that they require the maker of the report to be available for cross-examination. The party who commissioned the report would then contact the expert to make sure that he or she was available to give evidence at the hearing. In some cases this may involve the expert being given a subpoena to attend Court to give evidence. Subpoenae will be discussed in greater detail later in this module. It is often the case that expert opinions are not contested and no oral evidence is required.

In the event that an expert is required for cross-examination it can be helpful to be aware of the following:-

- (a) Lawyers often say there is no property to witnesses. That means either party may speak to any witness about the case and the evidence they propose to give;
- (b) The only time a witness should not discuss the case with either of the parties or their legal representatives is whilst they are under cross-examination (their oral evidence in Court has not concluded);
- (c) Witnesses should listen to the question, answering that question and that question only;
- (d) Yes, no, I do not know and I do not recall are all appropriate answers to be given in cross-examination if given honestly;
- (e) Tell the truth, the whole truth and nothing but the truth;
- (f) Know, before you enter the witness box, whether you would prefer give an oath (on the bible) or an affirmation;
- (g) Do not try and foreshadow what the cross-examiner may be wanting to get at or what the next question may be. Answer each question one at a time, and allow the cross-examiner to move onto the next question;
- (h) You should expect your evidence in cross-examination to be challenged and be prepared to make appropriate concessions, if required;
- (i) Remember that you can never win an argument with a cross-examiner because they control the conversation. Only they can ask questions;

- (j) If there is something in your evidence which is unclear or requires clarification that may be able to be resolved in re-examination where the instructing party's Barrister has the opportunity to make any such clarifications;
- (k) Do not rush and if a question is unclear you may ask for it to be repeated or clarified;
- (l) Look at and answer the person who has asked you the question;
- (m) Be conscious of what your hands are doing and your body language in the witness box;
- (n) You may be permitted to take notes with you into the witness box, you should ask before doing so;
- (o) You should not discuss your evidence with other witnesses as it may tend to blur your independent recollection;
- (p) You should be conscious that many Court microphones are in place for the purpose of tape recording the proceedings. Often they do not amplify sound in the Courtroom so you should speak clearly and at sufficient volume to be heard naturally.

FEES FOR AN EXPERT WITNESS

Fees for expert witnesses are determined by contract between those instructing the expert and the expert. Those terms should be set out clearly at the time of engagement. It is sensible to have a costs agreement setting out such fees and charges signed by those providing instructions. That costs agreement should set out the basis for charges (eg. the hourly rate) and estimated cost for any examination, the preparation for and provision of a report and attending Court if required.

Most solicitors operate trust funds for holding their client's money for expenses associated with carrying out the legal work. It is prudent for experts to confirm with any solicitor or solicitors instructing him or her that the solicitor holds in trust the amount estimated for any work proposed to be carried out or that the solicitor personally undertakes to be responsible for such fees. In some cases solicitors may seek to have work done on a contingency (no win, no pay) or delayed payment basis. This should be ascertained at the time of becoming instructed.

In some cases it may be required that an expert witness disclose to the Court the basis of his or her retainer and the amount of any fees paid or to be paid for the work carried out. This is usually done in cases where it is suggested that there is a financial incentive for the expert to have provided a favourable report on behalf of a party.



In cases where the Court appoints an expert the Court will usually also specify the proportions in which the parties will bear the costs of engaging the expert. The expert should still ensure that the party's legal representatives are in a position to meet payment for the work performed.

In some cases it may be appropriate to ask for payment or part payment up front and in some cases it may be appropriate not to provide the report to the parties until the costs of any examination and report have been paid.

QUESTIONS IN WRITING TO BE ASKED OF AN EXPERT BEFORE GIVING EVIDENCE

In some jurisdictions the Court Rules provide for questions to be submitted to an expert in a written form in order to clarify any fact or opinion expressed in a report. Such questions may put forward additional facts, which that party will seek to prove in the case. Questions which follow will ask if in light of those additional facts the opinions contained within the report will alter. An expert should always seek guidance as to the appropriateness of such a request from the party or parties who commissioned the original report.

RECORDS TO BE RETAINED

It is quite common for a subpoena to be issued by a party who might seek to contest the opinions expressed in an expert report. Such subpoena would routinely request that all documents, notes and recordings from any examination, testing or research and any other material used in the preparation of the report be provided to the Court and made available for the parties to view. Such material should generally be retained in order to verify the information contained within the report.

Under some circumstances where an expert is engaged by one party a report may be provided to that party in draft for their approval prior to its finalisation. It is common practice for that report which has been prepared in draft to be provided on the basis that it gets returned prior to the final report being provided. This is done so that the expert witness can maintain control of that report and is done with a view to the draft being destroyed once the final report is issued. In this way any preliminary views or inaccuracies that may be expressed in a draft may be eliminated from the expert witness' records which may ultimately be subpoenaed.

THE MODE OF GIVING EVIDENCE

It is the matter for discretion of the Court as to how evidence in any particular case should be given. The usual manner in which evidence is given is a first instance by Affidavit and subsequently orally in the witness box. The Court in some circumstances



may be content to receive evidence via telephone or video link. Those options vary from Court to Court and case to case.

SUBPOENAE

What is a subpoena? A subpoena is a form of Court Order that requires a person to produce documents or things to the Court, attend the Court to give evidence or both. A subpoena may be issued to a person or corporate entity to produce documents or things to a Court.

Given the above there are three different kinds of subpoenae: -

- (a) A Subpoena to Produce;
- (b) A Subpoena to Give Evidence; and
- (c) A Subpoena to Produce and Give Evidence.

Subpoenae are issued by the Registrar of a Court at the request of one of the parties to a dispute. The subpoena should clearly state which of the above three types of subpoena it is, bear an original Court seal, indicate precisely what is required to be done to satisfy the subpoena, be provided with conduct money, and bear a statement that indicates that compliance is not required if the subpoena is served upon the subpoenaed party after a given date (eg. compliance with this subpoena is not required if it served after 4.00 p.m. on 30 June...) and if on an individual it is required to be personally served. A company may be served by mail at its registered office or on a director personally. There may be some other variations from jurisdiction to jurisdiction and the Court has power to vary the above as it sees fit. If the Court has ordered a variation to any of the above usual conditions an order setting out that variation will usually be served with the subpoena.

Personal service means that the subpoenaed party has personally been handed or provided with a copy of the subpoena document.

Conduct money is money supplied with the subpoena in order to enable compliance. It is not designed to compensate for the expense of complying but merely to enable compliance (eg. \$30.00 may be provided to enable a person required to produce documents to post the documents or things to the Court. It is not designed to compensate the person for the time taken to retrieve and collate the documents). Expenses associated with the compliance of a subpoena can be claimed by the subpoenaed party by making application to the Court on the return date of the subpoena, being the date the subpoena will be listed before the Court.



The Court has power to extend the time for compliance for a Subpoena to Produce (eg. allow a further period of time to produce the documents or things required by the subpoena), however, such indulgences are often not available in relation to Subpoenae to Give Evidence as the Court date for the hearing will be fixed.

When you are complying with a Subpoena to Produce documents a copy of the subpoena should be attached to the documents to be produced. Those documents can either be originals or in most jurisdictions clear photocopies can be provided, in an envelope addressed to the Registry of the Court. If those documents are to be provided by post they are usually required to be provided two days before the return date of the subpoena (the date the subpoena is before the Court), otherwise the person producing the documents is required to attend on the occasion the subpoena is listed before the Court and personally hand up the documents on that occasion.

The Court has the power to issue a warrant for the arrest of any person not complying with a subpoena and have that person brought before the Court to explain why they have not complied. Failure to comply with a subpoena may also be considered contempt of Court which can involve incarceration. Failure to comply with a subpoena may also lead to an order that the subpoenaed party pay the reasonable legal costs of one or both of the parties to a dispute that had been wasted as a result of the failure to comply with the subpoena.

Documents that have been created for the purpose of obtaining legal advice or evidence in a particular case are generally considered by the Court to be privileged. That means that they are not necessarily required to be disclosed to the other party if they are subpoenaed. It is not for the subpoenaed party to make any determination as to whether or not any such documents are privileged. Where such privilege documents exist the party asserting the privilege will usually be granted first access to inspect the documents that have been produced to the Court and if any claim for privilege in relation to all or part of those documents is asserted the Court can determine that claim and limit the access to the documents produced as it sees fit.