Medical Experts and Evaluations of the Standard of Care in Medical Litigation – Strengths, Weaknesses and Potential Improvements

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Medical experts play a central role in establishing the standard of care in medical litigation and whether the duty of care has been breached. There has long been criticism of them and their performance of this function. They are subject to biases including partisanship and cognitive biases. They may idealise the standard of care or fail to take adequately into account the context in which care was delivered. As a group, they are unrepresentative of the profession in age, gender, location and type of practice. Recent changes to how expert evidence is managed by courts is addressing some of these issues but may have raised other problems. This article discusses the strengths and weaknesses of medical expert evidence, both as delivered traditionally and in the recent innovations of expert conclaves and concurrent evidence, and discusses potential further improvements including increased accountability and refinements to the conclave processes.

Keywords: *medical expert evidence; standard of care; bias; concurrent evidence; conclave*

> To put it bluntly, in many professions service as an expert witness is not generally considered honest work. Experts in other fields see lawyers as unprincipled manipulators of their disciplines, and lawyers and experts alike see expert witnesses – those members of other learned professions who will consort with lawyers – as whores. The best that anyone has to say about this system is that it is not as bad as it seems, and that other methods may be worse.
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> Samuel R. Gross, "Expert Evidence" (1991) 6 *Wisconsin Law Review* 1125.[1]

INTRODUCTION

In medical litigation, medical expert opinion plays a central role in informing triers of fact about matters which would usually be outside the court's experience or expertise. But expert evidence is not without challenges and there has long been criticism of experts as a group and the way they perform their expert evidence function. These criticisms include lack of representativeness and a range of biases – both conscious and unconscious. Recent changes to management of expert evidence by courts, including concurrent evidence and conclaves of experts, aim to address some of these issues but their effectiveness is unclear. This article will explore these issues and potential improvements to expert evidence processes in medical litigation.

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[1] As cited in LB Andrew, "Expert Witness Testimony: The Ethics of Being a Medical Expert Witness" (2006) 24(3) *Emergency Medicine Clinics of North America* 715.

Role and Function of Experts in Medical Litigation

Obligations of an Expert

The obligations of an expert witness have been summarised in *Wood v The Queen*,[2] drawing on the judgment in *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (the Ikarian Reefer)*.[3] They include independence, freedom from bias, assuming the role of educator rather than advocate, setting out the factual bases for opinions (including addressing when facts detract from that opinion) and confining opinions to their area of expertise.

Breach of Duty and Defining the Standard of Care

The standard of care expected of a professional is articulated in the *Wrongs Act 1958* (Vic)[4] and its jurisdictional equivalents. With respect to health practice, it is a re-statement of the so-called *Bolam* test.[5]

The *Wrongs Act 1958* states that:

> 1) A professional is not negligent in providing a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by a significant number of respected practitioners in the field (peer professional opinion) as competent professional practice in the circumstances.
> (2) … (omitted)
> (3) The fact that there are differing peer professional opinions widely accepted in Australia by a significant number of respected practitioners in the field concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.[6]

This wording acknowledges that there may be more than one reasonable standard of care. As there is no "test" for determining an appropriate standard of care, reliance is placed on expert opinion.[7] The wording including "at the time" and "in the circumstances" is important. This wording makes it clear that the contemporaneous standard must be applied and justified. "In the circumstances" makes it explicit that issues such as setting (eg rural/remote), the capabilities of the hospital and the level of training and experience of the clinician(s) should also be considered.[8]

While not specifically stated in the Act, expert witness codes of conduct place an onus on experts to support their opinion with research, clinical guidelines and evidence of acceptance beyond their personal practice environment.

Issues with Medical Expert Evidence

> the effective and fair use of expert evidence is one of the most significant issues which the courts now face.[9]

Expert evidence may be provided as a written report, as oral testimony or both. The vast majority of case involvements for medical experts are as a written report.[10] Very few cases proceed to a hearing.[11]

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[2] *Wood v The Queen* (2002) 84 NSWLR 581; [2012] NSWCCA 21.

[3] *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (the Ikarian Reefer)* [1993] 2 Lloyd's Rep 68.

[4] *Wrongs Act 1958* (Vic) s 59; *Civil Laws (Wrongs) Act 2002* (ACT); *Civil Liability Act 2002* (NSW); *Civil Liability Act 2003* (Qld); *Civil Liability Act 1936* (SA); *Civil Liability Act 2002* (Tas); *Civil Liability Act 2002* (WA).

[5] *Sidaway v Governors of Bethlem Royal Hospital* [1985] 1 AC 871.

[6] *Wrongs Act 1958* (Vic) s 59.

[7] RH Aicher, "What Standard of Care?" (2016) 36(3) *Aesthetic Surgery Journal* 376.

[8] Andrew, n 1.

[9] P McClellan, "The New Rules" (Paper presented at the Expert Witness Institute of Australia and The University of Sydney Faculty of Law Conference, Sydney, 16 April 2007).

[10] G Grant and D Studdert, "The Injury Brokers: An Empirical Profile of Medical Expert Witnesses in Personal Injury Litigation" (2013) 36 *Melbourne University Law Review* 831.

[11] Australian Institute of Health and Welfare, *Australia's Medical Indemnity Claims 2012–13*, Table of Contents <https://www.aihw.gov.au/reports/hospitals/medical-indemnity-claims-2012-13/>.

The main strength of expert evidence is that it provides information and analysis to decision-makers in areas where they could not reasonably be expected to be expert. Countering that benefit, a number of weaknesses of expert evidence have been identified. Some apply to all expert evidence, while others are particular to oral evidence.

Issues with the Pool of Medical Experts

The number of clinicians engaging in expert evidence work in Australia is relatively small.[12] This is especially the case in specialist fields where there are low practitioner numbers, the area of practice is undergoing rapid change or the opportunity cost for being absent from clinical practice is high, such as surgical and procedural specialties.[13]

Relatively little is known about the characteristics of clinicians who make up the medical expert witness pool in Australia. A recent study of experts providing evidence in transport accident compensation cases found a high concentration of expert witness activity within a small group of clinicians.[14] The defined "frequent experts" were overwhelmingly male (>90%) with an average age of 61 years. This is very different from the make-up of the medical workforce. Most "frequent experts" were engaged more often for either defence or plaintiff, with almost half exclusively acting for one side.[15] This suggests that the pool of medical experts may be unrepresentative of the profession more broadly.[16] Although not yet investigated, it is also possible that it is also unrepresentative with respect to location of practice, academic centre versus non-academic and rural/regional versus metropolitan.

One of the underlying reasons for the small pool of medical experts is reluctance of suitably qualified experts to participate in what they see as a system focused on winning rather than finding the truth and where they believe that their evidence will be distorted by the adversarial system.[17] There is also a reluctance of peers to find fault with one another.[18]

Issues with Individual Medical Experts

Lack of Specific Training with Respect to Law and Expert Evidence

The role of a medical expert in litigation is a distinct skill and, it can be argued, requires specific training. This would ensure experts were aware of their responsibilities and legal processes, including the burden of proof and how the reasonable standard of care should be assessed.[19] In medical negligence cases, the burden of proof is on the balance of probabilities, quite different from the higher standards usually applied to medical decision-making. Similarly, the standard of care is assessed against care that would be regarded as competent or reasonable care rather than ideal care.[20]

For Australian medical experts, there is no evidence about what, if any, training for the role they have undertaken. What limited data there are suggests that medico-legal training (including training regarding expert evidence) is very uncommon in specialist training programs.[21] While university, private provider

[12] Grant and Studdert, n 10; Avant Mutual, *Credible Medical Expert Witnesses: The Role, Knowledge and Legal Obligations* <https://www.avant.org.au/news/credible-medical-expert-witnesses/>.

[13] Grant and Studdert, n 10, 834.

[14] Grant and Studdert, n 10, 835.

[15] Grant and Studdert, n 10, 856.

[16] Grant and Studdert, n 10, 865.

[17] Justice P McClellan, "Contemporary Challenges for the Justice System – Expert Evidence" (Speech delivered at Australian Lawyers' Alliance Medical Law Conference, Sydney, 20 July 2007).

[18] DE Bernstein, "Improving the Qualifications of Experts in Medical Malpractice Cases" (2002) 1 *Law, Probability and Risk* 9; Andrew, n 1.

[19] P Caldwell, "Courting the Expert: A Clash of Culture?" (2005) 129(6) *British Journal of Haematology* 730.

[20] Andrew, n 1.

[21] N Cunningham and T Weiland, "Current Level of Training, Experience and Perceptions of Emergency Physicians as Expert Witnesses: A Pilot Study" (2009) 21 *Emergency Medicine Australasia* 497.

and the Australasian College of Legal Medicine courses are available, there are no data on what proportion of medical expert witnesses have undertaken any of these courses.

Quality of Opinion

It is widely agreed that experts should apply the same intellectual rigour to their opinions as they would in their clinical practice.[22] Unfortunately that is not always the case.

(a) Reliability

Expert evidence can be unreliable. There is no guarantee of the quality of either an expert's knowledge or their opinions.[23] Whether intentionally or otherwise, some expert evidence may be misleading.[24] Witnesses may provide an opinion outside their scope of expertise.[25] They may put forward opinions that are not based on the facts available to them.[26] They may misuse or misrepresent research or clinical guidelines, for example by being selective in those they choose to refer to, or they may misuse or misapply statistical tests.[27] Experts can also stray into developing hypotheses and inferences which can confuse the issues and detract from accurate fact finding.[28]

Experts also have a tendency to idealise the reasonable standard of care. Their evaluation may reflect what experts *think* is done rather than what most physicians actually do.[29] Alternatively they may judge the standard against care that is possible in a tertiary, academic centre rather than the actual practice setting in question. Lack of personal experience in non-academic or rural settings may exacerbate this bias. Lack of clinical currency of practice further reduces the reliability of clinician expert evidence.

(b) Cognitive Bias

In clinical practice, decisions are made in situations of uncertainty. It is therefore unreasonable to judge the quality of those decisions based on patient outcome. However, it is well recognised that cognitive bias can influence evaluation of error and standard of care.[30] Hindsight bias refers to the tendency of those with knowledge of the outcome to exaggerate the extent to which they would have predicted the events beforehand. Outcome bias refers to the influence of knowledge of the eventual outcome on retrospective evaluations of clinical care. Both can influence an expert to be over-critical of care provided.

(c) Failure to Expose Legitimate Variation in Practice

Parties choose the experts they engage. This tends towards experts most favourable to a party's case rather than the most expert opinions and favours extreme views and a lack of exploration of legitimate middle ground.[31] Clinical decisions in medicine are made balancing potential risks and benefits and

[22] DS Caudill, " 'Dirty' Experts: Ethical Challenges Concerning, and a Comparative Perspective on, the Use of Consulting Experts" (2018) 8 *St. Mary's Journal on Legal Malpractice & Ethics* 338.

[23] J Gans and A Palmer, *Uniform Evidence* (OUP, 2nd ed, 2014) Ch 7.

[24] Gans and Palmer, n 23.

[25] For example, *Squier v General Medical Council* [2016] EWHC 2739; *Morocz v Marshman* [2015] NSWSC 149.

[26] For example, *Squier v General Medical Council* [2016] EWHC 2739; *Meadow v General Medical Council* [2006] EWCA Civ 1390.

[27] For example, *Squier v General Medical Council* [2016] EWHC 2739; *Meadow v General Medical Council* [2006] EWCA Civ 1390.

[28] TF Bathurst, "Three Contemporary Issues in Civil Litigation: Discovery, Expert Evidence and Alternative Dispute Resolution" (2016) 5 JCivLP 168.

[29] Andrew, n 1.

[30] B Fischoff, "Hindsight Not Equal to Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty" (2003) 12 *Quality and Safety in Health Care* 304; NV Dawson et al, "Hindsight Bias: An Impediment to Accurate Probability Estimation in Clinicopathologic Conferences" (1988) 8 *Medical Decision Making* 259; A Annunziata, "Retrospective Bias in Expert Evidence: Effects on Patient and Doctor Safety" (2009) 21 *Emergency Medicine Australasia* 80; TB Hugh and GD Tracy, "Hindsight Bias in Medicolegal Expert Reports" (2002) 176 *Medical Journal of Australia* 277.

[31] T Kearney, "The Unresolved Problem of Expert Evidence" (2018) 92 ALJ 127; Australia and Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (2000).

are often based on incomplete information. This can result in there being several reasonable courses of action at any decision point.

There have been several studies of closed malpractice claims that have explored agreement between experts about the standard of care. These have shown only moderate agreement and that agreement is at its lowest in cases that are less clear cut.[32] Bias has been found to be highest where the quality of care is near the acceptable standard.[33]

(d) Partiality

There is a widely held view, and some evidence, that expert opinions may be biased in favour of the party who engages them.[34] Partisanship can be deliberate or unconscious.[35]

Judges in the United States report that in their view experts could not be relied upon to be impartial. Sixty-three percent thought that expert witnesses were noticeably biased in favour of the party paying them and 57% thought of experts as "hired guns".[36] In a similar study of Australian judges, 85% reported that they had encountered partisanship in expert witnesses. Most considered partisanship to be a significant problem for the quality of fact-finding. About a quarter reported that they encountered bias or partisanship "often".[37] As further evidence of partisanship, judges reported that they perceived that the same doctors "always" turn up on the same side.[38]

Regarding the experts' perspective, a survey has reported that 79% agreed that lawyers manipulate their experts to weaken unfavourable testimony and strengthen favourable testimony.[39] In the traditional sequential delivery of oral evidence, this is hard for an expert to counter.

Rarely, at the extreme, partiality can result in inappropriate behaviour on the part of experts in their relationship with instructing lawyers. An example is to change their report on the instruction of counsel without confirming for themselves that the contentions of the lawyer are supported by facts.[40]

(e) Distortion Imposed by the Adversarial System

Under the adversarial system, especially with sequential oral evidence, evidence is selective. It is chosen because it will help one party or the other to "win", rather than help the court to correctly find the facts.[41] This was recognised by the Australian Law Reform Commission which commented that questioning by lawyers may lead to the presentation of an inaccurate picture which may mislead the court and frustrate experts.[42]

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[32] Cited by C Robertson and A Kesselheim, *Blinding as a Solution to Bias: Strengthening Biomedical Science, Forensic Science, and Law* (Academic Press, 2016) 188.

[33] M Gupta, DL Schriger and JA Tabas, "The Presence of Outcome Bias in Emergency Physician Retrospective Judgments of the Quality of Care" (2011) 57 *Annals of Emergency Medicine* 323.

[34] Access to Justice, Interim report to the Lord Chancellor on the Civil Justice System in England and Wales, Lord Woolf, June 1995; A Champagne et al, "Are Court-Appointed Experts the Solution to the Problems of Expert Testimony?" 84 *Judicature* 7; Victorian Law Reform Commission, *Civil Justice Review*, Report (2008) Ch 7: Changing the Role of Experts, 484.

[35] Victorian Law Reform Commission, n 34.

[36] Caudill, n 22; Access to Justice, n 34.

[37] IR Freckelton, H Selby and P Reddy, *Australian Judicial Perspectives on Expert Evidence: An Empirical Study* (Australian Institute of Judicial Administration Inc, 1999).

[38] G Downes, "Expert Evidence: The Value of Single or Court-Appointed Experts" (Paper presented at Australian Institute of Judicial Administration Expert Evidence Seminar, Melbourne, 11 November 2005).

[39] Caudill, n 22.

[40] *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 222 FCR 465; [2005] FCA 1242 as reported by Kearney, n 31.

[41] HD Sperling, "Expert Evidence: The Problem of Bias and Other Things" (2000) 4 *The Judicial Review* 429.

[42] Australia and Law Reform Commission, n 31.

In oral evidence, experts are expected to be clear-cut in their opinions, favouring polarisation of views.[43] However, clinical practice is not an exact science. Circumstances, context and gaps in knowledge are important qualifiers that can be hidden by the processes of adducing evidence.[44]

(f) Commercial Distortion

> He who pays the piper calls the tune – Proverb, anonymous

Some expert witnesses derive a significant proportion of their income from expert opinion work. This exerts influence to please the client in order to attract more work.[45] The recent advent in some jurisdictions of the practice of paying expert opinion fees contingent on the outcome of the litigation raises further doubts about expert independence and bias.[46] Some jurisdictions require disclosure of contingency arrangements to the court. Many codes of ethics specifically preclude provision of opinions on a contingency basis.[47]

Issues with Judicial Evaluation of Expert Evidence

Traditional Sequential Oral Evidence

Oral evidence in medical litigation has traditionally been given sequentially. Lawyers decide the order of witnesses and lead the evidence. This allows them to emphasise what they choose. Medical experts giving evidence about the same issue may be separated by days, making comparison between opinions difficult.

Weight Attributed to Expert Evidence

It has been suggested that triers of fact may be less critical of expert evidence than they are of other evidence.[48] Expert evidence has also been described as "evidence cloaked under the mystique of science".[49]

In *Hannes v Director of Public Prosecution (Cth) (No 2)*,[50] the New South Wales Court of Appeal highlighted the danger that the tribunal of fact may abdicate its role in favour of expert evidence:

> [T]here is a potentially more serious risk that the exercise required of the Court or jury will be subverted through adoption of a shortcut, by acceptance of the opinion of another, without evaluation of the steps by which that opinion was reached.[51]

There can also be the unjustified assumption that whenever experts disagree, one of them must be wrong. In fact, good experts often disagree, at least on some questions at issue.[52]

Recent Advances in Expert Evidence

Recently, there have been a number of innovations in how expert evidence is managed. They emphasise the responsibilities of experts, attempt to increase reliability and reduce partiality of opinions and promote pre-trial resolution and contain costs.

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[43] Victorian Law Reform Commission, n 34.

[44] Caudill, n 22.

[45] Sperling, n 41; Kearney, n 31.

[46] B Madden, J McIlwraith and B Madden, *Australian Medical Liability* (LexisNexis, 3rd ed, 2017).

[47] For example, American College of Emergency Physicians, *Expert Witness Guidelines for the Specialty of Emergency Medicine* (2015) <https://www.acep.org/patient-care/policy-statements/expert-witness-guidelines-for-the-specialty-of-emergency-medicine/>.

[48] Gans and Palmer, n 23; see comment in *R v Mohan* [1994] 2 SCR 9, 21.

[49] *R v Bland* [1987] 2 SCR 398, 434 (La Forest J).

[50] *Hannes v Director of Public Prosecution (Cth) (No 2)* (2006) 205 FLR 217; [2006] NSWCCA 373.

[51] *Hannes v Director of Public Prosecution (Cth) (No 2)* (2006) 205 FLR 217, [290]; [2006] NSWCCA 373.

[52] Caudill, n 22.

Expert Witness Codes of Conduct and Procedural Rules

The development of codes of conduct for expert witnesses and related procedural rules has been a relatively recent development in Australia. Their objectives are to inform experts of their responsibilities and, potentially, to increase accountability by facilitating action against experts for breaches of the code.

Each State and Territory has separate expert witness codes of conduct.[53] These are based on the principles described in *the National Justice Compania Naviera SA v Prudential Assurance Co Ltd (the Ikarian Reefer)*[54] that were endorsed on appeal of that case[55] and later judgments.

While slightly different in wording, their principles are the same – that:

- an expert has an overriding duty to assist the court on matters relevant to their area of expertise;
- an expert is not an advocate for a party;
- an expert's paramount duty is to the court and not the retaining party;
- the facts and assumptions relied upon for the opinion must be clearly stated;
- the reasons for opinions must be clearly explained;
- the expert should identify when a question falls outside their area of expertise; and
- the expert has declared that they have made all inquiries that they believe are relevant.

Most codes also require experts to comply with a court's direction to confer (eg in a conclave) and to produce a joint report. They do not however set direction regarding the format or layout of reports, a requirement for the use of accessible (non-jargon) language or a requirement for opinions to be backed by published evidence or guidelines, if available.

There are no specific consequences of breaching the codes of conduct, however there are potential sanctions if experts breach their duty to the court.[56]

Conclaves of Experts and Concurrent Evidence

> The open-ended nature of scientific investigation does not mean that there is no desire … to reach closure on important questions. … closure ideally is achieved through a process of consensus building based on its merits.[57]

In Australia, medical litigation has traditionally been adversarial rather than interrogatory. This is time-consuming and can make it hard to compare the logic of varying opinions. It leaves selection of questions and exposition of evidence to lawyers.[58] The relevant issues can become submerged in unnecessary detail.[59] Experts can feel that they are constrained by the process, that their evidence is misconstrued and that their knowledge and skill is not adequately respected.[60] The result is that information important to understanding key issues may be lost. Experts have complained that this process is more about winning the argument than seeking the truth and confines them to answering only "the questions asked, depriving them of the opportunity to accurately inform the Court".[61]

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[53] For example, *Supreme Court (Chapter 1 Expert Witness Code Amendment) Rules 2016* (SR No 52 of 2016-Reg 6 Form 44A Substituted; *Uniform Civil Procedure Rules 2005* (NSW) Sch 7; *Uniform Evidence Act 2011* (NT) O 44 Expert Evidence; *Uniform Civil Procedure Rules 1999* (Qld) Ch 11 Pt 5 Div 2 rr 423–429S; *Supreme Court Civil Rules 2006* (SA) rr 160,161; *Supreme Court Rules 2000* (Tas) Pt 19 Div 5 Expert Opinion Evidence rr 514–517; *Rules of the Supreme Court 1971* (WA) O 36A Expert Evidence rr 1–9.

[54] *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (the Ikarian Reefer)* [1993] 2 Lloyd's Rep 68.

[55] *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (the Ikarian Reefer)* (1995) 1 Lloyd's Rep 455.

[56] Victorian Law Reform Commission, n 34.

[57] As quoted by Caudill, n 22.

[58] G Edmonds, "Merton and the Hot Hub: Scientific Conventions and Expert Evidence in Australian Civil Procedure" (2009) 72 *Law and Contemporary Problems* 159.

[59] Edmonds, n 58.

[60] Justice Rares, "Using the 'Hot Tub' – How Concurrent Expert Evidence Aids Understanding Issues" (Presentation, 12 October 2013) <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-rares/rares-j-20131012>.

[61] McClellan, n 17.

In recent years most jurisdictions have introduced methods for managing expert evidence that promote a more interrogatory/collaborative approach. These processes are referred to as conclaves of experts and concurrent evidence. Their aim is to improve the quality and usefulness of expert evidence as well as to increase efficiency.[62] There is significant jurisdictional variation in how often these methods are used in medical litigation as well as significant judicial flexibility about whether they are used.

The potential benefits of concurrent evidence can be summarised as achieving better evidence and case outcomes by respecting experts' professionalism and independence, promoting discussion between experts to refine opinions and focusing on areas of real difference of opinion.[63]

Conclaves of Experts

Expert conclaves are pre-trial conferences attended by the experts, usually without the parties or their lawyers present. The experts discuss specified issues (usually posed as a list of questions agreed by the parties and the court) and attempt to reach agreement on some or all of the issues.[64] The experts provide a joint report to the court setting out matters on which they agree and matters on which they do not, along with reasons for disagreement. The process aims for experts to be "free to discuss matters, change or modify their views and articulate their views to colleagues without any fear of that process being used in evidence to form the basis of a challenge to their final position".[65] The meeting content is confidential.

Among the advantages of a conclave are that it may improve judicial understanding of the issues, clarify the specific issues in dispute, reduce expert bias and partisanship, reduce costs and promote alternative dispute resolution.[66] The interrogatory and collaborative nature of the process promotes exploration of reasons for differing opinions. It is hard for an expert to defend unsubstantiated opinions. As they are in discussion with peers, they cannot hide behind complex language, technical details and obfuscation.[67]

There are however potential problems with the conclave process. Some experts may dominate the interaction, overshadowing opposing views.[68] Differences in personality and preferred conflict resolution strategies may exacerbate this. Experts may fail to engage appropriately in the process or demonstrate no interest in working towards agreement.[69] This may be for reasons of partisanship. The conclave process may also mask a lack of expertise of an expert, as their expertise may not be formally tested unless they give oral evidence.[70]

While the aim of conclaves is to identify areas of agreement and disagreement, the process may in fact favour reaching consensus. Agreement and consensus are not the same. Consensus implies negotiation and potential acceptance of a position that is not exactly one's opinion. If a conclave works towards consensus rather than accurately reflecting agreement and disagreement, there is the risk that key information relevant to decision-making will be lost or inaccurate.

Another criticism of conclaves is that they may lack transparency unless sufficient reasons are given for its conclusions – in particular for change of opinion and disagreement.[71] Currently there is no requirement

[62] G Edmond, A Plenderleigh-Ferguson and T Ward, "Assessing Concurrent Evidence" (2018) 37 *Civil Justice Quarterly* 344.

[63] M Rackemann DCJ, "The Evolving Role of the Expert" (Panel discussion at National Business Valuation and Forensic Accounting Conference 2012, Melbourne, 26 October 2012) <https://archive.sclqld.org.au/judgepub/2012/rackemann261012.pdf>.

[64] Bathurst, n 28; B Madden and T Cockburn, "Ethics and Law: Conclaves and Concurrent Expert Evidence: A Positive Development in Australian Legal Practice" (2016) 204 *Medical Journal of Australia* 82.

[65] Garling J, *Concurrent Evidence: Perspective of an Australian Judge* (University of Oxford Faculty of Law, Procedural Justice Discussion Group, Evidence Discussion Group, 16 October 2013).

[66] Bathurst, n 28; *Matthews v SPI Electricity Pty Ltd (No 4)* [2011] VSC 613, 15 (Forest J).

[67] MC Livesey, "The Effectiveness of Expert Evidence" (Paper presented at the Australian Bar Association Conference 2017, Adelaide, 6 July 2017).

[68] Madden, McIlwraith and Madden, n 46; Bathurst, n 28; Madden and Cockburn, n 64.

[69] A Ross, "Murky Waters: An Expert's Perspective on the Effectiveness of Expert Conclaves and Hot Tubs" (2013) 119 *Precedent* 30.

[70] KA Martire and G Edmond, "Rethinking Expert Opinion Evidence" (2017) 40 *Melbourne University Law Review* 967.

[71] Madden, McIlwraith and Madden, n 46.

to provide reasons for a change of opinion on a key issue. This may be highly relevant to deciding the matter. It may also be important for lawyers in deciding the direction of their case.

While court processes usually allow for appointment of independent facilitator and "scribe", these are rarely used. Usually members of the conclave are appointed/elected to the roles of chairperson and recorder/scribe. A chairperson controls the dynamic of the meeting and has particular influence on the discussions and, potentially, the conclusions. Similarly, being scribe is at odds with full participation in the discussions. Driven by a subjective interpretation of discussions, the scribe can also introduce bias into the joint report. Because experts when talking together often use jargon, having a participant-scribe can encourage the use of jargon in the joint report which may limit its utility.

It is been suggested that the cost reduction argument for conclaves is weak because unless a conclave is well managed, it may be very lengthy (and therefore expensive) and/or not result in a narrowing of issues or saving of court time.[72]

An untested potential risk of expert conclaves is that the process may leave participants open to suit for negligence if during the process they change their opinion. Mills describes a scenario in which an expert has produced a report for a plaintiff that disagrees with an opposing expert's report. A conclave is held during which the plaintiff's expert changes their opinion (reflected in the joint report). The changed opinion is less supportive of the plaintiff's case. Based on the joint report, the plaintiff settles for less than they had initially expected. As there had not been a judicial determination of the case, it is possible (based on the decision in *Attwells v Jackson Lalic Lawyers Pty Ltd*[73]) that the expert could be sued for negligence. The plaintiff might claim that the expert was negligent in not maintaining their opinion in the joint report thus breaching their duty of care.[74] This eventuality cannot have been foreseen by the expert.

In summary, conclaves of experts address several of the issues with medical expert evidence identified previously – quality and reliability of an opinion, cognitive bias, failure to explore legitimate variation in practice, partiality, distortion by the adversarial system and judicial evaluation of expert evidence. They are however open to dominance and deference issues on the part of participants, which could be addressed by the use of facilitators.

Concurrent Evidence

Concurrent evidence is the hearing of oral evidence from a number of experts at the same time. It is considerably more inquisitorial than sequential oral evidence.[75] In some ways it mirrors the discussion and analysis that would take place between clinicians when making treatment decisions in practice – such as in case conferences.[76]

The legislative basis for concurrent evidence is set out in the States' various Civil Procedures Acts (or equivalents).[77] The judge leads a directed discussion focusing on matters in contention. Experts explain their opinion on a particular question. They are also usually encouraged to ask and answer questions of each other. Counsel may also ask questions to ensure opinions are adequately explained and tested.[78]

Concurrent evidence has a number of strengths compared to the traditional sequential adducing of evidence. The evidence on one issue is given at the same time. Judges do not have to rely on lawyers to ask the most relevant questions.[79] Experts tend to act in a more collegial manner because they are present

[72] Ross, n 69.

[73] *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1; [2016] HCA 16.

[74] CD Mills, "Protecting the Continued Development of Collaborative Expert Witness Evidence in Australia: Surely We Should?" (2019) 26 JLM 621.

[75] Edmond, Plenderleigh-Ferguson and Ward, n 62.

[76] P McClellan, "Two Contemporary Challenges: The Role of Deterrence in Sentencing and the Effective Use of Experts" (Paper presented at the Association of Australian Magistrates Annual Conference, Sydney, 7 June 2008).

[77] For example, *Civil Procedure Act 2010* (Vic).

[78] McClellan, n 76.

[79] Livesey, n 67.

together. It is more difficult to be partisan.[80] Areas of disagreement can be more deeply explored as cross-examination takes place with all experts present so that they can immediately be asked to comment on the answers of others.[81] There is less opportunity for misunderstanding of evidence.[82] There is also a theoretical advantage of a reduction in hearing time and cost.[83]

In a study of the use of concurrent evidence in the Administrative Appeals Tribunal, 69% of judges who had used it were very satisfied with it. Most judges (92%) reported that concurrent evidence made it easier for them to compare the evidence of each expert and that it enhanced the decision-making process. Eighty percent stated that concurrent evidence improved the objectivity of the expert's evidence and 73% believed that it improved the quality of the expert's evidence.[84] Similar views were expressed in a study of United Kingdom judges' experience of concurrent evidence.[85] Anecdotal evidence is that experts and professional associations support concurrent evidence.'[86]

That said, the success of concurrent evidence rests in part upon the interaction of the experts.[87] As with conclaves, there is the risk that one expert may defer to another, especially if there is a perceived seniority or eminence gap.[88] Some experts may dominate the process, swamping other opinions.[89] At the extreme, concurrent evidence can deteriorate into an argument between experts.[90]

Another potential criticism of concurrent evidence is that the manner of a participant – confidence, debating skills and the appearance of being conciliatory and open-minded – might unduly influence the court.[91] That said, the same argument could apply to traditional sequential evidence. It has also been suggested that experts may simplify their analysis to enhance comprehension by lawyers and judges and to meet time constraints.[92] This could lead to the nuances of complex evidence being lost.

Concurrent evidence processes may also involve more judicial preparation time, especially if questioning is judge-led.[93] There is also the possibility that there may not be sufficient opportunity to test expert's opinions, if opportunity for questioning by counsel is limited.[94] This poses a challenge to procedural fairness. Importantly, there is as yet no evidence that concurrent evidence improves decision-making when the judge is a non-expert and the expert witnesses disagree.[95]

In summary, concurrent evidence addresses several of the weaknesses of expert evidence including cognitive bias, exploration of legitimate variation in practice, partiality and distortion by the adversarial system. It should also improve the overall quality of information received by the court and assist judicial evaluation of the expert evidence as a whole. It does however require additional judicial preparation

[80] Mills, n 74.

[81] Downes, n 38.

[82] Livesey, n 67.

[83] Mills, n 74; Livesey, n 67.

[84] Administrative Appeals Tribunal, *The Concurrent Evidence Study* <https://www.aat.gov.au/about-the-aat/engagement/speeches-and-papers/the-honourable-justice-garry-downes-am-former-pre/concurrent-expert-evidence-in-the-administrative-a>.

[85] Civil Justice Council, *Concurrent Expert Evidence and "Hot-Tubbing" in English Litigation Since the Jackson Reforms: A Legal and Empirical Study* (2016).

[86] McClellan, n 76.

[87] Civil Justice Council, n 85.

[88] Civil Justice Council, n 85.

[89] Madden, McIlwraith and Madden, n 46.

[90] McClellan, n 76.

[91] As reported by Edmond, Plenderleigh-Ferguson and Ward, n 62; Civil Justice Council, n 85.

[92] Madden, McIlwraith and Madden, n 46.

[93] Civil Justice Council, n 85.

[94] Civil Justice Council, n 85.

[95] Edmond, Plenderleigh-Ferguson and Ward, n 62.

time and skills on the part of the judge to manage the personalities and behaviours of the experts so as to ensure all opinions are appropriately explored and that information is not oversimplified.

Single Joint Experts and Court-appointed Experts

In some jurisdictions, courts may require parties to appoint a joint expert. While this is an attempt to overcome the perceived bias of experts engaged separately by parties and reduce costs, it too has challenges. In particular, it runs the risk that the range of genuinely held opinions is not heard and that that the court places undue reliance on the opinion of the expert.[96] Some judges argue that the logic for a single expert is flawed because it implies that in areas of specialist knowledge there is only one right answer.[97] In the field of medicine this is rarely the case.[98]

An alternative approach is for the court to be able to appoint a court-appointed expert in addition to parties being able to call a limited number of experts. This allows a range of views to be aired and provide an additional independent view focused on matters identified as important by the court distinct from the parties.

There is diversity of opinion about the use of single experts. Judges overwhelmingly report that they are helpful to the quality of fact-finding and minimise bias.[99] Lawyers on the other hand report that court-appointed experts are of lower quality.[100] They also express concerns about losing control of their case.[101] Experts report that acting as a court-appointed expert affords greater professional independence and greater access to relevant information.[102] They also report more willingness to participate in legal processes.[103]

A less obvious risk is that appointment of single experts may actually increase costs, as parties may engage "shadow" experts to assist understanding of the joint expert's opinion and/or plan cross-examination.[104]

Potential Improvements to Medical Expert Evidence

As discussed above, the introduction of codes of conduct and concurrent evidence processes have addressed a number of the weaknesses with medical expert evidence. Gaps however remain which the suggested improvements below might address.

Increased Accountability

Changes to Expert Immunity

There are calls for expert witnesses to be more accountable for their conduct. In Australia, expert witnesses are immune from suit for defamation and negligence in relation to court work, even if their opinion is dishonest or malicious.[105] Similar immunity is held by lawyers. This immunity is based on public policy considerations to avoid challenges to the finality of decisions and to promote the provision of full and frank expert evidence.[106] In the United Kingdom, expert witness immunity has been narrowed, albeit

[96] Sperling, n 41; Caudill, n 22.

[97] Downes, n 38.

[98] Robertson and Kesselheim, n 32.

[99] Sperling, n 41; Champagne et al, n 34.

[100] Champagne et al, n 34.

[101] Champagne et al, n 34.

[102] Champagne et al, n 34.

[103] Champagne et al, n 34.

[104] Champagne et al, n 34; Sperling, n 41.

[105] T Cockburn and B Madden, "Expert Witness Immunity in Australia after Attwells v Jackson Lalic Lawyers: A Smaller and Less Predictable Shield?" (2017) 24 JLM 628.

[106] B McSherry, "Professional Disciplinary Proceedings against Expert Medical Witnesses" (2007) 14 JLM 306.

only in very specific circumstances.[107] For example, in *Jones v Kaney*[108] the United Kingdom Supreme Court allowed an action against a clinical psychologist related to her participation in the production of a joint report. Her clinical assessments were not at issue; it was the conduct of her responsibilities as an expert witness. She failed to engage properly in the conferral and joint report process (including failing to read the opposing expert's report). She also failed to ensure that the joint report accurately reflected her opinion. This significantly impacted on the outcome for the plaintiff. Implications for Australian law are unclear.[109] That said, it is not unreasonable for courts to decline immunity when experts act unethically or fail to exercise due care and skill. This would be consistent with s 5B of the *Civil Liability Act 2002*.[110]

A recent High Court of Australia decision has narrowed immunity for lawyers, specifically related to situations where negligent advice leads to the settlement of a case.[111] It determined that "immunity would only be afforded where evidence leads to a judicial determination and does not apply to cases which settle".[112] This narrowing of immunity could be extended to medical expert evidence, especially when an expert changes their opinion in a conclave which results in a settlement.[113] This has yet to be tested.

Disciplinary Action by the Regulator

Regulation of health practitioners is the responsibility of the Australian Health Practitioner Regulation Agency (AHPRA). It seems logical that it would be within AHPRA's powers to consider cases where it is alleged that medical experts have acted misleadingly or without due care and skill.

However, doubt has been expressed about whether AHPRA can take action against clinicians providing expert evidence. Recently there were a number of complaints against a psychiatrist giving expert evidence in family court matters. Apparently, the NSW Health Complaints Commission (a co-regulatory body with AHPRA in New South Wales) has informed the complainants that it cannot take action because expert evidence constitutes advice to a court and does not fall within the definition of providing a health service[114] – a requirement for action under *Health Practitioner Regulation National Law Act 2009* (Qld) (the National Law, and its jurisdictional equivalents).[115]

This is in contrast to pre-National Law decisions that, while upholding immunity from suit, have found that "witness immunity affords no protection to experts for regulatory liability in respect of their discharge of forensic roles".[116] It is also in contrast to the United Kingdom where there is not immunity from disciplinary proceedings for expert witnesses.[117]

Accountability could be significantly improved by amending the definition of provision of a health service under the National Law[118] to specifically include provision of advice to courts about health care–related matters within that definition. This would allow AHPRA to receive, investigate and act on complaints regarding medical expert evidence.

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[107] *Jones v Kaney* [2011] 2 AC 398; [2011] UKSC 13; *Meadow v General Medical Council* [2006] EWCA Civ 1390.

[108] *Jones v Kaney* [2011] 2 AC 398; [2011] UKSC 13.

[109] As reported by IR Freckelton, "Expert Evidence Accountability: New Developments and Challenges" (2011) 19 JLM 209.

[110] For example, *Civil Liability Act 2002* (WA).

[111] *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1; [2016] HCA 16.

[112] Cockburn and Madden, n 99.

[113] Mills, n 74.

[114] J Robertson, E Clark and H Davoren, *Unaccountable* <https://www.abc.net.au/news/2019-06-14/family-court-report-writer-takes-mum-to-wine-bar/11171556>.

[115] *Health Practitioner Regulation National Law Act 2009* (Qld).

[116] Freckelton, n 109; *James v Medical Board (SA)* (2006) 95 SASR 445; [2006] SASC 267; *James v Keogh* (2008) 101 SASR 42; [2008] SASC 156.

[117] *Meadow v General Medical Council* [2006] EWCA Civ 1390, [113].

[118] *Health Practitioner Regulation National Law Act 2009* (Qld).

Expansion of Profession Imposed Codes of Conduct

The Australian Medical Association (AMA) is a representative body for doctors, but only a small proportion of doctors are members. In its "Code of Ethics", it sets out the responsibility of doctors with respect to medicolegal matters, including expert evidence.[119] The AMA has also published a document entitled "Ethical Guidelines for Doctors Acting as Medical Witnesses".[120] This document goes into considerable detail about matters including the role of a medical expert, the requirement for independence, preparation of reports, relationships with lawyers, attendance at court or conclaves and fees. The code and guidelines are not enforceable, as the AMA has no power to take action against doctors who breach them.

Some specialist Colleges also have ethical guidelines for medical experts.[121] Breaches may be open to investigation and sanction by the College's Standards and Complaints Committees.[122] The sanctions that can be applied by a College are unclear. Potentially, they could include removal from a register of experts, reprimand or a recommendation for further training. It is unlikely that membership of the College could be suspended or terminated.

Overseas professional groups have gone further. Some have a process by which applicants to be listed on their expert registers must provide a declaration that they will abide by profession-specific expert witness guidelines.[123] Some are instituting peer review processes and disciplinary action for false or misleading expert evidence.[124]

Expansion of discipline/College-specific ethical guidelines (including those applicable to expert evidence) coupled with sanctions for breaches of those standards could improve accountability of medical experts.

Expansion of the Expert Pool

Available data suggest that the current pool of medical experts is unrepresentative. This provides a strong argument for a larger, more diverse, more representative pool of medical experts with a focus on gender balance, appropriateness to the clinical setting of interest and clinical currency of practice. This would promote access to a diversity of experience and opinions. The counter-argument is that a more experienced but smaller pool of expert witnesses may facilitate access to expert opinions and provide stability and predictability to the system.[125] It could also be hard to attract clinicians to expert opinion work as the income derived from it may not compare with clinical activities, particularly for procedural specialists or surgeons.[126] Additionally, having an expanded pool of experts does not mean that the expanded pool would be used. Lawyers choose their experts. The conclave and concurrent evidence processes may encourage them to select experts based on their known opinion and likely performance in a conclave or concurrent evidence session rather than their expertise. Overall, the benefits of expanding the pool outweigh the counterarguments.

One way of increasing the pool of experts is to encourage specialist bodies (such as medical Colleges) to establish a panel of experts. This could be achieved by establishing a register of members who were

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[119] Australian Medical Association, *AMA Code of Ethics 2004. Revised 2016*.

[120] Australian Medical Association, *Ethical Guidelines for Doctors Acting as Medical Witnesses 2011*. See <https://ama.com.au/system/tdf/documents/AMA%20Ethical%20Guidelines%20for%20Doctors%20Acting%20as%20Medical%20Witnesses%202011.%20Revised%202016.pdf?file=1&type=node&id=46100>.

[121] For example, The Royal Australian and New Zealand College of Radiologists, *The Guidelines for RANZCR Fellows Who Act as Expert Witnesses* (2012) <www.ranzcr.com%2fdocuments%2f757-guidelines-for-ranzcr-fellows-who-act-as-expert-witnessess%2ffile/RK=2/RS=AlSM89dEJ20S67TWThmkOXee9PY->; The Royal Australian and New Zealand College of Obstetrics and Gynaecologists, *Guideline for College Fellows Participating in the RANZCOG Expert Witness Register* (2015).

[122] The Royal Australian and New Zealand College of Obstetrics and Gynaecologists, n 121).

[123] For example, American College of Emergency Physicians, n 47.

[124] American College of Emergency Physicians, *Medical/Legal: Standard of Care Review* <http://www.acep.org/life-as-a-physician/ethics--legal/standard-of-care-review/standard-of-care-review/medicallegal-standard-of-care-review/>.

[125] Grant and Studdert, n 10.

[126] Grant and Studdert, n 10.

willing and qualified (by explicit criteria) to provide expert evidence. The registers could be structured to indicate whether those listed had undertaken additional relevant training (such as courses) or had completed formal training in law/health law. In the United States, some professional associations have set out qualifications for expert witnesses in that profession and ethical guidance for clinicians providing expert opinions.[127]

Having experts nominated by a specialist body is not without precedent. In *Salay v Est late Harry Bailey*,[128] the Royal Australia and New Zealand College of Psychiatrists nominated, at the court's request, psychiatrists to assist with the case.

In the past, the AMA (via its medicolegal committee) put forward a proposal that specialist Colleges compile lists of practitioners whom they regard as experts.[129] The proposal has not been broadly adopted. Of the 13 specialist medical colleges in Australia, only 2 have published criteria for a specialist providing expert evidence.[130] Diversity of and access to experts could be enhanced if Colleges acted on the AMA's recommendation.

Being a medical expert in litigation is a distinct skill and, in theory, should require specific training. This would ensure experts were aware of their responsibilities and legal processes, including standards of proof. That said, a requirement for training, especially for medical experts undertaking this work infrequently, is likely to dissuade doctors from making themselves available, limiting the pool of experts. The problem would be magnified in highly specialised areas of practice. It could result in there being no experts qualified to provide an opinion in a particular specialist area. Overall, the problems posed by a training requirement outweigh the benefits.

Standardisation of Expert Reports

While codes of conduct state that the facts and assumptions relied upon for an opinion must be clearly stated and the reasons for opinions must be clearly explained, they do not prescribe or recommend the form of a report/written opinion.

This issue was considered in Canada by in the Alberta Rules of Court Project.[131] The main perceived benefit of standardised reports was the provision of more useful and complete information to the court. Without a standard format or minimum criteria, it was considered that reports may be insufficiently detailed. They might also be deliberately vague, masking weaknesses in their conclusions. This could make it hard to evaluate and compare opinions accurately and their underlying rationale or supporting evidence. A perceived secondary benefit of standardised reports was to assist experts who are inexperienced in provision of expert evidence to create useful and complete expert reports. These arguments are similarly applicable to Australian jurisdictions.

Peer Review of Cases as an Educational and Quality Improvement Tool

An educational tool used in the United States but not yet practised in Australia is post-case peer review. The process used by the American College of Emergency Physicians (ACEP) is described to illustrate. ACEP has specifically included willingness to participate in peer review of medical expert opinions

[127] For example, WA Maggiore, DF Kupas and C Glushak, "Expert Witness Qualifications and Ethical Guidelines for Emergency Medical Services Litigation: Resource Document for the National Association of EMS Physicians Position Statement" (2011) 15(3) *Prehospital Emergency Care* 426; SR Paul, SK Narang and AAP Committee on Medical Liability and Risk Management, "Expert Witness Participation in Civil and Criminal Proceedings" (2017) 139(3) *Pediatrics* e20163862; American College of Emergency Physicians, n 47.

[128] *Salay v Est late Harry Bailey* (Unreported, NSW Supreme Court, Common Law Division, Badgery-Parker J, No 12427/82, 24 February 1995).

[129] Reported by Caldwell, n 19.

[130] The Royal Australian and New Zealand College of Radiologists, n 121; The Royal Australian and New Zealand College of Obstetrics and Gynaecologists, n 121.

[131] Alberta Law Reform Institute, *Consultation Memorandum 12.3: Expert Evidence and "Independent" Medical Examinations* (2003).

in its guidelines for expert witnesses.[132] After a case has been finalised, ACEP members can request a review of questionable expert witness testimony regarding emergency medicine standards of care. The requesting member does not have to have been involved in the case. A Standard of Care Review Panel conducts a blinded review of the case materials, specifically focusing on questions related to the standard of care. The outcome is provided as a de-identified summary for educational purposes and discusses the evidentiary basis for the panel's opinions and where they disagree with the expert opinion under review. The summary is made available via the ACEP website for use by others for self-education. No disciplinary action can ensue from the process.[133]

It is doubtful that this approach would be able to be implemented in Australia. It is reliant on access to court documents and transcripts. As in Australia about 98% of medical negligence cases settle before a hearing, the vast majority of expert opinion evidence will not be accessible. That said, an adaptation of the process could form part of specialist continuing professional development programs. College members might confidentially submit de-identified expert reports for feedback from a committee of suitable peers. Over time, this could improve the quality of expert evidence. A potential barrier is that as Australia is relatively small, even with de-identification of reports, it may be difficult to adequately protect privacy of the patient, the hospital and the expert.

Blinding of Experts to Engaging Party and Outcome

There are two approaches to blinding of experts. The first applies to how experts are chosen and the second to how experts access and use data for their report.

Blinding Experts to the Engaging Party

As a potential solution to expert partiality, Robertson proposes that experts meeting specified criteria could be engaged via an intermediary agent, blinded to the identity of the client.[134] Put simply, the expert would not be told if they were being engaged by plaintiff or defence. The rationale is that reports blinded to the engaging party are more likely to represent mainstream care and the diversity of reasonable care. They could also be more credible to all parties and decision-makers.

This approach was tested experimentally for oral evidence using videoed mock medical litigation trials where one expert was a blinded expert and the other was not. Irrespective of the side they were representing, jurors considered the blinded experts to be more credible and more persuasive. Use of blinded experts doubled (or halved) the odds of a favourable verdict.[135] No evidence of the use of the approach in the Australian context was identified.

Blinding of Case Materials to Outcome

This process aims to minimise outcome bias in written reports. It is a two-step process where the expert is asked to provide an opinion about whether the standard of care was reasonable based on materials that do not include information about the outcome. They are then informed of the outcome and asked whether it modifies their opinion. In practice, the two sets of materials can be provided in sealed envelopes at the same time or the second set may only be provided after the first report has been completed.

While consistent with strategies to minimise cognitive bias, this approach is administratively complex and expensive. There is also no guarantee that the expert will not look at both sealed envelopes before completing their first report. Experts can often guess the outcome (or possible range of outcomes) from the first set of materials. They know that there has been an adverse outcome because there is litigation and there are usually a small number of serious adverse outcomes for a particular clinical presentation type.

[132] American College of Emergency Physicians, n 47.

[133] American College of Emergency Physicians, n 124.

[134] CT Robertson, "Blind Expertise" (2010) 85 *New York University Law Review* 174.

[135] CT Robertson and DV Yokum, "The Effect of Blinded Experts on Juror Verdicts" (2012) 9(4) *Journal of Empirical Legal Studies* 765.

Thus, the net reduction in outcome bias is doubtful. The complexity and cost of this process probably outweigh any marginal gain in bias reduction.

Increased Use by Courts of Commissioned Evidence Summaries from Learned Institutions

Currently courts access evidence supporting the reasonable standard of care via medical experts. This includes evidence from clinical practice guidelines and the medical literature.[136] As previously discussed, this approach is open to bias and selectivity. The medical literature is vast and expanding exponentially. In fact, in 2015, approximately 800,000 new medical papers were published.[137] There has been similar proliferation in clinical practice guidelines.[138] It is very difficult and time-consuming to keep abreast of all of the data. It is neither feasible nor cost effective to expect medical experts to conduct an exhaustive search of evidence sources.

Universities and other research agencies frequently compile evidence summaries for government bodies and private entities. It would potentially assist the assessment of the standard of care if courts were empowered to independently commission summaries of research evidence and clinical practice guidelines from such organisations. While some have suggested that evidence summaries could replace medical experts,[139] this is unlikely. The nuances of decision-making (especially in the face of incomplete data and context-specific issues) that can only be provided by clinical experts will be important for fact-finding. Summaries could however complement experts' opinions and be useful to courts in framing questions for conclaves and leading concurrent evidence.

Procedurally, this could fall within the court's provisions to appoint a court-appointed expert. The expert would not necessarily be a medical expert but an expert in identification, evaluation and summarising of published data. They would quality as expert witnesses by their training and experience. To date, there is no report of this approach being used in Australia.

Improvements to Conclave Processes

While the advent of conclaves has addressed several of the weaknesses of medical expert evidence, some further enhancements are recommended.

Routine Use of Facilitators and Scribes

As described above, appointment of a chairperson and scribe from within the conclave membership affords these people influence over the proceedings and the report. It may also limit their participation in the conclave as a discussant due to conflict between the roles. These problems can be overcome by the routine appointment of a facilitator and scribe. Court procedures already allow for this, but they are uncommonly used.

Facilitators have additional advantages including managing the conclave and reporting process efficiently, ensuring that all participants participate appropriately and are heard, managing any experts who exhibit inappropriate behaviours, ensuring that experts do not over-simplify their analysis of complex issues and ensuring that the report is an accurate reflection of the conclave. An independent scribe has the advantages of ensuring the joint report complies with court requirements and that jargon is minimised.

Arguments against facilitators and scribes are that they may change the dynamic of the meeting and stifle discussion.[140] A further objection is that there is no code of conduct for these roles. In a recent judgment,

[136] J Davies, "Clinical Guidelines as a Tool for Legal Liability. An International Perspective" (2009) 28(4) *Medicine and Law* 603.

[137] D Maier, *How Many Medical Papers Are Published Each Year? – Quora* <https://www.quora.com/How-many-medical-papers-are-published-each-year>.

[138] SJ Genuis, "The Proliferation of Clinical Practice Guidelines: Professional Development or Medicine-by-Numbers?" (2005) 18(5) *The Journal of the American Board of Family Medicine* 419.

[139] C Taylor, "The Use of Clinical Practice Guidelines in Determining Standard of Care" (2014) 35(2) *Journal of Legal Medicine* 273.

[140] *Coffey v Murrumbidgee Local Health District* [2017] NSWSC 1441.

it was found that an experienced member of the Bar would understand the role of facilitator and its responsibilities negating the above concerns.[141] The cost of these roles is small in the context of overall case costs and the potential savings derived from more efficient conclave processes.

Changes to the Content of Joint Reports

Conclaves may lack transparency unless reasons are given for its conclusions.[142] Current joint reports only require that agreement and disagreement on questions is reported, with reasons only required for disagreement. Reasons for change of opinion are not required. Transparency, and the court's understanding of the issues, would be enhanced if brief reasons for a change of opinion were required. They could also assist parties regarding decisions about the direction of their case.

Clarification of Expert Immunity for Conclaves

It is theoretically possible that an expert who has changed their opinion in a conclave could be sued for negligence, with the plaintiff claiming that expert was negligent in not maintaining their opinion in the joint report and thus breaching their duty of care to the client.[143] This risk would not be predictable to the expert beforehand.

While this potential risk may encourage provision of more considered opinions in pre-conclave expert reports, there is a strong argument that expert immunity should be extended to conclaves so as to promote the objectives of honest and robust exploration of issues, finding of agreement where it exists and accurate identification of the true issues in dispute.

SUMMARY AND CONCLUSIONS

Medical expert evidence is central to assisting the trier of fact to make judgments about competent standards of care and whether there had been a breach of the duty of care. Weaknesses of expert evidence include issues with reliability, bias, partisanship, failure to identify legitimate differences in opinion or practice and inadequate scrutiny of expert evidence by decision-makers. The introduction of new processes, including expert witness codes of conduct, conclaves of experts and concurrent evidence has gone some away to addressing these issues, but further improvements are recommended. These include:

- increasing accountability of experts by strengthening the regulatory response to complaints about expert evidence by specifically including advice to courts and tribunals about standard of care within the definition of provision of a health service;
- encouraging professional bodies to establish profession-specific codes of conduct for expert witnesses and registers of experts;
- standardising the format of reports;
- empowering courts to commission independent summaries of evidence of standard of care from universities/research agencies;
- clarifying immunity from suit for participation in conclaves; and
- improving processes for the management and reporting of conclaves.

Every case in medical litigation is the story of real people and of events in the real world. Medical experts play an essential role in helping courts understand what took place, the clinical context and what constituted reasonable care, based on the specific circumstances of the case. Recent changes have addressed some of the weaknesses of medical expert evidence. Refinements could result in further increases in the quality and utility of medical expert evidence.

[141] Coffey, n 132.

[142] Madden, McIlwraith and Madden, n 46.

[143] Mills, n 74.