

CONFERRING OF MEDICAL EXPERTS

An Accident Compensation Corporation (ACC) perspective

2019 AFOEM Annual Training Meeting – Auckland, New Zealand

Presented by:

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Date:

04 May 2019

Background

Acclaim Otago (Inc.)

- Established in 2003, based in Dunedin with members throughout New Zealand.
- Support group for injured New Zealanders and their families.
- Advocates for systemic change, active in the area of human rights.
- Seat on ACC's Consumer Outlook Group - providing advice to ACC's Chief Executive Officer on issues facing consumers.
- Member of the Advocates and Representatives Group - providing direct input into policy and strategy at ACC.
- Significant public profile
- Significant media presence.

Background (continued)

Report from Acclaim Otago

- Dated July 2015:
 - “Understanding the Problem: An analysis of ACC appeals processes to identify barriers to justice for injured New Zealanders.”
 - Dr Denise Powell, Mr Warren Forster, Tom Barraclough, Tiho Mijatov.
 - Funded by New Zealand Law Foundation and University of Otago Legal Issues Centre.
- Identified four broad themes/problem areas with ACC’s dispute resolution processes:
 - Inadequate access to legal resources.
 - **Limited access to evidence (particularly medical).**
 - Claimants not feeling that their stories are genuinely heard.
 - Limited access to experienced lawyers.

Background (continued)

Independent Review

- The Independent Review was tasked with examining the validity of four themes/problem areas raised by Acclaim Otago Inc. and recommend changes, whether legislative, policy-related or operational, in response to any of the report's findings that were deemed to have substance.
- Review performed by Miriam R Dean CNZM QC and dated May 2016:
 - *“Independent review of the Acclaim Otago (Inc.) July 2015 report into Accident Compensation dispute resolution process.”*

Recommendations

The 'Dean Review'

- Review made numerous recommendations, but of particular interest are those relating to access to medical evidence:
 - ACC convenes a working group to address the policy and process-related problems with accessing medical evidence (ACC has subsequently formed the Medical Issues Working Group).
 - Consideration be given to District Court judges having the ability to commission an expert medical report for claimants who are unable to do so where appropriate.
 - **Reviewers and District Court judges consider directing experts, where appropriate, to confer and identify where they agree and disagree on medical issues.**

District Court-Directed Conferences of Expert Witnesses

Proposed Process (Slide 1 of 2)

Principles

- When clinical advice is provided for legal proceedings it is considered expert evidence and the roles of the individual clinicians – including OEMs, are considered those of expert witnesses.
- The District Court has followed the High Court’s approach of directing expert witnesses to confer on specified matters (Appendix 1: High Court Rules 2016, Subpart 5 - Experts), by requesting that the appropriate experts (including OEMs who provide advice to ACC on clinical issues) confer to identify areas of agreement and disagreement for a particular case.
- Expert witnesses are expected to comply with the High Court’s Code of Conduct for Expert Witnesses (Appendix 2: High Court Rules 2016, Schedule 4 - Code of Conduct for Expert Witnesses).

District Court Directed Conferences of Expert Witnesses

Proposed Process (Slide 2 of 2)

Purpose

- When should experts confer?

District Court direction

Experts

- Overriding duty to Court
- Not an advocate for the party
- **Read this code of conduct and agrees to comply**
- State qualifications
- State issues of evidence and is within area of expertise
- State the facts and the assumptions on which the opinions are based
- State the reasons for the opinion
- Literature or other material – outline evidence for and against
- Incomplete or accurate
- Inconclusive opinion – must state this – (insufficient data or research)
- **Try to reach agreement on the matters**
- Prepare and sign
- Independent and professional judgement

District Court Directed Conferences of Expert Witnesses

Example (Slide 1 of 5)

Purpose

- How should experts confer?

Questions

You both have different interpretations of the MRI scans relating to the presence of an acute prolapse, can you please discuss this and comment (either by way of agreement, or each of you providing your differing views) on:

- a. whether a prolapse is present
- b. if present, whether the prolapse is acute
- c. whether/how it is possible to identify from an MRI if a disc prolapse is acute or not?

Dr Xx is of the opinion that a disc prolapse present.

Dr Xx is of the opinion that a disc prolapse is not present.

Agreed position

It is the clinical history that may provide the necessary information about whether a disc prolapse (if present) is acute or not.

It is not possible to tell from looking at the images on the MRI scan whether a disc prolapse is acute or non-acute. There is nothing specific on the MRI images of that disc that would define the timeframe within which a prolapse has occurred.

District Court Directed Conferences of Expert Witnesses

Example (Slide 2 of 5)

Purpose

- How should experts confer?

Agreed position

The clinical history rather than the MRI scan would provide the best information to support whether or not a disc prolapse (if present) was considered to be acute.

In general, asymmetrical loading of the disc in the cervical spine could theoretically lead to an increase in pressure within that disc in turn leading to an acute prolapse.

It was important to assess how likely it was given the forces involved in the differing descriptions provided of the mechanism of accident; that it would have caused an increase in pressure within that disc in turn was sufficient to have caused a traumatic disc prolapse and traumatic acute nerve root compression.

The first mechanism of injury as described in the contemporaneous record was less likely in terms of the mechanism and the forces applied to cause an acute disc prolapse, especially in the presence of a pre-existing disc-osteophyte complex and foraminal narrowing that was possibly in its own right causing asymptomatic nerve root compression.

The second mechanism of injury as described to the treating specialist was sufficient in terms of the mechanism and the forces applied to cause an acute disc prolapse even in the presence of a pre-existing disc-osteophyte complex and foraminal narrowing.

The third mechanism of injury as described in the statement of evidence was unlikely in terms of the mechanism and the forces applied to cause an acute disc prolapse especially in the presence of a pre-existing disc-osteophyte complex and foraminal narrowing that was possibly in its own right causing asymptomatic nerve root compression.

District Court Directed Conferences of Expert Witnesses

Example (Slide 3 of 5)

Purpose

- How should experts confer?
 - Either by way of agreement, or with each of you providing your differing views on each question

Other Examples of Questions

Could you please provide an explanation of the process at work in the client's cervical spine? Can you, in very simple terms, explain the relationship between the osteophyte complexes, the foraminal stenosis, the disc pathology and the nerve root compression, in particular:

- a. What causes what
- b. What is producing the symptoms
- c. What is pre-existing
- d. Can osteophytes be caused by trauma?
- e. What is currently causing neurological symptoms?

Are symptoms caused by the injury or substantially by a pre-existing condition, or is this a case of a combination of both factors trauma and pre-existing?

District Court Directed Conferences of Expert Witnesses

Example (Slide 4 of 5)

Purpose

- How should experts confer?

Questions

Please summarise the areas of agreement between yourselves and the areas of disagreement, and if possible indicate how, if at all, discussing the issue together has changed your views.

Hot-tubbing summary

OEMs in NZ are asked by ACC to provide reports on e.g.; causation, fitness for work, return to work.

The implications of losing/gaining compensation entitlements are potentially significant.

In that situation, a second opinion may be requested from a different OEM.

The OEMs may be required to meet together and work through their differences of opinion with the goal of acting as independent experts – conferring – and endeavouring to find agreement.

interactions are governed by the High Court Rules.

Points of agreement do not need to be weighed up by the ‘trier of fact’.

Where does your professional and ethical responsibility lie?

District Court Directed Conferences of Expert Witnesses

Example (Slide 5 of 5)

Purpose

- How should experts confer?

Questions

Please summarise the areas of agreement between yourselves and the areas of disagreement, and if possible indicate how, if at all, discussing the issue together has changed your views.

What can I do?

In your reports;

- Acknowledge that you agree to conform with the High Court Rules
- Consider providing and commenting on all of the literature – not just the literature that supports your view

Be prepared to meet with an OEM colleague and:

- Discuss your differing opinions,
- Endeavour to find agreement,
- Sign a joint witness statement.

Appendix 1

High Court Rules 2016, Subpart 5 - Experts



9.43 Expert witness to comply with code of conduct

1. A party to a proceeding who engages an expert witness must give the expert witness a copy of the code of conduct set out in Schedule 4.
2. An expert witness must—
 - a) state in any written statement of the proposed evidence of the witness served under rule 9.2 or 9.3, or at the time of giving any oral evidence, or in any affidavit containing the evidence of the expert witness, that the expert witness has read the code of conduct and agrees to comply with it:
 - b) comply with the code of conduct in preparing any written statement of the proposed evidence of the witness to be served under rule 9.2 or 9.3 or in giving any oral or affidavit evidence in any proceeding.
3. The evidence of an expert witness who has not complied with subclause (2)(a) may be offered only with the leave of the court.

9.44 Court may direct conference of expert witnesses

1. The court may, on its own initiative or on the application of a party to a proceeding, direct expert witnesses to—
 - a) confer on specified matters:
 - b) confer in the absence of the legal advisers of the parties:
 - c) try to reach agreement on matters in issue in the proceeding:
 - d) prepare and sign a joint witness statement stating the matters on which the expert witnesses agree and the matters on which they do not agree, including the reasons for their disagreement:
 - e) prepare the joint witness statement without the assistance of the legal advisers of the parties.
2. The court must not give a direction under subclause (1)(b) or (e) unless the parties agree.
3. The court may, on its own initiative or on the application of a party to the proceeding,—
 - a) appoint an independent expert to convene and conduct the conference of expert witnesses:
 - b) give any directions for convening and conducting the conference the court thinks just.
4. The court may not appoint an independent expert or give a direction under subclause unless the parties agree.
5. Subject to any subsequent order of the court as to costs, the court may determine the remuneration of an independent expert and the party by whom it must be paid.
6. The matters discussed at the conference of the expert witnesses must not be referred to at the hearing unless the parties by whom the expert witnesses have been engaged agree.
7. An independent expert appointed under subclause (3) may not give evidence at the hearing unless the parties agree.

Appendix 1

High Court Rules 2016, Subpart 5 - Expert



9.45 Status of joint witness statement by expert witnesses

1. A joint witness statement prepared by expert witnesses under rule 9.44—
 - a) must be circulated by the parties to the proceeding by whom the expert witnesses have been engaged to every other party who has given an address for service; and
 - b) may be produced in evidence by any expert witness who signed the statement; and
 - c) may, if the parties to the proceeding agree, be produced in evidence without the need to call any of the expert witnesses who signed the statement.
2. Rules 9.4 to 9.11 apply, with all necessary modifications, to a joint witness statement as if the statement were a written statement under rule 9.2 or 9.3.
3. An expert witness is not precluded from giving evidence on any matter at the hearing simply because the expert witness has participated in the preparation of a joint witness statement under rule 9.44 or because the witness statement is evidence at the hearing under rule 9.6.

Appendix 2

High Court Rules 2016, Schedule 4 - Code of Conduct for Expert Witnesses



Duty to the court

1. An expert witness has an overriding duty to assist the court impartially on relevant matters within the expert's area of expertise.
2. An expert witness is not an advocate for the party who engages the witness.
- 2A. If an expert witness is engaged under a conditional fee agreement, the expert witness must disclose that fact to the court and the basis on which he or she will be paid.
- 2B. In subclause 2A, conditional fee agreement has the same meaning as in rule 14.2(3), except that the reference to legal professional services must be read as if it were a reference to expert witness services.

Evidence of expert witness

3. In any evidence given by an expert witness, the expert witness must—
 - a) acknowledge that the expert witness has read this code of conduct and agrees to comply with it;
 - b) state the expert witness' qualifications as an expert;
 - c) state the issues the evidence of the expert witness addresses and that the evidence is within the expert's area of expertise;
 - d) state the facts and assumptions on which the opinions of the expert witness are based;
 - e) state the reasons for the opinions given by the expert witness;
 - f) specify any literature or other material used or relied on in support of the opinions expressed by the expert witness;
 - g) describe any examinations, tests, or other investigations on which the expert witness has relied and identify, and give details of the qualifications of, any person who carried them out.
4. If an expert witness believes that his or her evidence or any part of it may be incomplete or inaccurate without some qualification, that qualification must be stated in his or her evidence.
5. If an expert witness believes that his or her opinion is not a concluded opinion because of insufficient research or data or for any other reason, this must be stated in his or her evidence.

Appendix 2

High Court Rules 2016, Schedule 4 - Code of Conduct for Expert Witnesses



Duty to confer

6. An expert witness must comply with any direction of the court to—
 - a) confer with another expert witness:
 - b) try to reach agreement with the other expert witness on matters within the field of expertise of the expert witnesses:
 - c) prepare and sign a joint witness statement stating the matters on which the expert witnesses agree and the matters on which they do not agree, including the reasons for their disagreement.
7. In conferring with another expert witness, the expert witness must exercise independent and professional judgment, and must not act on the instructions or directions of any person to withhold or avoid agreement.