

MEDICO-LEGAL MEDICINE EXAMINATIONS

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The term medico legal is perhaps an oxymoron, but maybe not as pronounced as such used by Romeo in Act 1, scene 1 of Shakespeare's Romeo and Juliet:

"Why then, O brawling love! O loving hate! O heavy lightness, serious vanity..."

Medico-legal Medicine is the interface between medicine and the law and usually requires a medical examination and the provision of a report.

Administrators/Legal professionals require medical information to make some decisions. Medico-legal reports may be used for resolution of claims such as in civil injury, medical negligence, or as part of a worker's compensation or in the transport accident scheme.

Medico-Legal Medicine: Information exchange

Medico legal work requires a medical practitioner to provide assessment and advice, usually to enable the resolution of the administrative or legal action.

This may occur with the provision of the treating doctor/s information via practitioner reports or requests for records. Interpretation of this information can be an issue. Legal practitioners, although experienced in medico legal issues, are not trained to interpret the nuances in medical records and significance of clinical and investigative findings.

There are medical specialists who can provide expert advice on a disease or condition in the context of the legal proceedings. This is expert medical evidence.

There are also medical experts who specialise in preparing and undertaking medico legal examinations. This field of medicine differs from a specific medical expert who may be called upon because of their particular expertise in a field of medicine, to give an opinion regarding a particular disease or disease process.

Common issues in Medico-Legal examinations:

'Commissioning bias' is when each party contracts their own expert witnesses who present evidence, either in a report or directly to the court, that favours the party that contracted them. These experts are often referred to as "hired guns". An example of this is the well demarcated opinions that exist amongst medical experts in relation to the issue of the work relatedness of carpal tunnel syndrome.

It is recognised that third-party examinations or medico legal examinations are also disproportionately represented in complaints

Common complaints include that the examiner was rude or dismissive, or there was a lack of respect for privacy, or even worse that there was an exacerbation of the injury as a result of the medical examination.

The dynamics of a third-party examination contribute to these difficulties because it is not a therapeutic relationship. When a patient attends a treating doctor there is an element of trust. The consultation is not adversarial and the doctor's first duty is to the patient. In a third-party examination the examining doctor's first duty is to the third party who has commissioned the report. The consultation is not confidential and often the patient does not know what to expect from the consultation.

The introduction of an Expert Witness Code of Conduct into the courts, has assisted courts to deal more openly with the problem, and to ensure expert witnesses understand their obligations to the court.

The introduction of conferences between experts, who produce a joint report for the court on where they agree and disagree, has also helped eliminate some aspects of bias.

Education and Standards. Further education is available for both medical and legal practitioners to improve the medico- legal interchange.

Medical Panels

In Victoria the Government has established the Medical Panels system for answering 'medical questions' in relation to claims under the *Accident Compensation Act 1985 (Vic)* and disputes determining the threshold for access to the *Wrongs Act 1958 (Vic)* for claims for non-economic loss.

The function of a Medical Panel as defined in section 67(1) of the *Accident Compensation Act*:

"is to give its opinion on any medical question in respect to injuries arising out of, or in the course of, or due to the nature of employment....."

Medical Panels – How do they work?

The process for convening a Medical Panel is straight forward and requires:

1. The Governor in Council approves a list of medical practitioners to be eligible to be appointed to a Medical Panel. The list consists of medical practitioners of different specialties with appropriate experience and peer credibility.

2. From this list, the Minister appoints a Convenor and Deputy Convenor.
3. The Convenor and Deputy Convenor appoint the doctors to a Panel for the medical questions that are referred to Medical Panels. The office of the Convenor is supported by both legal practitioners and administrative staff.
4. A Presiding Member of each Panel is appointed, who then has the responsibility for preparing an Opinion which answers the questions, and Reasons which explain the Panel's reasoning behind its opinion
5. A medical examination is undertaken, generally conducted as joint medical examinations with the different specialties represented, at dedicated premises, and with one member of the Panel appointed as the presiding member.
6. A Medical Panel only exists for the life of the referral, until the Opinion is released.

Under the *Accident Compensation Act*, referrals to the Medical Panel can come from

- Authorised Agents and Self-insurers
- Conciliation Service
- County and Magistrate Courts
- Worksafe

Under the *Wrongs Act*, the Respondent can make a referral in relation to the Certificate of Assessment for purposes of considering whether the threshold requirement has been met.

Medical Panels as a Tribunal

The Supreme Court of Appeal in Victoria has ruled that a Medical Panel has the status of a "Tribunal" for the purposes of *Administrative Law Act, 1978* - see *Masters v McCubbery*.¹

Final and binding decision

Amendments made to the Accident Compensation Act in 1997 determined that any finding of a Medical Panel, is final and binding on all parties, including the Courts.

As a result the only method of disputing a Medical Panel's opinion is on the basis of an error in process, or natural justice under administrative law. That is, there is no appeal available on the merit of the case but appeal is limited to procedural aspects. If a

Medical Panel opinion is quashed by the Supreme Court, it is referred back to Medical Panels and usually to a differently constituted Panel, for a further opinion.

There are approximately 4,000 Medical Panels appointed per year in Victoria, and only a small proportion of these cases are referred for review by the Supreme Court. The general consensus from the stakeholders is that this method of alternative dispute resolution of medical disputes, is effective, and certainly anecdotally, most claimants will frequently say that the medical examination that they have undertaken is generally one of the best examinations that they have undergone, irrespective of the outcome.

Impairment

- Impairment is the loss of use, or derangement of any body part, system, or function
- Disability is the effect of the impairment on an individual
- The same impairment in two different individuals can have significantly different disability – eg: loss of finger for concert pianist and labourer
- For assessment purposes, impairment must be permanent

Impairment Assessment

Despite the need to discriminate between disability and impairment, it is now a common approach in Australia to use a measure of impairment for purposes of compensation.

The *American Medical Association's Guides to the Evaluation of Permanent Impairment* is utilised in various states in its various editions. In Victoria we use the fourth edition AMA Guides, whereas the fifth edition is used in other States.

The AMA Guides are currently published in the sixth edition, and although there are subsequent editions, they are not necessarily more advanced or better to use.

The Guides do have a degree of reliability and validity and when assessments are undertaken by appropriately trained medical practitioners. In Victoria all medical practitioners undertaking assessments using the Guides, are required to have completed a Ministerially approved course in the various modules.

Abnormal illness behaviour and Impairment Assessments:

Another feature of the third-party examination that is often discussed, is the concept of abnormal illness behaviour.

Other terms which have been used to describe this behaviour include 'Inappropriate illness behaviour' or 'Functional Overlay'.

It is important to recognise that this behaviour is different behaviour from true malingering, which is a deliberate and conscious attempt to feign illness or disability for secondary gain, and also from psychiatric conditions such as hysterical conversion reactions and somatoform disorders.

An understanding and recognition of the impact of socio cultural differences, is important for the adequate assessment of impairment, when considering the presence or otherwise of abnormal illness behaviour

Abnormal illness behaviour may make the technical task of assessing impairment difficult, especially when range of motion is required for the assessment. However a skilled examiner can usually overcome some of the difficulties.

In conclusion although there has been considerable change and improvement in the interchange of information between law and medicine, there is a need for continuing dialogue and refinement of process.

There is also a responsibility of both professions to ensure that our lawmakers develop legislation and regulations that are fair and equitable.

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¹ Masters v McCubbery [1996] 1 VR 635