

# Courtroom Drama

SPARKS CAN FLY WHEN SCIENCE MEETS THE LEGAL SYSTEM. JUST ASK THE PATHOLOGISTS WHO TESTIFY AS EXPERT WITNESSES. BY DAVE HOSKIN.

PHOTOGRAPHY: EAMON GALLAGHER AND TONY LEWIS



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The pathologist in the witness box seemed to be doing well. The opinions that he had proffered on this particular day were based on the latest research, and he had striven, as always, to retain his objectivity and impartiality.

While he'd joked that lawyers were the natural enemy of scientists attempting to give evidence, he was a civil litigation veteran, and had enormous confidence in the judiciary's ability to assess complex testimony and arrive at perceptive conclusions. It was only when the cross-examination began that the pathologist was presented with a credible scientific article that flatly rebutted the testimony he had just given. He recognised the opinion immediately – he'd written it himself. Welcome to the unpredictable world of the expert scientific witness.

Professor Douglas Henderson, (an anatomical pathologist from Flinders Medical Centre in Adelaide) however, was unperturbed. "You find that the lawyers will sometimes get out almost everything you've ever published," he says, "And I've had this where, 'Your opinion now is different to this article you wrote 20 years ago.' And I'd say, 'Yes it does differ.' 'Oh, you admit it?' And I said, 'Not only do I admit it, I'm proud of it'."

To a lawyer seeking to score points this might seem a damaging admission, but Professor Henderson insists that scientists working in fields with areas of rapidly changing information must modify their beliefs as new information is uncovered.

This is just one instance of the unique sparks that fly when science meets the legal system.



Experts are not confined to pathology, of course; they may come from a wide variety of disciplines. The Australian Law Reform Commission defines an expert witness as "possess(ing) appropriate specialised qualifications or experience and their expertise must form part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge".

The evidence must also fall outside the "common knowledge" rule. "If the matters are within common knowledge that is within ordinary human experience, expert opinion evidence about it may not be admitted."

The selection of an expert witness is often routine. Dr Noel Woodford works at the Victorian Institute of Forensic Medicine and regards testifying about issues such as injury interpretation as a necessary part of his job. However, in cases requiring different specialisations (such as Professor Henderson's in diseases caused by asbestos exposure), lawyers must cast their net a little wider.

In the case of pathologists, the most common method is seeking recommendations from members of the medical community, or lawyers with specialised knowledge of the issues in

question. After researching the candidate's track record and perceived credibility as a witness, the expert will be approached to review the case.

"The issues on which I'm usually asked to comment," says Professor Henderson, "are firstly, is the diagnosis of the disease correct? And secondly, the issue of causation, that is, was the disease caused or contributed to materially by the agent in question, that is asbestos, derived from a particular defendant?"

Unlike other witnesses, experts are paid for their work. While this is standard practice (the pay scale being specified by the Australian Medical Association in the case of pathologists), a perennial concern is that this remuneration may influence specialists' testimony.

Dr Robert Moles, a legal expert with particular interest in specialist witnesses, confirms that this can occur. "Oh, absolutely, without a doubt. If you look at America you have a lot of career expert witnesses, and in fact, in some cases they find that the expert witness hasn't done the job in donkey's years — they've spent all their time being expert witnesses."

Dr Moles also cites the adage that the person that pays the piper calls the tune,

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and both Dr Woodford and Professor Henderson acknowledge the potential for payment to corrode witness credibility. This said, they also stress their own efforts to remain impartial, and put the payment issue into context.

"Sometimes you find that preparing a report can be a protracted exercise," says Professor Henderson, "which involves many hours of work, and it would be unreasonable to expect people to do it without recompense. For example, because we have to give reasons for each opinion stated and cite the scientific literature, some of the expert witness reports that I write are almost like scientific articles. Some of them have up to a hundred references attached."

Indeed, it is often these preliminary expert reports that can result in many cases being expedited, with settlements reached in civil cases where reports from the plaintiffs and the defendants roughly agree.

However, if there is a significant difference of opinion, the case can go to trial. It is here that the most obvious differences between the experts and the ordinary witnesses become apparent. Both are asked to provide evidence of fact, and no distinction is made between, for instance, an ordinary witness' testimony that they saw a stabbing occur, and an expert noting knife wounds in a victim's chest.

"The difference is that normally the courts will not allow a person to give an opinion as to what the meaning is of what they've seen," says Dr Moles. "In certain circumstances, the court can call upon the services of an expert and they can say, given these observations, what does that mean? An expert witness can then give an opinion as to how to interpret the observations."



There's an amusing moment in John Bryson's *Evil Angels* in which two journalists covering the Chamberlain trial attempt to turn the testimony of Professor Barry Boettcher into copy. "Pity the jury," one of them mutters, as he wrestles with complex subjects such as immunology and molecular structure.

This is a hazard that has long been recognised, and communicating effectively in court is where many pathologists face their greatest challenge.

"Lawyers and the experts all talk a highly specialised language," says Dr Moles, "and this can create problems for a jury that doesn't speak that language."

Says Dr Woodford: "We are at the moment investigating the feasibility of plain English reports. In other words translating some of the complex scientific terminology or jargon into language that people can understand... But sometimes it's a real problem. The terms (were) developed because they precisely describe the sorts of things that we're saying. It's not so much dumbing down, but there's a danger sometimes of oversimplifying things and losing the real meaning of it."

Dr Moles raises the possibility that it may not simply be jurors who find themselves baffled by a pathologist's deposition. "I do suspect that one of the biggest dangers that we have is in fact that lawyers who are not trained in science and anatomy and physiology actually don't understand the issues themselves. They don't have the probing cross-examination of the forensic witness by the legal people in court, because they



**Professor Douglas Henderson says its not uncommon for two experts to disagree.**

don't want to show themselves up as not really understanding it either."

This possibility is recognised by the Australian and New Zealand Forensic Science Society. Its code of ethics stresses that experts' ultimate duty is to the court, and that they are responsible for ensuring that their testimony is presented completely and clearly. Dr Woodford affirms this stance.

"I've had times in court when I've asked the judge's permission because I don't think I've been able to encapsulate entirely what I wanted to within the time given by the requesting barrister. And the judges usually, at least in my experience, are pretty keen to hear what you have to say."

A courtroom can be an intimidating environment, not least because of the ways in which our adversarial system of justice has developed. The result is that experts often find themselves subjected to a merciless cross-examination, with the science essentially being presented under fire.

The advantage of the adversarial system is that the courtroom can act as a crucible for the truth, probing the evidence for deficiencies. The disadvantage is that the hostile theatrics can overshadow more important considerations.

"One of the tactics that lawyers use," says Dr Woodford, "is to try and unsettle people, and they might do that in a number of different ways. I've had some harrumphing, and eyes cast heavenwards and things like that from the lawyer."

Conversely, Dr Moles was unequivocal when asked whether expert witnesses often intimidated lawyers. "Yes. In fact, I can guarantee you that there's a particular expert witness that ... has a reputation for being the sort of person that would get angry in the witness box if the opinion was seriously challenged. And even the lawyers themselves felt a little bit apprehensive about doing that."

The adversarial system can also result in expert witnesses taking sides, serving the needs of their "team" rather than those of the court as a whole. In Professor Henderson's opinion, this kind of behaviour discredits their objectivity. "I've seen cases where people become incredibly involved in the actual proceedings. Not only pathologists, but other scientists, non-medical scientists. I've seen them give advice to lawyers on



how to cross-examine people and how to attack their reputations and the like."

It's not uncommon for two experts to disagree, and when both seem credible this can present a challenge for the court.

However, as many pathologists are well aware, science may not be able to provide a simple yes-or-no answer to a question. In cases such as these, it is left to the court to weigh up what may be two entirely valid interpretations of the same data, and a diligent judge will direct a jury to be wary in such cases of divided scientific opinion.

The key, as with any evidence, is whether jurors believe beyond a reasonable doubt that the prosecution's case has been proven. While the expert evidence may be difficult to grasp, it is not impossible.

When their testimony is complete, most expert witnesses admit that they are relieved rather than exhilarated. "If you get called to court to give testimony," Professor Henderson says, "that can be an unpleasant and protracted and time-consuming experience. For example, earlier this year, I prepared a case that I thought was pretty straightforward, but nonetheless there were courtroom proceedings ... and I ended up being cross-examined for almost two and a half days."

Bearing this in mind, perhaps the most interesting question is why pathologists are willing to subject themselves to being expert witnesses at all. The simple answer, as Professor Henderson notes, is that the vast majority of experts are not prepared to, and their reluctance is completely understandable.

"The reason I do this," he concludes, "is, one, it gives me an awful lot of very well worked up cases of asbestos-related diseases, much better than I see in my everyday clinical practice, and that can become the subject of further scientific investigation and research. (A second reason is that) if I have specialised knowledge and can communicate it, I almost have a duty to the courts and society and science, to communicate that as a matter of assisting the courts in their deliberations. I think that's a fairly arduous responsibility and one I take very seriously." 🔥

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***Professor Douglas Henderson is one of the world's leading experts on asbestos related diseases, their diagnosis and causation. He is Professor of Anatomical Pathology at Flinders University and is at the Flinders Medical Centre in South Australia.***

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***Dr Robert N Moles graduated in law from Queens University, Belfast, and completed his PhD at Edinburgh University. He previously held positions as Associate Professor of Law at the University of Adelaide and senior lecturer in the Faculty of Law at the Australian National University. He has recently published A State of Injustice (Lothian Books) 2004, and currently works full-time on the Networked Knowledge Project which investigates alleged miscarriages of justice that have occurred in South Australia over the last 30 years.***

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