PREPARATION, PREPARATION

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I cannot tell you how excited I was to be asked to talk to you today. Who would miss the opportunity to speak to a group of medicos who have reluctantly given up their Saturday golf? And under the semi-compulsion of a conference put on by their employer. And the topic: "Preparation, Preparation". It was riveting. "Before anything else, preparation is the key to success", said Alexander Graham Bell. Say that and I could sit down. There is nothing more to be said.

As the instructor said to the would-be skydiver as they were plummeting, instead of floating: "I forgot to prepare the chute". Or as the nurse said to the surgeon as the first incision was made: "I forgot to sterilise the scalpel". Or as the junior said to the unprepared silk as he was asked to examine a witness: "I haven't prepared either".

I guess it is the result of the pressures on the system, particularly those associated with the socialisation of medicine, but lawyers will rarely give an opinion on the

spot while medical practitioners usually do. It is not uncommon for tests to be arranged, but, in my experience, it is unusual for medical practitioners to say: “I want to think about this and read up on it”. Perhaps a number of you do delay giving opinions and, if I am wrong, I expect to hear from you at the end of the lecture. I would be interested to know, however, how often, in your consultations, you ask a patient to come back tomorrow. Mostly this will not be necessary because you know the answer. But sometimes it may be the pressures of time – and the fact that all tomorrow’s appointments are taken.

I am not sure why lawyers are different. Perhaps because any opinion they give is likely to be marked by an examiner, namely a court. But generally, even in relatively clear situations, lawyers think and act in writing. The cynic may say this is because of higher financial rewards. But I do not think so. The culture of the law is reasons and reasoning. And both imply time and preparation. To my mind, preparation for a task is nearly always a very good idea.

I hope I have not offended too many of you but I did not decide on the topic. And I was particularly asked to speak about preparation from my experiences as President of the Administrative Appeals Tribunal and as a Federal Court judge.

So, while on one view Alexander Graham Bell said all that is necessary I will now attempt the rather tedious task of saying something more specific that is relevant to your situation. I propose to make some personal remarks. They will not be academic. Certainly not academic law. If you have heard some of them before, I apologise. But they are my thoughts about what is important in the task you undertake. I have heard that you have been lectured a lot about procedural fairness. I will be saying a little bit about it myself. But I will be trying to explain why it is necessary rather than setting out the technical requirements. To the extent to which I am repeating what others have said I hope, at least, that my remarks serve the purpose of underscoring its importance.

It might be appropriate first to put your task, as Motor Accident Service Medical Assessors, in context and to compare it with the roles from which I have gained experience.

At one level, you see surrogate patients and write medical reports. That is a function very familiar to the role of specialists, as well as general practitioners, and not only in medico-legal contexts. My role, on the other hand, is often thought of as listening to, and refereeing, a contest between expert protagonists and then retiring to decide the winner. The process is very structured, involving elaborate rules, and often time consuming.

The role of administrative decision-making in a tribunal, which is the role I perform in the Administrative Appeals Tribunal, is slightly different to a court. The rules are less rigid. Procedures are more flexible. Yet there is a distinct similarity to the processes in Courts. At first sight, therefore, your role is quite different to the role of a tribunal or court. But let us look at the respective roles from a different perspective.

Your roles as assessors and my role as a tribunal member from this different perspective are very similar, if not identical. This can be illustrated by one aspect of the jurisdiction of the Administrative Appeals Tribunal. The Tribunal does not deal with motor accident compensation, but it does deal with workers' compensation. It administers the Commonwealth scheme for compensation of employees of the Commonwealth and its agencies and former agencies and, now, even those who compete with those agencies and former agencies. The employers involved include the National Australia Bank (a competitor of the Commonwealth Bank), Optus (a competitor of Telstra) and Toll Holdings (a competitor of Australia Post).

In these cases the Administrative Appeals Tribunal makes exactly the same decisions as you make relating to permanent impairment. The members of the Tribunal include a number of medical practitioners. At least two of them also are fellow assessors. They are here today. Nevertheless, superficially, medical members in the Tribunal go about their task in a different way to you. Determinations in the Administrative Appeals Tribunal are hearing oriented. Your determinations are consultation oriented. What is important, however, is that in

both cases a similar determination is made and the determination is generally binding upon both the claimant and the insurer.

Both you and the Administrative Appeals Tribunal are determining finally, issues such as the level of permanent impairment of compensation claimants. The fact that we are both making final determinations is very important. This gives rise to legal obligations. Courts will say that similar obligations apply to both of us. This is because our decisions affect people's rights. The medical examination you undertake as assessors may look like a consultation, but the process is very different. Apart from affecting legal rights, there is no room for a change in diagnosis, nor for a second opinion.

This is a very important matter for each of us to bear in mind. We are accordingly both bound by the rules of procedural fairness, or natural justice as they used to be called, except to any extent to which those rules are modified by the legislation governing us. Your legislation reinforces the applicability of the rules. There is even a right to apply to have a matter reallocated if the appointed assessor is thought not to be appropriate. That power is wider than issues of bias, but must include it.

The rules of procedural fairness have traditionally been divided between the obligation to give an opportunity to be heard and the obligation to bring a completely unbiased mind to the determination.

In your case the opportunity to be heard will be provided through the material that is referred to you, which will include material supplied by the claimant and what the claimant says when being examined. This means listening carefully. That function will generally come easily to you. It is what you do. So, in a way, is the second function. But that function is very important. The consequences of the assessment role are so important, because the decision is final, that care should be taken to see that the assessment considers all reasonable alternatives. As assessors you are acting as adjudicators upon the applicant's claim. It is necessary to come to the assessment with an open mind. It is important to note, however, that what is required is an open mind, not a blank mind.

The diagnosis which follows from a consultation will ordinarily be the same as the assessment which follows from a medical examination. However, the very significant difference, that the assessment binds the applicant and affects the applicant's rights, needs constantly to be born in mind.

What are the ways to satisfy the extra obligations which even handed collecting and assessing of the evidence requires, so that the best determination is made? The courts have said that the obligation is to reach the correct decision, or the preferable decision, if a range of possibilities are presented. That is precisely your function.

One very important aspect of satisfying the obligation is preparation. Preparation is always important. It is particularly important to your role of medical assessment. You do not have the advantage of hearing advocates for both the claimant and the insurer, drawing attention to the matters which advance one case and hinder the other. You have to perform this role. You have to draw out the information. The applicant will generally be able only to provide, at best, lay assistance.

It is accordingly your role to investigate the claim; to consider and assess the applicant's complaints; to identify the possibilities; to evaluate them and to come to a conclusion. And to do all this without real assistance and usually without being able to rely on another medical practitioner putting an alternative position – except to the extent that this appears in the written material and reports you have been provided with.

You are no doubt familiar with the role of experts in court litigation. Proceedings in the Administrative Appeals Tribunal are very similar. The claimant is examined by his or her own doctor and by a doctor appointed by the insurer. Reports are prepared. The reports are put into evidence. Often the doctors give evidence orally. The Tribunal assesses the different opinions and arrives at a conclusion. When medical practitioners sit in the Administrative Appeals Tribunal it is their role to assess the differing medical opinions.

Much has been written recently about this method of determining facts when expert evidence is involved. There has been considerable pressure for courts to move away from the traditional method of resolving differences of expert opinion. The idea has been put about that experts tend to be partial – to argue the cause of the party appointing the expert. The solution contended for has been single experts, either appointed by agreement of the parties, or by the court, when agreement cannot be reached. The role of the single expert is to consider both sides and to give evidence to the court of the conclusion reached and the reasons supporting it.

I have written a good deal about this approach (see, for example, 'Expert Evidence: The Value of Single or Court-Appointed Experts', paper delivered to the Australian Institute of Judicial Administration Expert Evidence Seminar, Melbourne, 11 November 2005; 'Problems with Expert Evidence: Are Single or Court-Appointed Experts the Answer?' (2006) 15(4) JJA 185; 'Expert Witnesses in Proceedings in the Administrative Appeals Tribunal', paper delivered to the New South Wales Bar Association Administrative Law Section, Sydney, 22 March 2006; 'The Use of Expert Witnesses in Court and International Arbitration Processes', paper delivered to the 16th Inter-Pacific Bar Association Conference 2006, Sydney, 3 May 2006; and 'Future Directions: How Can We Make Administrative Law More Relevant?', paper delivered to the Australian Institute of Administrative Law, National Administrative Law Forum, Canberra, 15 June 2007). The position I have adopted, based on 35 years experience as a barrister and 6 years as a judge, is that single experts are rarely the answer; that there are usually two sides to every story; and that the traditional method is the best way to reach the correct conclusion. I am speaking, of course, about expert disputes of all kinds, not just medical: accounting, economic, scientific, engineering, building.

Part of my reasoning is that there are often credible alternative expert opinions. The scientific literature is filled with debates about matters of expert opinion. Medical opinion is no exception. A very recent non-medical expert issue I dealt with, where experts disagreed, was the size of the population of grey nurse sharks off the coast of New South Wales. I have heard experts disagree about the

climate and the soils and the geology of North East Victoria in a case about wine. I have heard experts disagree about aeronautical issues.

In the professional development programme in the Administrative Appeals Tribunal we occasionally invite experts to address us. These include sessions by specialist medical practitioners. Impartiality in the Tribunal requires us to invite doctors who tend to be called to support applicants and also those who tend to support respondents. This simply reflects reality. There are doctors who traditionally give evidence for one side and those who give evidence for the other. And we find they place the emphasis differently when giving their evidence. Post Traumatic Stress Disorder is a good example. But the differences are not confined to these areas of medical expertise where the highest subjective elements are found. It must also be remembered that expert disputes which continue unresolved to a tribunal for resolution are generally those where there is room for differences of opinion. Some cases which require tribunal determination are cases of alleged fraud or exaggeration, but these cases can be no less difficult to resolve.

My conclusion, therefore, is that experts are rarely advocates for their client or patient, but they do give different opinions which reflect different schools of thought. Single experts are therefore not the answer. They may firmly belong to one of two schools. The ideal is an independent decision-maker, preferably with expert assistance, evaluating the competing evidence. This is the model upon which the Administrative Appeals Tribunal is based.

You are really in the very position I have been arguing against in the debate about expert evidence. You are the final decision-maker. You are the single expert. You are the equivalent of the judge or tribunal. In your case there is no other decision-maker – no judge or tribunal. You have to anticipate the countervailing considerations. You have to evaluate and rule on them. You have to isolate them. You have to decide which of the two sides of an expert debate is the preferable one. If you have a particular view of the prevalence of PTSD or the lack of it, you have to put it to one side. If you have a history of having been on an insurer's panel of doctors, or not on one, you have to put aside any generalised thoughts

you developed from the experience. To do otherwise will not be to bring an open mind to the task. It will amount to not doing your duty. This task is accordingly very important. It is central to what you do as assessors. And it is not an easy task.

Preparation, indeed careful preparation, is an important aid, probably the most important aid, to achieving this objective. Preparation is an important task in every pursuit. That is what Alexander Graham Bell said. The importance of preparation is a given. But in your role it assumes special importance. And so I would like to devote the remaining part of this talk to giving you some general suggestions about what are the important components of preparation.

It used to be the case that judges thought it was inappropriate to read any of the papers, other than the pleadings and similar documents which identified the issues between the parties, before they entered the court. Where there was evidence in the form of affidavits, for example, they would not read them. The affidavits might not be relied upon or might be rejected under the rules of evidence, so the thinking went, with the consequence that reading them might compromise the mind of the judge. However, that thinking long ago disappeared. Nowadays judges read all the material they have before they go into court. You will remember that I said judges must have an open mind not a blank mind. Well the same is true for you. Nowadays, the more informed a judge is or you are about the matter for decision the better. This is, of course, provided that you come to no final conclusion and remain ready to be persuaded by both sides.

So the first step in preparation is to inform yourself about the matter in hand. This will be achieved by a thorough reading of all the material with which you have been provided relating to the claimant you will be assessing. If you are given the material well in advance, so much the better. But even if you are given material just before you begin your examination, you will benefit from delaying to first read the material thoroughly.

The natural second step is to think about the material. To bring to some early consideration of the material, your knowledge and experience. After all, you were

appointed because you have this collected knowledge and experience. But here it is important to steel yourself to re-examine any habits of thought you may have developed from prior experiences – to put aside any conclusions you may have drawn relating to matters which are still controversial in your discipline. There is no reason why your thinking should not address some tentative matters relating to the ultimate question before you. That is not, however, the focus at this stage. The thinking ought to be directed to further steps:

1. What are the applicable parts of the Guidelines, such as the Permanent Impairment Guideline?

2. How should they guide the process?

3. What further preparatory work does the filed material suggest would be of assistance?

4. What other resources should be utilised? What texts or journals should be consulted? On what precise topics?

5. What history should be taken from the claimant?

6. What physical examination of the claimant should be undertaken?

7. Do I need any further information?

If you have enough material to make a decision with certainty then further supporting information will not be necessary. If you feel that further information is required, however, to reach the appropriate level of satisfaction, then you are bound to request it. The Motor Accidents Authority will no doubt arrange to supply the information on request. If it is appropriate the Authority will give both parties notice and an opportunity to comment on the material. I am sure that any delay will be accommodated by the Authority. You have to balance speed in decision-making with fairness and justice, but fairness and justice are the dominating factors.

The third step will be to follow up the thinking, to research the texts and journals. In simple cases this may not be necessary, but it will always be profitable to consider the possibility.

This should be the basic preparation for the examination. But that is by no means the end of the process. The examination is itself a preparation – a preparation for the giving of the certificate and reasons for decision which is the critical and final step. It will be appropriate to return to many of the matters which were attended to prior to the examination for further consideration. Is there further reading or research to be done? How are the certificate and the reasons to be framed? The need for further information may have arisen.

The most important reason for thorough preparation is the reason I have concentrated on so far. It will ensure that the very important task you must undertake is carried out well. But there are some more practical reasons why preparation is important. They are generally associated with making the task easier, as well as ensuring it is well done.

Preparation before the examination will make the examination easier. The claimant, who will be under a degree of stress, and may be suspicious of the process – even thinking that the medical assessor's task is to protect the interests of the insurer – will be more relaxed. The examination process will be smoother and may take less time. The assessor will be less likely to run the risk of missing an examination which should be undertaken, or a question which should be asked. The process of decision-making leading to the issue of a certificate and the preparation of reasons will be easier.

The importance of the role you undertake cannot be overestimated. Exercising the power to affect the rights of individuals is accompanied by the acceptance of a trust. The trust is to fairly and justly undertake the task. It must be undertaken conscientiously and with an open mind. In the case of medical assessments under the New South Wales Motor Accidents Scheme the trust is a particularly onerous one. This is because you are on your own. No lawyers to assist you. No court or tribunal to make the truly final decision. Usually no colleague to discuss

findings with. Careful preparation will always enhance your ability to perform the trust. Additionally, it will make the job easier. It will give you more satisfaction. And it will increase the likelihood that you achieve your ultimate goal of reaching the right decision.