

‘What is evidence?’

Gathering information to assist with the common law process

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Meet your moderator

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How to interact today

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After the webinar

- Webinar recording and presentation will be on workcoverqld.com.au in the coming days
- If we don't get to all of your questions, we will collect them and publish answers on our website afterwards
- So we can continually improve our level of service, we would appreciate you completing a short survey at the end of the webinar

Meet your presenter

Damien van Brunschot
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Session summary

- Court system of oral evidence
- Two main bodies of evidence at trial
 - lay evidence
 - expert evidence
- What is the role of documentary evidence

The critical importance of accurate, contemporaneous evidence Conflicts as doctor/patient and between employer/employee

Case Study 1 - Rogers v Whittaker

- Marie Whittaker was almost blind in her right eye for nearly 40 years since suffering a severe injury to her eye at the age of 9. Consulted Dr Rogers, an ophthalmic surgeon who advised her that an operation on the injured eye could not only improve its appearance but would probably restore sight to it.
- Following the surgery she developed sympathetic ophthalmia in her left eye. In the end she lost sight in her left eye and there was no restoration of sight in her right eye. She was left totally blind. She was not warned there could be complication causing sympathetic ophthalmia. She did incessantly question the doctor about possible complications. The risk of sympathetic ophthalmia was one in 14,000 so it was a very remote risk. Still found there was a duty to warn of this risk.
- **The importance of contemporaneous clinical note taking and/or documentation with respect to informed consent.**

Good contemporaneous evidence won the day

Case Study 2 - Apolloni v Traffic Technologies Management Division Pty Ltd (2012) QSC 070 (Henry J)

- Claimant was employed as a traffic controller and injured on 2 July 2007 in an accident on the Bruce Highway where the Defendant was conducting traffic control works. Slipped or tripped in stepping up and over curve and alleged she had poor visibility. Plaintiff alleged the incident occurred before daylight and the Defendant's failure was to illuminate the premises or provide adequate lighting. *Critical issue to determine when the incident occurred.*
- Work time records supplied by the Defendant revealed that the start time for the Plaintiff was 8.00am. Plaintiff gave evidence she left home at 5.30am and arrived at the accident scene at 6.20am, 1 hour 40 minutes before her work time.

- After the accident the Plaintiff was driven to Innisfail Hospital and the triage time recorded was 8.14am.
- Completed an incident report with the time of incident being recorded as 8.00am.
- Also an Application for Compensation said the incident occurred around 8.00am.
- Plaintiff did not give a plausible explanation as to why she arrived at work some hour and a half before starting. Sunrise at that time was at 6.47am. Court preferred evidence of a supervisor, Mr Yates. He gave evidence that he did not arrive until 7.30am and after he arrived the Claimant arrived at work. Court found Mr Yates to be the preferable witness to that of the Claimant and his time was supported by diary entry. Plaintiff's claim dismissed.
- Case illustrates the importance of good contemporaneous documentation.

Documentation required

- Pre-employment documentation including medical questionnaires
- Instruction and training documentation signed by workers
- Minutes of tool box meetings
- Incident investigation reports and witness accounts
- Photos and/or videos of incident scene or plant and equipment
- Safe work method statements
- Risk assessments
- Diary entries
- Disciplinary warnings and file notes re: enforcement of safe system and instruction

The onerous obligation on an employer to instruct, train and warn

Case Study 3 - Heywood v Commercial Electrical

- Heywood concerned a trainee electrician who, as he alighted from a ladder, cut himself on a sharp edge of a u-shaped piece of metal which he knew to be sharp and had himself positioned atop a high tool box near his ladder. The worker severed his ulnar nerve which came in contact with the sharp edge of the u-shaped metal which was effectively a metal offcut.
- Worker given no training or warning concerning the handling of dangerous objects and their placement. Even though the young apprentice knew that the u-shaped metal was on the tool box because he had placed it there, there was still a finding that the employer was in breach of its duty by failing to provide the worker with a safe system of work, in particular, giving instruction to avoid sharp objects.
- This was a case in which WorkCover was successful at first instance and the decision was overturned on appeal. The case illustrates the importance of instruction or training, preferably reinforced in writing. This obligation extends to even experienced workers who are familiar with operating plant and equipment as was the worker in Schmidt.

Case study 4 - Schmidt v S J Saunders

- Schmidt involved a claim by a 62 year old truck driver who alleged injuries to his head, lumbar spine and cervical spine, together with a psychiatric injury, when he slipped and fell from the cabin of his B Double truck.
- In this case it was found that while any reasonable inspection of the truck step would not have revealed a defect which required modification, it was considered that training and instruction as to the method of a 'true backwards descent' was required to be provided by the Employer.

The Assessment of Credit

- Witness demeanour
- Consistency
- Concessions
- Corroboration

Rules against hearsay evidence?

- The hearsay rule makes inadmissible all out of Court statements tendered for the purpose of asserting facts in the statement.
- Hearsay evidence can be tendered for other purpose other than the truth of its contents. Truthfulness and accuracy of words spoken cannot be tested through cross examination.
- Example: WorkCover hotline call.

The Assessment of Credit

Case Study – Gladman v Q Comp (2010) QMC 013

- The worker alleged she sustained psychological injuries during the course of her employment.
- Claim contested in the statutory arena re: reasonable management action. A work colleague made advances toward the worker which were rejected. She then received numerous phone calls and text messages which were threatening and abusive. The text messages were brought to the attention of her employer. The worker was found to be an anxious but truthful witness. She answered questions in a forthright manner and she made concessions about matters which would not have been otherwise expected for her to make. For example, she conceded that she had engaged with this colleague to the extent of being a sounding board about the state of his marriage along with replying to several of his text messages.
- It was concluded in that case that the Claimant had a psychological condition which arose from employment. It was also found that there was unreasonable management action on the part of the employer in that there was no action taken by the employer to investigate, mediate or try to resolve the situation when it was brought to the directors attention.

Case Study 2 – Adam v Skilled Group Limited & Anor (2013 (QSC7) – McMeekan J

- Worker was a 45 year old labourer employed by Skilled Group and placed at the premises of a host employer, National Food. The Plaintiff alleges that he sustained a back injury after using a steel hook to manually drag a stack of crates of milk. The alleged injury occurred on 5 March 2010 and an incident report was not completed until 10 March 2010.
- An attack was made on the Plaintiff's credit in circumstances where he had failed to disclose a previous back injury sustained in 2005, had disclosed to a GP and his specialist that he had fully recovered in order to obtain a work licence when in fact he was otherwise disabled, had refused to accept an offer of two days work when it was offered to him by the Defendants in May 2010, failed to disclose that he had worked at a meat works for a month after he was cleared to return to work.

Adam v Skilled Group Limited & Anor continued...

- Presented with various symptoms. The claimed degree of disability was not supported by medical evidence.
- Although the Plaintiff succeeded on liability in convincing the Court that he was injured as a consequence of the manual handling, it was otherwise accepted that the Plaintiff was not a witness of credit. It was concluded that the Plaintiff was so unreliable that none of his evidence to any disputed fact was to be accepted other than where it was independently corroborated.
- The Court concluded that the Plaintiff's injury was temporary, that he recovered within three months. The Defendant's medical expert was preferred. Modest damages award allowed. Court awarded damages of \$16,235.88 against the First Defendant and \$27,250.00 against the Second Defendant. The Court awarded costs against the Plaintiff.

Admissibility of expert evidence

- A matter of genuine expertise
- For the assistance of the Court
- Joint experts?

Key learnings

- Documentation re: systems training
- Documentation through safe work method statement and risk assessments
- Thorough contemporaneous investigations including witness statements

Questions submitted during the webinar

More information

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- Safe work procedures and PPE – 26 March 2015
- Considerations for working with a young or ageing workforce – 30 April 2015