SEMINAR PAPER FOR ADA SEMINAR – ETHICS LAW AND RISK MANAGEMENT – 2 September 2009

EVIDENCE AND THE COURT PROCESS

Introduction

1. The purpose of this paper is to provide some observations from a barrister's perspective on the way evidence is given in court proceedings. The main focus of the paper will be on civil proceedings, though many of the observations contained in the paper apply equally to giving evidence in disciplinary proceedings.

2. I propose to start with some observations about the way evidence is typically given in court proceedings brought against health care professionals. I will then focus more closely on evidentiary issues which apply to dental practitioners and particular problems which can arise in claims against dental practitioners. I will conclude by making some hopefully practical suggestions as to dental record keeping, with a view to assisting dental practitioners to avoid being sued or in the event that they are sued.

Giving Evidence in Court Proceedings

3. With some exceptions, the vast majority of civil proceedings brought against dental practitioners are brought in the District Court of NSW. That is because for some years now, the District Court has had a jurisdictional limit of $750,000, meaning that the court is able to award damages in actions brought before it of up to $750,000, plus costs. Whilst there are occasional, very large, claims brought against dental practitioners which are commenced in the Supreme Court, my experience is that it is rare for a plaintiff to suffer an injury consequent upon dental treatment which would result in an award of damages of more than $750,000.

4. In the District Court of NSW, the evidence in chief of lay witnesses (which will include the plaintiff him or herself and the dental practitioner against whom the claim is made) is given orally. In that way, the other side will not normally know precisely what the plaintiff or defendant is going to say until he or she gets into the witness box and begins giving evidence. In the ordinary course however the parties have a fair idea of what the other side's case will be, in that expert reports are almost invariably served by the plaintiff and the defendant and it is usual for a Statement of Assumptions to be provided to each expert by the party retaining him or her. Those Statements of Assumptions are typically requested and exchanged in advance of the court hearing.

5. On the other hand, in the Supreme Court of NSW, evidence in chief of lay witnesses is now typically given by written witness statement[1]. What that means is that in Supreme Court matters, the solicitors acting for a dental practitioner will typically have to spend considerable time with him or her well in advance of the hearing, so as to take a detailed statement which will then be served on the other side. The dental practitioner will then only give oral evidence for the purpose of being cross-examined and re-examined.

6. Irrespective of whether a dental practitioner gives evidence orally (as in the District Court) or by statement (as in the Supreme Court), there are three basic ways in which he or she will typically give evidence about the dental treatment[2] which is in issue in the proceedings.

7. The first way in which evidence is typically given is according to actual recollection. That is, a dental practitioner might say that he or she actually remembers patient X coming to see him or her on 5 June 2007, reporting

[1] See Practice Note SC CL7 and Order number 3 of the final PNL Orders.
[2] For the purposes of this aspect of the discussion, dental treatment is intended to include the history taken from the patient, any findings on examination, any investigations undertaken, any referrals suggested, any recommendations made regarding treatment and any treatment actually provided.

severe pain in her back tooth on the upper left side and then pointing to a lump in the gum area immediately below that tooth.

8. As a practical matter and a function of the busy lives that health care professionals lead, it is rare that a dentist will be able to recall aspects of a particular consultation with a patient on a particular day in sufficient detail to give detailed evidence according to actual recollection. Indeed, a court would normally react with some surprise, if not suspicion, if a busy health care professional such as a dentist claimed to have detailed recollection of a consultation with a particular patient some years prior. In circumstances where busy practitioners may see upwards of 10 or 15 patients a day, 5 days a week over a 48 week working year, it is simply not possible for anyone who does not have a photographic memory to recall events in fine detail.

9. The difficulty of giving evidence according to actual recollection is exacerbated by the fact that as far as conversations are concerned, the rules of evidence normally require that the person giving evidence set out conversations by way of the words used or words to the effect of those were used, rather than by way of summary of the topics which were discussed. In my experience, it is very rare for people to be able to recall discussions in that level of detail some years after they occurred.

10. The courts recognise the difficulty in trying to give evidence according to actual recollection when the relevant events which are being recounted have occurred some years ago. Giving evidence in court is not akin to taking a memory test and Judges typically make allowance for the fact that memories fade over time. Indeed, the problem of recalling events years after they have occurred is one of the key rationales for the existence of limitation periods[3], which set the time during which a plaintiff must ordinarily bring a claim against

[3] In NSW, the limitation period for personal injury actions (which would include a civil claim against a dentist) is 3 years running from the date on which the cause of action first accrues pursuant to section 18A of the *Limitation Act* 1969.

a defendant. Because of the inherent difficulties in giving evidence according to actual recollection alone, the courts also allow witnesses to give evidence according to contemporaneous records they created and based on usual practice. I will deal with each of those in turn.

11. It is beyond the scope of this paper to examine in detail the law in NSW as to the admission into evidence of documents. But suffice it to say that ordinarily, contemporaneous records made by a person of particular events are admissible in later court proceedings in which the occurrence of those events are a matter in issue[4]. Put in the language of dental practice, notes made by a dentist about treatment provided in the nature of the placement of a filling on tooth 27 will be admissible in later proceedings in which the plaintiff alleges that at the relevant time, it was negligent to treat by way of a filling and that proper treatment should have involved the performance of root canal therapy.

12. Thus, the dental practitioner is able to refer to what his or her dental notes reveal in terms of what occurred at a particular consultation. That may involve matters of the history taken from the patient, the examination performed, any investigations ordered, any referrals offered, any diagnoses reached, any treatment recommendations made and any treatment performed. For reasons that I will explain further below, reliance on contemporaneous treatment notes for the purpose of giving evidence in court can be more difficult for dental practitioners than for other health care professionals.

13. In any proceedings brought against a dental practitioner, he or she starts with a great advantage over the plaintiff, in that he or she will have actual records of what occurred at the various consultations he or she had with the patient. On the other hand, the patient will almost invariably have no records and will be giving evidence according to actual recollection only. It follows from what I have said above about actual recollection evidence that this places the

[4] According to common law principles and see also sections 60, 66A and 69 of the *Evidence Act*1995.

defendant dentist at a decided advantage when it comes to the court making findings of fact about disputed matters. Typically in claims against dentists, that will mean matters such as the condition of the plaintiff's teeth at the time of various consultations with the dentist and what advice or warnings the dentist provided about proposed modes of treatment.

14. The final means by which evidence is typically given is according to usual practice. That is, the defendant dentist would say that he or she cannot recall precisely what occurred on a given occasion, but is able to say what his or her usual practice would be in the circumstances which existed at the relevant time. By way of example, in a case which involved an allegation that a dental practitioner failed to give any warnings about the risk of nerve damage associated with third molar removal and failed to give the patient the option of referral to an oral surgeon, the dental practitioner would normally be permitted to give evidence according to what his or her usual practice was of warning of various risks and of offering referrals.

15. It is worth making a few observations about usual practice evidence at this point. First, it is well established that such evidence is admissible[5]. Secondly, when a witness such as a dental practitioner gives usual practice evidence, it is usually in fact a combination of evidence based on usual practice and evidence based on the dental practitioner's notes. In other words, the dental practitioner uses the notes as a starting point and indicates, given what they record, what his or her usual practice would have been in the relevant circumstances.

16. Thirdly, whilst evidence of usual practice is admissible, Judges will normally require the person giving the evidence to exhaust his or her actual recollection and to give his or her evidence based on the contents of his or her notes, before permitting the usual practice evidence to be given.

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[5] See *Connor v Blacktown District Hospital* [1971] 1 NSWLR 713, at 721 and *Morris v Hanley* [2003] NSWSC 42, at [70].

17. To put the concept of usual practice evidence in lay terms, it involves the dental practitioner saying what he or she would have done, according to the established practice that he or she employed at the time, rather than what he or she can actually remember doing. In that sense, the evidence is a form of reconstruction, albeit reconstruction buttressed by an established practice.

18. As a general proposition, when the court is trying to make findings of fact and is faced with a contest between evidence of actual recollection and evidence based on usual practice, there will be a tendency for greater weight to be given to the evidence of actual recollection, provided it is reliable. In other words, if a dental patient gives credible evidence about what occurred at a particular consultation and the dental practitioner concedes that he or she has no actual recollection and no relevant notes on the disputed issue, so that he or she is relying on usual practice evidence only, it will make it easier for the court to prefer the evidence of the patient. It is with those considerations in mind that the authors of the leading Australian text on professional liability have stated that a usual practice defence "is difficult for doctors but it does sometimes succeed"[6].

19. In my experience, whilst the courts treat usual practice evidence from health care professionals such as dentists carefully, particularly when the patient claims to have a good actual recollection, it is not that unusual for the usual practice evidence to be preferred. For instance, where it can be demonstrated that the patient's alleged actual recollection is wrong on key details, the courts quite commonly prefer the evidence of the health care professional, whether based on records, usual practice or a combination of the two[7].

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[6] Warmsley, Abadee and Zipser, *Professional Liability in Australia – Second Edition* (2007) at page 304.

[7] See for instance *Kocev v Toh* [2009] NSWDC 169, at [51]. That case involved a chiropractor, but the relevant principles are the same.

20. Having now looked at the three ways in which evidence is typically given by defendants in professional negligence proceedings, I now intend to consider some particular evidentiary issues which arise in respect of dental records.

Dental Records – Particular Issues in the Evidentiary Process

21. As a generalisation, dental records are typically very brief and contain abbreviations or codes which describe the particular treatment provided. It is not at all unusual that where for example tooth 27 is extracted, the dental practitioner's notes will simply state "exo 27", without any particular description of the condition of the tooth leading to the decision that extraction was the appropriate treatment. I do however acknowledge that different dental practitioners have different styles and standards of note keeping, so that it is now not unusual for dental practitioners' notes to contain more in terms of description of what actually occurred at the consultation.

22. Nonetheless, it is, in my experience, fair to say that dental notes normally contain less detail than would be recorded in a general practitioner's notes or an emergency department doctor's notes, in terms of the presenting complaint, the history given, the examination performed, the tests or investigations suggested or ordered, the diagnosis reached, the treatment advice given and the treatment actually provided.

23. It follows from the above that the evidentiary advantage that a health care professional has, by virtue of the fact of actually having contemporaneous records, is lesser in dental claims than in claims against other health care professionals. Where, as above, the dental practitioner's records simply state "exo 27", it is difficult for that dental practitioner to get much assistance from the notes when coming to give evidence some years later, as to what the condition of the tooth was at the relevant time and what discussions he or she had with the patient prior to performing the extraction. Of course, x-ray films

provide further assistance in that regard, but they do not contain any detail as to the complaints the patient made and the advice the dentist gave.

24. It is perhaps useful at this point to give some consideration to the function which the notes of health care professionals, such as dentists, are intended to fulfil. In the matter of *Bruce v Kaye* [2004] NSWSC 277, at [17], Justice Grove stated as follows:-

> "*It needs to be remembered however that the notes are kept for the purpose of enabling the doctor to manage the patient. The notes are not created as a log of every incident and exchange between them. They are not a detailed chronicle presenting a complete description of the progress of pregnancy. There needs to be a sufficiency of notes but I accept that there would be no purpose in simply recording everything particularly things which are routine and satisfactorily progressing. The result is that some things will be noted and others not. I recognise that there is also a purpose in the notes in that, should a situation arise that Dr Kaye could not continue management (for example if he became ill), they could be made available to a succeeding obstetrician. I expect that they would be useful to such a professional but I am unconvinced that there are always useful in the hands of others, such as lawyers, seeking to make hindsight deductions.*"

25. Whilst *Bruce v Kaye* was a claim against an obstetrician, Justice Groves' observations as to the nature of medical records apply equally to records maintained by dental practitioners. In summary, whilst the notes are not intended to be a verbatim transcript of everything that occurred on each occasion the patient attended for treatment, they must contain sufficient detail to allow the attending dental practitioner, or other dental practitioners, to manage the patient. Where dental records are very brief and simply include abbreviations indicating that particular treatments were performed on

particular dates, it makes it difficult to use them in that manner, let alone to use them as the basis for later giving evidence in court as to the detail of what occurred on specific occasions.

26. It is with the above limitations in mind that I have made some suggestions below. In making my suggestions, I have tried to strike a reasonable balance between the realities of what can actually be done in a busy practice and the evidentiary advantages that a dental practitioner may obtain through having more comprehensive records.

Practical Suggestions Regarding Dental Record Keeping

27. Whilst accepting that dental notes need not be created as a log of every incident and exchange between dentist and patient and that no dental practitioner has the time to create records of that nature, I do believe that in a general sense, dental practitioners would be better served by creating slightly more detailed records of their consultations with patients. Even within the limits of a busy practice, I would suggest putting the following detail into standard patients' notes:-

(i) History – record important matters of history, including earlier dental treatment and particularly, the patient's main complaint, using the patient's own words if possible;

(ii) Findings on examination – record the main findings on examination, including the state of the teeth in respect of which the patient is seeking treatment and the state of any existing dental work;

(iii) Investigations – record details of the type of x-rays ordered (i.e. bitewings or OPGs) and the reasons for ordering any more specific or unusual investigations;

(iv) Referrals – record details of any referrals suggested to the patient where the patient does not agree to the referral. Otherwise, simply keep a copy of the referral letter;

(v) Treatment recommendations – record details of the treatment options provided to the patient, including the patient's agreement or refusal of such treatment;

(vi) Treatment actually provided – record brief details for run of the mill procedures and more detail in respect of more unusual procedures.

28. In making the above suggestions, I am not advocating that dental practitioners practice defensively in the way in which they make dental records. I intend that there be some degree of flexibility in the type of records a dental practitioner would make. For instance, a routine scale and clean would only require the briefest of notes. However, where the examination performed prior to undertaking a routine scale and clean revealed some significant decay, leading the dental practitioner to suggest a need for prompt treatment, perhaps in the form of root canal therapy, a lengthier and more detailed entry would be appropriate.

29. Medical students are routinely taught as part of their University training that when it comes to making patient notes 'if it's not in the notes, it didn't happen'. Whilst that saying is somewhat of a cliché, it emphasises the point which I seek to make that a dental practitioner has a great advantage in later court proceedings involving a dispute about what occurred at a particular consultation if he or her made reasonably detailed notes about that consultation at the time. All other things being equal, where the dental practitioner made no notes or only very brief notes, it makes it far easier for the court to prefer the actual recollection evidence of the patient.

30. In creating the sort of notes I have suggested, there is no reason why the dental practitioner cannot use abbreviated language to refer to particular matters. For instance, where a dental practitioner is advising as to the need for third molar removal, whilst it would be ideal to record the critical information given and the critical risks warned of, even a notation to the effect of "usual warning given re third molar extraction" would be helpful. The dental practitioner would then have to give evidence about what those usual warnings were, but at least it would provide a starting point for the court in terms of accepting the dental practitioner's evidence that specific warnings were in fact given.

31. The second suggestion I wish to make, which is allied to the first, is that there are particular resources available to dental practitioners with which to simplify and streamline the task of making more detailed notes. The ADA produces treatment information pamphlets about commonly performed dental procedures. By way of example, you will be provided today copies of the ADA treatment information pamphlets in respect of wisdom teeth and dental implants. Similar documents are provided by a number of other Colleges to their members.

32. The treatment information pamphlets have been created with a view to dental practitioners providing them to patients as part of a discussion about proposed procedures. The treatment information pamphlets set out some background regarding the proposed procedure, a description of the way in which it is commonly performed and also lists possible side effects or risks. As stated on page 1 of each treatment information pamphlet, there is a removable sticker which the dental practitioner can place in his or her notes when he or she discusses the proposed procedure and provides a copy of the treatment information pamphlet to the patient.

33. Of course, the dental practitioner could also create his or her standard form document in relation to commonly performed procedures. However, given

that the ADA treatment information pamphlets are available at a fairly low cost, it would ordinarily be more practicable to simply rely upon them.

34. I have acted for a number of medical practitioners and dental practitioners in cases involving allegations of failure to warn where documents such as treatment information pamphlets proved to be critical pieces of evidence. Where a patient claims that he or she was not warned about a particular risk of a procedure or alternatives to that procedure, proof that the patient was in fact given a document like a treatment information pamphlet can prove decisive in the outcome of a case. Where that patient can be shown to have received the treatment information pamphlet and still gone ahead with the procedure, it provides powerful evidence that either the patient knew of the risk or of the alternative treatment modality and nonetheless decided to go ahead or (where the patient claims not to have read the treatment information pamphlet at all) that the patient was not influenced by those other matters in making a treatment decision.

35. In my view, the small cost involved in using documents like treatment information pamphlets is well worth spending. They can often mean that a patient contemplating bringing proceedings against a dental practitioner will be advised by solicitors that the claim is unsustainable, so that no proceedings are commenced. Alternatively, when they are not discovered until after proceedings are commenced, they can prove decisive in the patient's solicitors persuading the patient that the claim should not be continued. In either case, they can directly or indirectly result in considerable savings to the dental practitioner, in terms of time spent at court rather than in dental practice and in terms of professional indemnity premiums.

36. I understand that in the future there will be a further resource available to dental practitioners in New South Wales, of a similar nature to the treatment information pamphlets. That is, as the result of a recent grant from the NSW Dental Board and NSW Health, the ADA NSW Centre for Professional

Development is producing on line patient focused information about particular dental procedures. Thus, a dental practitioner providing advice about a particular type of treatment could suggest to the patient that he or she read the relevant web pages or watch the relevant video content from the website, prior to making a final treatment decision. The dental practitioner could even have the patient go to the website in the practice rooms and then confirm this in the dental records (either by some entry by the dental practitioner him or herself or by way of an entry made by a dental nurse or receptionist).

37. The use of resources such as the treatment information pamphlets I have referred to or the on line information to be created, will assist the dental practitioner to record important details of particular dental consultations in a time efficient and cost effective manner. Ultimately, by using resources of that type, the dental practitioner will put him or herself in the best possible position to enjoy the evidentiary advantage I referred to above which exists by virtue of the fact that the dental practitioner has contemporaneous records, whereas the patient does not.

38. I fully acknowledge that there are limitations in the use of resources like treatment information pamphlets. Obviously, there is not a pamphlet for every clinical situation and there will always be times where more patient specific records are needed.

39. The final suggestion I wish to make is a very basic, but critically important one. It is that a dental practitioner should **never** go back to dental records some time after the relevant consultation occurred and add detail to them. In particular, a dental practitioner should never go back to treatment records for a patient and add detail to them after:-

(i) the patient has made a complaint about the treatment;

(ii) the patient has lodged a complaint about the treatment with the Dental Board;

(iii) the patient has sent a letter, through a solicitor, seeking records or threatening proceedings; or

(iv) the patient, through solicitors, has served a Statement of Claim commencing proceedings.

40. The evidentiary advantage I described above that dental practitioners have in claims against them by patients arises from the fact that only the dental practitioner has a contemporaneous record of what occurred at particular consultations. That evidentiary advantage is destroyed where the records which the dental practitioner seeks to rely upon are no longer wholly contemporaneous. It might seem so self evident that dental records should not be added to that it does not bear saying. However, in my experience in acting for dental practitioners and a number of other health professionals over more than 15 years, I have personally encountered more than a dozen cases of just that happening.

41. No matter how pure the intentions of a dental practitioner in going back to the notes and adding to them some time after the treatment occurred, the net effect of doing so is almost inevitably to call into question the integrity of the notes as a contemporaneous record. I have seen a number of cases where once the evidence is given of the notes having been added to, the trial Judge treats every aspect of the health professional's evidence carefully and ultimately prefers the actual recollection evidence of the patient. I have had cases where a health professional's evidence based on the notes and usual practice has been preferred, despite admitting having added to the notes after learning that he was going to be sued[8], but they are exceedingly rare cases.

[8] *Kocev v Toh* [2009] NSWDC 169

42. Where a dental practitioner wishes to record particular thoughts about a claim or particular matters which were not recorded in the contemporaneous notes, there is no difficulty in creating a separate document, which is placed in the dental records for the patient, setting those matters out. For instance, if the original notes said nothing about particular warnings or information given or said only that "risks warned of" without providing any content, there is no difficulty in creating a later document (which is dated) in which further information is provided. That document can often be relied upon later, during the hearing, to corroborate the oral evidence the dental practitioner gives.

43. In conclusion, I have made the above suggestions with a view to helping dental practitioners reduce the risk of being sued and improving the prospects of a successful defence in the event of being sued. I emphasise that because it is normally the dental records that a potential plaintiff's solicitor and barrister will be reviewing and relying upon in providing advice as to whether there is a viable cause of action, there are powerful reasons for putting more, rather than less, detail into the notes.

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