Training and Expectations for the Expert Witness in Australia: Could Guidelines work in the US

Roy G Beran
The Sandy Sanbar MD PhD JD FCLM Lecture 2017

Conflict of Interest
- This talk was prepared in response to an invitation from the US ACLM which provided sponsorship to attend this meeting
- I have received both research and travel grants from various pharmaceutical companies including Novartis, UCB, Genzyme, Serono, Sanofi, Pfizer, Schering/Bayer amongst others
- I serve on the editorial boards of various national and international journals and am the editor-in-chief of the Journal, Medicine and Law, the official journal of the World Association for Medical Law (WAML)
- I was past-president of the OZ ACLM am Hon. Life Fellow

Greetings from the AUSTRALASIAN COLLEGE Of LEGAL MEDICINE (Oz ACLM)

Overview
- Review of courses
- Basic Law Intensive
- Advanced Law Intensive
- Expert Witness Training Programme
- Some insights into the role of the expert
- Other Oz ACLM activities

Australasian College of Legal Medicine (Oz ACLM) Courses
- Courses are designed to assist medical professionals to better understand the interface of Medicine and Law
- Courses include:
  - The Basic Law Intensive
  - The Advanced Law Intensive
  - The Expert Witness Training Programme (EWTP)
- These courses are a prerequisite to obtaining Fellowship of the Oz ACLM (FACLIM)
- Fellows must also participate in CPD/MOPS

Australasian College of Legal Medicine (Oz ACLM) Courses Continued
- Courses, esp EWTP, are run at least annually, throughout Australia and/or New Zealand.
- The EWTP is designed to help health professionals appreciate the rigors and expectations of being an expert witness.
- The legal profession in Australia is divided into: solicitors; barristers; and judges but for the US this differentiation is less relevant
- The differentiation will be explained to aid comprehension of the Australian legal system
Oz ACLM Courses
Basic Law Intensive for Doctors, Dentists and Other Health Professionals

What is the BLI?
- An intensive two-day lecture series providing doctors, dentists and other health professionals with an understanding of the basic concepts of medical law and its application to clinical practice.
- The Basic Law Intensive is presented by ACLM lecturers and serves as a supplement to the Advanced Law Intensive.

Actual Programme of a BLI

Basic Law Intensive – Timetable
Day 1
- 8.30 – 8.40am Welcome and course overview
- 8.40 – 9.20 Legal Framework of the Australian Health System
- 9.20 – 10.00 Consent to Medical Treatment
- 10.00 – 10.40 Consent to Medical Treatment Case Scenarios - small group work
- 10.40 – 11.00 Morning Tea

Day 1 Continued
- 11.00 – 11.40 Medical Negligence
- 11.40 – 12.20 Medical Negligence Case Scenarios - small groups
- 12.20 – 1.20 Lunch
- 1.20 – 2.00 Regulation of Health Professionals
- 2.00 – 2.40 Regulation of Health Professionals – small groups
- 2.40 – 3.20 Confidentiality, Privacy and Medical Records
- 3.20 – 3.40 Afternoon Tea
- 3.40 – 4.40 Confidentiality Case Scenarios – small groups
- 4.40 – 5.00 Review & consolidation

Day 2
- 9.00 – 9.30am Assisted Reproductive Technology
- 9.30 – 10.00 Assisted Reproductive Technology Case Scenarios - small groups
- 10.00 – 10.40 Withholding and Withdrawing Life Sustaining Measures
- 10.40 – 11.00 Morning Tea
Actual Programme of a BLI

Basic Law Intensive – Timetable
Day 2 Continued

- 11.00 – 11.40 Withholding and Withdrawing Life Sustaining Measures - Case Scenarios – small groups
- 11.40 – 12.20pm Doctrine of Double Effect
- 12.20 – 1.20 Lunch

Actual Programme of a BLI

Basic Law Intensive – Timetable
Day 2 Continued

- 1.20 – 2.00 Doctrine of Double Effect Case Scenarios – small groups
- 2.00 – 3.00 Clinical Forensic Medicine
- 3.00 – 3.30 Review & consolidation

Oz ACLM Courses

Advanced Law Intensive for Doctors, Dentists and Other Health Professionals

What is the ALI?

The intensive provides participants with a greater knowledge and understanding of how the principles are applied by the civil, criminal and disciplinary law in the context of clinical practice, thereby providing an opportunity to further enhance the care of patients.

What is the ALI?

An intensive two day lecture series that focuses in some detail on the principles that define the legal relationship between the patient and the health care professional.

These principles involve firstly, consent to treatment by both adults and children; secondly that advice and treatment provided with reasonable care and skill in accordance with accepted standards of care; and thirdly the relationship maintained through acceptable standards of professional conduct.

Actual Programme of an ALI

Advanced Law Intensive Timetable – Day 1

- 08.00 – 08.30 Registration
- 08.30 – 09.00 Common Law and Consent
- 09.00 – 10.00 Consent and Children with scenarios
- 10.00 – 10.15 Morning Tea
Actual Programme of an ALI

**Advanced Law Intensive Timetable – Day 1 Continued**

- 10.15 – 11.30 Trespass to the person in medical cases with scenarios
- 11.30 – 12.30 Duty and Medical Negligence with scenarios
- 12.30 – 13.30 Lunch
- 13.30 – 14.30 Breach of Duty and Medical Negligence with scenarios
- 14.30 – 15.30 Causation and Medical Negligence with scenarios
- 15.30 – 16.15 Afternoon Tea
- 15.45 – 16.15 Vicarious Liability and Non-Delegable Duty with scenarios
- 16.15 – 16.45 Defences and Medical Negligence with scenarios
- 16.45 – 17.00 Close

Actual Programme of an ALI

**Advanced Law Intensive Timetable – Day 2**

- 09.00 – 10.00 Regulation of Health Professionals – AHPRA/Health Boards
- 10.00 – 11.00 Regulation of Health Professionals – Disciplinary Law
- 11.00 – 11.20 Morning Tea
- 11.20 – 12.20 Disciplinary Law – case scenarios
- 12.20 – 13.20 Lunch
- 13.20 – 14.20 Withholding and Withdrawing Life Sustaining Measures
- 14.20 – 15.20 Withholding and Withdrawing Life Sustaining Measures – case scenarios
- 15.20 – 15.30 Close

Oz ACLM Courses

**Expert Witness Training Programme (EWTP)**

- Run over 1 or 2 days depending on numbers

Expert Witness Training Programme

- It is designed to teach medical professionals how to perform the tasks of an expert witness
- It is a practical course designed for those who want to act as experts in ‘legal medicine’ cases to meet the expectations imposed by the law
- It requires:
  - Submission of a de-identified report to be marked;
  - Didactic lectures; and
  - A moot where each participant defends the submitted report in a simulated court in front of other participants with adequate time for feedback.
Expert Witness Training Programme

- Faculty:
  - Solicitor
  - Barrister
  - 2nd Barrister
  - Judge
  - Expert Witness (Convenor)
- Format: Didactic lectures followed by moot

Expert Witness Training Programme

- Lectures:
  - Expectations of the Solicitor (1st port of call)
  - Complying with subpoena
  - Report writing
  - Liaison between barrister and witness
  - (Good report means no court)
  - Expectations of the Barrister (may only meet face-to-face if going to court yet barrister may actually write the letter of instruction provided by the solicitor)
  - Needs a ‘good’ witness in court
  - Witness must ‘have a presence’ and be believable

Expert Witness Training Programme

- Lectures Continued:
  - Expectations of the Judge
    - Must be reliable witness
    - Evidence must be believable
    - Must explain complex issues in simple terms
    - Must avoid impression of bias
  - Expectations of the Witness
    - Should understand what the lawyer wants
    - Needs good letter of instruction
    - Needs to understand the case in hand
    - Expects adequate compensation for time expended

Schedule 7 – Expert Witness Code of Conduct

(SCR Part 39, rule 2; DCR Part 28A, rule 2; LCR Part 38A, rule 2 of Uniform Civil Procedures Rules 2005)

- 1. Application of Code – Applies to all experts
  - (a) who provide expert reports re proceedings or planned proceedings
  - (b) who give opinion evidence in proceedings or planned proceedings

Schedule 7 – Expert Witness Code of Conduct

- 2. General Duty to the Court
  - (1) the expert has overriding duty to assist the court impartially re the expert’s area of expertise
  - (2) the witness has paramount duty to the court and not to any party to proceedings (including the person retaining the expert)
  - (3) the witness is not an advocate for a party

Schedule 7 – Expert Witness Code of Conduct

- 3. Duty to comply with the court’s directives
  - Expert must abide by any directions of the court

- 4. Duty to work co-operatively with other experts
  - (a) must remain independent in judgement
  - (b) must endeavour to reach agreement with other experts
  - (c) must not be obstructionist
Schedule 7-
Expert Witness Code of Conduct

5. Expert's report
   (1) Expert's report must include
       (a) expert's qualifications as an expert
       (b) facts and assumptions upon which the opinion is based
       (c) reasons for opinions expressed
       (d) identify any issues beyond the expert's expertise
       (e) any literature or supporting material relied upon in advancing an opinion

5. Expert's report
   (1) Expert's report must include continued
       (f) examinations, tests or other investigations upon which the expert relied to achieve proffered opinion [plus qualifications of (s)he who provided such material]
       (g) an executive summary where applicable

6. Experts' conference
   (1) Without limiting Clause 3, the expert must
       (a) confer with other experts as directed by the court
       (b) try to reach agreement where practicable

(1) Without limiting Clause 3, the expert must cont.
   (c) prepare a joint report specifying matters agreed and not agreed and reasons for any disagreement
   (d) base joint report on specified facts or assumption of fact

(2) expert must exercise independence and professional judgement re expert conference and joint report and not act on instructions from other sources

Why You? The Evidence Act

Uniform Evidence Acts – s76
The Opinion Rule
Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed

Uniform Evidence Acts – s79
Exception: opinions based on specialised knowledge
If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

UCPR 31.23 Code of Conduct

An expert witness must comply with the Code of Conduct.

An expert's report may not be admitted in evidence unless the report contains an acknowledgment by the expert witness that (s)he has read the Code of Conduct and agrees to be bound by it.

Oral evidence may not be received from an expert witness unless the court is satisfied that the expert witness has acknowledged, in that expert's report, the it was prepared, in relation to the proceedings, that (s)he has read the code of conduct and agrees to be bound by it and is an expert in the field.
The Expert Witness – What Does (s)he have!

- The expert witness has specialised knowledge based on training, study or experience.
- The expert witness has an overriding duty to assist the Court impartially on matters relevant to his/her area of expertise.
- The expert witness has a paramount duty to the Court and not to any party to the proceedings.
- The expert witness is not an advocate for a party.

The Uniform Civil Procedure Rules 2005

UCPR 31.27

An expert's report must (in the body of the report or in an annexure to it) include the following:

- the expert's qualifications as an expert on the issue
- the facts, and assumptions of fact, on which the opinions in the report are based (a letter of instructions may be annexed)
- the expert's reasons for each opinion expressed
- if applicable, that a particular issue falls outside the expert's field of expertise

UCPR 31.27 Continued

- any literature or other materials utilised in support of the opinions.
- any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out.
- in the case of a report that is lengthy or complex, a brief summary of the report located at the beginning of the report.

What does the lawyer want?

- Answers to set questions!
- Explanations of findings on examination and what they really mean to a lay person?
- No evidence of outward bias.
- The expert is not a lawyer! (S)he should not plead law!
- NB The expert’s duty is to the court.

Responding to Questions in Written Format

- Read the question!
- Answer the question!
- Provide reasons based upon experience and training? Remember why the lawyer came to you, the expert, it was for the report in the first place.
- Avoid jargon – if necessary state what it really means (explain jargon in simple terms).
- Does the answer make sense to a lay person?
Complying With a Subpoena
- 2 types of Subpoenas
- Subpoena to Produce
- Subpoena to Attend Court

Differences Between Solicitors and Barristers

Solicitors
- The Solicitor is the client’s day to day contact
- The Solicitor spends most of his/her time out of court and is involved in the day-to-day legal affairs of his/her clients.
- Such day-to-day affairs can include telephone and email communication, taking instructions from clients, drafting letters and court documents, conveyancing, out of court negotiations and the administrative conduct of the legal file.
- A Solicitor can appear on behalf of a client in Court however a solicitor mainly appears for preliminary and interim hearings, before the parties engage in formal argument.

Barristers
- A barrister is a lawyer, in the Australian common-law system, who specialises in litigation.
- A barrister spends most of his/her time in Court, conducting Court appearances, primarily appearing in Court applications and trials.
- A barrister is also commonly retained for a matter in order to provide specialist advice on a particular issue or to be involved in the drafting of court documents with the solicitor.
- By not being involved in as much of the direct day to day running of a file of a client, barristers are able to specialise in, and become better skilled at, conducting arguments and knowing intricate parts of the law.
- To avoid unnecessary duplication, barristers are often engaged for specific tasks, when their skills are most needed.

Interaction of Solicitors and Barrister
- The retainer is actually paid by the solicitor
- The solicitor instructs the barrister on behalf of the solicitor’s client
- The barrister is the legal equivalent of the medical specialist/consultant.
- In the same way the medical consultant relies on referrals from GPs, so the barrister relies on referrals from the solicitor
What Else does the Oz ACLM Provide???

- Annual Scientific Meeting
- Newsletter
- Mentoring
- Legal Medicine lectures at academic institutions
- It has its own Journal (shared with other organisations)
- It is an affiliate of the World Association for Medical Law
- It is closely aligned with the US ACLM
- It offered a Master of Legal Medicine at Griffith University and is seeking a new home
- It is my belief that together we can achieve more than we can in isolation

Conclusions

- The Oz ACLM is a College of health professionals specifically with dual training in medicine and either law or forensic medicine
- Training courses are not restricted to doctors but are offered to all health professionals
- The Oz ACLM provides educative courses designed to bridge the gap between medicine and law and to help medical professionals to understand the law and its expectations
- The courses provided by the Oz ACLM could be converted to the US jurisdiction with little effort

Training and Expectations for the Expert Witness in Australia: Could Guidelines work in the US

YES!!!

Questions????