

Wednesday 5 June 2024
BMA House, London and online

Medico-legal conference 2024 Conference report

General medico-legal update for expert witnesses 2024

Dr Michael Powers KC, The Barrister Group

Dr Powers' presentation highlighted the importance of being well prepared for giving evidence in court. All Institutes provide mandatory guidelines which experts must adhere to and which permits doctor the exceptional privilege of being an expert. Firstly, when you produce any kind of report, it must adhere to the declaration at the end of it; this is not determined by solicitors, it is the expert's job. When preparing for cross examination they look at that declaration first. Has the expert included everything and are there any errors? Has the expert understood it all? If they find an error it opens a way forward. The expert must include everything which is material to the report including written and oral instructions. Dr Powers always looks for gaps and inconsistencies. When preparing, you must assume the advocate is going to cross examine you and that they will know more about the subject than you do. Preparation for giving evidence in court requires a phenomenal amount of time as everybody will be on their toes. Dr Powers advised against attacking advocates on account of their age; advocates can handle this and will humiliate you if you say they are not up to it. Dr Powers also warned the expert might not get paid. Some experts are very well paid and although fees are agreed beforehand, you won't get paid if you don't meet your contractual obligations. They reiterated the need for preparation - in order to justify your costs, you need to know as much details as you can before the hearing. You are also advised to ensure you are insured.

Excellence in report writing

Kate Hill, managing director and trainer, InPractice Training

Ms Hill's talk covered very helpful tips in report writing. She advised before starting a report to check you are working in the appropriate specialty and asked whether you are willing to provide all evidence? You also need to ensure you don't have a conflict of interest and be crystal clear about the type of report you are being asked to write, of which there are three. For a breach of duty report, you need to decide whether the appropriate standards of care have been met. Causation reports review a case which show whether failure to act in accordance with established standards of care. She advised discussing causation with those instructing you so that you are all on the same page. A quantum report is where the expert will help to decide how much the claimant is entitled to. Damages could be 'general' or 'special'. Ms Hill shared a template letter and gave more practical tips e.g. report length; it mustn't be too long or contain too much history or factual narrative. A report needs to be succinct, analytical, very balanced and written as if for the lay person. The cover sheet should have everyone's contact details on it, there should also be a content page, an index, a summary of the case and the expert's opinion. If you have not received GP records or you couldn't open them, you will need to explain this. Qualifications should take a couple of paragraphs and list the evidence i.e. what you did and didn't see. Her final tip was to never stray out of your area of expertise.



Courtroom and cross-examination skills

Simon Jelf, barrister, Partnership Counsel and Bond Solon Training

Mr Jelf gave a presentation on how to get the best out of your performance in court and gave some very helpful dos and don'ts. He started with some red flag about different types of witnesses. Some relish going to court and are looking for a fight but court should be approached with trepidation. Some witnesses were argumentative but trying to beat the barrister or sparring with them was ill advised because it could get personal. Witnesses could be defensive and unable of giving a yes/no answer. Mr Jelf noted courts can be scary places but it is nothing an expert witness can't deal with. Other tips included honesty being the best strategy which is not as easy as it sounds. Telling the truth isn't always comfortable but small lies can be just as dangerous as big lies. Keep in mind trying to help the court should be your mindset. Credibility is paramount, if you lose on something minor, you have lost everything. Similarly, if you make something up, the court might doubt the rest of what you say. Objectivity is also important; avoid giving grudging one word answers and talk about what is relevant. Don't digress and if you've been brief, say you'd like to go back a bit. You might need to say you got something wrong and pretending to know the answer is unwise - if you say you don't know, they court will feel that they can trust you. Lastly, do not avoid the Judge, the decision maker is the most important person in the room and only ever answer to them - the Judge is your audience.

Expert witness impartiality: the importance of objective, unbiased opinion

Richard Wilson KC, 36 Group

Mr Wilson KC noted it's the expert's job to weigh and consider and provide an expert opinion in an impartial fashion i.e. free from prejudice or bias. The role of the expert witness in civil procedure is governed by Practice Direction supplements CPR Part 35. The doctor is there to help on matters of expertise, that duty overrides everything including by whom is paying. The expert does not usurp the judge who makes the decision so you need to be true to your role; you are expected to remain impartial. Four considerations apply with equal force to both the expert witnesses and the expert evidence of fact; admissibility of evidence (whether expert evidence would assist the court), the weight of evidence (whether the proposal witness has the necessary knowledge and expertise), sanctions (whether the expert is impartial in presentation and assessment of evidence) and the experts reputation. Experts should weigh up and consider the matter at hand and provide impartial advice. A bold opinion is worthless, it's the reasoning that matters. Another aspect to consider regarding impartiality is your reputation. You can enhance it as a witness and become renowned.

Legal gaps in protected disclosures and regulatory reform: the BMA perspective

Dr Simon Minkoff, BMA Medico-legal committee chair

Whistleblowing is one of the major workstreams of the medico legal committee (MLC). Whilst MLC have been working up ideas and gradually lobbying through the BMA's Parliamentary and Public Affairs Teams, a few high profile events have happened e.g. Lucy Letby. In raising a concern, Dr Minkoff noted you must reasonably believe that the concern is in the public interest and you must raise your concern in accordance with the law – either internally to your employer or externally to an outside body. The disclosure can be made not just by an employee but a broader defined group of workers. The concern can be raised in a number of ways, but evidenced in writing may be best to raise it internally first – and many organisations will be keen to learn, develop, improve. Whilst the Public Interest Disclosure Act (PIDA) covers workers not just employees it does not appear to extend



to all people who may be involved in the healthcare environment. MLC are particularly concerned that medical students do not appear to be workers and thus cannot make protected disclosures with protection of PIDA. The BMA has seen that the impact of the consequences of raising concerns can be severely damaging, even traumatic for doctors. As well the emotional toll on the doctors involved, these lengthy legal processes following a dismissal can be extremely costly to the NHS. The investigation and the professional legal team divert a lot of money away from direct patient care.

Whistleblowing has been on the committee's agenda for a few years and MLC is in the process of developing a vision of how to improve for the medical profession and healthcare in the 21st century. Doctors seek to deliver the best service (quality, safety, efficiency, value) possible. Where doctors identify risks we strive to correct these.

Panel discussion: Raising concerns to senior managers post-Letby

Dr Iain Kennedy, BMA Scottish council chair, Ms Toli Onon, joint group chief medical officer, Manchester University NHS Foundation Trust, Andrew Pepper-Parsons, director of policy and communications, Protect and Richard Wilson KC

Each panellist noted their association to whistleblowing. In the case of D Kennedy, he identified as a whistleblower and shared some findings of research he had undertaken which revealed only 17% of whistleblowers were satisfied with the response of their organisation and younger and non white people were more likely to speak up. He then suggested ways Scottish doctors wished to see change including having a clear and supportive speaking up process. Ms Onon spoke as a medical witness and noted the two most important and relevant components i.e. the oversight of patient safety and quality of care and the maintenance of high standards for doctors and dentists. Senior managers have a responsibility to look at the processes around them as ultimately it rests with them. Doctors have influence which can be used or misused. Mr Pepper-Parsons gave an introduction to Protect; they receive 50,000 calls a year and give legal advice to whistleblowers all year round. He suggested the law in this area is out of date and needs looking at. As for the NHS, the culture was recently highlighted in the recent infected blood scandal. He highlighted some concerns of Protect's callers and noted they were suggesting the creation of a whistleblowing champion in England. Scotland has an independent body and an ombudsman which was a good place to look for future reform. Mr Wilson KC touched on three issues: institutional support for whistleblowers, the position of medical trainers and the question of extending the time of bringing a claim to an employment tribunal. He also recounted the tale of a whistleblower whose case took years, was costly and although he won the case still had to go to an employment tribunal. He was accused of malpractice and was on his own throughout. Would he have been better not doing it? The doctor felt he was acting in the interest of the patient. Finally, Mr Wilson KC felt the BMA should continue to push hard for a change in the law. After each panellist had spoken, they took questions from the delegates.

Close

Dr Minkoff, as Chair thanked all those involved in organising the event and the speakers and the delegates for their attendance. He then closed the conference.

