Giving evidence

Angela Williams, MBBS, MforensMed, FACLM, is a forensic physician, Victorian Institute of Forensic Medicine, and Senior Lecturer, Department of Forensic Medicine, Monash University, Victoria. angelac@vifm.org

BACKGROUND

The Australian civil and criminal court systems are adversarial. They are based on the concept of two opposing sides, one eventually becoming the 'winner' as determined by a neutral/independent judge. Doctors are often requested to present evidence on behalf of one of the 'sides', although it is imperative that their evidence remains unbiased or bipartisan. For most doctors, attending court is infrequent, perhaps contributing to the fear associated with being summonsed.

OBJECTIVE

This article provides information and skills training for doctors on how to be 'expert witnesses' and giving evidence in court.

DISCUSSION

With a good understanding of the issues involved and the provision of evidence, attending court may be made easier for doctors. Prior knowledge of the system and adequate preparation of the case is important in ensuring the medical evidence is both admissible and weighted correctly.

Hearsay and opinion evidence

Most witnesses in court are only permitted to give evidence of fact; that is, evidence of events they have seen, heard or been involved in directly. Hearsay evidence is inadmissible on these terms based on the fact the historian was not under oath when the account was given. On some occasions (eg. death of the historian) the history may have been obtained from someone who can never be legally examined under oath. A patient history is hearsay as it is an account from someone else told to the doctor. Included in that account may be more hearsay as the patient describes something someone else (eg. the accused) has said or done. There are exceptions to the hearsay rule: courts will often accept a medical history as it is an indispensable part of a medical consultation. This is a complex issue, often subject to much legal argument.

Opinion evidence is also only permitted in court if the testimony is from an expert witness. This is to ensure that the opinion is based on research, literature and common professional themes. Expert witnesses are entitled to present evidence based on hearsay and bound by opinions, on the assumption that their role is to aid the court in understanding technical matters and giving advice on the case in fields where the court may be unskilled.[1] The court will decide whether the issues before it require simplification and explanation by an expert witness, however, they are not necessarily bound to accept the expert evidence once presented.

Most doctors who are called to court are required to give evidence of fact only. You may be asked to give an opinion after stating the facts (ie. examination findings, test results) but only if you have been deemed an 'expert' by the court.

Who is an expert witness?

To be considered an expert witness, a witness must be an expert in the field.[2] As long as the judge is able to deem the doctor an expert under the necessary legal rules (despite what the expert witness might feel constitutes their own expertise), their opinion evidence can be heard and evaluated for admissibility. Controversy exists over the notion that expertise is only acquired by formal education, and therefore the true medical expert (one with a demonstrated depth of knowledge and skills) may be underacknowledged due to a lack of formal qualifications.[3] To address this issue the doctor should outline their expertise (formal qualifications and depth of experience) in the

forefront of their report. Once the expert, expertise and the opinion are established, it is up to the judge/jury to attach the necessary weight to the evidence offered.

A medical witness giving evidence is reminded not to stray beyond the boundaries of their expertise and to know the limitations of their knowledge and skills. By travelling beyond these boundaries, the expert witness puts their entire testimony at risk of being inadmissible. Often the hardest words to utter in medicine – 'I don't know' – are the most self empowering and thus protective in a court.

How to be an expert witness

One of the easiest ways to perceive yourself (while containing your nerves on the witness stand) is that of a teacher and educator to the court. Your obligation is to identify, explain and simplify medical matters so the judge/jurors are able to make informed decisions according to the evidence presented. Remember that you are not on trial. This is one of the commonest misinterpretations doctors make, and indeed incites the most anxiety. You should remain calm, clear and within your knowledge area, avoiding being perceived as emotive, defensive or impartial.

When asked, you should state the facts, your observations, and what records/documentation were used in the reasoning process when forming an opinion. If you are not able to form an opinion (ie. you do not feel this is within your area of expertise) you should avoid doing so and defer the question to another expert witness. Make sure your opinion is formulated using evidence based medicine where available, although an opinion based on tests performed by other doctors/scientists, discussions with colleagues or information provided by an alternative source such as family or friends of the patient is also admissible.[2] Beware not to address the 'ultimate issue' (ie. issue of innocence or guilt) as this is up to the judge/jury to decide the case based on the total evidence given.

Before court

The name of the defendant, details of the informant, date and time you are requested to appear in court and the items you are requested to bring with you are outlined in the subpoena/summons which is served on you before the date of the hearing. The defendant (the accused) or the participants in a civil case may not be known to you in cases where you have seen the patient or victim. The easiest way to determine to whom the evidence is related, is to ring the contact person noted on the document. This may be a member of the police force, or a lawyer. You must attend court if required, but it is not unreasonable to request a standby status (eg. 30 minutes notice to attend).

Once you have determined the case, read it, and reread it. Know your case well, check your documents and identify any mistakes. Discuss your case with a colleague (preferably someone with expertise or court experience) and know the boundaries of your expertise. Remind yourself of the research used in providing your opinion and bring the literature with you to court. It is impossible to predict the lines of questioning so prepare from the material you have – anything you don't have an answer for is outside your area of expertise. *Table 1* lists material to take to court. Request a pretrial conference to discuss the scope of issues that may arise.

Table 1. What to take to court

Subpoena/summons
Phone number of the contact person
Copies of written medical records/photographs - at least one each for the prosecution and the defense
Original medical records/documents for yourself (do not part with these)
A copy of your statement, medicolegal report
Literature on which you based your evidence
Equipment for demonstration of a procedure
Body charts to map injuries

Arriving at court

Dress professionally and be at court early. It is best to arrive 15 minutes early to have a pretrial conference and to review your notes. In the courthouse, a notice is posted with the trial names and times and will direct you to the number of the courtroom you should attend. Wait outside the courtroom until the informant or lawyer introduces him or herself. Do not enter the courtroom until told to do so. Do not discuss your case with anyone outside the courtroom.

The tipstaff will lead you into the courtroom when your name is called. Upon entering the courtroom, bow your head to the judge or magistrate. This is a time honoured tradition as is standing when the judge enters the room. Always address the judge as 'your honour'. If you are unwilling to take the oath on the Bible, let the tipstaff know you would prefer to give an affirmation and this will be organised for you.

Giving evidence

Once you are in the witness box, you will be directed to take a solemn oath on the Bible (or give an affirmation). At this point you are swearing to 'tell the truth, the whole truth and nothing but the truth'. Next you will be asked to state your full name and your professional address before demonstrating your qualifications and therefore establishing your expertise. Your statement will be tendered after you have acknowledged it as your own, identified your signature and declared it is true and correct.

Expert witnesses may be called to court by either party. The party who calls the witness is the first to ask questions and

elucidate the relevant information to their case. This is called the evidence-in-chief. The other party then has the opportunity to question the witness, known as cross examination. The original party then has a further opportunity to clarify matters raised in cross examination, known as re-examination. These three phases may take seconds and be dominated by legal argument or you may be in the witness box for hours. An estimate (albeit an educated guess) of the time you are likely to spend in the witness box can be made by the informant or legal officers. You should ask permission before referring to your notes on hand. In almost all circumstances where contemporaneous notes are made, this permission is granted.

When speaking in the witness box, project your voice; be clear and concise in your answers. Maintain transparency as you make your statements and take time to reflect on the question first. If the question is not clear to you, ask to have it repeated. Give professional medical answers making sure they are in terms that the judge and jury understand. Employ lay terms but be careful not to oversimplify. If the court needs further clarification it is up to the legal counsel to request further explanation.

When giving your evidence, it is imperative that you address your answers to the judge or the jury by facing them. Do not engage in banter with the prosecution or defense, as it may be a tactic employed to discredit you and render your evidence inadmissible. Be willing to entertain alternative interpretations of circumstances without becoming defensive or being perceived as biased. State the limitations of your evidence, your examination, and your opinions where necessary.

Define the strength of your opinion on a scale of likelihood. For example, 'the most likely explanation is...' or, 'it is highly unlikely that given these circumstances it may have occurred'.

In the event you are asked to disagree with another professional, state your reasons clearly without attacking the other professional personally. Remember that each doctor has different areas of expertise and experience and your findings may have been a result of an examination at a point in time that differed from another's examination. Use policy and procedure documents or evidence based medicine to support your opinion.

You may be asked to comment on photos. Be confident about noting the limitations of the photographs you are presented with and take care when commenting on photographs that you have trouble interpreting.

After court

At the conclusion of the re-examination the witness is usually 'excused' from the court; meaning that their presence is no longer required and they may leave the precincts of the court. Once the experience is over you will no doubt be feeling elated! If you want to know the outcome of the case, contact the informant; you can also request a transcript if you are likely to reappear again.

Summary of important points

- Project a professional image that is respectful to the court and reflects the seriousness of the occasion.
- You are there to educate the court, you are not on trial.
- Know your limitations, stay within the boundaries of your area of expertise.
- The hardest answer to give but the most essential to learn is: 'I don't know'.
- Don't be pinned to an answer you are not happy with – elaborate if necessary.
- Know your case, speak clearly and loudly.
- Face the counsel when they are asking a question.
- Face the judge and jury when speaking.
- Qualify any medical terminology in lay terms.
- Be prepared for court – sit in on a case one day... before you are part of one.
- Being a medical expert witness is considered an 'art form'; the best experts are 'not necessarily the best witnesses'.[4]

Conflict of interest: none declared.

References

1. Holburn C, et al. Healthcare professionals as witnesses to the court. UK: Greenwich Medical Media Ltd, 2000.
2. Freckleton I, Selby H. The Law Book Company. Expert evidence. Vol 1, 1–1301–3212.
3. Medical Evidence Course Handbook. The Graduate diploma of Forensic Medicine. Monash University 2001;103–16.
4. Vervaina J, Bone R, Kassoff E, editors. Legal aspects of medicine. USA: Spinger-Verlag 1990;33–8.

AFP

Correspondence
Email: afp@racgp.org.au