

Legal Medicine Aspects of Practising Medicine in the ADF

A Personal Perspective

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Introduction

The practice of medicine in the ADF is becoming increasingly complicated by administrative requirements, Health Directives and Instructions, with better informed patients and by an increasing doctor liability for medical outcomes. Patients and lawyers perceive modern medicine to be an exact science and, consequently, expect positive outcomes and have reduced tolerance for adverse events. Mother Nature can be cruel but she is not often held accountable for a poor outcome if a suitable human can be implicated. It is also considered disrespectful to blame the dead and injured for their misfortune, even if they were contributory to the outcome. Finding a 'guilty party' will appease complainants and their relatives and enable closure of the episode with resultant compensation. This outcome is often more preferable to finding systemic deficiencies or management failings. The long duration and exorbitant cost of Inquiries (often over \$1m) necessitates a definite, if expedient, outcome.

In 32 years as an ADF medical officer I have observed increasing risks in practising ADF medicine. Having been a defendant in a military medical matter before a civilian medical board and an observer of several military Inquiries, I have observed a pattern of behaviour by lawyers appointed to such Inquiries. Natural justice with an equitable finding, from a common sense appraisal of the facts, does not always appear to be the main priority of a Commission of Inquiry into an adverse medical outcome.

Background

To a medical officer appearing before an Inquiry, it seems that a presumption of guilt usually prevails as opposed to the presumption of innocence. In the contrived atmosphere of an Inquiry, lawyers can become specialists in the practise of retrospective medicine where medical evidence is presented in chronological order (often selectively) with diagnoses appearing obvious so that any previous misjudgement, by a doctor, is viewed as a mistake by a lawyer. Despite lawyers insisting that Inquiries

are inquisitorial this is not the impression of those under cross-examination on the witness stand, who consider that the atmosphere is adversarial.

An interesting example, demonstrating the often inherent anti-doctor sentiment at these Inquiries, involved a colleague of mine who was the Senior Medical Officer (SMO) in the case of an officer's death at sea in August 2006. The Inquiry's barristers ridiculed the SMO and witnesses in a private email (which I read after a copy was discretely delivered to my colleague's house one evening) and which prompted him to seek an injunction through the Federal Court. The Inquiry was dismissed and a judge was appointed to review the evidence and to make a finding that absolved the SMO of any blame in the death, concluding that the officer was the architect of his own demise.

The 2010 Inquiry into the APC rollover death at Puckapunyal, in 2009, is significant in that it was dismissed by a Federal Court judge after he found that the President of the Inquiry had shown bias against the psychiatrist in the case. The working assumption of the Inquiry appeared to have been that doctors contributed to the death of the crew commander. Subsequently, Victoria Police charged the driver with dangerous driving causing death and in March 2013 the Victorian County Court found him not guilty. The pragmatic approach by professional VicPol accident investigators is in stark contrast to the six weeks of cross-examination conducted by the Inquiry's lawyers, attempting to incriminate the doctors (SMO and psychiatrist) in the death of the crew commander. A senior counsel (Reserve lawyer) remarked, at an ADF medico-legal lecture I attended in Apr 2011, that he was bewildered as to how this matter could occupy twelve lawyers for six weeks.

I will discuss some legal aspects relevant to the practice of military medicine, gained from my experience as an ADF general clinician, noting some areas of concern for new doctors in the ADF. Junior medical officers are generally not aware of the potential traps awaiting them.

Medical Indemnity cover in the ADF - vicarious protection

ADF medical officers are medically indemnified under the terms of 'vicarious liability', a somewhat vague term whereby the employer will provide medical indemnity cover. The financial extent of this cover, when appearing before a civilian medical board, is unpredictable in that it is determined by the Defence Legal Service (DLS) and is dependent on the findings. Consequently, any adverse findings made against the medical officer could reduce full financial cover. In my particular case, costs for my legal team of \$200,000 were 95 per cent covered by DLS such that I paid \$10,000 of the legal costs, but only after the vigorous entreaties of a previous Director General of Defence Health Services (DGDHS). It was fortuitous that the DGDHS suspected that my case was not related to medical mismanagement, as alleged by the complainants counsel, but appeared more to do with a quest for compensation (reputedly being paid over \$100,000 ex gratia). I received several convictions for administrative improper conduct, but none for incompetence or negligence, and personally paid fines of \$10,000. My barrister stated in his final report, inter alia, that "I am absolutely flabbergasted at the findings made against you". There was no adverse medical outcome for the complainant but eventually a career truncation due to workplace issues. My private medical defence organization, which did not represent me, considered that the adverse findings set an undesirable precedent for the ADF in that a civilian medical board made an uncontested judgement while ignoring the obligations and peculiarities of military service, thereby demonstrating an anti-ADF bias. During the hearing, the board's presiding lawyer had referred to official defence regulations as "folklore" which elicited a vigorous response from my barrister in an attempt to explain the purpose of defence regulations in the Defence Force.

In the civilian domain, all doctors subscribe to their own private medical defence organization (MDO) which will provide dedicated medico-legal cover for the doctor, with his or her personal protection being paramount irrespective of the priorities of the employer. All legal costs are covered by the MDO but any fines imposed are paid by the doctor and are not a tax deductible expense.

It is essential to comply with all Health Instructions and Directives as failure to do so could potentially result in the medical officer being liable for legal costs if using vicarious liability cover. It is important to note that some of these documents are not consistent with current clinical practice and strict compliance

could incur criticism by a civilian medical board (now AHPRA).

Patient Notes

Accurate contemporaneous medical notes are critical in establishing a good defence, as the legal assumption is that if it's not recorded in the notes then it didn't happen. Traditionally, medical notes have been hand written in the Unit Medical Record, but presently we are in a transitional phase where computer typed notes are superseding hand notes. My preference is to write hand written notes in addition to computer entries as I can write more detail and use diagrams.

When managing a mental health patient the notes should be comprehensive, since managing these patients has the highest chance of provoking a complaint, especially if self-harm occurred. The primary health care physician is the Clinical Case Manager for mental health patients and becomes the primary target at an Inquiry. It is interesting to observe how rarely psychiatrists and psychologists are implicated in an adverse medical outcome.

In my experience, the use of a personal defence diary (a private ADF note book admissible as evidence) is essential. It can be used for writing unflattering notes and observations about problematic patients or staff (non-compliant or insubordinate), for retaining disturbing emails and recording meetings and conversations with colleagues who may provide corroborating statements at a later stage. It is also wise to retain your own copy of particular notes about a patient if there has been a potentially litigious interaction. Although good medical notes are critical to establishing a defence case, it is still possible for a legal team to ignore significant entries in medical notes to the detriment of the case.

Appearing before an Inquiry

It is important to meet your legal team well before the Inquiry so as to assess their interest and understanding of your predicament and if they are able (especially counsel) to represent you. A campaign strategy will be discussed and if you have any doubts, these should be clarified early or else a second opinion obtained from ADF orientated lawyers (ADF Reserve lawyers). It is important to understand that despite your case being paramount to you, your lawyers are dealing with many other clients simultaneously and you might not rate highly on their radar.

For a medical officer being cross-examined before an Inquiry (being a potentially affected person against whom adverse findings may be brought) for an adverse medical outcome there is often the inference

of guilt which sets the scene for a potentially hostile interaction. The main tactic of Counsel Assisting (the cross-examining lawyer) is to discredit the doctor which, if achieved, will invalidate most of his/her evidence. The initial line of questioning may seem benign, as in detecting errors in notes such as spelling, dates of events so as to show sloppiness and erode confidence with the aim of getting the doctor to doubt or contradict him-or herself. Questions should be answered with a clear, concise and unemotional voice and with carefully considered explanations, as excessive talking or embellishment may give Counsel Assisting the opportunity to expose any weakness or contradictions in your evidence. It is very important not to reveal any emotion (anger, frustration, tears) as this is construed as weakness and will intensify cross-examination. Despite an initial appearance of respectful affability, Counsel Assisting is not your friend.

Witnesses before an Inquiry

The more supportive and credible witnesses you call, the better your position, though not necessarily. Some of your most valuable witnesses may have convenient memory lapses and not be as supportive as anticipated, especially if their own professionalism may be called into question. This memory affliction appears more likely to affect senior officers who may wish to avoid potential controversy associated with an adverse outcome.

It is interesting to reflect upon the witness who is a “cross-examiner’s nightmare”, as described by Geoffrey Robertson QC in his book “The Justice Game” (p 334), being a “skilled witness adept at turning your every question to your client’s disadvantage”. A skilled witness or defendant will make a cross-examiner work hard for his \$4000 in fees per day.

For those civilian witnesses who may risk serious professional consequences as a result of appearing before an Inquiry there is an evasive tactic whereby a statement can be given ‘de bene esse’ – good for the time being. This enables a witness to submit their deposition before an Inquiry starts and not be available for further cross-examination during the course of the Inquiry, since they are intentionally absent. Traditionally, this option has been reserved, in good faith, for those who might not survive an Inquiry e.g. asbestosis victims, but I have observed it used by a local civilian doctor trying to avoid questions about his notes, which included a backdated medical certificate which used fictitious consults for a military person. (The doctor had gone overseas incommunicado to avoid the possibility of facing accusations himself).

Advice

To those junior medical officers who have not yet had the dubious honour of appearing before an Inquiry investigating a complaint or an adverse medical outcome, I make the following comments:

1. Subscribe to a private medical defence organization so as not to rely upon vicarious liability protection from the employer, as ‘he who pays the piper calls the tune’.
2. Make careful and concise medical notes, as they are now medico-legal notes which will be critically examined at an Inquiry.
3. Keep a personal defence diary for private notes which can be used as evidence at an Inquiry.
4. Comply with relevant Health Directives and Instructions and, if unable to do so, then justify your non-compliance in writing. Non-compliance can amount to medical negligence.
5. Consult senior colleagues for advice sooner rather than later.
6. Keep a close watch over your legal team and retain copies of all your instructions to them and request perusal of all relevant correspondence from them to the opposing lawyers.
7. Do not expect your lawyers to have any understanding of the practise of clinical medicine as what may be highly significant to you will not necessarily be obvious to them.
8. Take a notebook into the Inquiry and record verbatim lawyers’ comments that may suggest bias (apprehended or real) against you, which could justify seeking an injunction.
9. Having an adverse finding made against you is an undesirable outcome as it exposes you to the risk of civil legal proceedings being commenced by the complainant or their relatives. I am not aware of any process whereby an adverse finding can be appealed.

I believe that to restore confidence, fairness and integrity in ADF Commissions of Inquiry into adverse medical outcomes, there should be appointed a medical co-chairman who is an experienced independent, general clinician. This would enable a balanced assessment of the various aspects of medical management involved in a case, as opposed to lawyers making possibly biased and unchallenged findings. In conclusion, a self-protective and wary approach should be pursued when interacting with lawyers at a Commission of Inquiry.

Caveat Medicus

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