

ACLM 2018 ANNUAL SCIENTIFIC MEETING: PERSONAL INJURY LAW

Program

SATURDAY 20 OCTOBER 2018

- 8:30 am *Registration opens*
- 9:00 am **CLINICAL A/PROF. SANDRA JOHNSON**
President's welcome
- 9:15 am **BILL MADDEN**
Medical Litigation: Memories, Perspectives
and Incremental Change
- 9:45 am **LOUISE CANTRILL**
Privacy in the Digital Age
- 10:15 am **DR DION SUYAPTO**
Occupational Injuries: the Medical-Legal Aspect
- 10:45 am *Morning tea*
- 11:15 am **DEIDRE PETRAKIS**
Good Medical Records in Improving
Patient Outcomes
- 12:00 pm **DR ADAM GRIFFIN**
Personal Injury Law and the Forensic Physician
- 12:30 pm *Lunch*
- 1:30 pm **PROF. ERWIN LOH**
Medicine and the Rise of Robots
- 2:00 pm **PROF. ALBERT LEE**
Alternate Dispute Resolution for Injury Cases
- 2:45 pm **DR DREW DIXON**
Minor Soft Tissue Injuries –
Motor Accidents Injury Act 2017
- 3:15 pm *Afternoon tea / ASM Day 1 close*

3:30 pm **ACLM Annual General Meeting**

4:30 pm *AGM close*

6.30 pm **COLLEGE DINNER**

Beginning with pre-dinner canapes

Dress: Cocktail

*Location: Elizabeth Room,
Sir Stamford at Circular Quay*

Presentation of College awards with
guest speaker Bill Madden presenting
"Trying to be helpful?"

SUNDAY 21 OCTOBER 2018

- 8:30 am *Registration opens*
- 9:00 am **PAUL BARAM**
Section 50 Civil Liability Act 2002 –
The State of Play
- 9:45 am **HIS HONOUR JUSTICE PETER GARLING**
Expert Witnesses: a Judicial Perspective
- 10:30 am *Morning tea*
- 11:00 am **DR WASIM SHAIKH**
When is Work Stress an Illness?
The Significance of Clinical Significance
- 11:30 am **PROF. ROY BERAN**
Informed Consent Treating
Multiple Sclerosis
- 12:00 pm **FRANCESCA MENNITI**
Medico-Legal Implications of
Clinical Incident Review
- 12:30 pm **PROF. MIKE O'CONNOR**
Pain and Suffering in Childbirth:
Eve's Curse or a Compensable Damage?
- 1:00 pm *Lunch / ASM concludes*



ACLM

AUSTRALASIAN COLLEGE
OF LEGAL MEDICINE

Speakers & Abstracts

BILL MADDEN

Lawyer, Carroll & O’Dea Lawyers | BA, LLB (Hons)(Macq), FAAL

Medical Litigation: Memories, Perspectives and Incremental Change

“*The past is a foreign country; they do things differently there*” said the British novelist Leslie Hartley in his 1953 book ‘The Go-Between’. This presentation looks at the medical litigation timeline. Is our impression of the past of medical litigation reliable? How should we interpret the recent incremental advances of case law and statutory amendment? And what new issues will the courts be asked to grapple with over the coming years?



LOUISE CANTRILL

Partner, Mills Oakley | BEc, LLB

Privacy in the Digital Age

There is a growing tension between the benefits that the use of digital information and big data can provide to an individual and the community expectation that personal information can, and will, be kept secure. Add to this the growing sophistication of the criminal element and you have a perfect storm. This presentation will examine privacy as security as “two sides of the same coin”. Starting with the obligations imposed by privacy legislation, including the mandatory data breach reporting provisions, it will look at how these obligations may affect personal injury claims, including class actions. It will conclude with a discussion around whether a “right to privacy” could give rise to its own cause of action for personal injury.



DR DION SUYAPTO

Consultant Occupational Physician | MBBS, LLB, GDOH, FAFOEM

Occupational Injuries: The Medical-legal Aspect

Occupational injuries carry a significant burden not only on the injured worker but also to their family, friends, employer and the community in general. Data from SafeWork Australia outlined the number of serious Australian worker’s compensation claims in 2015—16 were 104770 with increasing median time lost and compensation paid for serious injury. Management of occupational injuries can be difficult with many stakeholders wanting a say in the management of the injured workers including the employer, case managers, worker’s representatives and various doctors, specialists and allied health professionals. Injured workers will require the support of the treating doctors and determination of capacity. The Australasian Faculty of Occupational and Environmental Medicine endorses the health benefit of work. Although injury and incapacity go hand in hand, it is crucial for medical practitioners to recognise the health benefit of work and focus on the capacity rather than the incapacity.



DEIDRE PETRAKIS

Associate, Adviceline Injury Lawyers | BA, LLB

Good Medical Records in Improving Patient Outcomes

The treating doctor of a patient with a compensable injury has a vital role to play in their patient’s claim. A prompt, fair settlement achieved prior to a court hearing is almost always the best outcome for an injured person. A key element of this is good medical records. This seminar will explain the medico-legal implications of documentation and provide effective strategies to facilitate the keeping of detailed medical reports. Participants will gain an understanding of the application of the Health Records Act 2001 in litigation, and appreciate the critical nature of records in whether a claim is accepted or rejected.



DR ADAM GRIFFIN

Director, QLD Clinical Forensic Medicine Unit | MBBS, MForensMed, FACLM, FFCM (RCPA)

Personal Injury Law and the Forensic Physician

Clinical Forensic Medicine is most frequently associated with the application of specialist knowledge to injury interpretation in aspects of criminal law. The focus in such cases tends to be causation with only gentle consideration of broader aspects of disability and impairment. The role also encompasses the investigation of health care related death which may in turn lead to other legal arenas for consideration of the award of damages. There are considerations in how the information prepared for a criminal case may differ from cases where personal injury considerations are brought to bear in a civil arena. There have been benefits to practitioners in clinical forensic medicine through attendance and participation in the ACLM Law Intensive and Expert Witness courses. A consideration for the development of a Personal Injury Law Intensive for ACLM will be discussed.



PROFESSOR ERWIN LOH

Chief Medical Officer, Monash Health | MBBS, LLB (Hons), MBA, MHS (PhD), FRACMA, FACLM

Medicine and the Rise of Robots

Artificial Intelligence (AI) has the potential to significantly transform the role of the doctor and revolutionise the practice of medicine. One of the concerns that has been raised is the issue of legal liability when personal injury occurs. If a medical error occurs, who is to be held liable? A robot surgeon is not a legal entity, so should the patient sue the owner, the programmer, the manufacturer or someone else? Could an AI ever be subject to criminal liability? There is also the matter of morality and ethics with AI, illustrated by the classic 'trolley problem'. As a profession, we need to have a mature discussion and debate about the legal, ethical and moral challenges of AI in health, and be leaders in this space rather than passive observers. Reference: <http://bmjleader.bmj.com/content/early/2018/06/01/leader-2018-000071>



PROFESSOR ALBERT LEE

Professor (Clinical) in Public Health and Primary Care, and Associate Dean of General Education of Wu Yee Sun College, The Chinese University of Hong Kong | MBBS, LLB (Hons), MPH LLM (Distinct-Arb & DR-CityU.HK), MD, FRCP (Lond & Ire), FCIArb, FFPH (UK), FRACGP, FHKAM(FamMed), FCLM (US), US Nat.Acad.Med (Foreign Associate)

Alternate Dispute Resolution for Injury Cases

Persons suffering from injuries as result of mishaps are going through a period of trauma. Litigation as a means of resolving the disputes might not offer all the remedies that the claimants want. Moreover, the process of litigation is lengthy and can be very painful for both parties. Alternate Dispute Resolution (ADR) such as arbitration can be an option not only for speedy resolution but also both parties would agree on issues to be arbitrated and selection of arbitrator(s) with expertise for the disputed matters. Confidentiality also minimises undue stress and anxiety. There is a concern regarding process of justice without formal judicial procedure. Jurisdictions like Australia and Hong Kong have systems of law protecting public interest. They would be very appropriate places to make greater use of ADR in resolving disputes on injuries.



DR DREW DIXON

Consultant Orthopaedic Surgeon and Medicolegal Consultant | MBBS, FRACS, FOrthA, DrthA, FACLM, FAADEP

Minor Soft Tissue Injuries – Motor Accidents Injury Act 2017

The meaning of a "minor injury" is a) A soft tissue injury, b) Minor psychological injury. A soft tissue injury is an injury to a tissue that connects, supports, or surrounds other structures such as muscle tendons, ligaments, menisci, cartilage but not an injury to nerves or a complete or partial rupture of tendons, ligaments, menisci or cartilage. The regulation may exclude or include specific injuries to soft tissues. The Motor Accidents Guidelines make provision for minor injury in establishing a new model for Dispute Resolution. Even though there may be minor injuries they can be multiple and can result in a complex assessment with a large quantity of documents, attracting a complex fee. Deterioration of minor injuries may require additional information such as video surveillance. Soft tissue injuries usually resolve but some evolve. Examples are given in this paper, eg a muscle contusion in a leg which leads to a DVT with post phlebotic syndrome. Another example is a minor injury to sciatic nerve root following a back strain injury with a disc bulge which subsequently manifests as an irritative sciatica (radicular complaint) which may later develop into radiculopathy. Other examples will be given.



PAUL BARAM

Partner, Norton Rose Fulbright | BA, LLB

Section 50 Civil Liability Act 2002 – The State of Play

A number of cases within the last year have analysed and applied the section 50 defence under the Civil Liability Act. The following cases will be reviewed:

- Sparks v Hobson; Gray v Hobson [2018] NSWCA 29
- Zhang v Hardas (No2) [2018] NSWSC 432
- South West Sydney Local Health District v Gould [2018] NSWCA 69

The cases raise a number of issues:

- When can the section 50 defence be relied upon?
- Who is a professional?
- What is the peer professional opinion?
- Must there be evidence of an established practice?
- What is the meaning of irrational?



THE HONOURABLE JUSTICE PETER GARLING

Justice of the Supreme Court of NSW | BA, LLB

Expert Witnesses: A Judicial Perspective

This presentation will examine the essential basis for expert opinion evidence in a Court, and provide a judicial perspective about expert witnesses particularly when giving concurrent evidence.



DR WASIM SHAIKH

Psychiatrist and Independent Medical Examiner, Hamilton Dental and Specialist Suites | MBBS, MRCPsych, FRANZCP, CIM

When is Work Stress an Illness? The Significance of Clinical Significance

40% of workers report stress in the workplace. Not many of them develop psychiatric disorders. The DSM diagnostic criteria for most psychiatric conditions includes the “clinically significant impairment in functioning” clause. Research shows that when only the presence of symptoms are relied upon for diagnosis (not impairment) the false positives would more than quadruple people suffering with mental illness. Whilst this may in some cases relate to better recognition and access to treatment, it also puts a mostly unnecessary label of a psychiatric illness, when there is not one. The presentation aims to discuss thresholds for a psychiatric diagnosis in response to work stressors, comparing “normality” vs “diseasality”. The concept of clinical impairment being person specific and individual assessment processes will be explored. There will be a focus on secondary psychiatric disorders, adjustment disorders, and permanent impairment. Multiple case examples and common practice scenarios in medicolegal assessments will be highlighted.



PROFESSOR ROY BERAN

Consultant Neurologist, Conjoint Associate Professor of Medicine, Department of Medicine, University of New South Wales | MD, FRACP, FRACGP, BLegS, FACLM

Informed Consent Treating Multiple Sclerosis

Existence of 'material risk' has been demonstrated in a number of patients with Multiple Sclerosis (MS) being treated with medications known to be associated with development of JC viral infection and potential to develop Progressive Multifocal Leukodystrophy (PML). Many doctors who are involved in the care of such MS patients are not aware that even the low risk of 1/10,000 cases is sufficient to make the doctor liable in negligence should the patient contract the condition, in the absence of being advised of such risk and potential testing and possible change in treatment, should the patient prove positive for JCV presence. It is not just the risk, being more common than the 1/14,000 cited in Rogers, but also the experience being presented, where patients who were offered JCV testing readily accepted the test and those with a positive titre opted to change treatment to a less potent remedy devoid of reported cases of PML. This meets the Rogers authority that doctors 'know or ought to know' that this is considered highly relevant by their patients and thus failure to warn or discuss and offer alternatives may place the doctor at risk in negligence should a patient contract PML within this context.



FRANCESCA MENNITI

Principal, McCabe Curwood Lawyers | B Com (Marketing), LLB, Graduate of Australian Institute of Company Directors

Medico-Legal Implications of Clinical Incident Review

This paper explores the impact of the clinical incident review process (with reference to NSW Health Incident Management Policy PD 2014_004) on subsequent litigation resulting from incidents, particularly in the Coroner's Court and in civil jurisdictions. The impact of open disclosure, internal investigations (including Professional Practice Investigations), incident reports, early preparation of witness statements and Root Cause Analysis is discussed.



PROFESSOR MIKE O'CONNOR

Professor of Obstetrics & Gynaecology, School Of Medicine, Western Sydney University | AM, MD (Syd) MHL, ForensMed(Monash), DCH, DDU, FRCOG, FRANZCOG, FACLM

Pain and Suffering in Childbirth: Eve's Curse or a Compensable Damage?

For most prospective mothers, pain in childbirth is their greatest fear. This was perpetuated in Genesis 3:16 as 'Eve's curse': to bring forth children in great pain. However intolerable labour pain should no longer be accepted by the health professions. Without adequate pain control in labour fetal complications can be significant. Moreover, if relief from pain is a fundamental human right then surely standards of good obstetric care should include a definition of adequate pain relief in labour and obstetricians should pay due attention to alleviating that pain. Pain and suffering are seen in law as a secondary consequence of medical negligence. However, I argue that failure to adequately address pain in labour should be seen as medical malpractice or at least unprofessional conduct. Actions in medical negligence may well advance the clinical imperative to control pain. Effective pain control in labour should be seen as good medicine as well as humane treatment.

